Indiana Law Review

Volume 48 **2014** **Number 1**

2014 MIDWESTERN PEOPLE OF COLOR LEGAL SCHOLARSHIP CONFERENCE

IN *WINDSOR*'S WAKE: SECTION 2 OF DOMA'S DEFENSE OF MARRIAGE AT THE EXPENSE OF CHILDREN

TANYA WASHINGTON*

INTRODUCTION

The troubling trend of sidelining children's rights and interests in the same-sex marriage debate is evidenced by the exclusion of children from plaintiffs' classes in the vast majority of suits challenging marriage bans.[1] Despite the direct and adverse impact of these bans on children in same-sex families, the majority of claims asserted against these laws litigate the rights of adults as same-sex couples and identify infringement of adults' rights as the basis for their invalidation.[2] In the few cases that do advance children's claims, the courts' analyses and holdings are often framed exclusively in terms of adults' constitutional rights.[3] Notably, in *Windsor v. United States*, the U.S. Supreme

* Associate Professor of Law, Georgia State University College of Law; J.D., University of Maryland School of Law; LLM, Harvard University Law School. This Article was presented at the Midwestern People of Color Legal Scholarship Conference in April 2014 and at Emory University Law School's Transformation of the Family and the Recognition and Regulation of Intimate Lives Symposium in December 2013. The Article was introduced at the American Bar Association Annual Family Law Continuing Legal Education Conference in October 2013. The Author extends a special thanks to Professor Kimberly Norwood and to Professors Bernadette Hartfield, Christine Gallant, Lynn Hogue, and Andrea Freeman for their invaluable editorial comments. She is indebted to Danielle Le Jeune and Matthew Johnson for their excellent research assistance. Finally, the Author expresses gratitude to her son, André Washington Thomas, and her mother, Cynthia G. Williams, who continue to inspire her to speak, write, and work on behalf of children.

1. *See, e.g.*, Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5 (M.D. Tenn. Mar. 14, 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012); Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (D. Haw. 2012); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012); Della Corte v. Ramirez, 961 N.E.2d 601 (Mass. App. Ct. 2012).

2. *See* cases cited *supra* note 1 and *infra* note 9.

3. *See* Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *7-9 (W.D. Ky. Feb.

Court determined Section 3 of the Defense of Marriage Act (DOMA)[4] was an unconstitutional infringement of liberty interests held by legally married gay and lesbian couples,[5] and acknowledged and described the disabilities the law creates for children in same-sex families. Justice Kennedy explained:

> DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. *And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives . . . DOMA also brings financial harm to children of same-sex couples . . . DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.*[6]

Despite the absence of children in the family at issue in *Windsor*, the Court's holding rejected DOMA's defenders' characterization of Section 3 as a child-

---

12, 2014). Despite the children of same-sex couples involved, six in total, being named as plaintiffs, the court's analysis focused on the injuries and interests of the couples specifically. *Id.* at *2, *8-9. Notably, the court limited its determination of the applicable standard of review to the impact of the ban on the couple, stating,"it is clear that Kentucky's laws treat gay and lesbian persons differently in a way that demeans them." *Id.* at *7.

4. Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

5. United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013). The Court held:

> DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. . . . The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Id.

6. *Id.* at 2694-96 (emphasis added).

welfare measure.[7] The opinion highlighted how the law deprives thousands of children in same-sex families of economic and legal entitlements and protections that serve their best interests, and demeans them and their families with government-issued badges of inferiority.

The invalidation of Section 3 represented a significant victory in the movement toward equal recognition and treatment of gay and lesbian couples and raised the profile of children's rights and interests as relevant to the debate.[8] The

---

7. *Id.*; *see* the House of Representatives Report which justifies DOMA as a means to "encourag[e] responsible procreation and child-rearing," H.R. REP. NO. 104-664, pt. 5, at 2917 (1996). For an example of the child-welfare arguments provided by opponents, *see* Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 44-49, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), U.S. S. Ct. Briefs LEXIS 280 at *74-82 (noting the "intrinsic connection between marriage and children" and arguing that same-sex marriages do not produce unintended and unplanned offspring that the government has an interest in protecting and fail to support the societal goals of children being raised by biological parents employing "differing parental roles").

8. In previous articles and a co-authored Supreme Court amicus brief in *Windsor*, this Author has advanced children's rights based challenges in a number of other contexts. In the transracial adoption context, the Author has argued that the best interests of the child standard demands the consideration of race in placement decisions and she challenges the Multiethnic Placement Act's categorical prohibition of the consideration of race as a politicized departure from meaningful application of the best interests standard. Tanya Washington, *Loving Grutter: Recognizing Race in Transracial Adoptions*, 16 GEO. MASON U. CIV. RTS. L.J. 1 (2005). In the same-sex adoption context, the Author argues that the due process rights of waiting children, particularly children of color and other children classified as "special needs," are infringed by state adoption bans that categorically exclude gay and lesbian couples and individuals from the pool of adoptive parents. Tanya M. Washington, *Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans,* 6 HASTINGS RACE & POVERTY L.J. 1 (2008). She advances children's challenges to "orphan placement bans," and she articulates a negative liberty interest waiting children possess against state action that categorically forecloses the superior placement option, permanent placement, in favor of temporary or institutional care that compromises children's best interests. *Id.*; *see also* Tanya M. Washington, *Once Born Twice Orphaned: Children's Constitutional Case Against Same-Sex Adoption Bans*, 15 UTAH L. REV. 1003 (2014); Tanya Washington, *Suffer Not the Little Children: Prioritizing Children's Rights in Constitutional Challenges to "Same-Sex Adoption Bans,"* 39 CAP. U. L. REV. 231 (2011) [hereinafter Washington, *Suffer Not the Little Children*]. In the context of same-sex marriage bans, the Author proposes a claim by children in same-sex families against marriage bans as infringing a liberty interest in parentage incident to marriage, in violation of their substantive due process rights. Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1 (2012) [hereinafter Washington, *What About the Children?*]. The Author co-authored an amicus brief in *United States v. Windsor* highlighting the stigmatic, dignitary, and material harms Section 3 of DOMA causes children in same-sex families whose parents' marriages are denied recognition. The respondents' cited this amicus brief in their merits brief to the Court. Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondant Edith Windsor Addressing the Merits and Supporting

holding and reasoning in *Windsor* has inspired a proliferation of challenges to state marriage bans ("mini-DOMA's");[9] thereby confirming the prophetic nature of Justice Scalia's observation that the opinion, despite the inclusion of language that could cabin the applicability of the holding, would encourage challenges to state bans.[10] He predicted:

> the real rationale of today's opinion . . . is that DOMA is motivated by 'bare . . . desire to harm' couples in same sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples [sic] marital status.[11]

Despite an avalanche of claims filed against state marriage bans across the nation,[12] all too often, challenges have failed to include children as members of the plaintiff's class, even while they highlight how marriage bans harm children

---

Affirmance, United States v. Windsor 133 S. Ct. 2675 (2013) (No. 12-307).

9. *See, e.g.*, Baskin v. Bogan, No. 1:14-CV-00355-RLY-TAB, 2014 WL 1568884 (S.D. Ind. April 18, 2014); Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) ; DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Lee v. Orr, No. 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); McGee v. Cole, No. 3:13-24068, 2014 WL 321122 (S.D. W. Va. Jan. 29, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013); Garden State Equality v. Dow, 2012 WL 540608 (N.J. Super. Ct. Law Div. Feb. 21, 2012). *See generally* Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *2 (S.D. Ohio Apr. 14, 2014) (court highlighting that "ten out of ten federal rulings since the Supreme Court's holding in *United States v. Windsor*—all declaring unconstitutional and enjoining [marriage] bans in states across the country" (citations omitted)). *Id.* at *1.

10. *Windsor*, 133 S. Ct. at 2705, 2708-09 (Scalia, J., dissenting). Justice Scalia remarked in his dissent, "My guess is that the majority . . . needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term.) But I am only guessing." *Id.* at 2705; *see also Tanco*,2014 WL 997525, at *5. The Court in *Tanco* noted that other "courts have uniformly rejected a narrow reading of *Windsor*" and cited numerous cases where preliminary injunctions were issued to preclude enforcement of "anti-recognition laws." *Id.* at *5 n.8; *see, e.g.*, *De Leon*, 975 F. Supp. 2d at 632; *Lee*, 2014 WL 683680; *Bourke*, 2014 WL 556729; *Bostic*, 970 F. Supp. 2d at 456; *Bishop*, 962 F. Supp. 2d at 1252; *Obergefell*, 962 F. Supp. 2d at 968; *Kitchen*, 961 F. Supp. 2d at 1181.

11. *Windsor*, 13 3 S. Ct. at 2709 (Scalia, J., dissenting) (citation omitted).

12. As of October 12, 2014, lawsuits are pending in all states that do not currently allow same-sex couples to marry. Since the Supreme Court's decision in *Windsor* there have been forty-one court decisions striking down marriage bans and two decisions upholding marriage bans as constitutional. *See* PENDING MARRIAGE EQUALITY CASES, http://www.lambdalegal.org/pending-marriage-equality-cases (last visited Oct. 12, 2014).

in same-sex families.[13] In the absence of claims by children challenging laws adverse to their interests, the focus of litigation challenging marriage bans will remain on protecting adults' interests and maintaining the primacy of marriage.[14]

Despite Section 3's invalidation and the utility of the *Windsor* opinion and its rationale as a tool for dismantling laws that deny gay and lesbian couples the right to marry, Section 2 of the Act remains enforceable and poses a significant threat to children's legal relationship with their non-biological parent. This provision of DOMA, which permits states to disregard valid marriages created in states where same-sex marriage is allowed (recognition states),[15] by extension, authorizes the nullification of the filial relationship between children in same-sex families and their non-biological parents when the family relocates to a non-recognition state.[16]

---

13. *See Bostic*, 970 F. Supp. 2d at 478. Although the child of the same-sex family at issue in this case was not named as a plaintiff, the court acknowledged the harm the Virginia marriage ban poses to her interests. It observed, that:

> [o]f course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. Instead, needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. E.S.T., like the thousands of children being raised by same-sex couples, is needlessly deprived of the protection, the stability, the recognition and the legitimacy that marriage conveys.

Id. The Court presented protection and stability as derivative of marriage, rather than as inherent in parentage. *Id.* at 478-79. The Author of this piece, in accordance with the arguments of Professor Nancy Polikoff, believes this perspective entrenches the primacy of marriage and will focus instead on the primacy of parentage to avoid such entrenchment. *See generally* Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005) [hereinafter Polikoff, *For the Sake of All Children*]; *infra* Part III.C. For additional perspectives on same-sex marriage from the child's perspective, see Ruth Butterfield Isaacson, *"Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 131-51 (2010); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well Being of Children*, 46 HARV. C.R.-C.L.L. REV. 81, 85-89 (2011).

14. *See Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting); *but see DeBoer* , 973 F. Supp. 2d at 757; *Bourke*, 2014 WL 556729, at *2; Ellis v. Hous. Auth. of Baltimore City, 82, A.3d 161, 163 (2013); Garden State Equality v. Dow, 82 A.3d 336, (2013).

15. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996). The law specifically states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

16. In most cases, a child in a same-sex relationship will only be biologically related to one parent. The exception to this rule arises when the sperm donor and/or surrogate are related to both parents. *See infra* note 18.

At common law, parentage was determined two ways: by a child's birth to her mother and by the mother's marriage to her husband at the time of the child's birth.[17] Children in same-sex families can only be biologically related to one of their parents and consanguinity establishes and protects the filial relationship.[18] The relationship between the child and her non-biological parent, however, exists as ancillary to the marriage or is constructed by adoption, by contract, or by consent.[19] The legal status of that relationship is vulnerable to invalidation when the family relocates to a state that does not acknowledge the legal status of the parents' marital relationship and rights, relationships and claims arising therefrom.[20] This Article identifies the nullification of an existing filial relationship, authorized by Section 2 of DOMA, as a legal deprivation that unjustifiably infringes children's constitutional rights and provides a basis for an independent claim challenging Section 2 by children in same-sex families.

Arguably, Section 2 only operates to expressly authorize states to do what they could do anyway—withhold recognition of out-of-state, same-sex marriages by statute or constitutional amendment and void the parent-child relationships attendant to those unions.[21] So, one could argue, state bans are the more appropriate target for children's constitutional challenges, not Section 2 of DOMA.[22] However, Section 2 permits states to eschew their constitutional duty

---

17. Michael H. v. Gerald D., 491 U.S. 110, 115 (1989).

18. If the couple is a gay couple, one of the fathers would have donated his sperm. If the couple is a lesbian couple, one of the mothers would have used her egg, though the other mother could be the gestational mother who carries and gives birth to the child. Despite a strong connection to the child for nine months, gestational mothers are not considered to be biologically related to the child. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 681 (2009).

19. *See infra* Part II.

20. *See, e.g.*, Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *3 (S.D. Ohio Apr. 14, 2014) (discussing that in defending Ohio's non-recognition law, Defendants take "the position that they are prohibited under Ohio law from recognizing [Plaintiffs'] Massachusetts marriage and the marital presumption of parentage that should apply to this family for purposes of naming both parents on the baby's birth certificate. . . . Without action by this Court, Defendants . . . will list only one of these Plaintiffs as a parent on the baby's birth certificate . . . .").

21. *See* Joshua Baker & William Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriages Measures*, 24 REGENT U. L. REV. 1, 8 (2012); William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1392 (2012); Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. GENDER RACE & JUSTICE 153, 158 (2009). *But see* Adar v. Smith, 639 F.3d 146, 160 (5th Cir. 2011); Pamela K. Terry, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out of State Adoptions*, 80 FORDHAM L. REV. 3093, 3134 (2012).

22. *See* Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5-6 (M.D. Tenn. Mar. 14, 2014); Bishop v. United States *ex rel*. Holder, 96 2 F. Supp. 2d 1 252, 1266 (N.D. Okla. 2014) (rejecting challenge to Section 2 and explaining, "The injury of non-recognition stems exclusively from state law . . . and not from the challenged federal law."); *see also* Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, 32 FAM. ADVOC. 10, 13 (2010) ("Legal challenges to section [sic] 2 of DOMA have been few, and none have succeeded, at least in part

to respect existing legal parent-child relationships created in jurisdictions that permit gay marriage.[23] Naming children as plaintiffs in cases with their parents undermines the government's defense of Section 2 as a child protective measure with direct evidence to the contrary. Children's claims also challenge the government to establish that the non-recognition laws Section 2 authorizes serve, rather than harm, children's interests. A favorable holding in such suits would highlight the direct and harmful impact of marriage bans on children in same-sex families and would present children's rights and interests as grounding a viable constitutional claim,[24] rather than treating them as mere factors in the constitutional calculus, as the *Windsor* majority did.[25]

While the substance of constitutional claims against state bans would be almost identical to claims challenging Section 2, the latter would, like the decision in *Windsor*, have greater symbolic and precedential value. A holding invalidating Section 2 as unconstitutionally infringing children's constitutional rights could animate and provide jurisprudential support for challenges to state bans nationwide. By comparison, prevailing in suits challenging state bans would have persuasive, not precedential, effect outside of the state invalidating the ban.[26]

Though the *Windsor* Court referenced the stigmatic and dignitary harm children experience when their families are denied recognition, Section 3's

---

because it is the state's non-recognition law that presents the impediment to recognition, not section [sic] 2 itself.").

23. There is a split of authority as to the existence of a public policy exception to the Full Faith and Credit Clause, which would mean Section 2 authorizes states to enact non-recognition laws in violation of principles of comity. *See* cases cited *infra* note 51.

24. Just as Justice Scalia noted the applicability of the rationale underwriting the Court's decision in *Windsor* to state challenges, the claims proposed in this Article can be used to frame and assert children's challenges to mini-DOMA's that proliferate in *Windsor*'s wake. United States v. Windsor, 133 S. Ct. 2675, 2705, 2708-09 (2013) (Scalia, J., dissenting); *see also* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of the Child* , 102 W. VA. L. REV. 411, 412 (1999) (discussing that the preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; "precious little" focus is given to the rights of a child who may be a product of a same-sex relationship.).

25. *Windsor*, 133 S. Ct. at 2694-96; *see also Tanco*, 2014 WL 997525 at *7. In the *Tanco* case, several of the same-sex families bringing suit included children and the plaintiffs advanced arguments relating to the direct and harmful impact of Tennessee's non-recognition statute and constitutional amendment on their children. Noting the "immanent risk of potential harm to their children during their developmental years from the stigmatization and denigration of their family relationship," the court acknowledged such potential harm by stating :

> [u]nder the existing state of the law in Tennessee, upon the birth of their child, Dr. Jesty will not be recognized as the child's parent, and many of the legal rights that would otherwise attach to the birth of a child . . . will not apply to Dr. Jesty or to the child.

Id. at *2. However, children are not named plaintiffs. *Id.* at *2-3.

26. *See Tanco*, 2014 WL 997525, at *5 n.8.

impact on children was framed principally in terms of the material deprivation children experience (e.g., social security benefits, health insurance coverage, etc.).[27] To be sure, these deprivations also emanate from enforcement of Section 2 by non-recognition states. Children in married same-sex families could assert that, though they are similarly situated to children in married opposite-sex families, state bans deprive them of certain material entitlements and protections because of their parents' sexual orientation, in violation of their equal protection rights.[28] This argument is supported by scholarship proposing and analyzing children's substantive equal protection claims in a variety of contexts, including same-sex marriage laws. [29]

In addition to advancing an equal protection claim, this Article focuses on how Section 2 deprives children in same-sex families of the security, consistency, and permanency that are defining features of the filial relationship, and makes the claim that these deprivations constitute substantive due process infringements.[30] Children's constitutional protections and entitlements encompass more than tangible benefits, expressed in monetary terms. This Article seeks to highlight intangible, substantive qualities inherent in the filial relationship that deserve constitutional protection. Beyond dignitary and stigmatic harms, courts should regard depriving children of the permanency, stability, and security inherent in the legal parent-child relationship as an infringement of the kind and quantum of care secured by the "best interests of the child" standard and as violating children's constitutional rights.[31] The focus on Section 2's detrimental impact

---

27. *Windsor*, 133 S. Ct. at 2694-96 ("DOMA also brings financial harm to the children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.").

28. *See infra* Part IV.A.

29. Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondant Edith Windsor Addressing the Merits and Supporting Affirmance, United States v. Windsor 133 S. Ct. 2675 (2013) (No. 12-307) (noting "[t]he material and intangible deprivations caused by laws that [ ] prescribe same-sex marriage impair children's interests and arguably infringe children's rights"); *see also* Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307 (2010) [hereinafter Smith, *Challenging the Three Pillars*]; Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. R. 1589 (2013) [hereinafter Smith, *Equal Protection for Children*]; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994) [hereinafter Woodhouse, *" Out of Children's Needs, Children's Rights"*].

30. *See infra* Part IV.B; *see also* Washington, *What About the Children?*, *supra* note 8, at 1.

31. In addition to protecting certain substantive rights, the Due Process clause also provides procedural protection by requiring adherence to fair procedural processes when depriving persons of certain liberty interests. Whitney v. California, 274 U.S. 357, 373 (1927). There is a viable

on children's legal relationship with their non-biological parent also engages a broader query unanswered by the U.S. Supreme Court in *Michael H. v. Gerald*

---

procedural due process challenge available to children in same-sex families against Section 2 of DOMA because it authorizes laws that enforce categorical, self-executing invalidation of their filial relationship with their biological parent, without due process before being deprived of their liberty interest in that relationship. In *Stanley v. Illinois,* 405 U.S. 645 (1972), the U.S. Supreme Court invalidated a law that deprived an unmarried father of his parentage rights without a hearing to determine his parental rights. The Court's reasoning for its determination provides ample support for a procedural due process claim by children in same-sex families whose filial relationships are invalidated by non-recognition laws. *Id.* It explained:

> Stanley is treated not as a parent, but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights. . . . We observe that the State registers no gain toward its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family. . . . Procedure by presumption is always cheaper and easier than an individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand (citation omitted). . . . The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming, rather than proving, Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

Id. at 648-58. The non-recognition laws Section 2 authorizes, like the law at issue in *Stanley* , automatically nullify the filial relationship between a child in a same-sex family and her non-biological parent based on the presumption that gay parenting is inherently harmful. *See* Bostic v. Rainey, 970 F. Supp. 2d 456, 479-80 (E.D. Va. 2014) (The Court, relying upon the U.S. Supreme Court's decision in *Stanley*, opined: "The 'for the children rationale' rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. Forty years ago a similarly unfortunate presumption was proffered to defend a law in Illinois. . . . The Supreme Court said that such a startling presumption 'cannot stand' (citation omitted). . . . The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-sex marriage."). In addition to dispensing with procedural due process guarantees, these laws dispense with the individualized, fact specific determinations of parental fitness required by the best interest of the child standard, which is controlling in the custody, visitation and adoptions contexts. *See infra* note 163. A children's procedural due process challenge also has the advantage of more easily clearing standing obstacles, particularly when advanced against a non-recognition law like Georgia's which excludes claims related to or arising out of out-of-state same-sex marriages from the jurisdictional authority of its state courts. *See infra* Part I.A, Part II. Despite the viability and advantages of children's procedural due process claim against Section 2, this Article limits its focus to children's equal protection and substantive due process entitlements because the Court's decision in *Windsor* focused on those constitutional guarantees.

D: whether children have a constitutionally protected right to a legal relationship with a parent.[32]

Part I of this Article introduces Georgia law, which prohibits gay marriage by statute and constitutional amendment, to illustrate how Section 2 of DOMA authorizes the abrogation of a filial relationship created in a recognition state between a child and her non-biological parent. This section also explains how non-biological, legal parentage, whether created as incident to a valid marriage, by contract, by law, or by intent, is vulnerable to invalidation in non-recognition states. Part II describes how children plaintiffs can satisfy standing requirements in jurisdictions like Georgia, which, in addition to banning gay marriage, forecloses all claims and rights relating to same-sex marriage, from litigation in its courts.

Part III analyzes the deprivation permitted by Section 2 within the context of the "best interests of the child" standard, which defines the nature and scope of care to which children are entitled and which recognizes the primacy of the filial relationship.[33] It acknowledges and responds to a critique that an expansive reading of children's rights would have the adverse and corresponding effect of limiting parental rights in a variety of contexts. This portion of the Article engages the scholarship of Professor Nancy Polikoff,[34] who warns against the entrenchment of marriage, and explains how the argument advanced here is preoccupied with the actual benefits attendant to the parent-child relationship, not the presumed benefits of the marital relationship. Part IV conducts the Equal Protection and Substantive Due Process analysis, considers the applicable level of constitutional scrutiny, and examines whether the laws Section 2 authorizes are justified by a state interest in negating existing filial relationships. This section highlights the advantage that children's claims may enjoy over adult claims against marriage bans, as the former arguably triggers a heightened level of constitutional scrutiny.[35] The Article concludes with a determination that Section 2's impact on children in same-sex families can be said to serve neither compelling nor legitimate governmental ends and is therefore unconstitutional.

---

32. Michael H. v. Gerald D., 491 U.S. 110, 1 30-31 (1989). The facts in *Michael H.* raised the issue of whether a child resulting from an extramarital affair, but born into an existing, though admittedly dysfunctional marriage, could have a constitutionally protected relationship with her biological father and her mother's husband. This Article will address the Court's relevant holding and rationale. *Id.*; *see infra* text accompanying notes 193-205.

33. Gomez v. Perez, 409 US 535, 538 (1973) (referencing the "substantial benefits accorded [to] children generally"). *Id.*

34. *See infra* note 242.

35. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988); Plyler v. Doe, 457 U.S. 202, 219-20 (1982) (noting that "children who are plaintiffs in these cases are special members" of the legal class being analyzed); Trimble v. Gordon, 430 U.S. 762, 767 (1977); Weber v. Aetna, 406 U.S. 164, 168 (1972) ; Levy v. Louisiana, 391 U.S. 68, 71 (1968).

I. ARE YOU MY MOTHER? WHO'S YOUR DADDY?: LEGAL PARENTAGE IN SAME-SEX FAMILIES IN NON-RECOGNITION STATES

A. The Workings of DOMA and "Mini-DOMA's"

Even as the majority in *Windsor* invalidated Section 3 of DOMA, it acknowledged, "Section 2 . . . allows States to refuse to recognize same-sex marriages performed under the laws of other States."[36] The origins of Section 2 of DOMA can be traced to *Baehr v. Lewin,*[37] a 1993 decision by the Hawaiian Supreme Court, in which the state was required to provide a strong justification for its marriage ban.[38] On remand, the state failed to satisfy its burden,[39] however, the hope the decision inspired as movement toward marriage equality was extinguished by an amendment to the Hawaiian Constitution inviting legislators to prohibit same-sex marriage by statute.[40] Accepting the invitation, the Hawaiian legislature enacted a marriage ban foreclosing recognition of same-sex marriage in the state and muting the impact of *Baehr*'s holding.[41] Nevertheless, the case provoked alarm among opponents of same-sex marriage, who feared that *if* gay marriage were to become legal in Hawaii, which boasts a breathtaking backdrop for weddings and honeymooners, states throughout the nation would have been required to recognize the marital status of all same-sex couples married in Hawaii.[42] DOMA was enacted as a prophylactic measure to

---

36. United States v. Windsor*,* 133 S. Ct. 2675, 2682-83 (2013).

37. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

38. *Id.* at 67 (holding sex to be a suspect class for the purposes of the equal protection analysis and requiring, on remand, that the state satisfy strict scrutiny).

39. Baehr v. Mike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

40. HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). On November 13, 2013, Hawaii became the sixteenth jurisdiction in the United States to extend the freedom to marry to same-sex couples when Gov. Neil Abercrombie signed the freedom to marry into law.

41. HAW. REV. STAT. § 572-1 (1994).

42. Congress was concerned that "if Hawaii (or some other State) recognizes same-sex 'marriages,' other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions." H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2913; *see also* Elizabeth Kristen, *The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 113 (1999) (noting that DOMA was enacted as part of the "backlash" against Hawaii's consideration of legalizing same-sex marriage); Rebecca S. Paige, *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage will Other States Have To?: An Examination of Conflict of Laws and Escape Devices*, 47 AM. U. L. REV. 165, 171 (1997) ("If the Hawaii Supreme Court ultimately determines that the marriage license statute is unconstitutional and recognizes same-sex marriages, proponents of same-sex marriage insist that other states must recognize such marriages under the Full Faith and Credit Clause, or alternatively that conflict of laws rules should be invoked to expand same-sex marriage beyond the boundaries of the sovereign State of Hawaii.").

ensure that same-sex marriages created in one state did not automatically enjoy recognition in other states, and effectively legalize same-sex marriage throughout the nation.

The text of Section 2 makes clear,

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[43]

Many claims about the constitutionality of Section 2 focus on fundamental precepts of federalism and adults' constitutional rights.[44] Some legal theorists posit that because Section 2 allows states to disregard the validity of a marriage legally created in another state, it violates the Full Faith and Credit Clause.[45] This argument is based upon the understanding that the Full Faith and Credit Clause imposes a constitutional duty on states to afford judgments by sister-states the same effect they would enjoy in their state of issuance.[46] Historically, states have routinely recognized marriages effectuated in other states, despite considerable variance among marital prerequisites.[47] Accordingly, they argue, Section 2's grant of authority to states to decline to recognize same-sex marriages sister-states represents a substantial departure from this practice.[48] Other

---

43. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996) (emphasis added).

44. *See, e.g.*, Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006); Palladino v. Corbett, No. 13-5641, 2014 WL 830046 (E.D. Penn. Mar. 4, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

45. U.S. CONST. art. IV, § 1 (" Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); 28 U.S.C. § 1738C (allowing states specially to not "give effect to any public act, record, or judicial proceeding of" another state); *see also Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

46. Thompson v. Thompson, 484 U.S. 174, 174 (1988); Estin v. Estin, 334 U.S. 541, 545-46 (1948); Mills v. Duryee, 11 U.S. 481, 485 (1813).

47. United States v. Windsor, 133 S. Ct. 2675, 2691 (2013). Justice Kennedy observed in *Windsor* , "Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington—prohibit the practice)." *Id.* (citations omitted); *see also* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 442-46 (2005); U.S. MARRIAGE LAWS, http://www.usmarriagelaws.com (last visited Mar. 31, 2014).

48. Grossman, *supra* note 47, at 477-78; Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 385 (2005) ("[O]n its face, the DOMA interstate judgment recognition provision seems to contradict the full

scholars contend that the Full Faith and Credit Clause only requires states to respect *judgments* issued by other state courts[49] and because marriage is not a judgment, it is not entitled to comity.[50] In addition, some argue that the common law public policy exception to the Clause may justify disregarding same-sex marriages where recognition of such unions would violate a state's public policy, notwithstanding Section 2.[51] However, the existence of such an exception is the subject of some debate among courts and scholars.[52] Opponents of Section 2

---

faith and credit Act and doctrine of mandatory interstate judgment recognition.").

49. Adar v. Smith, 639 F.3d 146, 160 (5th Cir. 2011) (noting that the U.S. Supreme Court "continues to maintain a stark distinction between recognition and enforcement of judgments under the full faith and credit clause"). The U.S. Supreme Court has noted a distinction between the application of full faith and credit to public acts, which may be subject to a public policy exception, and judicial proceedings, which do not fall within the scope of a public policy exemption. Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1988) (stating, "Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments."); *see also* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 437 (1943).

50. *See generally* Grossman, *supra* note 47.

51. Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1021 (D. Nev. 2012) (finding that the "protection of Nevada's public policy is a valid reason for the State's refusal to credit the judgment of another state, lest other states be able to dictate the public policy of Nevada"); Anders e n v. King County, 138 P.3d 963, 1005 (Wash. 2006) (Alexander, C.J., concurring) ("Where foreign law clearly violates our State's strong public policy, there is an important and well-established exception to the rule for recognizing foreign law. This exception probably requires that Washington courts would not recognize same-sex ' marriage' even in the absence of DOMA."); *In re* Marriage of J.B. and H.B., 326 S.W.3d 654, 670 (Tex. Ct. App. 2010). *But see Adar,* 639 F.3d at 179 (noting that there is "no roving public policy exception to the full faith and credit that is owed to out-of-state judgments."); *Baker*, 522 U.S. 222 at 233-34; *Estin*, 334 U.S. at 546 (finding that the Full Faith and Credit Clause "ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it").

52. *Compare* Borman v. Borman, No. 2014CV36, 2014 WL 4251133, at *4 (Tenn. Cir. Ct. Aug. 5, 2014) ("The laws of Iowa concerning same sex marriage is so diametrically opposed to Tennessee's laws, and Tennessee's own legitimate public policy concerning same-sex marriage, that Tennessee is not required by the U.S. Constitution to give full faith and credit to a valid marriage of a same-sex couple in Iowa."), *with* Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *17 n.24 (S.D. Ohio Apr. 14, 2014) (explaining, "The Supreme Court has thus rejected any notion that a state may disregard the full faith and credit obligation simply because the state finds the policy behind the out-of-state judgment contrary to [its] own public policy." (citing *Baker*, 522 U.S. at 233 (1988)); *see also* Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 753 (2003) ("Differences between the states on local public policy, significant in whether one state will recognize the statutes of another state, do not provide exceptions to the constitutional command to recognize a sister state's valid, final judgments."); Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 78

theorize that it violates the equal protection and substantive due process rights of married same-sex couples by allowing non-recognition states to deny their marital status.[53]

Section 2 authorizes non-recognition states to invalidate both out-of-state, same-sex marriages and legal parentage between a child and her non-biological parent that exists as incident to the marriage, in violation of the child's equal protection and substantive due process rights. Giving support to a claim that Section 2 infringes a child's constitutional rights to a filial relationship, one New York Surrogate Court judge cautioned:

> Currently there are explicit prohibitions against same-sex marriages in forty-four states . . . Without a change in these laws, or an unlikely expansion of the Full Faith and Credit Clause jurisprudence, *these clear legislative statements of public policy would appear to permit courts of those states to deny recognition of same-sex marriages contracted elsewhere, and, arguably, also to legal rights flowing from those marriages, including presumptive parenthood*. Such a position is supported by DOMA, . . . [which] not only defines marriage as solely a relationship between a man and a woman, but also appears to allow the states to deny recognition of same-sex marriages validly contracted elsewhere.[54]

There are presently twenty states that prohibit same-sex marriage by statute and/or constitutional amendment.[55] Georgia has one of the most comprehensive set of laws prohibiting same-sex marriage and, therefore, provides the ideal context within which to assert children's constitutional challenges to Section 2.[56]

(2004) ("States are not free to refuse to enforce a judgment on public policy grounds.").

53. *See* Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006); Palladino v. Corbett, No. 13-5641, 2014 WL 830046 (E.D. Penn. Mar. 4, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014). Adults have also advanced claims that Section 2 infringed their right to travel by jeopardizing the legal status of the relationship between the child and her non-biological parent when the family traveled into a non-recognition state. *See, e.g.*, Finstuen v. Crutcher, 496 F.3d 1139, 1143 (10th Cir. 2007); Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *2 (M.D. Tenn. Mar. 14, 2014).

54. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 683-84 (2009) (emphasis added) (citations omitted).

55. It is important to note that the exact number of states that do and do not provide for marriage equality is changing, even as of the writing of this Article. As of October 12, 2014 almost one-half of states and the District of Columbia allow same-sex marriage. Erik Eckholm, *Gay Marriage Is Upheld in Idaho and Nevada*, N.Y. TIMES, Oct. 7, 2014, http://www.nytimes.com/2014/10/08/us/same-sex-marriage-bans-struck-down-in-idaho-and-nevada.html?_r=0("[T]he number of states authorizing same-sex marriage, which was 19 last week and 24 as of Monday, is likely to approach 35 in coming weeks, as the legal aftermath of the four appeals-court decisions issued to date plays out.").

56. Larry Copeland, *Seven Georgian Challenging State's Gay Marriage Ban*, USA TODAY (Apr. 22, 2014), http://www.usatoday.com/story/news/nation/2014/04/22/georgias-gay-marriage-

Several Georgia statutes and a constitutional amendment proscribe gay marriage, and, as an added guarantee of exclusion, Georgia courts are divested of jurisdiction over cases, claims and rights related to the prohibited unions. The jurisdictional obstacle precludes litigation of claims and rights that derive from the marriage such as legal parentage between a child and her non-biological parent, custodial rights, visitation rights, claims to material entitlements and protections, and claims relating to the security, permanency, and stability inherent in the filial relationship. Though, arguably, these deprivations result from non-recognition laws generally, Georgia law invokes Section 2 of DOMA to create the most severe consequences for children in same-sex families: the voiding of their legal relationship with their non-biological parent *and* denial of access to the courts to enforce the benefits, protections and parental responsibilities inherent in an existing filial relationship.

The Georgia Constitution provides in relevant part:

> This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. *The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.*[57]

The Georgia statute establishing the strongest prohibition against same-sex marriage provides:

> It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state. No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage

---

ban-challenged/8007629/. On April 22 three gay couples and one individual filed suit challenging Georgia's constitutional amendment banning gay marriage as violating their equal protection rights. *Id.* Despite the presence of children in two of the families, children were not named plaintiffs in the suit. *Id.* The state of Georgia's defense of its exclusionary marriage laws centers on how they protect and serve the interests of children. Its motion to dismiss provides in pertinent part, "The challenged laws . . . rationally further Georgia's legitimate interest in ensuring legal frameworks for protection of children of relationships where unintentional reproduction is possible; ensuring adequate reproduction; [and] fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children . . . ." Defendant Deborah Aderhold's Brief in Support of Her Motion to Dismiss the Complaint at 33, Innis v. Aderhold, (2014) (No. 1:14-CV-01180-WSD), 2014 WL 3828018.

57. GA. CONST. art. I, § 4, para. 1 (emphasis added).

> entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. *Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.*[58]

Georgia's statutory and constitutional law, limiting jurisdiction to exclude claims and disputes arising from or relating to same-sex unions, echoes Section 2's exemption of "any . . . judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, or a right or claim arising from such relationship" from respect by non-recognition states.[59] This language implicates the legal status of parent-child relationships ancillary to a legal marriage considered void in a non-recognition state, and parent-child relationships constructed by law, by contract, by consent, and by estoppel that rely upon recognition of the marital relationship. Section 2 of DOMA and the laws it authorizes, like Georgia's, extinguish the filial relationship between a child and her non-biological parent, in violation of the child's constitutional rights.

B. Constructing Legal Parentage

The marital presumption of parentage affords the most secure guarantee of legal parentage, second only to biology-based parentage, in the opposite-sex marriage context.[60] In the "traditional" marriage context, the presumption of legal parentage with respect to children born within the marriage enjoys substantial constitutional protection, even where the child is not biologically related to the father and the child results from an adulterous affair.[61] The legal status of the relationship between the child and her non-biological father derives

---

58. O.C.G.A. § 19-3-3.1 (2013) (emphasis added).

59. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996).

60. Michael H. v. Gerald D., 491 U.S. 110, 124-27 (1989); Wendy G-M v. Erin G-M, 2014 WL 1884485, at *9 (N.Y. Sup. Ct. May 7, 2014) (describing parentage incident to a valid marriage as "reflecti[ve] of the strong presumption, displayed across the boundaries of many states, connecting marriage to parenthood"); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L 505, 528-29 (1998) (noting that, in *Michael H.*, "Justice Scalia's plurality opinion is a ringing endorsement of both the vision of the traditional family as a 'good' which the law properly protects, and also, more implicitly, of the utility of the exclusiveness framework as a way to bolster and protect the traditional family").

61. *Michael H.*, 491 U.S. at 127. Pursuant to the adage, "mama's baby daddy's maybe," the marital presumption of parentage only applies to fathers who are married to the mother at the time of the child's birth but who are not biologically related the child. *Id.*

from the existing marriage, and the child's entitlement to the benefits and protections afforded by the filial relationship is not dependent upon the family's state of domicile.

In sharp contrast, the relationship between a child born to same-sex married parents who agree to and participate in her conception, birth, and co-parenting is vulnerable to invalidation in states that do not recognize the parents' marital relationship. Children with a filial relationship with their non-biological parent that derives from a marriage Section 2 authorizes states to void are vulnerable to the nullification of that relationship and deprived of the constitutional benefits and protections it secures for them. As a result, Section 2 authorizes states to invalidate the most secure guarantee of legal parentage for children and their non-biological parents.

When a same-sex family moves to a non-recognition state, like Georgia, the marriage and the attendant filial relationship between the child and the non-biological parent are categorically and automatically void and the non-biological parent is rendered a legal stranger to the child. The net effect of not recognizing an existing filial relationship is deprivation of the benefits and protections inherent in the legal parent-child relationship. In a non-recognition state the non-biological parent could be denied employer-provided health care benefits, be unable to make emergency medical and educational decisions, be unable to obtain her child's Social Security card, and be unable to travel internationally with her child.[62] Nullification of the legal status of her relationship with her child deprives the child of material entitlements and protections and compromises the security, permanence, and stability that a filial relationship provides.

A simple story illustrates the potential impact of Georgia's non-recognition laws, authorized by Section 2, on the legal status of existing parent-child relationships in same-sex families. Assume Jennifer was born in California one year after her mothers' marriage. Jennifer is biologically related to Carol, who carried and gave birth to her. Carol and Susan agreed to and participated in Jennifer's conception by in vitro fertilization and the couple agreed to co-parent their daughter. Susan, who serves in the U.S. military, is relocated to Fort Benning, one of many military bases in the state of Georgia. Shortly after the family moves to Georgia, Susan is deployed overseas, leaving Jennifer in the exclusive care of Carol.

One morning, as Jennifer is getting dressed, she complains of severe pain on the right side of her abdomen. Susan takes her to an urgent care clinic, and the

---

62. *See* Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *see also* Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 17-18 (2006) (noting that both the marriage and parent-child relationships of same-sex couples may be terminated when they cross state borders and detailing the potential negative implications of this termination).

doctor recommends that Jennifer be admitted to the hospital to determine whether the pain is caused by a ruptured appendix. After a thorough examination at the hospital, the doctor concludes that Jennifer's appendix is inflamed. She explains that Jennifer's parents need to authorize emergency surgery so that it can be removed before it bursts. Susan is unable to reach Carol to authorize the surgery, and Susan is not Jennifer's legal parent because their filial relationship exists by virtue of a marriage Georgia considers void. In contravention of Jennifer's best interests, a hospital official can disregard Susan's legal parentage and deny her the right to make a life-or-death medical decision for her daughter.[63]

In California, Jennifer had two legal parents and she is entitled to all of the benefits and protections that legal parentage affords, which would include a relationship with both mothers sufficient to allow either of them to make emergency medical decisions on her behalf.[64] The invalidation of her filial relationship with Susan and the resulting harms, authorized by Section 2, can have catastrophic consequences. The nullification of a legal parent-child relationship compromises benefits and protections guaranteed to the child by the Equal Protection and Due Process Clauses.

Where the child has no genetic relationship to a parent, parentage attendant to marriage provides little protection against invalidation of their filial relationship by non-recognition laws authorized by Section 2 of DOMA.[65] In

---

63. *See* Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *17 (S.D. Ohio Apr. 14, 2014) (describing the adverse impact of Ohio's non-recognition law on legal parentage thusly, "Same-sex couples' legal status as parents will be open to question, including in moments of crisis when time and energy cannot be spared to overcome the extra hurdles Ohio's discrimination erects.").

64. In the absence of the marriage ban Section 2 authorizes, children's filial relationship with their non-biological parent is not vulnerable to invalidation. *See* Wendy G-M v. Erin G-M, 2014 WL 1884485, at *11 (N.Y. Sup. Ct. May 7, 2014). In that case the court was tasked with determining whether a non-biological spouse married to the birth mother in a civil ceremony in Connecticut is a parent pursuant to New York's long standing presumption that both spouses are the legal parents of any child born within an extant marriage. *Id.* Determining both spouses to be the child's legal parents, the court held, "Because the Marriage Equality Act has sanctioned marriage in New York, this state no longer needs to afford comity to other jurisdictions on resolving issues relating to parenthood in same-sex marriages." *Id.*

65. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 682-83 (2009). The Court explained the lesbian mothers' desire, despite their marital status, to allow the biological mother to adopt their child by stating:

> [A]s the child of a married couple, Sebastian already has a recognized and protected child/parent relationship with both Ingrid and Mona, arguably making adoption unnecessary and impermissibly duplicative. Unfortunately, while this is the case in New York, the same recognition and protection of Mona's parental rights does not currently exist in the rest of this country, or in most other nations in the world. For this reason, the parties argue that only an order of adoption would ensure the portability of Sebastian's parentage, and further ensure that the federal government and other states would recognize Mona as Sebastian's legal parent.

light of this reality, same-sex couples employ a variety of legal devices to establish and buttress the filial relationship between a child and her non-biological parent. These efforts are designed to insure against invalidation of the legal parent-child relationship by non-recognition laws that void the couple's marriage. These forms of legal parentage fall loosely into two categories: parentage by adoption and parentage by judgment. The availability of these "alternative" forms of legal parentage does not eliminate the harm caused by Section 2, and their viability remains subject to non-recognition laws.

Section 2 permits states to disregard "judicial proceeding[s] of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship," including legal parentage.[66] Parentage created by judgment, particularly those that rely upon the existence of a marital relationship between same-sex partners, falls within the scope of the exclusion authorized by Section 2. Additionally, same-sex adoptions and second parent adoptions have fallen prey to invalidation by marriage and adoption bans in non-recognition states and can secure no guarantee of legal parentage in those jurisdictions.

Alternative methods of creating the filial relationship may provide an added measure of security, however, they cannot entirely insulate against the harm caused by Section 2's grant of authority to non-recognition states to disregard the legal status of those relationships.[67] As same-sex couples challenging Tennessee's non-recognition statute argue in *Tanco:*

> [a]lthough . . . they can take additional steps to reduce some of these uncertainties . . . these steps would be costly and time-consuming . . . [and] they would result in only minimal legal protections relative to the full panoply of rights that otherwise attach to state-sanctioned marriage.[68]

The existence of "alternative" forms of legal parentage does not negate the claim that the non-recognition laws Section 2 authorizes deprives children in same-sex families of the most protected form of parentage—parentage incident to an existing marriage.[69]

C. Second Parent and Joint Adoption

One popular method of constructing legal parentage between a child and a

---

Id. (citations omitted).

66. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (1996).

67. *Himes*, 2014 WL 1418395, at *17.

68. Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *4 (M.D. Tenn. Mar. 14, 2014).

69. Anderson, *supra* note 62, at 3 (noting that non-recognition laws result in situations where "children of [same-sex] relationships are subject to fluctuating legal relationships based only on geographical location.").

non-biological parent is by adoption.[70] Joint adoption involves a same-sex couple adopting a child, with both parents enjoying constitutional rights and protections identical to those biological parents possess, with respect to the child.[71] Second-parent adoption is the process by which the non-biological parent in a same-sex family or the stepparent, in an opposite-sex family, adopts the child, thereby, establishing a filial relationship.[72] Some states require marriage as a prerequisite for allowing a second-parent adoption.[73] Some states allow an individual gay or lesbian person to adopt a child, but prohibit gay and lesbian couples from adopting.[74] However, several states and counties within states prohibit second parent adoption, making it challenging for non-biological parents in same-sex marriages to establish a filial relationship with their child.[75] Additionally, there are non-recognition adoption statutes and constitutional amendments that void same-sex adoptions created in other states.[76]

Professor Rhonda Wasserman identifies three explanations non-recognition states offer for refusing to recognize out-of-state adoptions by gays and lesbians.[77] First, states have the right to decline to recognize adoptions deemed

---

70. Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoption by Gays and Lesbians*, 58 AM. U. L. REV. 1, 41 (2009). It is important to note that adoption is a complicated and involved process, and couples who pursue this option do so at considerable cost. *Id*. Adoption proceedings are generally lengthy and require an intrusive, and often expensive, professional " home study, "which investigates the intimate details of a couple's relationship, finances, family, and living environment. *Id.* The investigation may also entail fingerprinting and a mandatory check for a criminal record as well as any prior reported child abuse or neglect. *Id.* at 41-42.

71. MOVEMENT ADVANCEMENT PROJECT ET AL., SECURING LEGAL TIES FOR CHILDREN LIVING IN LGBT FAMILIES: A STATE STRATEGY AND POLICY GUIDE 11 (2013) [hereinafter SECURING LEGAL TIES], *available at* http://www.lgbtmap.org/file/securing-legal-ties.pdf.

72. Deborah H. Wald, *The Parentage Puzzle: The Interplay between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 397-408 (2007).

73. *See, e.g.*, MD. CODE ANN., FAM. LAW § 2-201 (2013); *but see* D.C. CODE §§ 16-302, 46-401 (2001) .

74. *See* OHIO REV. CODE ANN. § 3107.03 (West 2011); Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395, at *10 (S.D. Ohio Apr. 14, 2014) (noting that under Ohio law "opposite-sex married couples can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. Ohio courts allow an individual gay or lesbian person to adopt a child, but not a same-sex couple."); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 980 (S.D. Ohio 2013). Even in the absence of explicit bans gay couples and individuals still suffer discrimination in the placement context. SECURING LEGAL TIES, *supra* note 71, at 11.

75. *See, e.g.*, Wheeler v. Wheeler, 642 S.E.2d 103, 104 (2007) (Carley. J., dissenting) ("There is not any appellate opinion addressing same-sex adoptions in Georgia, even though they have been permitted at the trial court level in certain counties . . . ."); *see also* SECURING LEGAL TIES, *supra* note 71, at 14-15.

76. Anderson, *supra* note 62, at 17-18.

77. Wasserman, *supra* note 70, at 5.

fundamentally inconsistent with their public policy.[78] Second, the non-adversarial nature of most adoption proceedings allows states to argue that adoptions are not judicial determinations; rather, they are created by private agreement between the adoptive and birth parents, and therefore they are not entitled to recognition under the Full Faith and Credit Clause.[79] Finally, she notes, a state may characterize recognition of parental status as a matter of enforcement and determine that its adoption and parentage laws, rather than those of the issuing state, are controlling.[80] A survey of recent case law highlights the limited utility of adoption as a method of insuring the filial relationship between a child and her non-biological parent against invalidation.

Adar v. Smith, a Fifth Circuit case, involved an unmarried gay couple who adopted a child born in Louisiana.[81] A New York court issued a joint adoption order and both men were designated the child's legal parents.[82] The parents applied to the Louisiana State Registrar requesting that the child's original birth certificate be amended to include both of their names.[83] Citing a Louisiana statute prohibiting adoption by unmarried couples, the registrar refused the parents' request.[84] In recognition of the adoption order, the registrar agreed to add one of the men's names to the birth certificate.[85] The parents and the child filed suit arguing that the adoption decree and the resulting filial relationships between the child and both parents were entitled to recognition by Louisiana under the Full Faith and Credit Clause.[86] They also claimed that the actions of the registrar violated their equal protection rights because they discriminated against the child based upon the marital status of the parents.[87]

The District Court granted the Plaintiffs' motion for summary judgment, without reaching their equal protection claim.[88] A three-judge panel of the Fifth Circuit Court of Appeals affirmed the lower court's decision; however, that ruling was set aside by a majority of the full 16-member court sitting en banc.[89] In an 11-5 decision the Fifth Circuit ruled that the Full Faith and Credit Clause did not apply to the registrar's decision and that Louisiana was not obliged to recognize the law of a sister-state repugnant to its public policy against adoption by unmarried couples.[90] The court also rejected the parties' equal protection claim, reasoning that the state's goal of ensuring that children are raised in stable,

---

78. *Id.* at 23-24. *But see* cases cited *supra* note 52.
79. Wasserman, *supra* note 70, at 36-39.
80. *Id.* at 72; *see also* Adar v. Smith, 639 F.3d 146, 160 (5th Cir. 2011).
81. *Adar*, 639 F.3d at 149.
82. *Id.*
83. *Id.*
84. *Id.* at 149-50.
85. *Id.* at 150.
86. Adar v. Smith, 639 F.3d 146, 151 (5th Cir. 2011).
87. *Id.* at 161.
88. *Id.* at 150.
89. *Id.*
90. *Id.* at 161.

married homes justified its adoption law and that goal was rationally related to the registrar's refusal to amend the birth certificate.[91] While the Louisiana law at issue in *Adar* did not prohibit same-sex marriage, it had the same adverse effect that enforcement of state marriage bans authorized by Section 2, would have on children's rights and interests. It renders second-parent and joint adoptions vulnerable to invalidation in non-recognition states in violation of children's constitutional rights.[92]

The outcome in *Boseman v. Jarrell*[93] also underscores the vulnerability of filial relationships created by adoption. In that case, a lesbian couple living together in North Carolina as domestic partners made joint efforts to conceive a child with the expressed intent of co-parenting him.[94] The non-biological mother assumed an equal share of the parenting responsibilities after their son's birth.[95] To secure the legal status of her relationship with the child, both parties sought an adoption order designating the non-biological mother as a legal parent without terminating the legal parentage of the biological mother.[96] Though North Carolina law did not expressly authorize the kind of adoption sought by the parties, an adoption court granted the parties' request.[97] Upon dissolution of their relationship and on appeal to the North Carolina Supreme Court, the biological mother obtained a judgment invalidating the filial relationship between the child and her non-biological adoptive mother.[98] At issue in that case was enforcement of an existing adoption order within the state of its issuance, not enforcement of an out-of-state order.[99] Nevertheless, the court's decision invalidating the order

---

91. *Id.* at 162.

92. NAT'L CTR. FOR LESBIAN RIGHTS: ADOPTION BY LBGT PARENTS 2 (2014), *available at* http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf. For example, gay adoption in Georgia is not prohibited by law and the status of second parent adoption in Georgia is unclear. Wheeler v. Wheeler, 642 S.E.2d 103, 104 (Ga. 2007) (Carley, J., dissenting) (cert. denied) ("There is not any appellate opinion addressing same-sex adoptions in Georgia, even though they have been permitted at the trial court level in certain counties . . . ."). The uncertainty that characterizes the treatment of second parent adoptions in Georgia raises questions about the state's willingness to recognize out-of-state, same-sex adoptions. Parents can protect their families by applying for legal guardianship, but guardianship "proceedings are burdensome and often lack finality . . . ." DeBoer v. Snyder, 973 F. Supp. 2d 757, 763 (E.D. Mich. 2014). In addition, legal guardianship does not provide the same rights as legal parentage. *Id.* at 771 (the court observed that under Michigan guardianship law: "in the event that a state court were to award guardianship of . . . surviving children to the non-legal parent, the guardianship would have to be renewed annually and would remain susceptible to the challenge of an interested party at any time . . . plac[ing] such children in a legally precarious situation").

93. Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010).

94. *Id.* at 497.

95. *Id.*

96. *Id.*

97. *Id.* at 497-98.

98. *Id.* at 502.

99. *See generally id.*

and extinguishing the non-biological mother's status as the child's legal parent illustrates the limited ability of an adoption order to create legal parentage that is not vulnerable to invalidation by non-recognition laws. [100]

The Tenth Circuit's decision in *Finstuen v. Crutcher*[101] reaches a different conclusion regarding the constitutionality of state laws precluding recognition of out-of-state, same-sex adoptions. The court held:

> [F]inal adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation. Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause.[102]

Similar holdings in *Russell v. Bridgens*[103] and *In re Adoption of Sebastian*[104] also inspire some optimism regarding the security of legal parent-child relationships created via adoption by a gay or lesbian parent or couple in non-recognition states.[105] However, as the more recent holding in *Adar* suggests, the protection adoption affords against invalidation of the filial relationship between a child and her non-biological parent is far from absolute.[106]

---

100. *See id.* at 502 (noting that the court is obligated to "recognize the statutory limitations on the adoption decrees that may be entered" and, due to this, the adoption decree was void *ab initio* and the non-biological mother is not a parent of the child).

101. Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).

102. *Id.* at 1141.

103. Russell v. Bridgens, 647 N.W.2d 56, 59 (Neb. 2002) ("A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.").

104. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 692-93 (2009) (holding that: "although it is also true that an adoption should be unnecessary because Sebastian was born to parents whose marriage is legally recognized in this state, the best interests of this child require a judgment that will ensure recognition of both Ingrid and Mona as his legal parents throughout the entire United States").

105. *See also* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 962, 970 (Vt. 2006) (holding DOMA does not require adherence to judgment from a non-recognition state (Virginia) where biological mother took daughter to have former partner's parental and visitation rights extinguished reasoning that another state's judgment will not be given greater weight than a pre-existing order in the home state and the former partner is a parent of the child).

106. Notwithstanding a valid adoption order, the filial relationship between a child and a non-recognition parent may still have to be litigated to be acknowledged in a non-recognition state. *See, e.g.*, Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *13 (S.D. Ohio Apr. 14, 2014) (describing the discriminatory impact of Ohio's non-recognition law the court observed: "Under Ohio law, if the [Plaintiffs'] marriages were accorded respect, both spouses in the couple would be entitled to recognition as the parents of their expected children. As a matter of statute, Ohio respects the parental status of the non-biologically related parent whose spouse uses AI to conceive a child born to the married couple . . . . However, Defendants refuse to recognize these Plaintiffs' marriages and the parental presumptions that flow from them, and will refuse to issue birth

These cases were decided before *Windsor*, which was preoccupied with the constitutionality of Section 3 of DOMA and left the legality of Section 2 to be determined in the future.[107] Section 2 authorizes states to disregard any "right or claim arising from" a same-sex marriage which includes legal parentage of a non-biological parent in a same-sex marriage who obtains a second-parent adoption.[108] In some states second-parent adoption is permitted only when that parent is married to the biological parent.[109] If the marriage to the biological parent is void, the second-parent adoption, which may exist by virtue of the marriage, arguably, is also void.[110] Accordingly, a child could be deprived of the constitutional entitlements and protections inherent in a legal parent-child relationship with her non-biological parent, notwithstanding the second-parent adoption.

D. Parenting Judgments

Parenting judgments provide another method of creating a filial relationship based on an expanded definition of parentage beyond consanguinity, adoption, and as appurtenant to marriage.[111] These judgments are issued pursuant to state parentage laws and judicial determinations that recognize parentage based upon a variety of considerations including: intent to parent, consent to the conception of the child, conduct of the parent in relation to the child, and the child's best interests.[112] Several states recognize that a non-biological and non-adoptive parent can be a legal parent under specified circumstances.[113] Some states have enacted filiation laws that extend legal parentage to include a parent who has lived with a child and held herself out as the child's parent.[114] Parentage statutes in Delaware reflect an expanded definition of parentage and recognize a *de facto* parent as a legal parent if she functions as a parent in the child's life.[115]

---

certificates identifying both women in these couples as parents of their expected children.").

107. United States v. Windsor, 133 S. Ct. 2675, 2682-83 (2013).

108. *See, e.g.*, MD. CODE ANN., FAM. LAW § 2-201 (2013); *but see* D.C. CODE §§ 16-302 (1963), 46-401 (2010).

109. *Id.*

110. *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 683-84 (2009).

111. Meghan Anderson, *K.M. v E.G.: Blurring the Lines of Parentage in the Modern Courts*, 75 U. CIN. L. REV. 275, 288-89 (2006); Nora Udell, *A Riddle for Dr. Seuss "Are You My (Adoptive, Biological, Gestational, Genetic, De Facto) Mother (Father, Second Parent, or Stepparent)?" and an Answer for our Times: A Gender-Neutral, Intention-Based Standard for Determining Parentage*, 21 TUL. J.L. & SEXUALITY 147, 149 (2012) ("Diverse . . . laws among states make allocating parental rights and obligations both overly complex and unjustly simple."); Wald, *supra* note 72, at 392-99.

112. Anderson, *supra* note 111, at 278-95.

113. *Id.* at 284-86.

114. SECURING LEGAL TIES, *supra* note 71, at 19-20.

115. DEL. CODE ANN. tit. 13, § 8-201 (2013); Smith v. Guest, 16 A.3d 920, 932 (Del. 2011); *see also* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain*

In other states, parentage may be established based on intent and expressions of consent to parent a child.[116] In those jurisdictions, a same-sex couple that plans to conceive, bear, and raise a child together using new reproductive technologies can petition the court to declare the non-biological parent to be a legal parent to the child.[117] Several state courts have held that a woman who consents to her female partner's insemination can be a legal parent,[118] and a few states have enacted statutes that explicitly recognize either a man or a woman who consents to another woman's insemination as a legal parent, without regard to the couple's marital status.[119] Some states have adopted the most flexible standard for establishing legal parentage and have determined a filial relationship to exist based on factors that include the following: acceptance of parenting responsibilities, living with the child, action by the legal parent that fosters a parent-child relationship between the child and her non-biological parent, and the existence of a bonded parent-child relationship between the child and her non-biological parent.[120]

Parentage judgments should be entitled to full faith and credit by all states; however, as the decision in *Adar* instructs, states may not be required to recognize out-of-state parentage where recognition contravenes that state's laws or is repugnant to its public policy.[121] This form of legal parentage is particularly vulnerable to invalidation in non-recognition states that define parentage more narrowly and without regard for parties' intent, consent, or conduct.[122]

Relationships With Parent-Like Individuals, 53 MD. L. REV. 358, 393-94 (1994) (providing a test for establishing a principled limitation on the expansive definition of parent).

116. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005). In this case, the California Supreme Court declared Elisa to be the presumed mother of the children her former same-sex partner conceived through artificial insemination. *Id.* The court reasoned that she actively participated in causing the conception of the children with the understanding that she and her partner would raise them together, "she received the children into her home and openly held them out as her natural children," she voluntarily accepted the rights and obligations of parenting the children after they were born, and there existed no competing claims to her being a second parent. *Id.*

117. Anderson, *supra* note 111, at 284-85, 289-91; NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LBGT FAMILIES 4 (2014), *available at* http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf.

118. *See, e.g.*, *In re* T.P.S., 978 N.E.2d 1070, 1079 (Ill. App. Ct. 2012); Shineovich v. Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009); *In re* Parentage of Robinson, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005).

119. *See*, *e.g.*, N.M. STAT. ANN. § 40-11A-703 (2010).

120. *See, e.g.*, D.C. CODE § 16-831.01 (2009); IND. CODE § 31-9-2-35.5 (2007); KY. REV. STAT. ANN. § 403.270(1) (2004); S.C. CODE ANN. § 63-15-60 (2008).

121. *See supra* note 51.

122. *See, e.g.*, MISS. CODE ANN. § 43-21-105(e) (2014); *see also* Wendy G-M v. Erin G-M, 2014 WL 1884485, at *11 (N.Y. Sup. Ct. May 7, 2014) (explaining that "a determination [of parentage by equitable estoppel] by a trial court is fraught with complications, disputed facts which could easily lead to expensive and contentious hearings and appeals.").

Additionally, if the parentage judgment depends upon the marital status of the couple under the parentage laws of the state where it is created, the filial relationship is vulnerable to nullification because the prerequisite marital relationship is void in a non-recognition state.

The specific language of Georgia's non-recognition statute makes clear "the courts of this state shall have no jurisdiction whatsoever under any circumstances . . . to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage."[123] This jurisdictional exclusion, which is repeated in the state constitution, can be interpreted as expressly prohibiting litigation of parenting judgments in Georgia courts. If a hospital, school, or state official declined to recognize legal parentage pursuant to such a judgment the child is expressly prohibited from litigating that deprivation in Georgia courts.

State laws governing the construction, existence and enforcement of the filial relationship have evolved to allow persons unrelated to a child to establish legal parentage. This expansion of the law affords greater protection to the legal status of the relationship between parents and children in same-sex families in recognition states. However, these laws do not insure against invalidation of the filial relationship, authorized by Section 2 in non-recognition states. As a result, their legal parent-child relationship and the benefits and protections inherent in that relationship, are only secure in recognition states. When the family moves to a non-recognition state the parent and the child may be rendered legal strangers.

The availability of alternative forms of legal parentage does not eliminate, though it may mitigate, the harm caused by Section 2 because those filial relationships may not be accorded full faith and credit by other states. Section 2 authorizes the enactment of non-recognition laws depriving a child of the most secure guarantee of their filial relationship with their non-biological parent – presumptive parentage incident to marriage. It authorizes states, like Georgia, to categorically nullify the filial relationship between a child and her non-biological parent, to deprive the child of the benefits and protections of that relationship, and to deny her the right to bring claims to enforce that relationship. In this way, Section 2 infringes children's equal protection and substantive due process rights, and it should be invalidated.

II. STANDING: CHILDREN HAVE SKIN IN THE GAME

For children's claims against Section 2 of DOMA to be successful they must satisfy standing requirements. Plaintiffs are said to have constitutional standing to bring actions in federal court where they meet the following three criteria: claimants must suffer an injury-in-fact, there must be a causal connection between the alleged deprivation and the state action, and a favorable decision must provide plaintiffs with actual relief.[124] In light of the direct and adverse

123. GA. CODE ANN. § 19-3-3.1 (2013).

124. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-64 (1992); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Los Angeles v. Lyons, 461 U.S. 95, 101-105 (1983); Opala

impact of Section 2's grant of authority to states to create non-recognition laws, children should satisfy standing requirements.

Hollingsworth v. Perry[125] was the first case heard during the 2012-2013 U.S. Supreme Court term addressing same-sex marriage. The case centered on the constitutionality of California's marriage ban, Proposition 8.[126] Though the case was ultimately decided without reaching the issue of Proposition 8's legality,[127] oral arguments in the case produced commentary by Justice Kennedy that support an argument that Section 2 of DOMA inflicts an injury-in-fact on children in families with same-sex parents. At the *Hollingsworth* hearing, he described the impact of California's marriage ban on children in same-sex families as "an immediate legal injury or . . . what could be a legal injury," acknowledging the existence of "40,000 children in California . . . that live with same-sex parents, [who] want their parents to have full recognition and full status."[128]

Justice Kennedy's acknowledgment of a potential legal injury to children affected by marriage bans has no precedential value; however, it ascribes an actionable injury to children whose same-sex families are not accorded full, legal recognition. Notably, Justice Kennedy's remarks centered on the marital relationship and the derivative harm children suffer due to the stigmatizing denial of their same-sex parents' marriage. Arguably, Section 2's impact on children is more direct and adverse than the dignitary harm described by Justice Kennedy because it authorizes states to enact laws that nullify *existing* parent-child relationships. Justice Kennedy's characterization of the impact of same-sex marriage bans as an immediate, legal injury, however, provides significant support for the argument that children suffer an injury-in-fact by the non-recognition laws Section 2 authorizes.

Though *Finstuen* centers on a non-recognition adoption law, it is instructive with respect to the injury-in-fact requirement.[129] In that case, of the three same-sex families seeking to enjoin enforcement of Oklahoma's adoption law, only one family was determined to have suffered an injury-in-fact.[130] One plaintiff was a gay couple residing in Washington with their child.[131] The child was born in Oklahoma and was jointly adopted by the couple.[132] In an effort to honor their promise to the surrogate mother to bring the child to Oklahoma for occasional visits, they sought issuance of an Oklahoma birth certificate identifying both of

---

v. Watt, 454 F.3d 1154, 1157 (10th Cir. 2006).

125. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

126. *Id.* at 2659; *see also* CAL. CONST., Art. I, § 7.5.

127. *Hollingsworth*, 133 S. Ct. at 2668 (holding the parties lacked standing to challenge this provision).

128. Transcript of Oral Argument at 21, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf.

129. Finstuen v. Crutcher, 496 F.3d 1139, 1143-45 (10th Cir. 2007).

130. *Id.* at 1144-45.

131. *Id.* at 1142.

132. *Id.*

them as parents.[133] The court upheld the trial court's dismissal of their claim for lack of standing and explained:

> Ordinary travel generally does not require a state to examine the legitimacy of an asserted parent-child relationship. Although a medical emergency might create a scenario in which parental consent is required, such a situation is merely hypothetical, as opposed to an actual or impending contact with Oklahoma authorities that could jeopardize the rights of any member of the Hampel-Swaya family . . . . [The] family's alleged injuries are simply too speculative to support Article III's injury-in-fact requirement for standing.[134]

The second same-sex family involved two children born to one of the mothers in New Jersey who now reside in Oklahoma.[135] The non-biological mother obtained a second-parent adoption in New Jersey, which issued new birth certificates for the children naming both women as their parents.[136] The circuit court overturned the district court's determination that standing was satisfied based on the non-biological mother's fear that her filial relationship would be invalidated by the Oklahoma adoption statute.[137] The court explained:

> Ms. Finstuen recites no encounter with any public or private official in which her authority as a parent was questioned. Most importantly, she has not established that the amendment creates an actual, imminent threat to her rights as a parent or the rights of her adopted children, because she is not presently seeking to enforce any particular right before Oklahoma authorities. The Finstuen-Magro plaintiffs, therefore, also fail to state a sufficient injury to confer standing under Article III for this suit.[138]

---

133. *Id.* Their request was initially granted and fulfilled, but an Oklahoma statute, passed one month later, expressly refusing to recognize out-of-state, same-sex adoptions, invalidated the birth certificate. *Id.*; OKLA. STAT. tit. 10, § 7502-1.4(A) (effective 2004), (*declared unconstitutional by Finstuen*, 496 F.3d at 1156). The statute provided:

> The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.

Id.

134. *Finstuen*, 496 F.3d at 1144.

135. *Id.* at 1142.

136. *Id.*

137. *Id.* at 1144-45.

138. *Id.* at 1145.

The third same-sex family resided in Oklahoma with their adopted daughter who was born in Oklahoma.[139] One mother adopted the child in California, where the couple resided, and received a supplemental birth certificate listing her as the child's mother.[140] The other mother obtained a second-parent adoption six months later.[141] The couple's request that the child's birth certificate be amended to include the second mother's name was denied.[142] Contrasting their claimed injuries with those alleged by the other families, the court held they had standing and ruled:

> [T]he Doels have standing under Article III. OSDH has refused to revise E's birth certificate to add Jennifer Doel's name as a parent, and thus both Jennifer and E state an injury-in-fact. In addition, Jennifer and Lucy Doel recount an encounter with medical emergency staff in which they were told by both an ambulance crew and emergency room personnel that only "the mother" could accompany E and thus initially faced a barrier to being with their child in a medical emergency. This incident too constitutes a concrete, particularized injury. . . .
>
> . . . .
>
> Moreover, the Doels brought an equal protection claim claiming that Jennifer and Lucy Doel were injured when they were told that only 'the mother' could accompany child E in a medical emergency. In equal protection claims, 'the injury is the imposition of the barrier itself.'. . . It is clear that the adoption amendment is the codification of a general policy not to recognize the parent-child relationship of same-sex parents, and the Doels have stated that this policy caused their injury. Thus, the Doels have standing under Article III to claim that the Oklahoma adoption amendment is unconstitutional and to request a revised birth certificate for E naming Jennifer Doel as a parent.[143]

Finstuen makes clear that the injury-in-fact requirement demands more than prospective, speculative, or hypothetical harm; however, in *Tanco* the court explained:

> [t]he state has taken the position that the plaintiffs' fears, including those of Dr. Tanco and Dr. Jesty with respect to the upcoming birth of their baby and their rights in their home should one of them die, are "speculative," "conjectural," and "hypothetical." But the court need not wait, for instance, for Dr. Tanco to die in childbirth to conclude that she and her spouse are suffering or will suffer irreparable injury from enforcement of the Anti-Recognition Laws.[144]

---

139. *Id.* at 1142.

140. Finstuen v. Crutcher, 496 F.3d 1139, 1142 (10th Cir. 2007).

141. *Id.*

142. *Id.*

143. *Id.* at 1145, 1147 (citation omitted).

144. Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *7 n.12 (M.D. Tenn. Mar.

If to satisfy standing, a child must establish that she or her parent has had an actual—as opposed to anticipated—encounter with a public official—who has denied the existence of their filial relationship, she should be able to do so easily when Section 2 authorizes the enactment of laws, like Georgia's, that empower officials to disregard an existing filial relationship and that foreclose the litigation of claims and rights based on that relationship in its courts.[145]

Returning to the example of Jennifer, Susan and Carol: If the doctor at the hospital in Georgia refuses to recognize Susan's authority, as Jennifer's mother, to make the decision about the proposed necessary, emergency surgery, Jennifer could assert a concrete, particularized harm.[146] The harm at issue would be the

---

14, 2014). The court granted the Plaintiffs' request seeking a preliminary injunction preventing enforcement of Tennessee's non-recognition laws. The court explained:

> [T]he evidence shows that the plaintiffs are suffering dignitary and practical harms that cannot be resolved through monetary relief. The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization. . . .
>
> . . . .
>
> For Dr. Jesty and Dr. Tanco, and for Mr. Espejo and Mr. Mansell, there is also an imminent risk of potential harm to their children during their developing years from the stigmatization and denigration of their family relationship. The circumstances of Dr. Jesty and Dr. Tanco are particularly compelling: their baby is due any day, and any complications or medical emergencies associated with the baby's birth—particularly one incapacitating Dr. Tanco—might require Dr. Jesty to make medical decisions for Dr. Tanco or their child. Furthermore, if Dr. Jesty were to die, it appears that her child would not be entitled to Social Security benefits as a surviving child. Finally, Dr. Tanco reasonably fears that Dr. Jesty will not be permitted to see the baby in the hospital if Dr. Tanco is otherwise unable to give consent (citation omitted). For all of these reasons, the court finds that the plaintiffs have shown that they will suffer irreparable harm from enforcement of the Anti-Recognition Laws.

Id. at *7; *see also, e.g.*, De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014). Plaintiff couple, married in Massachusetts, contended that Texas' non-recognition law negated the non-biological parent's filial relationship with their child and that she could not be considered a legal parent unless she undertook "the long administrative and expensive process of adoption." *Id.* at 646. The court determined those "monetary damages [to] constitute a concrete, injury in fact suffered by Plaintiffs due to Texas' ban on same-sex marriage." *Id.*

145. The plaintiffs in the federal lawsuit challenging Georgia's non-recognition laws and marriage ban are adults who claim the laws violate their equal protection and substantive due process rights. Though there is a child present in one of the families, he is not a named plaintiff. *See supra* note 56.

146. This raises the question whether the imposition of the barrier (i.e., the existence Georgia's non-recognition law) would suffice to establish an injury-in-fact or whether Jennifer must actually

imposition of a barrier to the validity of Jennifer's filial relationship and the deprivation of the rights and protections inherent in the filial relationship, specifically authorizing life-saving medical care. Additionally, dismissal of a claim seeking to litigate a parent-child relationship for lack of subject matter jurisdiction, as prescribed by Georgia's jurisdictional exclusion, should qualify as an injury-in-fact. Such a claim could arise in the context of a child custody or visitation dispute. Citing language from *Windsor* that references the demeaning and humiliating message DOMA Section 3 delivered to same-sex couples and children within same-sex families,[147] courts entertaining suits challenging state laws have also determined dignitary harm to be cognizable as an injury-in-fact.[148]

With respect to the second standing requirement, a causal connection between the alleged deprivation and the state action, children in same-sex families can argue that Section 2, like the non-recognition law at issue in *Finstuen*, is a "codification of a general policy not to recognize the parent-child relationship of same-sex parents."[149] Though the Oklahoma law addressed non-recognition of out-of-state *adoptions* and not out-of-state *marriages*, as Section 2 does, the effect of the law is the same. It authorizes the invalidation of the child's filial relationship with her non-biological parent, which the *Finstuen* court described as the imposition of a barrier in violation of equal protection entitlements.[150] The injury inflicted, nullification of an existing parent-child relationship, is a result of the authority Section 2 grants states to disregard out-of-state, same-sex marriages, and the legal parentage incident to marriage.[151]

To satisfy the third standing requirement, children need to establish that invalidation of Section 2 would provide them with actual relief.[152] To that end, they can argue that abrogation of Section 2 would require states to recognize out-of-state marriages and legal parentage incident to the marriage in a manner consistent with the comity other out-of-state marriages generally enjoy.[153]

---

experience physical harm (i.e., death or critical injury) before she is considered to satisfy that standing criterion.

147. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

148. *See, e.g.*, Baskin v. Bogan, No. 1:14-CV-00355-RLY-TAB, 2014 WL 1568884, at *2 (S.D. Ind. Apr. 18, 2014) (finding, "the deprivation of the dignity of a state sanctioned marriage is a cognizable injury under Article III" based upon its determination "that Windsor recognized and remedied a dignitary injury.").

149. Finstuen v. Crutcher, 496 F.3d 1139, 1147 (10th Cir. 2007).

150. *Id.*

151. *See supra* note 15.

152. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-64 (1992).

153. Indeed, this argument is consistent with the purpose for which Section 2 was enacted—to permit states to disregard same-sex marriages and rights, claims, and relationships arising from those marriages. *See* Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1252, 1263 (N.D. Okla. 2014) (describing the purpose of Section 2 of DOMA by observing, "According to the House Report preceding DOMA's passage, the primary purpose of Section 2 was to 'protect the right of the States to formulate their own public policy regarding legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the

Arguably, even if the Full Faith and Credit Clause required recognition of out-of-state, same-sex marriages, its public policy exception would allow a state to disregard sister-state laws that contravene its public policy against gay marriage.[154]

If the public policy exception exists, and there are conflicting circuit court decisions on this point,[155] states could enact and enforce non-recognition laws, notwithstanding Section 2.[156] In that case, Section 2 is essentially inert, and invalidating it would not provide children with relief, as standing requires.[157] However, given that there is meaningful support for the position that no public policy exception to the Full Faith and Credit Clause exists,[158] the invalidation of Section 2 could require non-recognition states to give full faith and credit to out-of-state, same-sex marriages and parentage incident thereto.[159] In that case, it would remove a barrier, and might serve to invalidate state marriage bans, which

---

right for homosexual couples to acquire marriage licenses.'" (citing H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906).

154. *Id.* (referencing the House Judiciary Committee Report on Section 2, the court explained that the Committee "determined that states already possessed the ability to deny recognition of a same-sex marriage license from another state, so long as the marriage violated a strong public policy of the state having the most significant relationship to the spouses at the time of the marriage. However, the Committee also expressed its view that such conclusion 'was far from certain'").

155. *See supra* note 51.

156. *See* H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

157. Bishop, 962 F. Supp.2d at 1265-69. The *Bishop* court addressed the operation of Section 2 as relevant to the causation prong of standing requirements. It held,

> Section 2 is an entirely permissive federal law. It does not mandate that states take any particular action, does not remove any discretion from states, does not confer benefits upon non-recognizing states, and does not punish recognizing states . . . . Section 2 does not have any coercive or determinative effect on Oklahoma's non-recognition of the [ ] couple's California marriage. At a maximum, it removes a potential impediment to Oklahoma's ability to refuse recognition—namely, the Full Faith and Credit Clause.

Id. at 1266 (citations omitted).

158. *See* Adar v. Smith, 639 F.3d 146, 179 (2011) (noting that there is "no roving public policy exception to the full faith and credit that is owed to out-of-state judgments"); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971-76 (1997); *but see* Grossman, *supra* note 47, at 463-67; L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 43-44 (1998).

159. H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929 (referencing the potential necessity of Section 2, the report provides, "While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to same-sex marriages celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate."); *see also* Smelt v. Cnty. of Orange, 447 F.3d 673, 683 (9th Cir. 2006); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 378 (D. Mass. 2010); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1532 (2007).

would eliminate the injury suffered by children deprived of their filial relationships with their non-biological parent. Their filial relationships would no longer be vulnerable to nullification, and they would enjoy all of the benefits, protections, security, permanency, and stability that the legal parent-child relationship affords. Having addressed the issue of children's standing to challenge Section 2, this Article now turns to an examination of the best interests of the child standard, which informs the existence, scope, and substance of children's constitutional rights infringed by Section 2.

III. THE PRIMACY OF LEGAL PARENTAGE UNDER THE BEST INTERESTS OF THE CHILD STANDARD

The best interests of the child standard emerged as the polestar consideration for custodial determinations in late nineteenth and early twentieth century jurisprudence.[160] The rationale behind the application of the standard, which affords courts wide discretion to consider factors that inform a child's physical, psychological, social, and emotional well-being, is that the court, acting as *parens patriae,* will do what is best for the child.[161] This determination is fact-specific and should be done on a case-by-case basis with an eye toward ensuring the child's sustained growth, development and well-being, as well as security, continuity, and stability in her environment.[162] The best interests of the child standard is controlling in custody,[163] visitation,[164] and adoption determinations.[165]

---

160. Chapsky v. Wood, 26 Kan. 650, 654 (Kan. 1881) ("Above all things, the paramount consideration is, what will promote the welfare of the child?"); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925).

161. Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (noting "that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection"); Santosky v. Kramer, 455 U.S. 745, 766 (1982).

162. Watts v. Watts, 854 So. 2d 11, 13 (Miss. Ct. App. 2003). The Court stated:

> The factors used to determine what is in the " best interests "of a child with regard to custody are: (1) age, health, and sex of the child; (2) determination of the parent that had the continuity of care prior to the separation; (3) which parent has best parenting skills and . . . other factors relevant to the parent-child relationship.

Id. (citations omitted).

163. Barney v. Barney, 301 A.D.2d 950, 951 (N.Y. 2003). The Court made clear that:

> The paramount consideration in determining custody is the best interests of the child. This crucial consideration is not tied to a routine analysis but, recognizing the uniqueness of each case, looks to the totality of the circumstances, including factors such as the child's age, the quality of each parent's home environment, the parents' relative fitness, the ability of each parent to provide for the intellectual and emotional development of the child, and the effect of the custody award on the child's relationship with the noncustodial parent.

Id. (citations omitted).

164. Fine v. Fine, 626 N.W.2d 526, 532 (Neb. 2001) (noting that the best interest of the child

In the custody context, the standard is used to assess the comparative competencies of parents competing for custody of a child.[166] In other contexts, such as adoption, the standard is applied to each parent seeking to adopt, and the court engages in a fact-specific inquiry into a child's needs and corresponding parental abilities.[167] In all contexts, the standard focuses on the relationship between the child and parent, or prospective parent, and it contemplates whether a child's emotional, intellectual, social, and physical well-being is served by that relationship.[168] The legal parent-child relationship is presumed to serve the child's best interests.[169]

The application of the best interests standard in the visitation context is particularly instructive in analyzing a child's right to a legal filial relationship.[170] The generalized assumption that a child benefits from a continued relationship with both divorcing parents is subject to a determination that the relationship with each parent serves the child's best interests, absent a determination that a parent is unfit.[171] While the noncustodial parent may be determined to be comparatively less competent to provide for a child's best interests, visitation is underwritten by an acknowledgment that a child's estrangement from the non-custodial parent is adverse to her well-being.[172] Not only is visitation with the non-custodial parent regarded as beneficial to a child, courts have recognized that children have an independent right to visitation with their non-custodial parent.[173] A child and her parent can only be deprived of this right where there is evidence that visitation is inimical to the child's physical or emotional needs.[174] Similarly

---

standard serves as the "primary and paramount" consideration in decisions regarding visitation with a child).

165. Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. App. 3 Dist. 2010); Dupre v. Dupre, 857 A.2d 242, 251-52 (R.I. 2004).

166. *In re* Custody of Walters, 529 N.E.2d 308, 310-11 (Ill. App. 3d 1988).

167. *See* cases cited *supra* note 165.

168. *Dupre*, 857 A.2d at 251-52 ("Few principles are more firmly established in the law, however, than that in awarding custody, placement, and visitation rights, the 'paramount consideration' is the best interests of the child.") (citation omitted).

169. Parham v. J.R., 442 U.S. 584, 602-03 (1979) (emphasizing that "parents generally do act in the child's best interests"); *see also* Troxel v. Granville, 530 U.S. 57, 68-69 (2000).

170. *See In re* Marriage of Kiister, 777 P.2d 272 (Kan. 1989); Keen v. Keen, 629 N.E.2d 938 (Ind. Ct. App. 1994); DenHeeten v. DenHeeten, 413 N.W.2d 739 (Mich. Ct. App. 1989).

171. *See generally* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5 (2002); Rachel M. Colancecco, *A Flexible Solution to a Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 DREXEL L. REV. 573 (2009).

172. Negaard v. Negaard, 642 N.W.2d 916, 920-21 (N.D. 2002).

173. Camacho v. Camacho, 218 Cal. Rptr. 810, 220 (Ct. App. 1985) (noting that "visitation by the natural parent is as much a right of the child as it is of the parent"); Berg v. Berg, 642 N.W.2d 899, 903 (N.D. 2002); Johnson v. Schlotman, 502 N.W.2d 831, 835 (N.D. 1993) (noting that visitation is both presumed to be in the child's best interest and a right of the child).

174. *See* Woods v. Woods, 498 N.E.2d 906, 908 (Ill. App. Ct. 1986) (stating that visitation

children in same-sex families should not be deprived of their filial relationship with their non-biological parent when they move to a non-recognition state, unless the presumption that estrangement would be harmful to their interests is rebutted with credible evidence, or the determination is made subject to a fact-specific, individualized examination of the parent-child relationship. The categorical invalidation of legal parentage authorized by Section 2 dispenses with the required examination.[175]

The best interests of the child standard is a category of considerations relevant to a child's well-being, which should enjoy constitutional protection. In *Palmore v. Sidoti*, the U.S. Supreme Court described the best interests of the child as "indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[176] Many courts invalidating marriage bans have acknowledged the child's best interests as a compelling or legitimate state interest.[177] If children's interests rank as such, those same interests should enjoy constitutional protection against government infringement.

The substance of the best interests standard has evolved from being measured almost exclusively in terms of parental conduct,[178] to being focused on the benefits and protections a child derives from her legal relationship with her parent. As one judge observed, while questioning the constitutionality of depriving children of the opportunity to have *de facto* parents recognized as legal parents,

> [a law] that would deny children . . . the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother's sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns in light of . . . the best interests of the child.[179]

Children's rights and interests are presumptively served and secured by the legal parent-child relationship.[180] Undergirding this presumption is an implicit acknowledgment of the filial relationship as quintessential to a child's protection

---

may only be restricted where there is evidence that the child's physical, mental, moral, or emotional health would be endangered); Hendrickson v. Hendrickson, 603 N.W.2d 896, 902-03 (N.D. 2000) ("Denying a non-custodial parent visitation with a child is 'an onerous restriction,' such that ' physical or emotional harm resulting from the visitation must be demonstrated in detail' before it is imposed.") (citation omitted); Percle v. Noll, 634 So. 2d 498, 502 (La. Ct. App. 1994); Maxwell v. LeBlanc, 434 So. 2d 375, 379-80 (La. 1983).

175. *See supra* note 31.

176. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

177. *See infra* note 323.

178. *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925); Chapsky v. Wood, 26 Kan. 650, 654 (Kan. 1881) ("Above all things, the paramount consideration is, what will promote the welfare of the child?").

179. *In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (citation omitted) .

180. Parham v. J.R. 442 U.S. 584, 602 (1979) (noting that, "historically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children").

and care. In addition to the material benefits and protections children derive from the filial relationship,[181] there are also emotional, social, and mental benefits that derive from the permanency, constancy, and stability that the legal parent-child relationship provides.[182] Courts have consistently acknowledged these entitlements, which are inherent in the filial relationship, as serving children's best interests in a variety of contexts, including: custody disputes where courts reference the benefits of maintaining a relationship with both parents;[183] in federal permanency statutes and cases that acknowledge the primacy of permanent placement over extended foster or institutional care;[184] and in tort law.[185] By depriving children of the tangible and intangible benefits inherent in the filial relationship in contravention of their best interests, their equal protection and due process rights become casualties of the laws Section 2 authorizes.

A. Moving Children's Interests from Rhetoric to Rights

In *Planned Parenthood of Central Missouri v. Danforth*,[186] the U.S. Supreme Court expressly acknowledged the existence of children's constitutional rights, explaining, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[187] However, the scope and substance of those rights are not clearly defined, and are often obscured by parental rights. In his dissenting opinion in *Troxel v.*

---

181. United States v. Windsor, 133 S. Ct. 2675, 2694-96 (2013).

182. Woodhouse, *"Out of Children's Needs, Children's Rights*," *supra* note 29, at 327-30.

183. *See, e.g.*, Mason v. Coleman, 850 N.E.2d 513, 515 (Mass. 2006) (finding no abuse of discretion in lower court's refusal to authorize mother's removal of the children to a different state reasoning that protection of the children's relationships with both parents is in the best interest of the child).

184. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 811 (11th Cir. 2004); *Encouraging Adoption: Hearing Before the Subcomm. on Human Res. of the Comm. on Ways and Means*, 105th Cong. 112 (1997) ("Permanency has a variety of connotations including the notion of stability with respect to the home where a child lives and his or her relationship to their caregivers. In the strictest sense, however, permanency refers to that place where the legal relationship between a child and the caregiver is most secure.").

185. For example, in wrongful death cases, bystander recovery cases, and loss of consortium claims, children may be allowed to recover based on the psychological and emotional harm experienced as a result of the loss of a parent and the loss of the benefits and protections derived from that relationship. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 101 (1983); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

186. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

187. *Id.* at 74; *see also* Bellotti v. Baird, 443 U.S. 622, 634-35 (1979) (citing several areas of law where the U.S. Supreme Court has recognized and protected the interests of children against unconstitutional government action).

Granville,[188] Justice Stevens referenced the indeterminate nature of children's constitutional rights in the familial context and observed:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, *it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation*. At a minimum, our prior cases recogniz[e] that children are, generally speaking, constitutionally protected actors . . . ."[189]

In *Troxel*, the Court decided an appeal from a state court's grant of visitation to a child's grandmother over the objection of the custodial parent.[190] The Court determined the statute authorizing the visitation order infringed fundamental parental rights and was not justified even if visitation would serve the child's best interests.[191] The majority opinion in *Troxel* does not acknowledge the child as a constitutional stakeholder or consider the best interests standard to create a set of enforceable and protected rights that the child can assert. As Justice Stevens notes in his dissent, "Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at minimum a third individual, whose interests are implicated in every case . . . the child."[192]

Justice Stevens's suggestion that children's rights within the family and rights to relationships with family members exist and enjoy constitutional protection is raised, though not resolved, by the Court in *Michael H v. Gerald D*.[193] In this case, the Court expressly declined to determine whether a child has a substantive due process right to her relationship with her natural father.[194] Justice Scalia, writing for the majority, described the issue as one of first impression and explained, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here . . . ."[195]

---

188. Troxel v. Granville, 530 U.S. 57 (2000).

189. *Id.* at 88-89 (Stevens, J., dissenting) (citation omitted) (emphasis added). The claim advanced in this Article seizes upon a characterization of the best interest of the child standard as a vehicle for the expression of children's enforceable constitutional rights to the benefits inherent in the filial relationship.

190. *Id.* at 61-63.

191. *Id.* at 72-73.

192. *Id.* at 86 (Stevens, J., dissenting).

193. Michael H. v. Gerald D., 491 U.S. 110, 130-32 (1989).

194. *Id.* at 130. The Court framed the issue in terms of whether Victoria could have a relationship with both her natural father, with whom the evidence established she had a healthy relationship, and her stepfather. The Court's framing of the issue (i.e., whether a child can have two fathers) allowed it to more easily justify its decision.

195. *Id.* David Meyer makes an interesting observation about the seemingly contradictory

At the heart of *Michael H.* was Victoria, who was born into the marriage of Carole and Gerald, but was the result of an adulterous affair between Carole and Michael.[196] Michael acknowledged Victoria as his daughter, a blood test confirmed their biological relationship,[197] and during the first three years of Victoria's life she enjoyed a parent-child relationship with her biological father and with her mother's husband.[198] Michael filed a filial action in California state court to establish paternity and visitation rights.[199] On appeal from the lower court's decision denying him paternity, he argued that he had a constitutionally protected liberty interest in his parental relationship with Victoria, and that the termination of that relationship violated his substantive due process rights.[200] Victoria asserted a complementary constitutional claim to her filial relationship with Michael.[201] The Court framed the central issue in the case as whether tradition accords constitutional protection to the family unit and relationships that are formed within the "unitary family," rather than whether constitutional protection should encompass the individual rights of natural parents and natural children to a legal filial relationship with one another.[202] Scalia's skillful subversion of children's rights begins by conditioning the natural father's substantive, constitutional right to a continued relationship with his child upon his marital status vis-a-vis the child's mother.[203] He then framed Victoria's claim as asserting "a due process claim to maintain filial relationships with both Michael and Gerald," and rejected her claim reasoning, "whatever the merits of the guardian *ad litem's* belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."[204] The Court upheld the termination of Michael's filial relationship with Victoria, because it would intrude upon the filial relationship between Victoria and her mother's husband.[205] The Court's holding in *Michael H.* reveals the preservation

---

positions Justice Scalia takes in Troxel and Michael H observing, "In *Troxel v. Granville* . . . two Justices [Stevens and Scalia] suggested that future claims of parental prerogative over child visitation would need to be balanced against the competing privacy rights of children themselves." David Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1119 (2003).

196. *Michael H.*, 491 U.S. at 113.

197. *Id.* at 114 (noting that blood tests of Michael, Carol, and Victoria established a 98.07% probability that Victoria was Michael's child).

198. *Id.*

199. *Id.* at 115.

200. *Id,* at 115-16.

201. *Id.* at 116.

202. *Michael H.*, 491 U.S. at 124.

203. *Id.* at 130-31.

204. *Id*.

205. *Id.* at 130. Justice Scalia explains the tension inherent in the balance of protecting parental rights and preserving marriage:

In *Lehr v. Robinson* . . . we observed that "[t]he significance of the biological

of the marital ideal to be the thumb on the scale that prioritizes marriage, even one marked by infidelity, over an existing parent-child relationship. The Court has yet to clearly define the scope and substance of children's rights to legal parentage[206] that would animate the proposed challenge to Section 2 as authorizing states to nullify existing, filial relationships, in contravention of children's best interests. *Troxel* and *Michael H.* both involve the balancing of parental, third-party, children's and state interests and rights in the domestic context. In *Troxel*, the child's rights were not at issue and the Court's analysis, as Justice Stevens observed, centered on the conflict between parental rights and third-party rights to the child.[207] In *Michael H.*, even though the child was at the center of the controversy, the Court declined to determine her right to a relationship with her natural father, and the Court's holding was predicated upon the primacy of the marital relationship.[208] The Court fails to recognize the child as a constitutional stakeholder in both cases. However, neither decision encumbers the claim that the best interests of the child secures a child's right to an existing filial relationship. Negating that relationship and its benefits and preventing the child from raising claims and rights related to it infringes her constitutional rights.

B. Children's Rights vs. Parental Rights: A Zero Sum Game?

One argument against recognizing children's right to a filial relationship is

---

> connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring," and we assumed that the Constitution might require some protection of that opportunity. Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter. In *Lehr* we quoted approvingly from Justice Stewart's dissent in *Caban v. Mohammed*, to the effect that although "[i]n some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father," "the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist." . . . Here, to provide protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa.

Id. at 128-30 (citations omitted).

206. *See* Bellotti v. Baird, 443 U.S. 622 (1962). This case offers some guidance as to the privacy and liberty interests of children in the familial context. In *Bellotti*, the Court analyzed the constitutionality of a Massachusetts statute restricting the access of minors to abortion procedures by the imposition of parental notice and consent requirements. *Id.* at 625-26. The Court's analysis begins with an acknowledgement of children's constitutional rights and emphasizes the importance of the parent-child relationship as contributing to the child's well-being and as an integral aspect of an optimal familial environment. *Id.* at 633-39.

207. *See* Troxel v. Granville, 530 U.S. 57 (2000).

208. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

that it would diminish the scope and substance of parental rights. As children's rights scholar and law professor Martha Fineman has observed, "[s]ecured within the private family, the dependent child becomes the primary responsibility of the parent. This conceptualization renders most considerations of the child independent of the family (parent) inappropriate because they are potentially adversarial."[209] Many fear that the enlargement of children's rights will circumscribe parental authority over their children.[210] Observing the

---

209. Martha Albertson Fineman, *Taking Children's Interests Seriously*, *in* WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 229 (Martha Alberston Fineman & Karen Worthington eds., 2009). On this point Professor Fineman observes further, "As with many . . . decisions affecting children and families, the rights and responsibilities of parents and the state must be components of any consideration of what is appropriate for children. . . . Perhaps it is evidence of our inability to rise above binary thinking . . . . The independent interests of the child, if recognized at all, are submerged as we slip into a consideration of the competing claims of authority over children made on behalf of parent and the state." *Id.*

210. This argument is also credited by some as a principal reason for the United States' reluctance to ratify the United Nations Convention on the Rights of the Child. *See* Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 LOY. POVERTY L.J. 55, 56 (1998) (stating: "The argument that the Convention on the Rights of the Child will undermine or even negate parental rights and responsibilities is probably the most effective political weapon in the Convention opponents' arsenal. . . . These predictions cut to the core of our fierce, American-style independence, offend our sense of justice, individuality, and privacy, and seem to fly in the face of Supreme Court rulings holding parental rights to be protected by the Constitution."). The U.N. Convention on the Rights of the Child has been adopted by the U.N. General Assembly and has been ratified by every nation except Somalia and the United States. *Id.* at 57 n.8. On February 23, 1995, the United States became the 177th nation to sign the Convention, but it has not been considered by the Senate for ratification. *Id.* at 55-56. Historically it represents the most widely ratified human rights treaty. *Id*. at 57-59. It is also the first International document to comprehensively address children's civil, political, economic, social, and cultural rights. *Id*. It reflects the general principles espoused in two previously established non-binding declarations, the Geneva Declaration of the Rights of the Child (1924) and the United Nation Declaration of the Rights of the Child. *Id*. Critics of the Convention argue that in addition to interfering with state law, it would interfere with parental rights. Lainie Rutkow & Joshua T. Lozaman, *Suffer the Children?: A Call for the United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 165 (2006). State and local jurisdictions would be most impacted by the Convention because most of the Convention articles concern matters traditionally relegated to state rule. While some reservations to the terms of the Convention can be made, Article 51(2) limits the establishment of exceptions to those that do not contravene its central purpose. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, at art. 51 [hereinafter Convention]. It provides, "A reservation incompatible with the object and purpose of the present Convention shall not be permitted." *Id.* Proponents of the Convention contend that ratification would help define the best interest standard and increase enforcement of children's rights. Kilbourne, *supra* note 210, at 61. It could also result in the prioritization of children's rights over parental and governmental authority even when the latter two categories of power are

entrenchment of parental rights, one commentator explained:

> [T]he tradition of legal protection of parental rights has deep historical roots. Before the twentieth century, the combined status of biological parenthood and marriage signified a legal authority of almost limitless scope. . . . *Parental rights were understood to be grounded in natural law and were not dependent on behavior that promoted the child's interest*. . . . In the 1920s, the United States Supreme Court elevated parental rights to constitutional stature, restricting the extent to which the state can override parental authority.[211]

The right of the natural parent to raise her own child is considered fundamental and the right enjoys significant protection by the federal and many state constitutions.[212] The U.S. Supreme Court first recognized the constitutional character of parental rights in relation to their children in *Pierce v. Society of Sisters*[213] and *Meyer v. Nebraska*.[214] Although these early cases focused on parental rights, they implicitly raised questions about the existence, scope, and substance of rights held by the children over whom adults exercised authority.[215] Eventually, the Court expressly recognized children's rights as constitutional in *Prince v. Commonwealth of Massachusetts*,[216] although as in the cases that preceded it, parental rights enjoyed primacy.[217] These cases made it difficult for children to present their rights as independent from parental rights and as enforceable against infringement by parents and the State.

Ten years after *Prince*, children's rights finally began to emerge from the

---

asserted on behalf of the child. *Id.* Article 3 of the Convention provides, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention, *supra* note 210, at art. 3. Article 7 provides, "The child . . . shall have . . . as far as possible, the right to know and be cared for by his or her parents." *Id.* at 7. For a thorough examination of the implications of U.S. ratification of the Convention, see generally JONATHAN TODRESS ET AL., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION (2006).

211. Elizabeth Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2407-08 (1995) (emphasis added).

212. Santosky v. Kramer, 455 U.S. 745, 769 (1982).

213. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

214. Meyer v. Nebraska, 262 U.S. 390 (1923).

215. *But see* Barbara Bennett Woodhouse, *"Who Owns the Child:" Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 998 (1992) ("*Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property.").

216. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 164 (1944). The Court explained the relationship between the parental and children's rights at issue stating, "[T]wo claimed liberties are at stake. One is the parent's to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these . . . ." *Id.*

217. *Id*.

preponderant shadow of parental interests and ground independent constitutional challenges in *Brown v. Board of Education*[218] and later in *In re Gault*.[219] In *Brown* the plaintiffs were children who, through their legal representatives, challenged the constitutionality of the doctrine of separate-but-equal based on impairment of their right to an equitable educational experience.[220] The challenge was not framed in terms of parental rights – the right of parents to provide an equal educational opportunity for their children or the right of parents to have their tax dollars used to provide equal educational opportunities for their children without regard to their race. Instead, the claim centered on the direct harm *de jure* discrimination in the education context caused Black children.[221] A unanimous Court trumpeted, "[S]egregation of children in public schools solely on the basis of race . . . *deprive[s] the children* of the minority group of equal educational opportunities"[222] in vindication of children's rights. The decision, heralded for its significance in the struggle for civil rights, also represents a high water mark for children's rights jurisprudence.[223]

The Court's unequivocal acknowledgment of children as possessing enforceable constitutional rights against harmful State action in *Brown*[224] was echoed in the Court's decision four years later in *Cooper v. Aaron*.[225] Responding to Arkansas' reticence to integrate its public schools, the Court stated, "[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."[226] The Court's acknowledgment of children's constitutional rights expanded beyond equal protection entitlements to encompass due process protections as well, in one of its most celebrated juvenile law decisions, *In re Gault*.[227] In that opinion the U.S. Supreme Court addressed whether juveniles accused of crimes in delinquency proceedings are entitled to procedural due process protections comparable to those enjoyed by adults.[228] The Court declared, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone"[229] and held that juveniles facing an adjudication of delinquency and incarceration are entitled to certain procedural safeguards under the Due Process Clause of the Fourteenth Amendment.[230]

While *Pierce* and *Meyer* reflected only implicit recognition of children's

---

218. Brown v. Board of Educ., 347 U.S. 483 (1954).

219. *In re* Gault, 387 U.S. 1 (1967).

220. *Brown*, 347 U.S. at 487-88.

221. *Id.* at 493.

222. *Id.* (emphasis added).

223. *See generally* Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach*, 97 CORNELL L. REV. 549 (2012).

224. *Brown*, 347 U.S. at 493.

225. Cooper v. Aaron, 358 U.S. 1 (1958).

226. *Id.* at 16.

227. *In re* Gault, 387 U.S. 1 (1967).

228. *Id*. at 4.

229. *Id.* at 13.

230. *Id.* at 30-31.

rights, as co-extensive with or derivative of parental rights, the decisions in *Brown* and *In re Gault* identified children's rights as independent from parental rights and enforceable against government action. In both *Brown* and *In re Gault* children's rights were being advanced against State action and their claims did not implicate parental rights or support an argument that enlargement of children's rights could result in a corresponding diminishing of parents' rights.

The 1970s ushered in an era during which children's liberationists advocated for greater recognition of children's rights.[231] Perhaps in response to calls for legal reform, the U.S. Supreme Court recognized the existence of children's autonomous privacy interests;[232] however, the exact nature of those rights continues to provide fertile ground for debate.[233] One particularly formidable challenge to the project of defining children's constitutional rights is that they are neither fixed nor easily discernible and they continue to be measured in relation to parental rights, particularly in the familial context.[234] To ensure sufficient constitutional guarantees for children, the scope and character of their rights should be determined according to that which serves their best interests, and not in relation to parental rights.[235]

---

231. Stephen R. Arnott, *Autonomy, Standing, and Children's Rights*, 33 WM. MITCHELL L. REV. 807, 814 (2007); Gary A. Debele, *Custody and Parenting by Persons Other Than Biological Parents*, 83 N.D. L. REV. 1227, 1246-47 (2007).

232. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Ingraham v. Wright, 430 U.S. 651 (1977); Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Weber v. Aetna Cas. & Sur., 406 U.S. 164 (1972); *In re* Winship, 397 U.S. 358 (1970); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Levy v. Louisiana, 391 U.S. 68 (1968).

233. *See generally* Tom D. Campbell, *The Rights of the Minor: As Person, as Juvenile, as Future Adult*, 6 INT'L J.L. & FAM. 1, 2 (1992); Martha Minow, *What Ever Happened to Children's Rights?,* 80 MINN. L. REV. 267 (1995); Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights,* 40 WAYNE L. REV. 1227 (1994); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 (1979); Woodhouse, *"Out of Children's Needs, Children's Rights*," *supra* note 29, at 322.

234. Fineman, *supra* note 209, at 229-30 ("In our system, the family (headed by the parent) is the social institution to which children with their dependency are referred . . . In most cases, the family is presumed to function appropriately, and the child, invisible within the private sphere, can conveniently be ignored . . . ."); *see also* Glenn Collins, *Debate Over Rights of Children Is Intensifying*, N.Y. TIMES, July 21, 1981, at A1, *available at* http://www.nytimes.com/1981/07/21/style/debate-over-rights-of-children-is-intensifying.html (quoting Robert Mnookin). Professor Robert Mnookin recognizes three major themes reflected in U.S. Supreme Court jurisprudence addressing children's rights: "First, that parents have primary responsibility to raise children. Second, that the state has special responsibilities to children, to intervene and protect them. And third, that children as people have rights of their own and have rights as individuals in relation to the family and in relation to the state." *Id.*

235. Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). Justice Stevens critiques the plurality's subversion of children's constitutional rights, contending:

> A parent's rights with respect to her child have [ ] never been regarded as absolute, but

While it is clear that children possess enforceable equal protection and due process rights, what has yet to be resolved is the relative weight to accord children's rights when balanced against competing parental interests. This is of particular concern in domestic contexts where parental rights and children's rights are often in conflict with one another.[236] *Bellotti v. Baird* identified "the importance of the parental role in child rearing" as a justification for according children's rights less constitutional protection than parental rights.[237] However vis-à-vis the state, the Court has questioned the legitimacy of distinguishing between children's rights and parental rights and has observed:

> The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult. . . . These rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. . . . [T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'[238]

The proposed claims would not pit children's rights against parental rights and engage a set of competing, constitutionally protected interests that courts have struggled to balance.[239] Instead the child challenges Section 2 of DOMA, which authorizes states to adopt laws that nullify the existing filial relationship with his or her non-biological parent.

The child's claim to an extant, legal, parent-child relationship is identical to the parent's corresponding claim to the same, and both claims allege that Section 2 of DOMA authorizes unconstitutional infringement of children's and parents' constitutional rights. Though the invalidation of the legal parent-child

---

> rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, and, critically, *the child's own complementary interest in preserving relationships that serve her welfare and protection.*

Id. (emphasis added) (citations omitted).

236. Meyer, *supra* note 195, at 1134 ("[P]arent-focused constitutional doctrine often serves as a cover, rather than a cause, for many decisions subordinating children's welfare.").

237. *Bellotti*, 443 U.S. at 634.

238. *Id.* at 634-35 (emphasis added).

239. The Doe court's treatment of children's and parental rights as "co-extensive" provides a clear example of this jurisprudential machination. *In re* Adoption of John & James Doe (*Gill*), 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); Washington, *Suffer Not the Little Children*, *supra* note 8, at 245, 259.

relationship may result in different substantive deprivations for a parent than a child,[240] as a descriptive matter, a claim of infringement of the child's right to the filial relationship mirrors a parent's claim of infringement of the same relationship. A child's challenge to Section 2 does not advance in opposition to parental rights; rather it derives from the dyadic privacy interests shared by parent and child in the filial relationship. Accordingly, children's and parent's claims against Section 2 can advance contemporaneously, without divesting parental rights of their legitimacy or force. Indeed, the argument advanced here should meet with less resistance because it challenges harmful government action unencumbered by constitutionally protected parental autonomy over decisions for their children.[241]

C. Reinforcing the Primacy of Marriage

Professor Nancy Polikoff has written extensively and eloquently about how challenges to same-sex marriage bans revive the now-constitutionally defunct distinction between legitimate and illegitimate children.[242] Historical distinctions between legitimate and illegitimate children[243] have, in large part, been removed

---

240. Parents have well defined and widely recognized right to their relationship with their child and to rear that child, both of which enjoy substantial constitutional protection. The child has a less developed right to the kind of care inherent in the filial relationship and which the best interests standard is considered to secure.

241. Meyer, *supra* note 195, at 1117-18.

> [T]he courts have been fairly receptive to claims for children's rights where the claims have seemed least novel—in classic individual-versus-state conflicts, where the child was posed directly against the coercive power of government. . . . The suggestion that children might have rights corresponding to those held by adults against state coercion and abuse was essentially amendatory, not revolutionary.

242. *See, e.g.*, Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 208-15, 226 (2009); Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201, 226-29 (2003); Polikoff, *For the Sake of All Children*, *supra* note 13, at 584-91; Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722-23 (2012) [hereinafter Polikoff, *New Illegitimacy*].

243. 1 WILLIAM BLACKSTONE, COMMENTARIES *459. In his Commentaries on the Laws of England, William Blackstone, expresses the condemning common law view of illegitimate children, noted, "The rights [of a bastard] are very few, being only such as he can *acquire*: for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullus* [son of no one], sometimes *filius populi* [son of the people]." *Id.* This view of illegitimate children persisted well into the 20th century and perpetuated a judgment of illegitimacy as a characteristic or consequence of immorality. Since The U.S. Supreme Court's 1968 decision in *Levy v. Louisiana*, the Court's equal protection jurisprudence has provided a vehicle for the invalidation of laws discriminating against children born out of wedlock. Levy v. Louisiana, 391 U.S. 68 (1968). *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma and Discrimination Against Nonmarital*

by constitutional and legislative mandate.[244] In 1968, the U.S. Supreme Court first acknowledged children born to unmarried parents as "persons" within the meaning of the Equal Protection Clause.[245] In *Levy,* the Court interpreted the Equal Protection Clause to protect against the deprivation of wrongful death awards, by state statutes denying entitlement to children of unmarried parents.[246] In *Levy* and later cases, the Court expressly rejected the argument that the child's legal status and resulting entitlements are dependent upon the marital status of the parents.[247] Underwriting these decisions is an implicit acknowledgment of the value of the parent-child relationship, independent of the parents' marital status.

Professor Polikoff argues that recognition of same-sex marriage revives the distinction based on legitimacy and produces, what she has refers to as, the new illegitimacy. She argues,

> The prominent argument that same-sex couples must be permitted to marry to further the best interests of their children also intensifies the impression that parentage within marriage provides benefits that cannot be obtained in any other way. Furthermore, every success limited to married couples will compound the distinction between those children whose parents marry and those who do not. . . . Cases or campaigns that will result in parentage recognition only for married couples are a mistake because they prioritize marriage equality goals at the expense of the children of unmarried same-sex couples. The child of two heterosexuals who are not married has two parents. The child of two lesbians deserves the same.[248]

The children's claim presented here may provoke Professor Polikoff's illegitimacy critique because it is challenging Section 2 for authorizing states to

---

Children, 63 FLA. L. REV. 345, 346-47 (2011).

244. *See Levy*, 391 U.S. 68, at 71. The Uniform Parentage Act, promulgated in 1973 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), sought to "provid[e] substantive legal equality for all children regardless of the marital status of their parents . . . ." Doe v. Doe, 99 Hawai'i 1, 52 P.3d 255 (2002) (citing STAND. COMM. REP. NO. 190, in 1975 HOUSE J., at 1019); *see also* Unif. Parentage Act § 2 (1973). Revised provisions of the Act seek to establish legal equality by mandating that "child[ren] born to parents who are not married to each other ha[ve] the same rights under the law as [ ] child[ren] born to parents who are married to each other." *Id.* § 202. The 1973 Act was adopted by nineteen states and many others have adopted significant portions of it. *Id.* at Prefatory Note. Few states have yet to enact the revised UPA. *Id.*

245. *Levy*, 391 U.S. 68, at 70.

246. *See generally id.* at 72.

247. *Id.* at 71-72; Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.").

248. *See* Polikoff, *New Illegitimacy, supra* note 242, at 740.

create non-recognition laws. In doing so, it could be said to support the creation of a distinction between two classes of children: children of married same-sex parents (i.e., legitimate children) who would be able to maintain legal parentage with their non-biological parent and children of un-wed, same-sex parents (i.e., illegitimate children) who would not. This type of pseudo caste system would arguably prioritize marriage by making children's rights to a legal filial relationship dependent upon recognition of an out-of-state, marital relationship.

As a substantive matter, the children's challenges to Section 2 are neither asserting nor dependent upon the argument that marriage is the *sine qua non* of children's best interests.[249] Rather, the proposed claim invokes marriage in an instrumental capacity, highlighting its value as a vehicle for the creation of the most protected legal relationship available to a child and her non-biological parent. It is not making or supporting a normative claim regarding the superiority of marriage as the optimal domestic arrangement. Though marriage provides but one avenue for the construction of legal parentage, as explained generally *supra*, parentage incident to marriage provides the most secure guarantee of protection available for the relationship between a child and his or her non-biological parent in a same-sex family.

The claim presented here does not advocate for the marital relationship because it inherently serves the best interests of children. In fact, the proposed challenge would confront the government's assertion of this premise as a legitimate or compelling justification for Section 2.[250] Claimants would present evidence demonstrating that the relationship between the child and the parent, not the relationship between the parents, is the most reliable measure of whether a child's interests are served.[251] A child's challenge to Section 2 would assert

---

249. Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1293 n.41 (N.D. Okla. 2014) (rejecting the state's claim that opposite-sex marriage provides the optimal environment for child rearing in support of Oklahoma's non-recognition law).

250. In *Bishop v. United States*, defenders of Oklahoma's marriage law justified the ban as serving the legitimate goal of insuring the ideal family unit, which they described as:

> "1) 'a family headed by two biological parents in a low-conflict marriage' because 'benefits flow in substantial part from the biological connection shared by a child with both mother and father'; . . . 2) a family unit where children are being 'raised by both a mother and a father in a stable family unit;' and 3) a family unit with 'gender-differentiated parenting' . . . ."

Bishop, 962 F. Supp. 2d at 1293 (citations omitted). The court questioned the characterization of the ban's purpose stating, "many adoptive parents would challenge this defined 'ideal,' and [ ] many 'non-ideal' families would question this paternalistic state goal of steering their private choices into one particular model of child-rearing." *Id.* at 1293 n.41.

251. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 295 (1988) ("The law should force parents to state their claims, and courts to evaluate such claims, not from the competing, individuated perspectives of either parent or even of the child, but from the perspective of each parent-child relationship."); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); *In re* Adoption of John & James Doe (*Gill*), 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom.* Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G, 45 So. 3d 79

that the provision authorizes laws that prohibit recognition of an existing filial relationship in contravention of the child's best interests and in violation of his or her constitutional rights. Accordingly, it avoids Professor Polikoff's critique that challenges to marriage bans reinforce the primacy of marriage, devalue family formations other than marriage, and invite discrimination against children whose parents are not married.[252]

Concededly, many of the post-*Windsor* challenges to state marriage bans advance the argument that same-sex marriages serve the same goals as opposite-sex marriages, including providing the optimal environment for child rearing.[253] These claims, unlike the challenge proposed in this Article, undoubtedly reinforce the primacy of marriage, not for its utility in securing the most protected form of parentage, but rather for its inherent value as promoting and serving the child's best interests.[254] However, courts have recognized the legal parent child relationship as securing children's best interests,[255] and in the context of custody, visitation and single parent adoption have done so without regard for the parents' marital status.

The lack of coherence in the treatment of children's rights complicates the analysis that tests the constitutionality of enactments encroaching upon those rights. The incoherence is partially attributable to children's dependent status relative to their parents. There is some justification for children's rights to be accorded less weight than adults' rights where infringement of those rights is demonstrably related to the preservation of children's physical, mental and emotional well-being and where the parent is vested with the authority and responsibility of ensuring the child's best interests are served.[256] There is less, if any, justification for deprivations that pursue governmental ends that are not only unrelated to children's best interests but actually contravene them.[257]

(Fla. Dist. Ct. App. 2010).

252. Polikoff, *For the Sake of All Children*, *supra* note 13, at 593-94.

253. *See, e.g.*, Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5 (M.D. Tenn. Mar. 14, 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014).

254. Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014).

255. *See generally* Parham v. J.R., 442 U.S. 584 (1979) and cases cited *supra* note 169.

256. Fineman, *supra* note 209, at 229 ("The child is clearly an individual, but one who is not fully actualized or capable of autonomous decision making. Children are dependent in many ways—economically, emotionally, and often physically."); *see also* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 604, 650 1976 ("Precisely because of their lack of capacity, minors should enjoy legally protected rights to special treatment (including some protection against their own immaturity) that will optimize their opportunities for the development of mature capabilities that are in their best interest.").

257. Hafen, *supra* note 256, at 644. Professor Hafen notes :

> When children are involved, a significant distinction can be drawn between legal rights that protect one from undue interference by the state or from the harmful acts of others and legal rights that permit persons to make affirmative choices of binding consequence,

There is no reason to accord children's constitutional rights to an existing filial relationship less protection than adults' rights to the same relationship. Arguably the disability Section 2 enables (i.e., authorizing the deprivation of an existing, legal parent-child relationship) causes greater harm to children because of their vulnerability and capacity as dependents. Despite the reality of DOMA's harmful impact on children in same-sex families, it was characterized as a child welfare measure devised to ensure opposite-sex parenting and the optimal environment for responsible procreation and child rearing.[258] For Section 2 to survive equal protection and due process challenges by children in same-sex families, in states with non-recognition laws, its defenders must present evidence that the law serves legitimate governmental ends consistent with the child's best interests.

IV. THE CONSTITUTIONAL CALCULUS

Section 2 authorizes non-recognition laws that inflict material and stigmatic harm on children in same-sex families, and that punish children for parental conduct. Non-recognition laws categorically deprive children of the filial relationships that serve their best interests without an individualized evaluation of quality of the filial relationship and without procedural safeguards. Accordingly, children in families with married same-sex parents can challenge Section 2 as an infringement of their Equal Protection and Substantive Due Process rights. This Article will now turn to these constitutional claims.

> such as voting, marrying, exercising religious preferences, and choosing whether to seek education. For purposes of this discussion, the first category will be referred to as rights of protection; the second, rights of choice.

Id.; *see also generally* Gregory Z. Chen, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131 (1997); Bernard P. Perimutter, *"Unchain the Children:" Gault, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1 (2007). *But see* Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1367 (1995) (noting that, from the empowerment rights perspective, "[c]apacity would be irrelevant"). *See also* examples cited *infra* note 323 (discussing various court holdings that find marriage bans actually harm, not help kids).

258. H.R. REP. NO. 104-664, pt. 5, at 2917 (1996). As the court observed in *Henry v. Himes*,

> the U.S. Supreme Court in *Windsor* . . . similarly rejected a purported government interest in establishing a preference for or encouraging parenting by heterosexual couples as a justification for denying marital rights to same-sex couples and their families. The Supreme Court was offered the same false conjectures about child welfare . . . and the Supreme Court found those arguments so insubstantial that it did not deign to acknowledge them.

Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014); *see also* Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1 252 (N.D. Okla. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013); Greigo v. Olider, 316 P.3d 865 (N.M. 2013).

A. The Equal Protection Infringement

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[259] At the heart of this mandate is a command "that all persons similarly [situated] should be treated alike."[260] Children in same-sex families whose parent-child relationships are nullified by the non-recognition laws that Section 2 authorizes are denied equal protection because they are treated differently from children in opposite-sex families whose filial relationships are recognized.[261] Even though defenders of state same-sex marriage bans have argued that same-sex couples and opposite-sex couples are not similarly situated because they have different procreative capacities, there is no reasonable argument to be made that children in same-sex and opposite-sex families are not similarly situated.[262] Both categories of children are entitled to benefit from the protections and benefits an existing legal parent-child relationship affords, which arguably constitute a fundamental liberty interest.[263] Section 2 authorizes the enactment of laws that discriminate against children in same-sex families by invalidating an extant filial relationship that serves their best interests.

In certain equal protection claims the right advanced is "not the right to any specific amount of denied governmental benefits; it is 'the right to receive benefits distributed according to classifications which do not without sufficient justification differentiate among covered applicants solely on the basis of [impermissible criteria].'"[264] Additionally, the Court has held that children should not suffer discriminatory treatment because of parental conduct,[265] and the imposition of the barrier itself, authorizing laws that nullify a child's filial

---

259. U.S. CONST. amend. XIV, § 1.

260. Plyler v. Doe, 457 U.S. 202, 216 (1982).

261. Equal protection analysis can also entail the consideration of differential treatment, with respect to a fundamental right. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

262. *Himes*, 2014 WL 1418395, at *15 (finding no justification for Ohio's non-recognition law's disparate treatment of children of same-sex parents married in other states).

263. *See infra* Part IV.B.

264. Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1 252, 1267 (N.D. Okla. 2014) (quoting Day v. Bond, 500 F.3d 1127, 1133 (10th Cir. 2007)); *see also* Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (citation omitted) (the Court emphasized, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants, can cause serious 'injuries to those who are denied equal treatment solely because of their membership in a disfavored group'").

265. Levy v. Louisiana, 391 U.S. 68, 72 (1968) ("We conclude that it is invidious to discriminate against [non-marital children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother."); *see also Plyler*, 457 U.S. at 219-20.

relationship with her non-biological parent, is the constitutional injury.[266]

In addition to the barrier erected by the state marriage bans authorized by Section 2, specific, tangible deprivations result from nullification of legal parentage These specific, tangible deprivations include, but are not limited to, denial of: the right to register a child for school; the right to make medical decisions for a child; the right to obtain a social security card for a child; securing social security survivor benefits for a child upon a parent's death; the right to ensure a child's entitlement to inheritance upon a parent's death; the right to claim the child as a dependent on a parent's insurance plan or for federal income tax purposes; the right to obtain a passport for a child; and the right to travel with a child internationally.[267] The infringement of parental rights resulting from invalidation of the filial relationship, at a minimum, mirrors the infringement of children's rights and arguably these deprivations inflict greater harm on children due to their inherent vulnerability as dependents. The laws that Section 2 authorize also cause stigmatic harm which many courts, including the U.S. Supreme Court in *Windsor*, have acknowledged as an actionable injury.[268] Children in same-sex families suffer the humiliation of having their families and their familial relationships relegated to a status inferior to opposite-sex families.

The degree of constitutional scrutiny applicable to intentional discrimination by the government against classes of citizens varies according to whether the targeted group qualifies as suspect, quasi-suspect or non-suspect.[269]A law that disadvantages a suspect class (e.g., those that discriminate on the basis of race or national origin) is subject to strict scrutiny, which regards the enactment with a jaundiced eye and requires that the enactment be narrowly tailored to achieve a compelling state interest.[270] A law that harms a quasi-suspect class (e.g., those that discriminate on the basis of gender and legitimacy) is subject to intermediate

---

266. Ne. Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

267. *Himes*, WL 1418395, at *11 (describing Ohio's non-recognition law, which prohibited inclusion of non-biological mother's name on child's birth certificate as "the basic currency by which parents can freely exercise . . . protected rights and responsibilities. . . . The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities.").

268. United States v. Windsor 133 S. Ct. 2675, 2694-96 (2013); *see also* Bostic v. Rainey, 970 F. Supp. 2d 456, 468 (E.D. Va. 2014) ("Stigmatic injury is sometimes sufficient to support standing. . . . [Plaintiffs] satisfy the first requirement predicating standing on stigmatic injuries. Virginia Code § 20-45.3 prohibits the recognition of their valid California marriage. Similarly married opposite-sex individuals do not suffer this deprivation. Plaintiffs . . . suffer humiliation and discriminatory treatment on the basis of their sexual orientation. This stigmatic harm flows directly from current state law" (citations omitted)).

269. *See generally Windsor*, 133 S. Ct. 2675.

270. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Korematsu v. United States, 323 U.S. 214, 216 (1944).

constitutional scrutiny and must substantially serve an important state interest.[271] A law that inflicts injury on a class of persons that considered neither suspect nor quasi-suspect is presumed constitutional, and the law is only required to be rationally related to a legitimate governmental interest to pass constitutional muster.[272] Courts may consider any available governmental goal to satisfy the rational basis test as long as the goal is not arbitrary or capricious.[273]

Furthermore, Section 2 authorizes laws that draw distinctions between children according to their married parent's sexual orientation, thereby discriminating against children because the state objects to their parents' marriage. In *Henry v. Himes*, the court struck down Ohio's non-recognition law on equal protection grounds citing its harmful impact on children in same-sex families. However, despite the presence of children in the families challenging the law, children were not plaintiffs in the suit. Nevertheless, the court highlighted the distinction the law drew between children based on the sexual orientation of their parents and explained,

> Defendant's discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of their same-sex relationships. . . . The children in Plaintiffs' and other same-sex married couples' families cannot be denied the right to two legal parents . . . without a sufficient justification. No such justification exists.[274]

Laws, like the ones Section 2 authorizes, that punish children for parental conduct that a state considers immoral have historically been subject to heightened constitutional scrutiny and have been ruled unconstitutional.[275] There

---

271. Clark v. Jeter, 486 U.S. 456, 461 (1988); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982).

272. Romer v. Evans, 517 U.S. 620, 631 (1996).

273. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985) (holding "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

274. *Id.* at *15.

275. *See* Pickett v. Brown, 462 U.S. 1, 8 (1983); *see also* Plyler v. Doe 457 U.S. 202, 216 n.14 (1982) ("[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."); Weber v. Aetna Cas. & Surety, 406 U.S. 164, 175 (1972) (describing condemnation of a child for the actions of his parents as "illogical and unjust"); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (ruling it invidious to discriminate against illegitimate children for the actions of their parents); *Amicus Brief in* United States v. Windsor *by Scholars for the Recognition of Children's Constitutional Rights*, 17 IOWA J. GENDER, RACE, & JUST. 467, 482 (2014) (Tanya Washington, Catherine Smith, and Susannah Pollvogt) ("This Court has consistently expressed special concern with discrimination against children—in particular protecting their right to self-determination and to flourish fully in society, without being hampered

is no consensus as to the applicable level of constitutional scrutiny among courts deciding adult challenges to marriage bans;[276] however, children's challenges to Section 2 and the laws it authorizes make a persuasive argument for the application of heightened scrutiny.

In *Plyler v. Doe*, where the U.S. Supreme Court invalidated a Texas law denying public education to the children of undocumented immigrants, the Court made clear, "Even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[277] Similar to the law at issue in *Plyler*, Section 2 authorizes laws that nullify existing filial relationships between children and their parents' in same-sex families as a sanction for their parents' out-of-state, same-sex marriages. Accordingly, Section 2 should be subject to heightened scrutiny because it enables discrimination against children based on parental conduct. However, the absence of any justification for the disparate treatment of children in same-sex families makes it challenging for Section 2 to clear even the lowest constitutional hurdle erected by rational basis review.

B. The Substantive Due Process Infringement

The Due Process Clause of the Fourteenth Amendment prohibits the government "from abusing [its] power, or employing it as an instrument of oppression."[278] Rights derived from the liberty interests that fall within the scope of substantive due process protection are characterized as either fundamental or non-fundamental and are granted different degrees of constitutional protection according to their status.[279] The two applicable constitutional tests are the same tests that are used to evaluate a law's infringement of equal protection guarantees. Within the substantive due process framework, state infringement of a fundamental right is subject to strict scrutiny,[280] and state impairment of a

---

by legal, economic and social barriers imposed by virtue of the circumstances of their birth (citation omitted). . . . [I]t is impermissible for laws to disadvantage children for matters outside of their control, in an effort to control the conduct of their parents, or as an expression of moral disapproval of their parents' relationships and conduct.")

276. *Compare* Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012); Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1, 11 (1st Cir. 2012), *with* Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *5 (W.D. Ky. Feb. 12, 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013).

277. Plyler v. Doe, 457 U.S. 202, 219-20 (1982).

278. Davidson v. Cannon, 474 U.S. 344, 348 (1986).

279. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (noting that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests.").

280. Zablocki v. Redhail, 434 U.S. 374, 381 (1978) (requiring strict scrutiny when "the classification created by the statute infringed upon a fundamental right").

non-fundamental right is subject to rational basis review.[281]

The U.S. Supreme Court characterizes fundamental rights as those that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."[282] U.S. Supreme Court rulings make clear that parental rights are fundamental and only exceptional circumstances justify their infringement.[283] The interests of parents in the care, custody and control of their children are considered among the oldest fundamental liberty interests;[284] therefore children should be said to possess complementary, fundamental rights to the care, custody and control the legal parent-child relationship provides and which serves their best interests.[285]

The Court has instructed, "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right."[286] Though the permanency, security and stability inherent in the filial relationship are not enumerated constitutional rights, because they serve to ensure children's best interests, they should be considered fundamental in character. The Court has recognized that the Due Process Clause protects a number of un-enumerated rights from infringement by government action, and explained:

> [T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . .This 'liberty'. . . includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[287]

---

281. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

282. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

283. Troxel v. Granville, 530 U.S. 57, 66 (2000); Parham v. J.R., 442 U.S. 584, 602 (1979); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). *See generally* Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *7 (S.D. Ohio Apr. 14, 2014) (recognizing "a number of fundamental rights and/or liberty interests protected by the Due Process clause that are implicated by [Ohio's] marriage recognition ban, including the right to marry, the right to remain marry (citation omitted), and the right to parental autonomy.").

284. *See* discussion *supra* Part III.B.

285. Washington, *What About the Children?*, *supra* note 8, at 42-43 ("Despite the Supreme Court's reluctance to recognize new fundamental rights (citation omitted), it has done so most frequently in the area of family relations."). *See generally* Barbara Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption* , 34 CAP. U. L. REV. 297 (2005). If children's rights to an existing filial relationship do not rank as fundamental, one can hardly conceive of children's rights that would. *But see* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (explaining, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here . . . .").

286. Reno v. Flores, 507 U.S. 292, 302 (1993).

287. Poe v. Ullman, 367 U.S. 497, 543 (1961).

Indeed, if these quintessential qualities of the legal parent-child relationship, do not constitute fundamental rights then arguably children possess no such rights—a conclusion at odds with U.S. Supreme Court jurisprudence.[288] There is a persuasive argument to be made that Section 2 infringes children's fundamental rights because it authorizes laws that invalidate *existing* filial relationships, thereby depriving children of the quantum and kind of care they have been receiving. Children's best interests have been recognized as a "substantial governmental interest;"[289] therefore, heightened scrutiny should apply.[290]

Though children's rights infringed by Section 2 should be adjudicated as fundamental, the success of children's challenges to that provision is not

---

288. Bellotti v. Baird, 443 U.S. 622, 634-35 (1979) ("The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State."); Powell v. Alabama, 287 U.S. 45, 50, 57-58 (1932).

289. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (characterizing the best interests of the child as "indisputably a substantial governmental interest for purposes of the Equal Protection Clause").

290. There is some debate about whether the adult rights infringed are fundamental in character. The debate centers on whether the right infringed by marriage bans is the right to marry or whether same-sex couples are seeking recognition of a new right (i.e., the right to marry someone of the same-sex). Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *7 (S.D. Ohio Apr. 14, 2014) (noting, "Some courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry."); *see* Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *5 (W.D. Ky. Feb. 12, 2014) ("Neither the Supreme Court nor the Sixth Circuit has stated that the fundamental right to marry includes a fundamental right to marry someone of the same sex. . . . In *Windsor* the Supreme Court did not clearly state that the non-recognition of marriages under Section 3 of DOMA implicated a fundamental right . . . ."); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1096 (D. Haw. 2012) (referencing right infringed as "an asserted new right to same-sex marriage"). *But see* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1203 (D. Utah 2014) ("Both same-sex and opposite sex marriage are therefore simply manifestations of one right—the right to marry—applied to people with different sexual identities."). The *Windsor* majority's reticence to clearly define the nature of the constitutional right infringed by Section 3 of DOMA and to articulate the applicable constitutional test further fuels the debate. Some of language in the opinion suggests the majority is applying rational basis. United States v. Windsor, 133 S. Ct. 2675, 2996 (2013) (noting "no legitimate purpose overcomes the purpose and effect to disparage and to injure"). However, the level of scrutiny applied seems inconsistent with rational basis review. *Id.* at 2706 (Scalia, J., dissenting) (the majority "does not apply strict scrutiny, and [although] its central propositions are taken from rational basis cases . . . the Court certainly does not apply anything that resembles that deferential framework"); *see Bourke*, 2014 WL 556729, at *4 ("Although the majority opinion [in *Windsor*] covered many topics, it never clearly explained the applicable standard of review. . . So, we are left without a clear answer."). Fundamental rights adjudication of the rights asserted in the proposed children's claims against Section 2 should not be encumbered by conflicting interpretations of the liberty interests infringed (i.e., permanency, stability and security).

dependent upon this classification. Even under rational basis review, the State must establish that marriage bans are not "arbitrary or without reasonable relation to some purpose within the competency of the state to effect."[291] Because Section 2 authorizes laws that nullify children's filial relationships and compromise, rather than serve, their best interests, it should be difficult for it to withstand even rational basis review.

C. Interrogating Governmental Interests

In both the equal protection and due process contexts the applicable constitutional tests require a sufficient nexus between the law and its purpose.[292] The Court has explained:

> [t]he purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.[293]

The Court has made clear that government has no "interest in enforcing private, moral or religious beliefs without an accompanying secular purpose,"[294] and it has emphasized that where a law is "so discontinuous with the reasons offered for it that . . . [it] seems inexplicable by anything but animus toward the class it affects; it lacks a relationship to legitimate state interests."[295]

Under rational basis review the legitimacy of the state's interest is presumed and the plaintiffs are burdened with challenging the legitimacy of the government's interest.[296] For the proposed challenges to Section 2 to be

---

291. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

292. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000)(holding, "[W]e will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."); Romer v. Evans, 517 U.S. 620, 633 (1996) (courts must "insist on knowing the relation between the classification adopted and the object to be attained.").

293. Lochner v. New York, 198 U.S. 45, 64 (1905).

294. Lawrence v. State, No. 14-99-00109, 2000 WL 729417 (Tex. Ct. App. June 8, 2000) (unpaginated), *withdrawn* , 41 S.W.3d 349 (2001), *cert. granted*, 537 U.S. 1044 (2002), *rev'd*, 539 U.S. 558 (2003).

295. *Romer*, 517 U.S. at 632.

296. Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *5-6 (W.D. Ky. Feb. 12, 2014) (applying rational basis review to Kentucky's constitutional amendment banning gay marriage and opining, "Ultimately, the result in this case is unaffected by the level of scrutiny applied. . . . Plaintiff's have the burden to prove either that there is no conceivable legitimate purpose for the law or that the means chosen to effectuate a legitimate purpose are not rationally related to that purpose. This standard is highly deferential to government activity but is surmountable, particularly in the context of discrimination based on sexual orientation. . . . Even under this most deferential standard of review, courts must 'still insist on knowing the *relation*

successful, plaintiffs would need to establish, as an evidentiary matter, that sexual orientation does not inform parental competency; that parenting by gays and lesbians does not impair children's best interests; and that categorically depriving children of an existing filial relationship compromises the permanency, stability, and security that serves their best interests.[297]

In *Bourke v. Beshear*,[298] adults and children in same-sex families challenged Kentucky's non-recognition laws.[299] The court, applying the rational basis test, considered the following justifications for the ban: "the legitimate government interest of preserving the state's institution of traditional marriage,"[300] responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage.[301] The court, describing the reasons cited for the ban as "compris[ing] all those of which the Court might possibly conceive," held that all of the

---

between the classification adopted and the object to be attained'"); *see also* Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014) (observing, "the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003).

297. Under rational basis review, any conceivable state interest is sufficient to save a statute from invalidation. Romer v. Evans, 517 U.S. 620, 631 (1996) (holding that "the legislative classification [will survive] so long as it bears a rational relation to some legitimate end."). However, to date all of the federal circuit courts tasked with deciding appeals to lower court decisions striking state marriage bans have rejected every justification asserted by proponents in defense of these bans including: federalism, preserving traditional marriage, respecting democratic processes, ensuring opposite-sex parenting, promoting responsible procreation and facilitating optimal childrearing. *See* Latta v. Otter, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); Baskin v. Bogan, No 14-2386, 2014 WL 4359059 (7th Cir. Sept. 4, 2014); Bostic v. Schafer, 760 F.3d 352 (4th Cir. 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014). If heightened scrutiny is, as has been argued, the applicable test within the equal protection or substantive due process contexts, the burden of proof and production would shift to DOMA's defenders and the purposes for which Section 2 was enacted would no longer enjoy presumptive legitimacy.

298. *Bourke*, 2014 WL 556729.

299. Kentucky, like Georgia, enacted laws and amended its constitution to prohibit same-sex marriage and to deny recognition to out-of-state, same-sex marriages. *See* KY. CONST. § 233A; KY. REV. STAT. ANN. § 402.005 (West 2013).

300. *Bourke*, 2014 WL 556729, at *7.

301. *Id.* at *8. The court considered justifications offered by the state of Kentucky and by the Family Trust Foundation of Kentucky Inc., which submitted an amicus brief that the court described as "cast[ing] a broader net in search of reasons to justify Kentucky's laws." *Id.*; *see also* Wright v. Arkansas, No. 60CV-13-2662 at 7 (Cir. Ct. of Pulaski Cnty. May 9, 2014) ("The defendants offer several rationalizations for the disparate treatment of same-sex couples such as the basic premise of the referendum process, procreation, that denying marriage protections to same-sex couples and their families is justified in the name of protecting children, and continuity of the laws and tradition. None of these reasons provide a rational basis for adopting the amendment.").

proffered justifications failed to constitute legitimate government ends. The court rejected the characterization of Kentucky's non-recognition law as a child welfare measure, and held:

> The Court fails to see how having a family could conceivably harm children. Indeed, Justice Kennedy explained that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex . . . . . [N]o one in this case has offered factual or rational reasons why Kentucky's laws are rationally related to any of these purposes . . . . And no one has offered evidence that same-sex couples would be any less capable of raising children . . . . [T]he Court cannot conceive of any reasons for enacting the laws challenged here. Even if one were to conclude that Kentucky's laws do not show animus, they cannot withstand traditional rational basis review.[302]

The court in *Himes*, which gave due consideration to the Ohio ban's harmful impact on children in same-sex families, observed that post-*Windsor* trial court decisions have uniformly reached the conclusion that "child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples."[303] The court further noted, "[t]he Supreme Court was offered . . . false conjectures about child welfare . . . and the . . . Court found those arguments so insubstantial that it did not deign to acknowledge them."[304]

As the Court has noted, government action infringing on constitutional rights must "find some footing in the realities of the subject addressed by the legislation."[305] Laws, like Section 2, that parade as child protectionist measures must be grounded in more than conjecture and prejudice.[306] It would not be constitutionally sufficient for the government to describe and justify Section 2 as preserving and protecting children's interests when its actual effect authorizes the invalidation of existing filial relationships and deprives children of the permanency, stability, and security inherent in those relationships. The legitimacy of the government's justification for Section 2 should be assessed according to credible research and data reporting whether and how children's

---

302. *Bourke*, 2014 WL 556729, at *8 (citations omitted).

303. Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525, at *5 (M.D. Tenn. Mar. 14, 2014) ; Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014); Bishop v. United States *ex rel*. Holder, 962 F. Supp. 2d 1 252 (N.D. Okla. 2014); Bonauto, *supra* note 22, at 13. It is important, however, to note that this reasoning credits the marital relationship with providing that which serves children's best interests rather than the parent-child relationship itself. *See* discussion *supra* Part III.C.

304. *Himes*, 2014 WL 1418395, at *16.

305. Heller v. Doe, 509 U.S. 312, 321 (1993).

306. De Leon v. Perry 975 F. Supp. 2d 632, 654 (W.D. Tex. 2014) (rejecting defenders of Texas' marriage ban on the grounds that "Defendants' preferred rationale presumes that same-sex couples cannot be good parents-this is the same type of unconstitutional and unfounded presumption that the Supreme Court has held 'cannot stand.' (citation omitted)").

best interests are served by categorically depriving them of existing filial relationships and the benefits and protections inherent in those relationships.[307] The Supreme Court has highlighted courts' "constitutional duty to review factual findings where constitutional rights are at stake" and the Court described "uncritical deference to factual findings . . . [as] inappropriate."[308]

The conclusion that marriage bans protect children and serve their interests contradicts "thirty-five years of studies showing that children of gay and lesbian parents are normal and healthy on every measure of child development."[309] In *DeBoer* the court carefully considered the evidence presented by defenders of Michigan's marriage and adoption bans in support of their argument that the laws served to provide "children with 'biologically connected' role models of both genders that are necessary to foster healthy psychological development."[310] The court accorded considerable weight to empirical evidence presented by the plaintiffs' experts challenging the state's presumptions about gay parenting and establishing that the best interest of the child is served by particular parental competencies, not the sexual orientation of the caregiver.[311] The court

---

307. Latta v. Otter, No. 14-35420, 2014 WL 4977682, at *5 (9th Cir. Oct. 7, 2014) (noting that defendants failed to meet their evidentiary burden, the court opined, "We pause briefly before considering the substance of defendants' arguments to address the contention that their conclusions about the future effects of same-sex marriage on parenting are legislative facts entitled to deference. Defendants have not demonstrated that the Idaho and Nevada legislatures actually found the facts asserted in their briefs; even if they had, deference would not be warranted. Unsupported legislative conclusions as to whether particular policies will have societal effects of the sort at issue in this case—determinations which often, as here, implicate constitutional rights—have not been afforded deference by the Court.").

308. Gonzales v. Carhart, 550 U.S. 124, 165-66 (2007).

309. American Psychological Association, *Sexual Orientation, Parents, & Children*, COUNCIL POLICY MANUAL (July 30, 2004), http://www.apa.org/about/policy/parenting.aspx ("research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."); *see also* Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 HUMAN RTS. 3, 7 (2003); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 321 (2001) (stating that "all of the evidence shows that children raised by gay parents develop just as well as children raised by heterosexual couples").

310. DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014) (defendants also proffered "avoiding the unintended consequences that might result from redefining marriage; . . . upholding tradition and morality; and . . . promoting the transition of 'naturally procreative relationships into stable unions'" as justifications for its ban).

311. *Id.* at 761. Psychologist David Brodzinsky "testified that decades of social science research studies indicate that there is no discernible difference in parenting competence between lesbian and gay adults and their heterosexual counterparts (citation omitted)." Dr. Brodzinsky noted no "discernible difference in the developmental outcomes of children raised by same-sex parents as compared to those children raised by heterosexual parents (citation omitted)." He identified the primary factors influencing childhood development to include:

concluded, "What matters is the 'quality of parenting that's being offered' to the child . . . . [and] studies, approximately 150 in number, have repeatedly demonstrated that there is no scientific basis to conclude that children raised by same-sex parents fare worse than those raised by heterosexual parents."[312] The court was convinced by testimony showing that "children being raised by same-sex couples have only one legal parent and are at risk of being placed in 'legal

---

> [the] quality of parent-child relationships; quality of the relationships between the parents . . . [t]he characteristics of the parent, the styles that they adopt, parental warmth and nurturance [sic], emotional sensitivity. The ability to employ age appropriate rules and structure for the child. And the kinds of educational opportunities that children are afforded is important, as well as the resources that are provided for the child, not only in the family itself, but the resources that, from the outside, that impact the family and the child in particular. And of course, the mental health of the . . . parents.

Id. Sociologist Michael Rosenfeld described the strong consensus among professional organizations finding no differences in parenting based on the sexual orientation and no differences in outcomes for children in same-sex families. He stated in his expert report:

> Every major professional organization in this country whose focus is the health and well-being of children and families has reviewed the data on outcomes for children raised by lesbian and gay couples, including the methods by which the data were collected, and have concluded that these children are not disadvantaged compared to children raised in heterosexual parent households. Organizations expressing support for parenting, adoption, and/or fostering by lesbian and gay couples include (but are not limited to): American Medical Association, American Academy of Pediatrics, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Psychoanalytic Association, American Psychological Association, Child Welfare League of America, National Association of Social Workers, and the Donaldson Adoption Institute.

Id. at 762. One important development reflected in the litigation of marriage bans has been the presentation of empirical data confronting the state's proffered justifications for these laws. In addition, Plaintiffs have also subjected state experts to intense cross-examination, designed to reveal the absence of credible, reliable social science data underwriting claims about the harmful impact of these bans on children. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927, 936 (N.D. Cal. 2010) (Plaintiffs' challenging California's marriage ban, Proposition 8, made an evidentiary showing that resulted in the following findings of fact by the District Court:

> The factors that affect whether a child is well-adjusted are: (1) the quality of a child's relationship with his or her parents; (2) the quality of the relationship between a child's parents or significant adults in the child's life; and (3) the availability of economic and social resources . . . The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.

Id. at 980.

312. *DeBoer*, 973 F. Supp. 2d at 761.

limbo' if that parent dies or is incapacitated."[313] It concluded, "[d]enying same-sex couples the ability to marry therefore has a manifestly harmful and destabilizing effect on such couples' children."[314]

In contrast to the court's regard for the plaintiffs' witnesses as "fully credible"[315] and "highly credible,"[316] the court determined the defendants' witnesses' testimony to be "entirely unbelievable and not worthy of serious consideration"[317] and to be representative of "a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields."[318] The court rejected the state's optimal child-rearing rationale and held, "the isolated studies cited by the state defendants do not support the argument that children raised by heterosexual couples have better outcomes than children raised by same-sex couples. . . .the overwhelming weight of the scientific evidence supports the 'no differences' viewpoint."[319]

Even as the U.S. Supreme Court was deciding *Windsor*, The American Pediatrics Association, which reviewed 30 years of research on the subject of gay parenting, issued a policy statement endorsing gay marriage as promoting children's best interests.[320] Children's claims against Section 2, as authorizing

---

313. *Id.* at 764.

314. *Id.*

315. *Id.* at 761, 764.

316. *Id.* at 762, 764.

317. *Id.* at 766. In support of its justifications for its marriage and adoption bans the state called its star witness, Sociologist Mark Regnerus, to testify. His testimony focused on the results of a 2012 study he conducted (New Family Structures Study). His findings resulted in the following conclusions:

> [C]hildren who reported that their mothers had a same-sex relationship were less likely to pursue an education or obtain full-time employment and more likely to be unemployed and receiving public assistance, more likely to experience sexual assault, more likely to cheat on their partners or spouses and more likely to have been arrested at some point in their past. Similarly, Regnerus discovered that children who reported that their fathers had a same-sex relationship were more likely to have been arrested, more likely to have plead guilty to non-minor offenses and more likely to have numerous sexual partners.

Id. at 765. The court questioned the credibility and reliability of the study and noted that Regnerus' study was "heavily criticized . . . on several grounds" by sociological and demographic experts. Further noting the limitations of the study, the court also observed, "Regnerus acknowledged that 'any suboptimal outcomes may not be due to the sexual orientation of the parent' and that '[t]he exact source of group differences' are unknown." *Id.* at 765. The court described the study as "hastily concocted at the behest of a third-party funder, which found 'it essential that the necessary data be gathered to settle the question in the forum of public debate about what kinds of family arrangement [sic] are best for society' and which 'was confident that the traditional understanding of marriage will be vindicated by this study.'" *Id.* (citation omitted).

318. DeBoer v. Snyder, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014).

319. *Id.* at 771.

320. AMERICAN ACADEMY OF PEDIATRICS, *Promoting the Well-Being of Children Whose*

laws that deprive them of their existing filial relationships, would directly challenge the government's characterization of the provision as a child protective measure. These claims would compel a court to examine the impact of Section 2, within the context of evidence that depriving children of the permanency, stability, and security provided for in an existing filial relationship impairs their best interests. The available credible evidence significantly frustrates the state's ability to demonstrate even a rational relationship between Section 2 and its purported purpose of protecting children and preserving their best interests.

Rational basis review may be an obsequious standard; however, it "is not a toothless one."[321] The court in *Latta v. Otter* rejected the state of Idaho's optimal child rearing justification for its non-recognition law, and stated,

> Idaho's Marriage Laws fail to advance the State's interest because they withhold legal, financial, and social benefits from the very group they purportedly protect—children. . . . Failing to shield Idaho's children in any rational way, Idaho's Marriage Laws fall on the sword they wield against same-sex couples and their families.[322]

The overwhelming majority of post-*Windsor* courts deciding the constitutionality of state marriage bans have recognized protecting children as a legitimate or compelling state interest; however, they have found no logical link between that interests and laws prohibiting the recognition of same-sex marriages.[323] In *Latta* the court held:

Parents are Gay or Lesbian, 131 PEDIATRICS 827, 830 (2013) ("There is extensive research documenting that there is no causal relationship between parents' sexual orientation and children's emotional, psychosocial, and behavioral development."). To be sure, this study and others like it, highlighting the positive benefits of marriage for children in same-sex marriage, confirm Professor Polikoff's critique that focusing on the marital relationship, rather than on the parent-child relationship, as serving children's best interests reinforces the primacy of marriage. *See* Polikoff, *For the Sake of All Children*, *supra* note 13, at 593-94.

321. Matthews v. Lucas, 427 U.S. 495, 510 (1976).

322. Latta v. Otter, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *24 (D. Idaho May 13, 2014).

323. *See* Latta v. Otter, No. 14-35420, 2014 WL 4977682, at *11 ("Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. . . . Defendants have presented no evidence of any such effect."); Bostic v. Schafer, 760 F.3d 352, 384 (4th Cir. 2014) ("Because the Proponents' arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws."); Bostic v. Rainey, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite sex couples fails to further this interest. . . . [N]eedlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest . . . . The 'for the children rationale' rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. . . . The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-

> Children are indeed both vulnerable and essential to the perpetuation of society . . . . [a]nd although the Court agrees that the State has a compelling interest in maximizing child welfare, the link between the interest in protecting children and Idaho's Marriage Laws is so attenuated that it is not rational, let alone exceedingly persuasive.[324]

In light of Section 2's direct and harmful impact on children's best interests, it cannot be said to rationally relate to any legitimate governmental goal and it should be determined to be unconstitutional on equal protection and due process grounds.

CONCLUSION

Despite the direct and adverse impact of same-sex marriage bans on children of same-sex parents, children's interests are routinely marginalized in the gay marriage debate and in cases challenging marriage bans. Even after the Court's ruling in *Windsor*, the civil and constitutional rights of adults and the primacy of marriage continue to occupy center stage—dominating the discourse and framing litigation efforts to invalidate marriage bans. In the court of public opinion, politicians, legislators, religious leaders, community activists, and jurists have expressed their views on same-sex marriage; however, one voice has been

---

sex marriage."); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014) ("The Court fails to see how having a family could conceivably harm children . . . [a]nd no one has offered evidence that same-sex couples would be any less capable of raising children. . . ."); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1212 (D. Utah 2014) ("[T]he State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure he State wishes to promote. . . [T]he State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiff's assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah (citation omitted). These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples."); De Leon v. Perry 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) ("There is no doubt that the welfare of children is a legitimate state interest; however, limiting marriage to opposite-sex couples fails to further this interest. . . . Instead, Section 32 causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted . . . . Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing. Accordingly, this Court agrees with other district courts that have recently reviewed this issue and concludes that there is no rational connection between Defendants' assertion and the legitimate interest of successful childrearing."). *But see* Robicheaux v. Caldwell, No. 13-5090, slip op. at 23 (E.D. La. Sept. 8, 2014) ("This Court is persuaded that Louisiana has a legitimate interest . . . whether obsolete in the opinon of some, or not, in the opinion of others . . . in linking children to an intact family formed by their two biological parents, as specifically understood by Justice Kennedy in *Windsor*.").

324. *Latta* , 2014 WL 1909999, at *22.

conspicuously absent—the voice of children in same-sex families. During oral arguments in *Perry* and *Windsor*, there was only one substantial reference, over two days of hearings, to the interests of children.[325] At the *Perry* hearing, Justice Kennedy remarked, "There are some 40,000 children in California . . . that live with same-sex parents, and they want their parents to have full recognition and full status. The voice of those children is important in this case don't you think?"[326] The proposed claim would respond to Justice Kennedy's query in the affirmative, turn the spotlight on children who are deprived of existing filial relationships by non-recognition laws authorized by Section 2, and give greater voice and force to children's rights.

Children in same-sex families are a particularly vulnerable demographic. They deserve government action that serves rather than compromises their best interests. They deserve to be protected from, not victimized by, harmful and discriminatory governmental action, authorizing states to enact laws that invalidate existing filial relationships with their parents. Section 2 operates to harm children by depriving them of relationships that serve their best interests, and for that reason it should be invalidated as an infringement of children's constitutional rights.

---

325. Transcript of Oral Argument at 21, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf.

326. *Id.*

FAKE IT TILL YOU MAKE IT: A JUSTIFICATION FOR INTELLECTUAL PROPERTY "PIRACY"

LLEWELLYN JOSEPH GIBBONS*

I refuse, to suffer for your selfish mistakes!
There's consequences to your actions more than your dreams at stake!
I'll make a stand, take my life in my hands!
We won't let this end!
Dream up a future, make it happen!
And follow your plans!

—*Fake It Till You Make It*, Close to Home[1]

ABSTRACT

Economic development, especially in the Least Developed Countries (LDC), requires use of intellectual property without always compensating the rights holders in the most developed countries.[2] Unconventionally, this Article uses neoclassical economics to provide a rational solution to access rights in the LDC while respecting the first principle of intellectual property right—utilitarianism. The price discrimination model provides a useful rubric to segregate developed country markets from developing country markets. Furthermore, it also provides a subtle test in the case of individual uses of intellectual property as to which should be tolerated in developing nations as uncompensated uses and which should be punished as piracy due to their subverting the economic incentive necessary to promote the creation of intellectual property in the more developed nations. This Article concludes that in the long run, tolerated uncompensated uses in nascent LDC markets are more efficient engines of economic development than direct foreign or sporadic technology transfer and therefore, are in the developed countries' best interests to promote a stable global community through economic development in the LDC.

---

* Professor, University of Toledo College of Law (lgibbon@utnet.utoledo.edu). The author would like to express his appreciation to faculty participants who commented on his paper at the 14th annual Intellectual Property Scholars Conference (Berkeley School of Law), Midwestern People of Color Legal Scholarship Conference (Indiana Tech Law School), and 2014 Intellectual Property Scholars Roundtable (Drake University Law School). He would also like to acknowledge Professor Daryl Lim's extraordinary skills as a commentator. Finally, the author would like to acknowledge the encouragement of Gerardo Villagomez de Oliveira e Souza. As always, the many flaws in this Article are solely the responsibility of the author.

1. Close to Home, *Fake It Till You Make It*, PLYRICS (2012), http://www.plyrics.com/lyrics/closetohome/fakeittilyoumakeit.html.

2. *Least Developed Countries (LDCs)*, UNITED NATIONS CONFERENCE ON TRADE & DEV. (2013), http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/LDCs.aspx (last visited Sept. 19, 2014) (defining LDCs as "a category of States that are deemed highly disadvantaged in their development process, for structural, historical and also geographical reasons").

INTRODUCTION

Intellectual property is important for economic development.[3] Samuel Clemens ("Mark Twain") once quipped "that a country without a patent office and good patent laws was just a crab and couldn't travel anyway but sideways and backwards."[4] Economic development in the least developed countries (LDCs)[5] is a critical social, political, and national security interest of the more developed countries.[6] Over the past decades, many attempts have been made to accelerate the economic growth of the LDCs ranging from direct foreign aid to facilitating technology transfers.[7] Today, developed countries are facing increasing domestic pressure to cut direct foreign aid or to align more closely foreign aid with domestic or foreign policy strategic interests rather than to use foreign aid as a principled tool to promote economic development in the LDCs.[8] The existing models of direct foreign aid, technology transfer, customs, or market access preferences have been unsuccessful at promoting sustained or even culturally appropriate economic development.[9] So far, according to some reports, no country has "graduated" from the status of being designated a least developed country, despite substantial efforts by developed countries, international organizations, non-governmental organizations, and religious or secular private charities to promote economic development.[10] If the existing model was credible

---

3. Kamil Idris, *Intellectual Property: A Powerful Tool for Economic Growth*, WORLD INTELLECTUAL PROP. ORG. (2004), http://www.wipo.int/export/sites/www/freepublications/en/intproperty/888/wipo_pub_888_1.pdf. This Article suggests measuring a country's economic development using its health, welfare, and quality of life.

4. MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT 67 (Harper & Bros. 1917) (1889).

5. *Least Developed Countries (LDCs)*, *supra* note 2.

6. *Helping Developing Countries Benefit from Global and Regional Trade*, DEP'T FOR INT'L DEV. (June 2014), https://www.gov.uk/government/policies/helping-developing-countries-economies-to-grow/supporting-pages/helping-developing-countries-benefit-from-global-and-regional-trade.

7. Bichaka Fayissa & Mohammed I. El-Kaissy, *Foreign Aid and the Economic Growth of Developing Countries (LDC's): Further Evidence*, 34 STUD. IN COMP. INT'L DEV. 37, 37-38 (1999).

8. THOMAS CAROTHERS & DIANE DE GRAMONT, DEVELOPMENT AID CONFRONTS POLITICS: THE ALMOST REVOLUTION 89 (2013).

9. Fayissa & El-Kaissy, *supra* note 7, at 46-47.

10. UNITED NATIONS OFFICE OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES, & SMALL ISLAND DEVELOPING STATES, STATE OF THE LEAST DEVELOPED COUNTRIES v (2013), *available at* http://unohrlls.org/custom-content/uploads/2013/10/State-of-the-LDCs-2013.pdf (noting that while progress has been made, "the majority of LDCs grew at a pace slower than their last- decade averages") ; *but see* UNITED NATIONS CONFERENCE ON TRADE AND DEV., THE LEAST DEVELOPED COUNTRIES REPORT 2012 4 (2012), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CG0QFjAI&url=http%3A%2F%2Functad.org%2Fen%2FPublicationsLibrary%2Fldc2

in promoting economic development, then after almost thirty years, there should be at least one success story.

However, it is relatively uncontroversial that in the past many countries that successfully transitioned from developing to developed-nation status went through a sustained period of using the intellectual property of more developed nations without compensating foreign rights holders.[11] They were able to do this because of weak enforcement of domestic intellectual property laws and inchoate international intellectual property norms without an effective enforcement mechanism.[12] This lax period of intellectual property enforcement ended in the post-World Trade Organization era.[13]

The modern scope of domestic intellectual property rights protection is of critical concern to the new post-colonial nation states. These states were not part of the debates that formalized the 19th Century international instruments that made patent, copyright, trademarks, and, to a lesser degree, trade secrets international property rights norms.[14] More recently, these countries consisted of marginalized states that had only a feckless voice in creating the modern World Trade Organization (WTO) system of preferences, tariffs, and enforcement.[15] The post-WTO/Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) enforcement mechanisms create new tolls on the royal road to economic development without providing the necessary resources to develop a domestic infrastructure that promotes sustained economic development.

This Article develops its contentions through two rhetorical devices: a meme and a simile. A predominant meme of the latter part of the last century, and so far in this one, is to "fake it till you make it."[16] To be more charitable, "fake it till you make it" is more often promoted as "visualize it and you will achieve it."[17] This meme serves as this Article's starting point that developing countries, especially the LDCs, will have to fake it (engage in unauthorized uses of intellectual property) before they can make it to the coveted developed nation status. This Article then uses the simile of the pirate code as an ending point to

---

012_en.pdf&ei=WCL7U5TpHIuqyATIpICoAw&usg=AFQjCNGjADufXspGYNYNywLexpqUKpPkmg&sig2=mJCllCui-pex5pmndcbUDA&bvm=bv.73612305,d.aWw (noting that three countries have graduated from LCD status).

11. *See generally* ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES (2009).

12. *Id.* at 8-11.

13. *See id.* at 327-56.

14. Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS, WORLD INTELLECTUAL PROPERTY ORGANIZATION 13, 15-26 (Paul Torremans ed., 1999).

15. *See, e.g.*, Aurelie Walker, *The WTO Has Failed Developing Nations*, GUARDIAN (Nov. 14, 2011), http://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries.

16. *See, e.g.*, Close to Home, *supra* note 1.

17. *See* Lifer, *Why You Should Fake It 'Til You Make It*, LIFE BRINK (Aug. 9, 2014), http://lifebrink.com/why-you-should-fake-it-til-you-make-it/.

propose the critical rethinking of the scope of intellectual property rights. The pirate code was selected because it exists outside the scope of the formalities of maritime law; yet, it imposed law on the lawless.[18] Even lawful merchants benefited from the self-discipline of the pirate code.[19] The scope of the proposed solution is perhaps outside the patent, industrial property, and copyright conventions of the 19th Century, their exception and limitations, and their ultimate enshrinement into global trade norms as part of the WTO/TRIPs regime. Yet, it is entirely consistent with the economic purposes underlying modern intellectual property law.[20]

The modern mantra of the more economically developed, intellectual property rich nations is that more and ever increasingly strong and effective domestic enforcement of intellectual property rights promote economic growth in developing countries and create a sounder global economy.[21] As such, stronger intellectual property rights regime coupled with effective domestic enforcement will promote global general welfare.[22] The mantra of the poorer, less intellectual property rich countries is to demand access to the intellectual property belonging to the citizens of the more developed nations either through compulsory licenses or favorable pricing.[23] These two potentially extreme positions challenge the legitimacy of the modern intellectual property system, which is largely justified through a utilitarian model that balances the interests of intellectual property creators and intellectual property users.[24] This model presupposes that limited economic incentives to authors and inventors to create and to innovate will encourage the progress of science and promote the useful arts for the ultimate benefit of all.[25]

Either position in the long run promotes disrespect for intellectual property rights. The arguments for ever increasing levels intellectual property rights and draconian enforcement incentives are often anecdotal, counterfactual, and of the

---

18. Pam Uher, *The History of the Code*, HUMANITIES 360 (Apr. 9, 2008), http://www.humanities360.com/index.php/the-history-of-the-pirate-code-55869/.

19. *See* Michael Keenan, *Interview with Peter Leeson, Author of The Invisible Hook and Anarchy Unbound*, THE SEASTEADING INSTITUTE (Apr. 24, 2014), http://www.seasteading.org/2014/04/interview-peter-leeson-author-invisible-hook-anarchy-unbound/.

20. *See infra* CONCLUSION.

21. Nathan Associates, Inc., *Intellectual Property and Developing Countries: An Overview,* USAID (2003), *available at* http://www.nathaninc.com/sites/default/files/Intellectual%20Property%20and%20Developing%20Countries.pdf.

22. *Id.*

23. *See, e.g.*, Glyn Moody, *As Big Pharma Piles on the Political Pressure, Indian Government Slows Pace of Compulsory Drug Licensing*, TECHDIRT (Mar. 10, 2014), https://www.techdirt.com/blog/tag=robotsA/?tag=compulsory+license.

24. VAN LINDBERG, INTELLECTUAL PROPERTY AND OPEN SOURCE: A PRACTICAL GUIDE TO PROTECTING CODE 15 (2008). Of course, the categories of users and creators are not mutually exclusive. Today's creator is building on the work of yesterday's producers.

25. *See id.*

variety of "what might have been."[26] So far, the balance of interests has been consistently struck in favor of additional intellectual property rights.[27] Modern intellectual property policy has rested on the assumption that someday the protected newly-incentivized intellectual property will enter the public domain ultimately for the benefit of all, as opposed a regime with fewer intellectual property rights or weaker levels of enforcement which may at least theoretically result in underinvestment in research and development; and therefore, in the *ab initio* failure of the system to create new inventions or new works of authorship.[28]

This Article also proposes a "pirate code" of uncompensated uses that convert the deadweight loss resulting from protecting foreign intellectual property rights in the LDC, which provide no intellectual property incentive to developed nation intellectual property rights holders, into a consumer surplus in the LDCs. Neoclassical economic theory demonstrates that this Article's proposed model, which recommends permitting selected developing countries to use the intellectual "property" of more developed countries without compensating developed country rights holders, is consistent with the economic incentives needed to promote globally what the U.S. Constitution calls the progress of science and the useful arts[29] if the developed and developing country markets can be segmented using a modified third-order price discrimination model. This Article will analyze the possibilities and effects using a price discrimination model grounded in economic literature. By analyzing a price discrimination model and relevant literature, one may begin to predict the likely effects of uncompensated use in the LDCs on the research, development, and dissemination of intellectual property in the developed countries and the externalities of excluding the least developed countries from the modern international intellectual property regime.

Part II contends that rational property rights, including rational intellectual property rights, should be grounded in principles of economic efficiency, and that, therefore, ultimately the scope of property rights should be determined by economic efficiency.[30] Part III proposes using a price discrimination model to

---

26. *See, e.g.*, *Why Are Intellectual Property Rights Important?*, U.S. CHAMBER OF COMMERCE GLOBAL INTELLECTUAL PROP. CTR. (Dec. 28, 2009), http://www.theglobalipcenter.com/why-are-intellectual-property-rights-important/.

27. *See generally* William W. Fisher III, *The Growth of Intellectual Property: A History of Ownership of Ideas in the United States*, HARVARD CYBER LAW, *available at* http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf

28. Masiyuki Morikawa, *Protection of Intellectual Property to Foster Innovations in the Service Sector*, VOX (July 24, 2014), http://www.voxeu.org/article/intellectual-property-and-service-sector-innovation.

29. U.S. CONST. art. 1, § 8, cl. 8.

30. For the purposes of this Article, the so-called classical economic model and justifications for intellectual property are those as authoritatively espoused by William M. Landes and Richard A. Posner. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 8 (2003). Whether law and economics is a sound model on which to analyze intellectual property is a highly contested issue. *See* Andreas Rahmatian, *A*

demonstrate that the lack of intellectual property protection in at least the LDCs will not affect the utilitarian incentives needed to promote intellectual property creation and commercialization in developed nations. In Part IV, this Article will evaluate whether the LDCs are privateers or pirates and will return to the price discrimination model to articulate some legal and economic principles for the development of a pirate code of uncompensated uses. Part V will evaluate a few of the benefits for the developing country and for the developed country. This Article then concludes that when properly constrained, a "pirate code" of narrowly defined unauthorized and uncompensated uses in some markets is consistent with both the economic theory and reality of the intellectual property system and may also serve as a useful tool of economic development in the LDCs.

I. ECONOMIC JUSTIFICATIONS FOR INTELLECTUAL PROPERTY

Whether there is a sound economic justification for protecting intangible works of innovation and creativity as property under the rubric of intellectual property is hotly debated among economists.[31] The putative justification for intellectual property protection is that statutory protection of creative works and innovation provides the economic incentives necessary to assure their optimal production or, at least, to preclude the danger of their under production.[32] In the United States, the public policy justification for copyright and patent protection is clear: "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."[33] The U.S. Supreme Court would later opine: "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"[34] Therefore, at least in the United States, the constitutional boundary of legitimate intellectual property protection is the public policy and enforcement point where the consumer surplus is the greatest.[35]

Fundamental Critique of the Law and Economics Analysis of Intellectual Property Rights, 17 MARQ. INTELL. PROP. L. REV. 191, 192-93 (2003).

31. *See* Stanley M. Besen & Leo J. Raskin, *An Introduction to the Law of Economics of Intellectual Property*, 5 J. ECON. PERSP. 3, 3-4 (1991); *see also* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031-32 (2005).

32. Besen & Raskin, *supra* note 31, at 5.

33. Ebay v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932) (emphasis added); *see also id.* ("A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.") (internal quotation marks omitted).

34. Feist v. Rural Tel. Servs., 499 U.S. 340, 349 (1991) (emphasis added) (quoting U.S. CONST. art. 1, § 8, cl. 8).

35. *See* Eldred v. Ashcroft, 537 U.S. 186, 214-16 (2002). However, the exact point on this frontier is one that the U.S. Constitution permits the U.S. Congress to determine as a matter of competing policies rather than rational economic efficiency. *See id*. at 212-13; *see also* Richard

Even economists, who theorize that statutory protection is necessary in order to assure an adequate supply of intellectual property, would not contend that the existing intellectual property regime is sufficiently well calibrated in order to assure the optimal welfare maximizing production of intellectual property.[36] Excessive statutory economic incentives to create new copyrighted works or to promote research and development of innovation may actually result in sub-optional investment as firms compete in the winner-take-all race for patent protection or authors steer further afield than necessary to avoid possible allegations of copyright infringement.[37]

Of course, any economic incentives to promote creativity could be much to do about nothing. Whether the provision of an economic incentive actually does promote creativity is heavily discounted in the psychological literature.[38] One study of the psychological effects of economic incentives and creativity concluded: "The generalization that reward lessens creatively is commonly accepted as fact. Most literature reviews and textbooks agree that the powerful incremental effects of reward on conventional performance simply do not apply to creativity."[39] However, while economic incentives (rewards) may not be necessary to promote creativity (and may even hinder creativity), they still may be necessary for the dissemination and commercialization of works protected by intellectual property.[40]

As Fritz Machlup observed, "[i]f we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it."[41] In order to avoid counterfactual arguments about the success of intellectual property protection, the author would extend this principled tongue-in-cheek defense of patent protection to include our

---

A. Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAP. L. REV. 1, 27 (2003); *see generally* Craig W. Dallon, *Original Intent and The Copyright Clause: Eldred v. Ashcroft Gets It Right*, 50 ST. LOUIS U. L.J. 307 (2007).

36. *See*, *e.g.*, LANDES & POSNER, *supra* note 30, at 6-7; SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 98-123 (2006); Lemley, *supra* note 31, at 1065-66.

37. *See* LANDES & POSNER, *supra* note 30, at 6.

38. *See generally* Robert Eisenberger & Stephen Armeli, *Can Salient Reward Increase Creative Performance Without Reducing Intrinsic Creative Interest?*, 72 J. PERSONALITY & SOC. PSYCHOL. 52 (1997) (discussing psychology studies on the effects of rewards and creative behavior).

39. Robert Eisenberger et al., *Can the Promise of Reward Increase Creativity*, 74 J. PERSONALITY & SOC. PSYCHOL. 704 (1998).

40. LANDES & POSNER, *supra* note 30, at 53.

41. Fritz Machlup, *An Economic Review of the Patent System*, *in* COMMITTEE ON THE JUDICIARY UNITED STATES SENATE, AN ECONOMIC REVIEW OF THE PATENT SYSTEM 80 (1958), *available at* http://library.mises.org/books/Fritz%20Machlup/An%20Economic%20Review%20of%20the%20Patent%20System_Vol_3.pdf.

current regime of copyright protection.[42]

There is extensive scholarly questioning of the underlying economic utilitarian assumptions behind intellectual property protection; therefore, this Article posits that as the utilitarian justification for intellectual property weakens, this Article's policy recommendation of a limited return to the nineteenth century and early twentieth century market principles of laissez-faire domestic uncompensated uses, at least in the narrow context of the LDCs, grows logarithmically stronger.[43] This section will examine the scope of legal protection as providing legal incentives for the creation of two of the most significant forms of intellectual property, copyright and patent law, and then use economic theory to suggest limitations as to their proper scope in an LDC.[44]

A. Copyright

Traditionally, in common law countries since the Statute of Anne (and the U.S. Constitution), copyright law has relied on a utilitarian justification.[45] More recently, the economic rights of authors and artists have also been extended to recognize the civil law concept of *droit moral*, or moral rights.[46] This section will discuss each of these two concepts of copyright. However, for the purposes of this Article, the author's economic rights under copyright law are more significant as an issue of economic development.

1. Copyright's Economic Rights.—Copyright protects original works of authorship.[47] In the United States, two requirements for federal copyright protection are that the work be fixed and original.[48] Over time, U.S. copyright law has decreased the various formalisms necessary to obtain copyright protection; although, it still grants the copyright owner additional rights if the

---

42. *Cf.* Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

43. Of course, there are other theoretical justifications for intellectual property. *See* Adam Moore, *Intellectual Property*, STANFORD ENCYCLOPEDIA PHIL. (Mar. 8, 2011), *available at* http://plato.stanford.edu/entries/intellectual-property/ (but any diminution in the persuasive force of the law and economic justification would not weaken contentions based on other theoretical models).

44. Within the United States, there are other forms of intellectual property that are not discussed in this Article, for example: boat-hull protection, mask-works, and unfixed recordings. Outside the U.S., there are new forms of IP or quasi-IP, such as geographic indicators, intangible cultural heritage, and biodiversity. The marginal economic significance of these types of intellectual property protection in promoting innovation in the context of developing countries is probably not important.

45. *See* Fiest Publ'g, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351 (1991); Fox Film Corp. v. Doyal. 286 U.S. 123, 127-28 (1932); ALINA NG, COPYRIGHT LAW AND THE PROGRESS OF SCIENCE AND THE USEFUL ARTS 86 (2011).

46. Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap*,*"* 2007 UTAH L. REV. 659, 706-07.

47. *Fiest*, 499 U.S. at 351.

48. 17 U.S.C. §§ 101-02 (2014); *Fiest*, 499 U.S. at 345-46.

owner complies with some of the ancient formalities of the U.S. copyright law.[49] Moreover, the copyright incentive to the author has from the earliest days of copyright law been decoupled from the creator of the work and then transferred to the disseminator of the work, usually a publisher.[50] Over time, the term and scope of copyright law protection has been increasingly detached from its incentive purposes in order to grant strategic rents to a small number of copyright owners (and, in reality, more often to either publishers or to the estates of deceased authors, artists, and composers).[51]

2. Copyright's Moral Rights.—Moral rights are a more recent accretion from the civil law countries onto the copyright regime of the common law.[52] Unlike the author's (or artist's) economic rights under copyright law, which are freely alienable, in many countries moral rights are an extension of the person, or creator of the work, and may be waived, but not assigned, by the author.[53] The anti-assignment provision of moral rights as a form of property right makes it difficult to analyze moral rights under the rubric presupposed in this Article.[54] Moreover, it leads to serious questions as to whether it is in reality a property right, quasi-property right, tort right, misappropriation right, or even sounds in some other body of law.[55]

Consequently, the economic arguments justifying an author's moral rights are at best unproven; therefore, this section will not address them in detail.[56] This Article also will avoid the thorny issue of whether moral rights are economically efficient. It is sufficient to note on this problematic subject that even the

---

49. *See* 17 U.S.C. §§ 410-12; *see also* The Football Ass'n Premier League Ltd. v. YouTube, Inc., 633 F. Supp. 2d 159, 162-63 (S.D.N.Y. 2009).

50. *See* Edlred v. Ashcroft, 537 U.S. 186, 194-96 (2003).

51. *See id.* at 222 (Stevens, J., dissenting); *see also id.* at 242 (Breyer, J., dissenting).

52. Hughes, *supra* note 46, at 706-07.

53. *See Moral Rights*, WIKIPEDIA, http://en.wikipedia.org/wiki/Moral_rights#Worldwide_situation (last visited Aug. 28, 2014) (showing the various permutations of moral rights); *see also* Betsy Rosenblatt, *Moral Rights Basics,* HARVARD.EDU, http://cyber.law.harvard.edu/property/library/moralprimer.html (last modified March 1998) (providing a basic description of moral rights).

54. A more nuanced model of uncompensated uses for economic development could exclude moral rights in unique works versus fungible commodity works. The author posits that rarely will there be a significant moral rights issue in the types of commoditized works that are likely to be used as part of an economic development strategy. These works are more likely to fall under the rubric of neighboring rights in civil law copyright regimes or outside of the Visual Artists Rights Act ("VARA") in the United States. *See* 17 U.S.C. § 106A (2014).

55. *Cf.* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 390-91 (2003) (describing alienation as an essential element of property law); *see* Dane S. Ciolino*, Moral Rights and Real Obligations: A Property-Law Framework For The Protection Of Authors' Moral Rights*, 69 TUL. L. REV. 935, 950-51, 956-57 (1995); Lars S Smith, *General Intangible or Commercial Tort: Moral Rights and State-Based Intellectual Property as Collateral Under U.C.C. Revised Article 9*, 22 EMORY BANKR. DEV. J. 95, 124-155 (2005).

56. *See* LANDES & POSNER, *supra* 30, at 279-80.

proponents of an economic efficiency argument for moral rights recognize the, at best, tangential relationship between moral rights and economic efficiency.[57] The posited economic justifications for copyright's moral rights regime sound more in trademark law (or perhaps other forms of unfair competition or tort law) as they relate more to the artist's reputational interests than in traditional principles of copyright, which control "copying" broadly defined.[58] Having set aside the tangential question of moral rights, this Article will focus *solely* on the classical economic or utilitarian justifications for copyright protection.

3. Economic Model for Justifying Copyright Protection.—The economic classical model for copyright protection emphasizes the incentive-access tradeoff.[59] The classic economic model of copyright protection is one that attempts to solve the public goods problem inherent in the production of non-rivalrous copyrighted works.[60] Copyrighted works are expensive to produce (high fixed costs) and once created may be cheaply reproduced.[61] The unauthorized reproductions will compete in the market place with the author's own work; because the copyist does not bear the fixed costs of creation, the copyist's reproductions will be cheaper, and the author will not recover his or her fixed costs of creation.[62] Therefore, the historical classical model suffers from a lack of calibration. It does not consider that the level of legal copyright protection is also a variable that may be calibrated to assure the theoretical optimal production of new works.

This Article will use the Landes and Posner economic model for justifying copyright protection.[63] Landes and Posner expounded on the classical model for copyright protection.[64] Unlike previous standard copyright models that emphasized the incentive-access tradeoff, the Landes and Posner Model emphasizes the incentive-cost-of-expression with different levels of copyright protection.[65] Landes and Posner's model makes numerous assumptions in order to simplify the model. First, they assume that the quality of the original and the

---

57. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUDIES 95, 102-04 (1997). My comment regarding the law and economics literature should not be taken as criticism of any one scholar or article but, rather, as a generic observation on the paucity of robust articles engaging in a critical systemic economic analysis of moral rights.

58. *Id*. at 104-05; *see infra* Part III.C (discussing the economic justifications for trademark law).

59. Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841, 843-46 (2008).

60. *Id.*

61. *Id.* at 844.

62. *See id.* at 843-46. We can assume that the author could recover the marginal costs of producing units of the work, just not the fixed initial costs of creating the work. *See* LANDES & POSNER, *supra* 30, at 37-41.

63. *See* LANDES & POSNER, *supra* note 30, at 37-70.

64. *Id.* at 71.

65. *Id.*

alleged infringing copy are perfect substitutes.[66] This may be a problematic assumption in the case of reproduction in the LDCs.[67] They then also assume that demand is certain, the cost of expression is the sole fixed cost, and the marginal costs of the author-creators, but not the infringers, are constant.[68] This model develops with the following variables: p=copy price, q=quantity demanded, $q*p$=market demand, x=number of copies by author, y=number of copies by infringer (so that $q=x+y$), c=author's marginal cost per copy, e=cost of expression, and z=level of copyright protection from 0 (no protection ~ public domain) to 1 (complete protection ~ fee simple absolute in the work).[69]

Descriptively, the economic assumptions underlying the role of infringers in the Landes and Posner model is roughly analogous to the model of fringe competitors competing with a market dominant firm in a legitimate market.[70] Infringers are rational and will produce copies to the point where price equals marginal cost ($p=mc$) and, like in any legitimate firm, marginal costs increase depending on the number of copies (and in the case of the infringing firm, the level of copyright protection (z)).[71] The infringers demand curve may be described as $y=y(p,z)$ with $y_p>0$ and $y_z<0$ so that either an increase in price or a decrease in the level of copyright protection will increase the supply of infringing copyrighted works.[72] Therefore, the author's profits (π) are $\pi=(p-c)x-e(z)$.[73] With a few additional levels of algebraic manipulation and based on the previous assumption, one may conclude that a rational author will only create a new work if R (author's gross profits) is greater than or equal to the cost of expression (e) multiplied by the level of protection (z) [$(R \geq e(z))$].[74] The demand curve for copies produced by the author is represented by subtracting the supply curve of

---

66. *Id.*

67. This is problematic because a copy of many high value works is not a perfect substitute for the original. For example, it is not clear that a lawyer or doctor would rely on an unproven source—a lawyer would not rely on a "copy" of a case unless she was very sure of the source of the copy, and a doctor would not rely on unknown work as a source of medical information. Similarly, in the case of a patent infringing product, the quality of the infringing good may be inferior to that of the licensed product. This factor becomes even more problematic if one considers other intangible but measurable distinctions such as warranty, pre- or post-sale service, or interoperability with other products.

68. LANDES & POSNER, *supra* note 30, at 71. Landes and Posner talk about copiers broadly, from the legally excused fair uses by ordinary scholars to the illicit and copyright infringing uses. This Article focuses on the arguably illicit range of the uses, so it will describe these copiers as infringers.

69. *Id.* In the context of this Article, the range of (z) could be truncated to only that point on the line $z>0$ where illicit uses begin.

70. *Id.*

71. *Id.*

72. *Id.* at 72 n.4.

73. *Id.* at 72.

74. *Id.* at 73.

the infringers ($y=y(p,z^0)$) from the market demand for all copies of the work.[75] To understand how this interplays in a market, one needs to consider *N,* which is the total number of equivalent works.[76] For the purposes of this Article, equivalent works are works that could substitute the copyrighted work in the market. The cost of expression *e(z)* is a variable that will change by author and by work; so the supply of new, equivalent works will increase until $e(z)=R$.[77]

Regardless of the level of legal protection, lovers will always write sonnets and law students will always sing the blues while writing examinations because copyright law's economic incentives play no role in the creation of these works.[78] However, for those works requiring some incentive-level of copyright protection, too low a level of protection (*z*) will result in an under production of these new works,[79] and for those works with marginal expressive value, too high a level of legal protection (*z*) will also result in an under production of new works.[80] In commercial terms, this could be described as the range of incentivized copyrighted works from Hollywood blockbusters to user-generated puerile YouTube cat parodies. Similarly, faculty law review articles may have some economic value, but when faced with a very high level of (*z*), faculty members would stop writing because they could not afford the licensing costs of using the materials that they quote and cite. One doubts whether faculty who write law review articles would have sufficient incentive to continue to write them, if they faced either paying licensing fees or faced a serious risk of the threat litigation costs that would be associated with litigating a copyright infringement action under an extremely narrow fair use exception.

Landes and Posner conclude based on their economic model that social welfare is maximized when the marginal benefit of increasing copyright protection resulting in a "higher producer surplus exactly balances the reduction in welfare in the market for copies plus the reduction in producer surplus."[81] In economic literature, the concept of social welfare (and its maximization) is indeterminate.[82] However, one definition of social welfare that is consistent with the Landes and Posner model and the purposes of the Article's analysis states that "[s]ocial welfare is the sum of the firms' expected profits (or, if they are not risk neutral, of their expected utilities of profits) and the monetary equivalent of

---

75. *Id.* at 74.

76. *Id.* at 73.

77. *Id.* (assuming $N_R>0$, $N_z>0$).

78. *Id.* at 112 ("The point is only that nothing is gained, at least in terms of enhancing incentives to create expressive works, by allowing the identical copy to be copyrighted.").

79. *Id.* at 73.

80. *Id.* at 74 ("[T]oo much protection can raise the costs of creation to a point at which current authors cannot cover their costs even though they have complete copyright protection for their originality.").

81. *Id.* at 76.

82. *See generally* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 78-84 (1992).

consumers' welfare."[83] Accordingly, the preferred model of intellectual property consistent with the public policy justifications for its creation balances incentives, access, and future works. As discussed later in this Article, reducing the level of copyright protection in LDCs will increase the net social welfare without changing the economic incentives in more developed countries to produce new works.[84]

B. Patent

Patent law promotes the progress of science and the useful arts by encouraging investment in research, development, and commercialization, as well as providing an incentive to the inventor to publicly disclose the invention in exchange for a statutory period of strong exclusivity.[85] However, the inventor has an option that the author does not. Unlike an author who must disclose her work in order to commercialize it, the inventor could elect to exploit her new invention as a trade secret.[86] Patent law also provides a substantially shorter period of protection than copyright law.[87] The protection granted under patent law is more robust—albeit more expensive to obtain.[88]

The summary of Landes and Posner's economic analysis developed in the previous section on copyright law applies equally well here.[89] Although Landes and Posner have a well-developed theory of patent law,[90] these distinctions are not relevant to this Article. The basic model of copyright incentives adequately accounts for the incentives necessary to develop new forms of innovation under patent law incentives. The incentives behind patents, like those behind copyrights, are that a limited period of exclusivity and an opportunity to exploit the market for the claimed invention will provide an incentive to engage in research, development, and commercialization.[91] Similar to intellectual property as a whole, the preferred economic model of patent law also balances incentives, access, creation, and ultimate commercialization of future innovation.

C. Trademark

Although trademark law plays a significant role in the modern intellectual

---

83. A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447, 465 (1981).

84. *See infra* Part V.

85. *See* J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 142 (2001) ("The disclosure required by the Patent Act is 'the *quid pro quo* of the right to exclude.'") (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 484 (1974)).

86. LANDES & POSNER, *supra* note 30, at 354.

87. *Id.* at 295.

88. *Id.*

89. *Id.* at 71-76.

90. *Id.* at 297-300.

91. *Id.* at 294.

property regime and is susceptible to economic analysis,[92] it is outside the scope of this Article. Unlike copyrights and patents, the goals of which are the promotion of progress and the useful arts, trademark law is regulatory in nature.[93] Traditionally, the proper goal of trademark law was to regulate the integrity of the marketplace by preventing deceptive transactions that result in consumer confusion.[94] The author of this Article was unable to postulate an economic development reason that would justify deceiving a consumer in LDC or any other consumer in any market. Furthermore, it is not clear whether the externalities of trademark infringement could be limited to the LDC market where the infringing goods were sold. In a global economy, bad publicity resulting from the sales of defective, falsely-branded products in an LDC is likely to go viral and to affect the sales of the goods or other goods produced by the developed country rights holders in other countries or markets.

D. Conclusion

Although the points of limitation under copyright and patent law are different, each form of intellectual property contributes to the general welfare as long as it is securely moored to the appropriate level of incentives.[95] However, when incentives no longer play a role in their continued production, superfluous copyright and patent protection begin to reduce the general welfare, sometimes even the welfare of rights holders.[96] This Article posits that some markets for some goods are unnecessary to the utilitarian incentives that underlay intellectual property law in developed nations. Therefore, protection of intellectual property in these markets imposes costs and reduces the general welfare with no corresponding benefit to the author, inventor, or rights holder.

II. A RATIONAL ECONOMIC MODEL FOR INTERNATIONAL LIMITATIONS ON INTELLECTUAL PROPERTY

If one accepts the classical, unscientific, and intuition-based public policy justifications for intellectual property, such as those found in the U.S. Constitution or the Statute of Anne, that provide private incentives to promote the public welfare or even the more modern nuanced "scientific" justifications for intellectual property rights posited by economists, then one can reach a logical limit on the scope of international intellectual property rights. In public policy terms, this scope is defined as when the extent of the intellectual property rights protection is inimical to the public's interest in the creation and dissemination of intellectual property.[97] In economic terms, as marginal increases in intellectual

---

92. *Id.* at 166.

93. *See generally* Lanham Act, 15 U.S.C. § 1114 (2014).

94. *Id.* (The Lanham Act prohibits using a reproduction or copy without consent that "is likely to cause confusion, or to cause mistake, or to deceive.").

95. *See supra* Part II.A-B.

96. LANDES & POSNER, *supra* note 30, at 422.

97. *See* SCOTCHMER, *supra* note 36, at 119 (discussing deadweight loss and profit).

property protection do not provide any additional incentives to create new works or which promote innovation, and may even increasingly burden the creation or use of intellectual property.[98]

If one views the market for works of intellectual property as an undifferentiated amorphous fungible whole, then finding measurable points of limitation in the real world on this frontier are an intractable problem of the slippery slope variety. Fortunately, economic theory explains intellectual property incentives in terms of markets.[99] One of the most useful profit maximizing tools available to any commercial entity is the potential to engage in price discrimination in order to assure that each transaction is as profitable as possible—to maximize potential producer surplus.[100] This Article suggests the novel approach of flipping the usual justifications and understanding of price discrimination in the context of intellectual property enforcement in the LDCs. That is, replace the economic model that maximizes the capture of consumer surplus by firms with an economic model that maximizes consumer welfare in LDCs. Although, the proposed use is consistent with the normative understanding of price discrimination models, it is admittedly an unconventional use of these models. This Article takes a modified microeconomic approach and focuses with some caveats on each individual LDC as a collective-entity operating in markets and treats it as analogous to an individual or a collective entity such as a corporation operating in the marketplace. This section will analyze how commercial entities engage in price discrimination and how the price discrimination model can be structured to assure that the economic incentives necessary for the promotion of intellectual property remain while permitting the un-fared use of intellectual property by LDCs.

A. Price Discrimination

Price discrimination is sometimes proffered as a treatment, if not a cure, for intellectual property piracy.[101] The essence of price discrimination permits a business to attempt to charge each consumer (or groups of consumers) the maximum amount that they are willing to pay.[102] A more technical definition is "price discrimination is present when two or more similar good are sold at prices that are in different ratios to the marginal costs."[103] There are three prerequisites for effective price discrimination.[104] First, the firm must have some market

---

98. LANDES & POSNER, *supra* note 30, at 74.

99. *See generally* Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSPECTIVES 57 (2005).

100. *See generally* Hal R. Varian, *Price Discrimination*, *in* 1 HANDBOOK OF INDUS. ORG. 597 (R. Schmaense & R.D. Willig eds., 1989).

101. *See*, *e.g.*, A. Graham Peace et al., *Software Piracy in the Workplace: A Model and Empirical Test*, 20 J. MAN. INFO. SYS. 153, 169 (2003) ("country-dependent software pricing").

102. Varian, *supra* note 100, at 600.

103. *Id.* at 598.

104. *Id.* at 599.

power.[105] Second, the firm must have the ability to differentiate among customers.[106] Lastly, it must have the ability to prevent resale (limit arbitrage) between customers.[107]

For the purposes of this Article's analysis, one should assume that the intellectual property owner has market power over the legal uses of his or her intellectual property and that power is significant enough in the market to deter (but no eliminate) unlicensed uses of the intellectual property.[108] Candidly, the market power here is extremely narrowly defined as the compensated, authorized uses that fall within the scope of the intellectual property right and do not fall within the scope of legal limitations and exceptions to the intellectual property right.[109] As defined, the legal uses of intellectual property are a market over which the owner has almost total control.

This Article's narrow definition of market power is quite different from the usual much broader definition of market power, which is the ability of a firm to raise the price of a good above the marginal cost and still earn a positive profit.[110] One of the significant components of market power (traditionally defined) is the cross-elasticity of demand.[111] In the traditional definition, if there are ready adequate substitutes, then there is little market power.[112] As a practical matter, in order to simplify the discussion in this Article, it will assume that there is at least de jure market power and other foreign intellectual property rights (at least in the LDCs) that protect any readily available substitutes. Further, albeit a bit counter-intuitive, this Article assumes that because of an imbedded learning curve and network externalities, less expensive creative works or innovation that are "open source," "creative commons," or which are now in the public domain of intellectual property, may not be readily substituted for works that are currently protected by intellectual property.[113]

Second, this Article proposes a novel bright line test for distinguishing among potential customers. Individual consumer purchasing decisions are not a

---

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* LANDES & POSNER, *supra* note 30, at 378; *see also* Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 837, 855-56 (2007) (arguing that a patent-holder has inherent market power even if competing goods are only slightly differentiated).

109. *Cf.* Katz, *supra* note 108 (explaining that patent holders' market power typically does not encroach into antitrust territory due to competition from close-substitute goods).

110. *Id.* at 853-54; *see also* U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 621 (1977) (contextualizing the traditional market power definition).

111. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 470 (1992).

112. Paul S. Grunzweig, *Prohibiting The Presumption Of Market Power For Intellectual Property Rights: The Intellectual Property Antitrust Protection Act Of 1989*, 16 J. CORP. L. 103, 133 (1990).

113. *See generally* Stephen P. King, *Network Externalities, Price Discrimination and Profitable Piracy*, 15 INFO. ECON. & POLICY 271 (2003).

significant part of the relevant market in this Article's analysis. The focus of the Article is on aggregated purchasing power and decisions of the LDC's consumers as representing a "single" consumer for market analysis. This analysis focuses on defining the relevant customer through the gross national product or per capita income of the LDC with a stratified-nuanced emphasis on the types of consumers in that country receiving the benefits of the uncompensated uses. Consequently, luxury goods that are predominantly consumed by the middle or wealthy classes in the LDC, those who enjoy incomes roughly comparable to those in the developed world, would be ineligible for production under the proposed model while normal or inferior goods consumed by average or low-income consumers potentially would be within the proposed tolerated market for uncompensated uses of foreign intellectual property.[114]

The sole exception to this bright line test is foreign intellectual property that requires an economic incentive provided by developing countries.[115] Frequently, these would be goods that are produced largely for developing and emerging markets. Examples of such goods potentially include devices that are electrically powered in the developed markets but sold as gasoline powered in developing countries, or pharmaceutical and medical devices whose primary market is to treat medical conditions in developing countries.[116] Consistent with the thesis of this Article, these exceptions to the pirate code model only solely because the LDC markets constitute the markets that incentivize the creation, development, or commercialization of these goods.

Finally, the third factor for effective price discrimination is the ability to prevent resale or arbitrage.[117] In the context of the intellectual property limitation presented in this Article, this would be expressed in practice as the problem of exporting counterfeit goods and the effect of their subsequent importation into the markets of more developed nations on intellectual property incentives. Later, this issue will be discussed in greater detail; however, at this point, the Article assumes that between the LDCs' interests in regulating its domestic and export-international markets and the developed countries' ability to control their internal markets and borders, the spill over between the two markets would be insufficient to result in a significant reduction in intellectual property incentives.[118] The limitation here is the assumption that while there will be some externalities, there will not be a sufficient erosion of the incentives in developed countries to cause an underinvestment in the production of new intellectual property.

1. First-Degree Price Discrimination.—First-degree price discrimination is

---

114. *Id.* at 276-77.

115. *See generally* Brook K. Baker, *Patents, Pricing, and Access to Essential Medicines in Developing Countries*, 11 VIRTUAL MENTOR: AM. MED. ASS'N J. ETHICS 527 (2009).

116. *Id.*

117. Yongmin Chen, *Oligopoly Price Discrimination and Resale Price Maintenance*, 30 RAND J. ECON. 441, 442-43 (1999, *available at* http://stripe.colorado.edu/~cheny/research/rje_autumn'99_chen.pdf.

118. *See infra* Part IV.B.

sometimes called personalized pricing.[119] In an effective first-degree price discrimination situation, the intellectual property owner charges each customer (or each LDC in our hypothesized case) the highest cost that each would be willing to pay.[120] Under normal conditions, this is perfect price discrimination and is impossible to achieve.[121] However, if one treats each LDC as a separate "consumer," then this goal may be more precisely, if still imperfectly, achieved.[122] Theoretically, the scope of the intellectual property concessions or tolerated infringements under the pirate code could be tailored on a continuum to each country, region, consumer, industry, or product so as to produce the largest possible revenues to the developed country rights holders that correspond to social welfare maximization in the LDC, which results in economic development.

2. Second-Degree Price Discrimination.—Second-degree price discrimination links price to the differentiating qualities of a product.[123] One example of this is offering lower (but sometimes higher) prices to consumers based on the quantity sold.[124] However, this form of price discrimination may not be effective in the context of developing nations. Intellectual property that is licensed at a high rate in developing countries is likely to be dependent on developing country markets for its economic incentives.[125] As the proposed uncompensated use limitation requires that such uses not reduce incentives for intellectual property, it is unlikely that adjusting price based on large-quantity purchases would be an effective method of price discrimination between developed and undeveloped nations. There are models where this is possible, such as instances when the LDC's government purchases licenses for intellectual property on behalf of its residents. For some goods, industries, or individual rights holders, this model could be the most efficient model to protect the innovation-incentive provided by intellectual property law.

3. Third-Degree Price Discrimination.—The model that this Article finds most useful in developing the thesis that price discrimination can be useful in understanding the effects of uncompensated uses on intellectual property incentives is that of third-degree price discrimination. Third-degree price discrimination links prices to different consumer groups.[126] Here, this Article proposes that certain factors, such as the level of economic development, the characteristics of the intellectual property, and the access rights they represent would define in part the consumer groups with a *suggested* unique end point (at least in economic literature). For some consumers, the price point would

---

119. COSTAS COURCOUBETIS & RICHARD WEBER, PRICING COMMUNICATION NETWORKS: ECONOMICS, TECHNOLOGY AND MODELING 144 (Sheldon Ross & Richard Weber eds., 2003).

120. *Id.*

121. *Id.* at 149.

122. *See id.* at 149-50.

123. Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 72-75 (2001).

124. *Id.*

125. *See supra* text accompanying notes 101-16.

126. Meurer, *supra* note 123, at 69-72.

approach zero. Even if some consumers are receiving access to the intellectual property without payment, this does not mean that the intellectual property owner is receiving zero benefits from a so-called "free rider."[127] In LDCs, the collective free riding problem may result in long-term positive externalities for the rights holder. Free riders may be the phalanx of market penetration into what as the LDC economy develops will become the emerging markets for the rights holder. The use by free riders in the LDC may expand positive network externalities in the developed markets. These and other longer-term incentives must be properly valued by the rights holder, the developed countries, and the LDCs.

The model of third-degree price discrimination under the limited circumstances proposed in this Article suggests that there would be a net positive welfare effect in the LCDs without any corresponding loss to the intellectual property incentives. However, the welfare effect of third-degree price discrimination has long been debated in the economic literature.[128] Third-degree price discrimination may result in a misallocation of output and the total output may differ from the total output under uniform pricing.[129] As a general rule, welfare falls if the total output is the same or lower under price discrimination.[130] So, one prerequisite in order for price discrimination to increase welfare is that there must be an increase in total output. under a price discrimination model.[131] Assuming that the norms of economics remain true and that intellectual property is a normal good, then as the price (including the costs of associated with facing the threat of enforcement) are decreased, the quantity of intellectual property "consumed" should increase and the total output of goods based on foreign intellectual property rights should increase, thus increasing the overall welfare in the LDC.

4. Conclusion.—Regardless of which price discrimination model one adopts as appropriate for this analysis, the economic theory of price discrimination teaches that if one can properly segment the LDC markets for intellectual property from those of more developed nations, then the effects on developed country incentives would be marginal for most forms of intellectual property necessary for economic development. Previously, this Article discussed the Landes and Posner model of copyright and patent law incentives to create new works.[132] According to them, the demand curve for the author-inventor is defined by the infringer's supply curve ($y=y(p,z^0)$).[133] Accordingly, if the LDC market

---

127. *See generally* KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INVENTION (2012).

128. *See* Donghyun Park, *Price Discrimination, Economics of Scale, and Profits*, 31 J. ECON. EDUC. 66 (2000).

129. *Id.* at 67.

130. Inaki Aguirre, *Joan Robinson Was Almost Right: Output Under Third-Degree Price Discrimination*, UNIV. OF THE BASQUE COUNTRY (2008), *available at* http://ssrn.com/abstract=1434865.

131. Park, *supra* note 128, at 67.

132. *See supra* Part II.A.3.

133. LANDES & POSNER, *supra* note 30, at 74.

with the infringing goods can be differentiated from the developed market so that the supply of goods does not change in the developed nations' markets, then the demand curve and the rights holder's profits (incentives) would remain the same, but the LDCs would have an increase in the welfare of its residents.[134]

B. Law of One Price

The unnamed boogeyman, and often the straw man, in the argument against uncompensated uses is that these uncompensated LDC uses will force the developed world prices lower.[135] In economic literature, this is called the law of one price.[136] The law of one price assumes that, after adjusting for costs and purchasing power parity, a good must sell for the same price in all markets.[137] The underlying assumption is the arbitrage will result in goods moving from low price, low demand regions (decreasing supply) to higher-demand, higher-priced locations (increasing supply) until the two markets reach price parity.[138] An intuitive misapplication of the law of one price is why some developed nation intellectual property holders insist on enforcing intellectual property rights in the LDC at costs well in excess of any expected market return.[139] Rights holders worry that the lower price pirate goods will affect the price of the authorized good.[140]

The law of one price relies on arbitrage between markets.[141] This Article posits that developed nations can adequately police their borders and internal markets and provide sufficient incentives for the beneficiary LDC nations to police their internal markets and trans-border flows so as to reduce the possibilities of arbitrage.[142] This Article concedes that the global economy is starting at some level of trans-border trade from the developing to the developed world of goods that is protected in the receiving nation by intellectual property laws. However, the extent of that trade and the scope of its effect on the market incentives for the creation and dissemination of intellectual property in the developed countries are highly contested.

Further, the LDCs' goods, although perhaps similar in appearance to those goods from developed countries, would not have many of the essential intangible

---

134. *See* supra Part II.A.3.

135. *See, e.g.*, Sandra Marco Colino, *On the Road to Perdition? The Future of the European Car Industry and Its Implications for EC Competition Policy*, 28 NW. J. INT'L L. & BUS. 35, 42 (2007).

136. *Id.*

137. *Id.*

138. *Law of One Price,* INVESTOPEDIA, http://www.investopedia.com/terms/l/law-one-price.asp (last visited Aug. 24, 2014).

139. *See, e.g.*, Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT L.J. 259, 325-26 (2007).

140. *Id.*

141. *Law of One Price*, *supra* note 138.

142. *See infra* Part III.C.

qualities that make them attractive to consumers, such as warranty protection and access to customer services. Additionally, as this Article contends that trademarked goods should be excluded from the proposed limited uncompensated user regime, it is unlikely that goods produced in the LDC will serve as a ready substitute for purchase of an authorized or properly branded good in the developed country.

C. Marginal Utility of LDC Markets as Providing Incentives

Having established that, theoretically, economic theory would permit the segmentation of the disincentives of pirate code LDC markets from the incentives of the developed country markets, one must now consider when the LDC markets play any significant role in the research, development, or commercialization of non-LDC specific products. If the first principle of the utilitarian justification for intellectual property is to provide an economic incentive to create and to disseminate intellectual property,[143] then one must consider whether the LDC markets actually provide such an incentive. First, intellectual property, as a general rule, is already over incentivized in the developed countries.[144] Over the past decades, the movement of intellectual property protection has been for stronger, longer, and more effective protection.[145] Second, if for the sake of argument, one assumes that the level of protection in the developed countries is finely calibrated to the optimal level so as to provide incentives without unnecessary deadweight loss, the LDCs still represent an insignificant market for the sale of licensing of developed nations' intellectual property rights.[146] Realistically, they play little or no role in the creation, dissemination, or commercialization of products protected by intellectual property rights produced for the developed nations' markets.[147]

Any analysis of the economic role of an LDC must consider at least two different markets for intellectual property: (1) intellectual property products that are produced primarily for the LDCs and for which the LDC provides the critical market; and (2) goods that are produced primarily or even solely for developed country markets for which the LDC is merely an incidental beneficiary of their

---

143. Moore, *supra* note 43.

144. *See* Doris Estelle Long, *First, "Let's Kill All the Intellectual Property Lawyers!": Musings on the Decline and Fall of the Intellectual Property Empire*, 34 J. MARSHALL L. REV. 851, 853-56 (2001).

145. *Id.* at 854-56. In addition to increasing statutory protection, intellectual property owners are increasingly closing any gaps in that protection through technological protection measures (digital rights management), private law (licensing), imposing liability on so-called gate keepers, and of course, changing the default statutory fair use or other exceptions to the scope of protection to their statutory rights.

146. *See Economic Development and Patents*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/patent-law/en/developments/economic.html (last visited Sept. 19, 2014).

147. *See id.*

creation.[148] The first market type demands that the LDC provides the incentive to provide these works.[149] So, this Article focuses solely on the second type of intellectual property where the demand from the LDC is irrelevant to the creation of the work, but for whom access conveys a significant advantage.

There are forty-eight LDCs according to the United Nations.[150] A least developed country is defined by the United Nations as having the lowest socioeconomic development using the human development index.[151] To be defined as an LDC, the country must have a gross national income of $992 to $1,190 per year, human resource weakness, and vulnerability.[152] LDCs constitute about twelve percent of the world's population, but they represent less than two percent of the world GDP and approximately one percent of global trade.[153] Another way of considering this disparity is that LDCs collectively represent 878.2 million people, and these people collectively represent a GDP roughly twice the market capitalization of Google, which as measured by market capitalization is the *third* largest publicly traded company in the United States.[154]

---

148. *See, e.g.,* World Intellectual Property Organization Committee on Development and Intellectual Property (CDIP), Geneva, Switzerland, April 26-30, 2010, *Project on Intellectual Property and Product Branding for Business Development in Developing Countries and Least-Developed Countries (LDCS)*, (March 2, 2010), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_5.pdf (describing a program to utilize intellectual property concepts within LDC markets).

149. It is important to remember that all developing countries will not be in the same category for each type of intellectual property or even for individual embodiments of intellectual property. For example, a malaria drug will probably require a developing country incentive, but only from those that have a viable economic market for the pharmaceutical. This determination will be based on the demand curve of each country for each embodiment or use of intellectual property. To reiterate, the solution proposed in this Article is fact specific to each LDC and is dependent on the specific characteristics of its market for each good that is covered by intellectual property protection, and the author clearly rejects any one-size-fits-all approach to economic development.

150. *List of Least Developed Countries*, UNITED NATIONS. http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf (last visited Sept. 19, 2014). Unfortunately, this is a relatively stable classification. Since 1971, only three countries have graduated into the next level developing country status, and none have moved into the coveted developed nation status.

151. *See* Franco Gandolfi & Philip A. Neck, *Poverty: A Social Disgrace and Dilemma*, *in*, SUSTAINABLE ECON.: CORPORATE, SOCIAL AND ENVTL. RESPONSIBILITY 73, 76 (2010).

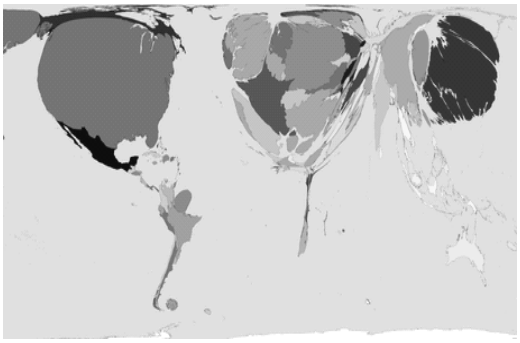
152. *The Criteria for Identifying Least Developed Countries*, UNITED NATIONS DEV. POLICY AND ANALYSIS DIV. (August 2013), http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_definitions.shtml (defining "health resources weakness" as weakness in health, nutrition, education, and literacy).

153. *About LDCs* UNITED NATIONS OFFICE OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES, & SMALL ISLAND DEVELOPING STATES, http://unohrlls.org/about-ldcs/ (last visited Sept. 19, 2014); *see generally Least Developed Countries: UN Classification*, THE WORLD BANK http://data.worldbank.org/region/LDC (last visited Sept. 19, 2014) (showing more statistical information about the LDCs).

154. Steven Russolillo, *Google Climbs Market-Cap Ladder; Takes Reins as Third-Biggest U.S.*

There is a cliché that a picture is worth a thousand words. In the diagram below, the larger the size of the country, the wealthier it is.

Illustration of GDP Wealth[155]



The small proportion of the world's wealth that is represented by the Global South and that the LDCs is almost infinitesimally small. In fact, they are just a bit larger than the economy of a small European country approximately the economic size of The Netherlands.[156]

III. PRIVATEER OR PIRATE

In the Age of Pirates, whether one was a pirate or privateer depended substantially on whose vessels were being captured (and where).[157] Many scholars and developing nations argue that the uncompensated intellectual property uses or technology transfers posited in this Article are already within the scope of permissible activities permitted to the LDC (the "privateer model").[158] Many developed country governments, speaking solely on behalf of their intellectual rights holders, disagree and contend that any uncompensated use is

---

Company, MARKET BEAT (Oct. 2, 2012), http://blogs.wsj.com/marketbeat/2012/10/02/google-climbs-market-cap-ladder-takes-reigns-as-third-biggest-u-s-company/; *see also* Brian Womack, *Google Briefly Tops Exxon as 2nd-Most Valuable U.S. Firm*, BLOOMBERG (Feb. 7, 2014), http://www.bloomberg.com/news/2014-02-07/google-passes-exxon-to-become-second-most-valuable-u-s-company.html.

155. *GDP Wealth*, WORLDMAPPER, http://www.worldmapper.org/display.php?selected=169 (last visited Sept. 19, 2014). On this map, the fatter the country or region, the wealthier it is, so compare the obese North with the famished South.

156. *Compare Least Developed Countries: UN Classification*, *supra* note 153 (showing a GDP of $775.4 billion), *with Netherlands*, THE WORLD BANK, http://data.worldbank.org/country/netherlands (last visited Aug. 26, 2014) (showing a GDP of $800.2 billion).

157. *See, e.g.*, *Francis Drake*, WIKIPEDIA, http://en.wikipedia.org/wiki/Francis_Drake (last updated Aug. 27, 2014); *see also* Brian Whitenton, *The Difference Between Pirates, Privateers and Buccaneers Pt. 1*, THE MARINERS' MUSEUM (Sept. 20, 2012), http://www.marinersmuseum.org/blogs/library/?p=1054.

158. *See infra* Part IV.A.1.

rank order, unmitigated, and shameless piracy.[159] This section will briefly contend that this activity is more akin to privateering than piracy; it will conclude, however, that even if uncompensated uses of intellectual property in the LDC is common piracy, the international community should adopt an informal policy (a "pirate code") to govern these activities to ensure that they do not threaten intellectual property incentives in the developed countries. For example, the developed countries could more aggressively police their borders to prevent counterfeit or infringing goods from being imported into developed country markets rather than shifting the costs and burdens of enforcement to developing countries. The most effective gatekeeper with the greatest incentives to protect a developed country's borders, markets, and intellectual property incentives is the sovereign developed country itself.

A. The LDC as Privateer

The difference between a privateer and pirate is that one is acting under the color of law, while the other operates without even a colorable legal justification for their piratical acts.[160] The difference does not lie in the economic effect on maritime commerce. This section will explore whether there are colorable or even sound bases for which more economically developed nations should accept the fact that the LDCs could, as a question of internal domestic development policy, permit uncompensated uses of the more developed nations' intellectual property. The various treaties that create the international intellectual property regime have inherent exceptions and limitations that provide a colorable basis for some uncompensated uses.[161] This area of research, namely the scope of appropriate protection under the international intellectual property regime, has been exhaustedly theorized and researched by numerous economic and legal scholars; therefore, there is little that this Article could add to the voluminous literature.

For the sake of thoroughness, this section will briefly discuss a few of these limitations and exceptions. Also, there may be some general principles of law, such as the civil law doctrine of abuse of right that would preclude domestic enforcement of foreign intellectual property rights. This section concludes that there are sufficient intentional exceptions, and perhaps unintentional ambiguities, that would permit many uncompensated uses under the color (if not the spirit) of

---

159. JOHNS, *supra* note 11, at 3-8.

160. Christopher Minster, *Pirates, Privateers, Buccaneers, and Corsairs*, ABOUT.COM, http://latinamericanhistory.about.com/od/Pirates/a/Pirates-Privateers-Buccaneers-And-Corsairs.htm (last visited Sept. 19, 2014); *see* U.S. Const. art. 1, § 8, cl. 11 (Letters of Marque and Reprisal).

161. WORLD INTELLECTUAL PROP. ORG., REPORT ON THE INTERNATIONAL PATENT SYSTEM, (2008), *available at* http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_3_rev.pdf; *see also* Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), Geneva, Switzerland, Dec. 6-7, 1999, *Exceptions and Limits to Copyright and Neighboring Rights,* (Dec. 3, 1999), *available at* http://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_1.doc.

intellectual property law (the "privateer model"). However, until it is demonstrated that such uncompensated uses do not threaten the utilitarian justifications proffered by developed countries for intellectual property protection and the rational interests of intellectual property owners, these uncompensated uses, despite there being a colorable basis for their legality, will continue to remain rare as an instrument of economic development.

1. Three-Step Tests and Other Limitations.—The major international conventions that require nations to protect intellectual property, and the global trade regime that requires their enforcement, contain specific exceptions and limitations as well as a general catchall exception usually referred to as a three-step test.[162] Three-step tests are a very recent addition to the international conventions to protect intellectual property.[163] Rhetorically, the three-step tests have become a bogeyman, with which opponents balanced intellectual property protection threaten legislatures, policy makers, and governments. If these governments consider laws or policies that create robust exceptions to the claims of intellectual property rights holders then under a three-step test such laws or policies will place the nation outside international intellectual property norms.[164] Perhaps the most cited example of a three-step test is Article 9(2) of the Berne Convention. Article 9(2) provides that: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[165]

So, the core of the three-step test is that when there are (1) certain special cases, which (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author, then the country may provide for exceptions that balance the interests of foreign rights

---

162. *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), arts. 13, 30, Apr. 15, 1994; Berne Convention for the Protection of Literacy and Artistic Works, art. 9, Sept. 9, 1886; *see also Berne Three-step Test*, WIKIPEDIA http://en.wikipedia.org/wiki/Berne_three-step_test (last updated Mar. 15, 2014) ("Since then, the three-step test has been modified and transplanted into the Agreement on Trade-Related Aspects of Intellectual Property Rights, the WIPO Copyright Treaty (Article 10), the WIPO Performances and Phonograms Treaty, the Directive on the legal protection of computer programs (Article 6(3)), the EU Database Directive (Article 6(3)), and the EU Copyright Directive (Article 5(5)"); *see generally* MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW (2004).

163. *See* William Patry, *Fair Use, the Three-Step Test, and the Counter-Reformation,* THE PATRY COPYRIGHT BLOG (Apr. 2, 2008), http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html (noting that the most famous three step test, Art. 9(2) of the 1886 Berne Convention, was not added until 1971).

164. *Id.*

165. Berne Convention for the Protection of Literacy and Artistic Works, art. 9(2), Sept. 9, 1886.

holders with its national public policy priorities.[166]

There is no authoritative tool for interpreting three-step tests.[167] Many prominent scholars have adopted the following interpretative tool:

> When correctly applied, the Three-Step Test requires a comprehensive overall assessment, rather than the step-by-step application that its usual, but misleading, description implies. No single step is to be prioritized. As a result, the Test does not undermine the necessary balancing of interests between different classes of right holders or between right holders and the larger general public. Any contradictory results arising from the application of the individual steps of the test in a particular case must be accommodated within this comprehensive, overall assessment.[168]

In light of the history and purposes of Article 9(2), one may argue that even at the macro level, LDCs are "special cases" in so far as they are well defined, circumscribed exceptions to the general enforcement norms. However, at the micro level of domestic intellectual property enforcement, the three-step test paradigm permits nations to grant well-defined exceptions to promote their domestic development agenda so long as the other factors are appropriately balanced to protect the economic incentives of the rights holders.[169] The normal exploitation of the work suggests market exploitation in the LDCs granting the limitation rather than the abstract possible examples of exploitation that the rights holder, or similarly situated rights holders may elect to engage in other countries or regions. Other than moral rights, a topic on which this Article is agnostic, the legitimate rights of an intellectual property holder are, at best, to receive economic remuneration at a fair market value and, at worst, to receive only sufficient rights to provide an incentive that results in the progress of science and the useful arts.[170] The limitation of rights in the LDCs is unlikely to prejudice the

---

166. *See* Martin Senftleben, *The International Three-Step Test A Model Provision for EC Fair Use Legislation*, 1 JIPITEC 67 (2010), *available at* https://www.jipitec.eu/issues/jipitec-1-2-2010/2605/JIPITEC%202%20-%20Senftleben-Three%20Step%20Test.pdf ("[T]he first three-step test in international copyright law was devised as a flexible framework, within which national legislators would enjoy the freedom of safeguarding national limitations and satisfying domestic social, cultural, and economic needs.").

167. WILLIAM F. PATRY, PATRY ON FAIR USE § 8:2 (2014) ("The 1965 Committee of Governmental experts unequivocally took the view that in the course of the preparatory work for the Stockholm conference that 'the main difficulty was to find a formula which would allow of exceptions, bearing in mind the exceptions already in many domestic laws.").

168. CHRISTOPHE GEIGER ET AL., DECLARATION: A BALANCED INTERPRETATION OF THE "THREE-STEP TEST" IN COPYRIGHT LAW, *available at* http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf; *see also* PATRY, *supra* note 167.

169. *Cf.* Annette Kur, *Of Oceans, Islands, and Inland Water—How Much Room for Exceptions and Limitations Under the Three-Step Test?*, MAX PLANCK INST. FOR INTELLECTUAL PROP., COMPETITION, AND TAX LAW 31-40 (2008) (discussing options for flexibility within the three-step test).

170. *Philosophy: TRIPS Attempts to Strike a Balance*, WORLD TRADE ORG., http://www.wto.

legitimate interests of the rights holder.

This conclusion assumes that the three-step test would apply in a domestic legal context; however, treaty obligations or rights under Berne, or similar conventions, are not personal as in that these rights are vested in the individual rights holder.[171] But rather, these treaties create rights that must be enforced by nation-states who are members of the treaty.[172] Pre-TRIPS, nations could seek to protect their citizens' treaty rights in the International Court of Justice.[173] Post-TRIPS, the enforcement measures focus on panel decisions and the withdrawal of trade concessions by aggrieved nations.[174] The penalty for breaching a WTO obligation is the possibility of retaliation.[175] Once approved, the retaliation is not directed against the government of the offending country but against the economic and trade rights of its citizens.[176] Accordingly, developed countries may select which uses of their citizens' intellectual property to challenge using the WTO process and which uses should be a matter of the domestic laws of the country where the treaty rights are arguably violated, and may also tailor their response in a proportional manner when the rights of their citizens have been violated.[177]

Finally, as a matter of policy, there may be institutional levers within the WTO to accomplish these goals.[178] The Doha Declaration represents merely one example where WTO members were able to negotiate an intellectual property strategy that balanced the needs of both rights holders and rights users in the context of the use of patented pharmaceuticals in the developing world.[179] Also, the WTO panels have some discretion when interpreting and developing trade law.[180] There is some flexibility in balancing the letter of the treaty in light of its

---

org/english/tratop_e/trips_e/factsheet_pharm01_e.htm (last visited Sept. 19, 2014).

171. *Summary of the Berne Convention for the Protection of Literacy and Artistic Works (1886)*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Sept. 19, 2014).

172. *Id.*

173. ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, COLLECTED COURSES 283 (2000); DAVID NIMMER, COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 108 (2003).

174. *See* Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 727-82 (2011).

175. *See* Frederick Abbott, *Cross-Retaliation in TRIPS: Options for Developing Countries*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. (Apr. 1, 2009), http://www.ictsd.org/themes/innovation-and-ip/research/cross-retaliation-in-trips-options-for-developing-countries.

176. *Id.*

177. *Id.*

178. *See generally* James Thuo Gathii, *The Legal Status Of The Doha Declaration On Trips And Public Health Under The Vienna Convention On The Law Of Treaties*, 15 HARV. J.L. & TECH. 291 (2002), *available at* http://jolt.law.harvard.edu/articles/pdf/v15/15HarvJLTech291.pdf.

179. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1 (2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

180. Gathii, *supra* note 178, at 299.

negotiating history and its stated purposes.[181] Therefore, the WTO/TRIPS regime is not an inherent obstacle to this Article's thesis; rather, it is potentially one of the policy levers that could enable it.

2. Abuse of Right.—"*[M]ale enim nostro iure uti non debemus*—we should not exercise our rights wrongfully" is an ancient principle of Roman and now, modern civil law.[182] This is a bit of a digression, but even if there is a legal right under intellectual property law to engage in the enforcement of the property right, these enforcement rights are not without limits.[183] In addition to the limitations inherent in the source of the right, for example, affirmative defenses, fair uses, subject matter, and other limitations in the organic act creating the intellectual property right, there is also a general limiting principle in civil law: the abuse of right[184]

> At least one of four conditions "is required to invoke the [abuse of right] doctrine: (1) the predominant motive for exercising the right is to cause harm; (2) no serious or legitimate motive exists for exercising the right; (3) the exercise of the right is against moral rules, good faith, or elementary fairness; or (4) the right is exercised for a purpose other than that for which it was granted."[185]

German law represents the typical civil law abuse of right factors: whether the exercise of rights is grossly inequitable under the circumstances or is carried out with no regard for the legitimate interests of other parties; the right is acquired through bad faith or in violation of the law; the exercise of rights is inconsistent with past conduct; or the right is exercised only for the purpose of causing harm.[186] However, the example of Swiss law may be more instructive and analogous to common law courts.[187] The Swiss Code provides that "the manifest abuse of a right is not protected by law."[188] Significantly, in radical departure for a civil law country, "article 1 of the Swiss Civil Code which, as an unprecedented measure, gives quasi-legislative functions to the courts by authorizing the judges to substitute their own interpretation where the text of the law or the accepted

---

181. *Id*.

182. Vera Bolgar, *Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1015, 1017 (1975), *available at* http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=4114&context=lalrev; *see also Abuse of Rights,* WIKIPEDIA, http://en.wikipedia.org/wiki/Prohibition_of_chicane#cite_note-1 (last updated Apr. 5, 2014).

183. *Id.*

184. *Id*.

185. N. Stephan Kinsella, *Civil to Common Law Dictionary*, 54 LA. L. REV. 1265, 1266 (1994), *available at* http://www.kinsellalaw.com/wp-content/uploads/publications/kinsella_civil-common-law-dictionary.pdf.

186. Bolgar, *supra* note 182, at 1027-28.

187. *Id.* at 1031.

188. *Id.* at 1031 n.83 (translated from original language).

custom is silent or inadequate."[189]

Under the conditions theorized in this Article, at least three of the four black letter law conditions may be present when enforcing intellectual property rights in a LDC.[190] The Author assumes that the exercise of the intellectual property right is done is not for the primary purpose of causing harm. The economic damage to the economy of LDCs is merely an unintentional, unfortunate, historical externality—an unfortunate incidental byproduct of colonization and globalization. However, the other three conditions are usually present in the case of enforcing most intellectual property rights in LDCs.

First, as was discussed earlier, if one defines the legitimate purpose for enforcing intellectual property rights as to retain or obtain the economic incentives provided to create new works of intellectual property,[191] then often enforcement of those rights, especially against small non-commercial users in an LDC, lack a legitimate economic motive and are being exercised for a purpose other than that for which the rights were granted. One may think of this as a modified, *T.J. Hooper*[192] or *Carroll Towing*[193] test for morality. This balancing of costs versus benefits of enforcement weighs especially in favor of non-enforcement in the LDC. These enforcement efforts fail even if one assumes that the individual acts of judicial or administrative enforcement were meant to have an *ad terrorem* effect on both commercial and non-commercial piracy in general.

The second condition requires a nuanced judgment whether "the exercise of the [intellectual property] right is against moral rules, good faith, or elementary fairness."[194] The author argues that this factor too is susceptible to economic analysis. If the direct costs of enforcement, private litigation, and public costs (developed nations' political and economic costs to pressure LDCs as well as LDCs' costs to adjudicate and enforce intellectual property rights) exceed either the increased sales or licensee fees to the intellectual property owner (or other incentives) or the damage to the local economy, then one may have some sense of elementary fairness (or at least test whether such enforcement is economically rational).[195]

Having shown that there is no injury to the economic incentives that underlay intellectual property rights,[196] there is a significant question as to whether there is a legal basis on which to ignore the effects of enforcing these rights. Absent the sound economic utilitarian justification underlying modern intellectual

---

189. *Id*. at 1031.

190. Kinsella, *supra* note 185, at 1266.

191. Besen & Raskin, *supra* note 31, at 5.

192. The T.J. Hooper, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

193. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.").

194. Kinsella, *supra* note 185, at 1266.

195. Bolgar, *supra* note 182, at 1019-20 (citing Court of Cassation, CASS. CIV., Feb. 18, 1907, D.1907.1.385, 387 (Switz.)).

196. *See supra* Part III.C.

property, one may conclude that requiring the domestic enforcement of intellectual property rights in the LDCs that benefit no one and which may harm the weakest and most desperate communities in our global village is an abuse of right. Civil law does not protect the manifest abuse of a legal right.[197] Although, outside context of real property law, there is not a clear equivalent to an abuse of right in the common law; however, one can see other doctrines that rely on similar jurisprudential moorings, such as the common law prohibition of a spite fence.[198] The law permits useful-fences, (even if it injures a neighbor), but prohibits spite fences because a useful-fence at least benefits one party while a spite fence benefits no one economically while causing an unnecessary and intentional injury to another.[199]

B. A Pirate Code for LDC

At first blush, permitting uncompensated uses of developing countries' intellectual property by the LDC may be viewed as a radical solution and one that totally disregards the underlying first principles of law and economics, and a decent respect for individual property rights. However, individual property rights are not unexamined axioms outside of law and economic theory, but rather property rights are critically subject to the same tools of analysis and the similar limitations as other legal institutions or transactions.[200] At least in the domestic context, the concept of uncompensated use is not a radical position. Professors Landes and Posner, in their seminal work *The Economic Structure of Intellectual Property*, analyzed the limits of property rights in differing forms of intellectual property.[201] First, they note the difference between theft of real property and intellectual property piracy.[202] They conclude:

> But when the purchaser of a software program makes a copy for someone else, he does not reduce the number of copies in the software producer's inventory. If the someone else was not a potential purchaser from the producer, the producer loses nothing from the unauthorized copying. Weak demand for drugs (for example, to treat AIDS in Africa) is an example of how piracy need not reduce the sales revenue of an intellectual property owner."[203]

They then discuss their principled (or principal) objection to piracy.[204]

---

197. Kinsella, *supra* note 185, at 1266.

198. *See* Dowdell v. Bloomquist, 847 A.2d 827, 830-33 (R.I. 2004).

199. *See generally* M.L. Cross, Annotation, *Spite Fences and Other Spite Structures*, 133 A.L.R. 691 (1941).

200. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 88-119 (1988) (discussing the intersection of property rights and economics).

201. *See generally* LANDES & POSNER, *supra* 30.

202. *See id.* at 47.

203. *Id*.

204. *Id*.

> We are not suggesting that piracy is harmless, let alone beneficial, to creators of expressive works and should therefore be permitted. The fact that some recipients of pirated copies would not have paid for them does not imply that all or most would not have paid. Creators of expressive works do obtain and enforce copyright, as they would not do if piracy benefited them on balance. No copying 'privilege' for those unwilling to pay the copyright owner's price would be feasible because the law could not distinguish between those who really were unwilling to pay and those who faked their unwillingness in order to avoid having to pay.[205]

Landes and Posner's arguments against uncompensated uses fail in the context of LDCs. First, it is not clear that, in general, intellectual property owners properly value the indirect economic benefits that they may receive by uncompensated uses, especially network effects.[206] Second, there is some evidence (albeit hardly conclusive) that casts some doubt on Landes and Posner's assumption of the inherent dishonesty in human nature that people will lie to get something for free for which they would have otherwise have had to pay.[207] iTunes and its competitors are excellent examples of companies whose consumers buy music that they could freely access without cost (including real risk of enforcement) on the World Wide Web.[208]

Third, and most importantly for this Article, the last Landes and Posner limitation, that the law cannot distinguish between those unwilling to pay and those unable to pay,[209] does not hold true in the aggregate markets of developing countries. It may be difficult to identify individual consumers who may or may not be willing to pay—consumers who feel no shame on free riding on the efforts of others without making a corresponding contribution.[210] However, in the aggregate of a nation-state, one can use economic and demographic statistical data to determine whether that country is unable to pay or unwilling to pay. As this Article is focused on aggregate incentives, this distinction between willing and unwilling, able to pay and unable to pay, could result in each type of good being protected by differing levels intellectual property law enforcement. It could even be finely tailored to individual products by individual manufacturers.

---

205. *Id*.

206. *See generally* Ariel Katz, *A Network Effects Perspective on Software Piracy*, 55 U. TORONTO L.J. 155 (2005).

207. *See, e.g.*, R. Preston McAfee, *Price Discrimination*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 465, 465 (2008) (providing an example of Dell selling the same memory module to different groups based on self-identification as government, small business, large business, or consumer status).

208. Jacqueline Sahagian, *Study: iTunes Is More Profitable Than Xerox and Time Warner* Cable, WALL ST. CHEAT SHEET (Feb. 12, 2014), *available at* http://wallstcheatsheet.com/stocks/study-itunes-is-more-profitable-than-xerox-and-time-warner-cable.html/?a=viewall.

209. *See* LANDES & POSNER, *supra* 30, at 47.

210. *Id*.

Concededly, there will be some free riders in the LDC who are both willing and able to pay, but the vast majority of the beneficiaries of the proposed pirate code of uncompensated uses represent deadweight loss but for the pirate code.

Even lawless brigands must be governed by a code. Whether privateer or pirate, there must be a code to govern these uncompensated uses; otherwise, the assumed economic incentive (as a prerequisite) for the creation of intellectual property would quickly fail. As any maritime historian or viewer of the recent *Disney Pirates of the Caribbean*[211] movies knows, the life of pirates, brigands outside of civil society having no allegiance to king or country, was not lawless. It was in fact governed by a pirate code.[212] The pirate code governed activities that took place in the shadow of double law, and failure to comply with the pirate code could result in the offending pirate being abandoned to the law of man, the law of nature, or submission to the judgment of the captain and crew.[213] This Article proposes, as a response of Landes and Posner's third criticism of intellectual property piracy, the creation of what will be called solely for the purposes of rhetoric device a pirate code—less rhetorical but more accurately, recommendations for policy choices to govern international enforcement of intellectual property rights in the LDC market.

The proposed pirate code could be very simple and should be grounded in law and economics. Activities that may constitute intellectual property piracy, especially in developing countries, should be measured against a golden rule of first principles. Activities that harm no one, or at least do not harm the intellectual property incentives in individual cases (as to individual intellectual property rights holders and markets) and that benefit the local economy should be tolerated. Enforcement efforts should largely focus on stopping activities that interfere with intellectual property incentives with increasing levels of enforcement with the severity of the impact of the use on incentives.

IV. BENEFITS OF A PIRATE CODE

The proposed pirate code promotes economic development in the LDCs at a minimal cost to developed world rights holders and promotes economic incentives that justify intellectual property rights. In essence, the pirate code permits LDCs to capture deadweight loss and to convert it into consumer surplus. It also permits LDC to stop expending public funds to enforce rights that provide no benefit either to the rights holder bringing the action or to the domestic economy. This process advantages the LDCs and the developed countries, and perhaps even developed countries' rights holders. This section will analyze some of the benefits of a pirate code.

---

211. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003).

212. *See generally Pirate Code of Conduct*, ELIZABETHAN ERA, http://www.elizabethan-era.org.uk/pirate-code-conduct.htm (last visited Sept. 19, 2014).

213. *Id*.

A. Benefits for the LDCs

Assuming that the economic incentives, if any, provided by the LDC are at best insignificant, then the developed country's internal utilitarian justification for exporting strong intellectual property rights fails, and one must then consider the effect of lax or no enforcement on the economic development of the developing country.[214] Uncompensated intellectual property transfers to developing countries promote economic efficiency, development goals, and constitute a type of foreign aid subsidy.[215]

> To a developing country, the economic effect is similar whether a developed country transfers $1 million in foreign aid, purchases a $1 million intellectual property license for the benefit of the developing country, or tacitly permits $1 million worth of unlicensed intellectual property use in a developing country. The first two examples, a transfer payment of $1 million or a purchase of a $1 million intellectual property license, represent an expense borne by the overburdened taxpayers of the developed country.[216]

Further, the economic value-received or economic development effect of such payments or licenses are often confounded with accusations of fraud, waste, and inefficiency.[217] However, willful blindness or tacit consent to the use of unlicensed intellectual property may promote development goals more efficiently—often without any measurable cost to the "donor country" or "rights-holder."[218] The first two examples are top-down, may have significant transaction costs, and are not necessarily responsive to market forces in the developing country.[219] "Acquiescence to unlicensed intellectual property transfers ameliorates most of these costs."[220] Furthermore:

> Absent strong domestic intellectual property enforcement, the developing country will not pay higher prices for imported goods and technologies since these goods and technologies could be produced locally or imported from another developing country (one with a slightly higher level of industrialization) without paying an intellectual property premium. Industries in developing countries that produce "pirated" products for their own marketplace, or for that of other developing

---

214. Of course, if this was litigation and not policy analysis, the burden would shift to developing countries to prove that uses in individual developing countries are resulting in a marginal decrease in the economic incentives to create or disseminate intellectual property.

215. *See* Llewellyn Joseph Gibbons, *Do as I Say (Not as I Did): Putative Intellectual Property Lessons for Emerging Economies from the Not So Long Past of the Developed Nations*, 64 SMU L. REV. 923, 927 (2011).

216. *Id*.

217. *Id*.

218. *Id*.

219. *Id*.

220. *Id*.

> countries, may continue or even thrive in business by catering to the demands of other developing countries—thus expanding domestic manufacturing capability, increasing domestic research and development capability, promoting local economic development and jobs.[221]

In the long run, this creates a sound basis on which to grow a developing country into a developed economy, which ultimately will respect foreign intellectual property rights in its own self-interest.[222]

B. Benefits for Developed Countries

Developed countries would also benefit from this proposed policy. A tolerated uncompensated use policy would more effectively promote economic growth with the concomitant increase in general welfare in developing countries. This would result in increased political stability, the creation of new markets for developed country's goods and services, and in the long run promote respect for international intellectual property norms. The normalization of these common but illicit practices would bring them more readily under some forms of regulation and control using the proposed pirate code model. This policy would also decrease demand for direct foreign aid and could be viewed as a good faith effort to meet the WTO promises of increased technology transfer to developing countries.

The extent of piracy and economic effects of uncompensated uses as a substitute for purchasing an authorized copyright or a licensed use are unclear in the international trade area.[223] The U.S. Government Accounting Office (GAO) concluded that while piracy was a problem that "[t]hree widely cited U.S. government estimates of economic losses resulting from counterfeiting cannot be substantiated due to the absence of underlying studies."[224] The GAO reported that the theoretical negative effects from piracy also call into question the survey data adduced by leading industry groups.[225] Significant to this Article's thesis, these studies counter intuitively assume that every unauthorized use is a substitution for a sale or license.[226] Further, these studies often value the

---

221. *Id.* at 927-28.

222. *Id.* at 927.

223. *See generally* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS (2010), *available at* http://www.gao.gov/assets/310/303057.pdf [hereinafter GAO].

224. *Id*. at 2.

225. *Id*. at 25-26.

226. *Id.* at 17; *see also* Brian Jackson, *Anti-Piracy Group's Study 'Shockingly Misleading', Says Expert*, ITBUSINESS.CA (Sep. 17, 2010), http://www.itbusiness.ca/news/anti-piracy-groups-study-shockingly-misleading-says-expert/15390 (Canada reduced its piracy, as calculated by the Business Software Alliance ("BSA"), by five percent using the BSA model, which should have resulted in 2,600 more jobs and $1.4 billion more in the GDP. As such, this model substantially over predicted the effects of a net reduction in piracy.); Glyn Moody, *BSA's Piracy Numbers: Less*

counterfeit product at the highest theoretical market price for the authorized copy (so-called "manufacturer's suggested retail price"), and often includes the value of warrantees or services that are obviously not provided to unauthorized purchasers and does not include ordering discounts.[227] This GAO finding is consistent with the Organisation for Economic Co-operation and Development's (OECD) conclusion that national assessments "rely excessively on fragmentary and anecdotal information; where data are lacking, unsubstantiated opinions are often treated as facts."[228]

The available data in the domestic arena is not better. Perhaps, the best research on whether unauthorized uses substitute for market price purchases was conducted as part of the *A&M Records, Incorporated v. Napster, Incorporated* litigation.[229] The *Napster* litigation represented one of the few instances in which there was a relatively level playing field in terms of research resources.[230] *Napster* is instructive because unlike the situation posited in this Article where there is much need but little or no market price demand, in the case of *Napster*, one may reasonably assume that the vast majority of Napster users could have purchased some or all of the music that they ultimately downloaded for free.[231] Also, one may assume a relative ease of access and availability of resources to conduct these studies. Yet, despite of all of these advantages to opponents of uncompensated uses, the results of the survey evidence, at best, are mixed.[232] One prominent economist concluded after analyzing the *Napster* litigation survey reports that "[a]ll in all, my reading of the reports in the case indicates that the plaintiffs in the case failed to make as persuasive a case for harm as the defense did for the lack of harm."[233] So, the domestic evidence (in the USA) is a fragile

---

Than They Seem, COMPUTERWORLDUK (Sept. 17, 2010, 2:54 PM), http://blogs.computerworlduk.com/open-enterprise/2010/09/bsas-piracy-numbers-less-than-they-seem/index.htm.

227. *See* Jackson, *supra* note 226.

228. GAO, *supra* note 223, at 16; *see also* Timothy B. Lee, *Swiss Government: Fling-Sharing No Big Deal, Some Downloading Still Ok*, ARSTECHNICA (Dec 5, 2011), http://arstechnica.com/tech-policy/2011/12/swiss-government-file-sharing-no-big-deal-some-downloading-still-ok/.

229. *See* A&M Records Inc., v. Napster, Inc., No. C9905183MHP, 2000 WL 1170106, at *2-11 (N.D. Cal. Aug. 10, 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001); A&M Records Inc., v. Napster, Inc., No. C000074MHP, 2000 WL 1170106, at *2-11 (N.D. Cal. Aug. 10, 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001); (both cases discussing the survey evidence presented to the court).

230. *Id.*

231. *See* Evan Hansen, *Study: Napster Users Buy More Music*, CNET (July 20, 2000), http://news.cnet.com/2100-1023-243463.html.

232. *See* Stan Liebowitz, *Policy Analysis No. 438: Policing Pirates in a Networked Age*, CATO INST. (May 15, 2002), http://www.cato.org/publications/policy-analysis/policing-pirates-networked-age.

233. *Id.* at 14; *see id.* at 14 n.14 (concluding that "[Judge Patel's] decision was in the end correct, even if not supported by the evidence at hand."); *see also* Martin Peitz & Patrick Waelbroeck, The Effect of Internet Piracy on CD Sales: Cross-Section Evidence (2004) (unpublished manuscript) (*available at* https://www.econstor.eu/dspace/bitstream/10419/76503/1/cesifo_wp1122.pdf) (suggesting a two percent loss of CD sales based on downloading).

basis on which to extrapolate the effects of uncompensated uses in the LDC on developed country intellectual property incentives.

In the run of the mill case, the party commencing the litigation is usually responsible for proving damages.[234] Rarely does the court impose a burden to disprove damages as part of the defendant's case.[235] However, as a matter of policy and law, the question at hand is does the infringement (and resulting damages) rise to the level where it raises the specter of subverting the intellectual property right holder's incentive to invest in intellectual property. If in the extreme case of *Napster*, operating in a developed country market with sixty million users and with 2.79 billion downloads in just one month,[236] actual damages are at best an speculative opinion, then it is even harder to speculate that uncompensated uses in the geographically distant LDCs, where consumers are unlikely be able to afford an authorized product, would reduce intellectual property incentives in the developed world.

The GAO conceded that "[t]here are also certain instances when IP rights holders in some industries might experience potentially positive effects from the knowing consumption of pirated or counterfeit goods."[237] So arguendo, having reduced claims of actual substantial economic damages to developed world intellectual property rights holders to mere unproven speculation, and having ameliorated fears that uncompensated uses in the LCDs will reduce the utilitarian incentives that underlay the modern intellectual property regime, a corollary is whether there may be positive externalities for the rights holders. These positive externalities may offset even the small degree of market substitution that may occur. Commentators have speculated that piracy has positively effected legitimate business creation and innovation through a four-step process.[238] First, it pioneered the use of new technologies.[239] Second, as early adopters pirate, communities are sources of valuable market insight.[240] Third, pirates contribute to creating new markets.[241] Finally, piracy can lead directly and indirectly to creating new business models.[242] This model of a positive externality for alleged

---

234. *See* Julie E. Zink, *Shifting The Burden: Proving Infringement And Damages In Patent Cases Involving Inconsistent Manufacturing Techniques*, 2 HASTINGS SCI. & TECH. L.J. 81, 84 (2010).

235. *Id*.

236. *See* Benny Evangelista, *Assessing Napster—10 years Later*, SFGATE (June 1, 2009), http://www.sfgate.com/news/article/Assessing-Napster-10-years-later-3229454.php ("At its peak, more than sixty million people worldwide used Napster. In one free-music frenzy, users downloaded 2.79 billion songs in February 2001 . . . .").

237. GAO, *supra* note 223, at 15.

238. *See* David A. Choi & Arturo Perez, *Online Piracy, Innovation, and Legitimate Business Models*, 27 TECHNOVATION 168, 169 (2007).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id*.

piratical activities has repeated itself through generations of new technologies.[243] So, one potential positive externality is that uncompensated uses in developing countries may as an externality create new sources of revenue in more developed countries or alternative ways to discover new compensated markets in developing countries.

CONCLUSION

Using third degree price discrimination, one can theoretically segregate economies that benefit from strong intellectual property protection from those that would benefit from selective, weak, or no intellectual property protection in order to analyze the effects of uncompensated uses on the market incentives to create new creative or innovative works. Intellectual property rights are not granted to authors, creators, innovators, and brand developers in order to make then wealthy. Rather, these rights are granted to serve an important public purpose, from the promotion and dissemination of new creative works (copyright) and innovation (patent) to the assurance of goods and services of consistent quality (trademark). In essence, these rights serve as Adam Smith's invisible hand, channeling the passions and energies of self-interest into a socially desirable goal.[244] Intellectual property rights are territorial in nature. In countries where the economic incentives that lay behind intellectual property rights serve the purpose of promoting the general welfare, these rights serve a useful purpose and must be protected in order to promote creativity and innovation. In countries where these rights hinder the general welfare and impose burdens without any corresponding benefit, either to the local citizens or the foreign rights holders, these rights are no longer grounded in good public policy or sound economic theory, and these legal privileges should be narrowly construed and enforced only in the rare individual cases where they continue to serve some useful purpose. This suggests that an economically effective international intellectual property policy would focus on strong enforcement of intellectual property rights in countries where piracy results in lost sales or licenses (market substitution) rather than in countries where piracy has little or no effect on sales of the protected goods.

---

243. *Id*.

244. *The Concise Encyclopedia of Economic: Adam Smith*, LIBRARY OF ECONOMICS AND LIBERTY, http://www.econlib.org/library/Enc/bios/Smith.html (last visited Sept. 19, 2014).

Indiana Law Review

Volume 48 **2014** **Number 1**

2013 PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

State Governments Face the Realities of Aging Populations

INTRODUCTION: GOVERNING CHOICES IN THE FACE OF A GENERATIONAL STORM

CYNTHIA A. BAKER*

Despite Congressional passage of the Older Americans Act,[1] state governments continue to be the laboratories of choice to address how we care for, protect, and recognize the autonomy of our elder citizens. The 2013 Program on Law and State Government Fellowship Symposium examined various state government approaches to their growing elderly populations.[2] As state legislatures respond to the array of public policy issues arising from the influence of the new relationships between state governments and their respective elderly populations, the symposium provided a space for our legal community to explore the implications of those decisions on our work, our worldview, our budgets, and our futures.

Some states are aiming to protect their elderly citizens through aggressive sentencing enhancements for those convicted of crimes against the elderly,[3] state sponsored Silver Alerts,[4] or filial responsibility laws.[5] Other states are trying to

* Clinical Professor of Law and Director, Program on Law and State Government, Indiana University Robert H. McKinney School of Law. B.A., *with distinction*, 1988, Valparaiso University; J.D., *magna cum laude*, 1991, Valparaiso University School of Law.

1. The Older Americans Act, 42 U.S.C. §§ 3001-3058ff (1965) (amended 2006).

2. The U.S. Census Bureau projects the fraction of the elderly (defined as sixty-five or older) in the total population to increase from its 2010 level of thirteen percent to nineteen percent by 2030. U.S. CENSUS BUREAU, THE NEXT FOUR DECADES: THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050 3 (May 2010), *available at* http://www.census.gov/prod/2010pubs/p25-1138.pdf.

3. *See, e.g.*, CAL. PENAL CODE § 368 (West 2014).

4. *See, e.g.*, Missing Persons Investigations, FLA. STAT. ANN. § 937 (West 2013). A "Sliver Alert" is like an Amber Alert, except targeted toward missing persons who are over a certain age, usually sixty or sixty-five.

5. *See, e.g.*, PA. CONS. STAT. ANN. §4603 (West 2005) (statute imposes liability on spouses, children, and parents of indigents unless statutory exceptions apply).

create new revenue streams from this growing population.[6] Some states are recognizing the legal implications of "professional guardians"—those who take care of the elderly in families where none in the younger generations can or care to.[7] Every state confronts the realities of managing state pension funds with the pensioners living longer than ever before.[8] Whatever the approach, whatever the policy goal, state governments' relationships with their elderly citizens are changing and present sometimes difficult choices.

The symposium's exploration underscored that each of these choices comes with costs, public and private, that shape other policy choices by our state government. Each reminds us that "the elderly" are not a homogenous group: they live in mansions and mobile homes; some are surrounded by generations who adore them and some are alone. Some of the policy and legal choices diverge at the most basic level. For example, individuals, families, immigrant groups, and certainly state governments, have very different ideas of what age even counts as "old."[9] As Professor Orentlicher notes in his article, the legal and policy choices of some states that recognize legal physician assisted suicide are evolving to better reflect long held moral views on end-of-life laws.[10] As Professor Rebecca Morgan emphasizes, this country's "silver tsunami" presents an awesome opportunity for legal development across the legal spectrum—zoning, transportation, health care, housing, disability, family, land use, tax, and banking law, to name just a few.[11]

---

6. *See, e.g.*, *Minnesota's Snowbird Tax: Spend Most of the Year in St. Pete, Pay the Government in St. Paul*, WALL ST. J., Feb. 1, 2013, at A12. If passed into law, such taxes would be paid by state residents who travel to warmer climates during the winter months.

7. *See, e.g.*, Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of* Ethics, 2012 UTAH L. REV. 1207. Indiana and other states have adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). *E.g.*, IND. CODE. §§ 29-3.5-1-1 to -5-3 (2014).

8. *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: THE UNDERFUNDING OF STATE AND LOCAL PENSION PLANS (2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12084/05-04-pensions.pdf; *see also* Olivia S. Mitchell, *Public Pension Pressures in the United States, in* WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTION FOR THE AMERICAN STATES IN FISCAL CRISIS 57, 60-61 (Peter Conti-Brown & David Skeel, Jr. eds., 2012) (author includes rising Medicaid expenditures due to aging populations and the retirement of record numbers of public sector employees as among the "exigencies . . . now competing with the need to hike contributions to meet public pension funding requirements.").

9. For example, Indiana's senior consumer protection law was amended in 2013 to reduce the age in the definition of "senior consumer" from sixty-five to sixty years old. IND. CODE § 24-4.6-6-3(5) (2013); 2013 Ind. Legis. Serv. 250 (West).

10. David Orentlicher, *Aging Populations and Physician Aid in Dying: The Evolution of State Government Policy*, 48 IND. L. REV. 111, 113 (2014) (stating that "we are seeing an evolution in moral and legal thinking about physician-assisted suicide").

11. Rebecca C. Morgan, *What the Future of Aging Means to All of Us: An Era of*

This year's event, *State Governments Face the Realities of Aging Populations*, brought together an impressive faculty from around the state and nation.[12] The twelfth Fellowship Symposium since the Program on Law and State Government's inception in 1997, this event embodied the Program's mission of fostering the study and research of critical legal issues facing state governments. A vital component of the Program on Law and State Government, the Fellowships offer an extra curricular academic opportunity for students interested in contributing to the contemporary scholarship of law and state government. As the custodian of this Fellowship experience at this school, I deeply appreciate the passion and professionalism that this year's fellows, Tarah Baldwin and Sean Deneault, brought to this year-long endeavor.[13]

The 2013 Fellowship Symposium began with Fellow Sean Deneault's presentation, *Medicare Fraud: The State Enforcement Option*.[14] Mr. Deneault first described the Medicare system and its vulnerabilities to fraud.[15] He described various categories of fraud—phantom billing, billing individually for services that should have been provided as a bundle, providing unnecessary medical services, and "upcoding."[16]

Mr. Deneault then described current federal enforcement of anti-fraud statutes[17] and the more recent implementation predictive payment analytics to flag

---

Possibilities, 48 IND. L. REV. 125, 127 (2014).

12. This year's symposium faculty is comprised of Dean Andrew R. Klein, Professor David Orentlicher, Professor Linda Whitton, Adjunct Professor and Attorney Rebecca Geyer, Attorney Claire Lewis, Professor Rebecca Morgan, Deputy Attorney General Allen Pope, Attorney George Slater, and Attorney Dennis Frick. Special thanks to Professors Jennifer Drobac, Mike Pitts, and Diana Winters and additional thanks to Deputy Attorney General Allen Pope, all of whom helped critique the fellows' presentations as they prepared for the symposium.

13. Program on Law and State Government Fellowship responsibilities include developing and sharing scholarship addressing the fellows' collaboratively chosen fellowship topic. Fellowships are designed to support students in their research and study of critical legal issues facing state and local governments. *See Program on Law & State Government*, ROBERT H. MCKINNEY SCHOOL OF LAW, http://mckinneylaw.iu.edu/law-state-gov/fellowships/index.html (last visited July 14, 2014).

14. *Events*, ROBERT H. MCKINNEY SCHOOL OF LAW, http://mckinneylaw.iu.edu/events/current.cfm?eid=146 (last visited Sept. 18, 2014) (providing a schedule of events for the 2013 Program on Law and State Government Fellowship Symposium, *State Governments Face the Realities of Aging Populations*).

15. Sean Deneault, Medicare Fraud: The Potential to Cut Fraudulent Expenditures by Incentivizing State Governments 3-6 (Sept. 20, 2013) (unpublished manuscript) (on file with author).

16. When a provider assigns a higher coding rate to the treatment of a patient than the treatment that was actually administered, the provider has "upcoded." *See, e.g.*, Reed Abelson & Julie Creswell, *U.S. Warning to Hospitals on Medicare Bill Abuses*, N.Y. TIMES, Sept. 25, 2012, at B1.

17. *See, e.g.*, False Claims Act, 31 U.S.C. § 3729 (2014); Anti-Kickback Statute, 42 U.S.C. § 1320a-7b (2014); Stark Law, 42 U.S.C. §1395nn (2014) (prohibiting physician referrals of

suspected fraudulent payments.[18] Pointing to the smaller geopolitical sphere of state governments, their large role in regulating the day-to-day operations of the health care industry and existing successes in state-run Medicaid fraud efforts, Mr. Deneault suggested that "[s]tates are the perfect solution to the deterrence problems plaguing the federal government."[19] The crux of Mr. Deneault's presentation was that the confluence of aging demographics, increasing Medicare recipients, and the current federal budget deficit supports his proposal to recalibrate how states interact with the health systems that care for their elderly.[20]

Next, Professor David Orentlicher shared remarks entitled, *Aging Populations and State Government Policy: Physician Assisted Suicide*.[21] In his book, *Matters of Life and Death: Making Moral Theory Work in Medical Ethics and the Law*, Professor Orentlicher explores the philosophical debates over the fundamental principles that guide life and death medical decisions.[22] Professor Orentlicher's address joined his impressive body of academic work in opening doors to important conversations—in courtrooms, hospital rooms, dinner tables, and legislative houses—about palliative care, hospice, and other important choices regarding health care, human dignity, and the law. Specifically, he addressed, as he does in the article contained in this issue, "the trend toward legalization of physician aid in dying and what it tells us about societal morality regarding medical decisions at the end of life."[23]

As Professor Orentlicher does so well, and does with such grace and clarity, he contrasted the evolution of moral and legal thinking about physician aid in dying with transitions on the issues of abortion in the 1960s and 1970s, and more recently with same sex marriage.[24] After he explained how the law uses proxies to distinguish between right and wrong, he described how society's fundamental understandings of "morally unjustified death" and "morally justified death" came to be expressed in the law.[25] Then, Professor Orentlicher traced the origins of

---

designated health services for Medicare and Medicaid patients if the physician has a financial relationship with that entity); Criminal Health Care Fraud Statute, 18 U.S.C. § 1347 (2014).

18. *See generally* Press Release, Centers for Medicaid and Medicare Services, CMS Fraud Prevention System Identified or Prevented $210 Million in Improper Medicare Payments in 2nd Year of Operations (June 24, 2014) (*available at* http://perma.cc/9VK4-KWGG?type=source) ("In its second year of operations, CMS' state-of-the-art Fraud Prevention System, that employs advanced predictive analytics, identified or prevented more than $210 million in improper Medicare fee-for-service payments, double the previous year.").

19. Deneault, *supra* note 15, at 11.

20. *See generally id.*

21. Professor David Orentlicher holds the Samuel R. Rosen Professorship and is the Co-director for the Hall Center for Law and Health at the Indiana University Robert H. McKinney School of Law.

22. DAVID ORENTLICHER, MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW (2001).

23. Orentlicher, *supra* note 10, at 112.

24. *Id*. at 112-13.

25. *Id*. at 114.

how physician assisted suicide and the withdrawal of life-sustaining medical treatment became legal proxies for each, respectively.[26] Professor Orentlicher pointed to the legal choices of Oregon, Washington, Vermont, Montana, and New Mexico as examples of how states are refining "legal rules for end-of-life law so they better reflect the public's long-standing moral views about death-hastening actions for patients."[27]

Tarah M.C. Baldwin's fellowship address, *Bilking the Elderly: A Fight for Financial Autonomy and Review of the Use and Misuse of Powers of Attorney and Guardianships*, began with a personal example of how powers of attorneys and guardianships can be misused.[28] Ms. Baldwin's example, involving a caregiver abusing both power of attorney and guardianship authority to deprive a parent of long protected savings for basic care, came from her *pro bono* work for the Senior Law Project.[29] Ms. Baldwin made clear that her experience representing her elderly client fanned the flame of her passion to use her fellowship experience to explore and improve Indiana's guardianship laws and policies.[30] The example poignantly highlighted President Obama's comments calling for state and federal government collaboration to combat elder abuse:

> Victims of elder abuse are parents and grandparents, neighbors and friends. Elder abuse cuts across race, gender, culture, and circumstance, and whether physical, emotional, or financial, it takes an unacceptable toll on individuals and families across our Nation. Seniors who experience abuse or neglect face a heightened risk of health complications and premature death, while financial exploitation can rob men and women of the security they have built over a lifetime. Tragically, many older Americans suffer in silence, burdened by fear, shame, or impairments that prevent them from speaking out about abuse.[31]

---

26. *Id.* at 121-22.

27. *Id.* at 123.

28. *See Events*, *supra* note 14; *see also* Tarah M.C. Baldwin, A Brief Essay on Federal and State Responses to Elder Abuse, 1-8 (unpublished manuscript) (on file with author) [hereinafter Responses to Elder Abuse].

29. The Senior Law Project is an initiative of Indiana Legal Services, a nonprofit law firm that provides free civil legal assistance to eligible low-income people throughout the state of Indiana. *See Indiana Legal Services—Senior Law Project*, IND. LEGAL SERVS. http://www.indianalegalservices.org/provider/588 (last visited July 14, 2014).

30. *See* Responses to Elder Abuse, *supra* note 28; *see also* Tarah M.C. Baldwin, The Delineating Dilemma: The Challenges in Defining Elder Abuse, 1-6 (unpublished manuscript) (on file with author); *see also* Tarah M.C. Baldwin, Current Indiana Criminal Laws Regarding Elder Abuse and a Proposal for an Elder Protection Act, 1-12 (unpublished manuscript) (on file with author) [hereinafter Elder Protection Act].

31. President Barack Obama, *Presidential Proclamation—World Elder Abuse Awareness Day, 2012*, THE WHITE HOUSE (June 14, 2012), http://www.whitehouse.gov/the-press-office/2012/06/14/presidential-proclamation-world-elder-abuse-awareness-day-2012; *see also* Responses to

Ms. Baldwin urged that symposium attendees, lawyers generally, our state, every state, and especially vulnerable elderly citizens could benefit from more consistent application and monitoring of state court granted powers of attorney and guardianships.[32] Ms. Baldwin then explained how state governments could protect our elderly from falling victim to careless or unscrupulous "caregivers" who assume rights they do not necessarily have.[33] Specifically, she suggested more broadly accessible education for all involved and affected by the guardianship, more judicial oversight of certain guardianships, and state-wide guardianship registration as low cost, effective ways to deter fraud and abuse under the legal auspices of powers of attorney and guardianship.[34]

The morning panel of the symposium, *Legal Tools for Balancing Autonomy and Protection: Advocacy, Scholarship, and Practice*, brought together three terrific lawyers, scholars, and advocates for the elderly. Professor Linda Whitton,[35] Adjunct Professor and Attorney Rebecca Geyer,[36] and Attorney Claire Lewis[37] shared experiences and insights on how the law is evolving to, in Professor Linda Whitton's words, "facilitate a principal's autonomous choices as well as . . . protect[ing] principals who later become incapacitated."[38] Moderated by Fellow Tarah Baldwin, the panel discussed specific examples of when elderly clients' or citizens' autonomy might trump what is deemed "the best choice" by children or other caregivers, and how the law supports or challenges such situations. The panel also entertained a wide variety of questions from the audience, gave different perspectives, and shared their collective experiences, to help us understand the changing landscape of what we call Elder Law.

The symposium's keynote address was presented by Professor Rebecca Morgan[39] in a room filled to capacity with symposium attendees, plus law students and others who could not attend the full symposium, but made time to join us for Professor Morgan's address. She did not disappoint! She arrived in Indianapolis between presentations in Alaska (the prior week) and Vancouver and Hawaii (the next week) to share from her vast scholarship, practice, and leadership about how we, as lawyers, can address important issues of autonomy

---

Elder Abuse, *supra* note 28, at 2.

32. *See* Responses to Elder Abuse, *supra* note 28, at 1.

33. *Id.*

34. *See generally* Elder Protection Act, *supra* note 30.

35. Professor of Law, Valparaiso University School of Law; Reporter, Uniform Power of Attorney Act.

36. Attorney, Rebecca W. Geyer & Associates, PC and Adjunct Professor of Law, Indiana University Robert H. McKinney School of Law.

37. Attorney, Law Offices of Claire E. Lewis and founding member and the first President of the Indiana Chapter of the National Academy of Elder Law Attorneys (IN-NAELA).

38. Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 344 (2008).

39. Boston Asset Management Chair in Elder Law, Director, Center for Excellence in Elder Law, Director, LL.M. in Elder Law, Stetson University, College of Law.

and protection as we shape laws reaching our older citizens and, as she convinced us, all of us.

The article based on Professor Morgan's symposium presentation*, What the Future of Aging Means to All of Us: Policies and Practicalities*, is included in this issue,[40] but even it fails to convey not only the energy and enthusiasm that accompanied her keynote address but also her boundless generosity in answering my and the fellows' questions throughout the 2013 fellowship year. As she does in her article, Professor Morgan first pointed out that Elder Law is unlike most other areas of the law in that its practice is defined by the client, rather than the subject matter of the law.[41]

Using examples from current research, history, scholarship, technology, health care, and the law, Professor Morgan persuasively conveys a holistic view of how our legal structure must change to keep up with the demands of what it means to age today, tomorrow, and well into the future.[42] As she notes, "Aging is [e]verybody's [b]usiness."[43] How law chooses to support or challenge ideas like universal design, remote health care delivery, the changing caregiver support ratio, housing and zoning issues, transportation issues, and pension issues are questions that she poses with insight and optimism.

The final panel discussion of the symposium, *Recent Developments in Indiana Elder Law*, as its name suggests, turned the day's dialog to Indiana and its unique elderly population and laws. Moderated by Fellow Sean Deneault, the panel comprised Indiana attorneys Allen Pope,[44] George Slater,[45] and Dennis Frick.[46] Topics included Indiana's newly implemented guardianship registry,[47] Indiana's Physician Order for Scope of Treatment (POST) form,[48] and the recently passed amendments to Indiana's Senior Consumer Protection laws.[49]

---

40. Morgan, *supra* note 11.

41. *Id*. at 125.

42. *See generally id*.

43. *Id*. at 147 (citing Celeste Headlee, *Are We Ready for a Massive Aging Population?*, NPR NEWS (Aug. 12, 2013), http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=211370947&m=211370940 (transcript available at http://www.npr.org/templates/story/story.php?storyId=211370947) (discussing Boomer's impact on culture, among other things)).

44. Chief Counsel and Director, Medicaid Fraud Control Unit, Office of the Indiana Attorney General.

45. Senior Attorney, Slater Law Office, LLC.

46. Attorney and Director, Senior Law Project, Indiana Legal Services, Inc.

47. *See* The Hon. Susan Orr Henderson, *How a Guardianship Registry Benefits the Citizens of Indiana,* IND. CT. TIMES, July 3, 2012.

48. *See* links to the POST form and other advance directive forms at the website for Indiana's State Department of Health, *Advanced Directives Resource Center*, IND. STATE HEALTH DEP'T, http://www.in.gov/isdh/25880.htm (last visited July 14, 2014). A POST form helps people keep control over medical care at the end of life and can provide other information about end-of-life health care.

49. IND. CODE §§ 24-4.6-6-24-4.6-6-6 (2012) (amended 2013); *see also* Dave Stafford, *Lawmakers Put More Teeth into Consumer Protection of Indiana Seniors*, IND. LAW., June 19,

Together, the panelists shared their experiences representing the legal interests of elderly clients and citizens of Indiana and answered a wide variety of questions, including, "What will be the biggest elder law challenge in the coming years?" The answer: Getting our laws to keep pace with the changing needs and expectations of a growing, elderly population.

As state governments confront the so-called generational storm, the storm continues to touch our workplaces, our families, and our lawmakers every day. As medical advances, debt, and health care costs increase, so must our awareness of what these forces bring to our clients and our communities. State and local governments have been identified by the United Nations General Assembly as critical players toward an effective elder law structure.[50] However, as our symposium faculty reminded us, we are much better poised to shape state government policy than the United Nations General Assembly. My sincere hope is that the dialog begun at the beginning of the 2013 Fellowship year, and continuing with the publication of this introduction and accompanying scholarly articles, informs and shapes better state government policy with respect to the growing, elderly population in our state, and across this nation.[51]

In closing, I urge us all to take the advice, paraphrased here, of the famous centenarian, George Burns: "Look to the future, because that is where you will spend the rest of your life."[52]

Cynthia A. Baker
Director, Program on Law and State Government

2013.

50. Second World Assembly on Ageing, April 8-12, 2002, *Political Declaration and Madrid International Plan of Action on Aging*, Art. 13 (2002), *available at* http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf; *see also* Responses to Elder Abuse, *supra* note 30, at 3.

51. My thanks, again, to the Indiana Law Review for continuing the dialog between state governments and the academic community by including the symposium pieces in this issue. Great appreciation, too, goes to Ms. Kyle Galster, Coordinator for the Program on Law and State Government, for her hard work and care in making the 2013 Program on Law and State Government Fellowship Symposium an unqualified success. Ms. Galster's professionalism and dedication to the Program and our guests made the event a joy to anticipate and a memory to treasure. The Program on Law and State Government celebrates the dedication and hard work of the 2013 Fellows, Ms. Tarah Baldwin and Mr. Sean Deneault.

52. QUOTES.COM, http://www.quotes.net/quote/54907 (last visited Aug. 31, 2014).

AGING POPULATIONS AND PHYSICIAN AID IN DYING: THE EVOLUTION OF STATE GOVERNMENT POLICY

DAVID ORENTLICHER, M.D., J.D.*

As state governments respond to the needs of their aging populations, an issue of particular concern is health care at the end of life. With the many advances in public health and medical treatment—as well as in education, wealth, and other socioeconomic metrics[1]—Americans are living much longer lives. But many Americans also face prolonged illness at the end of life that can result in great suffering. Often the suffering can be relieved with good palliative care, but for some Americans continued life becomes intolerable.

As a result, there has been increased interest in a right for terminally ill individuals to hasten the dying process by taking a lethal dose of prescription medication (i.e., by "physician aid in dying," commonly described as "physician-assisted suicide"[2]). The existence of such a right has been litigated in the U.S. Supreme Court[3] and state supreme courts,[4] debated in state legislatures, and addressed in ballot proposals at the state level. Voters in Oregon and Washington have legalized aid in dying by public referendum,[5] legislators in Vermont have done so by statutory enactment,[6] and justices in Montana[7] and a trial court in New

---

* Samuel R. Rosen Professor and Co-Director, Hall Center for Law and Health, Indiana University Robert H. McKinney School of Law. M.D., 1981, Harvard Medical School; J.D., 1986, Harvard Law School. This Article builds on discussions previously published in DAVID ORENTLICHER, MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW 11-80 (2001); David Orentlicher, *The Legalization of Physician-Assisted Suicide: A Very Modest Revolution*, 38 B.C. L. REV. 443 (1997) [hereinafter *Legalization*]; David Orentlicher, *The Legalization of Physician-Assisted Suicide*, 335 NEW ENG. J. MED. 663 (1996).

1. Indeed, these socioeconomic factors may play a much bigger role in health than does health care. David Orentlicher, *The Future of The Affordable Care Act: Protecting Economic Health More than Physical Health?*, 51 HOUS. L. REV. 1057, 1067 (2014).

2. I prefer physician aid in dying over physician-assisted suicide to reflect the fact that death hastening action by a competent, terminally ill person is different from the death hastening action by other persons, especially by otherwise healthy people who suffer from a mental depression. *See, e.g.*, *Patients' Rights to Self-Determination at the End of Life*, AM. PUB. HEALTH ASSOC. (Oct. 28, 2008), *available at* http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1372 (dissuading use of term "physician-assisted suicide"). If someone other than a mentally competent, terminally ill patient died from a lethal prescription, I would describe that as physician-assisted suicide.

I do not include euthanasia in my definition of physician aid in dying. That is, if a physician injected a terminally ill patient with a lethal drug, I would view that as an example of euthanasia rather than as an example of physician aid in dying.

3. Glucksberg v. Washington, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).

4. Sampson v. State, 31 P.3d 88 (Alaska 2001); Krischer v. McIver, 697 So. 2d 97 (Fla. 1997); Baxter v. State, 224 P.3d 1211 (Mont. 2009).

5. OR. REV. STAT. §§ 127.800-127.897 (2014); WASH. REV. CODE § 70.245 (2014).

6. VT. STAT. ANN. tit. 18, §§ 5281-5292 (2014) (LexisNexis).

7. *Baxter*, 224 P.3d at 1215.

Mexico[8] have done so by court holding.

In this Article, I discuss the trend toward legalization of physician aid in dying and what it tells us about societal morality regarding medical decisions at the end of life.

I. BACKGROUND

For many years, the law drew a sharp distinction between physician-assisted suicide and the withdrawal of life-sustaining treatment.[9] All patients could refuse medical care, while no one could obtain a prescription for a lethal dose of drugs.[10]

Thus, for example, people could (and still can) refuse ventilators, kidney dialysis, surgery, or artificial nutrition and hydration, even though they could die without the treatment. Moreover, the right could be exercised not only by the terminally ill, but also by people who could expect with treatment to live for decades with a high quality of life.[11] All medical treatments have side effects as well as benefits, and the law leaves it to the individual to decide whether the benefits are sufficient to outweigh the harms of treatment.[12] In other words, quality of life is just as important as length of life, and people should be able to take into account both quality and length of life in making their medical decisions.[13]

On the other hand, no matter how sick a person became, no matter how terminal their disease, and no matter how great their suffering, there was no right to obtain a prescription for a lethal dose of medication.[14] The law once drew a very bright line between treatment withdrawal, which was permitted,[15] and suicide assistance, which was prohibited.[16]

In recent years, this sharp distinction between withdrawal of treatment and assisted suicide has begun to erode. Oregon became the first state to legalize aid

---

8. Opposition to Defendant's Motion to Dismiss, Morris v. Brandenberg, No. D-202-cv-2012-02909 (2d Jud. Dist. N.M. Jan. 13, 2014) (opinion *available at* http://www.aclu-nm.org/wp-content/uploads/2012/03/Morris-v.-NM.pdf).

9. *Legalization*, *supra* note *, at 443.

10. *Id.*

11. To be sure, *In re Quinlan*, 355 A.2d 647 (N.J. 1976), limited the right to refuse treatment to patients with a serious medical condition, but later courts extended the right to all persons. DAVID ORENTLICHER ET AL., BIOETHICS AND PUBLIC HEALTH LAW 287-89 (3d ed. 2013).

12. PFIZER, MEDICINE SAFETY AND YOU: UNDERSTANDING 'SIDE EFFECTS' 1-2 (2011) (explaining that medications have benefits and risks).

13. In some cases, refusals of treatment reflect religious belief, as when a Jehovah's Witness refuses a blood transfusion. *See, e.g.*, Stamford Hosp. v. Vega, 674 A.2d 821, 824-25 (Conn. 1996).

14. *See* ALAN MEISEL, THE RIGHT TO DIE 450-57 (2d ed. 1995).

15. There are some exceptions to the right to refuse medical treatment, most importantly when a refusal of treatment would result in harm to other persons, as when an individual refuses treatment for tuberculosis. *See, e.g.*, McCormick v. Stalder, 105 F.3d. 1059 (5th Cir. 1997).

16. *See* MEISEL, *supra* note 14, at 450-57.

in dying after approval via public referendum in November 1994.[17] Voters in Washington followed suit in November 2008 with approval of a Washington Death with Dignity Act[18] that was patterned after the Oregon Death with Dignity Act, and the Montana Supreme Court one year later cleared the way for aid in dying by holding that there was no legal prohibition in state law against the practice.[19] In its 2013 session, the Vermont State Legislature enacted the Patient Choice and Control at End of Life Act,[20] and in January 2014, a state trial court found a right to aid in dying under the New Mexico constitution.[21]

Note that in all five states, physicians are allowed to prescribe a lethal dose of medication only for terminally ill patients who are mentally competent (i.e., the practice of aid in dying).[22] All five states still prohibit as forms of physician assisted suicide the prescribing of lethal medication to persons who are not both mentally competent and terminally ill.[23]

With these changes in the law, it appears that we are seeing an evolution in moral and legal thinking about physician-assisted suicide. A practice that once was universally condemned is gaining gradual acceptance when limited to the terminally ill.[24] It seems that public views about aid in dying are going through the same kind of transition that occurred with abortion in the 1960s and 1970s and that has occurred in recent years with same sex marriage.[25]

That probably is not what is happening. Rather, for the same reasons that the law drew a sharp distinction between treatment withdrawal and suicide assistance, it is now relaxing the distinction.[26] In other words, moral views about suicide assistance are not changing, but the law is being changed to better reflect the same moral views. Over time, it has become clear that society's legal rules for

---

17. Constitutional challenges and legislative action delayed implementation of the Oregon Death with Dignity Act until it was reapproved by public referendum in November 1997. *See* OR. REV. STAT. §§ 127.800-127.897 (1995). After implementation, the act survived another legal challenge from the George W. Bush Administration. *See* Gonzales v. Oregon, 546 U.S. 243 (2006) (rejecting effort to use the federal Controlled Substances Act to override the Oregon statute).

18. WASH. REV. CODE § 70.245 (2014).

19. Baxter v. State, 224 P.3d 1211 (Mont. 2009).

20. VT. STAT. ANN. tit. 18 §§ 5281-92 (2014).

21. Opposition to Defendant's Motion to Dismiss, Morris v. Brandenberg, No. D-202-cv-2012-02909 (2d Jud. Dist. N.M. Jan. 13, 2014).

22. *See id*; OR. REV. STAT. §§ 127.800-27.897 2014); VT. STAT. ANN. tit. 18 §§ 5281-92 (2014) (LexisNexis); WASH. REV. CODE § 70.245 (2014); *Baxter*, 224 P.3d at 1221-22.

23. *Id.*

24. MEISEL, *supra* note 14, at 450-57.

25. *See* Jacque Wilson, *Before and After Roe v. Wade*, CNN (Jan. 22, 2013), http://www.cnn.com/2013/01/22/health/roe-wade-abortion-timeline/; Andrew Flores, *Support for Same Sex Marriage is Increasing Faster than Ever Before*, WASH. POST (Mar. 14, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/14/support-for-same-sex-marriage-is-increasing-faster-than-ever-before/.

26. *Legalization*, *supra* note *, at 444.

end-of-life care had gotten out of sync with its moral views for such care.[27] By allowing aid in dying through suicide assistance for terminally ill patients, society can bring the law back in line with its moral perspectives.

Why do I say that by allowing aid in dying, states can ensure that end-of-life law reflects societal morality? Hasn't ethical thinking long viewed any kind of assistance with suicide as morally very different from withdrawal of treatment? Is there not a major difference between (1) letting a person die from natural causes without artificial ventilation or other invasive medical care and (2) actively causing a patient's death with a lethal dose of drugs?

I do not believe that the usual rationales explain the fact that the law once distinguished sharply between withdrawal of treatment and suicide assistance. That is, I do not believe that the legal distinction between treatment withdrawal and assisted suicide reflected an important moral difference between the two practices. To be sure, many scholars, institutions, and lay people have seen a moral difference between treatment withdrawal and assisted suicide.[28] But the distinction between treatment withdrawal and assisted suicide cannot be explained by the mere difference between withdrawing and assisting. Rather, the treatment withdrawal-assisted suicide distinction provided an important legal "proxy" to sort the morally justified death from the morally unjustified death.[29] End-of-life law has been designed to permit patients to make life-ending choices when they are morally justified in so choosing but to prevent patients from opting to end their lives when they are not morally justified in so opting.[30] In other words, it is more important *why* patients want to die rather than *how* they want to die. As I will explain, it is not possible to distinguish directly between morally justified and morally unjustified deaths, so the law does so indirectly. By permitting the life-ending choice of treatment withdrawal, the law *generally* permitted morally justified choices of death.[31] Similarly, by prohibiting assisted suicide, the law *generally* prevented morally unjustified choices of death.[32] This was the proxy role of the distinction between treatment withdrawal and suicide assistance.[33]

Over time, however, it became clear that the distinction between treatment withdrawal and assisted suicide did not do a good enough job sorting the morally

---

27. *Id.* at 475.

28. Jerald G. Bachman et al., *Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia*, 334 NEW ENG. J. MED. 303, 303 (1996); Jonathan S. Cohen et al., *Attitudes Toward Assisted Suicide and Euthanasia Among Physicians in Washington State*, 331 NEW ENG. J. MED. 89, 89 (1994); Melinda A. Lee et al., *Legalizing Assisted Suicide—Views of Physicians in Oregon*, 334 NEW ENG. J. MED. 310, 310 (1996).

29. *Legalization*, *supra* note *, at 462.

30. Norman L. Cantor, *Quinlan, Privacy, and the Handling of Incompetent Dying Patients*, 30 RUTGERS L. REV. 243, 249-50 (1977).

31. *Legalization*, *supra* note *, at 445.

32. *Id.*

33. *Id.*

justified death from the morally unjustified death. An absolute prohibition on suicide assistance forced many terminally ill patients to suffer intolerably through a prolonged dying process—to be denied the choice of a morally justified death.[34] Hence, Oregon, Washington, Montana, Vermont, and possibly New Mexico,[35] have revised their end-of-life laws so their legal rules do a better job sorting between morally justified and morally unjustified deaths. In those states, the rules for treatment withdrawal, aid in dying, and physician-assisted suicide are seen as better proxies for the distinction between morally justified deaths and morally unjustified deaths.

I will continue with a discussion of legal proxies and then a discussion of what I mean by morally justified and morally unjustified deaths.

II. LEGAL PROXIES

The law commonly distinguishes between right and wrong through legal proxies.[36] For example, instead of saying that people can drive at a "safe speed," the law says that people can drive up to a specific speed limit, whether 30, 55 or 70 mph, but not at faster speeds. It does not matter that driving a few miles above the speed limit often is perfectly safe. Or consider eligibility to vote. Instead of the law saying that people can vote when they are sufficiently mature enough to cast a ballot, the law says that people can begin voting at age eighteen.[37] A precocious seventeen-year old who has graduated from college is not permitted to vote, while a nineteen-year old who lacks any formal education or any interest in politics is granted voting rights.[38] The law does not try to make case-by-case assessments about the maturity of a potential voter or the speed at which a person drives, but instead adopts a clear rule that is designed to do a generally good job of sorting between the acceptable and the unacceptable.[39]

Why use legal proxies if they only do a generally good job of sorting between the acceptable and the unacceptable? Should we not strive for laws that fully sort the acceptable from the unacceptable? There are good reasons for choosing legal rules with clear distinctions as proxies for society's moral views about right and wrong. With speed limits, for example, it is important to give police officers and drivers predictable and understandable rules. If the law said that people could

---

34. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 794-96 (1989).

35. *See* OR. REV. STAT. §§ 127.800-127.897 (2014); VT. STAT. ANN. tit. 18, §§ 5281-5292 (2014) (LexisNexis); WASH. REV. CODE § 70.245 (2014). Appellate courts in New Mexico could reject the trial court's holding that the state constitution recognizes a right to aid in dying. For discussion generally of New Mexico's law, *see* Eric Eckholm, *New Mexico Affirms Right to "Aid in Dying,"* N.Y. TIMES (Jan 13, 2014), http://www.nytimes.com/2014/01/14/us/new-mexico-judge-affirms-right-to-aid-in-dying.html?_r=0.

36. *Legalization*, *supra* note *, at 466.

37. U.S. CONST. amend. XXVI.

38. *Id.* ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

39. *Legalization*, *supra* note *, at 466.

drive at any safe speed, then drivers would have to worry that they would come to different conclusions about the safety of particular speeds than would a police officer. In addition, police officers likely would come to different conclusions among themselves about the range of safe speeds, so some drivers would be at greater risk of being ticketed for speeding than would other drivers. Speed limits provide a level of certainty and fairness across different drivers that drive-at-a-safe-speed laws do not.[40]

Concerns about fairness can be especially important. Police officers have been known to apply traffic and other laws selectively according to the race of the driver—the "driving-while-black" problem.[41] The more discretion left to police officers in enforcing traffic laws, the more they can act on inappropriate biases.[42] Voting age rules respond to the same concern. If the law allowed people to vote when sufficiently mature, then we would have to worry about the partisan affiliations of voting clerks and voters. A Democratic clerk might be quick to certify the eligibility of Democrats to vote and slow to certify the eligibility of Republicans to vote, while Republican clerks might be inclined in the other direction.

End-of-life law also has relied on legal proxies. Instead of saying that people could make life-ending choices, whether treatment withdrawal or suicide assistance, as long as they had a morally justified reason for doing so, the law allowed treatment withdrawal and prohibited assisted suicide. As I discuss in the next section, having such a legal proxy has protected the public from the problem of the government making inappropriate life-and-death judgments.

III. THE MORALLY JUSTIFIED DEATH

I have said that end-of-life law is designed to distinguish between morally justified and morally unjustified choices that shorten life.[43] If a life-shortening choice is morally justified, it should be permitted by the law, while morally unjustified choices that shorten life should not be permitted.[44] The distinction between physician-assisted suicide and withdrawal of treatment was designed to distinguish between morally justified and morally unjustified deaths.[45]

A. The Distinction between Physician-Assisted Suicide and the Withdrawal of Life-Sustaining Medical Treatment

Commonly, people have said that withdrawals of treatment are morally

---

40. For these and other reasons, a Montana court found a safe speed law unconstitutional. State v. Stanko, 974 P.2d 1132 (Mont. 1998).

41. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

42. *Id.* at 302.

43. *Legalization*, *supra* note *, at 463-464.

44. *Id.*

45. *Id.*

justified and assisted suicides are not morally justified.[46] In this view, anyone can have unwanted medical treatment discontinued, even if death might result from the withdrawal. On the other hand, no one should be able to choose to end his or her life by swallowing a lethal dose of prescription medication. In other words, *how* life is shortened is morally—and therefore, legally—determinative.

I will argue that *how* one dies is not so critical; rather, it has mattered much more *why* a person wants to make a life-shortening choice. The line between morally justified and morally unjustified deaths is defined not simply by the difference between treatment withdrawal and suicide assistance, but on other grounds.

Why do I reject the usual moral distinction between treatment withdrawal and assisted suicide? If we consider the usual arguments, we find that they do not really explain the law's distinction between the two practices. For example, people typically cite considerations of causation to distinguish between treatment withdrawal and suicide assistance.[47] Assisted suicide entails a killing, while treatment withdrawal simply lets the patient die from natural causes.[48] And it is true that we hold people more accountable for their actions than their omissions. The law prohibits people from throwing infants into swimming pools, but it does not require people to rescue infants who have fallen on their own into swimming pools.[49]

It is not surprising that arguments from causation are important. Acts that cause death *usually* are worse than omissions that are followed by death.[50] There is a high correlation between the act-omission distinction and the distinction between unlawful and lawful conduct.

But it is not a perfect correlation. Even though most actions that cause death should be punished by the law and most omissions that are followed by death should not be punished, we still need to ask for any particular act or omission whether it should be prohibited. Some killings are permissible, as in the case of self-defense, and some omissions are not, as in a failure to feed one's baby.[51] Indeed, if I were to withhold treatment by discontinuing artificial nutrition and hydration for patients without their permission or that of their families, I would be prosecuted for murder.[52]

Moreover, if causation really explained the distinction between treatment withdrawal and assisted suicide, we would consider withdrawal of treatment

---

46. *Id.* at 445.

47. Vacco v. Quill, 521 U.S. 793, 801 (1997).

48. *Id.*

49. To be sure, parents or other caretakers of the infant would be held accountable, and the owner of the pool would as well if the owner had not taken proper precautions to prevent infants from falling in.

50. Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 514 (2002).

51. *See, e.g.*, IND. CODE § 35-41-3-2 (2014) (self-defense); *see also id.* § 31-34-1-1 (neglect of a dependent by failing to provide necessary food).

52. *See e.g.*, *id.* § 35-42-1-1.

worse than suicide assistance.[53] A physician who turns off a patient's ventilator directly causes the patient's death.[54] When a physician writes a prescription for a lethal dose of drugs that the patient takes later at home, the physician only indirectly contributes to the patient's death.[55]

Many observers distinguish between treatment withdrawal and assisted suicide in terms of the physician's intentions.[56] When medical care is discontinued, there is no intent to kill the patient.[57] Rather, the physician is intending only to relieve a patient of the burdens of a medical treatment that is causing pain or other discomfort.[58] In fact, the physician can hope that the patient will survive the withdrawal of treatment. With assisted suicide, on the other hand, the whole purpose of writing the prescriptions is to help patients end their lives.[59]

While considerations of intent can distinguish treatment withdrawal from euthanasia, they do not distinguish treatment withdrawal from suicide assistance. Physicians in Oregon, Washington, Montana, Vermont, and New Mexico can write a prescription with the intent that they will relieve their patients' anxiety or other psychic suffering and genuinely hope that the patients will not take the pills or even fill the prescriptions. Indeed, after more than fifteen years of experience with aid in dying in Oregon, data indicate that about thirty-five percent of patients never take the pills after receiving their prescriptions.[60] The odds that a patient will survive the writing of a prescription for lethal medication are much greater than the odds that they will survive the withdrawal of a ventilator, dialysis, or artificial nutrition and hydration.[61]

Critics of a right to assisted suicide worry about the risks to vulnerable patients.[62] People may choose suicide assistance because they are depressed, because of inadequate palliative care, or out of a perceived "duty to die" to relieve their families of the burden of their care.[63] These risks are real, and we should

---

53. *See* James Rachels, *Active and Passive Euthanasia,* 292 NEW ENG. J. MED. 78, 80 (1975); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 794-96 (1989).

54. *Legalization*, *supra* note *, at 466.

55. *Id.* at 448.

56. Vacco v. Quill, 521 U.S. 793, 801-02 (1997).

57. *Legalization*, *supra* note *, at 455.

58. *Vacco*, 521 U.S. at 802.

59. *Id.*

60. Through December 31, 2013, physicians had written 1,172 prescriptions under the Death with Dignity Act, and 752 patients had taken the lethal medication (64 percent), a small number were still alive, and the rest died of their illnesses. *See* OREGON HEALTH AUTHORITY, PUBLIC HEALTH DIVISION, OREGON'S DEATH WITH DIGNITY ACT—2013, *available at* http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year16.pdf.

61. David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia,* HASTINGS CONST. L.Q. 947, 958-59 (1997).

62. Washington v. Glucksberg, 521 U.S. 702, 731-32 (1997).

63. *Id.* at 782-83.

worry about them. But the risks are just as great a concern for decisions to withdraw life-sustaining medical treatment.[64] Patients also may refuse ventilators, dialysis, or artificial nutrition and hydration because they are depressed, have not received adequate palliative care, or feel a duty to die.

Indeed, the risk to vulnerable patients are greater for treatment withdrawal since it can occur for patients who have lost mental capacity and can no longer speak for themselves.[65] Family members may agree to the withdrawal of treatment in the mistaken belief that they are carrying out the wishes of the patient. The law responds to the risks of premature treatment withdrawal with various safeguards to protect vulnerable patients.[66] The same kinds of safeguards can be employed with suicide assistance, and in fact, they are an important part of the statutes in Oregon, Washington, and Vermont.[67]

Opponents of a right to assisted suicide especially worry about the effect of financial pressures on aid in dying decisions.[68] When physicians and hospitals face ever-increasing pressures to contain health care costs, they may too readily support or encourage their patients to choose suicide assistance. This risk is real, but as with the other risks discussed, it is also a serious risk for treatment withdrawal decisions. Assisted suicide for terminally ill persons would likely save far less money than withdrawing ventilators, dialysis, or artificial nutrition and hydration from patients who could live for many years—even decades—with continued care.

What about the Netherlands? Haven't there been abuses in that country?[69] There has been a good deal of controversy over practices in the Netherlands, but the controversy has arisen over the practice of euthanasia rather than suicide assistance.[70] The statutes in Oregon, Washington, and Vermont require physicians to report every case of aid in dying,[71] and there has not been evidence of significant abuse in those states. Moreover, concerns about abuse cannot distinguish suicide assistance from treatment withdrawal. Studies of treatment withdrawal in the United States have found that the practice often does not conform to ethical and legal standards that require physicians to make decisions in accordance with their patient's wishes.[72]

If the practice of assisted suicide is not inherently more problematic than the withdrawal of life-sustaining treatment, why has the law distinguished between

---

64. *Legalization*, *supra* note *, at 459.

65. *Id.*

66. *Id.* at 459-60.

67. OR. REV. STAT. §§ 127.800-127.897 (2014); VT. STAT. ANN. tit. 18 §§ 5281-5292 (2014) (LexisNexis); WASH. REV. CODE. § 70.245 (2014).

68. Vacco v. Quill, 521 U.S. 793, 794 (1997).

69. For discussion of the Netherlands, see *Legalization*, *supra* note *, at 461-62.

70. ORENTLICHER ET AL., *supra* note 11, at 372.

71. OR. REV. STAT. §§ 127.800-127.897 (2014); VT. STAT. ANN. tit. 18 §§ 5281-5292 (2014) (LexisNexis); WASH. REV. CODE. § 70.245 (2014).

72. ORENTLICHER ET AL., *supra* note 11, at 334. For discussion of other arguments made to distinguish treatment withdrawal from aid in dying, see sources cited *supra* note *.

suicide assistance and treatment withdrawal? That is the topic for the next section of this Article.

B. Identifying the Morally Justified Death

End-of-life law is designed to distinguish morally justified choices that shorten life from morally unjustified choices that end life. The distinction between treatment withdrawal and suicide assistance has provided a legal proxy for sorting morally justified patient deaths from morally unjustified deaths.

As when proxies are used elsewhere in the law, we cannot directly sort between the wrongful and the permissible. We cannot directly distinguish between morally justified deaths and morally unjustified deaths that result from decisions about health care at the end of life. But we can generally distinguish between morally justified and morally unjustified deaths with the distinction between assisted suicide and treatment withdrawal. In the public's view, the *typical* refusal of life-sustaining treatment is morally justified while the *typical* suicide is not.[73]

What do I mean by a morally justified death? The right to refuse life-sustaining medical care arose out of a sense that people should be able to decline treatment when they are suffering greatly from irreversible and severe illness.[74] In such cases, it is thought, the burdens of continued treatment can easily outweigh the benefits, and people should not be forced to endure a prolonged and undignified dying process.[75] This societal sentiment runs through judicial opinions, academic commentary, and religious doctrine.[76] What is critical about the right to refuse life-sustaining treatment is the desire to protect seriously ill people from an intolerable death.

Of course, that concern is exactly what motivates advocates for a right to aid in dying. They too justify such a right in terms of protecting seriously ill people from an intolerable death. In the *Glucksberg* aid in dying case before the U.S. Supreme Court, for example, one of the plaintiffs was terminally ill from widely metastatic cancer and experienced constant pain, which could be relieved only partially by medication.[77] She also suffered from bed sores, nausea, vomiting, and other debilitating symptoms.[78]

Or consider the example of a patient dependent on kidney dialysis for survival who decides to refuse further dialysis. That patient elects to have a life-sustaining treatment withdrawn, and death will follow within a few weeks. Suppose that after several days, the patient begins to experience intolerable suffering. The patient does not want dialysis restarted, but asks for a lethal dose of medication to avoid a prolonged dying process. If the goal of end-of-life law

---

73. *Legalization*, *supra* note *, at 464.

74. *Id.* at 450-51.

75. Cantor, *supra* note 30, at 249-50.

76. ORENTLICHER, *supra* note *, at 32-33, 65-66.

77. Compassion in Dying v. Washington, 79 F.3d 790, 794 (9th Cir. 1996).

78. *Id.*

is to prevent people from suffering greatly from a prolonged dying process, why allow the withdrawal of treatment but not the aid in dying? Denying aid in dying only prolongs the dialysis patient's suffering.

However, a right to suicide assistance could easily lead to many morally unjustified deaths. Many people want to end their lives with a lethal dose of medication when they are not dying from cancer or other severe and untreatable illnesses. A depressed college student might choose a lethal dose of drugs when psychiatric care could address the depression. A broad right to aid in dying would not limit death-causing choices to patients with a morally justified choice of death.

Of course, the same can be said about a broad right to withdrawal of treatment. Not all persons who refuse medical treatment are doing so to avoid a prolonged and undignified dying process.

Inasmuch as morally justified deaths could occur through either withdrawal of treatment or suicide assistance, and morally unjustified deaths also could occur through either practice, the law might permit both treatment withdrawals and assisted suicides when they are morally justified and prohibit both when they are not morally justified.

Under such an approach, however, someone representing the state's interest in preserving life would have to decide whether the patient's suffering is severe enough to justify either the withdrawal of treatment or the assistance in suicide.[79] The patient would select the life-shortening option, and some official representative would assess the patient's condition and prospects for recovery. The representative then would conclude either that (1) the patient's condition was serious enough and the suffering severe enough to justify the life-ending choice or that (2) the patient's condition was not serious enough or the suffering not severe enough to justify the ending of life.

But we do not want the state to decide when someone's quality of life is sufficiently miserable that it is permissible to choose death. That is one of the last powers we would want the state to assume. Judgments about quality of life can be made by people for themselves, but not by the government for them.

If we cannot decide each request to shorten life on its own merits, we need a "proxy" rule that generally sorts between the morally justified and the morally unjustified. For many years, the distinction between treatment withdrawal and suicide assistance served that proxy role.[80] Treatment withdrawals could be permitted for everyone because the typical refusal of treatment involves a patient who is suffering greatly from a serious medical condition.[81] Suicide assistance

---

79. The decision maker could be a physician, a judge, or another person. Even though the decision makers need not be government employees, they would be representing the state's interest in preserving life.

80. *Legalization*, *supra* note *, at 445.

81. Sometimes people refuse treatment that can restore them to good health, but those cases involve refusals of treatment for religious reasons. A Jehovah's Witness might decline a blood transfusion or a Christian Scientist might decline surgery. *See, e.g.*, Stamford Hosp. v. Vega, 674 A.2d 821, 824-25 (Conn. 1996).

had to be prohibited for everyone because the typical suicide does not involve a patient suffering greatly from a serious medical condition.[82] The typical treatment withdrawal would represent a morally justified death while the typical suicide would represent a morally unjustified death. In short, we could permit morally justified deaths and prevent morally unjustified deaths with the distinction between treatment withdrawal and suicide assistance without making quality of life judgments for individual patients.

However, it became apparent that the proxy rule for end-of-life law had a serious defect. While the typical taking of a lethal dose of medication is not morally justified, the taking of a lethal dose of medication by someone who is terminally ill is not a typical case. A patient dying from cancer is very different from a despondent college student. Assisted suicide for the terminally ill—or aid in dying—still limits death-hastening choices to people who are suffering greatly from a serious medical condition. Like treatment withdrawal, aid in dying results in deaths that typically are morally justified in society's view.

Hence, a proxy rule that allows the taking of a lethal dose of medication by the terminally ill represents a refinement of the proxy distinctions in end-of-life-law so they better reflect society's views about morally justified and morally unjustified deaths. Moreover, it allows the refinement without forcing a representative of the state to make quality of life judgments for individual patients. Thus, when Oregon, Washington, Montana, Vermont, and New Mexico have recognized a right to assisted suicide, they have done so only for people with a terminal illness.[83] In all of those states, anyone who is terminally ill is eligible for aid in dying, while no one who is not terminally ill may choose aid in dying.[84] The states do not consider the degree of the patient's suffering or other measures of the patient's quality of life.[85] The law still relies on proxy rules for end-of-life decision making, but it employs proxy rules that do a better job sorting the morally justified death from the morally unjustified death.

CONCLUSION

While legal recognition of a right to aid in dying is growing, its greater recognition does not reflect a change in societal views about the propriety of

---

82. *Legalization*, *supra* note *, at 462.

83. OR. REV. STAT. §§ 127.800 -127.897 (2014); VT. STAT. ANN. tit. 18 §§ 5281-92 (2014) (LexisNexis); WASH. REV. CODE § 70.245 (2014); Baxter v. State, 224 P.3d 1211, 1221-22 (Mont. 2009); Opposition to Defendant's Motion to Dismiss, Morris v. Brandenberg, No. D-202-cv-2012-02909 (2d Jud. Dist. N.M. Jan. 13, 2014). *See also* David Orentlicher et al., *The Changing Legal Climate for Physician Aid in Dying*, 311 JAMA 1961, 1961 (2014).

84. OR. REV. STAT. §§ 127.800 -127.897; VT. STAT. ANN. tit. 18 §§ 5281-92; WASH. REV. CODE § 70.245; *Baxter*, 224 P.3d at 1221-22; Opposition to Defendant's Motion to Dismiss, Morris v. Brandenberg, No. D-202-cv-2012-02909 (2d Jud. Dist. N.M. Jan. 13, 2014).

85. OR. REV. STAT. §§ 127.800 -127.897; VT. STAT. ANN. tit. 18 §§ 5281-92; WASH. REV. CODE § 70.245; *Baxter*, 224 P.3d at 1221-22; Opposition to Defendant's Motion to Dismiss, Morris v. Brandenberg, No. D-202-cv-2012-02909 (2d Jud. Dist. N.M. Jan. 13, 2014).

physician-assisted suicide. We are not seeing an evolution in ethical thought. Rather, society is refining its legal rules for end-of-life law so they better reflect the public's long-standing moral views about death-hastening choices at the end of life.

WHAT THE FUTURE OF AGING MEANS TO ALL OF US: AN ERA OF POSSIBILITIES

REBECCA C. MORGAN*

INTRODUCTION

There is an oft-quoted phrase about certainty, that two things in life are certain: death and taxes.[1] I would like to build on that and offer that there are three certainties in life: *aging*, death, and taxes. One of the universals for all of us is aging. With the tick of the clock, each second, we grow older. Because aging is universal, it is important for us to recognize that the issues surrounding aging and the future of aging—programs, services, policies, people, however you consider it—affect us all. Thus, it may be said, aging is a common denominator for all of humanity.

It is also important to recognize that because aging affects all of us, as both individuals and professionals, we need to look at the issues and solutions horizontally rather than vertically by individual disciplines. For example, as an elder law attorney, the client's legal problems can be impacted by the client's health, housing situation, financial security, and more. So we need to recognize the interdisciplinary nature of the future and organize our thoughts in a broader way, rather than just by our respective disciplines. Others may view or organize this as a wheel, with aging as the center and the different disciplines as the spokes.

Some might refer to the aging cohort known as the Baby Boomers as a speeding freight train heading for us, while others have made more colorful

---

* Boston Asset Management Chair in Elder Law, Co-Director, Center for Excellence in Elder Law, Director, LL.M. in Elder Law, Stetson University, College of Law. This paper is based on a speech (but is not a transcript) presented at the 2013 Program on Law and State Government Fellowship Symposium: *State Governments Face the Realities of Aging Populations* held at Indiana University Robert H. McKinney School of Law on September 20, 2013. Because this Article is based on a presentation, it is written more informally than a typical law review article and is not intended to provide an in-depth discussion of the issues presented in this paper. Instead, it is the Author's intent to raise these issues and to encourage thinking and planning surrounding these issues. The Author would like to thank Professor Cynthia Baker**,** Clinical Professor of Law, Director, Program on Law and State Government**,** Kyle Galster, and 2013 fellows Sean P. Deneault and Tarah M.C. Baldwin for the honor of participating. The author would like to thank the editors of the law review for accepting this article for publication and allowing this more informal format. Finally, the author would like to thank colleagues Associate Dean Michael Allen, Professors Mark Bauer, Brooke J. Bowman, and Roberta K. Flowers, and student Marissa McDonough for their helpful comments.

1. Benjamin Franklin, *Letter of Jean Baptiste LeRoy*, *13 Nov. 1789*, NOTABLE QUOTES, http://www.notable-quotes.com/f/franklin_benjamin.html (last visited Oct. 25, 2013).

references to silver tsunamis[2] and pigs in pythons.[3] One thing is for sure: the certainty of aging breeds uncertainty of responses and thus questions and possibilities, like a river, flow from this uncertainty that we are facing.

I. WHY AGING? WHY NOW?

Aging is not a new phenomenon, so why are we so focused on the future of aging now? I will offer two opinions: longevity and Baby Boomers.[4] The law impacts every profession and we see the applicability of many laws and regulations in the field of aging. Elder law, the part of the legal profession that deals with clients who are older, has grown from its inception as a specialty practice area to a general practice area within which attorneys specialize.[5] There are still areas where the field of elder law is evolving. The evolution is likely driven by a number of factors, including demographics, longevity, population shifts, technology, health care, you name it.

Why just offer longevity and Baby Boomers as justifications for why the future of aging is now important to all of us? Put aside the personal perspective (we all should be concerned with how we age and quality of life); focus instead on the professional issues. Regardless of our profession, aging populations have an impact on it. Whether it is co-workers who are older, Boomers with caregiving responsibilities for their parents, the customer or client base, a service we provide or a product we sell, there are impacts all around us. We just have to recognize it. Aging, like the law, is ubiquitous.

When elder law was first recognized as a practice area, it was viewed as a niche practice or specialty practice area – something of a novelty. Now, more than twenty-five years later[6] elder law is a recognized practice area[7] and, as I like

---

2. *See, e.g.*, Alliance for Aging Research, *Preparing for the Silver Tsunami*, http://www.agingresearch.org/newsletters/view/100 (July 1, 2006).

3. *See Pig in the Python Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/english/pig-in-the-python (last visited Nov. 3, 2013) (defining "pig in the python" as "a sharp statistical increase represented as a bulge in an otherwise level pattern, used especially with reference to the baby-boom generation regarded as having a gradual effect on consumer spending, society, etc. as they grow older. [[F]rom the shape of such an increase being likened to that of a pig swallowed by a python].").

4. Celeste Headlee, *Are We Ready for a Massive Aging Population?*, NPR NEWS (Aug. 12, 2013), http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=211370947&m=211370940 (transcript available at http://www.npr.org/templates/story/story.php?storyId=211370947) (discussing Boomer's impact on culture, among other things).

5. *Why an Elder or Special Needs Law Attorney?*, NAT'L ACAD. OF ELDER LAW ATTORNEYS, http://www.naela.org/Public/About/Consumers/Why_and_Elder_Law_Attorney_is_a_Good_Choice/Public/About_NAELA/Fact_Sheets/Why_an_Elder_Law_Attorney_is_a_Good_Choice.aspx?hkey=6569dbbe-5362-4cfa-8752-bd890a8a6ec1 (last visited Sept. 19, 2014).

6. The twenty-five plus years is a reference to the variances attributable to when elder law was "born." The National Academy of Elder Law Attorneys (NAELA), a membership organization of attorneys who practice in the fields of elder and special needs law was established in 1987. *See*

to describe it, a general practice area within which elder law attorneys specialize.[8] Elder law is unique in that, unlike most other areas of the law, the practice is defined by the client (the elder or family member), rather than the subject area of law.[9] So if the practice is defined by the client, a seventy-five-year-old could have a family law problem, a contracts matter, or a personal injury matter, be a victim or perpetrator of a crime, need a zoning variance, wish to create an estate plan, etc. As a result, elder law can encompass it all, but not all elder law attorneys do it all. Thus, my perspective of elder law is that it is a general practice area within which attorneys specialize. This is an especially interesting thought when looking at developments outside of the law that impact the client base (technology, housing, health care, income security) and, in my view, what seems to be the move from generalization to specialization within the law.[10] What are the expectations of clients who seek the services of an elder law attorney and what does elder law mean?

I. IS IT ALL ABOUT AGE?

Jack Weinberg famously said "don't trust anyone over thirty,"[11] but with time

---

About NAELA, NAT'L ACAD. OF ELDER LAW ATTORNEYS, http://www.naela.org/Public/About/Public/About_NAELA/About.aspx?hkey=3ae07a3c-c172-4565-a52b-091d49e31841 (last visited Sept. 19, 2014) (providing more information about NAELA). The National Senior Citizens Law Center (NSCLC) was established in 1972. *See History*, NAT'L SENIOR LAW CITIZENS CTR., http://www.nsclc.org/index.php/about/what-we-do/history-2/ (last visited Sept. 19, 2014) (providing more information about NSCLC).

7. Thirty-nine state bars have elder law sections or committees on aging and disability. *See* Charles P. Sabatino, *The Longevity of Elder Law*, 33 BIFOCAL, Aug. 2012, http://www.americanbar.org/publications/bifocal/vol_33/issue_6_aug2012/longevity_of_elder_law.html. NAELA has 4,474 members and twenty-eight chapters. Email from Peter Wacht, Exec. Dir., NAELA, to author (on file with Author). The National Elder Law Foundation has over 400 attorneys certified in elder law. *See About NELF*, NAT'L ELDER LAW FOUND., http://www.nelf.org/about-nelf (last visited Nov. 3, 2013).

8. *See* Rebecca C. Morgan, *The Future of Elder Law Practice*, 37 WM. MITCHELL L. REV. 1, 6-7 (2010).

9. *Id.* at 7 (citing *Why an Elder or Special Needs Law Attorney?*, *supra* note 5).

10. *See, e.g.*, *Standing Committee on Specialization*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization.html (last visited Nov. 3, 2013) (governing certification). The committee lists certifying entities and states, with eight private organizations approved to certify attorneys in specific areas and noting that twelve states have state-sponsored certification. *Sources of Certification*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html (last visited Oct. 25, 2013).

11. As part of U.C. Berkley's Free Speech Movement in 1964, Jack Weinberg actually said, "We don't trust anyone over thirty." *See* Daily Planet Staff, *Don't Trust Anyone over 30 Unless It's Jack Weinberg*, BERKLEY DAILY PLANET, Apr. 6, 2000, at 1, *available at* http://www.berkeleydailyplanet.com/issue/2000-04-06/article/759.

and age, perspectives and priorities change. What is meant by "old" is something determined in the eye of the beholder. At what age is a person "old?" Is it age or ability that matters? Why all the fuss about the Baby Boomers?

Ah, the Baby Boomers.[12] That cohort of our population always seems to get a lot of press and other generations may wonder why the attention. Is it just their numbers or is there something "special" about them?[13] According to Ken Dychtwald[14] at the American Society on Aging's 2012 *Aging in America* conference, "boomers change every stage of life through which they migrate."[15]

In my view, it is very hard to speak definitively about a generation. Although its members may share common characteristics, they also have many differences, which will impact how they age. How a generation will age does not refer to aging chronologically or biologically, but whether its members keep working, whether they will retire with hobbies, their level of community engagement, etc.

---

12. The Congressional Budget Office discussed the Baby Boomer generation and explained,

> Between 1946 and 1964 more than 75 million babies were born in the United States, forming a cohort that has come to be known as the baby-boom generation. The oldest people in the group turned 65 in 2011. The aging of that generation, in combination with increases in longevity and other factors, will cause the share of the population age 65 or older to grow rapidly from 2010 to 2030. The share of the population age 85 or older will grow rapidly beginning around 2030 and continuing until at least 2050.

CONGRESSIONAL BUDGET OFFICE, RISING DEMAND FOR LONG-TERM SERVICES AND SUPPORTS FOR ELDERLY PEOPLE 7 (2013) [hereinafter CBO], *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/44363-LTC.pdf.

13. If you are a member of the Boomer generation like the Author, you will pick the latter rather than the former! *See* Neil Howe, *What Makes the Boomers the Boomers?*, GOVERNING (Sept. 2012), http://www.governing.com/generations/government-management/gov-what-makes-boomers.html ("[T]his generation began to manifest so many of the collective attitudes and behaviors for which they have since become famous: their individualism, their attraction to personal risk, their distrust of big institutions, their carelessness about material wealth, their cultivation of self, their die-hard moralism . . . . Compared to their parents' generation, boomers have always lived on the edge. In their youth, they launched a behavioral trend toward personal risk-taking . . . . They've taken that 'born to be wild' streak—'If I have to break the rules to do it my way, I will'—and stuck with it.").

14. Dr. Dychtwald, among other things, is a futurist, noted author, and founding president and CEO of AgeWave. *See Keynote Presentations*, AGE WAVE, http://www.agewave.com/keynote/keynote_speaker.php?k=1 (last visited Sept. 19, 2014).

15. Laura Rawley, *Baby Boomers Will Transform Aging In America, Panel Says*, HUFF/POST50 (Apr. 2, 2012), http://www.huffingtonpost.com/2012/04/02/aging-in-america-baby-boomers-arianna-huffington_n_1397686.html; *see also, e.g.*, Celeste Headlee, *Are We Ready for a Massive Aging Population?*, NPR NEWS (Aug. 12, 2013) http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=211370947&m=211370940 (transcript available at http://www.npr.org/templates/story/story.php?storyId=211370947) (discussing Boomer's impact on culture, among other things).

III. NEARLY 10,000 PEOPLE A DAY IN THE U.S. ARE TURNING SIXTY-FIVE:[16] LONGEVITY

Life expectancies are increasing.[17] So we can all expect to live longer than prior generations.[18] This is true not just for the Baby Boomers (no matter how special we may think we are), but for all generations.[19] As well, increased longevity of the population is not unique to the United States.[20] With longevity comes its own basket of issues. We may be living longer, but are those longer years well-lived? Are we facing chronic conditions, disability, or good health? We are not going to live forever. Many of us will find ourselves with "functional limitations," that is "physical problems that limit a person's ability to perform routine daily activities, such as eating, bathing, dressing, paying bills, and preparing meals."[21] A fair number, almost thirty-three percent, of those at least age sixty-five, have a functional limitation, while for those of the oldest-old (age eighty-five and older), the number jumps to approximately sixty-six percent.[22] One study projected that for sixty-five-year olds, more than two-thirds of them will need help with functional limitations at some point in the remainder of their lives.[23]

---

16. *See Baby Boomers Retire*, PEW RESEARCH CTR. (DEC. 29, 2010), http://www.pewresearch.org/daily-number/baby-boomers-retire/.

17. *Health & Aging*, NATIONAL INSTITUTE ON AGING, http://www.nia.nih.gov/research/publication/global-health-and-aging/living-longer (last visited Sept. 19, 2014).

18. *Id.*

19. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., LIFE EXPECTANCY AT BIRTH, AT AGE 65, AND AT AGE 75, BY SEX, RACE, AND HISPANIC ORIGIN: UNITED STATES, SELECTED YEARS 1900-2010 (2013), *available at* http://www.cdc.gov/nchs/data/hus/hus12.pdf#018; U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT: BIRTHS, DEATHS, MARRIAGES & DIVORCES: LIFE EXPECTANCY (2012), *available at* http://www.census.gov/compendia/statab/cats/births_deaths_marriages_divorces/life_expectancy.html.

20. Sabrina Tavernier, *Life Expectancy Rises Around the World, Study Finds*, N.Y. TIMES (Dec. 13, 2012), http://www.nytimes.com/2012/12/14/health/worlds-population-living-longer-new-report-suggests.html?_r=0 (referencing *Global Burden of Disease Study 2010*, LANCET (Dec. 13, 2012), http://www.thelancet.com/themed/global-burden-of-disease.).

21. CBO, *supra* note 12, at 1. As they age, people may also experience cognitive limitations, which are "losses in mental acuity that may also restrict a person's ability to perform such activities." *Id.*

22. *Id.* (citations omitted). The CBO report notes that the chance of having a functional limitation grows with age. *Id.* at 12. Of those aged sixty-five to seventy-four who live in the community, fewer than twenty percent reported a functional limitation, but of those at least age eighty-five, it jumps to almost three-times that amount. *Id.* Nearly one-third of those aged seventy-five to eighty-four have a functional limitation. *Id.* Those who need help with activities of daily living (ADLs) (fourteen percent of the sixty-five to seventy-four age group), need assistance with at least one ADL while forty-one percent of those at least eighty-five do. *Id.*

23. *Id.* at 1 (citing Peter Kemper et al., *Long-Term Care over an Uncertain Future: What Can Current Retirees Expect?*, 42 INQUIRY 335 (2005), http://tinyurl.com/l9ml4a9). The CBO goes

Should there be outer limits on longevity? How long a life is long enough? That was an interesting question that the Pew Research Foundation studied in a recent survey.[24] As we live longer, we have to think of issues that arise from a longer life span. Should retirement age be raised because we will live longer?[25] Will we outlive our savings? Will we need more health care? Consider how increases in longevity will redefine family relationships. Ken Dychwald in his presentation to the American Society on Aging, *Aging in America 2013* conference, spoke about the longevity revolution and gave the example of a family with six living generations.[26] In popular culture, adult caregivers who are supporting their children as well as their parents are often referred to as the sandwich generation.[27] Imagine the sandwich for six living generations.

---

on to predict that if that estimate holds true, then the need for assistance with functional or cognitive limitations will greatly increase. *Id.*

24. CARY FUNK ET AL., LIVING TO 120 AND BEYOND: AMERICANS' VIEWS ON AGING, MEDICAL ADVANCES AND RADICAL LIFE EXTENSION (2013), *available at* http://www.pewforum.org/files/2013/08/Radical-life-extension-full.pdf.

25. *See, e.g.*, GLENN R. SPRINGSTEAD, DISTRIBUTIONAL EFFECTS OF ACCELERATING AND EXTENDING THE INCREASE IN THE FULL RETIREMENT AGE, SOC. SEC. ADMIN., OFF. OF RET. & DISABILITY POLICY, POLICY BRIEF NO. 2011-01 (2011), *available at* http://www.socialsecurity.gov/policy/docs/policybriefs/pb2011-01.html; Off. of Ret. Policy, *Policy Option Projections: Retirement Age Increases*, http://www.socialsecurity.gov/retirementpolicy/ projections/increases-fra.html (last visited Nov. 3, 2013).

26. Ken Dychtwald, *Transforming Retirement: New Timing, Roles, Funding, Challenges/Opportunities and a New Purpose* (video 2013) (*available at* http://asaging.org/asa-videos-general-sessions-aging-america).

27. *See* PAUL TAYLOR ET AL., THE SANDWICH GENERATION, RISING FINANCIAL BURDENS FOR MIDDLE-AGED AMERICANS, PEW RESEARCH CENTER FOR SOCIAL & DEMOGRAPHIC TRENDS (2013) [hereinafter TAYLOR ET AL., PEW SANDWICH], *available at* http://www.pewsocialtrends.org/files/2013/01/Sandwich_Generation_Report_FINAL_1-29.pdf. The "sandwich generation" is a phrase that refers to the adult who is caring (often in the terms of financial support) for an elderly relative while also supporting children. The adult is the filling in the sandwich, the children are one slice of bread, and the elderly relative the other. The Pew Research Center report on the Sandwich Generation defines it as:

> those adults with at least one living parent age 65 or older and who are either raising a child younger than 18 or providing financial support (either primary support or some support in the past year) to a grown child age 18 or older. Stepmothers/stepfathers who "played an important role" in respondent's life are included in cases where the mother/father is deceased. Stepchildren are included for respondents who volunteer that they have a stepchild and say they consider themselves to be his or her parent or guardian. . . .

Id. at 2 n.2. Sandwich generation

> members are mostly middle-aged: 71% of this group is ages 40 to 59. An additional 19% are younger than 40 and 10% are age 60 or older. Men and women are equally likely to be members. . . . Hispanics are more likely than whites or blacks to be in . . . [the sandwich generation]. More affluent adults . . . are more likely than less affluent

IV. A "NEW" HOUSING PARADIGM—AGING IN PLACE?

We are hearing a lot these days about "aging in place," referring to a person's desire to live and age in the same house.[28] Is this really a new paradigm? This is different than folks retiring and moving to a Sunbelt state.[29] The desire to grow older in one's own home rather than being moved into a facility is not just a hopeful wish. Technology, architecture, and government programs, policies, regulations, and even zoning are making this possible now. In the past, the typical solution for folks who were not able to live independently at home was a long-term care facility such as a nursing home, or, for those with a lower level of needs, supportive housing.[30] Perhaps the method of payment (with government programs, especially Medicaid, paying for the care)[31] and fewer options available

---

> adults to be in the sandwich generation. . . . Married adults are more likely than unmarried adults to be sandwiched between their parents and their children . . . .

Id. at 3.

This sandwich would look a lot like a "Dagwood Sandwich" made famous in the "Blondie" comic strip, which is described as:

> a multi-layered sandwich with a variety of fillings. Used to denote a sandwich put together so as to attain such a tremendous size and infinite variety of contents as to stun the imagination, sight, and stomach of all but the original maker.
>
> . . . [The] term . . . originated in the comic strips in the 1930s after a comic strip character named Dagwood Bumstead. According to the creator of the comic strip, Murat Bernard "Chic" Young . . . , the only thing that Dagwood could prepare in the kitchen was a mountainous pile of dissimilar leftovers precariously arranged between two slices of bread. Dagwood became known for his huge sandwiches he created on evening forays to the refrigerator.

A History of the Dagwood Sandwich, Whatscookingamerica.net, http://whatscookingamerica.net/History/Sandwiches/DagwoodSandwich.htm (last visited Sept. 7, 2013). A recipe by famous chef Emeril Lagasse on the Food Network website calls for ten slices of bread, among other ingredients. *Dagwood Stacked Sandwich*, FOOD NETWORK, http://www.foodnetwork.com/recipes/emeril-lagasse/dagwood-stacked-sandwich-recipe/index.html (last visited Nov. 3, 2013).

28. Mark D. Bauer, *"Peter Pan" as Public Policy: Should Fifty-Five-Plus Age-Restricted Communities Continue to be Exempt from Civil Rights Laws and Substantive Federal Regulation?*, 21 ELDER L.J. 33, 43-44 (2013).

29. *Sun Belt*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/573594/Sun-Belt (last visited Sept. 19, 2014) (explaining that the Sun Belt consists of fifteen states in the southern portion of the United States spanning from Virginia to Florida in the southeast, through Nevada in the southwest, and part of southern California).

30. *See, e.g.*, Bauer, *supra* note 28, at 43; *see also* Eldercare Locator, DEP'T HEALTH & HUMAN SERVS., http://www.eldercare.gov/eldercare.net/public/resources/factsheets/govt_assisted_housing.aspx (last visited Aug. 24, 2014).

31. *See, e.g.*, Jon Pynoos et al., *Aging in Place, Housing & the Law*, 16 ELDER L.J. 77, 84-85 (2008) (discussing, among other things, "[i]nstitutional bias against funding for in-home long-term care services" (citations omitted)).

are the reason for the default to a nursing home for long-term care. Recognizing the individual's desire to stay in the community,[32] funding of community care is increasing,[33] and so perhaps there will be more opportunities for individuals to age in place, or at least reside in a community setting rather than an institutional one.[34] Reports show a drop in the number of people residing in nursing homes with these individuals opting instead to reside in supportive housing, residential care facilities or their homes.[35]

Universal design is the design of homes and access so that everyone of different ages and abilities can live in and use the physical space. [36] This may mean that as we grow old, the thresholds at the doors will not trip us, the doorways are wide enough for a wheelchair, the bathrooms have grab bars, or are designed so they can be easily installed, etc.[37] A "new" housing paradigm—aging in place?

Architectural design made our homes livable. And with those homes built before this, remodeling is possible in many instances.[38] How does one pay for

---

32. *See, e.g.*, Anika Clark, *Elderly Population Is Rising, but Fewer End up in Nursing Homes*, SOUTHCOAST TODAY (Sept. 18, 2011), http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20110918/NEWS/109180326/-1/newsmap.

33. *See* Press Release, U.S. Dep't of Health & Human Servs., Affordable Care Act Supports States in Strengthening Community Living (Feb. 22, 2011), *available at* http://wayback.archive-it.org/3926/20140108162250/http://www.hhs.gov/news/press/2011pres/02/20110222h.html; *Money Follows the Person*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Balancing/Money-Follows-the-Person.html (last visited Nov. 3, 2013).

34. Donald Redfoot et al., *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers*, INSIGHT ON THE ISSUES, Aug. 2013, at 4, *available at* http://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-ltc.pdf (noting a twenty-six percent decline in Medicaid nursing home care from 1995 to 2010 and two-thirds increase in the number of individuals needing assistance with at least two ADLs living in the community).

35. CBO, *supra* note 12, at 2 (citing to the Medicare Current Beneficiary Survey (MCBS) which stated there was a ten percent drop in the number of elders living in nursing homes because more live-in supportive housing, residential care facilities or other care facilities and homes without supportive services. The MCBS noted that this is an even more significant trend for those of the oldest-old (eighty-five and older.)).

36. *See* Rebecca C. Morgan, *From the Elder-Friendly Law Office to the Elder-Friendly Courtroom: Providing the Same Access and Justice for All*, 2 NAELA J. 325, 327-28 (2006); CTR. FOR UNIVERSAL DESIGN, N.C. STATE UNIV., RESIDENTIAL REHABILITATION, REMODELING AND UNIVERSAL DESIGN (2006), *available at* http://www.ncsu.edu/ncsu/design/cud/pubs_p/docs/residential_remodelinl.pdf.

37. CTR. FOR UNIVERSAL DESIGN, *supra* note 36.

38. *See, e.g.*, DEBORAH MCCARTY & PHILIP B. STAFFORD, HOW TO DEVELOP A HOME MODIFICATION INITIATIVES: A COMMUNITY GUIDEBOOK (2010), *available at* http://www.aarp.org/content/dam/aarp/livable-communities/act/housing/how-to-develop-a-home-modification-initiative-a-community-guidebook-aarp.pdf; *see also* Howe, *supra* note 13 (stating "[t]he next

this type of remodel? Savings, home equity loans, reverse mortgages, or families?

The idea of staying at home is not limited to the individual. Some cities are part of the "livable" community or "communities for a lifetime" initiatives.[39] For example, the Indiana initiative[40] examined the "four domains" of a community that would be considered "elder-friendly."[41] This aging in place concept for cities (rather than individuals) offers significant opportunities for local government to provide a cohesive plan for its citizens as they pass through all ages of life.[42] But are all cities jumping on the livable communities concept? Some have but not all.[43] According to one study looking at the role of municipal government with law and aging,[44] there is a chasm between ideas and implementation[45] with no significant momentum to the development of ordinances that facilitate the creation of (or modification into) an elder-friendly city with sufficient services

---

decade promises to be the golden age of the home remodeler, as boomers with funds turn that circa-2000 pleasure-palace McMansion into a rambling circa-2020 extended-family home reminiscent of the rambling Depression-era residences in all those old Frank Capra movies.").

39. For example, the Florida Department of Elder Affairs defines the communities for a lifetime as "a statewide initiative that assists Florida cities, towns and counties in planning and implementing improvements that benefit their residents, both youth and elder." *Frequently Asked Questions*, COMMUNITIES FOR A LIFETIME, http://www.communitiesforalifetime.org/faq.php (last visited Nov. 1, 2013); *see also, e.g.*, JOANNE BINETTE, AARP RESEARCH & STRATEGIC ANALYSIS, MAINTAINING INDEPENDENCE AND QUALITY OF LIFE: A LIVABLE COMMUNITY SURVEY IN INDIANAPOLIS, INDIANA (2011), *available at* http://assets.aarp.org/rgcenter/il/livable-communities-indianapolis-general-indiana.pdf (noting in the Executive Summary that a significant percentage of those fifty and over expressed a preference for staying at home and in Indianapolis for as long as they could).

40. *See generally* Ind. Univ., *About*, AGING INDIANA: PLANNING ELDER-FRIENDLY HOOSIER COMMUNITIES, http://lifetimecommunities.org/about/ (last visited Sept. 10, 2014).

41. *See* Ind. Univ., *Community Planning Model*, COMMUNITIES FOR A LIFETIME, http://lifetimecommunities.org/community%20planning%20model/index.html (last visited Sept. 19, 2014) (mentioning that the four domains include responding to basic needs, furthering both civic and social engagement, maximizing health (physical and mental) and well-being and enhancing independence of those who are disabled or frail).

42. A. Kimberly Dayton & Israel Doron, *Municipal Elder Law: A Minnesota Perspective,* 20 ELDER L.J. 33, 43-44 (2012) [hereinafter Dayton & Doron, *Municipal Elder Law*].

43. *Id.* at 67-68 (explaining the Florida Communities for a Lifetime Project, the "Blue Zone" experiment in Albert Lea, Minnesota and the "Green House Project").

44. A. Kimberly Dayton & Israel Doron, *Thinking Locally: Law, Aging & Municipal Government: Findings from a National Survey*, 21 TEMP. POL. & CIV. RTS. L. REV. 101, 108 (2012) [hereinafter Dayton & Doron, *Thinking Locally*] (noting that in the cities surveyed, there were over 1000 ordinances that somehow affected older persons and that a majority of cities passed a minimum of one ordinance concerning housing that affected elders).

45. *Id.* at 115 (citing to NICHOLAS FABER & DOUGLAS SHINKLE, AGING IN PLACE: A STATE SURVEY OF LIVABILITY POLICIES & PRACTICES vii (2011), *available at* http://www.ncsl.org/documents/transportation/Aging-in-Place-2011.pdf).

to allow residents to age in place.[46]

V. ZONING FOR SERVICES

Even as we age in place and grow older, we still need services.[47] So this brings up the issues of zoning—at least in part because single-family zoning (instead of mixed use zoning or zoning to allow a la carte services or nearby services) limits the location of supportive housing or even aging in place. One can order most anything online these days, and some online companies can even deliver items, including groceries and medicines. So why would someone ever need to leave her home?[48] Concomitant with aging in place is the need for services to be geographically accessible and convenient to residents. This has led to Naturally Occurring Retirement Communities (NORCs).[49]

If the residents need a business and the business is willing, the local governments need to consider the zoning that allows the consumer-seller relationship to evolve.[50] Many local governments have zoning ordinances that will affect elders—these may focus on the type of housing or business, such as a health care facility.[51] Governments need to decide if they want their residents

---

46. *Id.* at 116 (discussing these findings as consistent with earlier studies and ordinances that do exist and primarily focus on zoning, with many ordinances viewing age negatively and stereotyping).

47. *See, e.g.*, BINETTE, *supra* note 39, at 1-2 (discussing that almost three-fourths of those responding rated repair services and home health care as very important or extremely important, and transportation as important).

48. *See* Howe, *supra* note 13 ("The new elders are much more likely to choose to age in place, in the house where they already live, than to decamp to an existing retirement village. The boomer buzzword for this phenomenon will be NORC, or 'naturally occurring retirement community.'").

49. *See* Bauer, *supra* note 28, at 44 ("An important aging in place initiative is the phenomenon known as naturally occurring retirement communities (NORC). 'Officially, the NORC designation now connotes a community that is bringing in necessary social services, and receives government funding to better address the needs of older residents,' although the term is used casually to refer to many informal communities comprised largely of elders."); s*ee also NORCs: An Aging in Place Initiative*, NORC NATIONAL INITIATIVE, http://www.norcs.org/Section.aspx?id=1283 (last visited Nov. 1, 2013).

50. *See, e.g.*, Dayton & Doron, *Thinking Locally*, *supra* note 44, at 108 (noting that in the cities surveyed, there were over 1,000 ordinances that somehow affected older persons and that a majority of cities passed a minimum of one ordinance concerning housing that affected elders); *see also* Dayton & Doron, *Municipal Elder Law*, *supra* note 42, at 54-56 (discussing ordinances that impact housing for the elderly and giving the example of one city that has a "health care facility district.").

51. *See, e.g.*, Dayton & Doron, *Thinking Locally*, *supra* note 44, at 113 (noting that in this national survey, almost all municipalities had zoning ordinances that would affect older persons, such as age-restricted housing, housing that provides supportive services, and long term care facilities); *see also* Dayton & Doron, *Municipal Elder Law*, *supra* note 42, at 38 (discussing uses

to stay as they age and if they do, then they need to offer the services for them to do so. There is a cost, as well as a benefit.

VI. TECHNOLOGY

Technology can make us safer, keep us connected, make us smarter, and help us maintain our independence.[52] We can unlock and start our cars through our smart phones,[53] we can adjust our thermostats despite being a thousand miles away.[54] We can turn on lights, we can have stoves that shut off, we can have medical cottages, and wander guards, life alerts and medication reminders.[55] Do we ever again have to lose track of someone with Alzheimer's who wanders off? We have robots that can do tasks for us.[56] We can have robots provide care.[57] We can deliver health care remotely,[58] and who knows what the next generation of robots can do. We can have virtual dinners with our families, we can monitor caregivers' actions around our grandparents without them even knowing about it. Before long our cars will drive themselves.[59] We are not yet living the life of the Jetsons,[60] but we are getting closer.

Considering that Baby Boomers were born before the Internet was available to the public, it is hard to imagine a life without technology. Society continues to disprove the old adage, "you can't teach an old dog new tricks" with the growing use of technology among "elders." We are truly a "wired" society but clearly more for some than others. The United States of Aging survey[61] noted

---

of zoning and land use ordinances and their effect on "the basic human rights" of everyone).

52. Christina DesMarais, *Domestic Robots: Hi-Tech House Helpers*, PC WORLD (Apr. 16, 2012), http://www.pcworld.com/article/253882/domestic_robots_high_tech_house_helpers.html.

53. *See, e.g.*, Christina Warren, *Want to Remotely Start Your Car? There's an App for That* (Oct. 13, 2009), http://mashable.com/2009/10/13/viper-smartstart/.

54. *See, e.g.*, Martin LaMonica, *Need a Better Thermostat? Look to Your SmartPhone*,(Jan. 19, 2012), http://www.cnet.com/news/need-a-better-thermostat-look-to-your-smartphone/.

55. *See generally* Heather Kelly, *Robots: The Future of Elder Care?*, CNN WHAT'S NEXT BLOG (July 19, 2013), http://whatsnext.blogs.cnn.com/2013/07/19/robots-the-future-of-elder-care/.

56. DesMarais, *supra* note 52.

57. Kelly, *supra* note 55.

58. *What Is Telemedicine?*, AM. TELEMEDICINE ASS'N, http://www.americantelemed.org/learn/what-is-telemedicine (last visited Nov. 3, 2013).

59. *See, e.g.*, Davide Santo, *Making the Autonomous Car a Reality: Getting Drivers Ready Is Half the Battle*, WIRED (Oct. 17, 2013), http://www.wired.com/insights/2013/10/making-the-autonomous-car-a-reality-getting-drivers-ready-is-half-the-battle/.

60. *See* Matt Novak, *50 Years of the Jetsons: Why the Show Still Matters* (Sept. 19, 2012), *available at* http://blogs.smithsonianmag.com/paleofuture/20102/09/50-years-of-the-jetsons-why-the-show-still-matters/.

61. *See generally* THE UNITED STATES OF AGING, THE UNITED STATES OF AGING SURVEY: NATIONAL FINDINGS (2013) [hereinafter UNITED STATES OF AGING SURVEY], *available at* http://www.ncoa.org/assets/files/pdf/united-states-of-aging/2013-survey/USA13-National-Fact-Sheet.pdf.

that respondents felt technology was significant to help them keep in touch with relatives, friends and "the wider world," and slightly more than one-third expressed a lack of knowledge on how to use technology.[62] Look around when you walk on the street – how many people do you see talking on their smart phones, listening to their personal music devices, or accessing data on their tablets? There are a number of studies tracking adults who use social media and technology. One such recent study[63] found that forty-three percent of individuals who are sixty-five and older and sixty percent of those fifty to sixty-four years old use a social networking site.[64]

Because of the capability and potential for technology to provide monitoring and care – freeing up human caregivers to work, among other things – it is critical for aging individuals to have access to the Internet and the equipment for their care and services. The ability to afford the Internet must be considered. Even though computers and smart phones at least seem to be ubiquitous, there are those who simply cannot afford being wired into the virtual world.[65] A study from the Pew Research Center's Internet and American Life Project[66] noted the frequency with which caregivers accessed caregiving related information via the Internet, with almost sixty percent of caregivers finding caregiving resources available on the Internet – putting them in a better position in the provision of care – and slightly over fifty percent finding Internet resources helpful in managing their caregiver stress.[67]

Caregiving can be divided into two categories: informal, in which typically family members provide care, and formal, that is, for example, paid caregivers that provide the care.[68]

---

62. *Id* (noting that eighty-three of elders in the survey responded that it is "very or somewhat important" for elders to use technology compared with eighty-eight of those eighteen to fifty-nine years old).

63. JOANNA BRENNER & AARON SMITH, PEW INTERNET: PEW INTERNET & AMERICAN LIFE PROJECT, 72% OF ONLINE ADULTS ARE SOCIAL NETWORKING SITE USERS (Aug. 2013), *available at* http://pewinternet.org/Reports/2013/social-networking-sites.aspx.

64. *Id.* at 2.

65. UNITED STATES OF AGING SURVEY, *supra* note 61 (Although eighty-one percent of those elders in the low-income category replied that "technology is very or somewhat important in helping them stay in touch with family and friends" a significant amount (forty-seven percent) indicated the cost of technology stops them from using it. Only twenty-one percent of those elders who are eighty and older and thirty-five percent of those who have at least three health problems found cost as an obstacle.).

66. SUSANNAH FOX ET AL., PEW INTERNET: PEW INTERNET & AMERICAN LIFE PROJECT, FAMILY CAREGIVERS ARE WIRED FOR HEALTH (2013), *available at* http://pewinternet.org/Reports/2013/Family-Caregivers.aspx.

67. *Id.* at 3 (discussing summary of findings).

68. *Definitions*, FAMILY CAREGIVER ALLIANCE, https://www.caregiver.org/definitions-0 (last visited Sept. 19, 2014) ("*Family (Informal) Caregiver*—any relative, partner, friend or neighbor who has a significant personal relationship with, and provides a broad range of assistance for, an older person or an adult with a chronic or disabling condition. These individuals may be primary

Consider the fiscal impact when informal caregivers are taken out of the work force to provide care,[69] and consider the fiscal impact when formal caregivers are providing care. Caregiving is a business.[70] All of us need to consider the impact of unpaid family caregiving. Although not faulting those who care for their

---

or secondary caregivers and live with, or separately from, the person receiving care. *Formal Caregiver*—a provider associated with a formal service system, whether a paid worker or a volunteer."); *see also Being a Caregiver*, JOHNS HOPKINS MED., http://www.hopkinsmedicine.org/healthlibrary/conditions/adult/home_health_hospice_and_elder_care/being_a_caregiver_85,P00602/ (last visited Sept. 19, 2014).

69. LYNN FEINBERG ET AL., VALUING THE INVALUABLE 2011 UPDATE THE GROWING CONTRIBUTIONS AND COSTS OF FAMILY CAREGIVING (2011), *available at* http://assets.aarp.org/rgcenter/ppi/ltc/i51-caregiving.pdf. There are two important perspectives to consider when examining the impact of family caregivers. One is the economic impact of working individuals providing unpaid caregiving and the other is the "value" of the unpaid caregiving. For the first, the report found:

> [a] key theme to emerge from systematic reviews of family caregiving studies over the past 30 years is that family care can have negative effects on the caregivers' own financial situation, retirement security, physical and emotional health, social networks, careers, and ability to keep their loved one at home. The impact is particularly severe for caregivers of individuals who have complex chronic health conditions and both functional and cognitive impairments.

Id. at 5.

Consider the financial outlays of the caregivers:

> In 2009, more than one in four (27 percent) caregivers of adults reported a moderate to high degree of financial hardship as a result of caregiving. Another study found that one in four (24 percent) caregivers said they had cut back on care-related spending because of the economic downturn. One recent online survey found that six out of ten (60 percent) caregivers surveyed were concerned about the impact of providing care on their personal savings, and more than half (51 percent) said that the economic downturn had increased their stress about being able to care for their relative or close friend.
>
> Many family caregivers make direct out-of-pocket expenditures to help support a family member or friend with a disability or chronic care needs. In one national survey of women, about one in five (21 percent) report that caregiving strains their household finances. A recent online survey found that more than four in ten (42 percent) caregivers spend more than $5,000 a year on caregiving expenses.

Id. at 5-6 (citations omitted). The caregiver's job can be impacted in various ways, including time off, altering the work schedule, or even leaving a job. *Id.* at 6.

70. *See id.* As noted above, there are two important perspectives to consider when examining the impact of family caregivers. Second is the "value" of the unpaid caregiving and the other is the economic impact of working individuals providing unpaid caregiving. The AARP report "estimates the economic value of family caregiving at $450 billion in 2009 based on 42.1 million caregivers age 18 or older providing an average of 18.4 hours of care per week to care recipients age 18 or older, at an average value of $11.16 per hour." (this excludes children who help with caregiving, children who need caregiving or caregivers who do not help with ADLs). *Id.* at 2-3.

families, we have to realize that there is a fiscal impact and implications for the caregivers' own future as they age. For example:

> Family caregivers can face financial hardships if they must leave the labor force owing to caregiving demands. Not only may they lose foregone earnings and Social Security benefits, but they also can lose job security and career mobility, and employment benefits such as health insurance and retirement savings. There is evidence that midlife working women who begin caring for aging parents reduce paid work hours . . . or leave the workplace entirely . . .
>
> A recent analysis estimates that the lifetime income-related losses sustained by family caregivers age 50 and over who leave the workforce to care for a parent are about $115,900 in wages, $137,980 in Social Security benefits, and conservatively $50,000 in pension benefits. These estimates range from a total of $283,716 for men to $324,044 for women, or $303,880 on average, in lost income and benefits over a caregiver's lifetime . . . .[71]

In one study from the Pew Research Center, many middle-aged individuals predicted an almost fifty percent chance of becoming the caregiver for an elderly relative,[72] thus becoming the filling in the sandwich of the sandwich generation.[73] The need for caregiving implicates living arrangements, arranging for health care, paying for health care, technology, autonomy, and, zoning.[74]

Think about caregiving for a moment – typically in the elder law scenario that involves the adult child, typically working, typically middle to late middle-aged, caring for the elderly relative. The sandwich generation[75] adds a child to the mix—whether a young child being raised by the parent or an adult child being

---

71. *Id.* at 6.

72. TAYLOR ET AL., PEW SANDWICH, *supra* note 27, at 2-3.

73. *Id.* at 2 ("Adults who . . . have a living parent age 65 or older and are either raising a child under age 18 or supporting a grown child. . . ." (citations omitted)). The Boomers, by growing older, are growing out of the sandwich generation, although the "late Boomers" are still part of it. The Boomers are being replaced by the Gen Xers as the sandwich generation. *Id*. at 8. ("Since 2005, many Baby Boomers have aged out of the sandwich generation, and today adults who are part of Generation X are more likely than Baby Boomers to find themselves in this situation: 42% of Gen Xers have parent age 65 or older and a dependent child, compared with 33% of Boomers." (citations omitted)).

74. Consider this example: Mom lives in her home and it is zoned for single-family dwellings. Daughter wants to move into the home to take care of Mom, but in order to maintain some independence, privacy and family harmony, wants to build an addition onto Mom's home with a separate entrance, separate kitchen, separate living quarters, etc. Is this allowable under the zoning? *See, e.g.*, Pynoos et. al, *supra* note 31, at 87-88, 101 (discussing, among other matters, zoning impact on accommodating a resident's special housing needs and how alternative housing options such as shared housing may violate zoning ordinances).

75. *See* TAYLOR ET AL., PEW SANDWICH, *supra* note 27.

supported by the parent—while the parent provides care or financial help to the elder. Thus, we see a multi-generational scenario with the adult in the middle.

In a survey done by the Pew Research Center, forty-seven percent of those who are in their forties and fifties (Gen X and late Boomers) "have a parent age 65 or older and are either raising a young child or financially supporting a grown child (age 18 or older)."[76] Further, fifteen percent of those who the study would consider "middle-aged" are financially supporting a child as well as an adult parent.[77] Make no mistake, the Boomers are still part of the sandwich generation, but because the Pew Trust uses sixty-five for the minimum age of the parent in the sandwich, at least the leading edge of the boomers have moved positions in the sandwich—from the filling to the slice of bread.[78] And all the boomers will move eventually from that filling position to that bread position. Instead of the caregivers, we will become the caregivees!

Who will be this next generation of caregivers? Remember how many Boomers there are compared to how many Gen Xers or Ys there are to be caregivers. A recent report studied what could be termed as the "caregiver support ratio."[79] The problem highlighted in the study is, not unsurprisingly, that there will be fewer caregivers for those elder relatives as a result of the Boomers reaching the age where most individuals are more likely than not in need of a caregiver.[80] The age eighty and above is considered the "high-risk" age with a corresponding need for caregivers.[81] In fact, the United States is expected to hit "the 2030 problem," that is providing long-term services and support for the Boomers.[82] So why is it a problem? It is a problem because family caregivers are traditionally the ones who provide the informal caregiving and helping a person age in place.[83] The fantasy and the reality of the situation are not even close: in the survey "[sixty-eight] percent of Americans believe that they will be able to rely on their families to meet their [long term services and supports] needs when they require help."[84] As the report notes, that math does not add up. A large

---

76. *Id.* at 1.

77. *Id.*

78. *Id.* at 8-9.

79. The "caregiver support ratio" is "the number of potential caregivers aged 45-64 for each person aged 80 and older . . . [which is] use[d] . . . to estimate the availability of family caregivers during the next few decades." Redfoot et al., *supra* note 34. Ages forty-five to sixty-four was used as the typical ages to be caregivers, with the typical caregiver being "a 49-year-old woman who works outside the home and spends about 20 hours per week providing unpaid care to her mother for nearly 5 years. Nearly two-thirds of family caregivers are female (65 percent). More than 8 in 10 are caring for a relative or friend aged 50 or older." *Id.* at 2 (citations omitted).

80. *Id.* at 5-7.

81. *Id.* at 6 (The report projects the caregiver ratio to drop "from 4.1 to 2.9 between 2030 and 2050.").

82. *Id.* (citing James R. Knickman & Emily K. Snell, *The 2030 Problem: Caring for Aging Baby Boomers*, 37 HEALTH SERVS. RESEARCH 849, 849 (2002)).

83. *Id*. at 1.

84. *Id*. (citing T. THOMPSON ET AL, LONG TERM CARE: PERCEPTIONS, EXPERIENCES, AND

percentage of Americans think their families will be there to help, yet the number of family members will be decreasing at the same time the need for help increases.[85] In this era of "less government" (or maybe more accurately, distrust of government),[86] if there are not enough family caregivers to step up, will we need to rely on government programs and services to fill the gap? Will we revert to the concept of "poor houses"[87] and old folks homes or simply rely on charities, religious organizations and other non-profits to fill the gap?[88] Will we return to the default of nursing home placement for those individuals without family caregivers and the means to hire in-home help?[89]

Expectations and realities frequently don't match and this instance is no exception. For example, in another survey, even though a number of respondents had concerns about losing independence as they age, they had not planned for the future.[90] I refer to this as the "ostrich approach," or maybe the "pull the covers over your head" method – depending on your level of fear about aging.[91] Most people surveyed don't really have a good sense of how much long-term care costs and what government programs cover.[92]

One result that probably justifies the "pulling the covers over your head" response (at least for the policy makers) is that people forty years old and over

---

ATTITUDES AMONG AMERICANS AGE 40 OR OLDER 10 (2013), *available at* http://www.apnorc.org/PDFs/Long%20Term%20Care/AP_NORC_Long%20Term%20Care%20Perception_FINAL%20REPORT.pdf).

85. *Id*. at 1-6.

86. *See, e.g.*, PEW RESEARCH CTR., TRUST IN GOVERNMENT NEARS RECORD LOW, BUT MOST FEDERAL AGENCIES ARE VIEWED FAVORABLY 1 (2013), *available at* http://www.people-press.org/files/legacy-pdf/10-18-13%20Trust%20in%20Govt%20Update.pdf; JOY WILKE & Frank Newport, Fewer Americans Than Ever Trust Government to Handle Problems, GALLUP POLITICS (2013), *available at* http://www.gallup.com/poll/164393/fewer-americans-ever-trust-gov-handle-problems.aspx.

87. *See, e.g*., John E. Hansan, *Poor Relief in the United States*, THE SOC. WELFARE HIST. PROJECT, http://www.socialwelfarehistory.com/programs/poor-relief/ (last visited Oct. 28, 2013).

88. *See, e.g.*, Alfred Lubrano, *Charity Can't Fill Holes in Aid to Poor*, PHILA. INQUIRER (May 2, 2013), *available at* http://articles.philly.com/2013-05-02/news/38960249_1_charity-hunger-special-supplemental-nutrition-program.

89. *See* Pynoos et al, *supra* note 31, at 1.

90. T. THOMPSON ET AL, LONG TERM CARE: PERCEPTIONS, EXPERIENCES, AND ATTITUDES AMONG AMERICANS AGE 40 OR OLDER at 2 (2013), *available at* http://www.apnorc.org/PDFs/Long%20Term%20Care/AP_NORC_Long%20Term%20Care%20Perception_FINAL%20REPORT.pdf.

91. Three in ten individuals surveyed in the AP-NORC report reported that they "would rather not think about" getting older, while thirty-two percent were "somewhat comfortable" thinking about it and thirty-five percent "very comfortable." *Id*.

92. *Id*. at 2; *see generally* SOCIETY OF ACTUARIES, KEY FINDINGS AND ISSUES: LONGEVITY: 2011 RISKS AND PROCESS OF RETIREMENT SURVEY REPORT (2012), *available at* www.soa.org/files/research/projects/research-key-finding-longevity.pdf (discussing, among other things, that people underestimate their life expectancies).

believe their families will "be there for them as they age."[93] This is where the wheels are going to fall off their expectations wagon. In this survey, "[s]ixty-eight percent . . . feel they can rely on their family a great deal or quite a bit in time of need. An additional 15 percent feel they can rely on their family a moderate amount."[94] This is "in time of need."[95] What about for aging? A higher number, seventy-seven percent, believe the respondent's "spouse or partner will be there to help a great deal or quite a bit."[96] "Forty-six percent . . . feel their children or grandchildren will provide a great deal or quite a bit of help."[97] The filling in the sandwich is getting thinner and thinner. Here's a serious thought:

> [i]f fewer family members are available to provide everyday assistance to the growing numbers of frail older people, more people are likely to need institutional care—at great personal cost—as well as costs to health care and [long term services and support] programs. Greater reliance on fewer family caregivers to provide home—and community-based services could also add to costs borne by family members and close friends—in the form of increasing emotional and physical strain, competing demands of work and caregiving, and financial hardships.[98]

Interestingly, the *Pew Sandwich* report covers a shift regarding children—the increase in parents helping their adult children.[99] Yet there is a slight difference in opinion regarding to whom responsibility is owed, with the report noting "that the public places more value on support for aging parents than on support for grown children. Among all adults, 75% say adults have a responsibility to provide financial assistance to an elderly parent who is in need; only 52% say parents have a similar responsibility to support a grown child."[100] Although there is strong support for helping the elderly parents, only about a quarter of those surveyed had done so.[101] The financial support of the aging parent is viewed as a long-term or ongoing event.[102]

---

93. *See* THOMPSON ET AL., *supra* note 90, at 2.
94. *Id*. at 10.
95. *Id*.
96. *Id*.
97. *Id*.
98. Redfoot et al., *supra* note 34, at 2.
99. TAYLOR ET AL., *supra* note 27, at 1-2.
100. *Id*. at 2.
101. *Id*. at 5.
102. *Id*. (noting that seventy-two percent of caregivers who have provided parents with financial support reported using money for ongoing expenses). The report goes on to note that some elders give money to their middle-aged children, so this would be more akin to an open-faced sandwich. *Id*. at 6.

VII. MORE ON ZONING

One of the more interesting areas of change and development involves housing, on a number of different fronts. In the elder law world, one of the main concerns for a client regarding housing was how the home was titled and whether that should be changed, whether as a tool for avoiding probate or as a 'reward' for a caregiver, or to appropriately reflect individual contributions. We began to see issues regarding zoning. Then it was reverse mortgages, public and private, home equity loans, co-signing for adult children, being upside down on a mortgage and facing foreclosure, and the housing bust of a few years back.[103] Now we still see those issues although hopefully the housing market is recovered and foreclosure proceedings are winding down, and more. There are some fascinating developments regarding housing that provide lessons and opportunities for all of us.

What does aging in place mean to the housing market? Will there be fewer homes for sale as fewer people decide to sell and move to the Sunbelt? Will people remain in urban areas or will they choose less dense communities? At least one study offered that the Baby Boomers would be likely to move into rural areas or smaller towns,[104] which changes the dynamics of what attracted them to the area in the first place, as well as creating policy decisions for governments. Yet, after the Great Recession, a more recent study found that that trend had not materialized and instead the Boomers were staying put.[105] Thus this could increase the need for services to allow Boomers to age in place and the need to

---

103. *See, e.g.*, Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Past Subprime Loans*, N.Y. TIMES (Feb. 12, 2008), http://www.nytimes.com/2008/02/12/business/12credit.html?pagewanted=all&_r=0.

104. *See* JOHN CROMARTIE & PETER NELSON, U.S. DEP'T OF AGRIC., ECON. RESEARCH REPORT #79: BABY BOOM MIGRATION AND ITS IMPACT ON RURAL AMERICA 8-9 (2009).

105. Mark Mather & Beth Jarosz, *More U.S. Baby Boomers Staying Put* POPULATION REFERENCE BUREAU (June 2013), http://www.prb.org/Publications/Articles/2013/us-babyboomers-staying-put.aspx. The study looked at data from the United States Census Bureau. *Id.* The study notes that the "mobility rates dropped to their lowest levels in more than sixty years." *Id*. (citations omitted). Although the report did not discover any reasons for the drop in moves by baby boomers, the report hypothesized that the reasons may include fewer job chances or less jobs in more rural areas, drops in home values, loss of stock portfolios, desire to stay near relatives, etc. *Id.* The relocation affected the typical retiree havens – the Sunbelt states. *Id.* This shift in projections from movement to staying put will have significant impacts in the more rural areas of the United States because of the loss of anticipated revenues. *Id*. (citations omitted); *see also* Howe, *supra* note 13 ("When the G.I. Generation retired, many of them packed up their bags, sold their homes and moved to retirement communities in sunny climes far away from their adult children. Most boomers won't want that – partly because of the desire to be near their kids, and partly because, again, many boomers will continue working well past retirement age. The new elders are much more likely to choose to age in place, in the house where they already live, than to decamp to an existing retirement village.").

remodel.[106]

Consider as well those "healthy" elders who purchase housing in an "active lifestyle," "55+" or some other age-restricted community of some type and plan to live out their lives in that space.[107] What services are provided? Can the resident age in place there?[108] Are there sufficient services to transition the resident as she or he may need caregiving?

VIII. TRANSPORTATION

Transportation is and will continue to be a significant issue for us as we age. Many cities lack public transportation that is available or even elder-friendly.[109] As one article noted, transportation is something cities need to consider when looking at the growing elder population.[110] There is a correlation between being

---

106. Howe, *supra* note 13. Howe explained:

> For boomers, the most sought-after local communities will be renowned for their culture, their soul, their unique story, their authenticity—not, as it might have been for G.I. Generation retirees, for their wide roads, gleaming tiles and endless golf courses. Many boomers will be congregating around universities and colleges, art and music hubs, and natural and historic landmarks.

107. *Id.* ("To the extent that boomers do move, they'll be much less interested in exclusive elder communities. Many will prefer mixed-use urban quarters where they can be around young people. And of course many will be attracted to locales – university towns, art centers—where they can reaffirm their connection to the world of the mind and culture. Even when they do opt to move to active adult communities, they'll choose to stay closer to home. Already, retirement-home developers have begun building fewer massive seniors-only projects in Arizona and Florida, and more smaller developments around various cities in the Northeast and Midwest. Wherever it's located, though, the elder community of the next couple decades is likely to have fewer rules and more opt-out provisions. Forget those restrictions against kids living in the communities."). *See also* Bauer, *supra* note 28.

108. Bauer, *supra* note 28, at 43-44; *see also* Howe, *supra* note 13 (noting that "Many will gather in intentional communities, cooperatives or just close groups of friends and neighbors and consider these their 'family.' Today, we habitually think of elders as defined by their lifetime marriages and nuclear families. Twenty years from now, we no longer will.").

109. *See, e.g.*, Danielle Kurtzleben, *Baby Boom Retirements Bring Challenges to Cities and Localities*, U.S. NEWS (June 14, 2011), http://www.usnews.com/news/best-cities/articles/2011/06/14/baby-boomer-retirement-bring-challenges-to-cities-and-localities--the-challenge-of-baby-boomer-retirement.

110. *Id.* (discussing National Association of Area Agencies on Aging (N4A) 2011 report that found challenges regarding transportation rank second and housing third, behind budgetary challenges and also found a significant number of communities in the N4A report have yet to start offering "mobility management services" to their elder citizens, educating them about availability and access to transportation options); *see also* MELISSA ZORNITTA, TOD, AGING POPULATIONS, & HEALTH, *available at* https://www.planning.org/resources/ontheradar/aging/pdf/NUtod.pdf ("The aging population is becoming an increasingly pressing issue for communities. One approach planners are taking is to create more livable communities where people can easily age in place

able to age in place and the access to transportation.[111] We may not need to drive, but we do need to get where we need to go, if we aren't able to walk. So consider the types, cost and accessibility of public transportation. And consider the benefits when we get people out of their cars and using public transportation or even walking.[112] Our health, and the environment, will thank us.

We offer silver alerts when an elderly driver has disappeared. Lawyers may have to counsel the family about how to talk to dad about giving up the keys. What process should states use to test drivers who are elderly – age or ability?[113] This is a hot-button item when elders believe they are singled out based on age. States have taken different approaches on how to regulate drivers who have lost the ability to drive safely.[114] Local governments need to keep in mind that when removing driving as a transportation option, there may be significant ramifications to the individual no longer driving, including isolation, inability to obtain goods and services, etc. Certain social service programs and technology may ameliorate this issue, but we have to consider the availability of the services and the commonality of technology.

There is an opportunity for leaders to make their communities more livable for a lifetime by making their cities suitable for their residents, rather than automobiles. So here's a thought: design roads in a way to be more elder-friendly. Is it really too much to have street signs visible before you reach an intersection? If people are going to transport themselves using power chairs, curb cuts are a must and it would be great if these people didn't have to be in a busy road. So how about bike lanes and motorized chair lanes? Oh, and I would also like to have sidewalks everywhere so elders don't have to walk in the street, but those sidewalks need to be in good repair and wide enough to accommodate a wheelchair. While I'm at it, could we also have good streetlights? I am ok if they are solar powered, but could they at least provide light and be maintained? My list keeps growing.

IX. PAYING FOR A LONGER LIFE: HOW MUCH MONEY IS ENOUGH?

It is not a secret that people stop working once they reach a certain age, typically known as retirement, and have to live on some income source. Social Security has been considered by many to be the primary source of income,

---

through Transit Oriented Development or TOD. Communities are looking to innovatively use this approach to transform development patterns and make a significant dent in addressing the needs of an aging population.").

111. AMANDA LEHNING & ANNIE HARMON, LIVABLE COMMUNITY INDICATORS FOR SUSTAINABLE AGING IN PLACE 12-14 (2013), *available at* https://www.metlife.com/assets/cao/mmi/publications/studies/2013/mmi-livable-communities-study.pdf.

112. *See* Headlee, *supra* note 4 (statement of Richard Florida, "The best therapy we have is walking. Twenty, thirty minutes an hour a day. Human beings were built to walk.").

113. *See, e.g.*, Katherine Mikel, *Drivers' Licenses and Age Limits: Imposition of Driving Restrictions on Elderly Drivers*, 9 MARQ. ELDER'S ADVISOR 359 (2008).

114. *Id.* at 362-66.

although that is not its purpose.[115] In fact, the retirement income "portfolio," if you will, has been likened to a three-legged stool with one leg Social Security, one leg private pensions, and the third leg, savings.[116] In a perfect world, that gives one a pretty good stool. But today's world is far from perfect and each leg has its own "cracks." This may result in a very wobbly stool, or maybe even a bi-legged stool or maybe just a footrest. Social Security is really viewed as replacing thirty-five percent of income upon retirement.[117]

Savings is subject to various vagaries and pressures of life.[118] Consider the Boomers, who seem to be notoriously poor savers[119] and who are also the current sandwich generation. They are taking care of their parents while raising their own children, perhaps helping both cohorts financially.[120] The Boomer caregivers may even have to take a hiatus from work to care for their children or their parents.[121] All of these will impact the ability to save.

Consider the family caregiver further. The value of this unpaid care from family members is astronomical.[122] Typically a spouse or daughter provides the care.[123] With the increasing number of women in the workforce,[124] a woman's

---

115. *See Social Security Basic Facts*, SOCIAL SECURITY ADMINISTRATION (Apr. 2, 2014), http://www.ssa.gov/pressoffice/basicfact.htm; *Prepare for Your Financial Needs*, SOCIAL SECURITY ADMINISTRATION, http://www.ssa.gov/retire2/r&m6.htm (last visited Sept. 9, 2013) (noting that for a worker with "average earnings, . . . Social Security retirement benefits will replace only about 40 percent."); *see also* Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, 383 EMP. BENEFIT RESEARCH INST. 1, 5 (Feb. 2013), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_02-13.No383.IncmEld.pdf (noting in study that to three age groups young-old (sixty-five to seventy-four), old (seventy-five to eighty-four) and old-old (eighty-five and above) Social Security is "most important source of income" with importance growing with the recipient's age).

116. *The Three-Legged Stool Metaphor*, SOC. SEC. ADMIN., http://www.ssa.gov/history/stool.html (last visited Sept. 7, 2013); s*ee also, e.g.*, Banerjee, *supra* note 115.

117. *See* NARI RHEE, THE RETIREMENT SAVINGS CRISIS: IS IT WORSE THAN WE THINK? (2013), *available at* http://www.nirsonline.org/storage/nirs/documents/Retirement%20Savings%20Crisis/retirementsavingscrisis_final.pdf (with current formula for benefits, Social Security income replacement of thirty-five percent for average household).

118. *See id.* (noting that typical "working household" almost completely without savings for retirement).

119. *See* Howe, *supra* note 13 ("This generation began to manifest so many of the collective attitudes and behaviors for which they have since become famous: their individualism, their attraction to personal risk, their distrust of big institutions, their carelessness about material wealth, their cultivation of self, their die-hard moralism.").

120. TAYLOR ET AL., *supra* note 27, at 4-7, 10-15.

121. *See* FEINBERG ET AL., *supra* note 69, at 6-7 (discussing, among other items, the dollar value of lost wages by family caregivers).

122. CBO, *supra* note 12, at 2 (noting that in 2011, the approximate value of that care was $234 billion).

123. *Id.*

124. *See, e.g.*, *Women in the Labor Force in 2010,* U.S. DEP'T OF LABOR, http://www.dol.gov/

decision to leave a job to care for her aging parent can have a significant impact on her ability to save for her own retirement.[125] For many years, workers who received work-based pensions were lucky to be covered by a defined benefits plan.[126] Over time, however, employers have changed the plans to defined contribution plans[127] and as a result, workers have less income from their pension plans for that leg of the stool.[128]

When you couple these issues with longevity, questions abound. Are people saving enough for retirement or their own future needs if they need supportive care?[129] Will people be able to afford to retire? With longevity increasing, will people outlive their retirement savings? Is there a "retirement savings crisis?"[130]

The second United States of Aging Survey[131] covered several issues in the national findings. Five cities were identified for the survey[132] and the groups surveyed were those sixty and older and those eighteen to fifty-nine.[133] Although the survey described the respondents as having a "positive outlook on their future and the aging process,"[134] the respondents did not share the same positive outlook about their communities' ability to provide services to the growing senior

---

wb/factsheets/Qf-laborforce-10.htm (last visited Nov. 3, 2013).

125. CBO, *supra* note 12, at 2 (citing Meredith B. Lilly et al., *Labor Market Work and Home Care's Unpaid Caregivers: A Systematic Review of Labor Force Participation Rates, Predictors of Labor Market Withdrawal, and Hours of Work*, 85 MILBANK Q. 641 (2007), *available at* http://tinyurl.com/m2djo97.

126. *See, e.g.*, *Retirement Plans, Benefits & Savings*, *Types of Retirement Plans*, U.S. DEP'T OF LABOR, http://www.dol.gov/dol/topic/retirement/typesofplans.htm (last visited Nov. 3, 2013) (discussing various types of retirement plans).

127. *Id.*; *see* RHEE, *supra* note 117, at 5 (noting that a significant majority of those who are "near retirement" (ages fifty-five to sixty-four) have a defined benefits plan while just over thirty percent of younger workers have such a plan).

128. RHEE, *supra* note 117.

129. The CBO report found that "[m]any, if not most, people do not make private financial preparations for their future [long-term services and supports] needs" for various reasons, including the lack of money to buy long term care insurance, a pre-existing health condition that renders them ineligible, concerns about the worth of such a policy; a mistaken belief that government programs will pay for their care; the view that they have saved enough, or that their families will care for them. CBO, *supra* note 12 (citations omitted).

130. *See, e.g.*, RHEE, *supra* note 117.

131. This survey was started in 2012 and was done by the National Council on Aging (NCOA), United Healthcare, and USA TODAY. The survey looks at the views of aging Americans on aging issues and how the U.S. can improve its positioning for the growing population of elders. UNITED STATES OF AGING SURVEY, *supra* note 61.

132. The cities were Birmingham, Alabama; Los Angeles, California; Orlando, Florida; Indianapolis, Indiana; and San Antonio, Texas. *Id.*

133. *Id.* The categories of elders surveyed included "older seniors" who were at least eighty years old, elders with low-incomes who were at least sixty with less than $15,000 in household income, and elders sixty and older who have at least three chronic health problems.

134. *Id.*

population or about their individual future financial security.[135] Forty-one percent of those surveyed who were still employed responded that Social Security would be their main source of retirement income,[136] even though experts indicate that should not be the case.[137] More than half were concerned about outliving their retirement income and their savings.[138]

X. "AGING IS EVERYBODY'S BUSINESS"[139]

For local governments and businesses, providing access is critical. We all benefit from access, such as curb cuts, ramps, automatic door openers, sufficiently long walk lights, good signage, well-maintained roads, bicycle lanes, transportation, and more.[140] There needs to be a culture of positivity toward aging, recognizing that is it universal—we are talking about ourselves in ten, twenty, thirty, forty, or even a hundred years—and it is good business. This is a group effort and not just the role of the individual – local governments have a role in the way land is zoned, services are provided, and infrastructure is created. In other words, local governments can create walkable and people-friendly environments.[141] Consider this an opportunity, not a challenge. Do not take the cheap way out in redesigning the community. Remember, every day now through 2030, there are nearly ten thousand people turning sixty five.[142] They have to live somewhere.

So what would it take for cities to have the needed services and programs so that its residents can age successfully? Cities can continue to provide the services they typically provide, only with a focus that recognizes unique features for housing, transportation, job opportunities, safety, culture, values of various generations, and more.[143]

---

135. *Id.*

136. *Id.* (This is compared to those aged eighteen to fifty-nine, twenty-three percent of whom indicated that Social Security would be their main income source).

137. *See, e.g.*, JACK VANDERHEI ET AL., RETIREMENT SECURITY IN THE UNITED STATES: CURRENT SOURCES, FUTURE PROSPECTS, AND LIKELY OUTCOMES OF CURRENT TRENDS (2006), *available at* http://www.ebri.org/pdf/publications/books/ebri_rsus.pdf.

138. UNITED STATES OF AGING SURVEY , *supra* note 61 (Fifty-three percent of seniors were very or somewhat concerned, compared to forty-four percent of older seniors and sixty-one percent of seniors with low income).

139. Headlee, *supra* note 4 (discussing Baby Boomers' impact on American society).

140. *See, e.g.*, *id.* (discussing the impact of the aging population on cities and services, and offering suggestions for accommodation).

141. Headlee, *supra* note 4 (Florida appeared on the show with Celeste Headlee and discussed how communities should change through land use to become more people-friendly).

142. *See Baby Boomers Retire*, *supra* note 16.

143. Anusuya Chatterjee, *Best Cities for Successful Aging*, MILKEN INST. (2012), http://successfulaging.milkeninstitute.org/bcsa.html ("[I]ndex identifies what these metros are doing right and creates a path other communities can follow to help their seniors remain healthy, active and engaged."). The Institute defines successful aging for a community as

CONCLUSION

Here is a sobering thought. Although I have covered a number of issues, I have not covered them all, nor have I covered in depth the ones I did discuss. Aging is happening to all of us – individuals, families, and communities, whether we are ready or not. It touches everyone to some degree. Rather than thinking of aging as a negative, consider it as an opportunity. There is an incredible chance for noteworthy and innovative leadership. Yes, we are certain there is uncertainty. But it brings us an era of possibilities. And besides, aging rocks!

> Liv[ing] in places that are safe, affordable, and comfortable . . . Be healthy and happy . . . .Be financially secure and part of an economy that enables opportunity and entrepreneurship . . . Living arrangements that suit our needs . . . . Mobility and access to convenient transportation systems that get us where we want and need to go . . . . Be respected for our wisdom and experience; to be physically, intellectually, and culturally enriched; and to be connected to our families, friends, and communities.

Id.

Indiana Law Review

Volume 48 **2014** **Number 1**

SYMPOSIUM

THE OPEN GOVERNMENT CLINIC: TEACHING THE BASICS OF LAWYERING

MARC ROTENBERG*
GINGER MCCALL**
JULIA HORWITZ***

INTRODUCTION

At a time when law schools are looking to provide students with lawyering skills that provide the basis for practice, a clinic devoted to the Freedom of Information Act (FOIA) provides an excellent model. Our class emerged from a rigorous curriculum we developed that broke the FOIA down into discrete modules that tied together theory and practice. Key to our technique for teaching FOIA to law school students is the emphasis on extensive research and analysis in the early stages of the FOIA request. We require careful consideration of the reasons to pursue the request, an assessment of the strategy to obtain the documents sought, a comprehensive FOIA request, and a well-organized and carefully argued administrative appeal. The administrative appeal provides students an opportunity to develop substantial legal arguments. In the vast majority of cases, students should be able to obtain a meaningful response from a federal agency within a single semester without ever going to court.

Over the course of many years, we have developed a structured approach for teaching open government litigation to law school students and young lawyers. The purpose of this Article is to describe the practices and philosophy that guided the development of this model. As law schools turn increasingly to opportunities for students to gain practical experience and to develop lawyering skills, the

* A.B., Harvard College; J.D., Stanford Law School; LL.M., International and Comparative Law, Georgetown University Law Center. President and Executive Director, Electronic Privacy Information Center ("EPIC"), 1994-present. Adjunct Professor, Georgetown University Law Center, 1990 to present. Co-Editor, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (EPIC 2010). Marc Rotenberg is a former counsel for the Senate Judiciary Committee. EPIC has established one of the leading FOIA litigation programs in the United States.

** A.B., University of Pittsburgh; J.D., Cornell Law School. Adjunct Professor, Georgetown University Law Center, 2011-2012. Co-Editor, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (EPIC 2010). Director, EPIC Open Government Project.

*** A.B., Brown University; J.D., University of Chicago School of Law. Adjunct Professor, Georgetown University Law Center, 2012-2013; EPIC Open Government Counsel.

FOIA may provide a useful framework to teach basic lawyering skills.

The strategy set out in this Article aims to teach students a broad range of FOIA related skills, and to obtain favorable outcomes in specific FOIA matters, while placing a minimal burden on federal agencies and the courts. Central to this approach is to encourage students to do as much research as possible at every stage of a matter, to understand deeply the significance of the various phases of a FOIA case, and to appreciate the underlying purpose of the law – to promote open government.

This strategy may not work as well for those in private practice or for more experienced FOIA litigators who may, for example, have a very specific reason for pursuing certain documents or may not care as much about the publication of documents obtained. Still, there is little formal literature about the pedagogy of open government law and litigation.

This Article is divided into four parts. In Part I, we discuss the significance of the FOIA, its purpose and history, as well as the role it is has played in significant policy debates. In Part II, we outline the stages of pursuing a FOIA request, focusing both on the formal requirements of the law, as well as the litigation tactics and teaching strategies we have developed. Part III looks at three sample FOIA cases in which we have obtained significant results pursuing the model we have outlined. Part IV discusses assessment, broader theories of clinic education, and includes recommendations for future work.

I. BACKGROUND ON THE LAW

The FOIA was enacted in 1966.[1] The fundamental purpose of the FOIA was to reverse a presumption that had existed in the Administrative Procedure Act—that records in federal agencies could be made available only on a need to know basis.[2] FOIA is considered a milestone in the development of open government laws and has been widely copied around the world.[3]

Of course, there have long been laws that establish affirmative disclosure obligation for the federal government. For example, the Constitution requires that Congress publish a public journal of its activities.[4] Congress established the Government Printing Office in the early nineteenth century to make the activities of the federal government routinely available to the general public, [5] and many local towns have emphasized the importance of transparency in government decision-making through the tradition of Town Hall meetings. But there was no presumption that information in the possession of federal agencies was a public

---

1. *See generally* 5 U.S.C. § 552 (1966).

2. Stephen J. Kaczynski, *"Reversing" the Freedom of Information Act: Congressional Intention or Judicial Intervention*, 51 ST. JOHN'S L. REV. 734, 734 n.3 (2012).

3. DAVID BANISAR, THE FREEDOMINFO.ORG GLOBAL SURVEY FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 3 (2004).

4. U.S. CONST. art I, § 5.

5. *The History of the Government Printing Office*, U.S. GOVERNMENT PRINTING OFFICE, http://www.gpo.gov/about/gpohistory/ (last visited Aug. 12, 2014).

record, subject to disclosure upon request.[6]

That changed in 1966 with the passage of the federal FOIA.[7] The law set out a fundamental commitment to make the information of the government available to the public.[8] Under the FOIA, agencies were obligated by law to provide records in their possession to those who requested them.[9] The law did not require requesters to state the basis for the request or how the records will be used.[10] Information held by federal agencies would be presumptively available to all who requested.[11] There were exemptions set out in the law that would allow agencies to withhold information, but the expectation was that the exemptions would be narrowly applied.[12]

However, there were problems. Requesters in the early days quickly found that the law did not work in practice.[13] Agencies were slow to respond.[14] There were few incentives for compliance.[15] Agencies interpreted exemptions broadly.[16] There was little judicial oversight.[17]

The 1974 amendments to the FOIA sought to remedy these problems.[18] New provisions limited the fees that agencies could charge requesters, imposed deadlines by which FOIA requests must be processed, created procedures for the expedited processing of requests, allowed requesters to obtain attorneys' fees and costs when they had "substantially prevailed,"[19] and imposed sanctions against agency officials for arbitrary and capricious withholding of materials.[20] When FOIA requesters today pursue FOIA requests, they are typically relying on the provisions added in the 1974 amendments.[21]

Since the 1974 amendments, there have been further changes to the law, typically with the goal of removing obstacles for requesters.[22] For example, an amendment in 1976 narrowed the circumstances when an agency could exempt

---

6. *See* Kaczynski, *supra* note 2.
7. *See generally* 5 U.S.C. § 552 (1966).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Sam Archibald, *The Early Years of the Freedom of Information Act 1955 to 1974*, 26 PS: POL. SCI. & POL. 726, 730 (1993) (discussing the difficulties of obtaining information under FOIA).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. 5 U.S.C. § 552(a)(4)(E) (2014).
20. *Id.* § 522(a)(4)(F)(i).
21. *See* Archibald, *supra* note 13.
22. Maria H. Benecki, *Developments Under the Freedom of Information Act: 1987*, 1988 DUKE L.J. 566, 591 nn.193-94.

materials for disclosure by statute.[23] A series of amendments in 1986 addressed exemptions for law enforcement records and fee determinations.[24] Later amendments in 2007 limited agencies' abilities to charge fees for requests that were not processed by the statutory deadline.[25]

As the statute has evolved over forty years, so too has the case law. There is now an extensive body of law, much of it focused in the D.C. Circuit Court of Appeals, where most FOIA appeals are brought. The U.S. Supreme Court has issued opinions in many cases since passage of the FOIA Amendments in 1974.[26] The Court has addressed such questions as whether companies may assert the "personal privacy" exemption,[27] whether certain records are "agency records" for the purposes of FOIA,[28] whether agencies could use a court-created exemption to withhold information,[29] and the obligation of agencies to promptly process requests for information sought under the FOIA.[30]

It is not the aim of this article to review the current state of FOIA law, though the authors hope that students pursuing a FOIA request will take the opportunity to engage in the research that is necessary to successfully pursue their request. Our point is simply that the FOIA is a vital area of administrative law, of significant interest to the Congress and the courts, and a good subject area for young lawyers to develop research and litigation skills.

A. The FOIA in Action

The FOIA has played a significant role in uncovering waste, fraud, and abuse in the federal government. The FOIA has also contributed substantially to developing health law and policy. For instance, in *Natural Resources Defense Council v. Food and Drug Administration*, the Natural Resources Defense Council (NDRC) submitted a FOIA request asking for records related to Food and Drug Administration (FDA) approval of antibiotics for livestock.[31] After the FDA did not initially respond, the NRDC filed a FOIA lawsuit, compelling the agency to produce the requested documents.[32] The documents showed that the FDA tested thirty antibiotics that are regularly administered to livestock and

---

23. *Id.*

24. *See generally id.*

25. Patrice McDermott, *Building Open Government*, 27 GOV'T INFO. Q. 401, 410 (2010).

26. *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); *see also* John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).

27. *See generally* FCC v. AT&T, 131 S. Ct. 1177 (2011).

28. *See generally* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980).

29. *See generally* Milner v. Dep't of the Navy, 131 S. Ct. 1259 (2011).

30. *See generally* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980).

31. *See generally* Natural Res. Def. Council, Inc. v FDA, 884 F. Supp. 2d 127 (S.D.N.Y. 2012).

32. *Id*. at 131.

determined that eighteen of them posed a high safety risk for human consumption, and the remaining twelve would fail the FDA's animal additive inspections.[33] However, the FDA chose not to act upon the test results, allowing livestock facilities to continue administering unsafe antibiotics to the animals that are eventually sold to humans as food.[34] This information has allowed the NRDC to launch a campaign urging the FDA to act upon its own findings and curtail the use of hazardous antibiotic additives.[35] The campaign resulted in twenty-five animal health companies agreeing to new FDA guidelines that will limit antibiotic use.[36]

Documents obtained under the FOIA from the FDA in 1982 helped to lead to mandatory warning labels on children's aspirin.[37] The documents showed that the agency had substantial evidence that children's aspirin could cause Reye's Syndrome, a dangerous and sometimes deadly condition.[38] This evidence added support to a public campaign to require mandatory warning labels.[39] In 1974, after a lawsuit compelled the release of Department of Transportation documents under the FOIA detailing the risks of the Ford Pinto, the exploding car was recalled.[40]

The FOIA has also helped the public to understand our government's approach to international aid and foreign policy. In a recent case, the Center for Effective Government sought disclosure of a secret communication from the president discussing changes in "the way we do business" with regard to foreign aid and development.[41] Although the White House had posted a fact sheet about the Presidential Policy Directive on its website, the State Department withheld the document under the FOIA.[42] The Center for Effective Government filed a FOIA lawsuit to force the State Department to release PPD-6, and the court ruled that the State Department must disclose the document.[43] As of the publication of this article, PPD-6 is being prepared for release by the State Department. As a result of the FOIA, not only will the public gain access to documents detailing the

---

33. *Id*. at 135-36.

34. *Id.* at 136.

35. Arlene Weintrau, *Drugmakers Agree to New FDA Rules Restricting Antibiotic Use in Livestock,* FIERCE PHARMA (Mar. 27, 2014), http://www.fiercepharma.com/story/drugmakers-agree-new-fda-rules-restricting-antibiotic-use-livestock/2014-03-27.

36. *Id.*

37. Michael deCourcy Hinds, *Aspirin Linked to Children's Disease*, N. Y. TIMES, Apr. 28, 1982, http://www.nytimes.com/1982/04/28/garden/aspirin-linked-to-children-s-disease.html.

38. *Id.*

39. *Id.*

40. Aviva Shen, *Happy 46th Birthday, Freedom of Information Act*, THINK PROGRESS (July 5, 2012), http://thinkprogress.org/justice/2012/07/05/511271/happy-46th-birthday-freedom-of-information-act/.

41. Ctr. for Effective Gov't v. U.S. Dep't of State, No. 13-0414 (ESH), 2013 WL 6641262, at *1 (D. D.C. Dec. 17, 2013).

42. *Id.*

43. *Id*.

White House's changes in foreign policy and aid, but also the decision will set a good precedent for FOIA requesters who want access to future presidential policy directives.

B. The FOIA and American Culture

The modern Freedom of Information Act has become an important part of American culture. The law is celebrated every year on the birthday of James Madison, because it was the fourth President of the United States who wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[44]

The FOIA establishes a legal right for individuals to obtain records in the possession of government agencies.[45] The FOIA is critical for the functioning of democratic government because it helps ensure that the public is fully informed about matters of public concern.[46] The FOIA has helped uncover fraud, waste, and abuse in the federal government.[47] It has become particularly important in the last few years as the government has tried to keep more of its activities secret.[48]

A hallmark of the new surveillance measures proposed by various government agencies is their disregard for public accountability. As the government seeks to expand its power to collect information about individuals, it increasingly hides that surveillance power behind a wall of secrecy.[49] Congress has long recognized this tendency in the Executive Branch, and sought to limit government secrecy by creating legal obligations of openness under the FOIA and the Privacy Act of 1974.[50] EPIC has used these open government laws aggressively to enable public oversight of potentially invasive surveillance initiatives.[51]

Public access through the FOIA not only allows for a more informed public debate over new surveillance proposals, but also ensures accountability for

---

44. Letter from James Madison, former President of the United States, to W. T. Barry, Lieutenant Governor of Kentucky (Aug. 4, 1822) (on file with the Library of Congress).

45. *See generally* 5 U.S.C. § 552 (2014).

46. Benecki, *supra* note 22, at 600, 605 (recognizing that public interests are served by disclosure).

47. Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM U. L. REV. 261, 263 (2003) (explaining "[p]ublic access to government information is one of our nation's most cherished and established principles").

48. *Id.* at 263-64.

49. *Id.* at 264-65.

50. 5 U.S.C. § 552(a) (2014).

51. *About EPIC*, ELEC. PRIVACY INFO. CTR., epic.org/epic/about.html (last visited August 23, 2014) (explaining what EPIC does).

government officials. Public debate fosters the development of more robust policy and leads to solutions that better respect the nation's democratic values.

In the post 9/11 era, the FOIA has also played an important role in the effort to assess and understand the scope of government surveillance power.[52] In several cases discussed below, we describe examples of how effective FOIA requests reveal not only government misconduct but also Congressional hearings and changes in agency practices.

C. The Scope of FOIA Activity in the Federal Government

Each federal agency is required to submit an annual FOIA Report to the Office of Information Policy (OIP) in the Justice Department.[53] The OIP website explains, "These reports contain detailed statistics on the numbers of requests received and processed by each agency, the time taken to respond, and the outcome of each request, as well as many other vital statistics regarding the administration of the FOIA at federal departments and agencies."[54] The reports provide an overview of the scope of FOIA activity in the federal government.[55]

According to the most recent Reports, the Department of Homeland Security (DHS) received the most FOIA requests of any federal department or agency in 2013, with 231,534 requests received.[56] DHS also had the largest backlog of any department or agency, with 51,761 pending requests.[57] DHS reported that it categorized requests as "simple," "complex," or "expedited."[58] The FOIA requires that agencies issue a response to requests within twenty days.[59] However, DHS reported that the respective average response times for its three categories were about thirty-seven days, about thirty-eight days, and about forty-four days.[60] This is just one example of the type of information that is now available.[61]

As FOIA teachers and litigators, the reports prepared by the OIP are of particular interest to us. We use the OIP reports to help students understand the scope of FOIA activity across the federal government, to identify those agencies that are most responsive to requests as well as those that are most likely to delay.

---

52. *See generally* Uhl, *supra* note 47 (discussing the role of the FIOA after September 11, 2001).

53. Exec. Order No. 13392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

54. *Reports*, OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/reports.html (last visited Sept. 12, 2014).

55. *See generally id.*

56. PRIVACY OFFICE, DEP'T OF HOMELAND SEC., 2013 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES, at ii (2014), *available at* http://www.dhs.gov/sites/default/files/publications/privacy-foia-annual-report-fy-2013-dhs_1.pdf.

57. *Id.*

58. *Id.* at iv.

59. 5 U.S.C. § 552(a)(6)(A) (2014).

60. PRIVACY OFFICE, DEP'T OF HOMELAND SEC., *supra* note 56, at 10.

61. *See generally id.*

The OIP reports can also provide useful data for agency appeals and litigation. For example, we may be able to cite past agency practices to emphasize an argument that the current delays cannot be justified. In the specific context of an "Open America Motion," in which an agency cites its own backlog in support of delay, the OIP reports can provide useful information to rebut such claims. The OIP reports, as well as reports provided by open government organizations, provide a context for the study of FOIA.[62]

II. THE STRUCTURE OF A SUCCESSFUL FOIA MATTER

The vast majority of FOIA requests that are submitted to federal agencies are likely poorly drafted, likely misdirected, and unlikely to produce meaningful results. The reasons are many: (1) the law is complex, (2) identifying the correct component within the agency takes a lot of work, (3) drafting a good request takes time and insight, and (4) it takes time and perseverance to obtain successful results in a FOIA matter. Even in the best of circumstances, requests can take months if not years to pursue.[63] It is essential that students learn how to craft an effective FOIA request and then how to follow-up. This section explores the strategy we have developed for the successful pursuit of FOIA requests.

A. Developing an Appropriate Request

Central to the successful FOIA project is the need to identify an appropriate FOIA request. Students should be encouraged to carefully research their proposed request before drafting a letter to the agency. There are many factors that should be considered before pursuing a FOIA request. As with other areas of FOIA, we have developed a structured approach that helps guide students.

1. The Case Memo.—At EPIC and at the Georgetown University Law Center, we have encouraged students to write case memos that answer five questions: (1) What are the documents you are seeking? (2) What is the significance of these documents? (3) At which federal agency do you believe the documents will found? (4) Have we or others made similar requests in the past? (5) Are there additional issues we may need to consider before pursuing the request, such as the possibility of running headfirst into one of the FOIA exemptions? Each of these questions is intended to help students establish the foundation for a good FOIA request, a successful appeal, and ultimately perhaps favorable litigation.

As a general matter, students should be encouraged to pursue a request where there is good reason to believe that the documents sought actually exist. We have disfavored the use of the FOIA as a general purpose research tool, though of course for historians and scholars, the FOIA is often an effective way to uncover

---

62. *See Annual FOIA Reports Submitted by Federal Departments and Agencies*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/fy13.html (last visited Mar. 21, 2014) (collecting all annual FOIA reports).

63. *Frequently Asked Questions*, FOIA.GOV, www.foia.gov/faq.html#answer (last updated Feb. 2011).

critical historical documents. But the processing of these kinds of large, complex requests often requires extensive time and delays, which are not conducive to a three month course. As a result, we much prefer the targeted request.

We encourage students to look for references to documents that are important but have not been disclosed to the public. A newspaper report might mention a classified report. A government official may refer to an internal agency report. The explicit reference to the document by a reliable source is a good basis for pursuing a request; speculation that a document may exist is not. Only in rare circumstances would we allow students to use the FOIA to try to locate documents that they themselves do not know to exist.

We also ask students to devote considerable attention to the significance of the request they are making. There is no question that it will take time to pursue a FOIA request. We want the student to persuade us that the request will be worth the effort. For a public interest organization, such as EPIC, we will make the determination based on the alignment with our mission, the timeliness of the request, and the benefit that may be obtained if the document is disclosed. Other public interest organizations are likely to make determinations about the value of a FOIA request considering a similar set of criteria. In the academic context, a slightly different set of criteria may apply.

Identifying the appropriate component within the agency to direct the request is also a critical part of the planning. While many agencies have catch-all addresses to receive FOIA requests, such requests will almost certainly take more time to process than a request that is directed to the correct component. In addition, students who take the time to find the right component have likely done a better job determining the location where the documents they are seeking are likely to be found.

To be sure, it is not easy to identify the correct component within an agency to direct a FOIA request. Some agencies, such as the Department of Justice, may have more than thirty components that could be the appropriate target for a FOIA request.[64] It is not uncommon for a request to go to several components within the same agency if there may be overlapping authority for a program concerning the record sought.

We also expect students to determine whether others have made similar requests for the documents they are seeking. There are two fairly easy ways to answer the question. The first is to do an Internet search for key terms associated with the document sought. This can help uncover related information. The second strategy is to look at the agency website. Some agencies are proactively posting documents that they generate.[65] Certainly, if an agency has already

---

64. *See generally DOJ Reference Guide: Attachment B*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/doj-reference-guide-attachment-b-listing-and-descriptions-department-justice-components-foia (last visited Aug. 23, 2014).

65. *See, e.g.*, *FOIA Proactive Disclosures*, IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/foia/proactive.htm (last visited Mar. 21, 2014); *see also FOIA Library*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/foia-library (last visited Mar. 21, 2014); *Steps Taken to Increase Proactive Disclosures*, DEP'T OF HEALTH AND HUMAN SERVS., http://www.hhs.gov/

released the records that are sought, there is no point in pursuing a FOIA request.

Both of the examples above assume that the documents sought have already been disclosed. It is possible that the students will seek documents that others have sought but have not yet been disclosed. It is not necessarily the case that such requests should not be pursued. The student's request may be more effectively framed than another's request. Multiple requests may be more likely to dislodge the documents that are sought. Still, students should be aware of this dimension of FOIA requests.

Our final consideration will be the possibility that the request will raise challenges because of certain FOIA exemptions or other practical considerations. For example, the National Security Agency is able to take advantage of a broad "(b)(3)" exemption set out in statute that effectively puts most of the agency's activities beyond the reach of the FOIA.[66] Because of this, we must consider carefully whether to pursue FOIA requests to the National Security Agency. The fact that an exemption exists does not mean we will not pursue the request. Like good lawyers, we will assess the prospects of success for the request in light of our assessment of the relevant law. For a FOIA requester, anticipating how exemptions may be asserted is a critical part of the calculation.

At the same time, a careful understanding of the law can also produce surprisingly successful requests. In one case pursued by EPIC, we were able to obtain documents from the Central Intelligence Agency (CIA), another agency with a broad (b)(3) exemption by focusing specifically on a provision in the FOIA, which explicitly set aside reports of the Inspector General.[67] Thus, an effective FOIA request to the CIA about its role in the surveillance of Muslim Americans in New York City was made possible by first recognizing a favorable provision in the Act.[68]

2. Drafting the Request.—There are many models for drafting a FOIA request. At a minimum, a FOIA request should include all of the requirements set out in the statute and the regulations appropriate for the agency to which the

---

foia/reference/2013_section3.html (last visited Mar. 21, 2014).

66. Wolf v. CIA, 473 F.3d 370, 377-78 (D.C. Cir. 2007); *see also* The National Security Act, 50 U.S.C. § 403-1(i)(1) (2012) (current version at 50 U.S.C.A. § 3024 (2014)). The National Security Act exempts from disclosure information related to the organization or function of the National Security Agency. This statute has been interpreted broadly to include almost any NSA activity, including confirming or denying the *existence* of certain NSA activities. The D.C. Circuit has ruled, "Congress certainly had rational grounds to enact for the NSA a protective statute broader than the CIA's" and found the "plain wording of the statute conclusive" in authorizing withholding NSA materials that are "integrally related" to NSA activities. Hayden v. NSA, 608 F.2d 1381, 1389-90 (D.C. Cir. 1979). *See also* People for the Am. Way v. NSA, 462 F. Supp. 2d 21 (D.D.C. 2006); Wilner v. NSA, 592 F.3d 60 (2d Cir. 2009).

67. *See* EPIC v. CIA, Case No. 1:12-cv-02053 (D.D.C. filed Dec. 20, 2012). Matt Sledge, *CIA Sued to Release NYPD Spying Report*, HUFFINGTON POST (Dec. 31, 2012, 4:05 PM), http://www.huffingtonpost.com/2012/12/31/cia-nypd-spying-report_n_2389364.html?utm_hp_ref=mostpopular; *see also* 5 U.S.C. § 552(b)(3) (2014).

68. Sledge, *supra* note 67.

request is directed.[69] These would include: the appropriate agency and agency address, a reasonably specific description of the documents sought, a request for expedited processing, if sought, a request for a fee waiver if appropriate, and contact information for the requester.[70] We ensure that all of these elements are included in FOIA requests before they are approved, but we also believe that there is much more to a good FOIA request.

For us, a good FOIA request proceeds from the issues identified in the case memo: a clear description of the documents that are sought, clear reasons to believe that they are in possession of the agency, and some discussion of the significance of the materials. Each one of these elements is aligned with underlying legal claims that will provide the foundation for the subsequent appeal, if necessary. They are also intended to help sharpen the student's understanding of administrative law and the specific requirements of the FOIA.

Describing the significance of the request in detail, in the request itself, may be one of the most important techniques we have developed to make an effective FOIA request. Our aim is to use the FOIA request to build a record in support of subsequent determination concerning the "public interest" standards set out in the statute that will determine whether the requester is entitled to the waiver of fees, to expedited processing, and eventually to eligibility and entitlement for attorney's fees if we choose to litigate.[71] Beyond this litigation 'tactic,' we are seeking to promote broader public interest in the material being sought. The FOIA request thus becomes a way to educate the public and the press not simply about the fact of the request but more broadly the policy issues that the request seeks to answer. All of this must be considered before we will allow a FOIA request to go out the door.

We will also ask students to request media fee status and a fee waiver for any costs that might otherwise be imposed. In one respect, the text is pro forma and should be routinely granted to any request that arises from an educational or media organization. In another respect, the inclusion of the fee status and the fee waiver text provides an opportunity for the students to research the relevant legal standard, to make the assertion as to fee determination, to include the relevant citation, and then to defend the argument, if necessary, in the context of the administrative appeal. In this regard, no element of an assignment in a FOIA clinic should be treated as a cut and paste operation. Each decision should be made purposefully and with full consideration of the relevant statutory provision and how it aids the requester in the matter.

Similarly, we will ask students to make a determination as to expediting processing based on the relevant standard and with consideration of the specific records being sought from the agency. This issue should also be addressed in the case memo. The aim is to encourage students to make a reasoned determination as to whether there is a good claim for expedited processing and then to be prepared to defend it to the agency on appeal, if necessary.

---

69. 5 U.S.C. § 552 (2014).

70. 5 U.S.C. § 552(a)(3)(A)(i) (2012).

71. 5 U.S.C. § 552(a)(4)(A)(iii) (2014).

Each of these tasks will help improve the student's understanding act of the FOIA and sharpen the student's lawyering skills. We strongly encourage those teaching a FOIA clinic to help students understand the application of the standards for fee waivers and expedited processing to their specific requests. If they do not, the subsequent appeal will likely be much more difficult.

3. Creating the Case File.—Because FOIA involves many deadlines for both requesters and agencies and because litigation requires evidentiary support,[72] it is especially important for requesters to keep comprehensive records of the request, subsequent appeals, agency responses, and other communications with the agency. EPIC has developed a standardized FOIA request filing system, including a form that includes a summary of the requested documents, the date the request was sent, the method it was sent, a record of all agency responses and interactions, and a record of all follow-up actions by EPIC (administrative appeals, phone calls with the agency, and modifications of requests).

B. Interacting with the Agency

Successful resolution of a FOIA request almost always requires several communications with the agency. In an ideal world, the FOIA requester would send a request to an agency for certain records, and the agency would respond within twenty working days with the records sought, perhaps with some material withheld or redacted. The requester would then have the opportunity to promptly decide whether to appeal the agency's processing of the request. That almost never happens.

The more typical process is: (1) the requester sends FOIA request to the agency; (2) the agency responds with an acknowledgement which notes that the agency has received the request and assigns an identification number to the request; (3) the agency eventually responds with a determination, although rarely within the twenty days required by the statute, including either documents or a denial, as well as explanations for any withholdings and information about how the requester can appeal any denials or withholdings; (4) the requester reviews the agency's response and appeals, if necessary.[73]

The actual process of pursuing a FOIA request is far more complicated and vexing than it should be. Agencies issue responses that are late, incomplete, or insufficient. Increasingly, agencies contact requesters and threaten to close FOIA requests permanently if the requester does not narrow or clarify the request within a specified number of days.[74] Often, requesters have to follow up with the agency multiples times on the phone or email to obtain information about the status of a request.

These hurdles routinely frustrate most FOIA requesters and are often the focus of litigation, reports, and Congressional hearings. But for students pursuing FOIA requests they also provide the opportunity to hone lawyering skills, to

---

72. *See generally id.* § 552.

73. *Frequently Asked Questions*, *supra* note 63.

74. *Id.*

develop strategies to obtain concrete outcomes. For example, students could follow-up with the agency by phone and email, filing an appeal for non-responsiveness, or seeking out the assistance of the Office of Government Information Services.

For communications with the agency, we encourage students to be polite, professional, and purposeful, and to document all such interactions. It is a useful class exercise to play out the roles of FOIA requester and agency official to help students better understand the reality of FOIA processing. To be sure, requesters should understand that they have certain rights under the statute that they would rightfully expect the agency to fulfill. But the practical challenge of responding to FOIA requests is very real, particularly when the request is complex or likely to trigger one of the statutory exemptions that would provide a basis for agency withholding.

1. Reviewing the Agency Response.—We emphasize to the students that once a requester does obtain a substantive response from an agency, the requester should review that response and disseminate the information to the public as quickly as possible. EPIC teaches students how to review documents with an eye to items of potential public interest and how to publicize the documents in the most effective way. There are many different ways to promote the release of documents obtained under the FOIA. Among the most simple is to simply scan the documents and post them on a website with a brief explanation. That will immediately make the documents available to the public and provide some context so that their significance can be understood. In our Internet Age, once the documents are readily accessible online (with a good URL), it is easy to post, blog, tweet, and even Instagram the outcome.[75]

Outreach to the press is another effective strategy that also becomes important in later determinations if the case is litigated. There is no obvious outlet for any particular documents obtained under the FOIA. But law schools are becoming savvier in promoting the work of their faculty and the success of their students. Students (and their excellent professors) who obtained significant documents from a federal agency as a result of a FOIA request should consider contacting the press office of the law school to see if there might be opportunities for a public release. But in the enthusiasm to inform the public, it will become clear whether requester has sufficiently researched the topic and understands the value of the documents obtained.

2. Preparing the Administrative Appeal.—Under the FOIA, a requester must first exhaust administrative remedies before filing a lawsuit.[76] This means that if an agency makes an unfavorable fee status determination, rejects a fee waiver or expedited processing request, denies or withholds documents, the requester

---

75. If people post pictures of what they had for lunch on Instagram, why not post picture of what they obtained by means of a FOIA request?

76. THE DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: LITIGATION CONSIDERATIONS 29 (2013) [hereinafter LITIGATION CONSIDERATIONS], *available at* http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf.

must file an appeal with the agency.[77] Typically agency regulations require that appeals are filed within either thirty or sixty days.[78]

While a FOIA appeal can be quite short and simple, EPIC has learned that the most effective FOIA appeals require time and research. In many respects, the FOIA agency appeal provides an opportunity to teach students essential lawyering skills and to apply these skills in an exercise that has concrete and measureable outcomes.

We encourage students to begin with their case file, the initial memo, and the FOIA request that they prepared. Students are taught to assess the documents they received, take note of withholdings asserted by the agency, and then research the relevant case law to craft an effective appeal. We encourage students to think of the agency appeal as their argument to a court, respecting the expertise of the decision-maker and the need to prepare a comprehensive and well-founded argument. Agencies are reluctant to reverse earlier determinations in FOIA matters. In those instances where agencies do reverse an earlier decision, however, a well-formulated appeal is typically the key. We work with students to draft a comprehensive appeal that lays out the legal case for why the agency should reconsider its decision. This appeal also lays the groundwork for a future lawsuit, should the agency fail to comply.

3. Assessing Documents Received.—Although a significant part of time in a FOIA clinic can be devoted to the review of documents received as a result of a FOIA request, it should be understood that this is not a simple task. Documents sought under the FOIA are typically highly technical materials, reflecting careful consideration of a complex policy issue. The proverbial "smoking gun" is rarely found. Aside from the substantive assessment of the documents obtained, students must also look carefully at documents to assess the agency's assertion of its various legal claims in support of withholding. On the agency side, these determinations have typically undergone significant legal analysis, and the claims are not made randomly. Students should anticipate that the arguments in support of withholding documents in whole or in part have a reasonable legal basis.

Students should begin a review of documents with a focus on two distinct questions: First, has the agency provided information that is significant and should be disclosed to the public? Second, has the agency fulfilled its statutory obligations? These two questions point in two very different directions.

To assess whether the agency has fully complied with its obligations under the Act is rarely a simple problem, except in the unusual circumstance where an agency provides everything requested in a timely fashion. That has happened to us several times, but it remains the exception. More likely, the agency will withhold some documents in full and other documents in part. The agency may also conduct an inadequate search for documents in response to the request. The agency may also provide a Vaughn index, which is a summary of the documents withheld and is required by statute, that is insufficient to determine whether the

---

77. *Id.*

78. *Appeals*, U.S. DEP'T OF JUSTICE, www.justice.gov/open/appeals.html (last modified Sept. 2013).

agency has fulfilled its obligations under the Act. It is possible that all of the above will occur.

The clinic instructor will need to make some determination as to how many issues to pursue on administrative appeal in light of the range of issues presented and the prospects for success. As there is little downside in the administrative appeal process to pursuing a wide range of issues, we generally favor more extensive appeals. The administrative appeal also provides the main opportunity for students to engage in actual legal research and an analysis on a FOIA matter and should therefore be considered the primary assignment in a FOIA clinic.

4. Publicizing and Posting Materials to the Internet.—Once documents have been received and reviewed, it is very important to disseminate them as quickly as possible and to as wide an audience as possible. Documents often lose public interest value as time passes. Information about the Foreign Intelligence Surveillance Court, for instance, may be much more useful in the weeks before legislative consideration of Foreign Intelligence Surveillance Act renewal than they will be after a vote occurs.

In an effort to disseminate information to the public and to preserve a record of EPIC's FOIA work, EPIC also publishes all the documents it obtains on epic.org, typically as part of a larger informational webpage describing the background and a shorter, more concise home page item summarizing the request and documents obtained.[79]

C. Litigation

The decision to undertake litigation in a FOIA matter is a significant decision and should not be undertaken lightly. It is certainly possible to give students a substantial exposure to the FOIA without filing a formal complaint in district court. Law schools typically require clinic professors to follow specific rules about representing clients, initiating lawsuits, and, most critically, keeping the law school itself outside the role of litigant. A well-designed FOIA clinic could end with the completion of the administrative appeal, some discussion of the case law, and perhaps an examination of key FOIA concepts.

The opportunity to initiate and pursue a legal complaint, based on the student's prior work, particularly one that is relatively easy to manage, presents little downside and no real costs. The opportunity should not be ignored. As FOIA cases typically do not require discovery, depositions, or trials, a matter can be fairly litigated without ever leaving the law school or speaking with a client. Nonetheless, it is critical to determine on whose behalf the case will be brought and to treat all decisions as the litigation progresses as requiring the highest duty of care to a client and to the court where the matter will be brought.

In the clinic at Georgetown Law Center, we brought FOIA cases on behalf of EPIC, thus allowing the law school students to have the full experience of litigating a FOIA matter without entangling the school in specific cases. Other

---

79. *See*, *e.g.*, *Air Travel Privacy*, ELEC. PRIVACY INFO. CTR., epic.org/privacy/airtravel#foia (last visited Aug. 27, 2014).

schools may welcome the opportunity to have students initiate cases on their behalf, particularly if there are specific programs or centers within the law school that have an interest in the subject matter of the FOIA request. Law schools will also likely be granted favorable fee status and fee waivers, avoiding concerns about the costs typically imposed in FOIA matters.

In this section, we do not intend to provide a comprehensive review of FOIA litigation strategy. There are several helpful books and guides on this topic.[80] Our aim is to outline how clinic-based FOIA litigation is likely to unfold, identify some of the key lessons we have learned, and make certain general recommendations. Our experience is also shaped by the specific rules of the D.C. Circuit Court of Appeals and the various practices we have developed in relations with federal agencies. Other jurisdictions may follow other practices.

In filing the complaint, we must also consider several factors, including our prospects for success, the current state of the matter, the duty to our clients, and the costs and any possible downside. Typically we will engage the students in this strategic discussion, asking them to consider how they would weigh these various factors based on the matter, the client, and the prospects for remuneration. If time permits, we will ask students who are considering litigating a FOIA matter to write a memo answering these questions. While this may be a substantial undertaking for a law school student who has never litigated a case, if the student has prepared a good case memo, a substantial request, and a well-argued appeal, the student is likely to produce a quality memo. This helps illustrate our point that a well-managed FOIA clinic can provide the basis for excellent lawyering skills.

1. The Complaint.—The beginning of a lawsuit is the filing of a complaint in federal district court. In the FOIA context, there are two ways to think of the initial complaint. The first is to ensure that it includes all of the necessary elements and sets out all of the necessary claims, so that it provides a basis upon which relief may be granted. The second is to provide a more comprehensive overview of the matter, to include facts that will be relevant for determinations at each stage of the litigation process, such as the public interest in the disclosure of the documents sought.

While many private litigants are often satisfied to provide the minimum necessary for filing the complaint, we have come to believe that the more comprehensive filing is a better choice. As explained above, there is rarely discovery in FOIA matters, which means that all favorable facts must be established through formal communications with the agency—the request, and the administrative appeal—and filings with the court. Also, as the public interest FOIA requester must make a showing as to the public significance of the request

---

80. *See Litigation Under the Federal Open Government Laws 2010: Covering the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act* (Harry A. Hammitt et al. eds., 25th ed. 2010); Freedom of Information Advocates Network, *Freedom of Information Guides and Resources*, *available at* www.foiadvocates.net/resources.php; Council of Europe, *Access to Official Documents Guide (2004)*, *available at* www.coe.int/t/e/integrated_projects/democracy/DocAccess_Guide_en/pdf.

pursued, references to news stories, Congressional hearings, and other developments related to the FOIA serve to both educate the court as to the significance of the request and assist with subsequent determinations concerning expedition, fee waivers, and attorneys' fees.

2. Motions.—FOIA cases are typically resolved on cross motions for summary judgment. A FOIA case follows a fixed procedure: Complaint, Answer, Scheduling Order, Defendant's Motion for Summary Judgment, Plaintiff's Cross Motion for Summary Judgment and Reply, Defendant's Reply and Opposition, and Plaintiff's Opposition. The government and the plaintiff typically agree on the schedule order, which sets out a schedule for motions and document disclosures.

Before the parties move for summary judgment, the agency must either disclose documents in full, partially disclose documents and account for its withholdings in a Vaughn Index, or fully deny the request and account for that denial in a Vaughn Index.[81] The Vaughn Index gives the plaintiff a basis to challenge withholdings or a full denial.[82] In the Vaughn Index, the agency must describe the documents, identify the exemption under which it is withholding the documents, and explain why that exemption applies.[83]

In their motions for summary judgment and replies, the parties assert legal arguments for either withholding or disclosing documents, covering a range of topics including document search and duplication fees, exemption use, and sufficiency of search.[84]

We have often provided opportunities for students who are pursuing their own FOIA requests to work with us on the motions we are drafting. In this respect, students are given an opportunity to see ahead in the development of a FOIA matter.

3. Delay.—The process above represents the ideal, simple FOIA case. Too often, though, agencies will seek to delay responding to a requester, even after a complaint is filed.[85] The agency tactics might include refusing to assent to a reasonable scheduling order, asking for unreasonably long timelines for production of documents (often two years or more), and filing multiple motions for extensions.[86]

Because the FOIA requester is the party seeking disclosure of documents, often with the additional request for expedited processing, it is nearly always against the FOIA litigator's interest to agree to an extension of time for the filing of a motion or the production of documents. Delay is the enemy of open government. As discussed above, documents often lose value as they lose

---

81. *See*, *e.g.*, U.S. DEP'T OF JUSTICE, VAUGHN INDEX (2010), *available at* www.justice.gov/usao/reading_room/data/info/VAUGHN_INDEX_FINAL_08_21_2010.pdf.

82. *See id.*

83. *See id.*

84. *See* LITIGATION CONSIDERATIONS, *supra* note 76, at 107-10.

85. *Frequently Asked Questions*, *supra* note 63.

86. LITIGATION CONSIDERATIONS, *supra* note 76, at 36 n.121 (explaining that extensions will be granted if an agency needs additional time).

timeliness.

Therefore, clinics choosing to litigate FOIA matters must respect the underlying purpose of the statute and seek to move the matter forward as quickly as possible. Courts in the D.C. Circuit typically favor this approach and do, for example, disfavor motions for delay that are filed without cause. If a clinic is unable or unwilling to pursue these matters in such a spirit, it is probably best not to initiate litigation.

4. Fees.—The successful public interest FOIA litigator can obtain financial compensation from the government for the time spent litigating the matter.[87] Before a court may award attorneys' fees in FOIA cases, it must first determine whether the plaintiff is eligible for a fee award.[88] FOIA provides that in a lawsuit "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."[89] FOIA defines "substantially prevailed" as when "the complainant has obtained relief through either (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[90]

If a plaintiff is eligible, the court must then determine whether the plaintiff is entitled to recover fees.[91] The D.C. Circuit employs a four-factor balancing test to determine a plaintiff's entitlement to attorney's fees.[92] The four factors cited by the court are "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding."[93]

We have obtained fees in a wide variety of cases against federal agencies, though cases typically take more than a year to litigate fully. The fee determination, which is made either by settlement or cross-motions, can take several additional months. We believe it is worthwhile to teach students about the opportunities to obtain fees in FOIA matters, though it is almost certain that the opportunity for fees will only arise long after the student's request is submitted, and even then fees will only be available to the attorneys who actually litigated the matter.

D. Amicus Briefs and Coalition Strategies

In the course of pursuing FOIA cases in the D.C. Circuit, we have also had several opportunities to write amicus briefs in support of other colleagues who are pursuing their own FOIA appeals. We have also had opportunities to obtain

87. 5 U.S.C. § 552(a)(4)(e)(i) (2014).

88. Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011).

89. 5 U.S.C. § 552(a)(4)(E)(i) (2014).

90. *Id.* § 552(a)(4)(E)(ii).

91. *Id.*

92. Judicial Watch, Inc. v. U.S. Dep't of Commerce, 470 F.3d 363, 369 (D.C. Cir. 2006).

93. *Id.* (citing Davy v. C.I.A., 456 F.3d 162, 166 (D.C. Cir. 2006)).

amicus briefs in support of our own appeals. For students in a FOIA class, the purpose and role of amicus briefs is worth some discussion particularly, as almost every FOIA case on appeal is likely to attract amici.

E. Class Dynamics

A typical practicum course should contain between eight and fifteen students in order to allow the supervising attorneys to really focus on helping students develop legal research, writing, and advocacy skills. The smaller class size also allows more opportunities for each student to participate in class discussions, litigation projects, and regulatory comment drafting assignments.

We encourage students to prepare written work for each class, to discuss the current status of their case, and to solicit opinions from others. Students that work in teams of two on FOIA requests can also have the experience of collaborative research and drafting.

In a typical class, we will divide the time between the substantive pedagogy of FOIA law and a review of the various matters being pursued by the student. In the beginning of the semester in particular, there is a real rush to teach enough about the history and purpose of the FOIA in order for the students to be able write a substantial case memo and draft a request so that the request can be finalized and submitted to a federal agency early in the semester. Once the request is out the door, there is more time to go into the statutory exemptions and tactics for pursuing the request, though such topics as fee status, fee waivers, and expedited processing must be addressed early in the course so that the FOIA request can properly reflect these claims.

1. Evaluation.—We based student grades on several aspects of the course: participation in classes, the FOIA request, the agency appeal, and assistance with FOIA litigation and regulatory comments. Our evaluation of written work was largely based on the student's demonstrated ability to research and draft a comprehensive, well-organized, factually supported document. We looked at both the quality of the initial draft and the quality of the final, revised draft.

2. Working in Teams.—In an effort to increase the quality of each student's work, we assigned students to work in pairs or small groups. This also mirrors the collaborative environment within EPIC, other non-profits, and law firms. We encouraged students to rigorously review each other's work and offer substantive criticism, edits, and recommendations. The work produced by a team of students will invariably be better than the work produced by a single student.

III. SAMPLE FOIA CASES

We have selected three cases from our experience to demonstrate how our approach to FOIA litigation works and also the significant role that students and young lawyers can achieve in pursuing these results.

Several of EPIC's FOIA cases were used as examples for our course on the Law of Open Government. Among them were two FOIA cases against the Department of Homeland Security (DHS). The first case involved requests for documents about airport body scanners, which produced front-page news stories

and led the agency to remove the devices from U.S. airports.[94] The other case concerned the DHS monitoring of Twitter and other social media.[95] In that case, EPIC obtained documents that revealed the agency's surveillance practices. This disclosure led to a Congressional hearing and a change in agency practice. A third matter demonstrated how significant outcomes were possible simply with a well-drafted and timely FOIA request.[96] In that case one of our students sought information about the "No Fly List."[97] When responsive documents were obtained, several press organizations ran front-page stories.[98]

These cases were used to illustrate effective use of the FOIA, FOIA procedures, and how FOIA requests can inform public debate and create policy changes within government. These cases were also used to teach students how a FOIA request can lay the foundation for further policy work and litigation.

A. EPIC v. TSA: Airport Body Scanners as FOIA and Then Administrative Relief

In 2007, the Transportation Security Administration (TSA) began using a new surveillance technology in American airports.[99] The body scanners allowed agency officials to see through travelers' clothing.[100] As each passenger walked through the scanning machine, a TSA agent would look on.[101] Another agent, stationed in the remote viewing area, would receive the machine-generated image and inspect it for "anomalies."[102] In practice, TSA officials were able to view the naked images of travelers absent any suspicion that would justify a search.[103]

There was considerable public debate about the use of the airport body scanners in US airports, particularly after the agency decided unilaterally to make the devices the primary screening technique.[104]

EPIC wrote one of the first articles about the risks to privacy posed by airport body scanners.[105] However, without more information about the actual operation

---

94. EPIC v. Dep't of Homeland Sec., 926 F. Supp. 2d 311 (D.C. Cir. 2013).

95. EPIC v. Dep't of Homeland Sec., 653 F.3d 1 (D.C. 2011).

96. *See generally* Elec. Privacy Info. Ctr., *FBI Watch List*, http://epic.org/foia/fbi_watchlist.html (last visited Apr. 1, 2014).

97. *Id.*

98. *Id.*

99. *Advanced Imaging Technology (AIT)*, TRANSP. SEC. ADMIN., www.tsa.gov/traveler-information/advanced-imaging-technology-ait (last modified Feb. 12, 2014).

100. Carol Kuruvilla, *TSA Has Completely Removed Revealing X-Ray Scanners from America's Airports: Rep*, NEW YORK DAILY NEWS (May 31, 2013, 6:25 PM), http://www.nydailynews.com/news/national/tsa-completely-removed-full-body-scanners-rep-article-1.1360143.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Whole Body Imaging Technology and Body Scanners ("Backscatter" X-Ray and Millimeter Wave Screening)*, ELEC. PRIVACY INFO. CTR., http://epic.org/privacy/airtravel/

of the devices, it was difficult to assess the privacy impact or effectiveness of the devices. EPIC filed two extensive FOIA requests with DHS, the parent agency of TSA, in April and July 2009, requesting technical specifications, contracts, details of the machines' privacy features, traveler complaints, training materials for machine operators, records of data breaches, and images captured by the machines.[106] When the agency failed to comply with statutory deadlines and issue a determination regarding EPIC's request, EPIC filed an appeal with DHS challenging the agency's failure to respond.[107] After the agency failed to respond to EPIC's administrative appeal, EPIC filed suit in Federal District Court for the District of Columbia in November 2009.[108]

In January 2010, EPIC successfully obtained documents from DHS detailing the capabilities of the machines.[109] The disclosed documents included TSA Procurement Specifications for body scanners, TSA Operational Requirements for the machines, a TSA contract with L3, a company that manufactures whole body imaging devices, and two TSA contracts with Rapiscan, another body scanner manufacturer.[110] EPIC carefully examined the documents and discovered several important details, which EPIC included in a memo that was disseminated internally and to several media groups.[111] The TSA documents indicated that the TSA had explicitly required that the machines be able to record, store, and transfer the graphic images produced by the machines.[112] In addition, the privacy filters could be turned off; and the machines may not have been designed to detect powdered explosives, which was a significant security threat at the time.[113] EPIC released the documents to the media, where the documents received extensive coverage.[114] Later, EPIC received hundreds of pages of traveler

---

backscatter/#topnews (last visited Aug. 27, 2014) [hereinafter *Whole Imaging Technology*].

106. *See EPIC v. Department of Homeland Security-Body Scanners*, ELEC. PRIVACY INFO. CTR., http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html#foia (last visited Aug. 27, 2014) (listing actions taken by EPIC regarding body scanners).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Memorandum from the Elec. Privacy Info. Ctr., on Documents obtained from Department of Homeland Security Concerning Body Scanners (Jan. 11, 2010), *available at* http://epic.org/privacy/body_scanners/EPIC_WBI_Memo_Final_Edit.pdf.

112. *Id.*

113. *Id.*

114. *See, e.g.*, Joel Tiller, *Scanners Can Store Images, Group Says*, GLOBE & MAIL (UK) (Jan. 12, 2010), http://www.theglobeandmail.com/news/national/scanners-can-store-images-group-says/article1207208/; *see also* Chris Mellor, *US Airport Body Scanners Can Store and Export Images*, REGISTER (Jan. 12, 2010), http://www.theregister.co.uk/2010/01/12/tsa_body_scanners/; *see also* Barbara E. Hernandez, *TSA Admits Body Scanners Store and Transmit Body Images*, CBS NEWS (Jan. 12, 2010), http://www.cbsnews.com/news/tsa-admits-body-scanners-store-and-transmit-body-images/; Jeanne Meserve & Mike M. Ahlers, *Body Scanners Can Store, Send Images, Group Says* CNN (Jan. 11, 2010), http://www.cnn.com/2010/TRAVEL/01/11/body.scanners/; Matthew

complaints regarding the machines, which EPIC also promptly publicized, leading to further public debate about the controversial agency program.[115]

These documents helped support a successful movement against the machines and provided the factual underpinning for several follow-up FOIA requests, petitions, and lawsuits, as well as EPIC's later lawsuit to suspend the use of the machines.[116] Based on the materials that EPIC received through the FOIA, such as the technical specification and passenger complaints, on July 2, 2010, EPIC filed suit in D.C. Circuit Court of Appeals, asking the Court to suspend the use of body scanner machines in American airports.[117] EPIC successfully claimed that TSA had violated the Administrative Procedure Act when the agency began using the body scanners as primary screening tools without first undergoing a public notice and comment rulemaking.[118] The D. C. Circuit Court of Appeals held that "[i]n sum, the TSA has advanced no justification for having failed to conduct a notice-and-comment rulemaking. We therefore remand this matter to the agency for further proceedings."[119]

Not long after the D. C. Circuit decision in July 2011, the TSA began the process of removing the backscatter x-ray devices from U.S. airports.[120] No longer would it be possible for public officials to routinely view the naked bodies of air travelers.[121] The FOIA lawsuit led to a successful legal challenge against an agency practice and a subsequent change in agency activity.[122]

EPIC also used the information it obtained in the initial FOIA lawsuit to file several follow-up FOIA requests and lawsuits.[123] EPIC requested documents detailing radiation risks posed by the body scanner machines, as well as plans to expand use of body scanners to locations outside of airports.[124] The documents that EPIC received as a result of these requests generated substantial public debate and further promoted agency policy changes.[125] EPIC testified before

---

L. Wald, *Mixed Signals on Airport Scanners,* N.Y. TIMES (Jan. 12, 2010), http://www.nytimes.com/2010/01/13/us/13scanners.html?_r=0.

115. Jaikumar Vijayan, *Travelers File Complaints Over TSA Body Scanners*, COMPUTER WORLD (Mar. 8, 2010), http://computerworld.com/s/article/9167618/Travelers_file_complaints_over_TSA_body_scanners.

116. *See generally* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

117. *Id.* at 3 (Because of an obscure procedural provision, the Circuit Court of Appeals was the proper venue for EPIC's lawsuit.).

118. *Id.* at 11.

119. *Id*. at 8.

120. Kuruvill, *supra* note 100.

121. *Id.*

122. *Id.*; *see also* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

123. *See Whole Imaging Technology*, *supra* note 105.

124. *See id.*

125. *See id.*

Congress several times regarding the body scanner machines.[126] Members of Congress expressed skepticism regarding the privacy, safety, and cost implications of the machines.[127]

Because of widespread public and Congressional opposition to the machines fueled in part by the documents EPIC obtained under the FOIA, TSA has made several modifications to the machines.[128] The machines no longer display a graphic image.[129] Instead, the machines display a "gumby" or stick figure image, with areas containing anomalies highlighted.[130] A TSA agent then pats down the specific area where the anomaly has been located.[131] The agency has also ceased the use of backscatter body scanner machines, which dosed travelers with radiation, and has replaced them with millimeter wave machines, which do not emit radiation.[132]

B. EPIC v. DHS: Social Media Monitoring and Congressional Oversight

Another of EPIC's most successful FOIA requests involved government monitoring of social media. EPIC filed the original FOIA request in April 2011.[133] EPIC requested contracts, statements of work, technical specifications, communications and agreements, and security measures related to the Department of Homeland Security's (DHS) social media monitoring program.[134] The agency had previously undertaken monitoring of social media for specific events, gathering intelligence pertaining to the January 2010 earthquake in Haiti, the 2010 Winter Olympics in Canada, and the April 2010 BP Oil Spill response.[135]

---

126. *See, e.g.*, *TSA Oversight Part 1: Whole Body Imaging: Hearing Before the H. Comm. On Oversight and Gov't Reform Subcommittee on Nat'l Sec.* (2011) (statement of Marc Rotenberg, President, EPIC), *available at* http://epic.org/privacy/body_scanners/EPIC_Body_Scanner_Testimony_03_16_11.pdf; *see also "An Assessment of Checkpoint Security: Are Our Airports Keeping Passengers Safe?" Hearing Before the House Homeland Security Committee, Subcommittee on Trans. Sec. & Infrastructure* (2010) (statement of Marc Rotenberg and Lillie Coney), *available at* http://epic.org/privacy/airtravel/03_17_10%20House_HSC_Testimony.pdf.

127. *TSA to Junk Naked Body Airport Scanners*, FOXNEWS.COM (Jan. 18, 2013), http://www.foxnews.com/politics/2013/01/18/tsa-junks-naked-body-airport-scanners/.

128. Kuruvill, *supra* note 100.

129. Mike M. Ahlers, *TSA Removing 'Virtual Strip Search' Body Scanners*, CNN (Jan. 19, 2013), http://www.cnn.com/2013/01/18/travel/tsa-body-scanners/.

130. Kuruvill, *supra* note 100.

131. *Id.*

132. *Id.*

133. *See EPIC v. Department of Homeland Security: Media Monitoring*, ELEC. PRIVACY INFO. CTR., http://epic.org/foia/epic-v-dhs-media-monitoring/ (last visited Aug. 27, 2014) [hereinafter *Media Monitoring*] (listing the actions taken by EPIC).

134. *See id.*

135. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE OFFICE OF OPERATIONS COORDINATION AND PLANNING HAITI SOCIAL MEDIA DISASTER MONITORING INITIATIVE (2010), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ops_haiti.

In a June 2010 Privacy Impact Assessment, DHS signaled its intention to pursue a permanent social media monitoring program.[136] Later, DHS publicly announced its intentions to monitor online media (including social media) in a February 2011 system of records notice.[137]

As a result of the FOIA request, in January 2012, EPIC received nearly 300 pages of documents from the DHS, including contracts, price estimates, a Privacy Impact Assessment, and communications concerning the media monitoring program.[138] The documents revealed that DHS was paying General Dynamics to monitor blogs, comment sections, and social media for "reports that reflect adversely on DHS, or prevent, protect, respond government activities."[139] General Dynamics was instructed by the agency to "capture public reaction to major government proposals" and generate "reports on DHS, Components, and other Federal Agencies: positive and negative reports on the Federal Emergency Management Agency, the Central Intelligence Agency, the Customs and Border Protections, Immigration and Customs Enforcement, etc. as well as organizations outside the DHS.[140]" The agency provided General Dynamics with several sample reports, including a report titled "Residents Voice Opposition Over Possible Plan to Bring Guantanamo Detainees to Local Prison-Standish MI."[141] This report summarizes dissent on blogs and social networking cities, quoting commenters.[142] DHS instructed General Dynamics to "Monitor public social communications on the Internet."[143] The records list the websites that will be monitored, including comment sections of the *New York Times*, *Los Angeles Times*, *Huffington Post*, *Drudge Report*, *Wired*, and ABC News.[144]

In February 2012, EPIC received an additional document, the DHS-authored "Analyst's Desktop Binder," which was designed to summarize policies and

---

pdf; *see also* DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE OFFICE OF OPERATIONS COORDINATION AND PLANNING 2010 WINTER OLYMPICS SOCIAL MEDIA EVENT MONITORING INITIATIVE (2010), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ops_2010winterolympics.pdf; DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE OFFICE OF OPERATIONS COORDINATION AND PLANNING APRIL 2010 BP OIL SPILL RESPONSE SOCIAL MEDIA EVENT MONITORING INITIATIVE (2010), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ops_bpoilspill.pdf.

136. *See generally* U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT: THE PRIVACY OFFICE OFFICIAL GUIDANCE (2010).

137. Publicly Available Social Media Monitoring and Situational Awareness Initiative System of Records, 76 Fed. Reg. 5603 (Feb. 1, 2011).

138. *See Media Monitoring*, *supra* note 133.

139. Dep't OF HOMELAND SEC., JANUARY 2012 DISCLOSURE, *available at* http://epic.org/foia/epic-v-dhs-media-monitoring/EPIC-FOIA-DHS-Media-Monitoring-12-2012.pdf.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

instructions for government contractors.[145] The document revealed that the agency had been routinely monitoring communications on social media containing such common terms as "cloud," "ice," "wave," "worm," "exercise," "electric," "smart," "pork," and "police."[146]

The documents obtained by EPIC produced stories in the *Washington Post*, *New York Times*, and several other publications.[147] The wide list of DHS search terms inspired criticism—sometimes serious, sometimes humorous[148]—from many circles. It garnered the attention of Congress, and on February 16, 2012, the Subcommittee on Counterterrorism and Intelligence held a hearing on "DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy."[149] The documents that EPIC obtained were referred to numerous times in the hearing.[150] Representative Patrick Meehan (R-PA), Chairman of the Subcommittee, stated:

> A few weeks ago, it was reported that DHS had instituted a program to produce "short reports about threats and hazards." However, in something that may cross the line, these reports also revealed that DHS had tasked analysts with collecting intelligence on media reports that reflect adversely on the U.S. Government and the Department of Homeland Security. In one example, DHS used multiple social networking tools – including Facebook, Twitter, three different blogs, and reader comments in newspapers to capture residents' reactions to a possible plan to bring Guantanamo detainees to a local prison in Standish, Michigan. In my view, collecting, analyzing, and disseminating private citizens' comments could have a chilling effect on individual privacy rights and people's freedom of speech and dissent against their government.[151]

---

145. DEP'T OF HOMELAND SEC., ANALYST'S DESKTOP BINDER (2011), *available at* http://epic.org/foia/epic-v-dhs-media-monitoring/Analyst-Desktop-Binder-REDACTED.pdf.

146. *Id.*

147. *See* Charlie Savage, *Federal Contractor Monitored Social Network Sites*, N.Y. TIMES, Jan. 13, 2012, http://www.nytimes.com/2012/01/14/us/federal-security-program-monitored-public-opinion.html?_r=0; *see also* Ellen Nakashima, *DHS Monitoring of Social Media Worries Civil Liberties Advocates*, WASH. POST, Jan. 13, 2012, http://www.washingtonpost.com/world/national-security/dhs-monitoring-of-social-media-worries-civil-liberties-advocates/2012/01/13/gIQANPO7wP_story.html.

148. Kevin Fogarty, *DHS List of Words You Should Never Ever Blog or Tweet. Ever.*, IT WORLD (May 31, 2012, 4:13 PM), http://www.itworld.com/security/279429/dhs-list-words-you-should-never-ever-blog-or-tweet-ever.

149. *Subcommittee Hearing: DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, COMM. ON HOMELAND SEC. (Feb. 16, 2012, 10:00 AM), http://homeland.house.gov/hearing/subcommittee-hearing-dhs-monitoring-social-networking-and-media-enhancing-intelligence.

150. *Id.*

151. *Enhancing Intelligence Gathering and Ensuring Privacy: Hearing on DHS Monitoring*

Representative Jackie Speier (D-CA), the Subcommittee's ranking member, stated:

> I am deeply troubled by the document that has just been put into the record by EPIC.org and while you have probably not had the opportunity yet to review it, Mr. Chairman, I would like to ask, after they do review it, to report back to this Committee, and to provide us with answers to the questions raised. So I'm going to start with a couple of them. They made a FOIA request back in April. DHS ignored it. And then EPIC filed a lawsuit on December 23, 2011 when the agency failed to comply with the FOIA deadlines. And as a result of the filing of the lawsuit DHS disclosed to EPIC 285 pages of documents. So I just want to make a note of that, that you shouldn't stonewall FOIA requests. You should comply with them within the deadlines. No entity should be required to file a lawsuit . . . . [b]ut what's interesting about what they have pointed out is that, while you say there's no personally identifiable information in this contract with General Dynamics in fact, they point out that there are some exceptions to the "No PII" rule . . . I find that outrageous. And I would like to ask you to amend the contract with General Dynamics to exempt that kind of information from being collected.[152]

In response to the public outrage and Congressional inquiries generated by the FOIA documents, DHS has instituted new safeguards, including audit trails to log the date and time of search, the analyst ID, and the character search term.[153] The agency also removed language from the new edition of the Analyst's Desktop Binder that allowed monitoring of First Amendment protected activities and public dissent, such as criticism of the agency's practices.[154] DHS instructed contractors to only collect information that is operationally relevant to DHS.[155]

C. A Student FOIA Request to TSA: A Washington Post Story About the No Fly List

Occasionally, a FOIA request is successfully resolved without litigation. In June 2011, a law school student, on behalf of EPIC, filed a request with the

---

of Social Networking and Media Before the S. Comm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Security, 112th Cong. (2012) (statements of Patrick Meehan, Chairman of S. Comm. On Counterterrorism and Intelligence).

152. *Enhancing Intelligence Gathering and Ensuring Privacy: Hearing on DHS Monitoring of Social Networking and Media Before the S. Comm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Security*, 112th Cong. (2012) (statements of Jackie Speier, Ranking Member, S. Comm. On Counterterrorism and Intelligence).

153. DEP'T OF HOMELAND SEC., OFFICE OF OPERATIONS COORDINATION AND PLANNING, PUBLICLY AVAILABLE SOCIAL MEDIA MONITORING AND SITUATIONAL AWARENESS INITIATIVE UPDATE (2013).

154. *Id.*

155. *Id.*

Federal Bureau of Investigation (FBI) for records related to the No Fly List and Selectee List, subsets of the FBI Terrorist Screening Center's Terrorist Screening Database.[156] The Terrorist Screening Database, created in 2003, is a consolidated watch list administered by the Terrorist Screening Center and used by multiple agencies.[157] It contains the No Fly List, Selectee List, Interagency Border Inspection System, Violent Gang and Terrorist Organization File, Automated Biometric Identification System, Integrated Automated Fingerprint Identification System, and several other watch lists and screening systems.[158]

The No Fly List and Selectee List were created by the FBI after the September 11, 2001 terrorist attacks and has since been transferred to the purview of the Transportation Security Administration (TSA).[159] Individuals who are on the Selectee List are subjected to more intensive screening at airports; individuals on the No Fly List are not permitted to board a commercial aircraft for travel within, or into, the United States.[160]

The number of individuals on these lists and the criteria for inclusion and removal from the lists has been highly secret.[161] Agency officials have said simply that the No Fly List has its "own minimum substantive derogatory criteria requirements."[162] In the beginning of 2010, multiple news outlets reported that the criteria for inclusion on the list had been relaxed, making it easier for individuals to be placed on the No Fly List and Selectee List.[163]

An EPIC law clerk, following the procedure described above to identify a significant FOIA topic and to direct it to the appropriate agency, requested documents detailing criteria for inclusion on and removal from the No Fly List and Selectee List, as well as information about the current number of individuals

---

156. Letter from Andrew Christy and John Verdi to David M. Hardy (June 7, 2011), *available at* http://epic.org/privacy/airtravel/EPIC_No_Fly_List_Criteria_FOIA_Request.pdf [hereinafter Christy Letter].

157. *Ten Years After: The FBI Since 9/11*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/ about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center (last visited July 15, 2014).

158. Federal Bureau of Investigation, *Criminal Justice Information Services,* FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis (last visited July 14, 2014).

159. TSIS TRANSPORTATION SECURITY INTELLIGENCE SERVICE, TSA WATCH LIST PRESENTATION, *available at* http://www.aclunc.org/cases/landmark_cases/asset_upload_file371_3549.pdf (released as part of a settlement in Gordon v. FBI, No. C – 03 - 1779 (N.D. Ca. Jan. 24, 2006)).

160. *Id.*

161. *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List,"* ACLU.ORG, https://www.aclu.org/national-security/factsheet-aclus-challenge-us-governments-no-fly-list (last visited Aug. 27, 2014).

162. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GENERAL, ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION 9 (2009), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIGr_09-64_Jul09.pdf.

163. Elise Labott, *U.S. Lowers Threshold for Inclusion on No-Fly Lists*, CNN (Jan. 6, 2010, 12:18 PM), http://www.cnn.com/2010/TRAVEL/01/05/terrorism.watch.list/.

and U.S. Citizens on the No Fly List and Selectee List.[164] When the agency failed to respond, EPIC followed up with an appeal in August 2011, and several contacts with the agency.[165] In September 2011, the agency responded, sending EPIC around 100 pages of documents.[166] The documents included the 2009 and 2010 guidelines for the No Fly List, FBI Terrorist Watch List Screening Procedures, an FBI report to Congress on the Terrorist Screening Center, and FBI Answers to questions from Congress on the Center.[167]

For the first time since the No Fly List was established, the public got to see the legal standard for inclusion on the list.[168] According to the documents sought by our summer clerk, in order for an individual to be included on the list, the FBI must have "reasonable suspicion" based on an objective factual basis.[169] "The objective factual basis linking a specific individual to terrorism or terrorist activities is also known as *particularized derogatory information*, which is the basis for adding the subject of an FBI investigation to the TSDB [Terrorist Screening Database]."[170]

The 2010 guidelines for the No Fly List revealed that law enforcement officers are expressly forbidden from indicating to an individual that he or she is on the No Fly List in any way.[171] The guidelines also revealed that even a successful acquittal in a court of law is not necessarily enough to remove a person from the No Fly List.[172]

These documents garnered attention in several national publications, including the *New York Times*.[173] The documents helped to inform the public about a very secret government program and gave the public the opportunity to scrutinize the justification for watch list placements.[174]

IV. CLINICAL EDUCATION, ASSESSMENT, RECOMMENDATIONS

The FOIA clinic we have described above arises within the larger context of

---

164. Christy Letter, *supra* note 156.

165. *See EPIC-FOIA—FBI Watchlist*, ELEC. PRIVACY INFO. CTR., epic.org/foia/fbi_watchlist.html (last visited Aug. 27, 2014).

166. *See id.*

167. *See id.*

168. *See* Charlie Savage, *Even Those Cleared of Crimes Can Stay on F.B.I.'s Watch List*, N.Y. TIMES, Sept. 27, 2011, at A1, *available at* http://www.nytimes.com/2011/09/28/us/even-those-cleared-of-crimes-can-stay-on-fbis-terrorist-watch-list.html.

169. *See generally* COUNTERTERRORISM PROGRAM GUIDANCE WATCHLISTING ADMINISTRATIVE AND OPERATIONAL GUIDANCE, FEDERAL BUREAU OF INVESTIGATION (2010), *available at* http://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11_CT_Guidance.pdf.

170. *See generally id.* (emphasis added).

171. *Id.*

172. *Id.*

173. *See* Savage, *supra* note 168.

174. *Id.*

American legal education. We have chosen this moment to draw attention to this particular class because we believe it follows an important evolution now taking place in American law schools. In this section, we review the history, theory, and development of clinical education.

A. History

Legal education in 19th century America was fractured and inconsistent.[175] Far from the standards and requirements provided by the American Bar Association (ABA) and state bars today, legal education before about 1870 consisted of a patchwork of methods and theories.[176] Some attorneys were trained in apprenticeships without classroom education.[177] Of those attorneys who attended law school, some were university graduates, and others had no prior education beyond grade school.[178] In addition, law curricula varied hugely between schools.[179] The legal education historian Charles R. McManis identifies three prevailing trends among law school methods in the 19th century: the applied skills method, similar to an apprenticeship; the European "general education" model, essentially a liberal arts curriculum that included legal studies; and the proprietary law school model, which Barry, Dubin, and Joy describe as "an analytical and systematized approach to the law as interconnected rational principles, taught primarily through lectures."[180]

The modern conception of legal education as a three-year, graduate-level law school began around the time that Christopher Columbus Langdell became the first Dean of Harvard Law School.[181] According to legal education lore, Langdell began the first meeting of his first Contracts not with the expected lecture typical of propriety schools, but by asking a student to recite the case history of *Payne v. Cave*.[182] It has been well-documented that Langdell was not the first law professor to introduce the case method into classroom teaching.[183] John Norton Pomeroy, a professor at the law school that later became New York University, notably taught using the case method in the 1860s.[184] Langdell, however,

---

175. *Id.*

176. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 184 (2008).

177. Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429 (1981).

178. Renée M. Landers, *A Profession of Students, Practitioners, Professors, and Judges*, 47 BOSTON B. J. 2 (2003).

179. Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 8 (2000).

180. *Id.* at 5.

181. Thomas C. Grey, *Langdell's Orthodoxy,* 45 U. PITT. L. REV. 1 (1983).

182. *Id.*

183. Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 LAW & HIST. REV. 277, 336 (2004).

184. *Id*.

provided a theoretical rationale for his choice of method.[185]

Langdell equated law with science, and the case method with the scientific method.[186] In the scientific method, the scientist uses observation and raw data to derive basic governing principles.[187] This process not only results in the creation of a set of scientific laws, but also a tested methodology for discovering further principles.[188] Langdell believed that law operated in the same way.[189] The facts of a case were raw, observable data, from which law students could derive basic governing principles.[190] By deriving these principles, the law student would learn both the rules of law and the skill of inductive legal reasoning.[191] Langdell's "scientific method" philosophy caught on almost instantly, and Langdell's combination of case method and Socratic method are still the dominant pedagogical theory of law schools today.[192]

It was against this backdrop that the clinical method of teaching law began to emerge in the early twentieth century.[193] Despite the immediate acceptance of Langdell's method, there remained pockets of legal educators around the country who believed the "scientific method" was unjustifiably narrow.[194] Its critics believed that the case method inadequately trained students to practice law.[195] As a result, students at a few law schools began to develop "legal aid bureaus" and clinics, or volunteer opportunities for law students to contribute to public service causes in exchange for practicing their legal skills.[196] Some universities endorsed these clinics; at other universities, the clinics were purely extracurricular activities.[197]

Most universities resisted the development of legal aid clinics. Since Langdell's popularization of the law school as intellectual center rather than trade school, universities were hesitant to cede their growing reputation as serious academic institutions.[198] Law schools perceived legal aid clinics as a return to the

---

185. Grey, *supra* note 181, at 18-19.

186. *Id.*

187. *Id.* at 5-6.

188. *Id.*

189. *Id.* at 19-20.

190. *Id.* at 43-44.

191. Nancy Cook, *Law as Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 27 (2012).

192. *See, e.g.,* Anthony Kronman, *The Socratic Method and the Development of the Moral Imagination*, 31 U. TOL. L. REV. 647, 647 (2000).

193. Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL EDUC. 504 (1999).

194. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 72 (2007) (usually referred to as the "Best Practices Report").

195. *Id*.

196. John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174-75 (1930).

197. Barry, Dubin, & Joy, *supra* note 179, at 2.

198. Charles R. McManis, *The History of First Century American Legal Education: A*

era of apprenticeships and ad hoc self-instruction—the dark ages of legal education.[199] This "first wave" of clinical education—that is, institutionalized skills training, rather than default apprenticeships resulting from the lack of an academic alternative—was really little more than a ripple. Nevertheless, by the 1950s, most universities had agreed to some sort of practical skills requirement in their curricula, and at least thirty schools housed or affiliated with a legal aid clinic in which students could gain hands-on experience.[200]

The "second wave" of clinical education in the 1970s and 1980s provided the real momentum for the clinical methodology in use today.[201] The champion of second wave clinical legal education was Professor Gary Bellow, who sought to unify the various threads of clinical legal education theory and construct a common vocabulary.[202] Barry, Dubin, and Joy note, "Without a commonly understood pedagogy, clinical legal education was too amorphous to take firm root and spread to every law school."[203] Professor Bellow therefore began to examine the legal aid clinics and other skills-based practicum courses and to develop a cohesive rationale for the clinic methodology.[204]

As Professor Bellow and others continued to construct the academic basis for a unified discussion of clinical legal education, other forces continued to push for legal clinics in law schools.[205] One force was the perception among students, practitioners, and judges that recent law school graduates were underprepared to practice law.[206] Professor Mark Spiegel notes, "In the 1970's, pressure developed for additional skills training in law school. Chief Justice Burger began giving speeches about the inadequacy of trial advocacy."[207] As a result of these growing complaints, legal regulatory boards and law schools " developed a broader focus on lawyer competency which included skills in addition to trial advocacy," including interviewing skills, counseling skills, and negotiation skills.[208] To further these goals, the Council on Legal Education and Professional Responsibility (CLEPR) was formed, and began giving law schools grants to

---

Revisionist Perspective, 59 WASH. U. L. REV. 597, 650 (1981).

199. Barry, Dubin, & Joy, *supra* note 179, at 8.

200. *Id.* at 9.

201. NEW YORK JUDICIAL INST., PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG COURTS, LAW SCHOOL CLINICAL PROGRAMS, AND THE PRACTICING BAR, 12-13 (2005), *available at* https://www.nycourts.gov/ip/partnersinjustice/Clinical-Legal-Education.pdf.

202. Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, CLINICAL EDUC. FOR THE L. STUDENT 374 (1973).

203. Barry, Dubin, & Joy, *supra* note 179, at 16l.

204. *See generally* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978).

205. Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 590 (1987).

206. *Id.*

207. *Id.*

208. *Id*.

establish clinics.[209] The response from Congress was similarly prompt.[210]

Another major force behind the growth of clinical education was the wealth of academic writing that emerged from the late 1970s and 1980s.[211] By the 1990s, academic engagement was so strong among scholars of legal education theory that the *Clinical Law Review* was established in 1994.[212] The major contemporary clinical legal education scholars have identified the tenure of the "Millennial" generation in law school as the marker for the "third wave" of clinical legal education.[213] The "third wave" theories of clinical legal education provide the underpinnings for the EPIC Open Government litigation practicum, and the major trends are described below.

B. Current Theories

Clinical education supplied its own theoretical underpinnings; rather than conceptualized and then implemented, 20th century clinical education was implemented and then rationalized. Writing of clinical legal education at the beginning of the "second wave," Mark Spiegel notes: "Little thought was given to basic questions concerning what clinical education had to offer law students and law schools other than the opportunity for the earlier acquisition of real life experience. If there was an explicit rationale, it was related to some connection between providing service and learning."[214] Since then, much has been written about the theory and practice of clinical education. Generally, the theories advocating the use of clinical education fall into three camps, which we will call the practical, the ethical, and the sociological.

The practical theory of clinical education coalesced in the early 1990s, following the ABA's publication of a study on the gap between a student's success in legal education and his or her preparedness to practice law.[215] Subsequent follow-up reports converged on the consensus that law schools should

---

209. *CLEPR: Origins and Program*, CLINICAL EDUC. FOR THE L. STUDENT 3, 8 (1973).

210. *See, e.g.*, *Qualification for Practice Before the United States Courts in the Second Circuit: Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159 (1975).

211. NEW YORK STATE JUDICIAL INST., PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG COURTS, LAW SCHOOL CLINICAL PROGRAMS AND THE PRACTICING BAR: INTRODUCTION TO CLINICAL LEGAL EDUCATION 12 (2005), *available at* https://www.nycourts.gov/ip/partnershipinjustice/Clinical-Legal-Education.pdf.

212. The Association of American Law Schools, *Resources: The Clinical Law Review*, *available at* http://www.aals.org/resources_clinical.php.

213. Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. (2013).

214. Spiegel, *supra* note 205.

215. AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 3 (1992) (commonly known as the "MacCrate Report," after the then-chair of the ABA).

be responsible for imparting three basic categories of education (or "apprenticeships"): legal theory, legal skills, and legal values.[216] Many legal clinicians who adopted the conclusion of these reports agree that the casebook method can only teach the legal theory apprenticeship, and students must learn lawyering skills and values in a different setting.[217] By identifying "the necessary core competencies to become successful legal professionals," clinical professors can structure their courses and methods of assessment around a practical, skills-based theory of education.[218] In this way, clinical education is conceived as a means to complete law students' education in one or both of the remaining apprenticeships.

The ethical theory is closely tied to the practical theory of clinical education in that it is intended to fulfill the third apprenticeship – legal values – by requiring students to experience firsthand the consequences of their work.[219] This theory recognizes the importance of the modern clinic's roots in the "legal aid bureaus" of the late nineteenth century.[220] The ethical theory imagines clinics as what Professor Peter Joy calls the "model ethical law office."[221] It posits that law students cannot learn to be ethical lawyers by learning ethics rules; instead, ethical lawyers must be shaped through practice and implementation.[222] Thus, clinical professors are understood to be ethics professors, and law students' clinic experience is conceptualized as a monitored practice space to learn the principles of zealous advocacy while confronting the realities of the ethics rules.[223]

The sociological theory of clinical education is related to the practical and ethical in that clinical instructors often identify interpersonal skills and sense of professional ethics among the core competencies that clinical education should instill.[224] However, some clinical educators approach the sociological aspect of clinical work as the course's primary educational goal.[225] The sociological theory is an outward-facing theory, orienting the student's education toward the needs

---

216. Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 337 (2010); *see also* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 191 (2007) (commonly known as the "Carnegie Report," after its sponsorship by the Carnegie Foundation).

217. Foxhoven, *supra* note 216.

218. *Id.* at 335.

219. Peter A. Joy, *The Law School Clinic As A Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35, 37 (2003).

220. *Id.* at 39 n.16.

221. *Id*. at 35.

222. *Id.* at 36-37; *see also* Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 111 (1996).

223. Joy, *supra* note 219, at 38.

224. Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 156 (2002).

225. *Id.* at 155; *see also* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 353 (1997).

of the client, rather than an inward-facing theory, orienting the student's education toward the needs of the curriculum.[226]

Under the sociological theory, clinics are meant to teach students to interact with clients, with colleagues and supervisors, and with their own concept of the role of "lawyer."[227] Learning to work with and for clients is the sociological component that has persisted throughout the history of clinical education. [228] The early apprenticeships, the first wave legal aid clinics, the second wave university clinics, and clinical education today all share the common task of pairing law students with those in need of advocacy. Contemporary clinical theory has recognized that this "hands on lawyering" aspect of clinical education binds the student's engagement with the clinic experience with the success of the client's case.[229] The greater the students' involvement and participation in clinic work, the more successful the client is likely to be.[230] Under this theory, the student learns to gauge academic success by the real-world outcome of the legal work.[231]

Finally, the sociological theory expects that the student will use the clinic experience to define the socially constructed role of "lawyer," and explore the consequences of accepting or rejecting that construction.[232] The student compares her interactions with her clients, colleagues, and supervisors with her own expectations of lawyering.[233] She encounters the competing pressures on an attorney to advocate zealously while respecting the courts and the law; and the competing demands of supervisors, judges, and clients.[234] Under this theory, the clinic experience provides the student with the environment to adjust her idea of what constitutes a "lawyer," and to decide whether her employer and client are best served by conforming to that role or by defying it.[235]

C. Assessment

The history and contemporary theories of clinical legal education bear directly on the theory of assessment. Consciously or unconsciously, a clinic instructor beginning a new course faces the basic question of whether the clinic

---

226. C. John Cicero, *The Classroom as Shop Floor: Images of Work and the Study of Labor Law*, 20 VT. L. REV. 117 (1995); *see also* Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 459 (2000); Jacobs, *supra* note 225, at 345.

227. *See* Minow, *supra* note 224.

228. Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 565 (1980).

229. Spiegel, *supra* note 205, at 592-93.

230. Ed Finkel, *Law School Clinics Provide Real World Training*, 41 STUDENT LAW. MAG. (2012).

231. *Id.*

232. *See* Minow, *supra* note 224.

233. *Id.* at 594.

234. *Id.*

235. *Id*.; *see generally* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978).

will be an alternative method by which the instructor teaches the traditional lecture courses, or whether the clinic is divorced from Langdell's scientific casebook theory altogether. These different conceptions of the purpose of a clinic will determine the metrics of success that the instructor will use.

If the clinic is conceived as a methodology for teaching traditional subjects—that is to say, a complement to the casebook method—the metrics of a student's success will likely mirror those of a student in a casebook-based course. The instructor will assess whether the student has learned the principles underlying the subject matter and is able to apply those principles to derive consistent results in different situations.[236] In such a clinic, the instructor could assign grades to filings with the court and interactions with the client.[237] If a student were responsible for filing a pleading with the court, for instance, the instructor could assign a grade to the motion based on its quality and the level to which it reflects the student's grasp of the relevant rules and principles underlying the pleading.[238] Assessment in such a clinic could also take the form of an exam or a paper, as in a casebook-based course.

If the clinic is conceived as an alternative to the casebook subjects, the metrics of assessment will likely correspond to the theory of the clinic.[239] For instance, a clinical professor whose primary goal for the clinical course is to teach the interpersonal skills underlying the sociological theory of clinic education will assess the student's ability to interact with clients, colleagues, and supervisors.[240] The clinical instructor can conduct a series of assessments to determine the student's performance in the clinic, including peer review, self-assessment, and supervisory reports.[241]

D. FOIA and Clinical Education

For all of the excellent scholarship that has developed around the pedagogy of clinical legal education, there has been no academic treatment of using the clinic model to teach the FOIA and open government litigation. The EPIC FOIA Practicum presents novel additions to the theory of clinical education, since EPIC has no clients. EPIC serves the public generally, using the FOIA to keep the public informed on the government's use of technology, personal data, and the Internet. As a result, the FOIA Practicum deviates from the trajectory of clinic development through the 20th century.

The EPIC FOIA Practicum, like many other clinics, incorporates elements of the practical, ethical, and sociological theories of clinical education. Assessment is based on a conception of the FOIA Practicum as both a method for teaching

---

236. Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models In Clinical Legal Education*, 3 CLINICAL L. REV. 299, 306-08 (1997).

237. *Id.* at 306.

238. *Id*. at 306-08.

239. Benfer & Shanahan, *supra* note 213, at 327-31.

240. *Id.*

241. *Id.* at 329.

traditional case law and also an alternative to traditional case law. However, the main goal of the FOIA Practicum is largely practical: to train the next generation of FOIA litigators. As a result, the FOIA Practicum primarily targets the development of students' open government lawyering skills. The Practicum syllabus outlined four goals for the course: an overview of the federal open government law; training in FOIA requests, appeals, and litigation; experience pursuing actual FOIA matters in various stages of the litigation process; and practical tips and strategies to become an effective FOIA attorney.

Assessment was broken down according to a set of discrete tasks that are required in open government litigation. Each preparatory memo or filing is treated as an exam or a paper, and graded out of a certain percentage of 100. In the Practicum's last semester, the syllabus broke out five individual graded assignments: a written case memo, a case presentation to the class, a FOIA request, a FOIA appeal, and an "agency response" exercise, in which students responded to each other's FOIA requests as though they were agency FOIA officers. Each assignment contributed a specified percentage of the final grade, up to eighty percent. Class participation accounted for the remaining twenty percent, and included clinic attendance and completion of reading assignments.

Some of the goals for the course necessarily required that we conceive of the Practicum as an alternative to the casebook subjects. Experience pursuing actual FOIA matters, for example, is inherently practice-based and could not be taught from a casebook. In other areas of the course, the Practicum was explicitly conceived as a methodology. Law students can, and often do, learn open government laws in casebook-based classrooms. The FOIA Practicum used the clinical model to teach the same substance; by writing and pursuing the requests, law students were able to learn the open government laws, and experience their impact as they learned.

CONCLUSION

Pursuing a Freedom of Information Act request provides an ideal opportunity for law students and young lawyers to learn the basic skills of lawyering—defining a problem clearly, identifying a goal, writing with precision, developing a strategy, and assessing outcomes. The EPIC FOIA clinic combines these threads—helping students develop the practical tools to pursue FOIA requests and continuing to understand as lawyers the broader operation of the FOIA. Lectures focus on a key topic each week, providing students with the opportunity to discuss and assess the current status of their various FOIA requests. Clinic meetings at EPIC then provide opportunities for students to apply the skills they learn in class under the supervision of experienced FOIA attorneys.

Throughout the semester, students are encouraged to share their views about how they made certain decisions. Why did they decide to pursue a particular FOIA request? What requests did they choose not to pursue and what was the reason for the decision? How did their decision-making process affect the outcome of their requests? How can they change the way they think about the FOIA in order to achieve more desirable results?

Students share their insights either in class discussion or in brief reflection memos submitted for class. In this way, students can compare their own experience with those of other students and with those of EPIC attorneys. Through group discussion, individual conversations, and written reflection, students obtain additional insights about the FOIA process, the value of open government, and the process of practicing law.

TAKING THE PERSONAL OUT OF DATA: MAKING SENSE OF DE-IDENTIFICATION

YIANNI LAGOS*

INTRODUCTION

Data is powerful but scary. Many consumer services rely on data aggregation.[1] A navigation system, for example, uses geolocation data to help consumers circumvent rush hour traffic.[2] This is a useful service. The aggregation of geolocation data creates a privacy concern as companies have access to each and every place a person visits.[3] This is, at the very least, unsettling.

De-identification provides a solution. It is a process to prevent a personal identifier from being connected with information.[4] A car owner's name is an example of a personal identifier. The speed a car is going on a crowded highway is an example of information. De-identification involves deleting or masking direct identifiers, such as the car owner's name, and suppressing or generalizing indirect identifiers, such as the location of a person's home or work.[5] With de-identification, consumers get real-time traffic delay information while their privacy is protected.[6] This is a potential win-win-win for consumers, for privacy, and for businesses. It allows companies to analyze data to provide consumer services, it protects privacy by breaking the connection between the analytical information and personal identifiers, and it gives businesses increased flexibility to innovate by discovering novel uses of data.[7]

Despite the increased relevance of de-identification, there is not a universal

---

* Yianni Lagos is an attorney for Lagos & Lagos P.L.L. He is a former Legal and Policy Fellow at Future of Privacy Forum.

1. *See*, *e.g.*, Sean Madden, *How Companies Like Amazon Use Big Data to Make You Love Them*, FAST CO. (May 2, 2012, 8:30 AM), http://www.fastcodesign.com/1669551/how-companies-like-amazon-use-big-data-to-make-you-love-them.

2. Phillip Swarts, *Is Your Car Spying on You? GPS Tracks 'Consumers,' Identity Theft at Risk*, WASH. TIMES (Jan. 7, 2014), http://www.washingtontimes.com/news/2014/jan/7/no-privacy-behind-the-wheel-your-car-might-be-spyi/?page=all.

3. Many services seemingly without need to track location are doing so and selling that data to third-party advertisers. *See* Charles Arthur, *Android Torch App With Over 50m Downloads Silently Sent User Location and Device Data to Advertisers*, GUARDIAN (Dec. 6, 2013, 3:00 PM), http://www.theguardian.com/technology/2013/dec/06/android-app-50m-downloads-sent-data-advertisers.

4. *New Words & Slang*, MERRIAM-WEBSTER (June 15, 2007, 11:08 PM), http://nws.merriam-webster.com/opendictionary/newword_display_alpha.php?letter=De.

5. *Id.*

6. ANN CAVOUKIAN & KHALED EL EMAM, DISPELLING THE MYTHS SURROUNDING DE-IDENTIFICATION: ANONYMIZATION REMAINS A STRONG TOOL FOR PROTECTING PRIVACY 1 (2011), *available at* http://www.ipc.on.ca/images/Resources/anonymization.pdf.

7. *Id.* at 4-5.

definition. Policymakers are currently debating when data is sufficiently stripped of identifying information to be considered de-identified.[8] Some examples are obvious. Data is not de-identified if it contains a person's name.[9] Similarly, data is not de-identified if it contains a revealing email address, john.smith@gmail.com, or a phone number listed in the phonebook.[10] These are examples of direct identifiers.

The more difficult cases arise when only indirect identifiers are present. Data may not be de-identified even if it does not contain a direct identifier.[11] For example, if john.smith@gmail.com is replaced with a random number or pseudonym (such as 578294@gmail.com), data is not de-identified if indirect identifiers can re-associate the information to John Smith (re-identification).[12] Common indirect identifiers are date of birth, gender, and location.[13] Though it is not obvious that having location information would lead to identifying a living person, people tend to be located at two places most of the week—home and work. A public records search of a person's home and work could potentially lead to identifying the individual.[14] The starting and ending destinations should be generalized (taking a street address and turning it into a zip code) before the dataset becomes de-identified.[15]

---

8. *De-Identification*, FUTURE OF PRIVACY FORUM, http://www.futureofprivacy.org/de-identification/ (last visited Sept. 13, 2014) (discussing the debate over the definition of personal information); *see also* FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS, at iv (2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf (explaining the criteria for data to be successfully de-identified).

9. *See De-Identification*, *supra* note 8 (explaining when data is de-identified); *see also* FED. TRADE COMM'N, *supra* note 8.

10. *See* FED. TRADE COMM'N, *supra* note 8.

11. *Id.* at 33.

12. *Id.*

13. *See* Daniel C. Barth-Jones, *The "Re-identification" of Governor William Weld's Medical Information: A Critical Re-examination of Health Data Identification Risk and Privacy Protections, Then and Now* 5 (Privacy Ass'n, Working Paper, July 24, 2012) (*available at* https://www.privacyassociation.org/media/pdf/knowledge_center/Re-Identification_of_Welds_Medical_Information.pdf) (study found that twenty-nine percent of a population bore risk of *plausible* re-identification with three data points (full date of birth, gender, and five-digit ZIP code), though risk of actual re-identification was much lower given that the data set was incomplete.).

14. Browser tracking data associated with what is commonly referred to as a cookie similarly contains information that can be used to identify individuals easily, i.e., a username typed into a webpage. *See* JONATHAN MAYER, THIRD-PARTY WEB TRACKING: POLICY AND TECHNOLOGY, 2012 IEEE SYMPOSIUM ON SECURITY AND PRIVACY 415-16 (2012), *available at* http://www.academia.edu/2784919/Third-Party_Web_Tracking_Policy_and_Technology.

15. This Article uses the example of geolocation information, but many combinations of information pose privacy concerns. Credit card information combined with zip code, for example,

Indirect identifiers create a major problem with defining de-identification. Indirect identifiers, such as location, provide useful analytical information but also create a potential link back to an individual.[16] De-identified data must be specific enough for data to still be useful, but broad enough so it cannot be associated with an individual. This balancing is a difficult task that this Article explores.

Before defining data as sufficiently de-identified, this Article urges balance between protecting consumer privacy and ensuring companies can continue to innovate. Part I of this Article stresses the importance of ensuring any definition of de-identification includes adequate privacy benefits. Data still poses a risk to privacy unless it is sufficiently scrubbed of identifying information.[17] If the definition of "de-identified" is too lenient, it would create the false impression that data was now safe. This would be unfair to consumers. More importantly, this could undermine the trust necessary for a vibrant data-driven economy.

Part II of this Article looks at the privacy preserving aspects of data that do not rise to the level of "de-identified." There is a wide gap between de-identified information and information directly tied to a person's name. Information that can only be tied to a person through extensive research on where people live and work, for instance, does not pose the same privacy concerns as a credit card number tied directly to a person's name. That gap should be filled with an intermediate level of data that should be appropriately called "intermediate data." Intermediate data is information that is not easily linkable to a particular individual but is tied to a unique identifier. Intermediate data should not be confused with de-identified data, but there are still privacy protecting aspects to intermediate data.

Part III recognizes that any definition of de-identification should minimize the negative effects on innovation. Data is becoming a more integral part of our economy.[18] Many of the services we rely on in our daily lives, from GPS to social networking, cannot function without collecting data.[19] Just as importantly, the profit driver of the internet relies on information and advertisements to provide free services.[20] These companies are in a position of trust and have a constant pipeline of new information on consumers.[21] That trust is a prerequisite to innovation. Without trusting companies with data, the data driven economy

---

could lead to identification of an individual who purchases a very unique product.

16. *See* CAVOUKIAN & EMAM, *supra* note 6, at 11.

17. *See De-Identification*, *supra* note 8.

18. *Innovation & Data Use*, FUTURE OF PRIVACY FORUM, http://www.futureofprivacy.org/issues/innovation-data-use/ (last visited Sept. 13, 2014).

19. Adam Thierer, *Relax and Learn to Love Big Data*, U.S. NEWS & WORLD REPORT (Sept. 16, 2013, 12:10 PM), http://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/16/big-data-collection-has-many-benefits-for-internet-users.

20. Quentin Hardy, *Troubles Ahead for Internet Advertising*, N.Y. TIMES (Aug. 29, 2013, 2:29 PM), http://bits.blogs.nytimes.com/2013/08/29/troubles-ahead-for-internet-advertising/?_php=true&_type=blogs&_r=0.

21. *Id.*

would suffer a significant setback.[22]

Part IV recommends balancing the privacy preserving aspects of de-identification with incentivizing companies to scrub data. Due to the power of technology companies, significant de-identification legislation is currently unlikely in the United States.[23] Even if passed, any statutory or regulatory definition of de-identification would almost assuredly be vague, as no specific definition of de-identification has been created. Today, it falls on companies to self-regulate. Companies will simply forgo de-identifying data if the definition of de-identification is too stringent, thus depriving consumers of a potentially powerful privacy protection.

I. BENEFITS OF DE-IDENTIFICATION

The privacy protecting benefits of de-identification depend on its definition. Yet there is no universal standard for when data has been scrubbed enough to be considered de-identified.[24] Any definition needs to live up to the name and provide true separation between a person's identity and his information.

Datasets are too varied for a simple definition. Those variations include the sensitivity of the data, the administrative safeguards used to protect the data, and the parties sharing the information.[25] Intimate medical details, for example, are more sensitive than preferences for shopping at Talbots or TJ Maxx.[26] Similarly, data released to the public at large creates more privacy concerns than data kept within a company.[27] All the variations of data need to be taken into account before defining the level of technical separation between peoples' identities and their information needed to call data de-identified.

One end of the spectrum, perfect de-identification, is not practical. If information has zero chance of being technically associated with a person or group of persons, there is no privacy risk in a dataset.[28] A useful dataset can never have zero chance of reconnecting a person to his information.[29] No statute

---

22. *Id.* (explaining how companies rely on data for advertising purposes).

23. Though the Federal Trade Commission has recently "called on Congress to protect consumers against the unchecked collection and sharing of their digital data," there is not an imminent chance of legislation getting through Congress. Steve Lohr, *New Curbs Sought on the Personal Data Industry*, N.Y. TIMES, May 28, 2014, at B1.

24. *See De-Identification*, *supra* note 8.

25. *See* CAVOUKIAN & EMAM, *supra* note 6, at 14.

26. *Id.* at 4 (explaining the sensitivity of health information).

27. INFO. COMM'R'S OFFICE ANONYMISATION: MANAGING DATA PROTECTION RISK CODE OF PRACTICE 6-9 (2012), *available at* http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Data_Protection/Practical_application/anonymisation-codev2.pdf.

28. Joseph Jerome, *Making Perfect De-Identification the Enemy of Good De-Identification*, FUTURE OF PRIVACY FORUM, http://www.futureofprivacy.org/2014/06/19/making-perfect-de-identification-the-enemy-of-good-de-identification/ (last visited Sept. 13, 2014).

29. KHALED EL EMAM, GUIDE TO THE DE-IDENTIFICATION OF PERSONAL HEALTH INFORMATION 135 (2013).

or regulation should require the impossible standard of perfect unlinkability.

The other end of the spectrum, the ability to identify 100% of individuals with their information, is not de-identification, even if other administrative safeguards are in place to protect the data. Administrative safeguards protect data from being misused without technically altering the data itself, and include limiting access controls to trusted employees and providing cybersecurity measures to prevent data breaches from hackers.[30] These safeguards alone can never be enough to count as de-identification. A common industry practice is to hash a person's name to create a random unique identifier (taking John Smith and transforming it to 578294).[31] Many times a company retains the algorithm (commonly referred to as a key) to continue to transfer information associated with John Smith to the unique identifier 578294 but restricts access to the key to a limited number of employees.[32] The problem with retaining the key is that bad acting employees with access to the key technically can re-associate the information to John Smith.[33] Similarly, threats from government requests or outside bad actors are still significant when all of the individuals in a database could be identified.[34]

If administrative safeguards alone justified calling data de-identified that could potentially harm the data-driven economy.[35] Without trust, internet users may start withholding their personal information and refrain from online purchases, both essential ingredients to the expansion of the internet economy.[36] Companies would undermine consumer trust if they claimed data was de-identified that could in fact be easily re-associated with the individuals.[37] Misleading is not the answer.

Administrative controls, however, can provide important protections when used in addition to technical measures.[38] In the example above, if the key is

---

30. This Article combines the administrative and physical safeguards referred to in the Privacy Act of 1974 into one category: administrative safeguards. Privacy Act of 1974, 5 U.S.C. § 552a(e)(10) (2011).

31. Ed Felten, *Does Hashing Make Data "Anonymous"?*, TECH. AT FED. TRADE COMM'N (Apr. 22, 2012, 7:05 AM), http://techatftc.wordpress.com/2012/04/22/does-hashing-make-data-anonymous/ (explaining how hashing alone can lead to re-identification of an individual).

32. Edith Ramirez, Remarks at the Media Institute in Washington, D.C., at 7-8 (May 8, 2014) (transcript available at http://www.ftc.gov/system/files/documents/public_statements/308421/140508mediainstitute.pdf) (describing Target's use of algorithms).

33. *See* Felten, *supra* note 31.

34. *Id.* (explaining how hashing often fails).

35. Administrative safeguards provide a vital role in protecting consumer data and creating trust in the data driven economy. Those safeguards, however, should not justify calling data de-identified when data can be easily associated with an individual.

36. Ardion Beldad et al., *How Shall I Trust the Faceless and the Intangible? A Literature Review on the Antecedents of Online Trust*, 26 COMPUTERS IN HUM. BEHAV. 857, 859 (2010).

37. *See* FED. TRADE COMM'N, *supra* note 8, at 8-9.

38. "DeID-AT" is a short hand form of describing the combination of administrative safeguards and technical de-identification. *See* Yianni Lagos & Jules Polonesky, *Public vs. Non-*

destroyed, there is no direct way to re-identify John Smith.[39] Individuals may nonetheless be re-identified through the use of indirect identifiers.[40] The re-identification of Massachusetts Governor Weld's medical records using full date of birth, zip code, and gender is an example of using indirect identifiers to reconnect personal information with a person's identity.[41] That re-identification was from a publically released dataset.[42] If administrative safeguards were used to protect the data from the public, it is likely the data would have never been re-identified.

With non-public datasets protected by strong administrative measures, the ability to re-identify a small number of individuals poses much less of a privacy concern. With administrative controls, only a very limited number of individuals in the company or a skillful hacker who broke the controls could attempt to re-identify the dataset.[43] The reported examples of re-identification required the work of computer scientists who could only successfully identify a fraction of individuals in a public database.[44] The time and expertise needed to re-identify datasets is likely a barrier to bad actors. It is likely not worth a criminal's time. The easier it is to reconnect individuals with data, the more likely bad actors will hack a company database and attempt to re-identify individuals to their information.[45]

A major concern with administrative safeguards does not come from companies or bad actors but from the government. The National Security Administration (NSA) scandal raised the concern that company data will fall into the hands of the government with unknown consequences.[46] In theory the government could always request the information, but the threat of a government request is significantly reduced through the use of de-identification. It is likely not worth the government's time. Government requests are much more likely when 100% of a database is identifiable than when only one percent of a database could potentially be re-identified after significant effort.[47]

The benefits of administrative controls are dependent on the quality of those controls. Currently, companies have not been forthcoming with their different

---

Public Data: The Benefits of Administrative Controls, 66 STAN. L. REV. ONLINE 103, 104 (2014).

39. *See* Felten, *supra* note 31.

40. *See* Latanya Sweeney, *k-Anonymity: A Model for Protecting Privacy*, 10 (5) INT'L J. ON UNCERTAINTY, FUZZINESS & KNOWLEDGE-BASED SYSTEMS 557, 559 (2002).

41. *Id.* at 560.

42. Barth-Jones, *supra* note 13.

43. Restricting data to only trusted parties reduces privacy risk. *See* Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1771 (2010).

44. Barth-Jones, *supra* note 13.

45. Felten, *supra* note 31.

46. Lisa Mascaro, *House Overwhelmingly Supports Bill to Curb NSA Domestic Spying*, LA TIMES (May 22, 2014, 7:57 PM), http://www.latimes.com/nation/politics/la-na-nsa-reforms-20140523-story.html#page=1 NSA legislation.

47. *Id*.

administrative techniques. Keeping the confidentiality of administrative safeguards does enhance their protections, but it is difficult to judge the efficacy of those programs without some disclosure. Additionally, the privacy preserving protections of administrative controls are lessened as more information is shared with outside parties (See Appendix A).[48] For datasets available to the public or released to a large number of individuals, administrative controls provide less of a benefit.[49] The benefits of technical de-identification, however, protect even data released to the public.[50]

Due to the protections of administrative controls, there should be a lesser requirement to remove indirect identifiers for internal databases than for public databases. A widely-used means of measuring the risk of indirect identifiers is k-anonymity.[51] K-anonymity measures re-identification risk by the number of individuals in a dataset with matching indirect identifiers.[52] If k equals three, then three individuals share all the same attributes in the dataset.[53] An example would be three people with the same birthday.[54] If k equals twenty, then twenty individuals share common attributes—a re-identification risk lower than when k equals three.[55] K-anonymity measures maximum risk by only considering the individuals with the smallest number of matching indirect identifiers or the biggest outlier (think the 100-year-old, 6'10", red head).[56] Public databases should have high k-values.[57] Current cell size precedents for public databases range from a k of three to a k of twenty.[58] With non-public databases, lower k-values should be acceptable.[59]

---

48. FED. TRADE COMM'N, *supra* note 8, at 33 (explaining companies should limit the amount of data shared with third parties to better protect privacy of consumers).

49. Even with publically available data, obscurity, or the difficulty in finding data, could still protect consumer privacy to a certain degree. *See* Woodrow Hartzhog & Evan Selinger, *Obscurity: A Better Way to Think about Your Data than Privacy*, ATLANTIC MAG. (Jan. 17, 2013), http://www.theatlantic.com/technology/archive/2013/01/obscurity-a-better-way-to-think-about-your-data-than-privacy/267283/.

50. *See* CAVOUKIAN & EMAM, *supra* note 6, at 4-5 (explaining the benefits of de-identification).

51. *See generally* Sweeney, *supra* note 40.

52. *Id.* at 5.

53. *See generally id.*

54. *See generally id.*

55. *See generally id.*

56. *See generally id.*

57. EMAM, *supra* note 29, at 279.

58. *Id.*

59. Deciding the exact level of k-anonymity needed involves looking at a number of factors that could include: administrative safeguards, sensitivity of the data, public or private data, the number of parties sharing the data, whether there is consumer choice, the purpose of using the data, and other factors. *See* Pierangela Samarati & Latanya Sweeney, *Protecting Privacy When Disclosing Information: k-anonymity and Its Enforcement Through Generalization and Suppression* 2-3, *available at* epic.org/privacy/reidentification/Samarti_Sweeney_Paper.pdf.

Average k-anonymity is another option for non-public databases. Instead of measuring only the individuals with the maximum risk (or lowest k), an average would take the mean risk of the entire database (or average k). For public databases, maximum risk is appropriate because many bad actors will likely focus exclusively on the easiest individuals to re-identify. That assumption may not hold true for non-public databases. Using average k-anonymity would give a more accurate measure of the risk to the entire database, while allowing companies to increase data utility. Using average k-anonymity does not necessarily mean that companies should allow for unique individuals in a dataset, or k values equal to one. Instead, companies should take into account both maximum k and average k when measuring risk.

II. INTERMEDIATE DATA

Data that does not rise to the level of de-identified still may have privacy preserving aspects. A data breach involving a person's name and credit card information, such as with the 2014 Target breach, creates significant danger of theft or other malfeasance.[60] A simple step of replacing a person's name with a random pseudonym could significantly reduce the harm from such a data breach.

Instead of generating a creative name for this intermediate level of data, the use of "intermediate identifiers" or "intermediate data" seems most descriptive. The most commonly used word to describe the intermediate category between fully identifiable and de-identified is "pseudonymized."[61] This word is fraught with confusion. An email address, for example, may be called a pseudonym, but "john.smith@gmail.com" does little to protect privacy.[62] Thus, a pseudonym alone has little to no privacy protection.[63] Intermediate data deserving of an intermediate category of privacy protection may be tied to a unique identifier

---

60. Though the Target breach has been reported as a point-of-sale breach, the high number of reported identify theft cases showcases the danger of combining personal identifiers with sensitive information, such as credit card data. *See Data Breach FAQ*, TARGET, https://corporate.target.com/about/shopping-experience/payment-card-issue-FAQ (last visited July 31, 2014).

61. MEP Jan Philipp Albrecht, European Union Committee on Civil Liberties, Justice, and Home Affairs, released a Draft Report on the General Data Protection Regulation that recognized such an intermediate category of data: "the rapporteur encourages the pseudonymous . . . use of services. For the use of pseudonymous data, there could be alleviations with regard to obligations for the data controller." JAN PHILIPP ALBRECHT, COMMISSION PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA (GENERAL DATA PROTECTION REGULATION) 211 (2012), *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf.

62. Holding browsing tracking data in what is commonly referred to as a cookie identifier is another commonly cited example of using a pseudonym that does not tie to a particular individual. A cookie identifier, could potentially become used broadly enough to be indistinguishable from other common numerical identifiers such as a social security number.

63. *See* Felten, *supra* note 31 (explaining how hashing works).

(such as a random number) but must not be easily linkable to a particular individual (such as an email address).[64]

The previously discussed example of hashing an identifier with a key should be considered intermediate data.[65] In that example the name, John Smith, is transformed into a random unique identifier, 578294. The unique identifier 578294 is not easily identifiable to John Smith for parties without access to the key.[66] If the key is protected by sufficient administrative controls, the data may be considered intermediate data.[67] A hacker would need to gain access to both the dataset and the key.[68] That double layer of privacy protection provides a barrier in the case of a data breach, but the data is not yet de-identified because the random identifier could be converted back to the name John Smith by anyone with access to the key.[69]

A dataset must also go through the additional scrubbing to remove obvious indirect identifiers before becoming intermediate data. Indirect identifiers, such as date of birth and location, can lead to identifying a significant number of individuals in a dataset.[70] Though intermediate data does not need to be scrubbed to the same extent of de-identified data, obvious indirect identifiers, like a person's home address, should be removed or generalized.

It is also important that organizations cannot use an intermediate identifier to discriminate against an individual. If a pseudonym can still be used to reach an individual, it should not be considered intermediate data. Mobile phones often transmit information with a common number identifier (mobile ID).[71] A mobile ID is a pseudonym just as the random number 578294 could be characterized as a pseudonym.[72] The difference is the mobile ID can be used to discriminate against the phone owner.[73] Companies could discriminate against a mobile ID by charging a higher price for a mobile shopper based on where the person lives by tracking their mobile phone. In that scenario, it does not matter whether a company attaches a mobile ID to a person's name. The consumer is harmed regardless. Thus, when a pseudonym can be used to discriminate against an individual, that data should not be considered intermediate data and only minor

---

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* CAVOUKIAN & EMAM, *supra* note 6, at 11 (describing quasi-identifiers).

71. Jennifer Valentino-DeVries, *Unique Phone ID Numbers Explained*, WALL ST. J. (Dec. 19, 2010, 9:40 PM), http://blogs.wsj.com/digits/2010/12/19/unique-phone-id-numbers-explained/.

72. *Id.*

73. *Value of Data*, FUTURE OF PRIVACY FORUM, http://www.futureofprivacy.org/issues/innovation-data-use/value-of-data/ (last visited Sept. 14, 2014) (explaining privacy advocates' concern that data will be used to discriminate against certain individuals); *see also* Omer Tene & Jules Polonetsky, *Privacy in the Age of Big Data: A Time for Big Decisions*, 64 STAN. L. REV. 63, 65 (2012).

alleviation on obligations are warranted.[74]

Only when a pseudonym is not directly tied to a person or their device should fewer restrictions apply to the uses of such information. The previously used example of hashing an identifier to create a random unique identifier 578294 is an example of a unique identifier that cannot be used to affect an individual. If companies restrict access to the key, the concern of discrimination is greatly reduced.[75] The consumer can no longer be reached by the identifier. Companies should have increased freedom to use intermediate data.[76]

The fact that data is not considered intermediate or de-identified data does not mean that companies should never use that information. Outright restrictions on data collection are rarely appropriate. Instead, increased consumer notice and control or use limitations are the appropriate responses.[77] There is currently a debate about whether to give consumers the ability to easily opt-out of broad scale collection of information, or whether companies should just be prohibited from using data for certain purposes.[78] Limitations on the uses of data, instead of collection, have the benefit of protecting consumers while allowing for non-harmful uses of the data.[79] Companies, however, have failed to provide comprehensive use restrictions that would give the public confidence that data would not be misused.

III. INNOVATION AND TRUST

Before defining the boundaries of de-identification and intermediate data, the effects on innovation should be considered in addition to the privacy implications.

---

74. The EU's General Data Protection Regulation currently has clauses allowing for a right to access and a right to data portability. ALBRECHT, *supra* note 61, at 53. The clauses allow consumers to see all data a company has about them and then transfer that information to their computer or to another company. *Id.* When companies hold data using only a number identifier, it is difficult for companies to verify the authenticity of such a request. *Id.* The data security concern of preventing identify theft outweigh the benefit to consumers of accessing information. Thus, policymakers should not allow a right to access or a right to data portability with data associated only with a mobile ID.

75. *See* Ramirez, *supra*, note 32.

76. The exact type of increased freedom should be decided on a case by case basis. Since consumers can no longer be reached directly by the data, companies should be able to use this information freely for research purposes if accompanied by a promise to not re-identify with the key. Companies should also be given increased freedom to share this data without also sharing the key.

77. *See generally* FED. TRADE COMM'N, *supra* note 8 (proposing changes for how consumers' data is handled).

78. *See* Wendy Davis, *Web Standards Group Moves Forward with Do-Not-Track Effort*, ONLINE MEDIA DAILY (Apr. 25, 2014, 5:11 PM), http://www.mediapost.com/publications/article/224423/web-standards-group-moves-forward-with-do-not-trac.html (discussing how some advertising groups preferred targeting use limitations to collection limitations).

79. *See generally* FED. TRADE COMM'N, *supra* note 8.

Innovation benefits consumers and businesses alike.[80] The large aggregation of data does lead to groundbreaking discoveries.[81] Studying the genetic code of large portions of the population could lead to breakthroughs in medicine.[82] Monitoring student performance could lead to the immediate recognition when a student is getting behind. On the other hand, organizations with access to a person's genetic code or a child's academic history create privacy concerns.[83] Finding the right balance recognizes both the potential for discovery and the privacy risk.

Less glamorous, but still vital to the economy, is corporate profit. Data leads to more profitable companies.[84] Facebook and Twitter exist because of data sharing.[85] The increasing use of data is leading to profitable companies that are providing services that consumers use every day.[86]

Many of these innovations are not possible without the aggregation of data.[87] The internet functions by assigning each user a unique IP address that is transmitted to every website visited.[88] Websites cannot function at the basic level of providing content to an individual computer without a minimum level of data collection.[89] Society needs to trust companies to protect and use data in appropriate ways to get these innovations.

With an endless stream of information from consumers, companies will always have the ability to exploit consumer information in inappropriate ways. The most stringent form of privacy protection would require companies to delete all information after this initial collection. This stringent requirement hurts consumers.[90] It deprives them of services without a corresponding benefit to privacy.[91]

The promise to protect data is similar to the promise to delete data. In both instances, trust is essential. Even if a company promised to delete all data

---

80. Johnathan Shaw, *Why "Big Data" Is a Big Deal*, HARV. MAG. (Mar. 2014), http://harvardmagazine.com/2014/03/why-big-data-is-a-big-deal.

81. *Id.*

82. *Id.* (explaining that data can be used for innovation in medicine).

83. *Id.* (describing the privacy concerns with uses of data).

84. Lin Jing & Chen Yingqun, *When Big Data Can Lead to Big Profit*, CHINADAILY (Apr. 21, 2014, 6:56 PM), http://www.chinadaily.com.cn/business/2014-04/21/content_17449249.htm.

85. *See* Shaw, *supra* note 80 (explaining that social media gathers significant amounts of data).

86. Jing & Yingqun, *supra* note 84.

87. Shaw, *supra* note 80.

88. Russ Smith, *IP Address: Your Internet Identity*, CONSUMER.NET (Mar. 29, 1997), http://www.ntia.doc.gov/legacy/ntiahome/privacy/files/smith.htm.

89. *Id.*

90. Society could change the driving laws to restrict cars from going above 5 mph. There would be a great reduction in car fatalities, but we as a society are moving faster than that.

91. Tim McGuire et al., *Why Big Data Is the New Competitive Advantage*, IVEY BUS. J. (July 2012), http://iveybusinessjournal.com/topics/strategy/why-big-data-is-the-new-competitive-advantage#.VBU31vldWAg (explaining the benefits of big data to businesses and consumers).

collected from consumers, it could simply change policies the next day and proceed to retain massive amounts of data. There is no privacy protection that does not involve some level of trust in companies.[92] Legal enforcement could similarly ensure companies follow through on promises to protect information just as easily as promises to delete information.[93]

Trust plays a crucial role in de-identification. Many debates on de-identification have centered on whether administrative safeguards should be used in conjunction with the technical transformation of the dataset.[94] Trust is essential for both controls.[95] Back to the key example, if the key is maintained, it is possible for the company to re-identify the information despite the administrative control.[96] Similarly, even if a company promises to destroy the key, the company could just retain the data, despite the supposed technical control. With both administrative and technical safeguards, companies can protect data or abuse it depending on their motivation.[97]

A natural reaction to the NSA's broad tracking practices is to restrict companies from collecting and retaining information, not just because we are afraid of what businesses are doing with the data, but because we are afraid government is going to get their hands on the information. Such a knee-jerk reaction could negatively impact the progress and innovation of society just as data aggregation is forming the center of many industries. There are valid reasons to restrict companies from collecting and using data, but companies should not be punished for the indiscretions of the government.

IV. BALANCING PRIVACY RISK WITH ADOPTION RATES

An often overlooked criterion in privacy protection is whether companies will actually protect data. The 2014 data breaches of eBay and Target show just how vulnerable consumer data is to potential hackers.[98] Those breaches involved both

---

92. EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 10-11 (2014) [hereinafter BIG DATA], *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf (explaining how trust is essential to utilizing big data within government).

93. *See generally* FED. TRADE COMM'N, *supra* note 8.

94. "MITIGATING CONTROLS WORK IN CONJUNCTION WITH DE-ID TECHNIQUES TO MINIMIZE THE RE-ID RISK." HEALTH SYS. USE TECHNICAL ADVISORY COMM. DATA DE-IDENTIFICATION WORKING GRP., 'BEST PRACTICE' GUIDELINES FOR MANAGING THE DISCLOSURE OF DE-IDENTIFIED HEALTH INFORMATION 19 (2010), *available at* http://www.ehealthinformation.ca/documents/Data%20De-identification%20Best%20Practice%20Guidelines.pdf.

95. *See* BIG DATA, *supra* note 92.

96. *See* Felten, *supra* note 31 (explaining how hashing works).

97. Criminal sanctions could provide an incentive not to abuse data, but those criminal sanctions would presumably be just as effective in ensuring administrative safeguards as technical safeguards.

98. *See* Dave Johnson, *eBay Data Breach: What You Need to do Now*, CBS NEWS (May 25, 2014, 8:44 AM), http://www.cbsnews.com/news/massive-data-breach-at-ebay-change-your-

personal identifiers (name or username) and sensitive information (credit card numbers and passwords).[99] If that data was de-identified, the privacy invasions from the breaches would have been much less severe.[100]

Data categories fall on a spectrum from fully identified to intermediate data to strict de-identification, with many categories in between.[101] Strict de-identification provides the lowest risk of reconnecting individuals with their data, but not necessarily the greatest protection for consumers.[102] Companies may find that the privacy benefits of strict de-identification are outweighed by the large loss data utility, and thus decide to hold data in fully identified form.[103] Given the lack of general legislation on de-identification, consumers cannot benefit from the added privacy protection if companies refuse to de-identify data.[104]

Loose de-identification standards, conversely, may promote company adoption but provide little additional protections to consumers. Companies probably desire to call data de-identified in an attempt to tout their consumer-protective policies. If de-identification does not actually protect consumers, then such claims would create the false impression that companies are adequately protecting consumer privacy.

Any definition of de-identification must balance the added privacy protections of reducing re-identification risk with the lost privacy protection from companies refusing to scrub data altogether (See Appendix B).[105] The rate that companies scrub data is likely a function of the benefits and costs.

Companies benefit in two main ways from scrubbing non-public databases. First, regulations and self-imposed promises restrict how companies use and share personal data.[106] If companies scrub data to meet those standards, companies can

---

password-now/; *see also* Samantha Sharf, *Target Shares Tumble as Retailer Reveals Cost of Data Breach*, FORBES (Aug. 5, 2014, 9:16 AM), http://www.forbes.com/sites/samanthasharf/2014/08/05/target-shares-tumble-as-retailer-reveals-cost-of-data-breach/.

99. *See* Johnson, *supra* note 98; *see also* Sharf, *supra* note 98.

100. A wronged customer of Target has the civil remedy of negligence, but simple consumer protections such as de-identification are a preferred solution. It seems unjust to force a consumer to affirmatively sue a mega-company for damages as the only real remedy a consumer has available to him.

101. *See* Lagos & Polonesky, *supra* note 38.

102. *Id.*

103. EMAM, *supra* note 29, at 6.

104. The likelihood of general legislation in de-identification is low. Thus, companies are left to self-regulate with the help of advocacy groups and regulators. The fact that some fields, such as health care, currently require de-identification actually furthers the need for guidance on de-identification. The current definitions of de-identification are too broad to give companies any real guidance, and standards for healthcare data may not be appropriate in other areas. *See generally* FED. TRADE COMM'N, *supra* note 8.

105. *See De-Identification*, *supra* note 8.

106. The Federal Trade Commission currently enforces statements made in company privacy policies under Section 5(B) of the Federal Trade Commission Act. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006).

use data for more purposes—in many cases without consent.[107] Companies can also more freely share datasets with business partners to gain further insights from the data.[108] Second, companies benefit from the lower risk of a data breach.[109] Data breaches have a large reputational cost, and reporting requirements may not apply to breaches of de-identified and potentially intermediate databases.[110]

De-identification, however, has costs. Companies weigh these benefits with the costs before scrubbing data. De-identification reduces data utility.[111] Data scrubbing techniques include data masking, suppression, and generalization—all of which reduce the statistical power of a dataset.[112] That is a loss for consumers and businesses alike.[113] Consumers lose out on novel new products and services specifically targeted to their interests, and companies lose out on profits.[114] Companies must also expend time and resources to scrub data that increase with stricter de-identification standards.[115] With data utility losses and implementation costs, companies may forgo any scrubbing under a strict standard because the costs outweigh the benefits.[116] Creating a reasonable definition of de-identification that companies will utilize should be the goal.

CONCLUSION

Defining de-identification is no easy task. Companies, regulators, and advocacy groups should adopt a pragmatic approach to de-identification. Any definition of de-identification should take into account the quality of the technical protections, the effects on innovation, and whether companies will actually use the tool. Intermediate data also has a vital role to play in protecting consumer privacy. A reasonable and clear definition of de-identification that companies choose to implement will go a long way in protecting consumer privacy.

---

107. In the European Union, for example, de-identification allows for public disclosure of data without violating individual privacy. Council Directive 95/46, 1995 O.J. (L 281) 26 (EC).

108. As the Federal Trade Commission recently advised, those business partners should be contractually bound not to re-identify. FED. TRADE COMM'N, *supra* note 8, at 21.

109. *See* CAVOUKIAN & EMAM, *supra* note 6, at 4-5.

110. *Data Breach FAQ*, *supra* note 60.

111. *See* CAVOUKIAN & EMAM, *supra* note 6, at 12.

112. EMAM, *supra* note 29, at 6.

113. Shaw, *supra* note 80.

114. *Id.*

115. *Id.*

116. *Id.*

APPENDIX A[117]

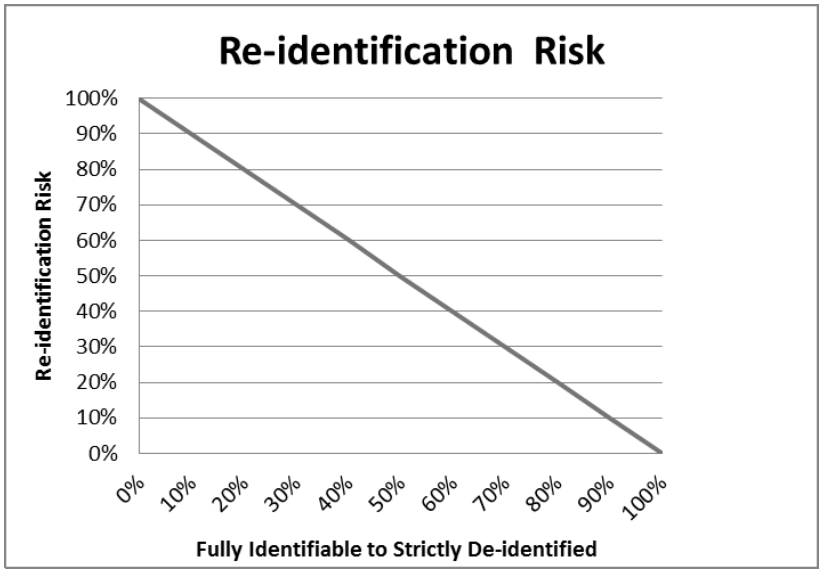
The benefits of using technical and administrative controls stem from the added protection of two independent events. Independence requires that the chance of a bad actor breaching administrative safeguards (administrative risk) is not correlated with the chance of a bad actor re-identifying data (technical risk). If administrative risk is independent from technical risk, then combining technical and administrative controls drastically reduces total privacy risk. As shown in the table below, if the probability of an administrative breach is one percent and the probability of a technical breach is one percent, the probability of a privacy breach drops to .01%. The benefits of this dual protection, however, decrease when companies share data with other business partners, as there is an independent chance of an administrative data breach within each company. With a relatively few number of companies exposed to the data, total privacy risk remains small, but when a company shares data with a hundred partners, the added benefits of combining administrative and technical controls can decrease or almost disappear. At a thousand companies, with the assumed one percent chance of breach, the data should be considered public. These statistics show large benefits of combining technical and administrative safeguards when a company confines data to a few trusted partners, but reduced benefits when the number of companies with access to the data increases.

# of Companies	**Technical Risk**	**Administrative Risk**	**Total Privacy Risk**
1	1%	1%	0.01%
2	1%	2%	0.02%
3	1%	3%	0.03%
4	1%	4%	0.04%
5	1%	5%	0.05%
6	1%	6%	0.06%
7	1%	7%	0.07%
8	1%	8%	0.08%
9	1%	9%	0.09%
10	1%	10%	0.10%
100	1%	64%	0.64%
1000	1%	100%	1.00%

117. Analysis and calculations were completed by the Author.

APPENDIX B[118]

Conventional thinking suggests that stricter de-identification standards best protect consumer privacy. The illustrative graph below shows that regulators can choose along a spectrum of the de-identification standard. The x-axis is the de-identification standard imposed, with 100% being the strictest standard. The y-axis is the re-identification risk. The line shows the re-identification risk for a given de-identification standard. When the de-identification standard equals zero (or fully identified data), the re-identification risk is 100%. As the de-identification standard increases, the re-identification risk decreases linearly. Re-identification risk, however, is only one component of overall consumer privacy protection.

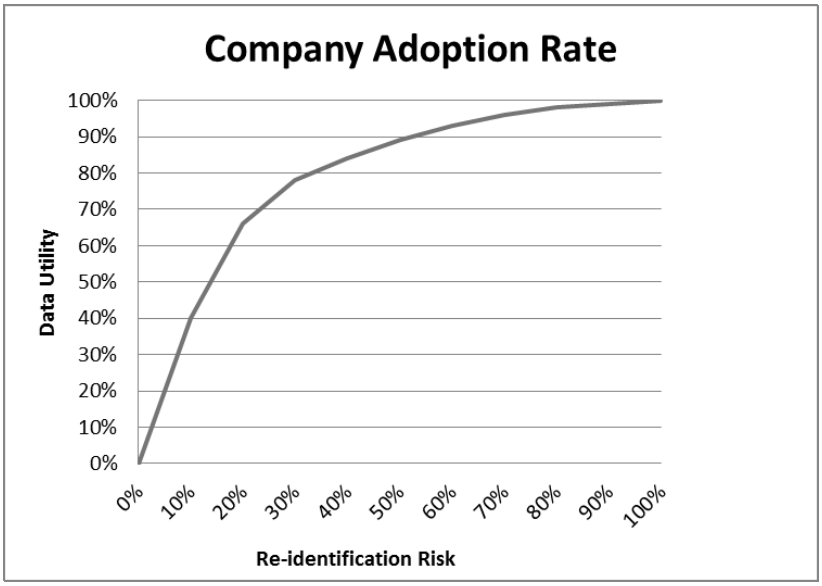


The privacy benefits provided by de-identification are meaningless unless companies de-identify public data. The graph below shows the relationship between re-identification risk and company adoption rates. The x-axis is re-identification risk. A strict de-identification standard is equivalent to a low re-identification risk. The y-axis is data utility. Stricter de-identification requirements reduce data utility. The line shows the percent of companies adopting De-ID AT for a given re-identification risk. Loss of data utility is a disincentive to companies, so when re-identification risk decreases, less companies adopt de-identification as a data protection tool.

Non-empirical thinking suggests that the number of companies de-identifying

118. Analysis and calculations were completed by the Author.

data does not follow a linear path. At a re-identification risk of zero, no companies will de-identify data because a re-identification rate of zero means the data has no utility. A small increase in re-identification risk from zero will have a large impact on data utility and company adoption because companies will add back the most useful data first (the steep part of the curve). At high risks of re-identification, a large increase in re-identification risk will have a small impact on data utility and company adoption because companies have already added back the most useful data (the flat part of the curve). In other words, when de-identifying data, companies remove the lowest value data first (i.e., low hanging fruit). Companies can therefore achieve reasonable de-identification with relatively little loss in data utility. If regulators require companies to reach strict de-identification standards, companies lose a relatively high amount of data utility.



The slope of the graph is dependent on the assumption that companies can efficiently de-identify data by using techniques that initially reduce the least useful data. For companies to efficiently de-identify, regulation needs to give room for companies to choose the appropriate techniques. The HIPAA statistical approach allows that flexibility. Under that approach, companies can de-identify data in any form, as long as a statistician certifies that the risk of re-identification is very small using accepted statistical and scientific principles and methods. That flexibility allows companies to de-identify data, while preserving data utility.

PRIVACY IN THE DIGITAL AGE

SENATOR D. BRENT WALTZ*

INTRODUCTION

The evolution of the concept of "privacy in the digital age" has been almost as dynamic as the technology itself that has driven humanity's mastery of our planet. The American roots of the "privacy in a digital age" concept began in the troubled birth of a nation. It endured an uncertain adolescence as conflicts arose because inventions and technological advancements allowed drastic increases in a government's ability to intrude on the communication of its citizens. It reached maturity as society continues to attempt to balance the tension between modern technology and historical jurisprudence on what may very well be the most significant constitutional question of the twenty-first century.

A. The History of American Privacy

Even the most casual student of American Constitutional scholarship will note that the notion of "privacy" as a distinct legal construct is lacking in our founding documents.[1] Efforts to piece together a semblance of its preconception is challenging at best in the common law, Magna Carta, and the English parliamentary reforms following the Glorious Revolution of 1688.[2] One piece of what was destined to be known as the privacy "penumbra" emerges in the Third Amendment to the U.S. Constitution[3]—a somewhat surprising conclusion considering that the more frequently invoked Fourth and Fifth Amendments seem to receive much more scrutiny and acceptance as a constitutional basis of privacy in both legal theory and practice.[4]

The prohibition of the quartering and maintenance of soldiers in the private homes of a free citizenry inherent in the Third Amendment would appear to be a quaint and outdated historical need to house an army to ward off attacks from

---

* Senator D. Brent Waltz is a graduate of Wabash College, President of the Indianapolis based investment banking firm Baron Group, and has served in the Indiana General Assembly since 2004.

1. David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 27 (1999).

2. CARL BECKER, NEW LIBERTIES FOR OLD 79 (1941); *see generally* Bill of Rights Institute, *Magna Carta (1215)*, BILL OF RIGHTS INSTITUTE, http://billofrightsinstitute.org/resources/educator-resources/americapedia/americapedia-documents/magna-carta/ (last modified 2010); *see also* U.S. National Archives & Records Administration, *Featured Documents*, NATIONAL ARCHIVES & RECORDS ADMINISTRATION http://www.archives.gov/exhibits/featured_documents/magna_carta/ (last visited Aug. 10, 2014).

3. Luban, *supra* note 1, at 31.

4. *Id.* (explaining that although the Fourth and Fifth Amendments are included in the penumbra of the right to privacy, the Third Amendment protects privacy rights within the home and thus belongs within the penumbra of the right to privacy).

French and Indian encroachment on the frontier in the mid-1700s.[5] Yet this conclusion seems to contradict basic military tactics of that period.[6] British troops were seldom quartered in private homes along the frontier; rather they were stationed in forts along strategic locations such as river convergences and mountain passes.[7] Besides the protections these fortifications provided, there was a practical need for not having troops spread out over large geographic distances.[8] The "Brown Bess" musket, standard issue for the British army at the time, was a highly inaccurate weapon.[9] Lacking a rifled barrel, soldiers carrying these muskets were traditionally ordered to form a line against a similarly equipped and organized opposing force.[10] British soldiers stationed in American cities in the years leading up to, and during, the American Revolution would have had a role more akin to an occupying military garrison.[11] The Third Amendment prohibits this function of government intrusion into the privacy of its citizenry.[12]

Having eyes and ears present inside the homes of citizens would have been an extremely effective method of intelligence gathering in the Age of Enlightenment.[13] A solider would report any suspicious or disloyal comments or activities to their superiors while discouraging dissent.[14] The technology did not exist to record or gather intelligence from great distances.[15] Nor were most communications physically recorded by their content, participants, or duration.[16] What would later be known as "Humint"—human intelligence—was the primary means of acquiring knowledge of potential threats.[17] The Third Amendment played a critical role in protecting privacy in the early days of the Republic.[18]

---

5. James P. Rogers, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL'Y 747, 751 n.34 (2008).

6. *Id.* at 751-52.

7. Robert A. Gross, *Public & Private in the Third Amendment*, 26 VAL. U. L. REV. 215, 218 (1991) (discussing that quartering soldiers was a last resort).

8. *Id.* at 217 (explaining that quartering troops in private homes was "hardly a good way to run an army").

9. Don Higginbotham, *The Second Amendment in Historical Context*, 16 CONST. COMMENT. 263, 267 (1999).

10. EDWARD HAGERMAN, THE AMERICAN CIVIL WAR & THE ORIGINS OF MODERN WARFARE: IDEAS, ORGANIZATION, & FIELD COMMAND (1992).

11. *See* Gross, *supra* note 7.

12. Luban, *supra* note 1, at 32.

13. *Id.*

14. Major Felix F. Moran, *Free Speech, the Military, & the National Interest*, AIR U. REV. (1980).

15. *See generally* Office of the Director of National Intelligence, *Data Gathering*, INTELLIGENCE.GOV, www.intelligency.gov/mission/data-gathering.html (last visited Aug. 10, 2014) (explaining human intelligence gathering is the oldest form of collecting information).

16. *See generally id.*

17. *See generally id.* (describing human intelligence data collection).

18. IRVING FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS xvii- xix (1997), *available at* www.ebooksmagz.com/pdf/a-history-of-mass-communications-

B. American Privacy in Today's Society

By the dawn of the twentieth century, technology had dramatically increased a person's ability to communicate across greater distance than previously imagined.[19] The telegraph, followed by the telephone, radio, and eventually television provided the means to disseminate information through new mediums.[20] However, technological advances also increased the ability to track and identify communication on a grand scale.[21] The 1920s saw the first use of wiretaps by the U.S. federal government in criminal investigations.[22] The landmark 1928 U.S. Supreme Court decision in *Olmstead v. United States* defined for a generation the government's ability to wiretap telephone conversations without a warrant.[23] This gathering of evidence would have been impossible without the new technological means to do so.[24] In *Olmstead*, prohibition officers used wiretaps to determine that Roy Olmstead and others were violating the National Prohibition Act.[25] The Court determined that the Fourth Amendment's protection of houses, persons, papers, and effects did not extend to telephone wires.[26] Furthermore, Chief Justice Taft in his opinion drew a clear distinction between the physical search and seizure of evidence secured only by the sense of hearing.[27]

This distinction has a modern corollary that has been in place for nearly thirty years, which is roughly the time it took the U.S. Supreme Court to reverse *Olmstead* in its 1967 *Katz v. United States* ruling.[28] In 1986, Congress passed the Electronic Communications Privacy Act.[29] This legislation bifurcated the protections afforded to private documents and communications.[30] Documents

---

54454.pdf.

19. *Id.*

20. *Id.* at xix-xx.

21. William Lee Adams, *Brief History: Wiretapping*, TIME MAG. (Oct. 11, 2010), http://content.time.com/time/magazine/article/0,9171,2022653,00.html.

22. *E.g.*, Olmstead v. United States, 277 U.S. 438 (1928).

23. *Id.* at 466 (holding that "the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment").

24. *See, e.g.*, *id.* at 473 (Brandeis, J., dissenting) (stating that "[s]ubtler and more far reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government . . . to obtain disclosure in court of what is whispered in the closet.").

25. *Id.* at 456-57.

26. *Id.* at 465.

27. *Id.* at 464.

28. Katz v. United States, 387 U.S. 347, 352 (1967) (overruling *Olmstead* by holding that the Fourth Amendment extends to "the recording oral statements overheard without any 'technical trespass' under local property law").

29. Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2511-22 (1986).

30. *Id.*; 18 U.S.C. §§ 3121-3127 (2014); *see generally*, Deidre K. Mulligan, *Reasonable*

that were typed or written physically were granted greater constitutional protection than those that might be stored in an electronic format.[31] Likewise, conversations that were spoken face-to-face were viewed differently than those transmitted over the airwaves or by wire.[32] This statute provides the impetus for much of the confusion and conflict regarding privacy in the digital age.[33] It is a law that is in desperate need of revision, if not repeal.

It may be useful to consider the level of technological sophistication in 1986 to determine which is more antiquated—the method of communication in use at the time, or the laws that govern them.[34] The "facsimile machine" was considered state-of-the-art in sending written documents across great distances through the growing number of fiber optic telephone lines.[35] Fiber optic transmissions began to usher in a new stage of communication—the Internet.[36] The rate of transmission between computers was an impressive—by the standards of the time—several hundred characters *per minute*.[37] The Commodore 64 was eponymous for the nascent personal computer industry, achieving a storage capacity of *64,000 bytes* of information—not enough to store this article on its hard drive.[38] Floppy disks could add a few thousand bytes of additional memory, provided one possessed a disk drive roughly the size of a shoebox to read its data.[39] Cell phones were largely confined to automobiles because of their need for a power source better than the internal battery technology of the time.[40] Email, chat rooms, the World Wide Web, on-line auctions, Microsoft Internet Explorer, iPhones, satellite communications for non-military purposes, digital conference calls, electronic bill paying, and a host of other modern electronic conveniences simply did not exist or were in their infancy.

All of the aforementioned technologies are subject to the uses and abuses of

---

Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act, 72 GEO. WASH. L. REV. 1557, 1565-71 (2004).

31. Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2511-22 (1986).

32. *Id*.

33. *See also* Mulligan, *supra* note 30, at 1571 (noting that there is a gap between current privacy laws under the Electronic Communications Privacy Act and society's expectation of privacy).

34. *See also id*. at 1571-76 (noting that the disconnect between privacy laws and society's privacy expectations is the result of legislation written before recent technological innovations).

35. *See* Fang, *supra* note 18, at 226-29.

36. *Id.* at 232-33.

37. Seung-Que Lee et al., *The Wireless Broadband (WiBro) System for Broadband Wireless Internet Services*, IEEE COMM. MAG. 106, 107 (2006), *available at* http://www.jcbroadband.com/Library/jcbwb4.pdf.

38. Mark Ollig, *Commodore 64 Is Tanned, Rested, and Ready for a Comeback*, HERALD JOURNAL (Apr. 11, 2011), www.herald-journal.com/archives/2011/columns/mo041111.html.

39. ENCYCLOPEDIA OF LIBRARY & INFORMATION SCIENCE: VOLUME 52 228 (Allen Kent, ed., 1993).

40. *Cell Phone Battery History*, CHARGEALL.COM (Mar. 31, 2012), chargeall.com/cell-phone-battery-history/.

the Electronic Communications Privacy Act of 1986.[41] It would be as if in the decades before the invention of the printing press, a government guaranteed the freedom to self-expression only in handwritten documents and books, and this law remained in place once printed newspapers, broadsides, and pamphlets were the societal norm. One can imagine Thomas Paine furiously scribbling copies of *Common Sense* as he sought to share his ideas of liberty and freedom with his countrymen.[42] As new technologies are integrated into modern culture it becomes increasingly difficult for those living today to appreciate the difference between the printed word in an electronic format and the hard copy one—just as people a few generations ago would have failed to differentiate a printing press from a quill and ink well.[43] Yet this is a distinction with several practical differences in our legal system.

Nearly a decade ago police departments around the United States began purchasing devices known as "Stingrays."[44] These devices, the size of a laptop computer, would send out a fake transmission to cell phones and Internet enabled computers in order to fool or "spoof" them into communicating with the device.[45] Once connected, the person operating the Stingray could access all information on their phone or computer.[46] Any emails, texts, websites recently visited, calendars, telephone numbers, contact data, photographs, and documents stored in the memory of a cell phone or laptop computer are subject to the search and seizure of any police department possessing this device *without a search warrant* because of the legal differentiation between written and electronic information.[47] Many civil libertarians once aware of the existence of these devices questioned the possibility of governmental abuse.[48] They frequently met resistance in their attempts to ascertain the circumstances and frequency of government's use of

---

41. Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-22 (1986).

42. *See generally* THOMAS PAINE, COMMON SENSE (Edward Larkin ed., 2004).

43. James A. Dewar, *The Information Age and the Printing Press: Looking Backward to See Ahead*, RAND.ORG www.rand.org/content/dam/rand/pubs/paper/2005/P8014.pdf (last visited Aug. 10, 2014) (describing the similarities between the information age and the time of the printing press).

44. John Kelly et al., *Law Enforcement Using Methods from NSA Playbook*, USA TODAY, Dec. 9, 2013, *available at* http://www.indystar.com/story/news/2013/12/08/indiana-state-police-tracking-cellphones-but-wont-say-how-or-why/3908333/.

45. *Id.*

46. *Id.*

47. *See generally Electronic Communications Privacy Act (ECPA)*, ELECTRONIC PRIVACY INFORMATION CENTER, http://epic.org/privacy/ecpa/#background (last visited Aug. 10, 2014). However, this is called into question by *Riley v. California*, which held that police must get search warrants to search cellular telephones seized incident to an arrest. *See generally* Riley v. California, 134 S. Ct. 999 (2014).

48. Ryan Sabalow, *Indiana State Police Tracking Cell Phones—But Won't Say How or Why*, INDIANAPOLIS STAR, Dec. 9, 2013, http://www.indystar.com/story/news/2013/12/08/indiana-state-police-tracking-cellphones-but-wont-say-how-or-why/3908333/.

Stingrays.[49] The Author of this article, who, in his capacity of Indiana State Senator, is drafting legislation to limit the use of these devices without a warrant by state and local law enforcement, was denied this information when he requested it in 2012. The Indiana State Police even refused to confirm they possessed such a device citing "security concerns."[50] It was only after the National Security Agency (NSA) revelations by Eric Snowden, and a subsequent *Indianapolis Star* and *USA Today* investigation that uncovered a purchase agreement totaling nearly $374 thousand (the approximate cost of a Stingray) from its manufacturer that the Indiana State Police acknowledged they had purchased one.[51] Even then, the Indiana State Police refused to acknowledge what "due process" they used to determine when a Stingray would be utilized.[52] They stated that law enforcement would "consult" with a judge before the device was deployed but refused to share what, if any, restraints they felt obliged to abide by.[53]

Such lack of judicial and legislative oversight simply begs for abuses to occur. Prior to his removal by pro-democracy forces, Ukrainian President Viktor Yanukovych employed such devices to identify protestors against his government in Kiev.[54] The morning following a major rally, those that had been present received a text or telephone message warning them that the government knew where they had been the day before and to stop their illegal gathering.[55]

Unfortunately, there was similar surveillance by local law enforcement in the United States.[56] In Miami, local police used their Stingray to develop a list of phone numbers belonging to protestors during a recent rally against the World Trade Organization in their city.[57] It is regrettable that members of the American law enforcement community would utilize similar intelligence gathering tactics ascribed to former members of the KGB and their affiliates. As the cost of this technology becomes lower and the technology becomes more widespread, it is likely that additional abuses like those documented in the Congressional testimony surrounding the NSA data collection efforts will become more common. It does not seem a serious reach to imagine that a sheriff deputy might deploy such a device in a fit of jealousy to learn about an ex-wife's activities, or for someone to come into private possession of one of these devices for some other nefarious purpose. The prevalence of more invasive technology, if left unchecked, could establish conditions consistent with the worse parts of George

---

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *A Lesson from Ukraine on Cell Phone Metadata*, HERE & NOW (Jan. 24, 2014), http://hereandnow.wbur.org/2014/01/24/ukraine-metadata-lesson.

55. *Id*.

56. Sabalow, *supra* note 48.

57. *Id*.

Orwell's novel, *1984*.[58]

But American society need not slip into an Orwellian nightmare. Much can be done on both the federal and state levels to provide robust protections against privacy violations. The most effective would be to adopt an amendment to the U.S. Constitution preventing the distinction between digital and written documents for the purposes of ascertaining privacy protection. Missouri is currently in the process of amending its state constitution to do exactly that.[59] Indiana will begin its amendment process in 2015 to eliminate this distinction as well.[60] The repeal or material alteration of the Electronic Communications Privacy Act of 1986 would also reduce the potential for government overreach. The U.S. Supreme Court recently reviewed cases from California and Massachusetts in which citizens were convicted primarily on information found in a digital format—in both cases the suspect's cell phones—that were searched without the legal protections afforded paper documents.[61]

CONCLUSION

It seems no analysis of privacy in any age, digital or otherwise, would be complete without invoking the wisdom of Justice Louis Brandeis on the subject. In his now legendary *Harvard Law Review* article on privacy, the future Justice based the foundational construct of the right to privacy in that the law had not evolved to the point society had developed to ensure a "fundamental right to be left alone."[62] His prescient words were echoed in his *Olmstead* dissent that reminded one that in prior days the government had only "force and violence" to compel self-incrimination.[63] In the digital age, the capabilities legally permitted by law enforcement agencies throughout the United States would have made the most committed members of the Gestapo, Stasi, Republican Guard, Apparatchik, or KGB extremely jealous. While the future advancement of technology appears to be assured, the success in preserving liberty is not. It is up to free societies that value both liberty and privacy to refuse to yield to the seemingly unrelenting march of governments to restrict these fundamental freedoms.

---

58. GEORGE ORWELL, 1984 (1949).

59. S. J. Res. 27, 97th Gen. Assem., 2d Reg. Sess. (Mo. 2014).

60. H.B. 1009, 180th Gen. Assem., 2d Reg. Sess. (Ind. 2014); H.B. 1384, 180th Gen. Assem., 2d Reg. Sess. (Ind. 2014).

61. Riley v. California, 134 S. Ct. 999 (2014) (holding that the search incident to lawful arrest exception to the Fourth Amendment's general warrant requirement does not apply to a cell phone seized during an arrest).

62. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

63. Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

BIG DATA: CATALYST FOR A PRIVACY CONVERSATION

JOSEPH JEROME*

INTRODUCTION

In Captain America's latest big screen adventure, his arch-enemy is neither some diabolical super villain nor a swarm of space aliens.[1] Instead, it's big data.[2] "The 21st century is a digital book," the Captain is told.[3] "Your bank records, medical histories, voting patterns, emails, phone calls, your damn SAT scores! [Our] algorithm evaluates people's past to predict their future."[4]

In popular imagination, big data can apparently do everything and anything. Its evangelists would suggest data holds near magical potential to change the world,[5] while skeptics increasingly worry that it poses the biggest civil rights threat of our generation.[6] Even if reality likely falls somewhere in between, there is little question that the advent of big data has altered our conversations about privacy. Privacy has been in tension with technological advances since Louis Brandeis worried that "recent inventions and business methods"—such as the widespread availability of the Kodak camera to consumers—necessitated a "right to be let alone."[7]

Yet the phenomenon of big data, alongside the emerging "Internet of Things,"[8] makes it ever more difficult to be left entirely alone. The ubiquitous

---

* Joseph Jerome is Policy Counsel at the Future of Privacy Forum in Washington D.C. where he focuses on big data and issues around the emerging Internet of Things. Previously, he served as National Law Fellow at the American Constitution Society, where he organized programming on topics involving civil liberties and national security.

1. Josh Bell, *What Captain America Has to Say About the NSA,* FREE FUTURE: PROTECTING CIVIL LIBERTIES IN THE DIGITAL AGE (Apr. 18, 2014, 10:41 AM), https://www.aclu.org/blog/national-security-technology-and-liberty/what-captain-america-has-say-about-nsa.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* RICK SMOLAN, HUMAN FACE OF BIG DATA (2012). For additional examples of how big data can specifically be used to empower vulnerable populations, see FUTURE OF PRIVACY FORUM, BIG DATA: A TOOL FOR FIGHTING DISCRIMINATION AND EMPOWERING GROUPS (2014), *available at* http://www.futureofprivacy.org/wp-content/uploads/Big-Data-A-Tool-for-Fighting-Discrimination-and-Empowering-Groups-Report1.pdf.

6. *See, e.g.*, ROBINSON + YU, CIVIL RIGHTS, BIG DATA, AND OUR ALGORITHMIC FUTURE (2014), http://bigdata.fairness.io; *Civil Rights Principles for Era of Big Data*, THE LEADERSHIP CONFERENCE (2014), http://www.civilrights.org/press/2014/civil-rights-principles-big-data.html [hereinafter *Civil Rights Principles*]; Alistair Croll, *Big Data Is Our Generation's Civil Rights Issue, and We Don't Know It*, SOLVE FOR INTERESTING (July 31, 2012), http://solveforinteresting.com/big-data-is-our-generations-civil-rights-issue-and-we-dont-know-it/.

7. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 195 (1890).

8. Michael Chui et al., *The Internet of Things*, MCKINSEY Q. (Mar. 2010), *available at* http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_internet_of_things; Bill

collection and unparalleled use of personal information is breaking down some of society's most common conceptions of privacy.[9] Law and policy appear on the verge of redefining how they understand privacy, and data collectors and privacy advocates are trying to present a path forward. This Article discusses the rise of big data and the role of privacy in both the Fourth Amendment and consumer contexts. It explores how the dominant conceptions of privacy as secrecy and as control are increasingly untenable, leading to calls to focus on data use or respect the context of collection. It argues that the future of privacy will have to be built upon a foundation of trust—between individuals and the technologies that will be watching and listening.

I. THE RISE OF BIG DATA

"Big data" has only recently gone mainstream.[10] Prior to 2012, big data was a buzzword used by engineers and scientists to describe advances in digital communications, computation, and data storage.[11] While some computer scientists remain skeptical of the term,[12] big data has commonly come to represent the drastic increase in the volume, variety, and velocity of data that can be analyzed.[13] Whatever the technical definition of the term, the idea of big data has become something more.

A. What Is Big Data?

danah boyd and Kate Crawford suggest that big data is a "cultural, technological, and scholarly phenomenon" with its own mythology about the untold value of data.[14] Acting almost as heralds of big data's potential, Viktor Mayer-Schönberger and Kenneth Cukier tout the transformation of our entire world into "oceans of data that can be explored" and that can provide us with a new perspective on reality.[15] The size and scope of the data now available

---

Wasik, *Welcome to the Programmable World*, WIRED (May 14, 2013), http://www.wired.com/gadgetlab/ 2013/05/internet-of-things/.

9. Helen Lewis, *'Like' It or Not, Privacy Has Changed in the Facebook Age*, GUARDIAN (Mar. 12, 2013, 4:32 PM), http://www.theguardian.com/commentisfree/2013/mar/12/privacy-facebook-lesbians-relax-online.

10. *Big Data*, GOOGLE TRENDS, http://www.google.com/trends/explore#q=big%20data&cmpt=q (showing interest in the term exploding since 2011).

11. Randal E. Bryant, Randy H. Katz, & Edward D. Lazowska, *Big-Data Computing: Creating Revolutionary Breakthroughs in Commerce, Science, and Society,* COMPUTING COMMUNITY CONSORTIUM, (Dec. 22, 2008), http://www.cra.org/ccc/files/docs/init/Big_Data.pdf.

12. *See* Cesar A. Hidalgo, *Saving Big Data From Big Mouths,* SCIENTIFIC AMERICAN (Apr. 29, 2014), http://www.scientificamerican.com/article/saving-big-data-from-big-mouths/.

13. *The Big Data Conundrum: How to Define It?*, MIT TECH. REV. (Oct. 3, 2013), http://www.technologyreview.com/view/519851/the-big-data-conundrum-how-to-define-it/.

14. danah boyd & Kate Crawford, *Critical Questions for Big Data: Provocations for a Cultural, Technological, and Scholarly Phenomenon,* 15 INFO., COMM., & SOC'Y 662, 663 (2012).

15. VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, BIG DATA: A REVOLUTION THAT

promises new insights and new forms of value that will fundamentally change how we interact with one another, the pair argue.[16]

Yet these bold expectations also mean that big data has become something of an amorphous concept, meaning different things to different audiences in different contexts.[17] A better takeaway is to understand big data as shorthand for the broader "datafication" of society.[18] While data analytics crunch the numbers, datafication is being fueled by another buzzword: the emerging "Internet of Things."[19] The Internet of Things is commonly understood to describe the growing network of devices that are linked together through wired and wireless communications technologies embedded in physical devices, from the average smartphone to intelligent thermostats[20] and pills that can actually monitor a patient's digestive tract.[21] By 2015, twenty-five billion devices are projected to be connected to the Internet; this number could double to fifty billion devices by the end of the decade.[22] Simply going about our everyday lives creates a vast trail of "digital exhaust" that can reveal much about us.[23]

The story of our lives now exists in digital form, yet individuals may be only passively aware of what story their data tells. Recent debates over the value of metadata illustrate this point.[24] In the immediate aftermath of revelations of the National Security Agency's (NSA) surveillance programs, government officials stressed that the NSA's action did "not include the content of any communications"[25] and was limited to "just metadata,"[26] largely implying that

---

WILL TRANSFORM HOW WE LIVE, WORK, AND THINK 97 (2013).

16. *Id.* at 6-7.

17. *What Is Big Data?*, DATASCIENCE@BERKELEY (Sept. 3, 2014), http://datascience.berkeley.edu/what-is-big-data/; Alan Charles Raul, *Don't Throw the Big Data Out with the Bathwater*, POLITICO MAG. (April 29, 2014), http://www.politico.com/magazine/story/2014/04/dont-throw-the-big-data-out-with-the-bath-water-106168.html#.U-oyYPeYamQ.

18. Jeff Bertolucci, *Big Data's New Buzzword: Datafication*, INFO. WEEK (Feb. 25, 2013, 11:13 AM), http://www.informationweek.com/big-data/big-data-analytics/big-datas-new-buzzword-datafication/d/d-id/1108797?.

19. Chui, *supra* note 8; *see also* Wasik, *supra* note 8.

20. NEST LABS, https://nest.com/ (last visited Sept. 1, 2014).

21. Nick Bilton, *Disruptions: Medicine That Monitors You,* N.Y. TIMES (Jun. 23 2013, 11:00 AM), http://bits.blogs.nytimes.com/2013/06/23/disruptions-medicine-that-monitors-you/.

22. DAVE EVANS, THE INTERNET OF THINGS: HOW THE NEXT EVOLUTION OF THE INTERNET IS CHANGING EVERYTHING 3 (2011), *available at* http://www.cisco.com/web/about/ac79/docs/innov/IoT_IBSG_0411FINAL.pdf.

23. James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, MCKINSEY & CO. (2011), *available at* http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation.

24. *See, e.g.*, Jameel Jaffer & Eric Posner, *Is the N.S.A. Surveillance Threat Real or Imagined?*, N.Y. TIMES (June 9, 2013), http://www.nytimes.com/roomfordebate/2013/06/09/is-the-nsa-surveillance-threat-real-or-imagined.

25. Press Gaggle, Deputy Principal Press Secretary Josh Earnest and Secretary of Education Arne Duncan, en Route Mooresville, NC (June 6, 2013), *available at* http://www.

looking at mere metadata could hardly present a privacy issue. On some level, this distinction makes sense: individuals are quick to assume that their actual conversations—whether in person, over the phone, or through email messaging—reveal more about themselves than a data trail. But our data trails are, in fact, highly sensitive pieces of information.[27]

Smart grid technologies, for example, are not only a complete evolution in how electricity systems operate,[28] but the sensor data they produce also offer a rich source of behavioral information at a granular level:

> Whether individuals tend to cook microwavable meals or meals on the stove; whether they have breakfast; the time at which individuals are at home; whether a house has an alarm system and how often it is activated; when occupants usually shower; when the TV and/or computer is on; whether appliances are in good condition; the number of gadgets in the home; if the home has a washer and dryer and how often they are used; whether lights and appliances are used at odd hours, such as in the middle of the night; whether and how often exercise equipment such as a treadmill is used. Combined with other information, such as work location and hours, and whether one has children, one can see that assumptions may be derived from such information.[29]

In a way, our digital exhaust is increasingly defining us as individuals. At the same time, big data is also changing *how* we understand this information. Mayer-Schönberger and Cukier suggest that big data is propelling us toward a world of correlation rather than causation.[30] They highlight the notion that big data brings about the "end of theory," and that with enough information, numbers can

---

whitehouse.gov/the-press-office/2013/06/06/press-gaggle-deputy-principal-press-secretary-josh-earnest-and-secretary.

26. Ed O'Keefe, *Transcript: Dianne Feinstein, Saxby Chambliss Explain, Defend NSA Phone Records Program*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/06/transcript-dianne-feinstein-saxby-chambliss-explain-defend-nsa-phone-records-program/.

27. Jonathan Mayer & Patrick Mutchler, *MetaPhone: The Sensitivity of Telephone Metadata*, WEB POL. (Mar. 12 2014), http://webpolicy.org/2014/03/12/metaphone-the-sensitivity-of-telephone-metadata/; Jane Mayer, *What's the Matter with Metadata?*, NEW YORKER (June 6, 2013), http://www.newyorker.com/news/news-desk/whats-the-matter-with-metadata (suggesting that metadata is "much more intrusive than content").

28. *See generally* EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL SCIENCE AND TECHNOLOGY COUNCIL, A POLICY FRAMEWORK FOR THE 21ST CENTURY GRID: ENABLING OUR SECURE ENERGY FUTURE (2011), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/nstc-smart-grid-june2011.pdf.

29. FUTURE OF PRIVACY FORUM & INFORMATION AND PRIVACY COMMISSIONER, SMART PRIVACY FOR THE SMART GRID: EMBEDDING PRIVACY INTO THE DESIGN OF ELECTRICITY CONSERVATION 10-11 (2009), *available at* http://www.ipc.on.ca/images/resources/pbd-smartpriv-smartgrid.pdf.

30. MAYER-SCHÖNBERGER & CUKIER, *supra* note 15, at 61.

literally speak for themselves.[31] For example, they point to the personalization and recommendation engines used by Amazon or Netflix as examples of data systems that only know the "what" and not the "why."[32] Netflix embraced this shift to correlation when it bet that its original programming effort, *House of Cards*, would be a major success.[33] Data suggested that David Fincher movies and films starring Kevin Spacey were especially popular on the service—no one knows why exactly—but these data points were enough for Netflix to commit $100 million to bring the two together.[34]

Unchecked, the insights we can uncover in data can turn into what Mayer-Schönberger and Cukier cleverly term the "dictatorship of data."[35] While the pair use that term to caution against fixating on data such that we fail to appreciate its limitation,[36] it may well refer to large structural shifts in power away from individuals and toward opaque data collectors. Evgeny Morozov provocatively suggests that information-rich societies "have reached a point where they want to try to solve public problems without having to explain or justify themselves to citizens."[37]

Many of the insights derived from data can be used for good or for ill, but that is true of any piece of information. The larger worry is that these insights are being uncovered at great expense to individual autonomy. The dictatorship of data arises as we are now faced with uses of data that produce accurate, efficient, or otherwise beneficial results but are still somehow unfair.[38]

B. Big Data's Big Worries

Big data has often been identified as one of the biggest public policy challenges of our time.[39] Recognizing this, in January 2014, President Obama

---

31. *Id.*

32. *Id*. at 52.

33. *House of Cards*, NETFLIX.COM, www.netflix.com/WiMovie/70178217?locale=en-us (last visited Sept. 1, 2014).

34. David Carr, *Giving Viewers What They Want*, N.Y. TIMES, Feb. 24, 2013, http://www.nytimes.com/2013/02/25/business/media/for-house-of-cards-using-big-data-to-guarantee-its-popularity.html?pagewanted=all; Andrew Leonard, *How Netflix is Turning Viewers into Puppets*, SALON (Feb. 1, 2013), http://www.salon.com/2013/02/01/how_netflix_is_turning_viewers_into_puppets/.

35. MAYER-SCHÖNBERGER & CUKIER, *supra* note 15, at 151.

36. *Id.*

37. Evygeny Morozov, *The Real Privacy Problem*, MIT TECH. REV. (Oct. 22, 2013), http://www.technologyreview.com/featuredstory/520426/the-real-privacy-problem/.

38. *See* Chris Calabrese, Legislative Director ACLU, Panel Discussion on Civil Rights and Big Data (Mar. 14, 2014), *available at* http://newamerica.net/events/2014/civil_rights_and_big_data.

39. Jules Polonetsky et al., *How To Solve the President's Big Data Challenge*, IAPP PRIVACY PERSPECTIVES (Jan. 31, 2014), https://www.privacyassociation.org/privacy_perspectives/post/how_to_solve_the_presidents_big_data_challenge.

began a comprehensive review of how big data is impacting society.[40] The ensuing report has been an important conversation starter; a significant finding of the administration's effort is that big data has the potential to undermine traditional protections that govern how personal information is used in housing, credit, employment, health, education, and the marketplace.[41] Moving forward, policy makers may need to weigh compelling benefits to national security, public health and safety, and sustainable development against new risks to personal autonomy from high-tech profiling and discrimination, increasingly-automated decision making, inaccuracies and opacity in data analysis, and strains in traditional legal protections.[42]

Worries about big data come in many different flavors, but they all largely derive from the ability of data analysis to better discriminate among individuals. Big data is fundamentally about categorization and segmentation.[43] Data analytics harness vast pools of data in order to develop elaborate mechanisms to more efficiently organize categories of information.[44] The challenge, however, is determining where value-added personalization and segmentation end and harmful discrimination begins.[45]

1. Better Price Discrimination.—Improvements in differential pricing schemes—or price discrimination—are often used as an example of how data analytics can harm consumers.[46] Price discrimination describes situations where one consumer is charged a different price for the exact same good based upon some variation in the customer's willingness to pay.[47] Differential pricing is not a new concept, and in fact, it happens every day. Airlines have long been considered the "world's best price discriminators."[48] The cost of a flight is often carefully tied to where a passenger is flying *and* the type of people they are flying with.[49] Price discrimination makes basic economic sense, and it need not

---

40. *See generally* EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES (2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf.

41. *Id.* at iii.

42. *Civil Rights Principles*, *supra* note 6.

43. Howard Fienberg, *Can Big Data and Privacy Coexist?,* MARKETING RESEARCH ASSOCIATION (Sept. 13, 2013), http://www.marketingresearch.org/news/2013/09/13/can-big-data-and-privacy-coexist.

44. Michael Schrage, *Big Data's Dangerous New Era of Discrimination*, HBR BLOG NETWORK (Jan. 29, 2014, 8:00 AM), http://blogs.hbr.org/2014/01/big-datas-dangerous-new-era-of-discrimination/.

45. *Id.*

46. *See* Fed. Trade Comm'n, *Spring Privacy Series: Alternative Scoring Products* (Mar. 19, 2014), http://www.ftc.gov/news-events/events-calendar/2014/03/spring-privacy-series-alternative-scoring-products.

47. *Id.*

48. Scott McCartney, *The Most Expensive Airports to Fly To*, WALL ST. J. (May 22, 2014), online.wsj.com/news/articles/SB10001424052702303980004579576012567760336.

49. *Id.* As a result, it currently costs more for U.S. travelers to fly to Europe than vice versa

necessarily be a bad thing.

What has changed in the age of big data, however, is the granularity at which firms can engage in price discrimination. Historically, prices could vary based upon the quantity of a good purchased, such as bulk order discounts, or prices could be based upon broad consumer categorizations, such as higher car insurance rates for young drivers.[50] With big data, we are moving toward a world where it is much easier to identify individual characteristics in such a way that every individual is charged based on their exact willingness to pay.[51] This type of price discrimination used to be incredibly challenging, if impossible.

Access to information in this fashion creates winners and losers.[52] For much of the twentieth century, consumers were in many ways the ultimate winners: pricing was largely democratized as consumers were offered products and services on identical terms.[53] The rise of the Internet initially provided consumers with an even greater advantage through the promise of quick comparison shopping, but the subsequent proliferation of tracking technologies and data sharing has made archaic any suggestion that the Internet is merely an impersonal tool for use by consumers.[54] While some recognize this information exchange as a basic improvement in market efficiency,[55] some consumers will necessarily lose in the process. Sophisticated consumers may be in a better position to take advantage of these shifts, but having access to so much granular data on individuals will ensure some are sorted into disfavored categories.[56] The larger worry is that big data can—and is being used to—exploit or manipulate certain classes of consumers.[57]

Moreover, individuals are both unaware of what is happening and how it is

---

because the U.S. has a stronger economy and quite literally can afford higher prices.

50. Adam Ozimek, *Will Big Data Bring More Price Discrimination?* FORBES (Sept. 1, 2013, 10:48 AM), http://www.forbes.com/sites/modeledbehavior/2013/09/01/will-big-data-bring-more-price-discrimination/.

51. *Id*.; *see also* Lior Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2027-43 (2013); Fed. Trade Comm'n, *supra* note 46.

52. *See generally* Strahilevitz, *supra* note 51.

53. Fed. Trade Comm'n, *supra* note 46 (Joseph Turow describing how pricing has evolved over time); Strahilevitz, *supra* note 51, at 2027.

54. Jennifer Valentino-DeVries et al., *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J., Dec. 24, 2012, http://online.wsj.com/news/articles/SB10001424127887323777204578189391813881534.

55. THOMAS M. LENARD & PAUL H. RUBIN, THE BIG DATA REVOLUTION: PRIVACY CONSIDERATIONS, 21-22 (2013), *available at* http://www.techpolicyinstitute.org/files/lenard_rubin_thebigdatarevolutionprivacyconsiderations.pdf.

56. *See, e.g.*, Joseph Jerome, *Buying and Selling Privacy: Big Data's Different Burdens and Benefits*, 66 STAN. L. REV. ONLINE 47 (2013); Fed Trade Comm'n, *supra* note 46. (discussing how easily and opaquely companies can make it harder for consumers to get better deals, Ashkan Soltani posed the basic question: "[W]ho wants to be included in [a] higher priced consumer category?").

57. Fed. Trade Comm'n, *supra* note 46.

happening.[58] While recognizing the legitimate value of price discrimination, the White House's Big Data Review cautioned that the capacity for data analytics "to segment the population and to stratify consumer experiences so seamlessly as to be almost undetectable demands greater review."[59]

2. Filter Bubbles & Surveillance.—Because so much of this data collection and analysis happens passively and without any active participation by individuals, individuals are caught behind a sort of data-driven one-way mirror. The resulting concern is that big data allows large data collectors, be they industry or government, to know more about an individual than that individual knows about himself or herself.

Even if organizations have the best of intentions, the knowledge gained from analysis of big data can quickly lead to over-personalization. Profiling algorithms can create "echo chambers" that create feedback loops that reaffirm and narrow an individual's thoughts and beliefs.[60] Eli Pariser first explained how "filter bubbles" could occur by pointing to Google's increasing efforts to improve and personalize searches: Pariser noted that one friend who entered "Egypt" into Google search saw information about the then-occurring Egyptian revolution while another received a list of travel agents and top tourist attractions.[61]

Over time, this has not only raised large questions about individual autonomy, but it also may pose a serious risk to core democratic values. By automatically sorting us into ideological or culturally segregated enclaves, there are worries that filter bubbles may lead to increased polarization.[62] As Joseph Turow explains, "the industrial logic behind the[se] activities makes clear that the

---

58. *FRONTLINE: United States of Secrets* (PBS television broadcast) (transcript *available at* http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/united-states-of-secrets/transcript-61/) (Barton Gellman: "Corporate America and law enforcement and national security state know so much about us. And we know so little about them. We know so little about what they're doing, how they're doing it.")

59. EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 47 (2014), http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

60. *See* Cynthia Dwork & Deirdre Mulligan, *It's Not Privacy, and It's Not Fair*, 66 STAN. L. REV. ONLINE 35 (2013); *see generally* JOSEPH TUROW, THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH (2011); *see also* CASS R. SUNSTEIN, REPUBLIC.COM.2.0 (2009).

61. *See, e.g.*, ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK (2012). More recently, Christian Rudder, one of the founders of OkCupid, suggested that Google's search autocomplete function was "the site acting not as Big Brother but as older Brother, giving you mental cigarettes" that could reinforce and perpetuate stereotypes or inaccuracies based on collective misinformation. CHRISTIAN RUDDER, DATACLYSM: WHO WE ARE (WHEN WE THINK NO ONE'S LOOKING) 132 (2014).

62. *But see* Farhad Manjoo, *The End of the Echo Chamber*, SLATE (Jan. 17, 2012, 11:00 AM), http://www.slate.com/articles/technology/technology/2012/01/online_echo_chambers_a_study_of_250_million_facebook_users_reveals_the_web_isn_t_as_polarized_as_we_thought_html (discussing Facebook study that suggests link-sharing is not as polarizing as assumed).

emerging marketplace will be far more an inciter of angst over social difference than a celebration of the 'American salad bowl.'"[63]

While filter bubbles present one end result of ubiquitous data collection and analysis, surveillance may be equally likely to shape individual behavior. Surveillance, like filter bubbles, can encourage like-mindedness and conformity, as well as anxiety and a general chilling effect on civil discourse.[64] For example, pervasive web tracking presents the possibility that people may avoid certain searches or sources of information out of fear that accessing that information would reveal interests, medical conditions, or other characteristics they would prefer be kept hidden.[65] Combined with a lack of transparency about how this information is being used, individuals may feel anxiety over consequential decisions about them being made opaquely, inducing a sense of powerlessness.[66]

A survey in November 2013 revealed just how much revelations about the extent of NSA surveillance had begun to chill speech.[67] Twenty-four percent of writers surveyed admitted they had engaged in self-censorship in email and phone conversations, and sixteen percent had avoided conducting Internet searches of visiting websites that could be considered controversial or suspicious.[68] Examples of controversial subjects included national security, mass incarceration, drug policy, pornography, and even general criticism of the U. S. government.[69]

3. A New Civil Rights Movement.—Recently, critics, including some of the United States' leading civil rights organizations, have argued that big data could be the "civil rights" issue of this generation.[70] The fear is that data determinism—or the dictatorship of data—could work to undermine equal opportunity and equal justice through either hidden or new forms of discrimination.[71] Big data could achieve these harms by contributing to currently illegal practices, allowing otherwise unlawful activity to go undetected due to a lack of transparency or access surrounding data analysis.[72] Alternatively, big data

---

63. JOSEPH TUROW, NICHE ENVY: MARKETING DISCRIMINATION IN THE DIGITAL AGE 2 (2006).

64. Chris Chambers, *Indiscriminate Surveillance Fosters Distrust, Conformity, and Mediocrity: Research* RAWSTORY.COM (Aug. 26, 2013), http://www.rawstory.com/rs/2013/08/26/indiscriminate-surveillance-fosters-distrust-conformity-and-mediocrity-research/.

65. FELIX WU, BIG DATA THREATS 2 (2013), *available at* http://www.futureofprivacy.org/wp-content/uploads/Wu-Big-Data-Threats.pdf.

66. *Id.*; *see also* Matt Stroud, *The Minority Report: Chicago's New Police Computer Predicts Crimes, But Is It Racist?*, VERGE (Feb. 19, 2014, 9:31 AM), http://www.theverge.com/2014/2/19/5419854/the-minority-report-this-computer-predicts-crime-but-is-it-racist.

67. PEN AMERICA, CHILLING EFFECTS: NSA SURVEILLANCE DRIVES U.S. WRITERS TO SELF-CENSOR 6 (2013), *available at* http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf.

68. *Id.*

69. *Id.*

70. Croll, *supra* note 6; *Civil Rights Principles*, *supra* note 6.

71. *Civil Rights Principles*, *supra* note 6.

72. Pam Dixon, *On Making Consumer Scoring More Fair and Transparent*, IAPP PRIVACY

may introduce societal biases that may impact protected classes or otherwise vulnerable populations disproportionately or unfairly.[73]

Some have argued that more data could actually mitigate arbitrariness or "gut instinct" in decision-making,[74] but even if algorithms produce the correct decision, that does not mean the decision is necessarily fair. Take the example of an Atlanta man who returned from his honeymoon to find his credit limit slashed from $10,800 to $3,800 because he had used his credit card at locations where *others* were likely to have a poor repayment history.[75] Is this a sensible decision for a credit card company to take, or does it remain somehow fundamentally unfair?

Many of our key anti-discrimination laws work to address classifications or decisions that society has deemed either irrelevant or illegitimate. The Equal Credit Opportunity Act, for example, explicitly forbids creditors from asking about a candidate's marital status or plans to have children.[76] An even better example is the Genetic Information Nondiscrimination Act of 2008, which prohibits employers from using an applicant's or an employee's genetic information as the basis of an employment decision, and it also limits the ability of health insurance organizations to deny coverage based solely on a genetic predisposition to develop a disease.[77] As a matter of public policy, our laws make a point of excluding genetic information that could no doubt lead to more accurate decision-making.

Moreover, big data can introduce new forms of discrimination due to bias errors or incomplete data, and it may make intentional discrimination harder to detect.[78] As Kate Crawford explains, "not all data is created or even collected equally" and "there are 'signal problems' in big-data sets—dark zones or shadows where some citizens and communities are overlooked or underrepresented."[79]

PERSPECTIVES (Mar.19, 2014), https://www.privacyassociation.org/privacy_perspectives/post/on_making_consumer_scoring_more_fair_and_transparent.

73. *See* Kate Crawford, *The Hidden Biases in Big Data*, HBR BLOG NETWORK (Apr.1, 2013), http://blogs.hbr.org/2013/04/the-hidden-biases-in-big-data/.

74. LENARD & RUBIN, *supra* note 55, at 7.

75. *See* Lori Andrews, *Facebook Is Using You*, N.Y. TIMES, Feb. 4, 2012, http://www.nytimes.com/ 2012/02/05/opinion/sunday/facebook-is-using-you.html.

76. 15 U.S.C. § 1691 (2006).

77. Pub. L. No. 110-233, § 122 Stat. 881 (2008).

78. Solon Barocas & Andrew Selbst, Big Data's Disparate Impact 3 (2014) (unpublished manuscript) (on file with author).

79. Kate Crawford, *Think Again: Big Data*, FP.COM (May 9, 2013), www.foreignpolicy.com/articles/2013/05/09/think_again_big_data; *see also* Crawford, *supra* note 73 (Crawford discusses the now infamous example of Boston's StreetBump app, which allowed residents to report potholes through a mobile app. The city quickly realized that wealthy residents were far more likely to own smartphones and cars and, thus, the map of potential potholes reflected only where the wealthy were most likely to travel.); *see also* Jonas Lerman, *Big Data and Its Exclusions*, 66 STAN. L. REV. ONLINE 55 (2013), http://www.stanfordlawreview.org/online/privacy-and-big-data/big-data-and-its-exclusions (Lerman argues that big data could end up excluding some

Discriminatory data begets discriminatory decisions.

The privacy challenge is that many of these risks are abstract or inchoate. They are not easily mapped to recognizable harms or are difficult to link to accepted privacy risks. To what degree they even represent real challenges to society—or are mere "boogeyman scenarios" or "hypothetical horribles"[80]—remains an open question. Yet it is against this backdrop that big data is on a collision course with our traditional privacy frameworks.

II. THE ROLE OF PRIVACY

Like big data, privacy also suffers from a multiplicity of meaning. Thomas McCarthy suggested that privacy, like "freedom" or "liberty," has become a powerful rhetorical battle cry within a plethora of unrelated contexts.[81] As a result, privacy has become entangled with policy debates ranging from education reform[82] to the future of robotics.[83] Scholars have wrestled with how to understand and define privacy, and ultimately to describe its value.[84] For example, Daniel Solove has suggested that privacy works as a set of protections against a variety of distinct but related problems.[85] He proposes a comprehensive privacy taxonomy that focuses on activities that invade privacy, but his notion that privacy is multifaceted also helps to explain why different privacy theories are deployed within different contexts. Two of the broadest and most common conceptions of privacy consider privacy to be about either (1) secrecy or (2)

---

members of society, as a result.).

80. Adam Thierer, *Planning for Hypothetical Horribles in Tech Policy Debates*, TECH. LIBERATION FRONT (Aug. 6, 2013), http://techliberation.com/2013/08/06/planning-for-hypothetical-horribles-in-tech-policy-debates/.

81. J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY 1-3, 5-65 (1992) (discussing section 1.1(B)(1) and section 5.7(D)).

82. Benjamin Herold, *inBloom to Shut Down Amid Growing Data-Privacy Concerns*, EDWEEK (Apr. 21, 2014, 10:33 AM), http://blogs.edweek.org/edweek/DigitalEducation/2014/04/inbloom_to_shut_down_amid_growing_data_privacy_concerns.html.

83. Mark Stephen Meadows, *Is Surveillance the New Business Model for Consumer Robotics?,* ROBOHUB (May 6, 2014), http://robohub.org/is-surveillance-the-new-business-model-for-consumer-robotics/.

84. *See generally* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE, PART II (2009) (giving an overview of competing theories); *see also* DANIEL SOLOVE, UNDERSTANDING PRIVACY 1-12 (2008); *see also* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (looking at how privacy intersects different legal categories).

85. SOLOVE, *supra* note 84, at 171.

control.[86] Privacy-as-secrecy is often invoked in debates about the relationship between government prerogatives and individual privacy, while privacy-as-control predominates within the context of consumer privacy.[87] Both theories are increasingly challenged by technology—and big data in particular.

A. Fourth Amendment Protections: Privacy as Secrecy

Traditionally, privacy was viewed as being roughly analogous to secrecy.[88] Privacy-as-secrecy has been a particularly dominant theme in the U.S. Supreme Court's Fourth Amendment search jurisprudence since *Katz v. United States*.[89] Decided in 1967, *Katz* emerged in an environment where new, more sophisticated surveillance technologies forced the Court to re-conceive how Fourth Amendment protections work.[90] In *Katz*, FBI agents had attached a bug to the outside of a public telephone booth in order to monitor the defendant's communications without first obtaining a warrant.[91] Ignoring a lack of any physical trespass—a factor that had previously dominated the Court's thinking[92]—the Court clearly had secrecy on its mind when it held that what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[93]

Katz is most famous, however, for producing Justice Harlan's concurrence discussing whether or not individuals may have a "reasonable expectation of privacy."[94] The test for determining whether one has a reasonable expectation of

---

86. *See generally* Bruce Schneier, *Privacy and Control*, SCHNEIER ON SECURITY (Apr. 6, 2010, 7:47 AM), https://www.schneier.com/blog/archives/2010/04/privacy_and_con.html ("To the older generation, privacy is about secrecy. And, as the Supreme Court said, once something is no longer secret, it's no longer private. But that's not how privacy works, and it's not how the younger generation thinks about it. Privacy is about control.").

87. David E. Sanger, *In Surveillance Debate, White House Turns Its Focus to Silicon Valley,* N.Y. TIMES (May 2, 2014), http://www.nytimes.com/2014/05/03/us/politics/white-house-shifts-surveillance-debate-to-private-sector.html?_r=0.

88. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978) (exploring a concept of privacy as concealment of facts and communications); DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 42-44 (2004) (discussing a "secrecy paradigm").

89. Katz v. United States, 389 U.S. 347 (1967).

90. *See* Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1305 (2002).

91. *Katz*, 389 U.S., at 348-49.

92. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, SUP. CT. REV. 86-95 (2013).

93. *Id.*

94. In time, Justice Harlan's concurring opinion effectively became the holding of the *Katz* opinion. *See, e.g.*, Peter Winn, *Katz and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 6-7 (2009) ((citing Minnesota v. Carter, 525 U.S. 83, 97 (1998)) (suggesting the *Katz* test "has come to mean the test enunciated by Justice Harlan's separate concurrence in Katz")); *see also* Smith v. Maryland, 442 U.S. 735, 740 (1979) (expressly adopting

privacy claims to be an objective assessment of what society reasonably regards as private.[95] Yet this test involves a degree of circularity: judicial rulings are to be guided by societal expectations, but societal expectations are necessarily shaped by judicial rulings. As Justice Alito recently noted, the *Katz* test regularly causes judges to "confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks."[96] In fact, as Christopher Slobogin has shown, the U.S. Supreme Court's conclusions about society's privacy expectations are often misguided, ignoring both positive law governing ordinary citizens and public opinion generally.[97] As a result, in practice, the *Katz* test often serves as a one-way ratchet against privacy.

This is particularly true when privacy is exclusively understood as being related to secrecy. The *Katz* test does this by insisting that anything a person "knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[98] As a result, the law treats *any* partial exposure—and any *risk* of exposure—of private matters as functionally exposing that concern to the entire world, relinquishing any privacy rights an individual may have as a result.[99] For example, even though society generally frowns upon sifting through a neighbor's trash, the U.S. Supreme Court has determined trash is "knowingly exposed" to the public and therefore, no reasonable expectation of privacy can be claimed should the government wish to search it.[100]

The logical result of treating privacy as secrecy is the much maligned "third-party doctrine," which governs the collection of information from third parties in criminal investigations.[101] The Court has repeatedly held that individuals have

---

Justice Harlan's "reasonable expectation of privacy" formula as the rule of *Katz*).

95. United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); *see also* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 560 (1990) (calling the subjective prong "useless"); Simmons, *supra* note 90, at 1312 (calling any subjective element "meaningless").

96. United States v. Jones, 132 S. Ct. 945, 962 (2012); *see also* Kyllo v. United States, 533 U.S. 27, 34 (2001).

97. *See generally* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT (2007).

98. Katz v. United States, 389 U.S. 347, 351 (1967).

99. *See, e.g.*, Sherry F. Colb, *The Supreme Court Decides the GPS Case*, *United States v. Jones, and the Fourth Amendment Evolves*, JUSTIA VERDICT (Feb. 15, 2012), http://verdict.justia.com/2012/02/15/the-supreme-court-decides-the-gps-case-united-states-v-jones-and-the-fourth-amendment-evolves-2. For a more extensive discussion of the analytical missteps the Court has made, see also Sherry F. Colb, *What Is A Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of A Remedy*, 55 STAN. L. REV. 119, 122 (2002).

100. *Compare* California v. Greenwood, 486 U.S. 35 (1988), *with id.* at 45 ((Brennan, J., dissenting) ("Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior.")).

101. *See* Orin Kerr, *In Defense of the Third-Party Doctrine*, 107 MICH. L. REV. 561, (2009), *available at* http://www.michiganlawreview.org/assets/pdfs/107/4/kerr.pdf.

no reasonable expectation of privacy in information provided to a third party.[102] In *United States v. Miller*, the Court found that individuals had no expectation of privacy in their bank records because "a depositor takes the risk" that their information could be shared—"even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[103]

Miller was cited again in *Smith v. Maryland*, which dealt with phone records captured and recorded by pen register devices.[104] According to the U.S. Supreme Court, when the defendant used his phone, he "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."[105] Crucially, the third-party doctrine applied even where the telephone company had entirely automated its record process.[106] This suggests that there is no legal difference between the disclosure of information to a human being or an automated system, which with the development of the Internet, effectively eliminated any possibility of Fourth Amendment protection for online data.[107]

As we now know, *Smith v. Maryland* provided key constitutional support for the NSA's controversial bulk metadata collection program under Section 215 of the Patriot Act.[108] This, despite the fact the U.S. Supreme Court has cautioned that any "dragnet-type law enforcement practices" like "twenty-four hour surveillance of any citizen," might receive heightened scrutiny under the Fourth Amendment.[109] The series of disclosures by Edward Snowden in 2013 have produced many legal challenges, and in *Klayman v. Obama*, the District Court granted a preliminary injunction against a NSA surveillance program on the grounds that it was impossible to "navigate these uncharted Fourth Amendment waters using as my North Star a case that predates the rise of cell phones."[110]

Technology often appears to challenge the judiciary as a whole—and the U.S. Supreme Court in particular.[111] When privacy and technology collide, the result is often more confusion than anything. A perfect example of this was the recent unanimous finding in *United States v. Jones* that sustained warrantless use of a

---

102. *See, e.g.,* United States v. Miller, 425 U.S.435 (1976).

103. *Id.* at 443.

104. Smith v. Maryland, 442 U.S. 735 (1979).

105. *Id*. at 744.

106. *Id*. at 744-45.

107. Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 600 (2011).

108. *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [redacted]*, http://www.fas.org/irp/agency/doj/fisa/fisc-082913.pdf.

109. United States v. Knotts, 460 U.S. 276, 284 (1983).

110. Klayman v. Obama, 957 F. Supp. 2d 1, 37 (D.D.C. 2013).

111. Lawrence Hurley, *In U.S., When High-Tech Meets High Court, High Jinks Ensue*, REUTERS (May 9, 2014, 1:12 PM), http://www.reuters.com/article/2014/05/09/us-usa-court-tech-idUSBREA480N420140509.

GPS-tracking device violated the Fourth Amendment.[112] While the Court was unanimous in finding a Fourth Amendment violation, the justices splintered in explaining *why* a violation had occurred.[113] In a concurring opinion authored by Justice Alito, four justices relied on the *Katz* test to hold that any long-term monitoring violated the defendant's reasonable expectation of privacy.[114] Led by Justice Scalia, four justices embraced a trespass rationale, which Justice Sotomayor joined to create a five-vote majority while also agreeing with Justice Alito's analysis.[115]

The *Jones* decision was considered "puzzling" and "confusing," leaving many of the case's privacy implications unanswered.[116] Justice Alito ominously conceded that a "diminution of privacy" may be "inevitable," and suggested further that society may find it "worthwhile" to trade convenience and security "at the expense of privacy."[117]

Alone among her colleagues, Justice Sotomayor recognized the looming threat of pervasive government surveillance.[118] New technologies, she observed, permit the government to collect more and more data and cost less and less to implement.[119] The technological invasion of citizens' privacy was clearly "susceptible to abuse" and over time could "alter the relationship between citizen and government in a way that is inimical to democratic society."[120] Moreover, she challenged not just the third-party doctrine but the Court's entire understanding of society's reasonable expectation of privacy.[121] Faced with an influx of new surveillance technologies, she argued that it is now time "to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed . . . to some member of the public for a limited purpose," suggesting that the courts should "cease[] to treat secrecy as a prerequisite for privacy."[122]

---

112. United States v. Jones, 132 S. Ct. 945, 954 (2012).

113. *Id.*

114. *Id.* at 958.

115. *Id.* at 955.

116. *See* Orin Kerr, *Why United States v. Jones is Subject to So Many Different Interpretations*, VOLOKH CONSPIRACY (Jan. 30, 2012), http://www.volokh.com/2012/01/30/why-united-states-v-jones-is-subject-to-so-many-different-interpretations/; *see also* Tom Goldstein, *Why Jones is Still Less of a Pro-Privacy Decision Than Most Thought*, SCOTUSBLOG (Jan. 30, 2012), http://www.scotusblog.com/2012/01/why-jones-is-still-less-of-a-pro-privacy-decision-than-most-thought/ *(conclusion slightly revised Jan. 31)*.

117. *Jones*, 132 S. Ct. at 962.

118. *Id.* at 956.

119. *See* Kevin Bankston & Ashkan Soltani, *Tiny Constables and the Cost of Surveillance: Making Cents Out of United States v. Jones*, YALE L.J (Jan. 9, 2014) http://www.yalelawjournal.org/forum/tiny-constables-and-the-cost-of-surveillance-making-cents-out-of-united-states-v-jones.

120. *Jones*, 132 S. Ct. at 956.

121. *Id.*

122. *Id.* at 957.

B. Consumer Privacy: Privacy as Control

Alan Westin famously defined privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[123] According to Westin, individuals engage in a continuous process of personal adjustment that weighs individual privacy interests against their social desires. While notions about "reasonable expectations of privacy" can occasionally inform consumer privacy issues,[124] consumer privacy is dominated by an understanding of privacy as privacy-as-control.

From "Do Not Call" registries to informed consent requirements under various health and financial privacy laws, privacy is promoted by giving individuals choices about their own information flows. The 2012 White House Consumer Privacy Bill of Rights builds on this.[125] The document places a principle of individual control front and center, before any other consumer right, declaring that "[c]onsumers have a right to exercise control over what personal data companies collect from them *and* how they use it."[126]

Individual control is expressed throughout a number of traditional Fair Information Practice Principles (FIPPs). The FIPPs are the bedrock of modern privacy law.[127] Similar to how technological changes motivated *Katz*,[128] the FIPPs emerged in the early 1970s against a backdrop of government surveillance scandals and rising worries about the use of early automated data systems.[129] They established a framework for both the public and private sectors to implement procedures governing the collection, use, and disclosure of personal information.[130] These principles were incorporated into the Privacy Act of

---

123. *See* Alan Westin, *Privacy and Freedom*, 25 WASH. & LEE L. REV. 166 (1968)

124. *See*, *e.g.*, Christopher Wolf, *Supreme Court in Warrantless GPS Tracking Case Offers Little Guidance in Consumer Privacy Context*, HOGAN LOVELLS CHRONICLE OF DATA PROTECTION (Jan. 24, 2012), http://www.hldataprotection.com/2012/01/articles/consumer-privacy/supreme-court-decision-in-warrantless-gps-tracking-case-offers-little-guidance-in-consumer-privacy-context/; *see also* Dominic Rushe, *Google: Don't Expect Privacy When Sending to Gmail*, GUARDIAN (Aug. 14, 2013), http://www.theguardian.com/technology/2013/aug/14/google-gmail-users-privacy-email-lawsuit.

125. *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, THE EXECUTIVE OFFICE OF THE PRESIDENT (2012), http://www.whitehouse.gov/sites/default/files/privacy-final.pdf [hereinafter Privacy Bill of Rights].

126. *Id.* (emphasis added).

127. Robert Gellman, *Fair Information Practices: A Basic History* (Aug. 3, 2012), http://bobgellman.com/rg-docs/rg-FIPShistory.pdf; *see also* Memorandum, Hugo Teufel III, Chief Privacy Officer, Dep't of Homeland Security, Privacy Policy Guidance Memorandum (Dec. 29, 2008), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2008-01.pdf.

128. Katz v. United States, 389 U.S. 347 (1967).

129. Gellman, *supra* note 127.

130. *Id.*

1974,[131] which governs the collection and use of data by federal agencies, and over time, were further embraced as the basis of global privacy law.[132]

The FIPPS have a degree of flexibility built into their application, and at different times, different principles have been emphasized ranging from the rights of individuals to the obligations of data collectors. However, from their earliest formulation, the FIPPs stressed the ability for individuals (1) to find out what information exists about them in records and how that information is used, (2) to prevent information obtained for one purpose to be used or made available for other purposes without consent, and (3) to be allowed to correct or amend identifiable records.[133]

In the United States, the chief privacy regulator, the Federal Trade Commission (FTC) embraces notice as the must "fundamental" principle of privacy protection.[134] In the process, the FTC has either "watered down" or excluded many traditional FIPPs.[135] Instead, individual control is largely governed through a notice-and-choice regime. In an ideal world, notice-and-choice captures the "personal adjustment process" or the decision-making process that Westin's definition envisions. Notice informs the individuals of the consequences of sharing their information, while choice ostensibly implements the individual's ultimate decision.

There is wide acknowledgement that the notice-and-choice framework has significant limitations at best, and at worst, provides only the barest illusion of control. As the President's Council of Advisors on Science and Technology describes it, only "in some fantasy world" do individuals "actually read these notices, understand their legal implications (consulting their attorneys if necessary), negotiate with other providers of similar services to get better privacy treatment, and only then click to indicate their consent."[136] Vast majorities do not read privacy policies—nor would they have the time to,[137] and studies have shown that privacy choices can be easily manipulated.[138] Former FTC Chairman

---

131. Privacy Act of 1974, 5 U.S.C. § 552(a) (2009).

132. Gellman, *supra* note 127, at 5.

133. DEPT. OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS (1973) [hereinafter HEW Report], *available at* http://epic.org/privacy/hew1973report/.

134. FEDERAL TRADE COMMISSION, PRIVACY ONLINE: A REPORT TO CONGRESS (1998).

135. Gellman supra note 127, at 11; *see also* Fred H. Cate, *The Failure of Fair Information Practice Principles*, in CONSUMER PROTECTION IN THE AGE OF INFORMATION ECONOMY 343 (Jane K. Winn ed., 2006), *available at* http://ssrn.com/abstract=1156972.

136. EXECUTIVE OFFICE OF THE PRESIDENT, PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, REPORT TO THE PRESIDENT BIG DATA AND PRIVACY: A TECHNOLOGICAL PERSPECTIVE 38 (2014) [hereinafter PCAST].

137. Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. L. & POL'Y FOR THE INFO. SOC'Y 543 (2008).

138. *See, e.g.*, Alessandro Acquisti Leslie John & George Loewenstein, What Is Privacy Worth? 27-28 (2010) (unpublished manuscript), *available at* http://www.heinz.cmu.edu/~acquisti/papers/acquisti-ISR-worth.pdf.

Jon Liebowitz even conceded that "notice and choice" has not "worked quite as well as we would like."[139]

Control can—and should—mean more than rote notice-and-choice. The Consumer Privacy Bill of Rights suggests that consumers be given usable and accessible mechanisms to implement their choices that are calibrated to the sensitivity of the data being collected and the sensitivity of the potential uses of that information[140]. However, calls for better "user empowerment" or "privacy management" tools are not new,[141] and as a practical matter, entities ranging from social networks like Facebook to data brokers like Acxiom offer users various dashboards to give users some ability to declare their own preferences and terms of engagement.

But meaningful choice faces numerous cognitive hurdles. An October 2012 piece in the Harvard Business Review posits that individuals should only part with their privacy "when the value is clear," explaining that "[t]his is where the homework needs to be done. You need to understand the motives of the party you're trading with and what [he] ha[s] to gain. These need to align with your expectations and the degree to which you feel comfortable giving up your privacy."[142] However, requiring individuals to do homework just to browse the Internet is a large ask. As discussed above, individuals neither read nor understand the average privacy policy or terms of use. Even assuming they did, it would still be impossible to understand the motives of third-parties. Truly informed choices are hard to achieve, and the status quo is a world where individuals frequently consent to the collection, use, and disclosure of their personal information when it is not in their self-interest.[143]

III. BIG DATA'S RELATIONSHIP WITH PRIVACY

Conceptions of privacy as secrecy or control break down when intimate details of our lives can be revealed simply in the course of carrying out mundane tasks. Since the revelation several years ago that Target was able to predict a teenager's pregnancy before her family was even aware of it,[144] it has become

---

139. Fred Cate, *Looking Beyond Notice and Choice*, PRIVACY & SECURITY LAW REPORT (Mar. 29, 2010), *available at* http://www.hunton.com/files/Publication/f69663d7-4348-4dac-b448-3b6c4687345e/Presentation/PublicationAttachment/dfdad615-e631-49c6-9499-ead6c2ada0c5/Looking_Beyond_Notice_and_Choice_3.10.pdf.

140. Privacy Bill of Rights, *supra* note 125.

141. Lorrie Faith Cranor, *Necessary But Not Sufficient: Standardized Mechanisms for Privacy Notice and Choice*, 10 J. ON TELECOMM. & HIGH TECH. L. 273 (2012) (discussing the rise and fall of the P3P tool); *see also* Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239, 243-51 (2013) (advocating for the "featurization" of data).

142. Chris Taylor & Ron Webb, *A Penny for Your Privacy?*, HBR BLOG NETWORK (Oct. 11, 2012, 11:00 AM), http://blogs.hbr.org/cs/2012/10/a_penny_for_your_privacy.html.

143. Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1895 (2013).

144. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES, Feb. 16, 2012,

apparent that corporate America, as well as government authorities, know far more about individual citizens than they let on. Even where individuals take affirmative steps to keep information secret or to tightly control it, privacy has given way to transparency.

Recently, another woman went to great lengths to try and hide her pregnancy from data collectors.[145] As the Target example illustrates, identifying pregnant consumers is a particular high priority—not only are pregnant women valuable from a data perspective,[146] but the arrival of children can be a potent time to lock in customer loyalty.[147] In order to hide her pregnancy, Janet Vertesi had to not only avoid social networks, but ensure her friends and family *also* made no mention about her pregnancy online.[148] To look for baby-information online, she relied on Tor, the anonymous web browser.[149] She relied on cash for any baby-related purchases, avoiding credit cards and store-loyalty cards.[150] While this protected her privacy from a consumer-facing perspective, her activities also raised red flags that pointed to potential criminal activity.[151] For example, when her husband attempted to buy $500 in gift cards with cash, a notice from Rite Aid informed him the company had a legal obligation to report excessive transactions to law enforcement.[152]

Meaningful secrecy has become impossible, and controls are increasingly inadequate—or confusing and unused.[153] In 1996, science-fiction author David Brin posited the rise of the "Transparent Society," where the proliferation of smaller and smaller surveillance devices would give society the choice between either an illusion of privacy or a system of accountability enforced by everyone watching everyone.[154] While the transparent society has itself been criticized for not *recognizing* unequal allocation of power and authority (e.g., in the relationship between citizen and law enforcement or employee and employer),[155] Brin's point that we move beyond illusions of privacy is important. Evgeny Morozov castigates privacy advocates for focusing on rethinking privacy

---

http://www.nytimes.com/2012/02/19/magazine/shopping-habits.ht.

145. Matt Petronzio, *How One Woman Hid Her Pregnancy From Big Data*, MASHABLE (Apr. 26, 2014), http://mashable.com/2014/04/26/big-data-pregnancy/.

146. *Id.* (According to Vertesi, the average value of a person's marketing data is just ten cents, but a pregnant woman's is worth $1.50.).

147. *See generally id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *See generally* JULIA ANGWIN, DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE (2014).

154. David Brin, *The Transparent Society*, WIRED (Dec. 1996), *available at* http://archive.wired.com/wired/archive/4.12/fftransparent.html?topic=&topic_set=.

155. Bruce Schneier, *The Myth of the "Transparent Society,"* SCHNEIER ON SECURITY (Mar. 6, 2008), https://www.schneier.com/essay-208.html.

controls, when privacy debates instead need to be infused with larger ethical principles.[156]

Our current reality more closely captures Brin's notion of an illusion of privacy without accountability.[157] Our legal and policy frameworks have clung to antiquated conceptions of privacy even as activities within the public and private sectors have become increasingly opaque while individuals more transparent. The past year's revelations of NSA surveillance programs provide a stark illustration of how one-sided our transparent society has become.[158] Despite repeated assurances from government officials that the programs were "under very strict supervision by all three branches of government,"[159] at different times it has been demonstrated that Congress had been caught largely unaware.[160] This accountability breakdown also exists within the judiciary, as well as within the executive branch itself.[161]

A chain of misunderstandings within the Department of Justice ultimately misled the U.S. Supreme Court about a key fact in *Clapper v. Amnesty International*, which considered warrantless surveillance under Section 702 of the FISA Amendments Act of 2008.[162] In *Clapper*, a collection of U.S. lawyers and journalists had sued alleging that their electronic exchanges with overseas contacts were being monitored without a warrant.[163] Section 702 would eventually be revealed as the authority underlying NSA PRISM program, which facilitates extensive surveillance of foreigners and can also incidentally acquire information about U.S. citizens.[164] In February 2013, the U.S. Supreme Court avoided the underlying privacy questions and dismissed *Clapper* on standing grounds, asserting that it was "speculative whether the Government will imminently target communications to which respondents are parties."[165] Though

---

156. Evygeny Morozov, *The Real Privacy Problem*, MIT TECH. REV. (Oct 22, 2013), http://www.technologyreview.com/featuredstory/520426/the-real-privacy-problem/ (viewing the ethical need for privacy to require "sabotag[ing] the system," and he would likely not view proposals to respect context or engage in data use-based considerations to adequately protect privacy).

157. *See* Brin, *supra* note 154.

158. Barack Obama, President, United States, Remarks on NSA (June 7, 2013), *available at* http://blogs.wsj.com/washwire/2013/06/07/transcript-what-obama-said-on-nsa-controversy/ (describing the NSA surveillance program).

159. *Id.*

160. Darren Samuelsohn, *Hill Draws Criticism Over NSA Oversight*, POLITICO (Mar. 2, 2014, 10:14 PM), http://www.politico.com/story/2014/03/hill-draws-criticism-over-nsa-oversight-104151.html.

161. *See id.* (explaining that blame has been placed on a variety of entities and individuals).

162. Clapper v. Amnesty Int'l, 133 S. Ct. 1138 (2013).

163. *Id.* at 1145.

164. Glenn Greenwald, *NSA Prism Program Taps Into User Data Of Apple, Google and Others*, GUARDIAN (June 6, 2013), http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data.

165. *Clapper*, 133 S. Ct. at 1148.

it would be subsequently revealed that the PRISM program likely did monitor the parties in *Clapper*, the U.S. Supreme Court had accepted assurances from the Solicitor General that another party could have standing because prosecutors would "provide advance notice" to anyone prosecuted with evidence derived from surveillance under the 2008 law.[166] However, this was not true at the time, and as was subsequently reported,[167] there appears to have been significant confusion within the Department of Justice as to what prosecutorial practice actually was.[168]

Lest anyone believe this sort of confusion—or semantic doublespeak—is only present in government surveillance debates, efforts by consumer groups and industry to establish a "Do Not Track" (DNT) standard reveal similar problems.[169] The basic idea behind DNT is that it would provide an easy-to-use browser setting to allow consumers to limit the tracking of their activities across websites.[170] In February 2012, the White House Consumer Privacy Bill of Rights lauded DNT as a "mechanism [that] allow[s] consumers to exercise *some* control over how third parties use personal data or whether they receive it at all."[171] But there remains no consensus over what DNT means and thus, little progress has been made in offering consumers *any* control. The advertising industry, for example, interprets DNT to refer only to prohibition on targeted advertising.[172] Their self-regulatory solution allows consumers to request not to be tracked, but this preference is reflected only by declining to show that consumer personalized advertising on-line. Advertisers and websites remain free to still collect data about users, i.e., "track" them, as well as sell this information.[173]

In January 2014, in the wake of one headline after another about NSA surveillance, data brokers, and big data, President Obama called for a

---

166. Brief for Petitioner at 8, Clapper v. Amnesty International, 133 S. Ct. 1138 (2013) (No. 11-1025), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-1025_petitioner.authcheckdam.pdf.

167. Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES, Oct. 16, 2013, http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html?_r=0; *see also* Dan Novack, *DOJ Still Ducking Scrutiny After Misleading Supreme Court on Surveillance* (Feb. 26, 2014, 8:12 PM), https://firstlook.org/theintercept/2014/02/26/doj-still-ducking-scrutiny/.

168. Savage, *supra* note 167.

169. *See generally* Omer Tene & J. Trevor Hughes, *The Promise and Shortcomings of Privacy Multistakeholder Policymaking: A Case Study*, 66 MAINE L. REV. 438 (2014).

170. *See* All About Do Not Track (DNT), http://www.allaboutdnt.com (last visited October 13, 2014).

171. Privacy Bill of Rights, *supra* note 125, at 12 (emphasis added).

172. Alexis C. Madrigal, *The Advertising Industry's Definition of "Do Not Track" Doesn't Make Sense,* THE ATLANTIC (Mar. 30, 2012), http://www.theatlantic.com/technology/archive/2012/03/the-advertising-industrys-definition-of-do-not-track-doesnt-make-sense/255285/.

173. Sarah A. Downey, *Why Do Not Track Really Means Do Not Target (and Doesn't Protect Your Privacy on Facebook)*, THE ONLINE PRIVACY BLOG (Feb. 28, 2012), http://www.abine.com/blog/2012/do-not-track-means-do-not-target/.

comprehensive review of how big data impacts individual privacy.[174] The resulting White House Big Data Review can be expected to set the tone for tone for future conversations about how to weigh big data against privacy. The two reports that emerged, *Big Data: Seizing Opportunities, Preserving Values*, by John Podesta, and a second report, *Big Data and Privacy: A Technological Perspective*, by the President's Counsel of Advisors on Science and Technology (PCAST), point to a future where secrecy and control are replaced by concepts like respect for context and responsible use.[175]

IV. EVOLUTIONS IN PRIVACY THINKING

Much of prior privacy thinking was binary.[176] Individuals either had a reasonable expectation of privacy, or they did not.[177] Users either consented or not.[178] Yet binary conceptions of privacy not only have done a disservice to individual's subjective and objective privacy beliefs, but it oversimplifies that spectrum of meanings and values of privacy.[179] Increasingly, policy makers are considering new privacy formulations that offer a more holistic review of different privacy values.[180] As I will discuss, new conceptions of privacy revolving around respect for context and responsible use will require difficult decisions—and will ask individuals to put their privacy into other parties' hands.

A. Respect for Context

Helen Nissenbaum's theory of contextual integrity has become especially important in privacy thinking.[181] Context views privacy as neither a right to secrecy nor a right to control, but rather views privacy as a right to the appropriate flow of personal information.[182] According to Nissenbaum, privacy can still be posited as an important human right or legal value, but viewing

---

174. John Podesta, *Big Data and the Future of Privacy*, THE WHITE HOUSE BLOG (Jan. 23, 2014, 3:30 PM), http://www.whitehouse.gov/blog/2014/01/23/big-data-and-future-privacy.

175. EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 55-57 (2014) [hereinafter BIG DATA REPORT], *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf; *see also* PCAST, *supra* note 136, at 41.

176. *See, e.g.*, Andrew D. Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 643, 647-48 (2013) (discussing binary distinctions of privacy in various legal formulations).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *See, e.g.*, Alexis C. Madrigal, *The Philosopher Whose Fingerprints Are All Over the FTC's New Approach to Privacy*, ATLANTIC (Mar. 29, 2012, 4:44 PM), http://www.theatlantic.com/technology/archive/2012/03/the-philosopher-whose-fingerprints-are-all-over-the-ftcs-new-approach-to-privacy/254365/.

182. HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 127 (2010).

privacy through the lens of contextual integrity admits that what exactly privacy amounts to varies from context to context.[183]

Respect for context takes into consideration the informational norms of society, and admits that how individuals act and share information varies depending upon different relationships and power structures, among other things.[184] Social contexts can include family and friend relationships or the workplace, and the different types of interactions individuals have with doctors, pastors, or professors.[185]

The context in which data is collected and used has become an important part of understanding individual's privacy expectations. Context has become a key principle in both the 2012 Consumer Privacy Bill of Rights and the FTC's recent Privacy Framework.[186] The Consumer Privacy Bill of Rights explicitly declares that "[c]onsumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data."[187] A theory of context helps to explain, for example, why parents are upset over suggestions that their school children's education data is being used for marketing or advertising purposes,[188] or why the public widely approves of Amazon using their data to power the site's purchase recommendation engine.[189] The philosophical challenge facing organizations and policy makers is that respect for context requires an appreciation for ever-shifting social and cultural norms.[190] Context rests on a number of subjective variables such as an individual's level of trust in an organization and his perception of the

---

183. *Id.*

184. *Id.* at 132.

185. *Id.*

186. Privacy Bill of Rights, *supra* note 125, at 15; FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 38-39 (2012), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

187. Privacy Bill of Rights, *supra* note 125, at 15.

188. Crista Sumanik, *National Poll Commissioned by Common Sense Media Reveals Deep Concern for How Students' Personal Information Is Collected, Used, and Shared: Americans Overwhelmingly Support Reforms to Protect Students, Including Increased Transparency, Tighter Security Standards, and More Restrictions on Companies and Cloud Services, Common Sense Media* (Jan. 22, 2014), https://www.commonsensemedia.org/about-us/news/press-releases/national-poll-commissioned-by-common-sense-media-reveals-deep-concern.

189. Stephanie Miller, *Privacy and Trust: Is it Time to Do it Like Amazon?*, DMA (Jan. 27, 2014), http://thedma.org/advance/data-driven-marketing-ideas/privacy-amp-trust-is-it-time-to-quotdo-it-like-amazonquot/.

190. Carolyn Nguyen, Director, Microsoft Technology Policy Group, Contextual Privacy, Address at the FTC Internet of Things Workshop (Nov. 19, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/internet-things-privacy-security-connected-world/final_transcript.pdf.

value he receives from the use of his information.[191]

While context has been warmly embraced in principle, in practice, much more work by academics, industry, and policy makers is needed in order to properly frame and define this principle. Even as the White House Consumer Privacy Bill of Rights highlights the importance of context, Nissenbaum notes that both the accompanying White House report, *Consumer Privacy in a Networked World*, and later comment and reaction relied upon a variety of different interpretations of context.[192] She highlights five prominent interpretations of context: (1) context as determined by purpose specification; (2) context as determined by technology, or platform; (3) context as determined by business sector, or industry; (4) context as determined by business model; and, finally (5) context as determined by social sphere.[193] Context as defined by either industry efforts to specify how they intend to use data *or* by industry determinations in general do little to promote respect for individual privacy, while context as determined by business model or technology remain open-ended.[194] Nissenbaum reiterates that respect for context lacks analytical rigor if it does not take the social sphere into account—it also results in a much diminished notion of privacy, as well.[195]

These different interpretations are particularly significant because privacy advocates view the notion of context as being generally pro-privacy.[196] Because of this, context both complements and is in tension with emerging frameworks that protect privacy through responsible data use.[197]

B. Responsible Use-Based Approaches

The untapped value of big data has spurred a number of organizations to

---

191. *Id.*

192. Helen Nissenbaum, *Respect for Context as a Benchmark for Privacy Online: What It Is and Isn't*, BERKLEY LAW (May 24, 2013, 9:31 PM), privacylaw.berkeleylawblogs.org/2013/05/24/helen-nissenbaum-respect-for-context-as-a-benchmark-for-privacy-online-what-it-is-and-isnt-2/ [hereinafter Nissenbaum, *Respect for Context*, BERKLEY LAW]. Nissenbaum's article on this subject remains a work-in-progress, though she has discussed formulations of these interpretations at a number of different venues. *E.g.*, Helen Nissenbaum, *Respect for Context as a Benchmark for Privacy Online: What It Is and Isn't*, *in* THE FUTURES OF PRIVACY 19 (Carine Dartiguepeyrou ed., 2014), *available at* http://cvpip.wp.mines-telecom.fr/files/2014/02/14-02-The-futur-of-privacy-cahier-de-prospective.pdf [hereinafter Nissenbaum, *Respect for Context*, *in* THE FUTURES OF PRIVACY].

193. Nissenbaum, *Respect for Context*, BERKLEY LAW, *supra* note 192.

194. *See* Nissenbaum, *Respect for Context*, *in* THE FUTURES OF PRIVACY, *supra* note 192, at 27-28 .

195. *Id.* at 28.

196. *See* Omer Tene & Jules Polonetsky, *A Theory of Creepy: Technology, Privacy and Shifting Social Norms*, 16 YALE J.L. & TECH. 59, 89 (2013).

197. BIG DATA REPORT, *supra* note 175, at 56 (The White House Big Data Report recognizes this tension, *see infra* Part IV.B.).

move from privacy protections based on how information is *collected* toward how information is *used*.[198] Big data promises much value from innovative secondary uses of information—including breakthroughs in medicine, data security, or energy usage—that are impossible to account for under current notice-and-choice models.[199] Both reports that emerged out of the White House big data review support a focus on the merits of a use-based approach to privacy; the report by John Podesta specifically emphasizes the value of responsible data use:

> Putting greater emphasis on a responsible use framework has many potential advantages. It shifts the responsibility from the individual, who is not well equipped to understand or contest consent notices as they are currently structured in the marketplace, to the entities that collect, maintain, and use data. Focusing on responsible use also holds data collectors and users accountable for how they manage the data and any harms it causes, rather than narrowly defining their responsibility to whether they properly obtained consent at the time of collection.[200]

However, the White House-Podesta report also attempts to harmonize use-based approaches with a contextual approach to privacy, stating that a focus on use "does not mean ignoring the context of collection."[201] The report goes on to state that "[p]art of using data responsibly could mean respecting the circumstances of its original collection," and it continues, suggesting that a "no surprises" rule should govern how entities use data.[202]

However, context is largely missing from use-based path forward proposed by Scott Charney, who runs the influential Trustworthy Computing Group at Microsoft. Charney emphasizes the shift in privacy burden from individuals to

---

198. *See* Polonetsky et al., *supra* note 39, at 7; *see also* WORLD ECONOMIC FORUM, UNLOCKING THE VALUE OF PERSONAL DATA: FROM COLLECTION TO USAGE (2013), *available at* http://www.weforum.org/reports/unlocking-value-personal-data-collection-usage; *see also* MICROSOFT, EVOLVING PRIVACY MODELS (2014), *available at* http://download.microsoft.com/download/1/5/4/154763A0-80F8-41C8-BE52-80E284A0FBA9/Evolving-Privacy-Models.pdf.

199. Fred H. Cate & Viktor Mayer-Schönberger, *Data Use and Impact Global Workshop*, CTR. FOR INFO. POLICY RESEARCH AND CTR. FOR APPLIED CYBERSECURITY RESEARCH INDIANA UNIVERSITY (Dec. 1, 2013), http://cacr.iu.edu/sites/cacr.iu.edu/files/Use_Workshop_Report.pdf; *see also* SCOTT CHARNEY, TRUSTWORTHY COMPUTING NEXT (2012); Scott Charney, *The Evolving Pursuit of Privacy*, HUFFINGTON POST (Apr. 10, 2014 3:04 PM), http://www.huffingtonpost.com/scott-charney/the-evolving-pursuit-of-p_b_5120518.html ("We can inform individuals what will happen to their data today, but what happens when organizations develop new services or data use models?").

200. BIG DATA REPORT, *supra* note 175.

201. *Id.*

202. *Id.*; *see also* Jedidiah Bracy, *Making the Case for Surprise Minimization*, IAPP PRIVACY PERSPECTIVES (Apr. 11, 2014), https://www.privacyassociation.org/privacy_perspectives/post/making_the_case_for_surprise_minimization (exploring how privacy best practices are increasingly about surprise minimization).

organizations through new accountability and enforcement mechanisms.[203] Ideally, a use-based approach aspires to consensus around broadly acceptable data uses, allowing "uses where reasonable minds can differ can stand out more prominently" and allowing stakeholders to focus on "managing the risks associated with these activities."[204] The larger goal in shifting responsibility in this fashion seeks to not only replace our current compliance-based privacy framework, but to actively promote better data stewardship, as well.[205]

Regulators and privacy advocates are skeptical. While not opposed to accountability and enforcement in principle, no one is quite sure what these new accountability mechanisms should look like in a world of big data. Ryan Calo has proposed formalized review mechanisms roughly analogous to the function institutional review boards play in human testing research,[206] while Mayer-Schönberger and Cukier have called for big data "algorithmists" that could evaluate the selection of data sources, analytical tools, and any resulting interpretations.[207]

Moreover, there are worries that this approach places too much power into the hands of companies.[208] Use-based approaches necessarily minimize the role and rights of the individual, and in effect, create a business-centric form of privacy paternalism.[209] The PCAST big data report is particularly supportive of

---

203. CHARNEY, *supra* note 199; *see also* Charney, *The Evolving Pursuit of Privacy*, *supra* note 199.

204. CHARNEY, *supra* note 199.

205. *See* Cate & Mayer-Schönberger, *supra* note 199.

206. Ryan Calo, *Consumer Subject Review Boards: A Thought Experiment*, 66 STAN. L. REV. 97 (2013).

207. Cate & Mayer-Schoenberger, *supra* note 199.

208. *See*, *e.g.*, Will Gore, *Google and Its Like Are Now Masters of Our Universe—By Order of the European Court*, INDEPENDENT (May 18, 2014), http://www.independent.co.uk/voices/google-and-its-like-are-now-masters-of-our-universe--by-order-of-the-european-court-9392372.html (The European Court of Justice's recent ruling that Google must implement procedures allowing users to request the deletion of certain information was hailed as a tremendous victory for privacy, but it may actually place tremendous authority to make decisions about what should and should not be "private" into the hands of a corporation.). Ann Cavoukian, *So Glad You Didn't Say That! A Response to Viktor Mayer-Schoenberger*, IAPP (Jan. 16, 2014), https://www.privacyassociation.org/privacy_perspectives/post/so_glad_you_didnt_say_that_a_response_to_viktor_mayer_schoenberger (According to Ann Cavoukian, Information and Privacy Commissioner of Ontario, regulator's resources "are already stretched to the limit, with no additional resources being allocated for such enforcement. And with the massive growth in online connectivity and ubiquitous computing, we would barely see the tip of the iceberg of the privacy infractions that would arise."); *see also* Robert Gellman, *A Better Way to Approach Privacy Policy in the United States: Establish a Non-Regulatory Privacy Protection Board*, 54 HASTINGS L.J. 1183, 1205 (2003) (for criticism of the FTC's privacy enforcement actions generally); *see also EPIC v. FTC (Enforcement of the Google Consent Order)*, ELECTRONIC PRIVACY INFO. CTR., http://epic.org/privacy/ftc/google/consent-order.html (last visited Sept. 10, 2014).

209. Justin Brookman*, Corporate Accountability Is Important, But Consumers Still Need*

a responsible use framework, and it largely assumes that privacy *should* be sacrificed in order to allow big data to pursue improvements in convenience and security in everyday life.[210] Evoking the transparent society, PCAST imagines a future where a young woman prepares for a business trip where her bags are tracked from bedroom to hotel with RFID tags, cameras on streetlights observe her home so she can leave her bags outside her front door, and amusingly, the Transportation Security Agency at the airport is hardly necessary because any signs the woman was "deranged and dangerous" would "already have been tracked, detected, and acted on."[211] This future, PCAST concedes, "seems creepy to us" today, but PCAST assumes individuals will accept a "different balance" in the future.[212]

V. TRUST BUT VERIFY

"Creepy" has been an oft-used (and oft-lamented) descriptor of technological changes.[213] Perhaps as a result, creepiness tends to go hand-in-hand with discussions about big data, as well as various implementations of the Internet of Things.[214] Target's predictive abilities were considered "creepy."[215] The past year has seen an endless parade of "scary" and "weird" things that the NSA can now do.[216] Connected "smart" cars may be the next "privacy nightmare,"[217] while

---

Meaningful Control, IAPP PRIVACY PERSPECTIVES (May 8, 2014), https://www.privacyassociation.org/privacy_perspectives/post/corporate_accountability_is_important_but_consumers_still_need_meaningful_c.

210. *The President's Big Data Report by PCAST-Examining Conflicts of Interest,* CTR. FOR DIGITAL DEMOCRACY (May 7, 2014), http://www.democraticmedia.org/presidents-big-data-report-pcast-examining-conflicts-interest (The Center for Digital Democracy notes that a number of the members of PCAST have direct connections to major technology companies and data collectors.).

211. PCAST, *supra* note 136, at 17-18.

212. *Id.*; *see also* G.S. Hans, *Big Data Report Shows Privacy Matters*, CTR. DEMOCRACY & TECH. (May 2, 2014), https://cdt.org/blog/big-data-report-shows-privacy-matters/ (providing additional criticism of PCAST's hypothetical).

213. Farhad Manjoo, *The End of the Echo Chamber*, SLATE (Jan. 17, 2012,11:00 AM), http://www.slate.com/articles/technology/future_tense/2012/08/facial_recognition_software_targeted_advertising_we_love_to_call_new_technologies_creepy_.html; *see also* Adam Thierer, *On "Creepiness" as the Standard of Review in Privacy Debates*, The Tech. Liberation Front (Dec. 13, 2011), http://techliberation.com/2011/12/13/on-creepiness-as-the-standard-of-review-in-privacy-debates/ (Thierer laments that "creepiness" is a "crappy standard by which to judge privacy matters.").

214. Future of Privacy Forum, *Public Comments, Big Data RFI* (Mar. 31, 2014), http://www.futureofprivacy.org/wp-content/uploads/OSTP-Big-Data-Review-Comments.pdf.

215. *Id.*

216. Jody Avirgan, *Every Scary, Weird Thing We Know the NSA Can Do*, FUTURE TENSE (Jan. 17, 2014, 5:00 PM), http://www.slate.com/blogs/future_tense/2014/01/17/nsa_surveillance_reform_every_scary_weird_thing_we_know_the_agency_can_do.html.

217. Ronald D. White, *Car Black Boxes: Privacy Nightmare or a Safety Measure?*, LOS ANGELES TIMES (Feb. 15, 2013), http://articles.latimes.com/2013/feb/15/autos/la-fi-hy-advocates-

Google offers tips on how to avoid being "creepy" with Google Glass.[218] In fact, Google's own policy "is to get right up to the creepy line and not cross it."[219] What is creepiness? Jules Polonetsky and Omer Tene suggest that creepy behaviors are connected with activity that

> is *not exactly* harmful, does not circumvent privacy settings, and does not technically exceed the purposes for which data were collected. They usually involve either the deployment of a new technology, such as a feature that eliminates obscurity, or a new use of an existing technology, such as an unexpected data use or customization. In certain cases, creepy behavior pushes against traditional social norms; in others, it exposes a rift between the norms of engineers and marketing professionals and those of the public at large . . . .[220]

Creepiness directly limits the ability of an individual to feel comfortable or in control of his life.[221] According to Francis McAndrew and Sara Koehnke, feeling "creeped out" is "an evolved adaptive emotional response to ambiguity about the presence of threat that enables us to maintain vigilance during times of uncertainty."[222]

Creepiness is inherently subjective, and as a result, creepy behaviors are detrimental to the development of any trust-based relationship—whether between friends, consumer and company, or government and citizen.[223] Increasingly, trust is at a premium. Polls routinely show, for example, that even as Americans have not gone off the grid en masse, they do not trust either private companies[224] or the

---

say-car-black-boxes-could-become-a-privacy-nightmare-20130215; *see also* Kashmir Hill, *The Big Privacy Takeaway From Tesla vs. The New York Times*, FORBES (Feb. 19, 2013, 2:45 PM), http://www.forbes.com/sites/kashmirhill/2013/02/19/the-big-privacy-takeaway-from-tesla-vs-the-new-york-times/ ("[M]y biggest takeaway was 'the frickin' car company knows when I'm running the heater?'").

218. Nick Bilton, *Google Offers a Guide to Not Being a 'Creepy' Google Glass Owner*, BITS (Feb. 19, 2014, 2:02 PM), http://bits.blogs.nytimes.com/2014/02/19/googles-guide-to-not-being-a-creepy-google-glass-owner/.

219. Bianca Bosker, *Eric Schmidt: Google's Policy Is To 'Get Right Up To The Creepy Line'*, THE HUFFINGTON POST (Oct. 4, 2010, 10:01 AM), http://www.huffingtonpost.com/2010/10/04/eric-schmidt-google-creepy_n_748915.html.

220. Tene & Polonetsky, *supra* note 196, at 61 (emphasis added).

221. Future of Privacy Forum, *supra* note 214.

222. Francis T. McAndrew & Sara S. Koehnke, (On the Nature of) Creepiness Poster presented at the Annual Meeting of the Society for Personality and Social Psychology, (Jan 18, 2013), *available at* http://www.academia.edu/2465121/Creepiness.

223. *See generally id.*; *see also* Joseph Jerome & Joseph Newman, *Video Games and Privacy: It's All About Trust*, GAMASUTRA (May 20, 2014, 2:43 PM), http://www.gamasutra.com/blogs/JosephJerome/20140520/217964/Video_Games_and_Privacy_Its_All_About_Trust.php.

224. Charlie Warzel, *Americans Still Don't Trust Facebook with their Privacy*, BUZZFEED (Apr. 3, 2014, 2:58 PM), http://www.buzzfeed.com/charliewarzel/americans-still-dont-trust-facebook-with-their-privacy; *see also* Kayla Tausche, *As Investors Fawn Over Facebook, Poll*

government[225] with their privacy. Over time, a loss of trust can impact not just a company's bottom-line, but have serious corrosive effects on society, as well.

Trust is essential for society.[226] And thus far, big data has played a harmful role from the perspective of enhancing trust. However, if it can move the future of privacy away from arbitrary binaries toward a more holistic understanding of privacy as a value spectrum, big data may yet be a boon to privacy conversations. In this regard, contextual privacy or a shift to responsible uses of data may force businesses and government to more carefully consider their actions. Certainly these approaches do not by themselves answer many of the normative questions that result from the collection and use of data, but they may provide constraints and structure to decision-making processes.[227]

A better approach to privacy is a start—and in many ways, trust is the flip side of the privacy coin.[228] According to Ilana Westerman, organizations ought to focus less on privacy and more on trust.[229] "Privacy professionals should become trust professionals and become involved in overall product creation," she writes, arguing that this will help engender trust and create value.[230] But getting society—and perhaps Captain America—to trust big data is a multistep process.

CONCLUSION

The big data privacy bogeyman will only be excised through a combination of accountability, transparency, and ultimately, public debate. Yet this is bigger than a mere privacy conversation. The fundamental problem posed by big data may be less a question of how it impacts our privacy and more that it upsets our society's sense of fairness. The debate around big data is often couched as something that implicates traditional privacy principles and that the uses and

---

Finds User Distrust, Apathy, CNBC (May 12, 2012, 12:05 AM), http://www.cnbc.com/id/47413410; *see also* Mat Honan, *The Case Against Google*, GIZMODO (Mar. 22, 2012, 12:19 PM), http://gizmodo.com/5895010/the-case-against-google.

225. *Just 11% Think NSA Less Likely Now to Monitor Phone Calls of Innocent Americans*, RASMUSSEN REPORTS (Aug. 12, 2013), http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/just_11_think_nsa_less_likely_now_to_monitor_phone_calls_of_innocent_americans.

226. *See* Bruce Schneier, *NSA Secrets Kill our Trust*, SCHNEIER ON SECURITY (July 31, 2013), https://www.schneier.com/essay-435.html.

227. *See* Andrew Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 643, 649 (2013).

228. Ilana Westerman, *From Privacy to Trust Professionals*, IAPP (Mar. 25, 2013), https://www.privacyassociation.org/privacy_perspectives/post/from_privacy_to_trust_professionals.

229. *Id.*

230. *Id.*

inferences drawn from our data invade our privacy, but this obscures the larger public policy challenge. We are increasingly threatened by abstract or inchoate risks to our autonomy and the state of our society, and no one has established the necessary trust to lead the way forward.

Indiana Law Review

Volume 48 **2014** **Number 1**

NOTES

CRIMINALIZING BULLYING: WHY INDIANA SHOULD HOLD THE BULLY RESPONSIBLE

ALICIA K. ALBERTSON*

INTRODUCTION

"P.S. it's the bullying that killed me."[1]

In March 2013, fourteen-year-old Angel Green committed suicide.[2] Angel, an eighth-grader in West Lafayette, Indiana, hung herself from a tree by her bus stop.[3] Her mother, Danielle, found a handwritten note addressed to her classmates blaming bullying for her decision to commit suicide.[4] According to Danielle, Angel's classmates often called her a "slut" and a "whore."[5] Angel chose the location of her suicide purposefully; Danielle said she hung herself at her bus stop before the bus arrived so that all the bullies who tormented her could see her death.[6] "You told me so much that I started believing it," Angel wrote in her suicide note.[7] "And I was stupid for doing that. Every morning, day, night [sic] I look in the mirror and cry, and replay the harmful words in my head."[8]

Angel is not alone. About one out of every four children in the United States is subject to bullying.[9] According to the National Education Association, nearly 160,000 students nationally do not attend school each day because they are afraid

---

* J.D. Candidate, 2015, Indiana University Robert H. McKinney School of Law; B.A. 2011, Saint Mary's College, Notre Dame, Indiana. I would like to thank Professor Yvonne Dutton for her feedback and assistance throughout the writing process.

1. Sasha Goldstein, *Indiana Girl's Public Suicide and Heartbreaking Note Sparks Anti-bullying Legislation in the State*, N.Y. DAILY NEWS (Apr. 4, 2013), http://www.nydailynews.com/life-style/health/indiana-girl-suicide-heartbreaking-note-spark-anti-bullying-legislation-article-1.1308060.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Tammy Sampson Moon, *Analysis of Suicide and Bullying in Indiana Schools,* EXAMINER, Nov. 15, 2011, www.examiner.com/article/analysis-of-suicide-and-bullying-indiana-schools.

of encountering bullies.[10] About twenty percent of American students in grades nine through twelve experienced bullying in 2011.[11]

Indiana faces a similar plight, losing children every year to bullying, including fifteen-year-old Tori Swope in 2012, fourteen-year-old Devon Pritt in 2011, and fifteen-year-old Billy Lucas in 2011. [12] Approximately 280,227 students throughout Indiana are being bullied or have been bullied since beginning to attend school.[13] Indiana ranks third nationally in instances of cyberbullying and bullying on school property.[14]

Indiana has responded to the bullying crisis by passing legislation that takes steps beyond what prior law mandated by requiring the Indiana Department of Education to help school corporations handle bullying.[15] During the 118th General Assembly's First Regular Session in 2013, Indiana passed amended bullying legislation aimed at promoting education and prevention of bullying.[16] The legislation requires the Indiana Department of Education to help school corporations implement bullying prevention programs and reporting procedures, and provided a definition for "bullying."[17] Before 2013, Indiana did not provide a comprehensive definition of bullying.[18] While prior Indiana bullying legislation already required school corporations to include provisions regarding reporting, investigation, and intervention, the legislation did not provide specific and detailed procedures or timetables for school corporations to adopt.[19] The

---

10. IND. GOVERNOR'S COUNCIL FOR PEOPLE WITH DISABILITIES, *Ignite Thoughts Into Actions Spark,* 1, 4 (2012), *available at* http://www.incasa.org/PDF/2013/Bullying_2012_SPARK_newsletter.pdf.

11. U.S. Dep't of Health & Human Services, *Frequency of Bullying*, STOPBULLYING, www.stopbullying.gov/what-is-bullying/definition/index.html#frequency (last visited Aug. 26, 2014).

12. Emine Sinmaz, *Parents' Agony After Daughter, 15, is Found Hanged in Her Bedroom After Relentless Bullying at Hands of Classmates*, DAILY MAIL (May 11, 2012, 4:32 PM), http://www.dailymail.co.uk/news/article-2143096/Girl-15-hanging-scarf-bedroom-enduring-relentless-bullying-classmates.html (discussing the death of Tori Swope in 2012); *see also* WTHR, *Friends Say Teen Committed Suicide Over Bullying*, WTHR (Sept. 16, 2011), http://www.wthr.com/story/15310834/friends-say-teen-committed-suicide-over-bullying (describing the circumstances surrounding Devon Pritt's 2011 suicide); *see also* RTV6, *Friends: Bullies Led to 15-Year-Old's Death*, RTV6 (Sept. 13, 2010), http://www.theindychannel.com/news/ friends-bullies-led-to-15-year-old-s-death (discussing the death of Billy Lucas in 2011).

13. Moon, *supra* note 9.

14. Sue Loughlin, *Hoosier Students 3rd Most-Bullied*, TRIBSTAR.COM, June 23, 2014, http://www.tribstar.com/news/local_news/hoosier-students-rd-most-bullied/article_183584a5-fe4d-58e1-a08f-b316e2001b0e.html.

15. IND. CODE § 20-33-8-13.5 (2013).

16. *Id.*

17. *Id.* § 20-33-8-0.2.

18. *Id.*

19. IND. CODE § 20-33-8-13.5 (2011) (amended 2013).

amended legislation became effective on July 1, 2013.[20]

While Indiana's current bullying legislation should help prevent some bullying, Indiana needs to implement additional measures to provide more protection for children. Indiana's current bullying legislation provides some reform to the previous laws, but the prior legislation already required school corporations to report instances of bullying and provide anti-bullying programming.[21] Legislation enacted in 2011 already required school corporations to "prohibit bullying" and to "include provisions concerning education, parental involvement, reporting, investigation and intervention."[22] The current legislation provides more comprehensive requirements for schools by requiring detailed procedures, but the method of preventing bullying is largely the same as it was previously.[23] Additionally, many schools across the state already had implemented more strict bullying procedures than the previous legislation required.[24] For example, Indianapolis Public School students were required to participate in anti-bullying programs from kindergarten through grade twelve before the legislation passed.[25] Despite anti-bullying measures taken in schools, bullying still occurred.[26] Therefore, Indiana should add a provision within its criminal code making bullying a criminal offense to better deter instances of bullying within the state.

The purpose of this Note is to argue that Indiana should make bullying a criminal offense to further discourage children from bullying each other. Part I of this Note discusses the definition and history of bullying in the United States and Indiana. Part II considers the different approaches Indiana could take to deter bullying. Part III discusses the imposition of criminal liability for bullies, including contemplating deterrence theory, retributivism, and the juvenile justice system. Finally, this Note proposes a criminal provision for bullying that Indiana should adopt to improve Indiana's bullying legislation.

I. DEFINITION AND HISTORY OF BULLYING IN THE UNITED STATES AND INDIANA

Because bullies can act in a variety of ways, it is important to determine what types of actions constitute bullying in order to understand what types of behavior needs to be prevented.[27] Indiana defined bullying in its 2013 bullying

---

20. IND. CODE § 20-33-8-13.5 (2013).

21. *Id.*

22. *Id.*

23. *Id.*

24. Lindsey Ziliak, *Bullying Reporting Now Required*, KOKOMO TRIB. May 19, 2013, http://www.kokomotribune.com/news/local_news/article_ee0e0035-35dd-5255-bdeb-0bebb8524b7d.html.

25. Adrienne Broaddus, *IPS Expulsion Sparks Bullying Debate*, WISH TV (May 8, 2012), http://www.youtube.com/watch?v=6QUoEcMmr0M&list=PL53CAB7FF4EBB9329&index=30.

26. *Id.*

27. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, UNDERSTANDING BULLYING 1

legislation.[28] Additionally, the history of bullying is also important to understand how the problems associated with bullying have evolved to determine the best means to prevent it.[29] This section will discuss the different definitions of bullying and examine the history of bullying across the United States and in Indiana.

A. Defining Bullying

Although there are many different definitions of bullying, bullying typically includes: "[a]ttack or intimidation with the intention to cause fear, distress or harm; [a] real or perceived imbalance of power between the bully and the victim; and [r]epeated attacks or intimidation between the same children over time."[30] Bullying can take many forms and can be verbal, physical, or psychological.[31] Physical bullying consists of physical harm or threats of harm, as well as other acts such as stealing, causing property damage, or making someone do something he or she does not want to do by the use of force.[32] Another type of bullying, relationship bullying, occurs when a student spreads a rumor about another student or coerces another student into doing something he or she does not want to do.[33] Verbal bullying is also a problem within schools and consists of teasing, insulting, or calling another student names.[34] Finally, the newest form of bullying is cyberbullying, which utilizes text messages, email, or social media websites to post embarrassing or hurtful things, spread rumors, or send hateful messages.[35] Since the early 1970s, Dr. Dan Olweus has conducted comprehensive studies about bullying.[36] Olweus completed the first scientific study of bullying and is responsible for creating the first systematic intervention program.[37] Olweus provided the most commonly quoted definition of bullying:

> A person is being bullied when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons. Negative action is when a person intentionally inflicts injury or discomfort upon another person, through physical contact, through

---

(2012), *available at* www.cdc.gov/violenceprevention/pdf/bullyingfactsheet2012-a.pdf.

28. IND. CODE § 20-33-8-0.2 (2013).

29. MARGARET R. KOHUT, THE COMPLETE GUIDE TO UNDERSTANDING, CONTROLLING, AND STOPPING BULLIES & BULLYING 13 (2007).

30. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 27; *see also* KOHUT, *supra* note 29; IND. GOVERNOR'S COUNCIL FOR PEOPLE WITH DISABILITIES, *supra* note 10.

31. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 27.

32. IND. GOVERNOR'S COUNCIL FOR PEOPLE WITH DISABILITIES, *supra* note 10, at 3.

33. *Id.*

34. *Id.*

35. *Id.*

36. KOHUT, *supra* note 29, at 19.

37. *Dan Olweus, Ph.D.*, HAZELDEN.COM, http://www.hazelden.org/OA_HTML/hazAuthor.jsp?author_id=4206 (last visited Aug. 26, 2014).

words, or in other ways. Note that bullying is both overt and covert.[38]

B. National Bullying Statistics

With that definition in mind, bullying remains a common occurrence in schools across the country.[39] Bullying is not a new phenomenon.[40] But "[b]ullying is now recognized as a widespread and often neglected problem in schools that has serious implications for victims of bullying and for those who perpetuate the bullying."[41] Twenty-three percent of public schools reported that students experienced bullying on a daily or weekly basis during the 2009-2010 academic year.[42] Another study indicated that in 2011, nearly 28% of twelve- to eighteen-year-old students were bullied at school and 9% said they were victims of cyberbullying.[43] Of the nearly 28% of students who reported being bullied at school, 18% reported they were verbally bullied.[44] Eight percent of students said they were bullied physically, while 5% indicated they were threatened with harm.[45] Of the students who reported being bullied at school, nearly 33% said they were bullied inside a classroom, and about 46% said they were bullied in a hallway or stairwell.[46]

In 2011, about 36% of students who experienced bullying at school experienced it at least once or twice a month.[47] These statistics indicate that bullying has remained a problem across the United States.[48] In 2005, nearly 28% of twelve- to eighteen-year-old students indicated they had been bullied, compared to about 31% in 2007, 28% in 2009, and 28% in 2011.[49] According to the American Psychological Association, 70% of middle and high school students have experienced bullying sometime throughout their schooling.[50]

In response to the acts of bullying occurring through the United States, many states have taken action.[51] As of April 2011, forty-six states have anti-bullying

---

38. KOHUT, *supra* note 29, at 19-20.

39. *Id.*

40. *Id.* at 13.

41. U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2012 44 (2013) [hereinafter INDICATORS], *available at* nces.ed.gov/pubs2013/2013036.pdf.

42. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 27.

43. INDICATORS, *supra* note 41, at 44.

44. *Id.*

45. *Id.*

46. *Id.* at 47.

47. *Id.* at 48.

48. *Id.* at 51.

49. *Id.*

50. Sandra Graham, *Bullying: A Module for Teachers*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/education/k12/bullying.aspx# (last updated 2014).

51. U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 15 (2011) [hereinafter ANALYSIS], *available at* https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf.

legislation, including Indiana.[52] Between 1999 and 2010, more than 120 pieces of legislation were enacted to address bullying in schools.[53] Forty-five states require school districts to adopt policies regarding bullying.[54]

C. The Problems Bullying Creates

With evidence of consistent, repeated instances of bullying occurring across the United States, bullying continues to remain a problem in many schools.[55] A student who is bullied can face a variety of mental, emotional, and physical issues, including emotional distress, and even death.[56] According to a report by Fight Crime: Invest in Kids, eight percent of girls who are frequently bullied are suicidal, and four percent of boys who are frequently bullied are suicidal.[57]

Although only a small fraction of bullied students are suicidal, Indiana has experienced several recent bullying-related suicides of students.[58] Anecdotal evidence supports the conclusion that suicide due to bullying is also a problem in Indiana.[59] As previously mentioned, there have been several instances of teens committing suicide in Indiana due to bullying within the past five years.[60] Like Angel Green, many students feel hopeless because of their victimization, and commit suicide as a means of escape.[61]

In addition to suicide, bullying can have other long-term effects on victims.[62] Some victims face psychological or physical distress and may face depression.[63] Bullying victims also perform poorly academically and harbor negative attitudes for school.[64] Bullied students are more likely to face "depression, anxiety, sleep difficulties, and poor school adjustment."[65] As one commentator explained, "[a]s the victim grows into adulthood, he or she has little self-esteem to build upon to

---

52. *Id.*

53. *Id.*

54. *Id.*

55. CATHERINE P. BRADSHAW ET AL., FINDINGS FROM THE NATIONAL EDUCATION ASSOCIATION'S NATIONWIDE STUDY OF BULLYING: TEACHER AND EDUCATION SUPPORT PROFESSIONAL'S PERSPECTIVES vii (2011), *available at* http://www.nea.org/assets/docs/Nationwide_Bullying_Research_Findings.pdf.

56. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 26.

57. FIGHT CRIME: INVEST IN KIDS, BULLYING PREVENTION *IS* CRIME PREVENTION 6 (2003), *available at* www.fightcrime.org/wp-content/uploads/sites/defaults/files/reports/BullyingReport.pdf.

58. WTHR, *supra* note 12.

59. *Id.*

60. *Id.*

61. Goldstein, *supra* note 1.

62. Graham, *supra* note 50.

63. RANA SAMPSON, BULLYING IN SCHOOLS 12 (2002), *available at* http://www.cops.usdoj.gov/pdf/e12011405.pdf.

64. Graham, *supra* note 50.

65. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 27.

form a happy, healthy future. Diminished social skills, lack of self-confidence, a seething core of internal anger, and a dark depression are ever-present barriers for the victim who suffered through years of bullying."[66] According to the American Psychological Association, eight- to fifteen-year-olds "rank bullying as more of a problem in their lives than violence."[67] Additionally, "emotional maltreatment" and "social cruelty from peers" are greater concerns for fifth through twelfth graders than anything else.[68]

Bullying can also create long-term effects on the bullies.[69] Bullies are more likely to have substance abuse problems, academic problems, and are more likely to become violent later in life.[70] If a student is identified as a bully by age eight, he or she is six times more likely to be convicted of a crime by age twenty-four than those who are not considered bullies.[71] Bullies are also typically less educated, drop out of school more frequently, and face unemployment more often than those who do not bully.[72]

A 2003 study also found that bullies are more likely to be convicted of crimes than non-bullies.[73] About sixty percent of boys in grades six through nine who researchers classified as bullies were convicted of at least one crime by the age of twenty-four.[74] About forty percent were convicted of three or more crimes by twenty-four.[75] Another study followed bullies as they grew into adulthood and found that those who were classified as bullies as children continued to bully into adulthood.[76] This study also found that bullies were more likely to suffer alcoholism and require government-subsidized treatment.[77] Bullies also suffered from personality disorders and had problems with marital relationships due to violence and instability.[78]

Because of the many problems associated with bullying, Indiana should do its utmost to prevent bullying. Adding provisions to Indiana's criminal code to make bullying a crime is one way Indiana could better deter students from bullying. There are many other measures that Indiana could take to deter bullying; however, those measures have not proven to be wholly effective.[79]

---

66. KOHUT, *supra* note 29, at 35-36.
67. Graham, *supra* note 50.
68. *Id.*
69. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 27.
70. *Id.*
71. KOHUT, *supra* note 29, at 39.
72. *Id.* at 40.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. BRADSHAW ET AL., *supra* note 55, at 19.

II. APPROACHES INDIANA COULD ADOPT, INDIANA'S APPROACH, AND ITS EFFECTIVENESS

There are many different approaches states can take to prevent bullying from occurring within school corporations.[80] Although these approaches have been shown to prevent some bullying, there is still a high rate of bullying in schools across the nation.[81] This section surveys the different approaches that Indiana could adopt, and will discuss the effectiveness of each alternative approach. This section will also discuss how Indiana is currently dealing with bullying in schools. Finally, this section will explain why the approach Indiana has currently adopted is insufficient.

A. Whole-School Approach and Other Bullying Prevention Programs

Bullying remains a problem across the United States, and many school corporations and states have taken various approaches to deter bullying.[82] Long-time bully researcher Dr. Dan Olweus advocates for the whole-school approach.[83] According to Olweus, schools must adopt a model targeting the entire student population.[84] Olweus suggests having a conference day within the school to allow the principal, teachers, counselors, nurses, parents, and students to create a long-term plan for the school.[85] He also suggests making sure that these parties take on a united front against bullying.[86] Olweus argues that educating parents and teachers about school environments that foster bullying increases the chances of creating a bully-free school environment.[87]

George Varnava, another bully researcher, also advocated for a whole-school approach to prevent bullying.[88] Varnava created the following eight step anti-bullying strategy for schools:

> 1. A whole-school action plan with all sectors of the school community represented in the plan; 2. Establishing a commitment: "We aim to be a bullying-free school."; 3. The commitment is publicized internally and externally, providing a basis for collaboration with parents and the local community; 4. A practical anti-bullying program is introduced in the school; 5. Self-auditing helps schools determine if their program is working; 6. Action is taken to address specific risk areas; 7. A whole-school review of the anti-bullying process is undertaken; 8. Each school formulates its own criteria for evaluating their progress and reducing

---

80. *Id.* at vii.
81. *Id.* at 19.
82. *Id.* at vii.
83. KOHUT, *supra* note 29, at 181. *See supra* text accompanying notes 27-29.
84. *Id.*
85. *Id.* at 181-82.
86. *Id.* at 182.
87. *Id.* at 183.
88. *Id.*

bullying.[89]

Varnava focuses on the need for training for staff and children to help create a bully-free environment.[90] The whole-school approach provides that interventions happen at all levels including a school-wide level, class-wide level, and an individual level by teachers, parents, and student peers.[91] According to a 2007 study by Rachel C. Vreeman, MD, and Aaron E. Carroll, MD, MS, the whole-school approach was the most effective school-based approach to bullying prevention.[92]

While the whole-school approach "more often reduced victimization and bullying," it still faces significant barriers that limit this approach's effectiveness.[93] Several studies of the whole-school approach have reported small to negligible effectiveness.[94] Two studies evaluating the Olweus whole-school approach conducted in Norway had differing results.[95] One 1993 study, conducted by Olweus, found a decline in both bullying and victimization; however, the other study, also conducted in 1993, found increases in bullying and victimization.[96] Another 2008 study examined whole-school anti-bullying programs in Europe, Canada, and the United States.[97] This study found no changes in bullying behaviors.[98] After synthesizing existing research and evaluations on whole-school bullying programs to determine the overall effectiveness of the approach in 2004, one group of researchers found that "[t]he majority of programs evaluated to date have yielded nonsignificant outcomes on measures of self-reported victimization and bullying, and only a small number have yielded positive outcomes."[99] This study found that ninety-two percent of bullying outcomes were negligible or negative, and ninety-three percent of victimization outcomes were negative or negligible.[100] While the whole-school approach to bullying can be effective in some instances, these studies indicate that that is not always the case.[101] Indiana should adopt additional measures to ensure a decline in bullying.

---

89. *Id.* at 184.

90. *Id.* at 188.

91. SAMPSON, *supra* note 63, at 24.

92. Rachel C. Vreeman & Aaron E. Carroll, *A Systematic Review of School-Based Interventions to Prevent Bullying*, 161 ARCHIVES OF PEDIATRIC ADOLESCENT MED. 86-87 (2007).

93. *Id.*

94. Susan M. Swearer et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, 39 EDUC. RESEARCHER 38, 41-42 (2010).

95. *Id.* at 42.

96. *Id.*

97. *Id.*

98. *Id.*

99. J. David Smith et al., *The Effectiveness of Whole-School Antibullying Programs: A Synthesis of Evaluation Research*, 33 SCH. PSYCHOL. REV. 547, 550 (2004).

100. *Id.*

101. Swearer et al., *supra* note 94, at 42.

B. Other Anti-Bullying Strategies

While the whole-school approach has had varying degrees of success within schools, researchers found other strategies like conflict resolution and peer mediation training are less effective, and in some instances further victimize bullied children.[102] Peer mediation allows students to resolve minor conflicts among themselves before the conflicts erupt into more serious problems.[103] "When a dispute occurs at school, the mediators, usually in student teams, become neutral third parties and work with the disputants through conflict resolution."[104] The goal of peer mediation is to help students understand how to handle a small conflict before it becomes a larger problem.[105] Traditionally, this program seeks to bring the bully and the victim to equal ground, providing them each with "equal bargaining power."[106] However, oftentimes the victim does not feel as powerful as the bully, and this may impact the result of the mediation.[107] Peer mediation involves resolving a conflict by having the bully and the victim work it out between themselves, but peer mediation may re-victimize the bullied student, because the victim is forced to encounter the bully again face-to-face in the mediation session.[108]

Zero tolerance policies, which provide discipline for certain conduct regardless of the circumstances behind it, have also been adopted by many schools.[109] Zero tolerance polices often do not address bullying prevention because they focus on the specific occurrences after instances of bullying have occurred.[110] With a zero tolerance policy, "a student who engages in a bullying act is either suspended or expelled" regardless of the circumstances surrounding the instance of bullying.[111] These policies also often do not inquire into the motivations behind behaviors.[112] By themselves, zero tolerance policies are often not the most effective methods of preventing bullying.[113]

According to a report distributed by the U.S. Department of Education, "[t]en

---

102. SAMPSON, *supra* note 63, at 24; *see also* Susan P. Limber & Maury M. Nation, *Bullying Among Children and Youth*, JUVENILE JUSTICE BULLETIN (Apr. 1998), http://www.ojjdp.gov/jjbulletin/9804/bullying2.html (explaining that conflict resolution strategies may not be effective because of the power dynamic between the bullied and the bullies).

103. Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools*, 9 NEV. L.J. 545, 562 (2009).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 564.

109. *Id.* at 558.

110. *Id.* at 559.

111. *Id.* at 558-59.

112. *Id.* at 559.

113. *Id.* at 558.

states either mandate or encourage districts to establish bullying prevention task forces, safe schools committees, or other local advisory groups to address school-wide prevention."[114] Many states also value the training of school staff, and twenty-five states mandate that districts develop and implement such training.[115] Additionally, twenty states have legislation requiring districts to employ bullying prevention, education, and awareness for students.[116] While these provisions have provided some relief for bullied students, these measures are not effective enough.[117]

C. Reporting

According to the U.S. Department of Education, thirty-six states have legislation requiring school districts to establish reporting procedures.[118] Additionally, twenty-two states have laws requiring school districts to adopt policies that either mandate or encourage school staff to report instances of bullying.[119] Eighteen states have legislation including "language regarding written documentation of bullying complains [sic] and investigations."[120] Some schools have implemented anti-bully hotlines to provide avenues for students to report bullying.[121] Reporting is an important part of bullying prevention, because it provides states with statistics about the commonality of bullying within their school corporations.[122] These statistics can help states determine whether current anti-bullying programs are effective.[123] Indiana's legislation has adopted these measures, and while they are an important part of bullying prevention, Indiana should adopt additional measures to ensure the prevention of bullying.[124]

D. Indiana's Current Approach to Bullying Prevention

There are many approaches that Indiana could take to prevent bullying. In 2013, Indiana enacted two laws that address bullying.[125] While many school districts have implemented anti-bullying programming, and Indiana and other states have created their own laws, there are no federal laws directly addressing

---

114. ANALYSIS, *supra* note 51, at 33.

115. *Id.*

116. *Id.* at 34.

117. *Id.* at 3 (finding that after six years of implementing anti-bullying measures in Washington, "bullying had not declined substantially since the first bullying legislation was passed.").

118. *Id.* at 36.

119. *Id.*

120. *Id.* at 38.

121. SAMPSON, *supra* note 63, at 21.

122. U.S. Dep't of Health and Human Services, *Assess Bullying,* STOPBULLYING, http://www.stopbullying.gov/prevention/at-school/assess-bullying/index.html (last visited Aug. 26, 2014).

123. *Id.*

124. IND. CODE § 20-33-8-13.5 (2013).

125. *Id.* §§ 20-33-8-0.2, -13.5.

bullying.[126] In Indiana, Indiana Code section 20-33-8-0.2 provides the definition of bullying.[127] This statute offers a comprehensive definition that can be applied within school districts across the state to address bullying.[128] Another statute, Indiana Code section 20-33-8-13.5, promotes education about and prevention of bullying within schools.[129] This statute offers specific provisions regarding how schools must handle bullying, including reporting measures, disciplinary measures, and follow-up services.[130]

Specifically, Indiana's most recent legislation provides an amendment requiring school corporations to create and implement a detailed bullying plan and reporting mechanisms.[131] Previous legislation did not require specific and detailed plans and implementation.[132] The Indiana Department of Education has issued a Model School Corporation Policy with regard to bullying.[133] This policy offers school corporations within the state an example of how to implement a bullying plan that fits within the amended state statute.[134] The Model School Corporation Policy defines bullying by utilizing Indiana Code section 20-33-8-0.2.[135] The model sets out the policy provisions that school corporations should adopt to deal with bullying.[136] First, the policy recommends school corporations adopt discipline rules in compliance with Indiana Code section 20-33-8-13.5 because these disciplinary actions are essential to ensure that there are no "substantial interferences with school discipline" and no unreasonable threats "to the rights of others to a safe and peaceful learning environment."[137] Then, the model policy suggests principals implement appropriate consequences to incidents of bullying.[138] Next, the policy states the principal at each school should designate a staff member to handle complaints regarding the bullying policy.[139]

The model policy also includes reporting provisions and recommends anyone who is in contact with students verbally report instances of bullying, and

---

126. U.S. Dep't of Health & Human Services, *Federal Laws*, STOPBULLYING, www.stopbullying.gov/laws/federal/index.html (last visited Aug. 26, 2014). (There are federal laws that address discriminatory harassment with regard to sex, race, national origin, disabilities, etc., which can overlap with bullying.)

127. IND. CODE § 20-33-8-0.2 (2013).

128. *See id.*

129. *Id.* § 20-33-8-13.5.

130. *See id.*

131. *Id.*

132. IND. CODE § 20-33-8-13.5 (2011) (amended 2013).

133. IND. DEP'T OF EDUC., MODEL SCHOOL CORPORATION POLICY 1-5 (2013) [hereinafter MODEL POLICY], *available at* www.doe.in.gov/student-services/anti-bullying-school-policy.

134. *Id.*

135. *Id.* at 1-2.

136. *Id.* at 2-5.

137. *Id.* at 2.

138. *Id.*

139. *Id.*

subsequently provide a written report regarding the incident within one day of the submission of a verbal report.[140] Additionally, the policy asks that students, parents, and visitors submit a written report of the incident the day it occurred.[141] The written report can be made anonymously, and if a person submits a report, he or she is immune from a cause of action arising from failure to remedy the reported incident.[142] This means if a person submits a report, he or she cannot be sued by the victim for failing to take action with regard to the instance of bullying.[143]

The policy also recommends the principal complete a full investigation within one school day of the report.[144] Moreover, the policy suggests schools record the frequency of bullying in the following four categories: verbal bullying, physical bullying, social/relational bullying, and electronic or written communication bullying.[145] This information should be submitted to the Indiana Department of Education by July 1 of each year.[146] The policy also provides that parents of children who are involved in any bullying investigation shall be informed about the investigation by the principal.[147] Additionally, any person who witnesses or receives a report of bullying must report it or he or she will be subject to disciplinary proceedings.[148] Under the policy, the superintendent of the school corporation has the authority to determine how to handle an instance of bullying, and is responsible for providing the bullying policy to parents each year to educate them about the anti-bullying program.[149] The policy also indicates that the principal will follow the code of student conduct based on the findings of the investigation, and he or she is authorized to respond to false reporting.[150] Any investigation or report made regarding an instance of bullying is not considered a public record.[151]

The policy also indicates that each school within the corporation should create and provide an anti-bullying policy or bullying prevention policy no later than October 15 of each school year.[152] Each school must also provide training on the policy and other bullying prevention and intervention training to corporation and school employees, as well as others who have continuous contact with students.[153] The school board should recognize that bullying prevention will

---

140. *Id.* at 3.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 4.
149. *Id.* at 5.
150. *Id.*
151. IND. CODE § 20-33-8-13.5 (2013).
152. *Id.*
153. *Id.*

constantly be changing and must adopt new provisions as needed.[154] Additionally, the school board should analyze data and determine where changes need to be made to improve the prevention policy.[155]

In the Model School Corporation Policy the Indiana Department of Education offers schools a list of levels of discipline for bullying for middle and high school students.[156] These levels, though, are only recommendations.[157] The first level provides that students should have conferences with school staff and a parent.[158] Level two provides different intervention options including referrals to school administrators, detentions, and Saturday school.[159] Level three offers in-school alternatives such as in-school suspension, in-school community service, or suspension from class.[160] Level four discusses out-of-school suspension options.[161] Level five offers alternative consequences and programs that include providing the student a modified schedule, school probation with a referral to a community agency, or conditional school.[162] Level six provides for expulsion of the student.[163]

E. Why These Approaches Are Insufficient

According to a report issued by the U.S. Department of Education, Indiana's bullying legislation is very similar to anti-bullying plans implemented in New Jersey and Georgia, which have some of the most extensive anti-bullying legislation.[164] Indiana's legislation is newly adopted, and there is limited information regarding its effectiveness to date.[165] New Jersey and Georgia's bullying legislation, when compared to Indiana's newly enacted legislation, provide an adequate background to evaluate whether or not Indiana's legislation will reduce the instances of bullying within the state.

1. New Jersey.—Indiana's model approach to bullying is based on New Jersey's approach.[166] Indiana and New Jersey have similar anti-bullying

---

154. *Id.*

155. *Id.*

156. IND. DEP'T OF EDUC., MS/HS LEVELS OF DISCIPLINARY CONSEQUENCES AND SUPPORT, 1 (2013) [hereinafter DISCIPLINARY], *available at* www.doe.in.gov/student-services/anti-bullying-school-policy.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. ANALYSIS, *supra* note 51, at 41.

165. IND. CODE § 20-33-8-13.5 (2013).

166. MODEL POLICY, *supra* note 133, at 5. (Within the Model School Corporation Policy, the document states, "This document is modeled, in part, on information provided through the following website: www.state.nj.us/education/parents/bully.htm" which indicates that Indiana used

statutes.[167] Indiana's legislation provides a definition of bullying and requires school corporations to adopt anti-bullying programming and reporting procedures.[168] Indiana's defines bullying as:

> [V]erbal or written communications or images transmitted in any manner (including digitally or electronically), physical acts committed, aggression, or any other behaviors . . . that places the targeted student in reasonable fear of harm to the targeted student's person or property; has a substantially detrimental effect on the targeted student's physical or mental health; has the effect of substantially interfering with the targeted student's academic performance; or has the effect of substantially interfering with the targeted student's ability to participate in or benefit from the services, activities, and privileges provided by the school.[169]

Similarly, New Jersey's legislation defines bullying as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that . . . will have the effect of physically or emotionally harming a student or damaging the student's property; . . . has the effect of insulting or demeaning any student; . . . [or] creates a hostile educational environment for the student by interfering with the student's education.[170]

New Jersey's legislation also requires school corporations to adopt anti-bullying policies and reporting procedures.[171]

New Jersey first implemented its anti-bullying law in 2002.[172] The legislation was amended in 2007 to include cyberbullying and in 2008 to require school districts to publish their anti-bullying policies on their websites and provide it to parents annually.[173] The legislature also enacted an amendment in 2011, making it one of the most comprehensive bullying laws in the United States.[174] The amendments enacted in 2011 added several additions to the New Jersey anti-bullying laws that do not pertain to Indiana including the appointment of an anti-

---

New Jersey as a model for the bullying prevention programming.).

167. *See id.*; *see also* MODEL POLICY AND GUIDANCE FOR PROHIBITING HARASSMENT, INTIMIDATION AND BULLYING ON SCHOOL PROPERTY, AT SCHOOL SPONSORED FUNCTIONS AND ON SCHOOL BUSSES 1 (2011) [hereinafter NJ MODEL POLICY], *available at* www.state.nj.us/education/parents/bully.pdf.

168. IND. CODE §§ 20-33-8-0.2, -13.5.

169. *Id.* § 20-33-8-0.2

170. N.J. STAT. ANN. § 18A:37-14 (West 2002).

171. N.J. STAT. ANN. § 18A:37-13.1 (West 2011).

172. N.J. STAT. ANN. § 18A:37-13 (West 2002).

173. *Id.* § 18A:37-13.1.

174. *Id.*

bullying specialist within the schools,[175] a bullying prevention fund,[176] and bullying laws relating to institutions of higher education.[177] Additionally, the New Jersey legislature amended portions of the previous legislation.[178] However, the changes were specific to language usage in certain parts and did not alter the substance of the previous legislation.[179]

Despite the comprehensive nature of the legislation, a report regarding the health of New Jersey high school students indicates that bullying is still a problem within the state.[180] In 2011, after the amended legislation was passed, twenty percent of high school students indicated they were bullied on school property.[181] These statistics are nearly identical to results of the 2009 survey, which indicated that nearly twenty-one percent of high school students reported they were bullied on school property.[182] Additionally, nearly twenty-five percent of students aged fifteen and younger reported being bullied on school property.[183] A comparison between New Jersey students and students nationally reported that students in New Jersey were at an equal risk of being bullied on school property as students nationally, which includes states without stringent anti-bullying legislation.[184]

These statistics indicate, at least initially, that the amendments to the bullying legislation had a limited effect on the prevention of bullying.[185] Additionally, these statistics indicate that the previous versions of the New Jersey anti-bullying legislation, nearly identical to Indiana's legislation, still failed to prevent nearly twenty percent of high school students from being bullied on school property.[186] New Jersey collected surveys from high school students to compile these statistics.[187] Even though the surveys were collected by the New Jersey Department of Education, only eighty-two percent of schools participated in the

---

175. N.J. STAT. ANN. § 18A:27-20 (West 2011).

176. *Id.* § 18A:37-2B.

177. *Id.* § 18A:3B-6B.

178. *Id.* § 18A:17-46; *id.* § 18A:37-17; *id.* § 18A:37-15; *id.* § 18A:37-14.

179. *Id.* § 18A:17-46; *id.* § 18A:37-17; *id.* § 18A:37-15; *id.* § 18A:37-14.

180. N.J. DEP'T OF EDUC., NEW JERSEY STUDENT HEALTH SURVEY 2011 34 (2012)*, available at* www.state.nj.us/education/students/yrbs/2011/full.pdf.

181. *Id.*

182. *Id.*

183. *Id.*

184. RUTGERS EDWARD J. BLOUSTEIN SCH. OF PLANNING AND PUB. POLICY, COMPARISON BETWEEN NEW JERSEY STUDENTS AND U.S. STUDENTS 2011 YRBS 1 (2012), *available at* www.state.nj.us/education/students/yrbs/2011/comparisons.pdf.

185. N.J. DEP'T OF EDUC., *supra* note 180. (This report shows that nearly twenty percent of high school students were still bullied after this legislation was in place. *See id.* Additionally, the comparison between New Jersey students and students nationally demonstrated that New Jersey students were at an equal risk of being bullied. *See id*. Thus, these statistics indicate a limited effect.)

186. *Id.*

187. *Id.* at 6.

survey, and only seventy-three percent of students participated.[188] However, the number of responses are still a representative sample of New Jersey's high school students.[189]

Although New Jersey's legislation may have prevented some bullying, bullying is still an issue that needs to be resolved.[190] Like the anti-bullying laws in New Jersey that have failed to protect children from being bullied, Indiana's anti-bullying legislation will also likely fail to adequately address the problem of bullying within Indiana's schools without additional measures.

2. Georgia.—Like New Jersey's anti-bullying legislation, Georgia's anti-bullying legislation is very similar to Indiana's anti-bullying legislation.[191] In 1999, the Georgia General Assembly enacted anti-bullying legislation that "(1) defined bullying; (2) required each school district to adopt policies that prohibit bullying for grades six through 12; and (3) required such prohibition to be included in the student code of conduct."[192] In 2010, the bullying legislation was amended to expand the definition and require schools to notify parents with regard to instances of bullying.[193] Georgia defines bullying, harassment, and intimidation.[194] Georgia's definition of harassment tracks closely with Indiana's definition of bullying. Georgia defines bullying as:

> [A]ny gesture or written, verbal, or physical act, or any electronic communication that . . . will have the effect of harming a student or school employee or damaging his or her property; . . . [h]as the effect of substantially interfering with a student's educational performance, or . . . [h]as the effect of having a substantial negative impact on a student's or a school employee's emotional or psychological well-being; or [h]as the effect of insulting or demeaning any student or school employee in such a way as to cause substantial disruption in, or substantial interference with, or the orderly operation of the school.[195]

Additionally, the 2010 amendments required the adoption of a bullying policy for all schools.[196] Georgia has published a student health survey each year, beginning with the 2007-2008 academic year.[197] In the 2007-2008 survey, 16.05% of

---

188. *Id.*

189. *Id.*

190. *Id.* at 34.

191. ANALYSIS, *supra* note 51, at 41. *See* MODEL POLICY, *supra* note 133 at 1; *see also* NJ MODEL POLICY, *supra* note 167; GA. DEP'T OF EDUC., POLICY FOR PROHIBITING BULLYING, HARASSMENT AND INTIMIDATION 11 (2011) [hereinafter GA. MODEL POLICY], *available at* http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/Documents/GaDOE%20Bullying%20Policy_August%202011.pdf.

192. GA. MODEL POLICY, *supra* note 191, at 3.

193. *Id.*

194. *Id.*

195. *Id.* at 4-5. See *supra* notes 166-77 for Indiana and New Jersey's definitions of bullying.

196. GA. MODEL POLICY, at 3.

197. GA. DEP'T OF EDUC., STUDENT HEALTH SURVEY II (2009) [hereinafter GA. SURVEY 2009],

students surveyed between grades six and twelve indicated other students had bullied them within the past thirty days.[198] These statistics haven't dramatically changed from the 2007-2008 academic year to the 2012-2013 academic year.[199]

In 2008-2009, 16.39% of students reported having been bullied;[200] in 2009-2010, 16.29% reported being bullied;[201] in 2010-2011, 14.91% reported being bullied;[202] in 2011-2012, 14.51% reported being bullied;[203] and in 2012-2013,

---

available at http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/GSHS-II/GSHS%20State%20Reports/2009/State%20Report%202009.pdf. (This statistic was calculated from data from *Table of Grade by Bullied*. The statistic was computed by subtracting the total students who reported being bullied zero days from the total number of students surveyed. The result was then divided by the total number of students surveyed. The result, when multiplied by 100, provided the percentage of students who reported being bullied within thirty days preceding the survey.)

198. *Id.* at 10.

199. GA. DEP'T OF EDUC., STUDENT HEALTH SURVEY II 13 (2013) [hereinafter GA. SURVEY 2013], *available at available at* http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/GSHS-II/GSHS%20State%20Reports/2013/State%20Report%202013.pdf. (This statistic was calculated from data from *Table of Grade by Bullied*. The statistic was computed by subtracting the total students who reported being bullied zero days from the total number of students surveyed. The result was then divided by the total number of students surveyed. The result, when multiplied by 100, provided the percentage of students who reported being bullied within thirty days preceding the survey.)

200. GA. SURVEY 2009, *supra* note 197.

201. GA. DEP'T OF EDUC., STUDENT HEALTH SURVEY II 10 (2010) [hereinafter GA. SURVEY 2010], *available at* http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/GSHS-II/GSHS%20State%20Reports/2010/State%20Report%202010.pdf. (This statistic was calculated from data from *Table of Grade by Bullied*. The statistic was computed by subtracting the total students who reported being bullied zero days from the total number of students surveyed. The result was then divided by the total number of students surveyed. The result, when multiplied by 100, provided the percentage of students who reported being bullied within thirty days preceding the survey.)

202. GA. DEP'T OF EDUC., STUDENT HEALTH SURVEY II 12 (2011) [hereinafter GA. SURVEY 2011], *available at* http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/GSHS-II/GSHS%20State%20Reports/2011/State%20Report%202011.pdf. (This statistic was calculated from data from *Table of Grade by Bullied*. The statistic was computed by subtracting the total students who reported being bullied zero days from the total number of students surveyed. The result was then divided by the total number of students surveyed. The result, when multiplied by 100, provided the percentage of students who reported being bullied within thirty days preceding the survey.)

203. GA. DEP'T OF EDUC., STUDENT HEALTH SURVEY 13 (2012) [hereinafter GA. SURVEY 2012], *available at* http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/GSHS-II/GSHS%20State%20Reports/2012/State%20Report%202012.pdf. (This statistic was calculated from data from *Table of Grade by Bullied*. The statistic was computed by subtracting the total students who reported being bullied zero days from the total number of students surveyed. The result was then divided by the total number of students surveyed. The

14.63% reported having been bullied.[204] It appears from these statistics that despite Georgia's bullying legislation seven out of every fifty students are still being bullied today.[205]

While these statistics are not staggering, they are still significant. They indicate that although Georgia's bullying legislation may have helped the problem, bullying continues to occur in Georgia. Georgia's bullying legislation could still be improved with other methods of bullying prevention. Much like Georgia and New Jersey, Indiana's legislation will not adequately reduce instances of bullying. Additional measures should be adopted to provide safer school environments for Indiana students.

III. IMPOSING CRIMINAL LIABILITY

Indiana needs to adopt criminal sanctions for bullies. This section discusses the effects of criminalizing bullying in Indiana and also discusses other jurisdictions that have adopted or are in the process of adopting criminal sanctions for bullying. Also, this section discusses the potential benefits and consequences of imposing criminal liability on bullies. Finally, this section considers other crimes that are similar to bullying and explains why bullying should be treated as a separate offense.

A. Criminalizing Bullying

With the high percentage of bullying occurring within Indiana, the state should adopt criminal sanctions for bullies to help reduce instances of bullying within the state. According to a report from the U.S. Department of Education, there is "a recent trend toward treating the most serious forms of bullying as criminal conduct that should be handled through the criminal justice system."[206] Additionally, the report concluded, "[r]ecent state legislation and policy addressing school bullying has emphasized an expanded role for law enforcement and the criminal justice system in managing bullying on school campuses."[207] The trend is characterized by the growing number of states that require mandatory reporting of bullying offenses that may violate criminal statutes.[208] In 2011, when the U.S. Department of Education released this report, seven states had bullying laws that included provisions for criminal liability for bullying behavior.[209] These laws mandate school officials report bullying instances that potentially violated criminal law or required school bullying policies to include clear instructions to

---

result, when multiplied by 100, provided the percentage of students who reported being bullied within thirty days preceding the survey.)

204. GA. SURVEY 2013, *supra* note 199.

205. *Id.*

206. ANALYSIS, *supra* note 51, at 20.

207. *Id.* at 19.

208. *Id.* at 20.

209. *Id.*

determine when and how violations should be reported to law enforcement.[210] Additionally, some states have put bullying provisions in their criminal codes.[211]

In 2009, North Carolina passed legislation making cyberbullying a misdemeanor.[212] Lawmakers passed this legislation to "protect[] children of this state by making cyber-bullying a criminal offense punishable as a misdemeanor."[213] North Carolina passed amended legislation in 2012 extending the protections provided by the cyberbullying law.[214] The North Carolina General Assembly stated that the purpose of the amended legislation was "to protect all children from bullying and harassment."[215] In North Carolina in 2009, more than twenty-three percent of middle school students aged fourteen or older were victims of cyberbullying.[216] A little less than two years after cyberbullying was criminalized, the number dropped to eighteen percent.[217] Additionally, the percentage of middle school females that were victims of bullying decreased by nearly two percent from 2009 to 2011.[218] Between July 2010 and July 2011, twenty-six individuals were charged with cyberbullying in North Carolina.[219] Additionally, eighty-nine individuals faced charges of cyberbullying between July 2011 and June 2013.[220] North Carolina's Department of Public Instruction provides specific standards of information that students are to receive during the course of their instruction in the state.[221] One set of standards, called the NC

---

210. *Id.*

211. *Id.* at 20.

212. *Id. See* N.C. GEN. STAT. § 14-458.1 (2009) (amended 2012). (Because North Carolina passed the law so recently, there is limited data available regarding how many students are victims of cyberbullying.)

213. N.C. GEN. STAT. § 14-458.1 (2009).

214. *See generally* N.C. GEN. STAT. § 14-458.1 (2012).

215. S. 707, 2011 Gen. Assemb., Reg. Sess. (NC. 2012).

216. N.C. DEP'T OF EDUC., YOUTH RISK BEHAVIOR SURVEY 39 (2009) [hereinafter YOUTH RISK BEHAVIOR SURVEY 2009], *available at* www.nchealthyschools.org/docs/data/yrbs/2009/middleschool/statewide/tables.pdf.

217. NORTH CAROLINA DEPARTMENT OF EDUCATION, YOUTH RISK BEHAVIOR SURVEY 9 (2011) [hereinafter YOUTH RISK BEHAVIOR SURVEY 2011], *available at* www.nchealthyschools.org/docs/data/yrbs/2011/middleschool/statewide/tables.pdf.

218. YOUTH RISK BEHAVIOR SURVEY 2009, *supra* note 216; YOUTH RISK BEHAVIOR SURVEY 2011, *supra* note 217.

219. *Misdemeanor Non-Motor Vehicle Case Activity Report*, THE NORTH CAROLINA COURT SYSTEM (Oct. 4, 2011), http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy10-11.asp.

220. *Misdemeanor Non-Motor Vehicle Case Activity Report*, THE NORTH CAROLINA COURT SYSTEM (July 31, 2012), http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy11-12.asp; *Misdemeanor Non-Motor Vehicle Case Activity Report*, THE NORTH CAROLINA COURT SYSTEM (July 17, 2013), http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy12-13.asp.

221. Linda Brannan, *K-12 Curriculum and Instruction/NC Standard course of Study,* N.C. DEP'T OF PUB. INSTRUCTION, www.ncpublicschools.org/curriculum/guidance/ (last visited Aug. 26,

Guidance Essential Standards, requires that a school counselor or teacher provide special class discussion focused on timely issues, such as cyberbullying.[222] All staff members are expected to implement these standards in each classroom, to ensure that students are aware of the policies and procedures regarding a variety of issues, including cyberbullying.[223]

Several other states also have criminal statutes regarding bullying.[224] Idaho passed legislation that provides a definition and prohibition of harassment, intimidation and bullying among students.[225] In Kentucky, legislators added "harassing behavior" and "harassing communication" to its criminal code in 2008.[226] The Kentucky Department of Education recently released information regarding trends of high school students from 2011 to 2013.[227]

The trends indicate that cyber-bullying decreased during that time period, falling from 17.4% of high school students having experienced cyberbullying in 2011 to 13.2% in 2013.[228] Virginia also considered expanding its current legislation, making bullying potentially punishable by a $2,500 fine and up to a year in prison.[229] Several states with laws that allow for the prosecution of cyberbullies experienced a lower percentage of cyberbullying among high school students in 2011 than Indiana.[230] In Indiana, 18.7% of high school students experienced cyberbullying, while only 14.8% high school students in Virginia were cyberbullied during the same time period.[231] Additionally, only 17.4% of Kentucky high school students and 17.0% of Idaho high school students were victims of cyberbullying.[232] Nationally 16.2% of high school students experienced cyberbullying during that same time frame.[233]

Florida legislators are considering making all types of bullying criminally punishable offenses.[234] Called "Rebecca's Law," House Bill 451 proposed to

---

2014).

222. *Id.*

223. *Id.*

224. ANALYSIS, *supra* note 51, at 20.

225. *See id.* (discussing IDAHO CODE ANN. § 18-917A (2013)).

226. *See id.* (discussing KY. REV. STAT. ANN. § 158.444 (2008) (amended 2013)).

227. Nancy Rodriguez, *Fewer Kentucky Students Engaging in Risky Behaviors*, KY. DEP'T OF EDUC. (Oct. 25, 2013), *available at* http://education.ky.gov/comm/news/Documents/R%2013-109-KY%20Youth%20Risk%20Behavior%20Survey.pdf.

228. *Id.*

229. ANALYSIS, *supra* note 51, at 20.

230. *See generally Youth Online: High School YRBS*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://nccd.cdc.gov/youthonline/App/Results.aspx?TT=C&SID=HS&QID=H23&LID=KY&LID2=SL&YID=2009&YID2=SY&SYID=&EYID=&HT=QQ&LCT=LL&COL=S&ROW1=N&ROW2=N&TST=false&C1=&C2=&SC=DEFAULT&SO=ASC&VA=CI&CS=Y&DP=1&QP=G&FG=1&FR=1&FS=1&TABLECLICKED=1 (last visited Aug. 26, 2014).

231. *Id.*

232. *Id.*

233. *Id.*

234. Alessandra Malito, *Mother of Bullied Teen Hopes to Change Florida's Laws*, NBC NEWS

make the first bullying offense a misdemeanor.[235] Matt Morgan, an attorney who has covered several high-profile civil justice cases in Florida, believes the legislation will create awareness among parents and students that bullying is a crime.[236] Morgan stated, "We believe that Rebecca's Law will deter students from bullying others in the future and will potentially save lives."[237] There was an identical bill in the Florida Senate.[238]

In a recent case in Massachusetts, five students faced criminal charges for the persistent bullying of another student who eventually committed suicide.[239] This was the first visible case involving school bullying where students faced criminal charges.[240] Two of the students pled guilty to criminal harassment[241] and were sentenced to probation and community service.[242] At the time this case was decided, sixty-one percent of registered voters in Massachusetts approved of making school bullying a crime.[243]

B. Benefits of Imposing Criminal Liability

1. General Discussion About Deterrence Theory.—As the recent trend toward criminalizing bullying suggests, there are benefits of imposing criminal liability. It is important to understand why criminalizing acts of bullying would be effective in reducing instances of bullying. One argument for the effectiveness of criminalization is the deterrence effect. The primary goal of general deterrence is to punish one person to dissuade others from committing the same or similar crimes.[244] Under general deterrence theory, a person's punishment is used to reduce instances of similar criminal conduct.[245] Because one person is punished, fear of punishment is instilled in would-be violators of the law, potentially persuading them to act lawfully instead of committing the crime.[246] One important aspect of general deterrence theory is that it "implies a *legal* theory of crime control, that is, a statement about the impact of legal sanctions on the

---

(Jan. 17, 2014), http://usnews.nbcnews.com/_news/2014/01/17/22341028-mother-of-bullied-teen-hopes-to-change-floridas-laws?lite.

235. *HB451-Bullying*, FLORIDA HOUSE OF REPRESENTATIVES, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=51583 (last visited Aug. 26, 2014).

236. Malito, *supra* note 234.

237. *Id.*

238. *HB451-Bullying*, *supra* note 235. (The bill did not pass in 2014.)

239. ANALYSIS, *supra* note 51, at 20.

240. *Id.*

241. Denise Lavoie, *5 Charged in Mass. Bullying Case Strike Deals*, ASSOCIATED PRESS, (May 4, 2011), www.nbcnews.com/id/42898390/ns/us_news-crime_and_courts/t/two-teens-mass-bullying-case-plead-guilty/#UleuClafgfE.

242. ANALYSIS, *supra* note 51, at 20.

243. *Id.*

244. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (2012).

245. *Id.*

246. *Id.*

incidence of crime."[247]

The thrust of general deterrence stems from the threat or fear of the punishment itself, for example, a person refrains from committing a crime for fear of being incarcerated.[248] Additionally, general deterrence relies on weighing the expected costs and rewards with regard to criminal activity.[249] In addition to fearing punishment, some would-be criminals fear the stigma of being arrested.[250] "If persons anticipate that others will disapprove of their arrest for committing a certain act, and they refrain from that activity because they fear the stigma of being caught."[251]

Another important aspect of general deterrence is the concept of attachment costs.[252] Attachment costs refer to the "negative consequences for relationships with close friends and relatives."[253] What many find "[m]ore important than that actual response of significant others is the perception of what their response is likely to be."[254] This assumes that the close relationships between family and friends and the would-be criminal are in actual jeopardy, not just the person's reputation.[255] If a person fears his or her relationship is in jeopardy due to a criminal act, he or she may be deterred from acting.[256]

In addition to general deterrence, would-be repeat criminals often face individual deterrence when they face the consequences of the court system.[257] With individual deterrence, the punishment is meant to prohibit the criminal from committing future misconduct.[258]

2. Deterring Bullies.—Criminalizing bullying would provide a deterrent effect and would help reduce the instances of bullying in Indiana.[259] While it is difficult to prove or measure deterrence effects, a 2005 study suggests that sanctions for juvenile offenders do have deterrent effects.[260] The study

---

247. Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. NO. 4 545, 547 (1986).

248. *Id.*

249. *Id.*

250. *Id.* at 562.

251. *Id.* at 562-63.

252. *Id.* at 564.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. DRESSLER, *supra* note 244.

258. *Id.*

259. *See generally id; see also* RICHARD E. REDDING, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? (2010), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf; Steven D. Levitt, *Juvenile Crime and Punishment,* 106 J. OF POL. ECON. NO. 6 1156 (1998) Morgan O. Reynolds, *Does Punishment Deter?*, PO L'YBACKGROUNDER NO. 148 (1998); Williams & Hawkins, *supra* note 247.

260. REDDING, *supra* note 259, at 3.

considered the effects of arrest rates on juvenile crime rates.[261] The study also found that "the arrest rate had a general deterrent effect on the crimes of drug dealing and assault."[262] Additionally, the study found that the likelihood that juveniles would sell drugs decreased by nearly four percent for each additional arrest, and the likelihood that juveniles would commit assault decreased by nearly seven percent.[263] If criminal liability were imposed on children who committed acts of bullying, there would almost certainly be a general deterrent effect on other would-be bullies.[264] After North Carolina passed the legislation that made cyberbullying a crime, cyberbullying declined within two years.[265] Kentucky also saw a decline.[266] Additionally, students would be generally deterred because they would fear the harm that criminal liability would impose upon their reputations.[267] By age eleven or twelve, children are aware of the importance of their reputations and the desirability of friendship.[268] Because students value their reputation, they are likely be deterred from criminal activity that will damage their reputation.[269]

Students would also fear the stigma of arrest.[270] General deterrence theory suggests that if students believe that other students, parents, or teachers will disapprove of the arrest then students will be deterred from committing the act due to that fear.[271] The juvenile justice system may cause youths to "experience stigmatization during interpersonal interactions with peers, guards, judges, lawyers, or social workers as he goes through the juvenile justice system."[272] Students would also fear the harm that criminal liability may impose upon their relationships with family members and friends.[273] Students may fear that important relationships may suffer if they are held criminally liable for bullying.[274] "Decisions to commit crimes . . . are influenced not just by the price of the crime, but also by individuals' perceptions of others' behavior and attitudes; these perceptions are shaped by the social meaning of law and private conduct."[275]

---

261. *Id.*

262. *Id.*

263. *Id.*

264. Williams & Hawkins, *supra* note 247, at 565.

265. *See* YOUTH RISK BEHAVIOR SURVEY 2009, *supra* note 216; *see also* YOUTH RISK BEHAVIOR SURVEY 2011, *supra* note 217.

266. Rodriguez, *supra* note 227.

267. Williams & Hawkins, *supra* note 247, at 562-63.

268. Bernice L. Neugarten, *Social Class and Friendship Among School Children*, 51 AM. J. SOC. NO. 4 305, 313 (1946).

269. Williams & Hawkins, *supra* note 247, at 565.

270. *Id.* at 562.

271. *Id.* at 562-63.

272. Anne R. Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 LAW & SOC'Y REV. NO. 4, at 583, 587 (1974).

273. Williams & Hawkins, *supra* note 247, at 564.

274. *Id.*

275. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349,

Finally, since juvenile records may not be erased, the ramifications for their actions may further deter bullying.[276] Although students may be punished under the current system, the punishments are less severe and less likely to impact the future of the student.[277] For example, since universities may have access to juvenile records, a high school student that plans to attend college may fear that a criminal sanction could cause problems with admittance.[278] Furthermore, students may also fear that criminal sanctions would prohibit them from participating in future activities which they enjoy.

Criminalizing bullying would provide many benefits to Indiana, including crime reduction and lower cost to the public. According to a report by Fight Crime: Invest in Kids, "[e]ach high-risk juvenile prevented from adopting a life of crime could save the country between $1.7 million and $2.3 million."[279] Sixty percent of boys who bully are more likely to commit crimes and have at least one conviction by age twenty-four.[280] The same report indicated that forty percent of boys who engaged in bullying behaviors are more likely to have three or more convictions by age twenty-four.[281]

3. Retributivism Theory.—In addition to deterrence, retributivism is another theory that supports criminalizing bullying. Retributivism stems from the idea that those who commit crimes deserve to be punished for them.[282] Retribution and punishment are "deserved when the wrongdoer freely chooses to violate society's rules."[283] Retributivism is based on the idea that humans have free will and should be blamed when they choose to commit a crime.[284] One type of retributivism, "victim vindication,"[285] focuses on punishment believing that it allows the criminal justice system to "right a wrong."[286] Because bullying may have significant effects on its victims, such as depression or poor academic performance,[287] under retributivism theory, the bullies should face the consequences of their actions.[288]

4. Accountability for Bullies.—Another reason Indiana should adopt legislation criminalizing bullying is because bullies should be held accountable

---

386 (1997).

276. THE YOUTH LAW T.E.A.M. OF IND., A GUIDE FOR PARENTS TO THE JUVENILE JUSTICE SYSTEM IN INDIANA: "YOUR CHILD AND JUVENILE COURT" 26-27 (2010), *available at* www.youthlawteam.org/files/2010%20Parent's%20Handbook.pdf.

277. DISCIPLINARY, *supra* note 156.

278. THE YOUTH LAW T.E.A.M. OF IND., *supra* note 276, at 25.

279. FIGHT CRIME: INVEST IN KIDS, *supra* note 57, at 15.

280. *Id.* at 8.

281. *Id.*

282. DRESSLER, *supra* note 244, at 16.

283. *Id.*

284. *Id.*

285. *Id.* at 18.

286. *Id.*

287. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 27.

288. Graham, *supra* note 50.

for their actions. Bullying is similar to crimes of intimidation, harassment, and stalking. [289] Criminal sanctions for bullying should be similar to those imposed for these types of crimes. Criminal sanctions would force bullies to face the consequences of their decisions. Although there are other ways to punish bullies, the criminal justice system is the most effective because allows for both deterrence and retribution.

C. Consequences of Imposing Criminal Liability

If Indiana adopted criminal liability for bullies, the bullies would face the juvenile court system which was created in the interest of the child.[290] Indiana's juvenile court system has three important matters to consider: the child's and society's interest; the custody or control of the offender; and the deterrence or reduction juvenile delinquency.[291] The financial expense of putting a bully through the juvenile justice system, as well as the limited facilities, must also be considered when utilizing the juvenile justice system.[292] In 2009, Indiana spent about $154 per day for each juvenile in residential placement, and in total, costing the state approximately $286,953 per day. [293] In comparison, Indiana's total cost per day for the total adult prison population is more than $1.5 million.[294]

Although there are costs associated with using the juvenile justice system, the system helps hold juveniles accountable for their behavior.[295] While juvenile court systems may punish juveniles, the court system may also offer rehabilitation.[296] The juvenile justice system promotes "'quality prevention programs' that address[] the therapeutic needs of juveniles amenable to treatment, as well as programs that increase[] 'juvenile accountability' for their crimes."[297]

An argument against criminalizing bullying is that children do not have the requisite mental capacity to be held liable for their actions.[298] Although children

---

289. IND. CODE §§ 35-45-10-1, -2 (2013); *id.* § 35-45-2-1.

290. Joseph B. Sanborn, Jr., *The Juvenile, the Court or the Community: Whose Best Interests Are Currently Being Promoted in Juvenile Court*, 17 THE JUST. SYS. J. NO.2 249 (1994).

291. *Id.* at 252.

292. *Id.* at 254.

293. JUSTICE POLICY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 4 (2009), *available at* www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps_pdf.

294. VERA INST. OF JUSTICE, THE PRICE OF PRISONS: INDIANA (2012), *available at* www.vera.org/files/price-of-prisons-indiana-fact-sheet.pdf.

295. Sanborn, *supra* note 290, at 257-58.

296. *Id.* at 260.

297. Elizabeth Brown, *Crime, Governance, and Knowledge Production: The "Two-Track Common-Sense Approach" to Juvenile Criminality in the United States*, 36 SOC. JUST. NO. 1 102 (2009) (referring to changes in the Juvenile Justice and Delinquency Prevention Act).

298. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. NO.4, at 333, 334 (2003).

under fifteen are more likely than older adolescents to have a lower mental capacity, nearly eighty percent of children ages eleven to thirteen are not significantly impaired. Similarly, approximately eighty-five percent of children ages fourteen and fifteen do not have a reduced mental capacity and may be held accountable for their actions.[299] Additionally, nearly ninety-five percent of children age sixteen to seventeen are not significantly impaired in their capacity to be held liable for their actions.[300]

D. Similar Criminal Sanctions

Indiana should enact a statute that makes bullying itself a crime.[301] With regard to student discipline, Indiana provided a definition of bullying with specific behaviors that must be addressed by school corporations.[302] While schools have attempted to address the problem,[303] as indicated previously, there is still a significant amount of bullying that occurs throughout the state, and the state of Indiana can do better.[304] Like New Jersey and Georgia, Indiana's bullying laws by themselves are not enough.[305] While bullying has decreased some, there is still room for improvement, and adding additional legislation that makes bullying a criminal offense would likely help Indiana to better deter bullying.[306]

Indiana should create a criminal statute against acts of bullying modeled after the definition provided in Indiana Code section 20-33-8-0.2.[307] This statute should include several elements. First, the statute should only punish "overt, unwanted, repeated acts or gestures."[308] Second, these acts must be "committed by a student or group of students against another student."[309] Third, the acts must be committed with "the intent to harass, ridicule, humiliate, intimidate, or harm the targeted student and create for the targeted student an objectively hostile school environment."[310] The school environment can be hostile in several ways, and the statute should include the following factors, which address hostility. A school environment is hostile if it:

> (1) [P]laces the targeted student in reasonable fear of harm to the targeted student's person or property;(2) has a substantially detrimental effect on the targeted student's physical or mental health; (3) has the effect of

---

299. *Id.* at 347.
300. *Id.*
301. *See generally* IND. CODE §§ 35-45-10-1, -2 (2013); *id.* § 35-45-2-1.
302. *Id.* § 20-33-8-0.2.
303. *Id.*
304. Loughlin, *supra* note 14.
305. N.J. DEP'T OF EDUC., *supra* note 180.
306. *Id.*
307. IND. CODE § 20-33-8-0.2 (2013).
308. *Id.*
309. *Id.*
310. *Id.*

> substantially interfering with the targeted student's academic performance; or (4) has the effect of substantially interfering with the targeted student's ability to participate in or benefit from the services, activities, and privileges provided by the school.[311]

The statute should provide that a student who engages in acts of bullying will be held criminally liable and may face punishments including: probation, community service, or mandatory anger management or counseling services depending on the severity of the bullying. The offender should first be punished without jail time, but should be put through the juvenile justice system's programming to hold them accountable for their actions.[312] If the child commits the offense multiple times, the punishment imposed should grow increasingly more severe, and could include time in detention facilities.[313]

Indiana could model their statute after Florida's proposed statute, House Bill 451.[314] This proposed bill states in part that "[a] person who willfully, maliciously, and repeatedly harasses or cyberbullies another person commits the offense of bullying, a misdemeanor of the first degree."[315] Additionally, the proposed legislation goes on to state that "[a] person who willfully, maliciously, and repeatedly harasses or cyberbullies another person and makes a credible threat to that person commits the offense of aggravated bullying, a felony of the third degree."[316]

A bullying statute imposing criminal liability would provide a more comprehensive approach for law enforcement to address bullying within the juvenile justice system because Indiana's definition of bullying already includes harassment and intimidation.[317] Although similar, bullying should be treated differently than harassment because harassment is "motivated by characteristics of the targeted victim."[318] Harassment includes "repeated or continuing impermissible conduct that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress."[319] Stalking and intimidation are defined in another statute similar to bullying.[320] Stalking includes repeated conduct which causes the victim to "feel terrorized, frightened, intimidated, or threatened."[321] Intimidation centers on threatening the

---

311. *Id.*

312. Brown, *supra* note 297.

313. Matt Morgan, *Matt Morgan: Rebecca's Law Will Deter Students from Bullying, Save Lives*, MORGAN & MORGAN (Jan. 23, 2014), http://www.forthepeople.com/blog/matt-morgan-rebeccas-law-will-deter-students-from-bullying-save-lives.

314. *HB451-Bullying*, *supra* note 235.

315. H.B. 451, 2014 Reg. Sess. (Fl. 2014).

316. *Id.*

317. IND. CODE § 20-33-8-0.2 (2013).

318. ANALYSIS, *supra* note 51, at 17.

319. IND. CODE § 35-45-10-2 (2013).

320. *Id.* § 35-45-10-1.

321. *Id.*

victim.[322] Students can be charged with these similar crimes, however, they are not as specific as the proposed bullying statute, which is more precisely defined and focuses on the impact of bullying within the school environment.[323] Florida's proposed legislation provides some insight into the importance of a separate law criminalizing bullying.[324] Florida State Representative Heather Fitzhagen, sponsor for House Bill 451, said she hopes that providing consequences for bullying will help attain national attention for the movement.[325] Fitzhagen stated, "I think this is going to raise awareness because now there is a consequence to this type of behavior."[326]

CONCLUSION

Although Indiana's current bullying legislation has taken a step in the right direction, Indiana needs to implement additional measures to provide more protection for children. By making bullying a criminal offense, Indiana will be better able to deter bullying. Indiana should utilize its existing definition of bullying and integrate it into the Indiana Criminal Code. When youths are accused of bullying, they should face Indiana's juvenile justice system.

Bullying is still a significant problem in the state of Indiana and across the nation. Nationally, eight percent of girls who are frequently bullied and four percent of boys who are frequently bullied are suicidal.[327] Both the victims and the bullies face long term consequences and lasting effects of bullying.

Making bullying a criminal offense in Indiana would be beneficial for two main reasons. First, it would create general and individual deterrence against bullying. [328] Second, it would hold the bully accountable for his or her actions.[329] While there are already similar statutes within the state, a criminal bullying provision would be a more comprehensive way for law enforcement officers to address the issue of bullying in the criminal context.

Through recent legislation, Indiana has attempted to remedy the problem of bullying, but like Georgia and New Jersey, Indiana's current bullying legislation still leaves many instances of bullying unpunished.[330] By creating a criminal statute that directly addresses bullying, the criminal justice system can work with school corporations to best prevent bullying from occurring.

---

322. *Id.* § 35-45-2-1.

323. *Manchester Regional High School Student Charged with Harassment for Cyberbullying*, NEWS 12 NEW JERSEY (June 14, 2013), http://newjersey.news12.com/news/manchester-regional-high-school-student-charged-with-harassment-for-cyberbullying-1.5485693.

324. Morgan, *supra* note 313.

325. *Id.*

326. *Id.*

327. FIGHT CRIME: INVEST IN KIDS, *supra* note 57.

328. DRESSLER, *supra* note 244.

329. *Id.* at 16.

330. N.J. DEP'T OF EDUC., *supra* note 180.

THE QUIET CRISIS: THE KERNAN-SHEPARD REPORT AND INDIANA'S NEED TO ELIMINATE TOWNSHIP GOVERNMENT

PATRICK M. CLINE*

INTRODUCTION

"President Harry Truman kept sign on his desk. It said, 'The buck stops here.' When it comes to local government in Indiana, few of us know where the buck stops."[1] In 2007, Governor Mitch Daniels asked then-Chief Justice Shepard and former Governor Joe Kernan to chair a bi-partisan, blue ribbon commission[2] on local government reform.[3] In December of 2007, the Indiana Commission on Local Government Reform (the Commission) delivered its report, colloquially known as the "Kernan-Shepard Report" (KSR), containing twenty-seven specific recommendations to improve the way Hoosiers govern themselves at the local level.[4]

It has been more than five years since the report was delivered and very little reform has taken place. The recommendations from *KSR* shrink from the public debate more and more each year.[5] Meanwhile, the "complex layers of government [that] are often difficult to understand, monitor and hold accountable" continue to be the law of the land.[6]

This Note addresses one specific recommendation from the report—the transfer of the duties of township government to their respective county. This Note confirms the Commission's findings and addresses the objections of opponents. Part I outlines the general background and duties of township government. Part II discusses *KSR* and the Commission's methods, findings and reasoning. Part III explores which groups, organizations, and outlets have supported *KSR* recommendations. Part IV briefly describes legislative attempts at township reform. Part V examines the recent transition from township assessments to countywide assessments as an indicator of what full township

---

* J.D. Candidate, 2015, Indiana University Robert H. McKinney School of Law. I would like to thank Mark Lawrance, Larry Mitchell, Marion County Assessor Joseph O'Connor, and Chris Pryor for their time and willingness to be interviewed for this note. Further, I would like to thank Debbie Driskell for providing many sources and documents. Finally, thank you to Professor Cynthia Baker for her help throughout the note-writing process.

1. IND. COMM. ON LOCAL GOV'T REFORM, STREAMLINING LOCAL GOV'T: WE'VE GOT TO STOP GOVERNING LIKE THIS 3 (2007) [hereinafter COMMISSION REPORT].

2. A blue-ribbon commission is defined as being "selected for quality, reputation, or authority." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 163 (1983).

3. COMMISSION REPORT, *supra* note 1, at 42-45.

4. *Id.*

5. *See, e.g.*, Scott Smith, *The Problem With Poor Relief: Trustee System Dogged by Efficiency Questions*, KOKOMO TRIB., Sept. 1, 2013, *available at* http://www.kokomotribune.com/local/x86514363/The-problem-with-poor-relief.

6. COMMISSION REPORT, *supra* note 1, at 3.

consolidation might look like. Part VI identifies the opponents of reform and discusses their positions and arguments. Finally, Part VII offers a proposal to provide political cover to achieve reform. No matter how this reform is accomplished, this Note concludes that Indiana's township government structure is antiquated, inefficient, unaccountable, and defenders of this structure advance flawed arguments for its retention. The Indiana General Assembly should pass legislation transferring the duties of township trustees and advisory boards to county governments.

I. BACKGROUND ON TOWNSHIP GOVERNMENT

Indiana has 1008 township governments.[7] The Indiana Code outlines the responsibilities of the executive of township government—the township trustee.[8] These duties include poor relief, fire protection (in some areas), emergency management services (EMS) in some areas, and cemetery maintenance.[9] In addition to the 1008 township trustees in the state, most townships have a three-member legislative body, the township board.[10] *KSR* notes "[t]he cumulative effect is that Indiana has three complete levels of general-purpose government (counties, townships, and municipalities), one more layer than in most of the rest of the country. No other state has a universal layer of township government."[11]

II. THE KERNAN-SHEPARD REPORT

KSR represents six months[12] of work from a dedicated commission consisting of some tremendous Hoosier leaders and thinkers.[13] Governor Mitch Daniels' charge to the commission was one sentence long: "The purpose of the Blue-Ribbon Commission on Local Government Reform . . . is to develop recommendations to reform and restructure local government in Indiana in order to increase the efficiency and effectiveness of its operations and reduce its costs

---

7. *Indiana Townships*, IND. TOWNSHIP ASSOC., http://www.indianatownshipassoc.org/index.php/about-us-topmenu-38/ita-news/1-latest/14-townships-in-indiana (last visited Sept. 19, 2014) (listing each Indiana township).

8. IND. CODE § 36-6-4-3 (2011).

9. *Id.*

10. *Id.* § 36-6-6.

11. COMMISSION REPORT, *supra* note 1, at 25.

12. *Id.* at 2.

13. *Id.* at 5 (listing the members of the commission as Sue Ann Gilroy (former Sec. of State), Adam Herbert (former Ind. Univ. president), Louis Mahern (former State Senator and current Marion Cnty Library Bd. Chairman), Ian Rolland (retired Lincoln Nat'l Corp. Chairman and CEO), John Stafford (former Allen Cnty/Ft. Wayne gov't official and current IPFW staff member)); Gov. Mitchell Daniels, Jr., State of the State Address (Jan. 15, 2008) (transcript *available at* http://www.in.gov/governorhistory/mitchdaniels/files/2008stateofstate.pdf) (noting "[a]t my request, seven leading Hoosiers with no axes to grind, no interests at heart except the public interest, recently completed a true act of citizenship").

to Hoosier taxpayers."[14]

The Commission report summarized its research methodology: "We reviewed previous proposals from both government and non-government sources. We relied on existing research, of which there is plenty. We also were blessed with extensive citizen input. Finally, we learned from people on the front lines of local government, and experts who study local government."[15] Further, the report indicates twelve "guiding principles," which live at the heart of the recommendations it would make.[16] Among those principles are simplicity, transparency, cost savings, and flexibility.[17] Seeking long-term, common-sense solutions to provide "more equitable distribution of services and responsibility for funding them" were also encompassed in the Commission's guiding principles.[18]

In December 2007, the Commission reported its findings.[19] The report noted "[f]or most of a century, studies and proposals have suggested how we might streamline local government. Some piecemeal measures have been implemented. But most have not. So despite lots of hard work and good thinking, the complexity of local government has actually grown, compounding over time."[20] Through its review of the current state of local government in Indiana, the commission found "[w]ith more than 3200 independent local governments, our complex system of boundaries, officeholders and taxing authorities makes it increasingly difficult for citizens to affect local government services or the taxes that pay for them."[21]

To remedy the alarming findings, the commission made twenty-seven specific recommendations to improve the way local government in Indiana functions.[22] The ninth recommendation reads: "[t]ransfer the responsibility for administering the duties of township government for assessment, poor relief, fire protection, emergency medical services (EMS), cemeteries and any other remaining responsibilities to the county executive. Establish a countywide poor relief levy."[23] In support of this recommendation, the commission argues:

> [T]ownships are often too small, in terms of land area and population, to provide cost-effective public services. This problem only becomes more pronounced with increasing administrative, staffing, training and equipment requirements, particularly for fire protection. Broad variations in resources among so many local governments create

---

14. COMMISSION REPORT, *supra* note 1, at 42.
15. *Id.* at 7.
16. *Id.* at 11.
17. *Id.*
18. *Id.*
19. *Id.* at 1.
20. *Id.* at 3.
21. *Id.*
22. *Id.* at 13-15.
23. *Id.* at 24.

> inequities in basic services and taxes, such as fire protection, emergency medical services and poor relief. . . . We believe that Indiana counties are large enough to allow economies of scale in services, but not so large that they preclude sufficient access and responsiveness for citizens.[24]

As this Note discusses, part of this recommendation has been implemented by the elimination of most of Indiana's township assessors.[25] The rest of this important recommendation remains largely unimplemented.[26] The reasons for this legislative inaction will also be discussed at length.[27]

III. SUPPORT FOR REFORM

The Commission's recommendations found an early champion in the bully pulpit. Governor Daniels wasted no time urging the Indiana General Assembly to consider and implement these reforms:

> [*KSR*] charts the path to better local government and keeping property taxes down over the long haul. Indiana owes [Commission co-chairs] Joe Kernan, Randy Shepard, and their colleagues a heartfelt expression of thanks. And, in the wake of property tax reduction, we owe them bold action on the excellent recommendations they have given us.[28]

While Daniels did not get the bold action he asked the general assembly for, he found allies in some business groups, media outlets, and political pundits.[29]

Two of the biggest sources of reform support came from the Indiana and Indianapolis chambers of commerce and boards of REALTORS®.[30] Other groups, such as the League of Women Voters, have completed further studies

---

24. *Id.* at 25.

25. *See infra* Part V.

26. Smith, *supra* note 5.

27. *See infra* Parts IV, VI.

28. Daniels, *supra* note 13.

29. *See, e.g.*, Interview with Mark Lawrance, Senior Vice President/Foundation and Operations, Ind. Chamber of Commerce, in Indianapolis, Ind. (Oct. 22, 2013) [hereinafter Lawrance Interview] (audio recording on file with author); Editorial, *Townships Out of Touch*, INDIANAPOLIS STAR, Nov. 25, 2009, at A12; Abdul Hakim-Shabazz, *Strange Bedfellows*, IND. BARRISTER (Mar. 9, 2010, 5:38 PM), http://www.indianabarrister.com/archives/2010/03/strange_bedfellows-2.html.

30. Lawrance Interview, *supra* note 29; *Legislative Agenda*, GREATER INDIANAPOLIS CHAMBER OF COMMERCE, http://data.axmag.com/data/201401/20140109/U105280_F258202/FLASH/index.html (last visited Nov. 27, 2013); *Senate Bill No. 240*, IND. ASSOC. OF REALTORS®, http://indianarealtors.com/Uploads/SB0240.1.pdf (last visited Nov. 27, 2013) (stamping SB 240, which would have consolidated township government, with "SUPPORT" and a message urging IAR members to ask their legislators to vote for the bill); Interview with Chris Pryor, Member & Industry Advocacy Director, Metro. Indianapolis Bd. of Realtors, in Indianapolis, Ind. (Sept. 30, 2013) [hereinafter Pryor Interview] (audio recording on file with author).

urging more attention and reform[31] and others have supported more specific reforms.[32] Mark Lawrance, Senior Vice President with the Indiana Chamber of Commerce (Indiana Chamber), explains why this issue is important to the business community:

> Taking a look at their duties and what has happened over the years—they used to be responsible for education, they used to be responsible for roads, . . . for property tax assessing—and over the years, those [duties] have winnowed down to where [they are] really only doing a few tasks that we believe could be done more effectively and efficiently at the county level.[33]

Lawrance also notes that if most states can get by without townships, perhaps Indiana should ask "how much government can we really afford?"[34]

In a policy report issued two years prior to *KSR*, The Greater Indianapolis Chamber of Commerce (Indy Chamber) estimated consolidation of township services would save $5.6 million annually.[35] The Indy Chamber has maintained its support of reform efforts and local government consolidation remains on its 2014 legislative agenda.[36]

In addition to these chambers, the Indiana Association of REALTORS® (IAR)[37] and some of its largest local boards,[38] including the Metropolitan Indianapolis Board of REALTORS® (MIBOR), have been staunch supporters of township reform.[39] IAR put its lobbying weight and grassroots advocacy behind

---

31. *See, e.g.*, JEAN ANDRES, TIPPECANOE CNTY. TOWNSHIP GOV'T STUDY COMM. REPORT (2010), *available at* http://leaguelafayette.org/files/localgovrpt_and_appendix.pdf; DEANNA H. DURRETT, TOWNSHIP GOVERNANCE IN MONTGOMERY CNTY IND. (2008), *available at* http://www.lwvmontco.org/LWVTrusteeReport.pdf.

32. Tony Cook, *Business Tax Cut Paid for by the State*, INDIANAPOLIS STAR, Feb. 12, 2014, at A1 (quoting president of Firefighters Local 416 union in support of merging the remaining township fire departments in Marion County into the Indianapolis Fire Department because it is more efficient and effective).

33. Lawrance Interview, *supra* note 29.

34. *Id.*

35. Phillip L. Bayt & David P. Lewis, Invest in Indianapolis: A Common Vision for Government Efficiency and Investment in Our Community 11 (2005), *available at* https://resources.oncourse.iu.edu/access/content/group/24a3ad89-4a70-4e4a-0087-26cb583ea139/Website%20Research%20Page%20Materials/Research/Invest-in-Indy.pdf.

36. *Legislative Agenda*, *supra* note 30.

37. *Senate Bill No. 240*, *supra* note 30 (stamping SB 240, which would have consolidated township government, with "SUPPORT" and a message urging IAR members to ask their legislators to vote for the bill).

38. The Fort Wayne area board of REALTORS® is also a supporter. *Local Government Reform*, UPSTATE ALLIANCE OF REALTORS®, http://upstarindiana.com/government-affairs/laws-to-know/local-government/local-government-reform/ (last visited Nov. 27, 2013).

39. Pryor Interview, *supra* note 30.

the reform efforts shortly after Daniels' charge to the general assembly.[40] IAR stressed the importance of reform, especially due to limited property tax revenue.[41] In a 2007 letter to the editor, IAR CEO Karl Berron said "[l]ocal government must be willing to accept reasonable reforms of their current antiquated structure. Until they do, voters should not tolerate their call for new sources of revenue."[42]

MIBOR's Member and Industry Advocacy Director, Chris Pryor, says the reason MIBOR joined the reform supporters came down to efficiency and modernization.[43] Pryor notes that townships were established around the same time Indiana became a state and with the purpose of accommodating the way Hoosiers were traveling in the nineteenth century, primarily by walking or by horse.[44] This, he says, has resulted in over 1000 township governments providing duplicative services.[45] MIBOR questions the efficacy of dedicating the resources to do the same job over and over again.[46] Pryor explains that the cost of inefficient government is ultimately passed on to homeowners, the clients of MIBOR's members, through property taxes.[47]

In 2009, MIBOR, working with the Indiana Chamber, pulled the 2008 finance reports[48] townships are required to file with the Indiana Department of Local Government Finance (DLGF).[49] They looked at fund balances and the cost, per township, to deliver one dollar in direct service.[50] The results varied wildly, but were overwhelmingly unimpressive. Each county's report had statistics on each township that filed their mandatory reports on time, which, equally as troublesome, excluded quite a few townships.[51] The two most telling statistics from each township's analysis were the "Operating Balance as [percentage] of Expenditures" and the "Admin Expense per [dollar] of Direct Service."[52] The Operating Balance statistics included figures like 794%, meaning that the

---

40. *Senate Bill No. 240*, supra note 30.

41. *Id.*

42. Letter from Karl Berron, CEO, Ind. Assoc. of REALTORS®, to editor (Sept. 27, 2007) (on file with author).

43. Pryor Interview, *supra* note 30.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. These reports include "Cash & Investments Combined Statement," "Disbursements by Vendor," and Form TA-7.

49. Lawrance Interview, *supra* note 29.

50. *See, e.g.*, Study by Metro. Indianapolis Bd. of Realtors, Countywide Township Financial Comparison—2008, County: Cass (2009) (on file with author).

51. Eric Bradner, *Two Sides of the Same Story: Indiana's Traditional Township System has Critics and Defenders*, EVANSVILLE COURIER & PRESS, Nov. 15, 2009, at A1, *available at* http://www.courierpress.com/news/local-news/two-sides-of-the-same-story (noting that less than half of Indiana townships filed their reports on time in 2009).

52. *See infra* Appendix A.

township government, Boone County's Sugar Creek Township, had a balance at the end of the year that could fund, at its current level, the township's expenditures for nearly eight years without taking another dime in taxes.[53] Meanwhile, two schools in the same county had revenue shortages that required a voter referendum on tax hikes to fund the schools.[54]

The "Admin Expense per [dollar] of Direct Service" figure included townships with modest $0.17 in administration costs for each dollar in services delivered to constituents.[55] However, many townships ranged between $20 and $34 per dollar in direct service.[56] In fact, of the 232 townships studied that actually filed a report, twenty had a ratio of more than $10 in administration costs for each dollar in direct service.[57] To put that in perspective, the National Center for Charitable Statistics notes the federal government, for participation in a federal combined charity campaign, required charities to not exceed $0.25 in administrative costs for each dollar that goes to the charity's stated cause.[58] Only seven townships came in under that benchmark.[59]

In addition to these business and community groups, many media outlets used their editorial pages to support the reform efforts. The *Indianapolis Star* conducted a similar study of township financial reports, finding that:

> Indiana's townships, designated to assist with poor relief, are sitting on $215 million in surplus funds. Where did those extra dollars originate? Primarily from property taxpayers. [It is] outrageous, but [it is] also not new. An *Indianapolis Star* investigation in February [2009] found that townships were hoarding about $200 million. Nine months later, with Hoosiers suffering through one of the worst recessions in decades, Indiana's 1,008 township governments continue to sit atop a mountain of cash.[60]

Similar to the MIBOR study, the *Indianapolis Star* report noted the operations were "woefully inefficient."[61] Citing a study by another Indiana newspaper, the editorial gave examples of two Vanderburgh County townships that had expenses of $87,000 and $786,000 while only providing $509 and $725 in poor relief,

---

53. STUDY BY METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON—2008, COUNTY: BOONE (2009) (on file with author).

54. *Metro Area Election Results*, INDIANAPOLIS STAR, Nov. 3, 2010, at B5.

55. STUDY BY METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON—2008, COUNTY: HENDRICKS (2009) (on file with author).

56. *See infra* Appendix A.

57. *Id.*

58. *Nonprofit Fundraising and Administrative Costs*, NAT'L CENTER FOR CHARITABLE STATISTICS, http://nccsdataweb.urban.org/knowledgebase/index.php?category=40 (last visited Oct. 9, 2013).

59. *See infra* Appendix A.

60. Editorial, *Townships Out of Touch*, supra note 29.

61. *Id.*

respectively.[62] The editorial continued, "[t]hose statistics are especially startling when considering that township trustees actually point to their poor relief duties as a primary reason why township governments should continue to exist."[63]

This type of editorial was not uncommon from the influential *Indianapolis Star* editorial page. In 2011, an editorial ran claiming that "state auditors found that [sixty-one percent] of townships served fewer than [twenty-five] needy families in 2009."[64] It again noted "[h]undreds of townships have built up cash balances that are at least two times their annual budget, but many of them continue to collect more property tax revenue than they need."[65] Their point: "with [property] tax caps now in place, dollars that county and city governments could use for essential services are instead diverted to township savings accounts. . . . The days of padding township bank accounts must end, as should the townships themselves."[66] The *Star*'s editorial cartoonist illustrated the problem in the cartoon shown here:[67]

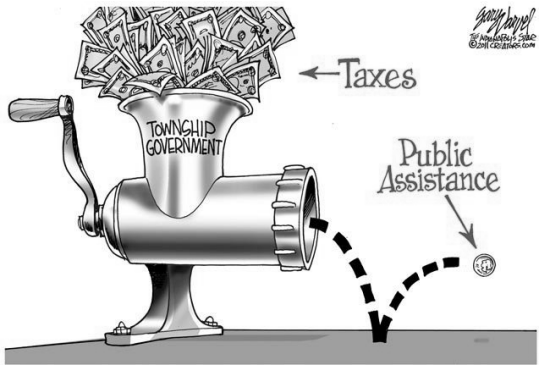


Figure 1 Gary Varvel editorial cartoon published in the *Indianapolis Star* (2011). Copyright permission obtained.

In addition to the *Indianapolis Star*, newspapers across the state have written editorials in support of reform and attacked townships when waste and inefficiency come to light.[68]

---

62. *Id.* (citing an *Evansville Courier & Press* investigation).

63. *Id.*

64. Editorial, *Indiana's Townships: Wasted Dollars, Broken Trust*, INDIANAPOLIS STAR, Jan. 19, 2011, at A10.

65. *Id.*

66. *Id.*

67. Gary Varvel, editorial cartoon depicting inefficient delivery of public assistance at the township level, INDIANAPOLIS STAR, Jan. 19, 2011, at A10.

68. *See, e.g.*, Doug Ross, *Calumet Twp. Is Poster Child for Reform*, NORTHWEST IND. TIMES (Jan. 13, 2013), http://www.nwitimes.com/news/opinion/editorial/editorial-calumet-twp-is-poster-child-for-reform/article_44a2d62d-ab1a-5156-8797-13519e95844e.html; Editorial, *Township Reform*, EVANSVILLE COURIER & PRESS (Dec. 19, 2010), http://www.courierpress.com/news/2010/dec/19/township-reform-the-issue-case-for-downsizing-of/; Editorial, *An Outdated System of Local*

Support for reform also came from elected officials, both Democrat and Republican,[69] as well as Hoosier political commentators.[70] More importantly, polling and referendum results demonstrated Hoosier voters were generally warm to the concept.[71] One poll conducted in September of 2008 covering thirteen central Indiana townships found that 66.5% of likely voters supported eliminating township officials and consolidating the duties to the county level.[72] A different group[73], using a different polling firm, conducted a statewide poll of likely voters in July of the same year; that poll showed 55.6% of voters supported the transfer of duties.[74]

While multiple polls showing majority support for an issue can be good indicators, the best test is often conducted at the ballot box. Ballot questions, allowing voters to decide if the duties of township assessors should be consolidated to the county level, were held throughout the state during the 2008 General Election.[75] Voters in twenty-nine of the forty-three townships holding

---

Government, TERRE HAUTE TRIB. STAR (Jan. 5, 2008), http://www.tribstar.com/editorials/x1155728391/TRIBUNE-STAR-EDITORIAL-An-outdated-system-of-local-government/print.

69. *See, e.g.*, Brendan O'Shaughnessy, *Peterson, Ballard to Push Ballot Measure*, INDIANAPOLIS STAR, Oct. 30, 2008, at B6 (covering event where Republican Indianapolis Mayor Greg Ballard and Democratic former Indianapolis Mayor Bart Peterson join together to support elimination of township assessors); *Indy Mayor Unveils Unigov2.0 Plan*, INSIDE IND. BUS. WITH GERRY DICK (Jan. 28, 2009, 8:21 AM), http://www.insideindianabusiness.com/newsitem.asp?ID=33672 (discussing support from Republican Indianapolis Mayor Greg Ballard on localized reform push); Michael W. Hoskins, *Q&A: Delaney on Township Government Reform*, IND. LAW. (Jan. 8, 2010), http://www.theindianalawyer.com/q-a-delaney-on-township-government-reform/PARAMS/article/22046 (discussing support of Democrat Representative Ed Delaney).

70. *See, e.g.*, Hakim-Shabazz, *supra* note 29; Abdul Hakim-Shabazz, *Still Waiting*, IND. BARRISTER (Jan. 1, 2009, 2:41 PM), http://www.indianabarrister.com/archives/2009/01/still_waiting.html.

71. Poll commissioned by Metro. Indianapolis Bd. of Realtors, Q.14, (Sept. 2008) (unpublished, poll conducted by SGS, Inc. with a sample size of 759 registered voters and a margin of error of +/- 3.69%) (on file with author) [hereinafter MIBOR Sept. Poll]; Poll commissioned by MySmartGov.org, Q.37, July 28, 2008 (unpublished poll conducted by On Message, Inc. with a sample size of 600 likely voters) (on file with author) [hereinafter MySmartGov.Org Poll]; Brendan O'Shaughnessy, *More Gov't Streamlining Seen: Officials: Results of Assessors' Vote to "Set the Stage" for More Cuts*, INDIANAPOLIS STAR, Nov. 6, 2008, at B1.

72. MIBOR Sept. Poll, *supra* note 71.

73. MySmartGov.org was a pro-reform coalition of individuals and groups concerned with redundant and inefficient local government. *See, e.g.*, *Kevin Brinegar Commentary on MySmartGov.org*, YOUTUBE (Oct. 13, 2008), https://www.youtube.com/watch?v=1VgDZA0iCoY; *We've Got to Stop Governing Like This*, YOUTUBE (Oct. 9, 2008), https://www.youtube.com/watch?v=rJGSFpvfj3U.

74. MySmartGov.Org Poll, *supra* note 71.

75. The legislation calling for these referenda, the referenda itself, and the resulting consolidation are all discussed in greater length in Part V.

referenda approved the consolidation.[76] In Marion County, the voters in all eight townships where consolidation was on the ballot voted to approve the move, with a county-wide total of sixty-four percent voting "yes."[77] The transition and effect of these consolidations are discussed in more detail in Part V, but the combination of polling and referenda results demonstrates the support voters have shown for township reform efforts.

IV. LEGISLATIVE HISTORY

In the legislative sessions following *KSR*'s release, several bills were introduced to implement the township consolidation recommendations.[78] However, with the exception of House Enrolled Act 1001 in 2008,[79] which set the stage for the consolidation of township assessing duties and the township assessor referenda in November 2008,[80] advocates of reform had no success in passing meaningful reform legislation.[81] Proponents of reform point to one primary reason for this lack of progress: politics.[82] Mark Lawrance from the Indiana Chamber noted that despite well-reasoned arguments from reform proponents, the vote often becomes a situation in which a legislators are uncomfortable turning their backs on their friends and political allies who serve in township government in their districts.[83] Further, many legislators, Lawrance notes, are former

---

76. O'Shaughnessy, *supra* note 71.

77. Cathy Kightlinger, *Eight Local Township Assessors Lose Job*, INDIANAPOLIS STAR, Nov. 5, 2008, at B4. It is worth noting the accuracy of the central Indiana poll that showed 66.5% of likely voters in thirteen townships supported the reform; the Marion County townships make up eight of the thirteen polled and the 64% result was within the poll's margin of error.

78. *See, e.g.*, H.B. 1341, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009) (bill which would have eliminated Marion County townships); H.B. 1406, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009) (bill which would have eliminated townships outside of Marion County); H.B. 1181, 116th Gen. Assemb., 2nd Reg. Sess. (Ind. 2010) (bill which would have provided for additional requirements on townships carrying a fund balance at the end of a fiscal year); H.B. 1249, 116th Gen. Assemb., 2nd Reg. Sess. (Ind. 2010) (bill which would have eliminated township government); H.B. 1376, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011) (bill which would have transferred duties of township boards to the county fiscal body); H.B. 1469, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011) (bill which would have made the county fiscal body the fiscal and legislative body for township government).

79. H.E.A. 1001, 115th Gen. Assemb. 2nd Reg. Sess. (Ind. 2008) (containing Section 693 which required the transfer of assessing duties for townships with less than 15,000 parcels or where the trustee served as the assessor to be transferred to the county assessor on July 1, 2008, the remaining townships would vote on the consolidation during the 2008 General Election).

80. *See infra* Part V.

81. *See* Smith, *supra* note 5.

82. Lawrance Interview, *supra* note 29. Here "politics" does not mean the usual partisan politics, but rather local political influences such as grassroots support, fundraising and general political support from township officials in the legislator's home district.

83. *Id.*

township elected officials, and they do not want to vote against the system of government that helped get them elected.[84] MIBOR's Chris Pryor echoed this sentiment: "ultimately, [the lack of reform is] the result of the local government being entrenched in the political system."[85] Pryor says he gets the feeling that legislators are "afraid of the backlash of eliminating those folks . . . that are most closely involved with elections at the primary level and are really engrained in the process."[86]

Whether the reform frustrations are a result of these fears and political ties, or, as Michael Hicks, Director of Ball State University's Center for Business Research, put it—"legislative fatigue"—it does not change the fact that the debate has shrunk so much in recent years that it is almost non-existent.[87]

V. CASE STUDY: H.E.A. 1001 AND TOWNSHIP ASSESSING DUTIES

In 2008, H.E.A. 1001 transferred the duties of the vast majority of township assessors to their local county assessors, leaving voters in the remaining forty-three townships to decide how their properties should be assessed.[88] This resulted in a highly relevant campaign between reform proponents and opponents, primarily in central Indiana where fifteen townships were holding the referendum.[89] The campaigns aligned much as the broader reform debate did: the Indy Chamber, along with the Indiana Chamber, and MIBOR campaigned aggressively for the passage of the consolidation while representatives of township government fought to retain their posts and structure of government.[90] Because of these parallels, the consolidation of this township function, and, more importantly, its effect, represents a good case study for larger township reform. The proponents made similar arguments to those advanced in the general reform debate in addition to more specific property assessment talking points.[91] For example, MIBOR, with its focus on the real estate market, was very concerned with inequities from township to township.[92] This was illustrated by a map

---

84. *Id.*

85. Pryor Interview, *supra* note 30.

86. *Id.*

87. Smith, *supra* note 5.

88. H.E.A. 1001, 115th Gen. Assemb., 2nd Reg. Sess. (Ind. 2008) (containing Section 693 which required the transfer of assessing duties for townships with less than 15,000 parcels or where the trustee served as the assessor to be transferred to the county assessor on July 1, 2008, the remaining townships would vote on the consolidation during the 2008 General Election).

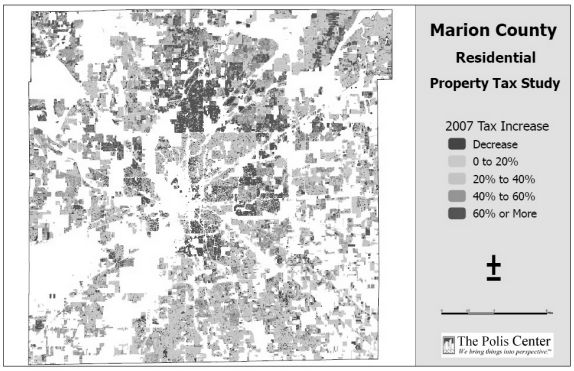
89. O'Shaughnessy, *supra* note 71.

90. Campaign Flyer, Citizens to Save Our Assessor, Vote "NO" November 4th on Referendum #1 (on file with author) (specifically challenging MIBOR and the Indy Chamber for their positions); E-mail from Joline Ohmart, Washington Township Assessor, to lengthy mail list of campaign allies (Aug. 8, 2008, 6:00 PM) (on file with author) (detailing efforts made for campaign and outlining the next steps of the reform opponents' campaign).

91. *Compare supra* Part III, *with infra* Part V.

92. Pryor Interview, *supra* note 30.

created by the Polis Center that displayed the level of increase in property taxes on each individual residential property.[93]



The map is color coded, and each color indicates a different level of increase from the previous year's property tax amount.[94] No other lines or boundaries, other than the county's outer-bounds, are displayed, yet the townships' political boundaries can be seen just by their impact on residential taxpayers.[95] A low-resolution image can be seen in this Note, but the full-resolution pdf makes the point much more effectively.[96] One problem is that ultimately each resident's property tax rate is calculated using a county-wide total assessed value (AV), so if one township assessor is assessing properties in a way that undervalues properties (to keep local voters happy), the result is that property taxpayers in other townships see their tax rate creep up to make up for the lower aggregate AV.[97]

The reform proponents ultimately won all fifteen referenda in central Indiana and won nearly seventy percent (twenty-nine of forty-three townships approved consolidation) statewide.[98] Thus, the duties of 994 township assessors were transitioned to their respective county assessor within a six-month period.[99] This

---

93. Indiana University-Purdue University Indianapolis: The Polis Center, Marion County Residential Property Tax Study (2008) (unpublished map) (on file with author). Copyright permission has been obtained from the owner.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Citizens Guide to Property Tax*, STATE OF IND. DEP'T OF LOCAL GOV'T FIN., http://www.in.gov/dlgf/2516.htm (last visited Dec. 4, 2013).

98. O'Shaughnessy, *supra* note 71.

99. Nine-hundred sixty-five townships had less than 15,000 parcels and were transitioned on July 1, 2008 as a result of H.E.A. 1001; the additional twenty-nine townships that passed the referendum transitioned on January 1, 2009. H.E.A. 1001, 115th Gen. Assemb., 2nd Reg. Sess. (Ind. 2008) (containing Section 693 which required the transfer of assessing duties for townships with less than 15,000 parcels or where the trustee served as the assessor to be transferred to the county assessor on July 1, 2008, the remaining townships would vote on the consolidation during

provides a good case study for what the consolidation of the remaining township duties would look like.

So, who was right? Did the consolidation of assessing duties result in the benefits promised by proponents or with the cost-overruns and disconnect predicted by the opponents? As with most government policies, the effect is never the panacea promised or the apocalypse anticipated. However, the results, thus far, seem to be that some benefits have been reaped in cost savings and uniformity while no major disconnects with citizens or bureaucratic nightmares have developed.[100]

"We came out a lot leaner than township government and are even leaner than that [now]," reports Marion County Assessor Joseph O'Connor,[101] who is no stranger to township assessor offices having worked in two of them before joining the county and subsequently being elected to the office.[102] O'Connor estimated before consolidation, the township and county assessors' offices combined had over 150 employees.[103] That number initially dropped to 119 or 120 after consolidation and now is closer to 100, he says.[104] The initial drop was a result of discovering that "[the county assessor's office] can be more efficient and hire better people and do a better job with less people" after consolidation. The rest has been primarily through attrition and budget restraints.[105] Referring to different policies and procedures from township to township, O'Connor said the most difficult thing about the consolidation was "getting everyone to sing from the same song sheet."[106] However, he reports that through bringing employees together and extensive training, the trend has been improving toward uniformity.[107]

Cutting to the chase, O'Connor explains, "I think [the assessment process] is more fair [after consolidation], overall. In general, I think assessments are better and more accurate."[108] He does note that a more accurate assessment does not always make the property owner happy (if they were previously under-assessed), but the goal is to get all properties assessed at their fair market value and remedy the unjustifiably erroneous assessments done under the township structure.[109]

As far as the fiscal impact, O'Connor says that despite contractual/overhead

---

the 2008 General Election).

100. Interview with Joseph O'Connor, County Assessor, Marion County, in Indianapolis, Ind. (Oct. 14, 2013) [hereinafter O'Connor Interview] (audio recording on file with author).

101. *Id.*

102. *County Assessor Biography*, CITY OF INDIANAPOLIS AND MARION COUNTY, http://www.indy.gov/eGov/County/Assessor/Marion/Pages/CountyAssessorBiography.aspx (last visited Dec. 2, 2013).

103. O'Connor Interview, *supra* note 100.

104. *Id.*

105. *Id.*

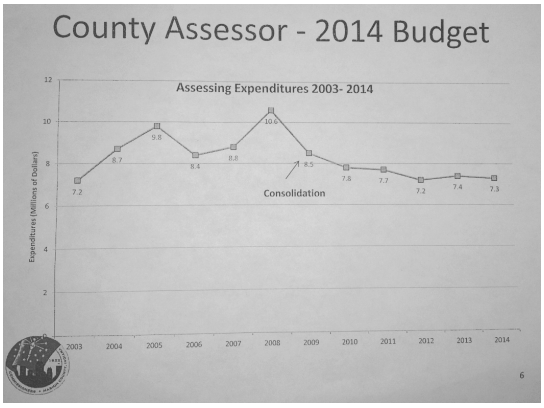
106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

costs rising significantly each year, the office's ability to operate leaner and more efficiently (while having more qualified and professional staff) has led to proposed 2014 budget that is $1.4 million less than it was ten years ago in 2004.[110] He shared the graph shown here to demonstrate the office's budget over recent years:[111]



O'Connor says they are now "spending less money to do better."[112]

When asked directly if he thought the predictions made by reform proponents materialized through consolidation, O'Connor responded "[y]es, for the most part. There was hyperbole on both sides, but I think the public is better off with one county assessor rather than nine [township assessors]."[113] He acknowledged that no system will result in perfection, but the "potential to do better" is in the consolidated structure we now have.[114]

Larry Mitchell is the Senior Managing Partner at Valbridge Property Advisors/Mitchell Appraisers, a firm that does commercial appraisals in Indiana as well as Michigan, Ohio, Kentucky and Illinois.[115] More than fifty percent of their business is doing appraisals for tax appeals on Indiana properties.[116] Mitchell says he interacts with assessors regularly both on an operational level (to understand their methodology) and in a quasi-litigation situation where assessors

---

110. *Id.* (giving example of computer software contract increasing from $400,000 to $600,000 to $900,000 in a matter of years).

111. MARION CNTY ASSESSOR, CNTY ASSESSOR—2014 BUDGET-HCT2 (2013) (graph detailing the budget for the assessor's office for last ten years).

112. O'Connor Interview, *supra* note 100.

113. *Id.*

114. *Id.*

115. Interview with Larry Mitchell, Senior Managing Partner, Valbridge Property Advisors/Mitchell Appraisers, in Indianapolis, Ind. (Oct. 22, 2013) [hereinafter Mitchell Interview] (audio recording on file with author).

116. *Id.*

are on the other side of the table from his clients.[117] "Before consolidation there [were] wide swings . . . due to the fact I think the assessment community for a long time has been understaffed and undermanned. And not only in the quantity of people in it, but the quality of the people,"[118] Mitchell recalls. He explained that when he refers to the "quality" of the staff, he means the qualifications of the people doing the job were inadequate in order to properly assess the wide variety of property types in each township.[119] He said they would often end up relying on a standardized mass appraisal computer system, which was "extremely inefficient in the fact that once they assessed something and set it up, they rarely ever changed it or went back to look at it because they [did not] have the time, or the manpower or the resources to do it."[120]

Mitchell noted one improvement from consolidation was that the new structure allowed for more specialization by staff in assessors' offices.[121] He explains:

> By putting a single county assessor [on top] and then [having] a staff level underneath them, you can have one person that is responsible for all the apartments in their county, or all the retail buildings in their county. They have been given the opportunity to get more specialized in individual segments of the commercial market, similar to how real appraisers do.[122]

This is in contrast with the traditional township structure where in each township, the understaffed and under-qualified township assessor would be tasked with assessing every type of property within their geographic township boundaries.[123]

Mitchell, too, acknowledges the consolidation is not a perfect situation, citing some grudges held by former township assessors now working in the county and some "fiefdoms" that have popped up in different offices, but that overall it has been a major improvement and a big step forward in producing more efficient and accurate assessment for Hoosier property owners.[124]

In 2010, Governor Mitch Daniels rightfully recognized the logical nexus between the assessment consolidation and the remaining reform:

> You reduced the number of cooks in the assessment kitchen by about one thousand. Having as many as [twenty-two] different assessors setting property values in a single county was a formula for unfairness, waste and, all too often, corruption. Moving assessment to a single, accountable county official was a matter of simple common sense. The

---

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

> exact same principle applies to poor relief and fire protection, still handled as they were in 1848.[125]

In short, reform proponents believe the experience of the township assessor consolidation has enhanced the credibility of their argument.[126]

VI. DISCUSSION: ARGUMENTS FROM REFORM OPPONENTS

As with any important debate, there is always more than one side. On the issue of township reform, opposition to the previously mentioned proponents has come from a number of sources, but, most understandably and most powerfully, from the Indiana Township Association (ITA).[127] This section will outline the opponents' chief arguments in opposition to *KSR*'s proposed consolidation of township government as outlined through media accounts, studies, and documents provided by the ITA.[128]

A. "Township Government Is 'Closest to the People'"

It is a good political buzz phrase, "closest to the people;" it conjures thoughts of good, responsive government as discussed by our framers and it alludes to a way to protect from corruption and tyranny.[129] Township supporters argue that being so close to the people provides for better service and more face-to-face interaction with citizens.[130] One document provided by the ITA summarizes this contention:

> Elected officials in smaller governments are able to manage budgets and operations more directly than in larger governments. Part of the reason is that they are closer to the voters. Residents can actually reach their elected officials on the telephone or even in person, as opposed to dealing with a staff member whose career does not depend on attracting voters in the next election. Indeed, this greater distance between voters

---

125. Daniels, *supra* note 13.

126. *See supra* Part V.

127. Because *KSR* proposed twenty-seven different reforms affecting many different groups, some groups affected by other proposals have banded together to oppose *KSR* aggregately. For example, *KSR* proposed eliminating the three-person county board of commissioners and replacing it with a single county executive; the Indiana Association of County Commissioners has therefore voiced opposition. Arthur Foulkes, *State Has Too Many Elected Officials, Officials Say*, TERRE HAUTE TRIB. STAR (Feb. 20, 2009),*available at* http://m.tribstar.com/news/local_news/state-has-too-many-elected-officials-official-says/article_dfe2b053-4e46-5aa9-8ddc-e5f5185cb1e5.html?mode=jqm, *archived at http://perma.cc/SX7W-ANFB*.

128. Again, thanks to ITA's Executive Director Debbie Driskell for going above and beyond to provide multiple documents, studies and resources to help achieve a fair and accurate portrayal of ITA's position and arguments on township consolidation.

129. *See, e.g.*, THE FEDERALIST NO. 52 (Alexander Hamilton).

130. Wendell Cox, Gov't Consolidation in Ind.: Separating Rhetoric From Reality 12-13 (2009).

> and elected officials and the loss of more direct management makes larger governments more susceptible to interest groups influence. Few interest groups lobby for less spending.[131]

The logic in the previous passage is flawed for two reasons. First, there are any number of interest groups who lobby for less spending, including, and especially, the interest groups previously mentioned who are advocating for the elimination of township government.[132] The fear that transferring the duties to the county will create an unfettered buffet of local government pork for lobbying groups is meritless and without support.[133]

Second, while the virtue of accountable government cannot be denied, Mr. Cox's application of this rationale to Indiana townships is misplaced. Cox implies that the proximity to voters brings with it familiarity with voters.[134] He infers the township trustee does the job better because he or she is dependent on the voters re-electing him or her.[135] If this is true, certainly the voters would be expected to know the name of their elected township leaders. However, the central Indiana poll asked voters "[w]hat is the name of your township assessor?" and found that to not be the case at all. [136] In fact, over the thirteen townships polled, the average was that more than ninety-three percent of voters could *not* name their township assessor.[137]

TOWNSHIP	KNOWS NAME
Center (Marion)	2%
Clay (Hamilton)	5%
Fall Creek (Hamilton)	3%
Franklin (Marion)	17%
Lawrence (Marion)	6%
Noblesville (Hamilton)	12%
Perry (Marion)	2%
Pike (Marion)	2%

131. Wendell Cox, Bigger Government Saves Money? Time to Look at the Reality (unpublished opinion editorial provided to author by ITA) (on file with author).

132. *See, e.g.*, Pryor Interview, *supra* note 30; *see also About AFP*, AMERICANS FOR PROSPERITY, http://americansforprosperity.org/indiana/about/ (last visited Jan. 14, 2014) (explaining Americans for Prosperity is a grassroots movement of over 2.3 million activists who advocate and promote limited government, lower taxes, and more freedom).

133. Cities and counties already have much larger budgets and more discretionary spending authority than townships yet the ITA has still not offered examples to support this claim. *Transparency: Local Gov't*, STATE OF IND. TRANSPARENCY PORTAL, http://www.in.gov/itp/2341.htm, *archived at* http://perma.cc/43JK-W4A7 (last visited Oct. 6, 2014).

134. Cox, *supra* note 131.

135. *Id.*

136. MIBOR Sept. Poll, *supra* note 71, at Q.6.

137. *Id.*

Pleasant (Johnson)	7%
Warren (Marion)	4%
Washington (Marion)	8%
Wayne (Marion)	2%
White River (Johnson)	12%

For comparison, the same poll found that 99.5% of the same voters knew of Mitch Daniels.[138] Again for comparison, a follow up poll done a month later in three of those townships, less than two percent of voters said they had never heard of Greg Ballard (mayor of Indianapolis at the time) and less than one percent said that of Bart Peterson (most recent previous mayor of Indianapolis at the time).[139]

It is unclear how an elected official can be held accountable at the ballot box when only such a small fraction of the voters know that official's name. One possible explanation is noted by Indiana's current Secretary of State (then-state senator) Connie Lawson: sixty-four percent of township board members run unopposed and only thirty-five percent of those who cast a vote make it down that far on their ballot to actually vote for those offices.[140] In addition, an *Evansville Courier Press* article pointed to voter apathy to explain instances of nepotism, waste, and theft by township officials who were "skat[ing] by without much attention."[141]

The potential for an elected official elected at such a local level to engage with the local citizens in a way that a state or county official might not be able to is surely there; we see this demonstrated by mayors and town council members.[142] The evidence here, however, does not bear that out for townships, as shown by voters who are overwhelmingly unaware of who represents them, the lack of challengers which indicates complacency, and an extremely low percentage of voters who care enough about the office to vote in that race.[143]

B. "Consolidation Will Not Save Any Money"

Supporters of reform argue that consolidating township government will

---

138. *Id.* at Q.7-13.

139. Poll commissioned by Metro. Indianapolis Bd. of Realtors, Q.8-11, Oct. 2008 (unpublished voter poll conducted by SGS, Inc.) (on file with author) [hereinafter MIBOR Oct. Poll].

140. Niki Kelly, *Township Remake Goes on to House*, JOURNAL GAZETTE (Feb. 25, 2009), http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20090225/LOCAL/302259987/1002/LOCAL.

141. Bradner, *supra* note 51.

142. Dan McFeely & Jeff Zogg, *Teacher, Politician Touched Many Lives*, INDIANAPOLIS STAR, Apr. 26, 2003, at A1.

143. *See supra* Part VI.A.

create a more efficient and cost effective way to deliver the same services.[144] They also pointed to excessive cash balances maintained by townships and to administrative cost ratios that go well beyond the parameters of good stewardship.[145] The ITA, however, claims consolidation will not create any cost savings for taxpayers and defends the administrative ratios by pointing to problems with the calculations. The Association also notes that township services demand quick response to requests for aid, resulting in higher costs.[146] The ITA addresses the large cash balances by explaining that townships often save up for large purchases, by claiming that the reports use balances right after tax revenue is received, and by pointing to a state regulation that ties their hands a bit.[147]

1. General Cost Savings.—A 2009 report prepared for ITA argues that "[i]t is likely that [*KSR*'s] recommendation to consolidate township governments into county governments will cost taxpayers *more* and make local government in Indiana *less* efficient."[148] To back this claim, the report points to a number of causes, beginning with "operational barriers."[149] "There are costs to harmonizing the service levels and employee compensation packages. Employees and their unions can be expected to receive remuneration packages that reflect the most expensive pre-consolidation packages, in both wages and benefits," the report notes.[150] It continues by pointing to varying levels of service each pre-consolidation jurisdiction is receiving, "[i]t can be expected that service levels will be harmonized at the highest level, essentially forcing residents of a jurisdiction with lower service levels to finance and receive higher service levels."[151] The report next points to political resistance to reducing the number of employees after consolidation, which, it claims, would be required to achieve any material savings.[152] It also points out that transitional costs would be incurred and could possibly be considerable.[153] In support of this, the report points to consolidation in Toronto where the transition costs went "far above projections" to as much as $275 million.[154]

Other cited barriers include reduced accountability and the incentives to spend more that, according to the report, "government consolidation tends to create."[155] Under this argument, the report claims "[d]emocracy is diluted and governments become remote from their electorates. . . . In smaller municipalities, elected officials are likely to be known personally by a larger number of

144. *See supra* Part III.
145. *See id.*
146. *See infra* Part VI.B.1-2.
147. *See infra* Part VI.B.3.
148. Cox, *supra* note 131, at 3.
149. *Id.* at 11.
150. *Id.*
151. *Id.* at 12.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

voters."[156] Finally, the report states that consolidation creates economies of scale for lobbying groups pushing for more spending, and then concludes that consolidated government, being more efficient for special interests, is therefore less accountable because the influence of a voter pales in comparison to that of a special interest lobbyist.[157]

In analyzing these claims, it is important to look at the report's cited sources. The report first notes "there are few reports that comprehensively compare the financial performance of governments *after* consolidation."[158] The report then mentions studies of consolidation in Jacksonville during the 1980s, in Nashville during the 1960s, Nova Scotia during the 1990s, and the study this report gives seems to give the most weight, Toronto's municipal consolidation in the late 1990s.[159]

Another assumption this report makes in the early stages is its definition of efficiency.[160] When introducing the term, it correctly notes that "[g]overnment efficiency is measured by relative spending. *All things being equal*, a government service is more efficient if it requires less money to perform its functions per unit of service."[161] However, as the report continues and points to consolidation of a foreign city, more populous than Chicago, as a predictor of the effects reform will have on Indiana townships, some of which have a population well below 400 people, the control of "all things being equal" is not given much weight in the reasoning.[162]

The report comes to this comparison (Toronto being comparable to Indiana townships) based on the simplification that all forms of government consolidation are the application of a "bigger is better" attitude.[163] *KSR*, on the other hand, was conducted over months by receiving "extensive citizen input," reviewing previous Indiana studies, and by reaching out to "the front lines of local government, and experts who study [it]."[164] While reduction in cost was one goal of the Commission, *KSR* also points to effectiveness and "making local government easier to understand with straighter lines of responsibility and accountability."[165]

---

156. *Id.*

157. *Id.* at 13.

158. *Id.* at 9 (emphasis in original).

159. *Id.* at 10 (noting that the Toronto consolidation had strong business support, but struggled with harmonizing wages and service levels which led to higher costs after consolidation).

160. *Id.* at 7.

161. *Id.* (emphasis added).

162. *Compare* Lauren Strapagiel, *North America's Largest Cities: Toronto Overtakes Chicago*, HUFFINGTON POST CANADA (Mar. 5, 2013), http://www.huffingtonpost.ca/2013/03/05/largest-cities-north-america-toronto-chicago_n_2815578.html, *with Annual Population Estimates for Indiana's Minor Civil Divisions by County*, STATS INDIANA, http://www.stats.indiana.edu/population/sub_cnty_estimates/2012/e2012_townships.asp (last visited Jan. 20, 2014).

163. Cox, *supra* note 131, at 2.

164. COMMISSION REPORT, *supra* note 1, at 7.

165. *Id.* at 4, 10-12 (listing the Commission's guiding principles).

These goals serve the larger purpose of strengthening the public faith.[166] In its recommendation to consolidate townships, the Commission noted its findings that Indiana townships were often "too small, in terms of land area and population, to provide cost-effective public services," and that "[b]road variations in resources among so many local governments create inequalities in basic services and taxes."[167] Contradicting Toronto's experience, the Commission concluded that "Indiana counties are large enough to allow economies of scale in services, but not so large that they preclude sufficient access and responsiveness for citizens.[168] Though previous Indiana studies have not been as cautious, *KSR* avoided making any specific cost saving predictions.[169] As previously noted, the Commission's goals were not singularly aimed at the savings, but rather a more understandable, accountable, and efficient way to deliver the same services to Hoosiers.[170]

The concerns raised by the ITA's report are not without basis, however. Marion County Assessor Joseph O'Connor seemingly agreed with the concerns about harmonizing labor agreements.[171] He said that one of the more difficult parts of transitioning from township assessing to countywide assessing was getting "everyone to sing from the same song sheet."[172] However, O'Connor continued that with good planning and training, the office has overcome these difficulties and is operating for $1 million less than they were ten years ago and are delivering more equitable government services to Hoosier citizens.[173] It seems the music metaphors both the ITA report and Assessor O'Connor use may be apt; the harmonization may be difficult and take practice, but it has the potential to be music to the taxpayer's ears as demonstrated in Marion County or could end up forcing the constituency to cover theirs like in Toronto.[174]

The ITA report claims that in order for consolidation to reap any cost savings it will have to come largely through personnel cuts, a task the report predicts will be prevented by political resistance.[175] Again, Assessor O'Connor's experience sheds some light on the report's concerns when he explains that before consolidation, the county and township assessing offices combined to have more

---

166. *Id.*

167. *Id.* at 25.

168. *Id.*

169. *See, e.g.*, Bayt & Lewis, *supra* note 35 (predicting $35 Million in savings for the Indianapolis Works proposal to consolidate townships and fire services in Marion County); INDIANA CHAMBER, IND. PROJECT FOR EFFICIENT LOCAL GOV'T: THE NEXT GENERATION OF THE '99 COMPETE STUDY 19 (2004), *available at* https://resources.oncourse.iu.edu/access/content/group/24a3ad89-4a70-4e4a-0087-26cb583ea139/Website%20Research%20Page%20Materials/Research/Next%20Generation%20of%20COMPETE%2004.pdf (predicting a $11.65 million savings statewide by consolidating Indiana's assessing duties from the townships to the state).

170. COMMISSION REPORT, *supra* note 1, at 10-12.

171. O'Connor Interview, *supra* note 100.

172. *Id.*

173. *Id.*

174. *Compare id.*, *with* Cox, *supra* note 131, at 10-11.

175. Cox, *supra* note 131, at 12.

than 150 employees but now hover at about 100 employees.[176] There may have been political resistance to this, but the numbers tell the story: a staff reduction of one-third and a budget proposal more than $1 million less than it was ten years ago.[177]

The concern that government consolidation will create incentives for greater spending, based on the premise that special interests will have a heyday with a larger, out-of-touch local government is less grounded in reality than the previous concerns. Hoosiers have not been shy about pushing back against what they consider wasteful spending and over-taxation.[178] In the midst of a property tax crisis, voters across the state sent a message by voting fifteen incumbent mayors out of office on what one article's author called "Bloody Tuesday."[179] While overwhelmingly underfunded, Greg Ballard unseated two-term incumbent Bart Peterson, who had attempted to increase income taxes in Indianapolis while property taxes were spiking.[180] State senator, and Ballard supporter, Brent Waltz explained, "[p]roperty taxes [are not] the third rail of politics. [It is] the only rail."[181] Hoosier voters were not done.

A couple years later, Hoosiers voted to put permanent caps on property tax rates into the Indiana Constitution.[182] This demonstrates that Indiana voters will not sit idly by and tolerate inefficient and wasteful government, no matter how prevalent special interest groups may become. The statewide nature of these examples contradicts the notion that the larger the political jurisdiction, the less influence Hoosier voters will have. In fact, it is during this era of unrest that the previously noted polling figures showed that central Indiana voters had no idea who their township officials were but had a near-unanimous understanding of who their mayor and governor were.[183] They are who the voters decided to hold accountable.

2. Administrative Cost Ratios.—Township supporters also argue the studies showing extremely high administrative costs for each dollar in direct service[184] are misleading.[185] "Federal and state programs, along with other service

---

176. O'Connor Interview, *supra* note 100.

177. *Id.*

178. Brian A. Howey, *Upset City: Ballard's Shock Wave: 15 Incumbent Mayors Fall Across the State, Sending Defiant Message to Statehouse*, HOWEY POLITICAL REPORT, Nov. 7, 2007, http://www.in.gov/library/files/HPR1414.pdf.pdf.

179. *Id.*; *see also* Brian A. Howey, *Hoosiers Are Changing*, HOWEY POLITICAL REPORT (Nov. 7, 2007), http://www.in.gov/library/files/HPR1414.pdf.pdf.

180. Howey, *supra* note 179.

181. *Id.*

182. *Indiana Voters OK Property Tax Amendment*, INDIANAPOLIS BUS. J (Nov. 2, 2010), http://www.ibj.com/indiana-voters-ok-property-tax-cap-amendment/PARAMS/article/23227.

183. *Compare* MIBOR Sept. Poll, *supra* note 71, at Q.6-13, *with* MIBOR Oct. Poll, *supra* note 139, at Q.8-11.

184. *See infra* Appendix A; Editorial, *Townships Out of Touch*, *supra* note 29, at A12 (citing an *Evansville Courier & Press* investigation).

185. IND. TOWNSHIP ASSOC., THE TRUTH ABOUT TOWNSHIP ASSISTANCE ADMINISTRATIVE

providers, assign everything from case management services to pencils and paper to a particular program cost. All program costs at the township level must be reported in the 'administration' category which drives our ratio of administrative dollars versus direct dollars up," a flyer distributed by ITA claims.[186] It notes that township assistance requires a seventy-two hour turn around which, in turn, requires administrative time.[187] Finally, the flyer points to an unspecified township, which was originally reported as having a $0.50 on the dollar ratio, but then by making the tweaks in calculating the ratio in a more equitable manner, the ratio becomes $0.27 on the dollar.[188] It also notes that if applying the Salvation Army's model, the ratio would be a cost of $0.08 for each dollar in aid distributed.[189]

No one would doubt that including pencils and paper from the office as a direct service expense rather than an administrative cost would make the ratio at the end of the new calculation seem more reasonable. However, there can surely be much debate about whether they truly *are* a direct service to the taxpayer. The ITA example uses a township that started with a $0.50:$1 ratio which, while not a terribly inspiring figure, is toward the more efficient end of the range of ratios from the studied townships.[190] So, even assuming the reduction of the ratio by forty-six percent is consistent, other townships that do not start with a lower ratio would still be quite rotund. For example, Hancock County's Jackson Township begins with an administrative cost of $22.03 per one dollar in direct service that might be reduced to a still alarming ratio of nearly twelve dollars for each dollar in direct service.[191] In Hendricks County, the same reduction to one township's ratio takes it from $34.18 per one dollar to $18.46 per one dollar in direct service.[192] While applying a constant rate of reduction based on ITA's example is surely an oversimplification, it does illustrate a larger point: moving a few things from one column to another cannot justify this sort of inefficiency when it comes to Hoosier tax dollars.

3. Excessive Township Cash Balances.—An ITA flyer, which discussed the reports that townships maintained extremely high cash surpluses,[193] noted that

---

COSTS [hereinafter TOWNSHIP ASSISTANCE ADMINISTRATIVE COSTS] (on file with author).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *See infra* Appendix A.

191. METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON—2008, COUNTY: HANCOCK (2009) (on file with author). Note that the ITA flyer does not show exactly how their model works, so these calculations are based on the assumption that the percentage of the reduction remains constant from township to township. This is unlikely; however, it is used simply as an illustration that some of these townships put up numbers that cannot be justified by misleading calculations.

192. METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON— 2008, COUNTY: HENDRICKS (2009) (on file with author).

193. *See infra* Appendix A; Editorial, *Indiana's Townships*, *supra* note 64, at A10.

many townships are simply saving up for a large capital purchase, such as a large fire apparatus or to build a needed fire station, and that saving in this manner actually saves taxpayers money in the long run.[194] The ITA also argues that these figures appear bloated because the reporting days are right after the township receives its tax draws, making the comparison to an individual's bank balance, which looks the largest right after payday.[195] Finally, the ITA asserts that if townships were to lower their tax levy and spend down their cash balance, once that balance reached a lower level, the township would have "no guarantee" it could then get that tax levy back up to where it needed to be in the following years.[196] On this point, the ITA states it would support reasonable caps on operating balances if they would be permitted to raise their tax levy as needed after lowering it to draw down the cash balance.[197]

Capital purchases may explain some of these large cash balances, however, it is hard to believe that is the case for all of these large balances. For example, Allen County's Adams Township maintained a cash balance that was 130% of the previous year's expenditures, but also had a capital outlay account for its fire services that paid out more than $52,000 in the same year.[198] Within the same county, another township maintained a cash balance of 140% of the previous year's expenditures, but was apparently utilizing a capital outlay account to the tune of nearly $44,000.[199] While individual examples do not prove that there are no townships that are saving as the ITA suggests, they do show that the ITA's explanation does not explain all of the large balances occurring around the state.

With regard to the balances being large because the report timing is right after the tax draws are deposited, this may be an explanation for cash balances near 100% of the year's expenditures, but it cannot account for the townships that have balances more than seven times what they spend in a year. For example, Boone County's Sugar Creek Township's balance was nearly 800% of its annual expenditures.[200] Within the same county, two more townships had balances north of 400% and a total of six townships with balances of more than 200% of their expenditures.[201] Bartholomew County had one township with a balance of 465% and another with 338% of their respective expenditures.[202] Morgan County had

---

194. IND. TOWNSHIP ASSOC., THE TRUTH ABOUT TOWNSHIP'S CASH BALANCES [hereinafter TOWNSHIP'S CASH BALANCES] (on file with author).

195. *Id.*

196. *Id.*

197. *Id.*

198. METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON –2008, COUNTY: ALLEN (2009) (on file with author).

199. METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON— 2008, COUNTY: HENDRICKS (2009) (on file with author).

200. METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON— 2008, COUNTY: BOONE (2009) (on file with author).

201. *Id.*

202. METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON— 2008, COUNTY: BARTHOLOMEW (2009) (on file with author).

one township with a balance of 839% and two more with balances of more than 600% of their expenditures.[203] These are not the only examples, and they are not an illusion created by timing. [204]

ITA's concern about returning their tax levy to an appropriate level after draining its cash balances is fair and its proposed compromise of capping operating balances if a taxing district could later raise its tax levy back to its previous level would be a welcome piece of legislation.[205] However, the absence of such legislation is not enough to justify these obscene balances. If townships were as financially accountable as claimed, allowing the balances to creep to these levels should never have happened in the first place. Truly accountable leaders would, at least when the reports came out about these balances, look for ways to reduce these balances in a responsible way rather than spending them on lobbying efforts to prevent reform.[206]

C. "Counties Are Ill-equipped for These Responsibilities"

Townships serve important purposes, such as emergency poor relief and, in some cases, fire service, among other duties.[207] "Townships provide case management services, food pantries, homeless shelters, payee programs, soup kitchens, budget counseling and the list goes on. Further, trustees must respond to all requests for assistance using investigative techniques within [seventy-two] hours," an ITA flyer notes.[208] An *Indianapolis Star* guest editorial provided by ITA executive director Debbie Driskell states, "[r]elagating township assistance program to a state or county program would likely ensure that "emergency assistance" becomes just another welfare entitlement program."[209] Other township supporters caution that the transition of township assessing duties to the counties may have been easy, but that is only because county assessors already existed and taking on additional assessing duties would be a much easier task than a county assuming the remaining township responsibilities.[210] With that in mind, one trustee said, "[i]f it ever comes to that and they eliminate trustees, they

---

203. METRO. INDIANAPOLIS BD. OF REALTORS, COUNTYWIDE TOWNSHIP FINANCIAL COMPARISON— 2008, COUNTY: MORGAN (2009) (on file with author).

204. *See infra* Appendix A.

205. TOWNSHIP'S CASH BALANCES, *supra* note 194.

206. Star News Service, *Township Trustees Asked to Fund Lobbying Effort*, INDIANAPOLIS STAR (Oct. 12, 2008), http://archive.indystar.com/article/20081012/NEWS05/810120387/Township-trustees-asked-fund-lobbying-effort; Editorial, *Your Money Defends Their Jobs*, INDIANAPOLIS STAR, Mar. 4, 2009, at A8.

207. IND. CODE § 36-6-4-3 (2011).

208. TOWNSHIP ASSISTANCE ADMINISTRATIVE COSt, *supra* note 185.

209. Deborah R. Driskell, *Township Government Provides Vital Services at Reasonable Costs*, INDIANAPOLIS STAR, Dec. 5, 2010, at B7.

210. Bradner, *supra* note 51.

better have a good game plan."[211] On that point, it seems most would agree.[212]

However, as Mark Lawrance pointed out, in addition to property assessing, townships were once responsible for education and roads.[213] Over time, these duties were re-assigned to other branches of government without apocalyptic results.[214] Lawrance also recalls numerous anecdotes of testimony which stressed how much the trustees care about their jobs and their constituents, to which he adds, "no doubt most of them do."[215] Referring to the passion[216] many trustees have, Lawrance praises that "they are running for office for a reason."[217] However, Lawrance notes, reform proponents are not pushing for change because of the people or the services, just the structure of its delivery.[218]

There is no reason that current township trustees and officials could not be a part of a new consolidated delivery of these services from the county level. Many township assessor employees transitioned to the county assessor offices and provided their expertise and knowledge under a new, more efficient roof.[219] These skilled and passionate township employees could continue to deliver their services to the constituents they currently serve while the taxpayers benefit from the county's ability to bring uniformity to local government, find cost savings in computer systems, insurance and other overhead costs and manage the townships' budgets in conjunction with the broader budget priorities of the entire county.[220]

Even without bringing former township employees into the fold of the county, the task would not be insurmountable. Many townships do not actually distribute much emergency assistance at all; "[m]ost of the time, [it is] less than $10,000 [per year]," according to one news account.[221] Duties and responsibilities of local governments have shifted and evolved, even in the case of townships, over time.[222] Township proponents offer nothing beyond puffery to back their claims that the level of government that already handles taxation, roads and highways, police protection, the operation of jails and courts, document recording, health inspections, and many other varied duties cannot handle the

---

211. *Id.*

212. *See, e.g.*, O'Connor Interview, *supra* note 100 (noting that their office planned for the transition for more than a year in advance).

213. Lawrance Interview, *supra* note 29.

214. *Id.*

215. *Id.*

216. However, while many good trustees serve honorably, there are still others who engage in nepotism, embezzlement, or forgery. Bradner, *supra* note 51. These problems have to do with the individual elected official and the solution is found at the ballot box, not in reform, and therefore, are not relevant criticisms of the township government structure beyond the lack of voter accountability discussed in this Note.

217. Lawrance Interview, *supra* note 29.

218. *Id.*

219. Mitchell Interview, *supra* note 115; O'Connor Interview, *supra* note 100.

220. *See, e.g.*, O'Connor Interview, *supra* note 100.

221. Bradner, *supra* note 51.

222. Lawrance Interview, *supra* note 29.

additional responsibility that many townships handle with part-time employees.[223]

D. Reality: All Politics is Local [Government][224]

The real hang up to this reform, it seems, is not a policy argument as much as it is the burden of change and political allegiances.[225] As Marjorie Hershey, a political science professor at Indiana University, puts it: "[it is] not that people can sit down and say '[Here is] an ideal structure.' Some people are advantaged by the current structure and some are disadvantaged by it. [It is] very hard to persuade those in office that it needs to be changed."[226] Chris Pryor seems to agree, "ultimately, [the lack of reform is] the result of the local government being entrenched in the political system."[227] Similarly, Mark Lawrance remarked,

> the problem is, and the difficulty and frustration, with getting changes made at the statehouse has come from the fact that you can have people presenting well-reasoned arguments about how we [do not really need townships] anymore . . . yet many of the legislators . . . [do not] want to turn around and vote against their friends or supporters back home.[228]

Mitch Daniels, the governor who charged the Commission to analyze local government in the first place, added "[t]hose who would resist are active, and those who would benefit wish you well but [do not] feel the need to do anything much about it."[229]

These comments should come as no surprise; Former Governor Joseph Kernan and then-Chief Justice Randall Shepard predicted just that in their cover letter to Indiana citizens that accompanied *KSR*.[230] They wrote, "[t]he transformation we propose will be disruptive, even painful, in the short run. Many who have vested interests in the status quo will resist these changes with great vigor."[231] However, they continue, "[w]e say the status quo in local government is simply not good enough."[232]

---

223. IND. CODE § 36-2 (2011); Driskell, *supra* note 209, at B7.

224. The phrase "all politics is local" was coined by former speaker of the U.S. House of Representatives, Tip O'Neill, and is used to summarize the principle that elected officials must appeal to the interests of those who elect them. THOMAS P. O'NEILL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME xi-xiii (1994).

225. Bradner, *supra* note 51.

226. *Id.*

227. Pryor Interview, *supra* note 30.

228. Lawrance Interview, *supra* note 29.

229. *Indiana's Long Fight for Less Government Has Politician's Protecting Own*, IBJ.COM (Oct. 30, 2013), http://www.ibj.com/indianas-long-fight-for-less-government-has-politicians-protecting-own/PARAMS/article/44339 [hereinafter *Indiana's Long Fight*].

230. COMMISSION REPORT, *supra* note 1, at 2.

231. *Id.*

232. *Id.*

VII. PROPOSAL

Policy compromises on township reform have been tried and have had no meaningful success.[233] The most logical compromise offered was one that would transfer the duties of the township boards to the county fiscal body (the county council) but leave the township trustee position intact.[234] This would have allowed counties to provide the financial oversight and prioritization that the current system lacks while allowing the township trustee to still serve their constituents.[235] The bill did not even receive a vote in committee.[236]

Political horse-trading should not be necessary to pass meaningful reform of an antiquated form of government, but as this Note concludes, the problem is a political one. Therefore, the solution must be a political one.

A debate over the repeal of the state business personal property tax (BPPT)[237], or business equipment tax, is currently raging in the Indiana General Assembly.[238] The proposal has been met with considerable resistance from a statewide group of local government officials concerned that the repeal would mean local governments could lose $7 million,[239] $54.4 million,[240] or $687 million,[241] depending on the specifics of the plan. Governor Mike Pence, however, is so supportive of it that he held a press conference announcing the state might replace the revenue lost by repealing the BPPT on businesses with less than $25,000 in equipment.[242] This proposal would then leave repealing the remaining BPPT tax (on business with more than $25,000 in equipment) up to each individual county.[243] As the 2014 legislative session came to a close, Indiana Speaker of the House, Brian Bosma, indicated the Indiana House and Senate came to a deal where the decision would be left almost entirely to local governments to decide and implement.[244]

---

233. *See supra* Part IV.

234. H.B. 1376, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

235. *Id.*

236. *Id.*

237. The BPPT is a tax assessed on all equipment/tangible assets used in the production of income or held as an investment. *Personal Property,* DEPT. OF LOCAL GOV'T FINANCE, http://www.in.gov/dlgf/7576.htm (last visited Feb. 26, 2014).

238. Cook, *supra* note 32.

239. Dan Carden, *Business Tax Cut Advances in Statehouse*, NORTHWEST INDIANA TIMES (Mar. 3, 2014), http://www.nwitimes.com/news/local/govt-and-politics/business-tax-cut-advances-at-statehouse/article_dd6e4f27-77f5-52b0-8ea6-c3a6195fa491.html.

240. Cook, *supra* note 32.

241. LARRY DEBOER & JOHN STAFFORD, THE PERSONAL PROPERTY TAX IN INDIANA: ITS REDUCTION OR ELIMINATION IS NO SIMPLE TASK 12 (2014), *available at* http://www.indianafiscal.org/resources/Documents/REPORT_The%20Personal%20Property%20Tax%20%20in%20Indiana_Indiana%20Fiscal%20Policy%20Institute_020614.pdf.

242. Cook, *supra* note 32.

243. *Id.*

244. Brandon Smith, *Legislators Reach Compromise on Business Property Tax*, IND. PUBLIC

Matthew Greller, executive director and CEO of the Indiana Association of Cities and Towns (IACT), expressed his belief that the issue should be approached holistically by looking at the financial impact the repeal would have, particularly on local governments.[245] He indicated he has the sense that repeal, in some form, is inevitable, but expressed concern with the county-by-county approach this deal will create and stressed that any dollar lost needs to be replaced.[246] This echoes their campaign battle cry, "Replace, Don't Erase."[247] It is unlikely that this is the last of the debate as legislators will likely reexamine the issue, the local impact, and modifications in upcoming legislative sessions.[248]

The combination of the strong political desire from the Governor's office, General Assembly and the powerful political pushback from local officials demanding replacement revenue with additional local options creates a unique opportunity to reintroduce the concept of township government reform. As previously noted, the last known study of the statewide cash balances of township officials exceeded $215 million.[249] In many of these townships, the cash reserves are wildly excessive for the needs of their respective townships.[250] Transferring the township duties and financial control to the county level could provide county governments with the ability to use these unused tax dollars in a way that serves the same local constituents whose tax dollars built these reserves in the first place.[251] This initial cash infusion could help the initial revenue losses and transition costs, creating what Speaker Bosma refers to as a "soft landing" for the BPPT repeal.[252] Then, as the township reform and the repeal of the BPPT take effect, the long run cost savings and efficiencies that township reform is expected to produce could help offset the lost tax revenue the BPPT repeal would create.[253]

MEDIA (Mar. 12, 2014), http://indianapublicmedia.org/news/legislators-reach-compromise-business-property-tax-64246/.

245. Interview by Abdul Hakim-Shabazz with Matthew Greller, Exec. Dir. and CEO, Ind. Assoc. of Cities and Towns, in Indianapolis, Ind. (Feb. 25, 2014) [hereinafter Hakim-Shabazz Interview], *available at* https://soundcloud.com/indypolitics/matt-greller-indiana.

246. *Id.*

247. *Replace Don't Erase*, IND. ASSOC. OF CITIES AND TOWNS (Feb. 26, 2014), http://www.citiesandtowns.org/ppt.

248. Barb Berggoetz & Tony Cook, *Compromises Near on Indiana Biz Tax Cut, Pre-Kindergarten*, INDIANAPOLIS STAR (Mar. 11, 2014), http://www.indystar.com/story/news/politics/2014/03/11/compromises-near-on-indiana-biz-tax-cut-pre-school/6292769/.

249. Editorial, *Townships Out of Touch*, *supra* note 29, at A12.

250. *See infra* Appendix A.

251. It would be important not to rededicate all of the surplus money to offsetting a tax cut, but in situations where the township expenditures are a fraction of the cash balance (instead of the other way around), the county council would have the option to prioritize the county's needs beyond the silo of traditional township responsibilities. While $215 is estimated to be the surplus figure, the repeal of the BPPT is estimated at about a quarter of that. Cook, *supra* note 32, at A1.

252. Ind. House Speaker Brian Bosma, Press Conference (Feb. 20, 2014) (audio recording *available at* https://soundcloud.com/indypolitics/house-speaker-brian-bosma).

253. *See supra* Part III.

Including township reform in this debate would help accomplish the expressed intent of the legislators and local officials. The Governor and General Assembly get the tax repeal they seek which, they believe, will create a more business-friendly climate and lead to more Hoosier jobs.[254] Officials at the municipal and county level get an infusion of cash from the excess township balances, more local flexibility and control, and an opportunity to continue to find more cost savings in the delivery of government services.[255] It would also reduce the burden on the state to fund any "replacement revenue."[256]

Township reform alone would not be the complete answer. There would still be issues to address, but, if combined with other proposals as a package/toolkit, the approach may be a viable option.[257] Other potential legislation that could be part of a toolkit of options for local governments could be addressing inaccurate distribution of local option income taxes, providing locals the authority to treat the Motor Vehicle Highway account and Local Road and Street account as interchangeable, and uncoupling the local option income tax from property tax requirements.[258] These are all proposals requested by IACT as a way to enhance local flexibility and efficiency.[259]

Repealing the BPPT would be a significant win for Governor Pence, the Indiana General Assembly and the business community.[260] It would enhance the business friendliness of Indiana and hopefully help attract jobs.[261] This repeal seems to be inevitable in one form or another, as such municipal and county officials are seeking replacement revenue and budget flexibility.[262] If packaged well, township reform may seem more palatable to these local officials than it has in the past. The sense of inevitability of repeal, any resistance to state-funded replacement revenue, and the concern with a county-by-county solution may be what is necessary to move IACT and county officials to stop their opposition to township consolidation. Splintering off these groups of traditional opponents would leave a smaller group of opponents left on the other side of the debate and put those who wish to repeal the BPPT without harming local governments in alignment with reform proponents.

---

254. Cook, *supra* note 32.

255. *See supra* Part III.

256. Cook, *supra* note 32.

257. One particular issue that would need to be addressed would be that the cash infusion and cost savings of township consolidation would be delivered directly to the counties, not the municipalities who would also be seeing losses in revenue from the BPPT repeal. Municipalities would likely benefit from a larger share of the countywide tax levy if counties needed less, but a more direct compromise might need to be addressed in legislation.

258. *2014 Legislative Session*, IND. ASSOC. OF CITIES AND TOWNS, http://www.citiesandtowns.org/Legislation-Policy/2014-Legislative-Session (last visited Feb. 26, 2014).

259. *Id.*

260. Cook, *supra* note 32.

261. DEBOER & STAFFORD, *supra* note 241, at 9-12.

262. Hakim-Shabazz Interview, *supra* note 245.

CONCLUSION

Political packaging is not the only way township reform can be achieved. A renewed debate with an emboldened push can still make reform a reality, but it will not be easy. Grassroots support for such a policy-heavy, structural reform movement is not easy to come by, making a political firestorm with voters demanding the type of change we saw in 2007 unlikely.[263] For this reason, *KSR* dubbed Indiana's stagnant structure of local government "the quiet crisis."[264] It will take continued support from the business community, editorial pages, political blogs, and most importantly, it will take political courage from the Indiana General Assembly and the governor's office.[265] Former Governor Kernan and then-Chief Justice Shepard outline Indiana's choices: "Indiana can either embolden itself, designing new arrangements for its future prosperity, or continue to trudge along under a system of government erected 150 years ago."[266]

Indiana has a reputation for being adverse to change.[267] However, in the last decade, Indiana has accepted a number of major changes and proved that it can be done.[268] She must do it again. Indiana's township government structure is antiquated, inefficient, unaccountable, and defenders of this structure advance flawed arguments for its retention. The Indiana General Assembly should pass legislation transferring the duties of township trustees and advisory boards to county governments.

Simply put, "[w]e've got to stop governing like this."[269]

---

263. Lawrance Interview, *supra* note 29 (noting the difficulty of getting voter engagement on the issue); *Indiana's Long Fight*, *supra* note 229.

264. COMMISSION REPORT, *supra* note 1, at 4.

265. Morton Marcus, *Opinion; Too Many Governments Plague Indiana*, IND. ECON. DIGEST (Sept. 1, 2008), http://www.indianaeconomicdigest.net/print.asp?ArticleID=42959&SectionID=31&SubSectionID=83.

266. COMMISSION REPORT, *supra* note 1, at 2.

267. *See, e.g.*, Stephanie Wang, *Why We're Still Talking About Race*, INDIANAPOLIS STAR (Mar. 7, 2014), *available at* http://www.indystar.com/story/news/2014/03/07/why-were-still-talking-about-race-in-indiana/6191765/ (quoting historian James H. Madison as saying "'The Indiana Way' . . . is that we are slow to change.").

268. Daniel C. Vock, *Indiana Highway Building Ramps Up as Daniels' Term Winds Down*, STATELINE (July 19, 2012), *available at* http://www.pewstates.org/projects/stateline/headlines/indiana-highway-building-ramps-up-as-daniels-term-winds-down-85899399309 (referencing major changes in Indiana such as daylight savings time, property tax caps, increasing taxes to build Lucas Oil Stadium, becoming a "right to work" state, and leasing Indiana toll roads).

269. COMMISSION REPORT, *supra* note 1, at 1.

APPENDIX A

Township Financial Report Summaries
Completed in 2009 using 2008 reports

County	Township	Operating Balance as a % of Expenditure	Cost to Provide $1 in Direct Service
Allen	Adams	130%	$0.81
Allen	Aboite	19%	$13.20
Allen	Cedar Creek		
Allen	Eel River		
Allen	Jackson	61%	$2.40
Allen	Jefferson	88%	$0.37
Allen	Lafayette		
Allen	Lake	159%	$1.25
Allen	Madison	60%	$17.47
Allen	Marion	124%	$0.79
Allen	Maumee		
Allen	Milan	140%	$1.65
Allen	Monroe	123%	$0.93
Allen	Perry	26%	$4.62
Allen	Pleasant	106%	$1.73
Allen	Scipio		
Allen	Springfield	39%	$2.32
Allen	St. Joseph	95%	$7.34
Allen	Washington	95%	$0.93
Allen	Wayne	10%	$5.22
Bartholemew	Clay	86%	$0.45
Bartholemew	Clifty	338%	$0.72
Bartholemew	Columbus	-1%	$1.43
Bartholemew	Flatrock	53%	$0.49
Bartholemew	Hawcreek	25%	$1.27
Bartholemew	Jackson	33%	$10.60
Bartholemew	Rockcreek	43%	$0.90
Bartholemew	Sandcreek	465%	$0.55
Bartholemew	German		

Bartholemew	Harrison		
Bartholemew	Ohio		
Bartholemew	Wayne		
Boone	Eagle	471%	$5.05
Boone	Sugar Creek	794%	$2.05
Boone	Washington	503%	$1.17
Boone	Center	110%	$0.32
Boone	Clinton	177%	$1.48
Boone	Harrison	218%	$1.52
Boone	Jackson	299%	$1.34
Boone	Jefferson	306%	$0.75
Boone	Marion	67%	$0.96
Boone	Perry	46%	$0.14
Boone	Union	27%	$3.41
Boone	Worth	11%	$0.52
Brown	Hamblen	106%	$0.78
Brown	Jackson	2%	$0.83
Brown	Washington	101%	$0.80
Brown	Van Buren		
Cass	Adams		
Cass	Bethlehem		
Cass	Boone	406%	$1.32
Cass	Clay		
Cass	Clinton		
Cass	Deer Creek		
Cass	Eel	122%	$3.29
Cass	Harrison		
Cass	Jackson	133%	$5.29
Cass	Jefferson		
Cass	Miami		
Cass	Noble	362%	$0.29
Cass	Tipton		
Cass	Washington	203%	$0.55
Clark	Bethlehem		
Clark	Carr		
Clark	Charlestown	66%	$1.05
Clark	Jeffersonville	157%	$0.98

Clark	Monroe		
Clark	Oregon	88%	$18.42
Clark	Owen		
Clark	Silver Creek	381%	$50.12
Clark	Union	80%	$106.02
Clark	Utica	43%	$2.72
Clark	Washington		
Clark	Wood		
Clay	Brazil		
Clay	Cass	1685%	$2.70
Clay	Dick Johnson		
Clay	Harrison		
Clay	Jackson	61%	$6.56
Clay	Lewis	47%	$1.84
Clay	Perry	62%	$2.11
Clay	Posey	180%	$0.92
Clay	Sugar Ridge		
Clay	Van Buren	135%	$0.66
Clay	Washington	153%	$0.99
Delaware	Center	3%	$1.32
Delaware	Delaware	28%	$6.69
Delaware	Hamilton	9%	$2.00
Delaware	Liberty	40%	$11.49
Delaware	Monroe	-5%	$16.06
Delaware	Mt. Pleasant	61%	$2.21
Delaware	Perry	169%	$2.69
Delaware	Salem	49%	$10.28
Delaware	Union	173%	$1.45
Delaware	Harrison		
Delaware	Niles		
Delaware	Washington		
Floyd	Franklin	97%	$0.74
Floyd	Georgetown	156%	$5.08
Floyd	Greenville		
Floyd	Lafayette		
Floyd	New Albany		
Hamilton	Wayne	-42%	$0.69

Hamilton	Adams	155%	$0.64
Hamilton	Clay	75%	$1.81
Hamilton	Delaware	12%	$8.44
Hamilton	Jackson	17%	$0.59
Hamilton	Noblesville	41%	$1.03
Hamilton	Washington	111%	$1.82
Hamilton	White River	77%	$3.97
Hancock	Buck Creek		
Hancock	Vernon	73%	$2.07
Hancock	Blue River	204%	$2.50
Hancock	Brown	170%	$0.74
Hancock	Green	222%	$1.37
Hancock	Jackson	72%	$22.03
Hancock	Sugar Creek	22%	$0.62
Hancock	Center	133%	$0.62
Hancock	Brandywine		
Hendricks	Brown	104%	$34.18
Hendricks	Center	115%	$0.88
Hendricks	Eel River	69%	$1.95
Hendricks	Franklin	134%	$0.17
Hendricks	Lincoln	108%	$4.96
Hendricks	Union	142%	$0.95
Hendricks	Clay	88%	$0.13
Hendricks	Marion	53%	$0.78
Hendricks	Middle	4%	$1.62
Hendricks	Washington	39%	$1.25
Hendricks	Liberty	242%	$0.25
Hendricks	Guilford		
Johnson	Blue River	53%	$0.80
Johnson	Clark	65%	$1.60
Johnson	Franklin	208%	$1.25
Johnson	Hensley	94%	$30.09
Johnson	Needham	38%	$2.17
Johnson	Nineveh	140%	$3.38
Johnson	Union	705%	$0.81
Johnson	White River	37%	$5.37
Johnson	Pleasant		

Lake	Calumet	5%	$5.80
Lake	Cedar Creek	4%	$3.05
Lake	Center	475%	$0.64
Lake	Eagle Creek		
Lake	Hanover	16%	$3.20
Lake	Hobart	33%	$4.32
Lake	North	10%	$9.29
Lake	Ross	194%	$21.10
Lake	St. John		$0.98
Lake	Winfield		$0.59
Lake	West Lake		
LaPorte	Cass		
LaPorte	Center	-9%	$12.28
LaPorte	Clinton		
LaPorte	Coolspring	11%	$17.62
LaPorte	Dewey		
LaPorte	Galena	150%	$0.33
LaPorte	Hanna		
LaPorte	Hudson		
LaPorte	Johnson		
LaPorte	Kankakee	-7%	$3.77
LaPorte	Lincoln	62%	$4.65
LaPorte	Michigan		
LaPorte	New Durham	114%	$0.30
LaPorte	Noble		
LaPorte	Pleasant		
LaPorte	Prairie		
LaPorte	Scipio		
LaPorte	Springfield	5%	$3.72
LaPorte	Union	7%	$0.81
LaPorte	Washington	28%	$4.46
LaPorte	Wills	59%	$0.59
Madison	Adams	57%	$0.73
Madison	Anderson	29%	$3.54
Madison	Boone	315%	$0.68
Madison	Duck Creek	260%	$1.30
Madison	Fall Creek	3%	$1.98

Madison	Green	0%	$0.47
Madison	Lafayette	28%	$0.93
Madison	Monroe	169%	$0.39
Madison	Pipe Creek	40%	$1.50
Madison	Richland	102%	$1.32
Madison	Stony Creek	65%	$0.52
Madison	Van Buren	22%	$1.73
Madison	Jackson		
Madison	Union	35%	$1.87
Marion	Franklin	18%	$1.86
Marion	Lawrence	19%	$1.36
Marion	Perry	17%	$0.25
Marion	Pike	11%	$0.31
Marion	Warren	0%	$12.49
Marion	Center	62%	$4.61
Marion	Washington	201%	$9.44
Marion	Decatur	23%	$0.32
Marion	Wayne	26%	$1.23
Monroe	Bean Blossom		
Monroe	Benton	39%	$7.60
Monroe	Bloomington	10%	$2.49
Monroe	Clear Creek	47%	$5.92
Monroe	Indian Creek	94%	$1.23
Monroe	Perry		
Monroe	Polk	275%	$0.93
Monroe	Richland	60%	$0.53
Monroe	Salt Creek	82%	$1.84
Monroe	Van Buren	26%	$1.19
Monroe	Washington	292%	$0.31
Morgan	Green	144%	$0.58
Morgan	Jackson	28%	$2.29
Morgan	Ray	258%	$1.52
Morgan	Baker	603%	$2.54
Morgan	Madison	4%	$2.85
Morgan	Brown	136%	$0.67
Morgan	Gregg	217%	$0.85
Morgan	Harrison	609%	$6.99

Morgan	Jefferson	105%	$0.30
Morgan	Monroe	839%	$9.17
Morgan	Washington	42%	$0.34
Morgan	Adams		
Morgan	Ashland		
Morgan	Clay		
Owen	Clay	186%	$0.73
Owen	Franklin	127%	$0.73
Owen	Harrison	54%	$2.29
Owen	Jackson	160%	$4.24
Owen	Jefferson	203%	$0.53
Owen	Jennings	113%	$1.11
Owen	Lafayette	181%	$1.12
Owen	Marion	20%	$0.32
Owen	Montgomery		
Owen	Morgan	20%	$1.38
Owen	Taylor	370%	$0.92
Owen	Washington	360%	$5.59
Owen	Wayne	376%	$0.96
Saint Joseph	Centre	1%	$1.21
Saint Joseph	Clay	50%	$0.30
Saint Joseph	German	17%	$10.44
Saint Joseph	Greene	12%	$4.21
Saint Joseph	Harris	20%	$0.28
Saint Joseph	Liberty	151%	$0.93
Saint Joseph	Lincoln	12%	$1.72
Saint Joseph	Madison	24%	$10.28
Saint Joseph	Olive	70%	$0.51
Saint Joseph	Penn	16%	$2.34
Saint Joseph	Portage	34%	$2.10
Saint Joseph	Union	84%	$3.56
Saint Joseph	Warren	50%	$0.67
Shelby	Addison	122%	$0.80
Shelby	Hanover	70%	$3.62
Shelby	Hendricks	15%	$2.75
Shelby	Jackson	61%	$2.33
Shelby	Liberty	91%	$3.18

Shelby	Marion	51%	$2.24
Shelby	Moral	-6%	$8.42
Shelby	Noble	79%	$6.22
Shelby	Shelby	114%	$0.58
Shelby	Sugar Creek	24%	$1.43
Shelby	Union	133%	$4.17
Shelby	Van Buren	237%	$0.39
Shelby	Washington	19%	$1.69
Tippecanoe	Fairfield	33%	$7.20
Tippecanoe	Jackson	173%	$1.78
Tippecanoe	Lauramie		
Tippecanoe	Perry	29%	$2.43
Tippecanoe	Randolph	23%	$2.52
Tippecanoe	Sheffield	385%	$0.90
Tippecanoe	Shelby	41%	$7.15
Tippecanoe	Tippecanoe	-9%	$3.56
Tippecanoe	Union	17%	$13.32
Tippecanoe	Wabash	36%	$5.50
Tippecanoe	Washington	119%	$2.03
Tippecanoe	Wayne	67%	$4.75
Tippecanoe	Wea	19%	$9.95
Vanderburgh	Armstrong	148%	$0.16
Vanderburgh	Center	140%	$1.41
Vanderburgh	German	3%	$0.50
Vanderburgh	Knight	77%	$0.95
Vanderburgh	Perry	140%	$1.41
Vanderburgh	Pigeon	42%	$2.15
Vanderburgh	Scott	19%	$0.71
Vanderburgh	Union	57%	$0.70
Vigo	Fayette	37%	$2.52
Vigo	Linton	23%	$1.92
Vigo	Nevins	136%	$2.10
Vigo	Sugar Creek	158%	$3.91
Vigo	Harrison	288%	$1.79
Vigo	Last Creek	106%	$29.44
Vigo	Otter Creek	29%	$4.90
Vigo	Honey Creek	482%	$4.06

Vigo	Pierson	46%	$2.10
Vigo	Prairieton	356%	$5.65
Vigo	Riley	139%	$5.85
Vigo	Prairie Creek	68%	$0.00

If a listed township has no data, it means that township had not filed their 2008 reports with DLGF when they were requested in 2009. All studies on file with author.

PEREMPTORY CHALLENGES TO JURORS BASED ON SEXUAL ORIENTATION: PREEMPTING DISCRIMINATION BY COURT RULE

ESTHER J. LAST*

During jury selection in a case involving a medication for HIV, a potential juror who is male responds to a question from the judge, mentioning his partner.[1] He refers to his partner several more times using the masculine pronoun, "he," in response questions from the judge.[2] He also states that he has friends with HIV.[3] Defense counsel has a brief interaction with the potential juror, establishing only that the potential juror has no particular knowledge of the drug in the case.[4] Defense counsel does not ask any questions about the potential juror's ability to remain fair and impartial.[5] Defense counsel then exercises a peremptory strike against the potential juror.[6]

Attorneys are not required to state a reason for striking a potential juror when exercising a peremptory challenge, but why was this man struck from the jury panel? Is this man gay? How would that be determined? If he is gay, is it acceptable to strike him solely for this reason? Should the attorney be forced to give a reason, other than the man's sexual orientation, for the strike? Must it be a good reason? If there is no other reason, should the attorney be reprimanded?

INTRODUCTION

Trial by an impartial jury has been described as a critical constitutional right.[7] In the quest to ensure that juries are made up of impartial members of the citizenry, the practice of allowing peremptory challenges, or allowing parties to remove potential jurors suspected of being biased, has developed in the American judicial system.[8] To achieve this end, peremptory strikes were traditionally and

---

* J.D. Candidate, 2016, Indiana University Robert H. McKinney School of Law; A.B. 2000, The University of Chicago, Chicago, Illinois; Pharm.D. 2008, Midwestern University Chicago College of Pharmacy, Downers Grove, Illinois. I am very much indebted to Professor Joel Schumm for his advice and assistance in the completion of this Note. I am also forever grateful to my wife, Sarah Heck, for her unending patience, understanding, and encouragement.

1. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014).
2. *Id.*
3. *Id.*
4. *Id.* at 474-75.
5. *Id.* at 475
6. *Id.*
7. U.S. CONST. amend. VI; Rodger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1370 (1993).
8. John J. Neal, Note, *Striking Batson Gold at the End of the Rainbow?: Revisiting* Batson v. Kentucky *and its Progeny in Light of* Romer v. Evans *and* Lawrence v. Texas, 91 IOWA L. REV. 1091, 1095 (2006); *see also* 28 U.S.C. § 1870 (2013); FED. R. CRIM. P. 24; FED. R. CIV. P. 47; Holland v. Illinois, 493 U.S. 474, 481 (1990) (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119 (1790)); Swain v. State of Ala., 380 U.S. 202, 215-17 (1965); Keith A. Ward, Comment, "*The*

by law universally permitted; however, jurisprudential action has somewhat changed the application of these challenges.[9] Peremptory challenges are now susceptible to objection, called a *Batson* challenge, by the non-striking party if the non-striking party suspects that the seating of the potential juror is being challenged as an act of discrimination based on race, ethnicity, or sex.[10] To date, *Batson* challenges have only been allowed based on these three classes.[11] Protection of jurors in only these three classes is inadequate to ensure a true cross section of the community or to protect the rights of gay, lesbian, and bisexual citizens to serve on juries. This Note argues that while extending *Batson* challenges to sexual orientation would be an appropriate application of equal protection, the *Batson* framework is not workable for sexual orientation. Rather, court rules should be adopted to prevent discrimination against gay, lesbian, and bisexual potential jurors.

Part I of this Note describes the history and use of peremptory challenges, including discriminatory uses. It also addresses the obligation of the lawyer to avoid discrimination in practice. Part II details the development of the common law limitations on the discriminatory use of peremptory challenges. Part III explores the possibility of extending *Batson* to prevent discrimination based on sexual orientation. This extension requires, first, that gay, lesbian, or bisexual sexual orientation be recognized as a class. Second, it requires the application of a heightened scrutiny standard to laws and practices that discriminate based on this class. Part III also addresses some practical problems of applying *Batson* to sexual orientation. Finally, Part IV discusses and proposes the better alternative of using court rules to remedy the discriminatory use of peremptory challenges.

I. PEREMPTORY CHALLENGES: HISTORY AND USE

A. The Peremptory Challenge—A Very Brief History

The Sixth Amendment's guarantee of a trial by impartial jury for criminal defendants is largely seen as the most critical constitutional right involving the jury.[12] The term "impartial jury" has been interpreted in two ways by the U.S. Supreme Court.[13] It applies both to a juror's decision-making ability and to the composition of the jury, requiring that the jury represent a fair cross-section of the

---

Only Thing in the Middle of the Road is a Dead Skunk and a Yellow Stripe": Peremptory Challenges—Take 'Em or Leave 'Em, 26 TEX. TECH. L. REV. 1361, 1363 (1995).

9. BLACK'S LAW DICTIONARY 261 (9th ed. 2009).

10. *Id.*

11. Throughout this Note, the terms sex and gender are used interchangeably. While this author recognizes that those terms are unique with different meanings, the law generally refers to class-based assignments of sex and gender interchangeably, so any distinction made here would unnecessarily complicate the discussion and analysis.

12. U.S. CONST. amend. VI; Hochman, *supra* note 7, at 1370.

13. Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 240 (1998).

population.[14] In order to comport with the first meaning of impartial jury, the law has developed methods for deselecting from service jurors who might show bias; prospective jurors may be removed for cause or without cause by peremptory challenge, also called peremptory strike.[15]

Peremptory challenges are an established part of the Western legal tradition.[16] They began during the Roman era and were continued under English common law.[17] They were first codified in the United States in 1790 for use in federal cases.[18] All states now have preserved the rights of peremptory challenges for both sides in civil and criminal cases.[19]

B. Federal and State Sources of Peremptory Challenge Authority

The rules for allocation of peremptory challenges in criminal cases are set forth in the Federal Rules of Criminal Procedure.[20] The number of peremptory challenges allowed for each side depends on the type of case: twenty per side in a capital case, six for the government and ten for the defendant in other felony cases, and three for each side in misdemeanor cases.[21] At its discretion the court may allow additional challenges in cases involving multiple defendants.[22] The Federal Rules of Civil Procedure and the United States Code specify the number of peremptory challenges allowed for federal civil cases.[23] Each side is permitted three peremptory challenges; though, again at its discretion, the court may allow additional challenges when there are multiple plaintiffs or multiple defendants.[24]

State rules addressing peremptory challenges generally mimic federal rules in distinction and number.[25] Some states, however, introduce limitations to the way in which the challenges may be used.[26]

C. Discriminatory Use of Peremptory Challenges

Peremptory strikes were traditionally and universally permitted by law; however, recent jurisprudential action has changed the application of these

---

14. *Id.*

15. Hochman, *supra* note 7, at 1371.

16. Ward, *supra* note 8, at 1363; Neal, *supra* note 8, at 1095.

17. Ward, *supra* note 8, at 1363; Neal, *supra* note 8, at 1095.

18. Holland v. Illinois, 493 U.S. 474, 481 (1990) (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119 (1790)); Neal, *supra* note 8, at 1096.

19. 28 U.S.C. § 1870 (2013); FED. R. CRIM. P. 24; FED. R. CIV. P. 47; *Holland*, 493 U.S. at 481; Swain v. State of Ala., 380 U.S. 202, 215-217 (1965).

20. FED. R. CRIM. P. 24.

21. *Id.*

22. *Id.*

23. 28 U.S.C. § 1870 (2013); FED. R. CIV. P. 47.

24. 28 U.S.C. § 1870; FED. R. CIV. P. 47.

25. *E.g.*, IND. JURY R. 18 (2013).

26. *E.g.*, N.H. R. CRIM. P. 22 (2014).

challenges.[27] Peremptory challenges are now susceptible to objection, called a *Batson* challenge, by the non-striking party if the non-striking party suspects a potential juror is being struck as an act of discrimination based on race, ethnicity, or sex.[28] To date, *Batson* challenges have only been allowed based on these three classes.[29]

Several distinct yet related interests are at stake when considering the discriminatory application of peremptory challenges. First, there are the rights of the defendant to a trial by an impartial jury drawn from a fair cross-section of the community.[30] The Court has held that a jury pool from which segments of the population have been excluded does not satisfy the fair cross-section requirement because it cannot fulfill its purpose "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[31] A defendant has an equal protection right to a jury selected without discriminatory criteria to ensure the type of protection that trial by jury is intended to provide.[32]

Second, there are the rights of the potential juror.[33] As is further described below, *Batson* and its progeny show that individual citizens have an equal protection right to the opportunity to serve on a jury; that is, equal protection of the juror is violated if he or she is removed for a reason sufficient to constitute discrimination (based on race, ethnicity, or sex).[34] Third, there is harm to the community as a whole when peremptory challenges are used in a discriminatory manner.[35] In the context of race discrimination, the Court has described the purposeful exclusion of black persons from juries as an undermining of the confidence of the public in the fairness of the judicial system.[36] The Court held that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."[37]

---

27. BLACK'S LAW DICTIONARY 261 (9th ed. 2009).

28. *Id.*

29. Sherrie J. O'Brien, J.E.B. v. Alabama ex rel. T.B.*: The Collapse of the Peremptory Challenge*, 14 ST. LOUIS U. PUB. L. REV. 655, 655-56 (1995).

30. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 370 (2010).

31. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citing Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968)).

32. Batson v. Kentucky, 476 U.S. 79, 85-86 (1986).

33. *Id.* at 86.

34. *Id.* at 87; Hernandez v. New York, 500 U.S. 352, 355 (1991); Powers v. Ohio, 499 U.S. 400, 402 (1991); *see also* Neal, *supra* note 8, at 1111 (providing that the Court has found attorneys to be state actors when they receive "assistance and authority from the court in conducting various stages of the trial").

35. *Powers*, 499 U.S. at 402; *Batson*, 476 U.S. at 87.

36. *Batson*, 476 U.S. at 87.

37. *Powers*, 499 U.S. at 402.

D. Obligation of the Lawyer to Avoid Discrimination

The guidance given to the legal profession regarding discrimination in the practice of law does not specifically address protection of the juror's rights and may actually serve to undermine them.[38] The American Bar Association (ABA) Model Rule 8.4 states that professional misconduct occurs when a lawyer "engage(s) in conduct that is prejudicial to the administration of justice."[39] Comment 3 to the rule further explains:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).[40]

The comment goes on to specifically exclude peremptory challenges from this rule: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."[41] While the model rule discourages discrimination against members of classes beyond those that have already been held susceptible to a *Batson* challenge, discrimination in the process of jury selection does not necessarily constitute misconduct for any of these classes.[42]

In seeking to regulate to this standard of professional conduct, states have generally employed one of two strategies: enacting a general rule regarding misconduct under which discriminatory use of peremptory challenges might fall, or enacting an express rule specifying that conduct in violation of *Batson* may subject the attorney to professional discipline.[43] A 2003 analysis of these rules as they relate to racism in jury selection determined that no lawyers in the 35 jurisdictions responding had ever been disciplined for racially discriminatory practices in jury selection.[44] While the data provided in that analysis suffers from some limitations based on non-response, it is reasonable to conclude that an actual number of formal complaints would be relatively small and that "lawyers, judges, and disciplinary officials seem to consistently regard racial discrimination in jury selection as not deserving of meaningful attention from a professionalism

---

38. *See* Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 271-278 (2003) (discussing the development of this rule and comment and the limits to them).

39. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2013).

40. *Id.* at cmt. 3.

41. *Id.*

42. *Id.*

43. Brown, *supra* note 38, at 278-79.

44. *Id.* at 282.

standpoint[.]"[45] What the profession is left with, then, is an obligation not to discriminate based on membership in certain classes but little in the way of enforcement or remedy if such discrimination is present in jury selection.[46]

II. COMMON LAW LIMITATIONS ON THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES—RACE, ETHNICITY, SEX

The procedure for charging and refuting discrimination in peremptory challenges was established in the landmark U.S. Supreme Court case *Batson v. Kentucky*, which disallowed race-based peremptory challenges. The Court held that the use of peremptory strikes is subject to the guarantees of the Equal Protection Clause.[47] However, even before the modern procedure was established in *Batson*, the Court began its examination of racial discrimination in the jury selection process.[48]

As early as 1879, in *Strauder v. West Virginia*, the Court recognized on equal protection grounds the impropriety of a state statute requiring all-white, all-male juries.[49] In *Strauder*, a black former slave was on trial for murder.[50] The Court held that "discriminating in the selection of jurors . . . against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man."[51] The Court first addressed the issue of equal protection in peremptory challenges in 1965 in *Swain v. Alabama*.[52] Emphasizing the historical importance of peremptory challenges; however, the Court refused to find any violation of the Equal Protection Clause when all African-American potential jurors were struck by peremptory challenge in a single case.[53]

It was against the backdrop of these cases that *Batson* was decided. Batson was a black man indicted on charges of second-degree burglary and receipt of stolen goods.[54] During jury selection, the prosecutor used his peremptory strikes to remove all four black persons who were among the potential jurors.[55] Before the jury was sworn in, defense counsel moved to discharge the jury, arguing that the removal of all black veniremen violated Batson's rights to a jury drawn from a cross-section of the community under both the Sixth and Fourteenth Amendments and to equal protection under the Fourteenth Amendment.[56] Batson's motion was denied, and he was ultimately convicted on both counts by

---

45. *Id.* at 285, 291-92.
46. *See generally id.*
47. Batson v. Kentucky, 476 U.S. 79, 89 (1986).
48. *See generally* Strauder v. West Virginia, 100 U.S. 303 (1879).
49. *Id.* at 304.
50. *Id.*
51. *Id.* at 310.
52. Swain v. Alabama, 380 U.S. 202 (1965).
53. *Id.* at 221.
54. Batson v. Kentucky, 476 U.S. 79, 82 (1986).
55. *Id.* at 83.
56. *Id.*

an all-white jury.[57]

On appeal to the Supreme Court of Kentucky, Batson pressed his claim regarding the prosecutor's discriminatory use of peremptory challenges.[58] Because the precedent set in *Swain* foreclosed an equal protection claim based on the prosecutor's actions, Batson directed the court to instead hold that his Sixth Amendment rights were violated by the prosecutor.[59] Batson also maintained that an equal protection violation under *Swain* was established in his case based on a pattern of discriminatory challenges.[60] The Supreme Court of Kentucky affirmed the decision of the lower court, reaffirmed its reliance on *Swain*, and did not adopt the reasoning offered by Batson.[61] Batson appealed to the U.S. Supreme Court, which reversed, overturning *Swain* to the extent that *Swain* had required a defendant to carry the burden of proof in showing purposeful discrimination by the prosecutor.[62]

Batson provided two major developments in the opposition of peremptory challenges.[63] The first was to establish the three elements necessary for a prima facie showing of discrimination in jury selection.[64] First, the defendant must show he is part of a cognizable racial group and the prosecution has used peremptory challenges to remove members of the defendant's race from the venire.[65] Second, the defendant may rely on the fact that peremptory challenges allow those who have the intent to discriminate to do so.[66] Third, the defendant must show the facts raise an inference that the prosecutor used peremptory challenges to exclude the veniremen based on their race.[67]

The second major development was to set out the three-part evidentiary standard for determining when a constitutional violation has occurred.[68] The first part is for the defendant to make a prima facie showing of discrimination.[69] In the second part, the burden is shifted to the State to present a race-neutral explanation for challenging black jurors that is related to the case to be tried.[70] The strength of the required race-neutral explanation was further detailed in a later case where the Court stated, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible."[71] Finally, in the third part, the

---

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 83-84.
61. *Id.* at 84.
62. *Id.* at 83, 92-93.
63. *See generally id.*
64. *Id.* at 96.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 96-98.
69. *Id.* at 97.
70. *Id.*
71. Purkett v. Elem, 514 U.S. 765, 767-68 (1995).

trial court must determine if the defendant has established a case of purposeful discrimination;[72] that is, whether the explanation given by the State is pretextual.[73]

Several cases have been decided by the U.S. Supreme Court since *Batson* that expand the situations in which *Batson* may be invoked.[74] In *Powers v. Ohio*, the Court eliminated the requirement that a defendant be a member of the same racial group of the peremptorily challenged jurors, holding that any criminal defendant may object to race-based exclusions, whether the jurors were of the same racial group as the defendant or not.[75] In *J.E.B. v. Alabama*, the Court extended *Batson* to gender-based discrimination, holding that gender is an "unconstitutional proxy for juror competence and impartiality."[76] Importantly, the Court specified that "parties may [ ] exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."[77] Pursuant to this holding, lower courts' determination of whether a class is protected under *Batson* has turned on the level of scrutiny applied to the class in an equal protection analysis.[78]

III. EXTENDING *BATSON* TO SEXUAL ORIENTATION

The expansion of *Batson* to gender-based discrimination in *J.E.B.* demonstrates the ability of the Court to identify other classes, including those receiving less than strict scrutiny for protection.[79] It also indicates that any new application will likely turn on the identification of the class as one requiring some form of heightened scrutiny under an equal protection analysis.[80] Despite the number of cases the U.S. Supreme Court has heard involving both equal protection claims based on sexual orientation—the classification of persons based on conduct or orientation as gay/lesbian/bisexual—and substantive due process claims where the sexual orientation of one of the parties was relevant, it has not consistently applied one level of scrutiny when addressing the cases.[81]

---

72. *Batson*, 476 U.S. at 98.

73. *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting).

74. *See* Powers v. Ohio, 499 U.S. 400 (1991); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (applying *Batson* to gender); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (applying *Batson* to parties in civil cases).

75. *Powers*, 499 U.S. at 402; *see also Edmonson*, 500 U.S. at 629-31 (applying *Batson* to parties in civil cases).

76. *J.E.B.*, 511 U.S. at 129.

77. *Id.* at 143.

78. *See* United States v. Watson, 483 F.3d 828, 833 (D.C. Cir. 2007) (holding that disability, specifically blindness, has not been recognized as a suspect class by the U.S. Supreme Court so a *Batson* challenge cannot be sustained and peremptory challenges to disabled jurors are subject to rational basis review).

79. *See J.E.B.*, 511 U.S. at 127.

80. *See id.*

81. Renee T. Hindo, *Connecticut's Class Divide: Sexual Orientation as a Quasi-Suspect Class*, 87 U. DET. MERCY L. REV. 227, 232-33 (2010).

A. The Legal Landscape of Gay, Lesbian, and Bisexual Persons as a Class[82]

The U.S. Supreme Court heard its first case considering the status of gay persons as a class in 1986 in *Bowers v. Hardwick*.[83] In that case, the Court upheld a Georgia law that made sodomy a criminal act.[84] The Court, refusing to extend a fundamental right to privacy to consensual sexual acts occurring in one's home, found instead that the moral disapproval of sodomy was a sufficient justification for upholding the law under rational basis review.[85] Because the issue in *Bowers* revolved around conduct common, but not exclusive, to a particular group of individuals, the Court could have performed an equal protection analysis, but it did not reach that question.[86]

The U.S. Supreme Court next faced the question of gay, lesbian, and bisexual people as a class ten years after *Bowers* when it heard *Romer v. Evans*.[87] That case was brought after Colorado passed Amendment 2 to the Colorado Constitution, the effect of which was to overrule ordinances put in place by cities and municipalities to protect gay, lesbian, and bisexual people from discrimination based on sexual orientation.[88] Although the Colorado Supreme Court found that Amendment 2 "infringed the fundamental right of gays and lesbians to participate in the political process" and thus was subject to strict scrutiny under the Fourteenth Amendment, the U.S. Supreme Court declined to adopt that reasoning.[89] Rather, the U.S. Supreme Court embraced an equal protection analysis, reasoning that the objective the state intended to achieve was so bereft of legitimate government interest so as to fail under rational basis review.[90] Even so, the decision on equal protection grounds indicates that "the [U.S.] Supreme Court implicitly held that state antidiscrimination statutes may include sexual orientation as a protected class."[91]

The U.S. Supreme Court reconsidered the due process approach of *Bowers*

---

82. Although the term LGBT (lesbian, gay, bisexual, transgender) is widely used, a legal discussion of the specific class at issue is based on sexual orientation and not gender identity, so the class addressed in this Note does not include transgender individuals. Discrimination based on gender identity or presentation is an important topic but is, unfortunately, outside the scope of this Note.

83. *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

84. *Bowers*, 478 U.S. at 186.

85. *Id.*

86. *Id.* at 201-02 (Blackmun, J., dissenting).

87. Romer v. Evans, 517 U.S. 620 (1996).

88. *Id.*

89. *Id.* at 625-26.

90. *Id.* at 632-33.

91. Elizabeth R. Cayton, Comment, *Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes*, 19 LAW & SEXUALITY 193, 199 (2010).

when it heard *Lawrence v. Texas* in 2003.[92] Like *Bowers*, *Lawrence* involved a state statute criminalizing sexual acts between two persons of the same sex but not the same acts between two persons of the opposite sex.[93] Although the Court granted certiorari in part to address whether the statute violated the Equal Protection Clause of the Fourteenth Amendment, it ultimately used the case to reassess and overturn *Bowers* on substantive due process grounds.[94] While the Court acknowledged that it could resolve *Lawrence* under an equal protection analysis, it instead sought to address both equality and fundamental rights in its treatment of *Lawrence*.[95] "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[96] However, the language employed by the Court helped to elucidate the link between conduct and class for equal protection purposes: "When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres."[97] Additionally, Justice O'Connor, concurring in the judgment, presented an analysis of the constitutionality of the statute under an equal protection framework.[98]

Justice O'Connor's concurrence in *Lawrence* provided the background necessary for the majority of the Court to find that gays and lesbians are an identifiable class in a subsequent case: *Christian Legal Society v. Martinez*.[99] There, the Court addressed a First Amendment issue brought by the Christian Legal Society (CLS) chapter at Hastings College of Law at the University of California Berkeley.[100] CLS applied to be a registered student organization, an officially recognized student group eligible for funding and benefits extended by Hastings.[101] In order to qualify to become a registered student organization, however, CLS was required to abide by the law school's Policy on Nondiscrimination.[102] CLS asked for an exemption from compliance with this policy because its bylaws "exclude[d] from affiliation anyone who engages in 'unrepentant homosexual conduct.'"[103] After Hastings refused to exempt the group from the nondiscrimination policy, CLS sued, alleging violations of the

---

92. Lawrence v. Texas, 539 U.S. 558, 564 (2003).

93. *Id.* at 562.

94. *Id.* at 578.

95. *Id.* at 575.

96. *Id.*

97. *Id.* (emphasis added).

98. *Id.* at 579-85.

99. Andrea L. Claus, Outstanding Student Articles, *The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation*, 5 PHOENIX L. REV. 151, 159 (2011).

100. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2984-3009 (2010).

101. *Id.* at 2979-80.

102. *Id.* at 2979.

103. *Id.* at 2980.

group's "First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion."[104] In its opinion, the U.S. Supreme Court did not expressly address an equal protection or due process issue involving sexual orientation; however, it did rely on both the *Lawrence* majority opinion and the concurrence of Justice O'Connor in that case to define gay *persons* as a status or class rather than identifying the group based on sexual *conduct*.[105]

The most recent U.S. Supreme Court case, brought as an equal protection violation based on sexual orientation, was *United States v. Windsor*.[106] Edith Windsor met Thea Spyer in New York City in 1963.[107] The two entered into a long-term relationship, becoming registered domestic partners in 1993 when New York City began allowing that designation; they traveled to Ontario, Canada to marry in 2007.[108] The couple continued to reside in New York City.[109] When Spyer died in 2009, she left her entire estate to Windsor.[110] Although the state of New York deemed their marriage valid, the Federal Defense of Marriage Act (DOMA), which defined, in section 3, marriage for federal purposes as being between one man and one woman, prevented Windsor from being considered Spyer's surviving spouse.[111] Because Windsor was thereby not entitled to the marital exemption from the federal estate tax, she paid $363,053 in estate taxes after Spyer's death.[112] Upon being denied a refund based on the marital exemption, Windsor brought suit, contending that the guarantee of equal protection under the Fifth Amendment was violated by DOMA.[113]

While the suit was pending in the district court, the Attorney General notified Congress that, on order of the President, the Department of Justice would not defend the constitutionality of DOMA section 3.[114] In making the decision not to defend DOMA, President Obama and Attorney General Eric Holder performed their own evaluation of sexual orientation-based classifications.[115] Acknowledging that the U.S. Supreme Court had not yet indicated the appropriate level of scrutiny to apply to classifications based on sexual orientation, the Attorney General pointed to criteria the U.S. Supreme Court looks to when determining if heightened scrutiny applies.[116] As summarized by the Attorney

---

104. *Id.* at 2981.

105. Claus, *supra* note 99, at 160.

106. *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).

107. *Id.* at 2683.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Press Release, Attorney General, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

115. *Id.*

116. *Id.*

General, those criteria are:

> (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society."[117]

The Attorney General concluded that upon analysis of these four factors, heightened scrutiny should apply.[118]

Windsor's case was first heard in the United States District Court for the Southern District of New York.[119] Lacking Second Circuit precedent on homosexuals as a suspect class and reluctant to create a new suspect class, that court found DOMA section 3 unconstitutional in a rational basis review under the Equal Protection Clause.[120] Relying on the same U.S. Supreme Court analysis highlighted by the Attorney General in his letter to Congress, the U.S. Court of Appeals for the Second Circuit concluded that homosexuals were a quasi-suspect class and intermediate scrutiny review was warranted for section 3 of DOMA.[121]

Against this background of mixed lower court analyses in *Windsor*, the U.S. Supreme Court failed to provide additional guidance on sexual orientation-based classifications in its ruling.[122] The Court held that DOMA section 3 violated the Fifth Amendment guarantee of liberty by forcing some state-sanctioned marriages to be less respected than others.[123] Justice Kennedy, in the opinion for the majority, explained in very particular terms the class of persons to which the opinion and holding applied: "[t]he class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State."[124] He further concluded that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[125]

The framing by the Court of the affected class as one not based on sexual orientation, but rather on marital status as determined by the State, complicates the question of whether homosexuals constitute a suspect or quasi-suspect class. However, the Court's language is reminiscent of that in *Lawrence* and demonstrates that laws targeting conduct that is unique to one class of persons

---

117. *See id.* (citing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987); City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 441-42 (1985)).*

118. Press Release, Attorney General, *supra* note 114.

119. *See generally* Windsor v. United States 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

120. *Id.* at 402.

121. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012).

122. *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).

123. *Id.* at 2695-96.

124. *Id.* at 2695.

125. *Id.* at 2696.

actually target that class of persons.[126] After all, it is generally, if not always, homosexual persons who enter into the same-sex marriages protected by the Court in *Windsor*.[127]

B. The Potential for Extension of Batson

Because *Batson* developments thus far have been based on the status of a class as suspect or quasi-suspect, this author believes that extension of *Batson* to protect jurors based on sexual orientation would likely turn on this question as well. Thus, two questions persist: will the holdings of the Court be consistently interpreted to understand homosexuals as a class requiring heightened scrutiny and will the establishment of homosexuals as a distinct class suffice for the extension of *Batson*?

Although not yet addressed by the U.S. Supreme Court, other courts heard six cases involving *Batson* challenges based on sexual orientation. There are four cases from federal courts of appeals and two state court decisions, in Massachusetts and California. Three of the federal appeals cases that have been decided do little to clarify the potential extension of *Batson* challenges.[128] In those three cases, the parties issuing the *Batson* challenges failed to make the prima facie showing of discrimination required if *Batson* did apply.[129] Further, none of the three federal courts involved reached the question of whether homosexuals constitute a suspect class.[130]

Johnson v. Campbell was a Ninth Circuit case in which a juror was excused by peremptory challenge after an exchange with the judge that revealed the juror to be a single freelance screenwriter who lived in West Hollywood, California.[131] Campbell's attorney exercised a peremptory challenge of the juror; Johnson's attorney issued a *Batson* objection.[132] In a side bar conversation, Johnson's attorney maintained that he thought the juror was gay and asked that the court question the juror to determine his sexual orientation. [133] The judge refused to question the challenged juror and denied the *Batson* challenge.[134] Considering these facts and the transcript of the voir dire, the appeals court held that Johnson's attorney failed to raise an inference that the peremptory challenge was based on purposeful discrimination, one of the three required elements for a prima facie

---

126. Lawrence v. Texas, 539 U.S. 558, 575 (2003) (emphasis added).

127. *See generally Windsor*, 133 S. Ct. at 2675.

128. Johnson v. Campbell, 92 F.3d 951, 952 (9th Cir. 1996); *see generally* United States v. Ehrmann, 421 F.3d 774 (8th Cir. 2005); United States v. Blaylock, 421 F.3d 758 (8th Cir. 2005).

129. *Johnson*, 92 F.3d at 952; *see generally Ehrmann*, 421 F.3d at 774; *Blaylock*, 421 F.3d at 758.

130. *Johnson*, 92 F.3d at 952; *see generally Ehrmann*, 421 F.3d at 774; *Blaylock*, 421 F.3d at 758.

131. *Johnson*, 92 F.3d at 952.

132. *Id.*

133. *Id.*

134. *Id.*

showing of discrimination required by *Batson*.[135]

United States v. Ehrmann and *United States v. Blaylock* were companion cases from the Eighth Circuit.[136] Both appeals arose from the same peremptory challenge at the same federal district court trial.[137] The same appeals court heard both cases, expressing doubt that *Batson* applied to sexual orientation.[138] However, the court held that even if *Batson* did apply and the defendants made a prima facie case of purposeful discrimination, the defendants' challenges still failed because the government offered "legitimate nondiscriminatory reasons for striking the panel member."[139] The prosecutor explained that the panel member's liberal education, musician background, and status as a potential loner led him to strike the juror prior to learning about the panel member's sexual orientation.[140] Thus, these cases fell on the second and third elements of the evidentiary standard established under *Batson*.[141]

Like the preceding federal cases, the court in *Commonwealth v. Smith* never reached the question of whether sexual orientation, or in this case status as a transgender person, constituted a suspect or quasi-suspect class.[142] There, the defendant's appeal included an argument that the prosecutor "improperly used a peremptory challenge to remove a juror who may have been either homosexual or [transgender]."[143] However the trial judge was never able to draw an inference that purposeful discrimination occurred.[144] The defendant did not raise a *Batson* challenge when the prosecutor struck the juror, the alleged class of the juror was not clear, and the prosecution did not present the reason it excused the juror.[145]

Until January 2014, the case providing the most direct analysis of an additional legal argument of relevance to applying *Batson* to sexual orientation was decided in California in 2000.[146] As the state intermediate court stated, the issue there was "whether lesbians—and presumably gay males—constitute a cognizable class whose exclusion resulted in a jury that failed to represent a cross-section of the community and thereby violated [the defendant's] constitutional rights."[147] After the defendant lost at trial, he raised his appeal based on the striking of two female potential jurors; both were excused by the prosecution when it was determined that they worked for a gay and lesbian

---

135. *Id.* at 953.

136. United States v. Ehrmann, 421 F.3d 774 (8th Cir. 2005); United States v. Blaylock, 421 F.3d 758 (8th Cir. 2005).

137. *See Ehrmann*, 421 F.3d at 774; *see Blaylock*, 421 F.3d at 758.

138. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 769.

139. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 769.

140. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 770.

141. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 770.

142. *See generally* Commonwealth v. Smith, 879 N.E.2d 87 (Mass. 2008).

143. *Id.* at 97.

144. *Id.*

145. *Id.*

146. *See generally* People v. Garcia, 92 Cal. Rptr. 2d 339 (Ct. App. 2000).

147. *Id.* at 341.

foundation.[148]

Defense counsel made a *Wheeler* motion, under which California law "prohibits exclusion of jurors based upon race, ethnicity, gender, or 'similar' group bias."[149] The trial judge, finding no cognizable group based on sexual preference, denied the motion.[150] On appeal, the court declined to undertake an equal protection analysis.[151] Rather, it based its decision on the guarantees to a trial by an impartial jury found in the Sixth Amendment to the U.S. Constitution and article I, section 16 of the California Constitution.[152]

Under California law, whenever a cognizable group is excluded from participation on a jury, the representative cross-section guarantee is violated. [153] California case law provides guidance on the determination of what constitutes a cognizable group for the purposes of the representative cross-section guarantee.[154] To be a cognizable group, group members must "share a common perspective arising from their life experience in the group" and "no other members of the community are capable of adequately representing the perspective of the group assertedly excluded."[155] Under this analysis, the court concluded that gays and lesbians are a cognizable group and the peremptory strikes were subject to *Wheeler* and *Batson* challenges.[156] As the court found that *Wheeler* and *Batson* challenges to juror exclusion based on sexual orientation are allowable under California law, the case was remanded to the trial court to allow the prosecution to provide a neutral reason for the strike, the second prong of the evidentiary standard required by *Batson*.[157]

The most recent and directly applicable case was decided by the U.S. Court of Appeals for the Ninth Circuit.[158] This case provides a factual situation substantially different from prior federal appeals, one that forced the court to address the issue of whether *Batson* applies to sexual orientation.[159] Oral arguments were heard in *Smithkline Beecham Corporation* (GSK) *v. Abbott*

---

148. *Id.* at 340.

149. *Id.* at 340 n.1 (citing People v. Wheeler, 583 P.2d 748, 761-62 (Cal. 1978)).

150. *See id.* at 339.

151. *Id.* at 342.

152. *Id.*; *see also* U.S. CONST. amend. VI. (guaranteeing trial by an impartial jury); *see also* CAL. CONST. art. I, § 16 ("Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.").

153. *See Garcia*, 92 Cal. Rptr. at 343.

154. *Id.*

155. *Id.* at 343-45.

156. *Id.* at 347.

157. *Id.* at 341.

158. *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014).

159. *Id.*

Laboratories (Abbott) in front of a three judge panel on September 18, 2013.[160] During the 2011 antitrust trial between the two pharmaceutical manufacturers involving an HIV medication, counsel for Abbott used a peremptory challenge to remove one potential juror after the man appeared to reveal that he was gay during voir dire by referring to his male partner.[161] A lawyer for GSK raised a *Batson* challenge, indicating that the juror could be gay, which was relevant because the case involved an AIDS medication and the incidence of AIDS among the gay male community is well-known.[162] The judge, demonstrating uncertainty with the application of *Batson* in this situation, gave three reasons why *Batson* might not apply: it might not apply in civil cases, it might not apply to peremptory challenges based on sexual orientation, and there would be no way to know if a prospective juror was homosexual unless he or she happened to mention that fact.[163] The judge then gave Abbott's counsel a chance to offer a neutral explanation for his challenge to the juror or to adopt her three reasons for not applying *Batson*.[164] Abbott's counsel chose to accept the judge's reasons.[165]

Had Abbott's counsel provided a neutral reason, the peremptory strike would likely have stood even if *Batson* did not apply.[166] However, the judge did not have the opportunity to determine if the reason was sufficient to overcome a *Batson* challenge, if one did apply, because Abbott's counsel did not provide any explanation.[167]

Abbott counsel's acceptance of the judge's reason opened the door to the appeal to the Ninth Circuit.[168] GSK raised the issue of the court allowing the discriminatory peremptory challenge on cross-appeal, and the Ninth Circuit had the opportunity to rule on this case and address the question of whether *Batson* should apply to sexual orientation rather than the question of whether the challenging party failed on one of the required elements of *Batson*.[169]

The briefs of the parties on cross-appeal in this case offered insight into the arguments for and against applying *Batson* to sexual orientation in light of the most recent U.S. Supreme Court cases.[170] GSK argued that applying *Batson* to

---

160. *Smithkline Beecham Corporation v. Abbott Laboratories ("Sexual Orientation of Jurors")*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000692 (last updated June 24, 2013).

161. Adam Liptak, *Judges Weigh Exclusion of Jurors Because They're Gay*, N.Y. TIMES, July 30, 2013, at A14.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Brief of Plaintiff-Appellee and Cross-Appellant, Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (2014) Nos. 2011-17357, 2011-17373 [hereinafter GSK Brief], *available at* http://cdn.ca9.uscourts.gov/datastore/general/2013/08/01/Document67.pdf.

170. *See id.*

this case of a homosexual male who was struck from the jury panel was appropriate for four reasons.[171] First, an Equal Protection Clause challenge is appropriate where the liberty rights of homosexuals have been impinged upon.[172] GSK argued that heighted scrutiny is appropriate under equal protection when either: 1) the group is suspect/quasi-suspect, or 2) when a fundamental or important liberty right is at stake.[173] On this basis, GSK asked the court to apply the precedent of *Lawrence v. Texas* and find that the burdening of a liberty right (service on a jury) based on sexual orientation was unconstitutional.[174]

Second, sexual orientation is a suspect or quasi-suspect class subject to heightened scrutiny.[175] Relying on the position of the Department of Justice and the four-part test employed by the Attorney General and the President, GSK argued that homosexuals meet the criteria of a class that should be protected.[176] Such classifications based on sexual orientation are subject to a heightened standard of scrutiny under the Equal Protection Clause.[177]

Third, the striking of the gay man constituted gender based discrimination.[178] GSK claimed that the strike was partially gender based because the stereotypes implicated involve gay men and not female members of the homosexual community.[179] Although gender based strikes are prohibited under *Batson* and its progeny, this point underscores one way in which sexual orientation and gender are intertwined.[180] It is important that the peremptory challenge was used against a potential juror identified as a homosexual male, which is a subset of the male population.[181]

Fourth, no binding authority forecloses the application of *Batson* to the striking of a gay man.[182] GSK maintained that previous Ninth Circuit cases that may appear similar are actually distinguishable and do not provide binding precedent.[183] The prior cases involved the military policy of "Don't Ask, Don't Tell" and were decided under rational basis review.[184] GSK further argued that

---

171. *See id.*

172. *Id.* at 19.

173. *Id.* at 19-25.

174. *Id.*

175. *Id.* at 25.

176. *See* Press Release, U.S. Attorney General Eric H. Holder, Jr., Department of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (citing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441-42 (1985)).

177. *Id.* at 25; *see also* GSK Brief, *supra* note 169, at 25.

178. GSK Brief, *supra* note 169, at 29.

179. *Id.* at 30.

180. *See id.*

181. *Id.*

182. *Id.*

183. *Id.* at 31-35.

184. *Id.* at 31-32.

the degree of judicial scrutiny is lower when military policies are involved, so the earlier cases do not guide the court here.[185] Additionally, those cases did not involve a fundamental right, so GSK argued that they do not control here.[186] Thus, the district court's error in not allowing the *Batson* challenge had no authority.[187]

In response to GSK's cross-appeal, Abbott presented three reasons for the court not to allow a *Batson* challenge based on sexual orientation.[188] Abbott first argued that neither the U.S. Supreme Court nor the Ninth Circuit had ever extended *Batson* to apply to a non-suspect or non-quasi-suspect class.[189] In addressing GSK's dismissal of possibly binding precedent, Abbott identified that the appropriate level of deference granted by the court is based on the classification at issue, not by the nature, that is, military or civilian, of the regulation in question.[190] Additionally, Abbott highlighted the *Batson* requirement that the party issuing the challenge to the strike must demonstrate "an historical practice of excluding homosexuals *from jury service*," presumably to establish the class as suspect.[191]

Abbott's second argument against extending *Batson* here was that no court has endorsed the application of *Batson* based on the juror's membership in a class likely to exercise a right protected under substantive due process.[192] As an example, Abbot highlighted that there is a substantive due process right to marry, but the existence of that right does not mean that peremptory challenges based on marital status violate *Batson*.[193] Finally, Abbott maintained that extending *Batson* to sexual orientation would create significant problems in implementation of the process because it is not always obvious whether someone is homosexual or bisexual, and further that it would be inappropriate for the court to inquire into the sexual orientation of potential jurors.[194]

In an opinion issued on January 21, 2014, the Ninth Circuit first found that under the three-part *Batson* analysis, Abbott's peremptory strike of the juror was discriminatory.[195] The court further rejected Abbott's proffered justifications for its use of the peremptory strike against the juror, holding that classifications based on sexual orientation "are subject to heightened scrutiny . . . . [and] that

---

185. *Id.* at 34.

186. *Id.* at 32.

187. *Id.* at 31.

188. Third Brief on Cross-Appeal of Defendant-Appellant and Cross-Appellee at 14-20, Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (2014), Nos. 2011-17357, 2011-17373, *available at* http://cdn.ca9.uscourts.gov/datastore/general/2013/08/01/Document65.pdf.

189. *Id.* at 14.

190. *Id.* at 15.

191. *Id.* at 16.

192. *Id.* at 17.

193. *Id.* at 17-18.

194. *Id.* at 18-19.

195. Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 475-76 (9th Cir. 2014).

equal protection prohibits peremptory strikes based on sexual orientation."[196] The court pointed to *Windsor* as being dispositive in the determination of the appropriate level of scrutiny that was to be applied.[197] While acknowledging that the Court in *Windsor* did not state expressly that a heighted scrutiny standard applied, the Ninth Circuit interpreted the *Windsor* opinion by what the Court did rather than the words it used.[198] In doing so, the Ninth Circuit understood the Court to have employed a heightened standard in two ways: 1) by looking to the actual purpose of DOMA instead of hypothetical reasons for its enactment as would be the case under rational basis review, and 2) by seeking justification for the identified state interest served by DOMA which is unnecessary under rational basis review.[199]

Having determined that *Windsor* required heightened scrutiny to be applied to classifications based on sexual orientation, the court looked to the logic of the decision in *J.E.B.* to inform its understanding of the application of *Batson*.[200] The concerns raised in *J.E.B.*, under which the U.S. Supreme Court extended *Batson* to gender, were the harms to litigants, the community, and jurors when the judicial system appeared to condone the exclusion of a group from jury service.[201] Additionally, the Court was concerned that by condoning the exclusion of a group that had historically been excluded, which was women in the case of *J.E.B.*, the message was sent that "certain individuals . . . are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."[202] Because the elements of exclusion and stereotype were present in *J.E.B.*, as they had been in *Batson*, the Court extended *Batson* to strikes based on gender.[203] The Ninth Circuit, highlighting the main concerns of exclusion and stereotypes in the case of gays and lesbians, thereby found *Batson* to apply in this case.[204]

Upon this finding, the Ninth Circuit remanded the case for a new trial.[205] On January 27, 2014, a motion by Abbott requesting an extension to file a petition for rehearing and for rehearing en banc had been granted.[206] The petition for en banc hearing was rejected.[207]

---

196. *Id.*

197. *Id.* at 480.

198. *Id.*

199. *Id.* at 481-82.

200. *Id.* at 484-85.

201. *Id.* at 484.

202. *Id.* (citing J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994)).

203. *Id.* at 484 (citing *J.E.B.*, 511 U.S. at 131-34, 140).

204. *Id.* at 485-86.

205. *Id.* at 489.

206. Order Granting 30-day Extension to file Petition for Rehearing at 1, Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (2014) Nos. 2011-17357, 2011-17373, *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/01/27/11-17357_order_granting_30-day_ext.pdf.

207. Order, Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (2014) Nos. 2011-17357, 2011-17373, *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/06/24/11-

C. Practical Problems with Extending Batson

Examinations of the issue of extending *Batson* to apply to sexual orientation have called for such expansion,[208] or they have at the very least noted that the opportunity for such expansion is still developing.[209] Assuming, arguendo, that sexual orientation constitutes a class that would be protected for *Batson* purposes, the practical implications of expanding *Batson* to include the class of sexual orientation highlights the likelihood that such extension may not achieve the desired outcome[210] and may lead to an additional compromise of jurors' equal protection and privacy rights.[211]

The extension of *Batson* to sexual orientation is primarily complicated by the difficulty of demonstrating the first prong; to make a prima facie showing of discrimination, the objecting counsel would have to prove that a potential juror is gay, lesbian, or bisexual. If a potential juror happens to mention that he or she is gay, lesbian, or bisexual, the application of *Batson* is relatively straightforward and may be handled as would a *Batson* challenge based on race.[212] If, however, the potential juror does not share this information, a *Batson* challenge would be brought upon the suspicion by one or both of the attorneys that the juror is homosexual or based on the perception that the juror is homosexual.[213]

If homosexuality is suspected, one way to meet the first prong would be to obtain confirmation of the prospective juror's sexual orientation, but it is difficult to imagine how this information would be determined without introducing additional complications into the process, specifically complications that violate the juror's privacy interest.[214] The prospective juror might be asked directly in court and be forced to publicly reveal information that the juror would rather not share. This approach may be insulting to the juror and could even subject him or

---

17357.pdf.

208. *See* Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 26 (2001); Neal, *supra* note 8, at 1115.

209. *E.g.* Lynd, *supra* note 13, at 287.

210. Kathryne M. Young, *Outing* Batson*: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 271 (2011).

211. *Id.*

212. *Id.* at 255.

213. *Id.* at 256.

214. *Id.*; *see* Neal, *supra* note 8, at 1110-15. The privacy interest recognized in *Lawrence* is a serious limitation to these methods of determining a juror's sexual orientation. *Id*. In *Lawrence*, the state penalized private homosexual conduct; if a juror's disclosure of his or her private life or conduct is an acceptable ground for exclusion from jury service, the state is penalizing that private conduct. *Id*. at 1111. Thus, direct questioning, in camera interviews, and questionnaire based inquiries posed to jurors regarding sexual orientation all infringe on the juror's privacy interest as drawn in *Lawrence*. *Id*. at 1112. Neal suggests that attempts to secure an impartial jury should be made by using direct questioning to establish bias among potential jurors rather than attempting to determine if a juror is gay or lesbian. *Id*. at 1112.

her to the risk of professional, personal, or physical harm for this public announcement.[215] Further, if voir dire is conducted by the attorneys in the case, it is unlikely that a person being asked to respond to this question, whether homosexual or heterosexual, would form a favorable opinion of the questioning attorney.[216] Attorneys might be reticent to use the challenge at all given these potential effects.[217]

More discreet methods of obtaining information regarding a juror's sexual orientation have their drawbacks as well. Written questionnaires, employed in some jurisdictions, might be used to inquire about jurors' membership in the class or questioning of the jurors might be done in camera.[218] However, written questionnaires do little to maintain the transparent nature of court proceedings, limiting the faith of the public that impartial juries are being selected, while also carrying the risk that they might become part of the public record and therefore may be no more private that questioning in court.[219] Questioning regarding sexual orientation done in camera is also problematic in that it, too, obscures the openness of jury selection.[220] Even more troublesome, however, is the message such a practice sends, the message that being homosexual is something that is shameful and deserving of secrecy and therefore should only be discussed behind closed doors.[221] If an effort is made to question all jurors in camera regarding sexual orientation, the process is likely to overburden the court and ultimately, upset jurors.[222]

If it is not membership in the class, but rather the perception that the juror is a member of the class that must be shown to satisfy the first *Batson* prong, the proof required becomes even more challenging and potentially ridiculous.[223] The attorneys involved might have to enter into a discussion based on stereotypes and inferences that are both insulting to the juror and inadequate for judicial consideration.[224] The trial judge would be asked to determine if the characteristics at issue were sufficient to constitute the perception of homosexuality, introducing prejudice and guesswork into the analysis.[225] The level of disrespect afforded to the juror in this situation might seriously counteract any equal protection benefits the process was designed to afford.[226]

One additional concern with allowing *Batson* challenges based on sexual orientation is the effect that such a practice might have on the behavior and

---

215. Young, *supra* note 210, at 258.
216. *Id.*
217. *Id.*
218. *Id.* at 258-60.
219. *Id.* at 259-60.
220. *Id.* at 258-59.
221. *Id.* at 259.
222. *Id.*
223. *Id.* at 256.
224. *See id.* (imagining how this interaction between opposing attorneys might proceed).
225. *Id.* at 258.
226. *Id.* at 261.

appearance of homosexual jurors.[227] Rather than being open and sharing information regarding their sexual orientation, gay, lesbian, and bisexual jurors might instead modify their behaviors and appearance in order to achieve fair treatment by not being suspected to be members of the class in the first place.[228] These types of modification result in gay, lesbian, and bisexual jurors becoming invisible in the jury selection process, leading to the suppression of information that might actually be relevant to jury selection and also penalizing those who do not attempt to conceal their identities.[229]

Ultimately, while extending *Batson* to include sexual orientation might be a legal possibility after *Windsor*, the hurdles to applying *Batson* in these cases outweigh the benefits. An appropriate solution to the problem of discrimination against potential jurors based on sexual orientation cannot be one that otherwise undermines those jurors' rights.

IV. A POTENTIAL REMEDY NOT INVOLVING EXTENSION OF *BATSON*—EXTENSION OF COURT RULES

As described, there are a number of factors that must be satisfied before *Batson* can be extended to protect against discrimination based on sexual orientation. A class based on homosexual sexual orientation would likely need to be established as requiring heightened scrutiny. A method for ensuring equal protection of the class that does not violate the privacy interest of its members would also be necessary. The practical problems with extending *Batson* to the class are significant. Still, while there may be problems with peremptory challenges in general and with the application of *Batson* to sexual orientation specifically, protection of the juror's rights remains an important end. In the context of race, it has been said that discrimination in jury selection constitutes serious professional misconduct that must be addressed in order to preserve the public good.[230] Given that the professional standards regarding discrimination are the same for race-based and sexual orientation-based classes,[231] violations of the standards should be treated with equal seriousness for discrimination based on these classes. In the absence of a *Batson* application to sexual orientation based discrimination, it is necessary that other means to prevent discrimination be explored.

The courts of each state are one possible avenue through which this type of discrimination may be addressed, at least at the state level. Because the state judiciary sets rules for the number and use of peremptory challenges, rules and procedures for objections to jurors being struck without cause could be set forth as well. While a comprehensive description of all state court rules addressing objections to peremptory challenges is outside the scope of this Note, some

227. *Id.* at 261-63.

228. *Id.* at 261.

229. *Id.* at 263.

230. Brown, *supra* note 38, at 315-16.

231. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013).

individual examples are helpful to highlight the current state of court rules in this area.

The Minnesota Rules of Criminal Procedure demonstrate one approach.[232] These rules include a statement that purposeful discrimination based on race or gender is not permitted in the exercise of peremptory challenges.[233] The rules further provide the procedure by which an objection to a challenge is made by the opposing party and decided by the judge.[234] This procedure essentially follows the requirements set by the Court in *Batson*.[235] Of note, the Minnesota rules also include the possible remedies if the objection is sustained: the challenged juror may be reinstated to the panel or the entire jury may be discharged and a new jury selected.[236]

In contrast, the Indiana Jury Rules place the burden of identifying and resolving "constitutionally impermissible" use of peremptory challenges on the court.[237] Under these rules, the court may, on its own initiative, "(a) inform the parties of the reasons for its concern, (b) require the party exercising the challenge to explain its reasons for the challenge, and (c) deny the challenge if the proffered basis is constitutionally impermissible."[238]

Still another approach is found in the California Rules of Civil Procedure, which specify that a peremptory challenge may not be used "on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."[239]

These three examples highlight just some of the ways that individual states can and do address discriminatory use of peremptory challenges. However, they also highlight the incomplete development of a means by which to combat discrimination in the jury selection process. Under the Indiana rule, for instance, it is unlikely that an objection to a *Batson* challenge based on sexual orientation would stand; the success of the objection would be driven by the court's understanding of constitutionally impermissible bases. As sexual orientation has not yet been established as a suspect or quasi-suspect class, an Indiana court might not only overrule the objection but also may be acting in error if it allowed the objection.[240] Given the existence of a professional standard prohibiting discrimination, this paradox is deplorable.

To prevent this hypothetical from becoming a reality, court rules against the discriminatory application of peremptory challenges should ideally include an open-ended list of classes that are at risk for discrimination, the process by which an objection is raised and resolved, and the possible remedies available to be

---

232. MINN. STAT. ANN. § 26.02 subdiv. 7 (West 2014).
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. IND. JURY R. 18(d) (2013).
238. *Id.*
239. CAL. CIV. PROC. § 231.5 (West 2014).
240. Hindo, *supra* note 81.

applied at the court's discretion. Importantly, rules must avoid the major pitfall of a *Batson* application; the privacy of the juror must be protected. To accomplish this, rules should forego the requirement of actually demonstrating that the struck juror is part of a cognizable class. Rather, an objection could be raised based on apparent discrimination and the responding party given the opportunity to offer a non-discriminatory explanation for the strike. While this would essentially transform a peremptory strike into a type of for cause strike, it would only be required when an objection based on purposeful discrimination has been raised.

A rule meeting these criteria might look like a combination of those established in California and Minnesota.[241] This rule could read:

Section 1. Rule. A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds. [242]

Section 2. Objection and Resolution. The objection and all arguments must be made out of the hearing of all prospective or selected jurors. All proceedings on the objection must be on the record. The objection must be determined by the court as promptly as possible, and must be decided before the jury is sworn.

(a) Any party, or the court, at any time before the jury is sworn, may object to a peremptory challenge on the ground of purposeful discrimination of the type provided in Section 1. The objecting party need not establish that the juror is actually of the race, color, religion, sex, national origin, sexual orientation, or similar ground that is the basis of the discrimination. If the objecting party fails to state appropriate grounds for the objection, the objection must be overruled.

(b) The responding party must articulate the non-discriminatory explanation for exercising the peremptory challenge. The responding party must present facts that satisfy the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the responding party. If the responding party fails to articulate a non-discriminatory explanation, the objection must be sustained.[243]

Section 3. Remedies. If the court overrules the objection, the prospective juror must be excused. If the court sustains the objection, the court must—based upon its determination of what the interests of justice and a fair trial to all parties in the case require—either:

(a) Disallow the discriminatory peremptory challenge and resume jury selection with the challenged prospective juror reinstated on the panel; or

(b) Discharge the entire jury panel and select a new jury from a jury panel not previously associated with the case.[244]

Additionally, professional conduct standards should be created or updated in all jurisdictions to indicate that purposeful discrimination by an attorney in the

---

241. *Id.*; MINN. STAT. ANN. § 26.02 subdiv. 7 (West 2014).

242. Adapted from CAL. CIV. PROC. § 231.5 (West 2014).

243. Adapted from MINN. STAT. ANN. § 26.02 subdiv. 7 (West 2014).

244. Adapted from *id.*

exercise of peremptory challenges constitutes professional misconduct.

CONCLUSION

The peremptory challenge is a well-established component of the American judicial process.[245] However, it is not a component that is protected from modification to improve its use and help it to better achieve its purpose. The development of *Batson* challenges to combat racial discrimination, while not perfect, serve as a measure to remedy some of the ills inherent in the system. The extension of *Batson* challenges to ethnicity and sex further demonstrate the ability to adapt this process to meet the evolving identification of discriminatory practices. Discriminatory use of peremptory challenges based on sexual orientation has been identified, and it is now time for the process to evolve again. However, the practical limitations of extending *Batson* to this class outweigh the potential benefits.

Limitations to extending *Batson*, however, cannot force the law to ignore the protection of gay, lesbian, and bisexual jurors' equal rights. Jurisdictions should proactively amend court rules to prevent this discriminatory practice, and lawyers should be held to the highest professional standards and actively work to prevent discrimination based on sexual orientation in this process.

245. Neal, *supra* note 8, at 1095.

ALLOWING PATENT VALIDITY CHALLENGES DESPITE NO-CHALLENGE CLAUSES: FULFILLING THE WILL OF KING *LEAR*

DYLAN PITTMAN*

INTRODUCTION

In July 2013, Martha Stewart received a letter that would end up costing her media conglomerate millions of dollars.[1] In the letter, a company called Lodsys accused Stewart of marketing four iPad apps that infringed Lodsys' patent, and threatened Stewart with a costly patent infringement lawsuit.[2] Lodsys belongs to a category of companies commonly referred to as patent assertion entities (PAEs) because, in general, Lodsys does not intend to commercially use its iPad app patent but, instead, holds it primarily to sue others for infringement.[3] Lodsys demanded that Stewart's company, Martha Stewart Living Omnipedia, pay a patent licensing fee of $5,000 per app.[4] This $5,000 price tag was not derived randomly.[5] Rather, Lodsys deliberately set this price at an amount far lower than the average cost of defending a patent infringement suit in order to make the choice easy for Stewart.[6] Indeed, patent litigation is extremely expensive.[7] The average suit involving damages between $1 million and $25 million costs $1.6 million through discovery and about $2.8 million through trial.[8] Unfortunately for Lodsys, however, Stewart is not one to roll over and play dead. Instead, she

---

* J.D. Candidate, 2015, Indiana University Robert H. McKinney School of Law; B.A. 2011, Indiana University, Bloomington, Indiana. I would like to thank my friends and family for all of their support and Professors Emily Morris and Margaret Tarkington for their assistance throughout this process.

1. Timothy B. Lee, *Patent Trolls Have a New Enemy: Martha Stewart*, WASH. POST (Sept. 26, 2013, 3:52 PM), http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/26/patent-trolls-have-a-new-enemy-martha-stewart/.

2. *Id.*

3. Katherine E. White, *Preserving the Patent Process to Incentivize Innovation in Global Economy*, SYRACUSE SCI. & TECH. L. REP. 27 (2006) (citing Brenda Sandburg, *Inventor's Lawyer Makes a Pile of Patents*, RECORDER (2001), *available at* http://www.phonetel.com/pdfs/LWTrolls.pdf ("A patent troll is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.")).

4. Edward Wyatt, *F.T.C. Votes for Inquiry into Patent Businesses*, N.Y. TIMES, Sept. 28, 2013, at B1.

5. Electronic Frontier Foundation, *FAQs for Lodsys Targets*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/faqs-lodsys-targets (explaining that a "patent troll often tries to extract a settlement (or a license) that costs less than what litigating would, leaving many potential defendants to simply settle the matter.").

6. Lee, *supra* note 1.

7. White, *supra* note 3.

8. AM. INTELLECTUAL PROP. LAW ASS'N, 2011 REPORT OF THE ECONOMIC SURVEY 35 (2012).

spurned the offer and welcomed the litigation head-on.[9]

But what happens when a company like Lodsys sends a similar letter to an individual less valiant (and less wealthy) than Martha Stewart? According to one study, fifty-five percent of businesses defending a suit brought by a PAE make less than $10 million per year and, thus, cannot afford Stewart's luxury of rejecting a settlement demand.[10] The bluff is simply too expensive to call.[11] PAEs[12] present a growing cause for concern.[13] One of the most concerning issues is that PAEs bring patent infringement suits against companies and individuals even though the underlying patents are of broad scope and in many cases teeter on the verge of invalidity.[14] There is considerable disagreement, however, about what to do about the abuse of invalid patents.[15]

One way of preventing entities from using invalid patents to extract settlements is to make it easier for others to challenge the validity of those patents. Although there are many ways to facilitate such challenges, this Note focuses on licensing agreements. In particular, this Note advocates for reducing the ability of patent holders to rely on pre-litigation no-challenge clauses (NCCs) to contractually estop their licensees[16] from bringing invalidity actions. An NCC is simply a clause in a licensing agreement stating that the licensee promises not to challenge the validity of the licensor's patent.[17]

The stakes of NCC enforceability are incredibly high. If NCCs are held

---

9. Lee, *supra* note 1.

10. Robin Feldman et al., *The AIA 500 Expanded: The Effects of Patent Monetization Entities* 19 (UC Hastings College of the Law, 2013).

11. *See id.*

12. The term "patent assertion entity" has gained a bit of notoriety for its ability to elude a precise definition. For the purposes of this Note, I will adopt the definition used by Colleen Chien: PAEs are "entities . . . focused on the enforcement, rather than the active development or commercialization of their patents." Colleen Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and its Implications for the Patent System*, 62 HASTINGS L.J. 297, 328 (2010).

13. *See* John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 694 (2011).

14. *See id.*

15. Sannu K. Shrestha, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 119 (2010); *see* James F. McDonough, III, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189 (2006); Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457 (2012).

16. A brief note of licensing agreement terminology is warranted. In general terms, a licensor is "[o]ne who grants a license to another." BLACK'S LAW DICTIONARY (9th ed. 2009). Likewise, a licensee is "[o]ne to whom a license is granted." *Id.* In the context of patent licensing agreements, a patent holder becomes a licensor by licensing his patent rights to a licensee. The next section will describe the basic patent rights that a patent holder might choose to license.

17. Christian Chadd Taylor, Note, *No-Challenge Termination Clauses: Incorporating Innovation Policy and Risk Allocation into Patent Licensing Law*, 69 IND. L.J. 215, 236 n.137 (1993).

enforceable, then licensees are not only precluded from challenging patent validity by *bringing* lawsuits against their licensors, but they are also precluded from challenging validity while *defending* infringement lawsuits brought by their licensors.[18] In other words, if NCCs are held enforceable, then licensees cannot challenge patent validity in litigation, regardless of whether the licensee is the plaintiff or defendant.[19]

Since the U.S. Supreme Court handed down a seminal decision in 1969 in *Lear, Inc. v. Adkins,*[20] courts have evaluated the enforceability of NCCs using a balancing test, with hefty values occupying both sides of the scale.[21] Two arguments weigh in favor of the enforceability of NCCs. First, contract law generally prohibits a party from reneging on a contract merely because the deal does not turn out as well as that party initially thought.[22] A rule permitting loose adherence to contracts could lead to unfairness, as such a rule would demean agreements that parties presumably worked to negotiate.[23] Second, from a law and economics standpoint, efficient settlement of litigation is desirable as it reduces transaction costs.[24] Patent law is not an exception to the general rule in favor of settlement of litigation.[25] Weighing in favor of the non-enforceability of no-challenge clauses is one main argument. No one should have to pay a would-be monopolist a licensing fee for the right to use an invalid patent.[26] That invention is already part of the public domain.[27] By the same token, consumers should not have to pay the higher prices that such licensing fee arrangements cause.

The real problem is that attempts to accommodate these competing interests and to create a harmonious body of precedent have failed.[28] Patent jurisprudence needs—and American inventors deserve—a straightforward framework for reconciling these two interests, especially during a period in which entities are

---

18. *Id.* at 215-18.

19. *Id.*

20. Lear, Inc. v. Adkins, 395 U.S. 653, 665 (1969).

21. *See* Andrew D. Kasenevich & Debodhonyaa Sengupta, *Licensee Estoppel: The Lear Doctrine, Rates v. Speakeasy, and Other Applications*, AIPLA.ORG, http://www.aipla.org/committees/committee_pages/Licensing-and-Management-of-IP-Assets/Committee%20Documents/Licensee%20Estoppel_%20The%20Lear%20Doctrine%20Rates%20v%20%20Speakeasy%20and%20Other%20Applications.pdf.

22. *See Lear*, 395 U.S. at 668.

23. *See* Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1370 (Fed. Cir. 2001).

24. Asahi Glass Co. v. Penetech Pharms., Inc., 289 F. Supp. 2d 986, 991 (N.D. Ill. 2003) (Posner, J., sitting by designation).

25. *Id.*

26. *See Lear*, 395 U.S. at 670.

27. *Id.*

28. *See* Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 173-74 (2d Cir. 2012) (noting a circuit split regarding the enforceability of pre-litigation NCCs in which the U.S. Courts of Appeals for both the Second and Ninth Circuits disfavored enforceability and the Court of Appeals for the Federal Circuit ("Federal Circuit") favored enforceability), *cert. denied*, 133 S. Ct. 932 (2013).

increasingly baiting operating companies into signing licensing agreements.

The purpose of this Note is to advocate that courts hold pre-litigation NCCs unenforceable to prevent patent holders, including PAEs, from using invalid patents to sue others. This Note proposes allowing a patent licensee to challenge the validity of the licensor's patent as long as the licensor and licensee have not yet engaged in litigation regarding the patent's validity. This rule will optimally balance the countervailing interests in protecting the public domain and respecting the doctrines of res judicata and contractual estoppel.

Part I of this Note provides background on patent law, explains why PAEs are a problem, and provides evidence that various entities, including PAEs, often initiate patent infringement suits based on invalid patents. Part II describes the origin and the evolution of the case law regarding the doctrine of licensee estoppel, which is the legal principle that has kept patent licensees from attacking the validity of patents. Part III lays out the four principal ways of resolving a patent dispute, and it indicates a circuit split regarding the enforceability of pre-litigation NCCs. Part IV addresses this circuit split by arguing that patent licensees should only be prohibited from challenging patent validity when such validity has already been established by a consent decree or final court order or when an NCC has been entered into mid-litigation, after the parties have had an opportunity to conduct discovery.

I. THE WORLD OF PATENT LAW AND THE TROLLS THAT PATROL IT

A. Patent Law in a Nutshell

Patent law incentivizes innovation by granting inventors temporary monopolies.[29] Upon being granted a patent, the owner of a patent (also known as a "patent holder" or "patentee") gains exclusive rights to an invention for twenty years[30] from the date the patent application was originally filed.[31] Taking advantage of these rights, patent owners can recoup the money that they invest in research and development.[32]

The constitutional basis for patent law resides in Article I, Section 8, Clause 8, of the U.S. Constitution.[33] According to that provision, Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and

---

29. 35 U.S.C. § 154 (2012); Rochelle Cooper Dreyfus, *Dethroning Lear: Licensee Estoppel and the Incentive to Innovate*, 72 VA. L. REV. 677, 679 (1989).

30. 35 U.S.C. § 154.

31. U.S. patent law is statutorily enshrined in Title 35 of the United States Code. Although patents were formerly granted on a first-to-invent basis, the Act was simplified in 2011 to provide for a first-to-file system. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, §125 Stat. 284 (2011).

32. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY 2 (2013).

33. *See* U.S. CONST. art. I, § 8, cl. 8.

Discoveries.[34]

To obtain a patent, an applicant must file an application, and certain requirements must be satisfied. The invention, for starters, must comprise patentable subject matter.[35] By statute, the realm of patentable material is limited to "any new and useful process, machine, manufacture, or any composition of matter, or any new and useful improvement thereof."[36] Abstract ideas, physical phenomena, and laws of nature fall outside the scope of patentable subject matter.[37] In addition, patents must satisfy the statutory requirements of novelty, nonobviousness, and utility.[38] If an applicant for a patent fulfills these requirements and is granted a patent, then the applicant gains access to a number of important rights that can be vindicated through litigation.[39] For example, a person infringes a patent if that person "makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent."[40] Specifically, patent holders may initiate actions for literal infringement,[41] contributory infringement,[42] and induced infringement.[43] In addition, and perhaps more importantly for the purposes of this Note, a patent holder wields the right to grant licenses to others to take advantage of any of the rights to a patent.[44]

B. What Is a Patent Assertion Entity?

Many types of entities license patents that turn out to be invalid.[45] This Note, however, primarily addresses one such type of patent holder known as a "patent assertion entity." PAEs are known by several names including "non-practicing entities," "patent monetization entities," and more commonly and pejoratively, "patent trolls."[46] For the purposes of this Note, these creatures will be referred to as patent assertion entities (PAEs). Also, this Note will refer to companies that actually sell goods or services other than patent monetization as "operating companies."[47]

---

34. *Id.*

35. *See* 35 U.S.C. § 101 (2012).

36. *Id.*

37. Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980).

38. 35 U.S.C. §§ 101-03 (2014).

39. *See* 35 U.S.C. § 281 (2012). Appellate patent litigation is entrusted exclusively to the Federal Circuit. 28 U.S.C. § 1295(a) (2012).

40. 35 U.S.C. § 271(a) (2012).

41. *See id.*

42. *Id.* § 271(c).

43. *Id.* § 271(b).

44. 35 U.S.C. § 261 (2013).

45. *See* Risch, *supra* note 15, at 481.

46. Sara Jeruss et al., *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE L. & TECH. REV. 357, 359-60 (2012).

47. *See* Feldman et al., *supra* note 10.

To be sure, PAE is a loaded term, entailing a variety of possible definitions and connotations. Peter Detkin, former assistant general counsel for Intel, coined the term "patent troll" in 2001.[48] In Detkin's view, a patent troll is a person who tries to make a lot of money off a patent that he is not currently practicing and has no intention of practicing in the future.[49] This version of the concept, although widely shared, bears a clearly negative connotation. Just as the folkloric creatures charge travelers to cross bridges that the creatures may or may not have built, patent trolls charge operating companies to use the inventions that the patent trolls may or may not have validly patented.[50] This negative connotation, however, is unfortunate because Detkin's definition sweeps up many entities that do contribute to society. For example, individual inventors, universities, and product manufacturing companies technically "[do not] produce a product or service, but instead make[ ] money from licensing and patent assertion primarily."[51] Universities, in particular, do not fit the mold of a typical PAE for at least two reasons. First, they do not acquire patents simply to assert them in litigation.[52] Instead, universities develop patents through the research of professors and students.[53] Second, patent-holding universities initiate patent infringement lawsuits relatively rarely, thus reinforcing the notion that such litigation is not their goal.[54] For the purposes of this Note, universities are not considered PAEs.[55]

It is perhaps more fruitful to describe PAEs' routines. As Martha Stewart knows all too well, PAEs often send "demand letters."[56] In general, the letters have at least three core elements: (1) they inform the alleged patent infringer of his or her probable infringement of the letter-sender's patent, (2) they threaten to file a lawsuit alleging infringement and, most importantly, (3) they propose avoiding litigation by entering into a licensing or settlement agreement.[57]

PAEs offer to settle for amounts they deliberately set below the cost the patentee would likely incur litigating the dispute.[58] Therefore, confronted with

---

48. Edward Wyatt, *Inventive, at Least in Court*, N.Y. TIMES, July 13, 2013, at B1.

49. Brenda Sandburg, *You May Not Have a Choice. Trolling for Dollars*, RECORDER (July 30, 2001), http://www.phonetel.com/pdfs/LWTrolls.pdf.

50. BRIAN T. YEH, CONG. RESEARCH SERV., AN OVERVIEW OF THE "PATENT TROLLS" DEBATE 4 (2013).

51. Jaconda Wagner, *Patent Trolls and the High Cost of Litigation to Business and Start-Ups - A Myth?*, 45-OCT MD. B. J. 12 (2012).

52. Risch, *supra* note 15, at 468.

53. *Id.*

54. Feldman et al., *supra* note 10, at 59.

55. For a more detailed discussion of the benefits of PAEs, see McDonough, *supra* note 15, at 199.

56. James R. Farrand, *Territoriality and Incentives Under the Patent Laws: Overreaching Harms U.S. Economic and Technological Interests*, 21 BERKELEY TECH. L.J. 1215, 1286 (2006).

57. The United States Patent and Trademark Office, *I Got a Letter . . .*, USPTO.GOV, http://www.uspto.gov/patents/litigation/I_got_a_letter.jsp (last modified Feb. 20, 2014 8:30 AM).

58. *Id.* at 1; David L. Schwartz, *The Rise of Contingent Fee Representation in Patent*

a threatening letter and an offer from a PAE, an operating company has two potentially expensive options: (1) engage in a licensing or settlement agreement, or (2) engage in costly, and often unpredictable, litigation asserting non-infringement and/or challenging the validity of the underlying patent.[59] The specter of having to pay for those options causes operating companies to devote more resources to doomsday preparations and fewer resources to researching and developing their products.[60] In addition, the specter of patent trolling dissuades venture capitalists from investing in businesses that may be subject to PAE demands in the future.[61] As a result, the *in terrorem* effect of PAEs essentially "taxes" operating companies.[62] Ultimately, consumers pay for these licensing agreements and litigation because they face higher prices.[63]

Practically, it is difficult to know exactly how often PAEs successfully exact licensing fees from the recipients of their demand letters because such arrangements are often confidential components of licensing agreements.[64] The same mystery enshrouds the amounts charged for these licenses pursuant to licensing agreements.[65] Nevertheless, Robin Feldman, a prominent patent law scholar, has collected some data regarding licensing agreements.[66] In one study, forty-six operating companies provided data on the costs of settling patent infringement lawsuits brought by PAEs; on average those companies spent approximately $30 million per settlement, including both legal fees and licensing agreements.[67]

PAEs do not just bait operating companies into costly settlements; they provoke costly litigation as well. Startlingly, Feldman's research revealed that as of 2012, PAEs initiated the majority of the patent litigation in the United States.[68] The problem of patent trolling is more severe today compared to 2007 and, indeed, even compared to 2010.[69] The numbers speak for themselves: PAEs initiated 29% of patent litigation in 2010, 45% in 2011, and 61% in 2012.[70] From

---

Litigation, 64 ALA. L. REV. 335, 370 (2012).

59. Jeremiah Chan & Matthew Fawcett, *Footsteps of the Patent Troll*, 10 INTELL. PROP. L. BULL. 1, 4 (2005).

60. YEH, *supra* note 50, at 7; Chan & Fawcett, *supra* note 59, at 4.

61. YEH, *supra* note 50, at 7.

62. Anna Mayergoyz, *Lessons from Europe on How to Tame U.S. Patent Trolls*, 42 CORNELL INT'L L.J. 241, 251 (2009).

63. *Id.*

64. Allison et al., *supra* note 13, at 705. Once litigation commences, however, nearly ninety percent of patent litigation involving PAEs results in settlement. Stijepko Tokic, *The Role of Consumers in Deterring Settlement Agreements Based on Invalid Patents: The Case of Non-Practicing Entities*, 2012 STAN. TECH. L. REV. 2, 1.

65. Allison et al., *supra* note 13, at 705.

66. *See* Feldman et al., *supra* note 10.

67. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 27.

68. Feldman, *supra* note 10, at 9.

69. *See id.*

70. *Id.* at 16.

2000 to 2010, the number of patent infringement lawsuits increased marginally.[71] But from 2010 to 2011, that number increased by one-third (31%).[72] From 2007 to 2011, the number of defendants in overall patent litigation increased by 129%.[73] The amount of money stashed behind these figures is staggering. One study revealed that PAE activity costs defendants and licensees $29 billion in 2011 alone.[74]

C. The Problem of Patent Invalidity

Unfortunately, invalid patents are not uncommon.[75] Patents are often granted to inventions that do not fulfill the statutory patent requirements.[76] As noted by the U.S. Supreme Court, the individuals who apply for—and eventually are granted—invalid patents sometimes intend to consciously defraud the United States Patent and Trademark Office (USPTO).[77] In other instances, the individuals are unaware that their requested patents are invalid.[78]

When it comes to winning patent litigation on the merits, PAEs have a terrible batting average.[79] In fact, according to one study, PAEs win only eight percent of the merits judgments to which they are parties.[80] Other entities win forty percent of such cases.[81] The reason for this is simple. Although PAEs accumulate patent portfolios of varying sizes, their patents are often overly broad and invalid.[82] Although broad patents potentially occupy more intellectual territory, they also often tend to be invalid by reason of anticipation by prior art.[83] Some of the patents issued by the USPTO "range[ ] from the somewhat ridiculous to the truly absurd."[84] Some patents "do not provide notice about their

---

71. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 14.

72. *Id.*

73. *Id.* at 15.

74. James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 389 (2014).

75. Allison et al., *supra* note 13, at 678.

76. *See id.*

77. Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969).

78. *Id.* at 671.

79. Allison et al., *supra* note 13, at 694.

80. *Id.*

81. *Id.*

82. David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System* 123 (Chicago-Kent Coll. Of Law Legal Studies, Paper No. 2012-13, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117421; Chan & Fawcett, *supra* note 59, at 4.

83. Giles S. Rich, *The Proposed Patent Legislation: Some Comments*, 35 GEO. WASH. L. REV. 641, 644 (1967). To put it briefly, "prior art . . . is knowledge that is available, including what would be obvious from it, at a given time, to a person of ordinary skill in an art." Kimberly-Clark Corp. v. Johnson & Johnson, 745 F.2d 1437, 1453 (Fed. Cir. 1984) (internal citations omitted).

84. Bilski v. Kappos, 130 S. Ct. 3218, 3259 (2010) (Breyer, J., concurring) (quoting In re

boundaries."[85] In a sense, bad patents are unavoidable. As one court put it, "the grant of a patent simply represents a legal conclusion reached by the Patent Office—a conclusion reached in an ex parte proceeding and based upon factors as to which reasonable men can differ widely."[86]

Moreover, the existence of invalid patents harms the public. The U.S. Supreme Court put it aptly:

> A patent by its very nature is affected with a public interest . . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.[87]

The damage wrought by invalid patents can be understood in light of the constitutional justification for patent law. As the U.S. Supreme Court emphasized in *Graham v. John Deere Co.* (1966), the constitutional authorization for Congress "To promote the Progress of . . . useful Arts" by providing for the issuance of patents is both a power *and a limitation*. [88] The clause constitutes a limitation because, for example, when the USPTO issues an invalid patent to a PAE, the USPTO has then transgressed its constitutional mandate.[89] Practically speaking, the PAE's invalid patent does not compensate society for the exclusive monopolistic rights that it affords its owner.[90] Only inventions that add to the sum of human knowledge "justif[y] the special inducement of a limited private monopoly."[91]

It is important, nevertheless, to refrain from overstating the harm posed by invalid patents, and the extent to which PAEs perpetuate invalid patents. As to the first point, it must be remembered that patent validity is an extremely slippery concept.[92] Because the criteria regarding patent validity are so subjective, it is

---

Bilski, 545 F.3d 943, 1004 (Fed. Cir. 2008) (Mayer, J., dissenting)).

85. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 28.

86. Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 168 (2d Cir. 2012) (citing Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969)) (internal citations omitted), *cert. denied*, 133 S. Ct. 932 (2013).

87. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 343 (1971) (quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816 (1945)).

88. Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 (1966).

89. *Id.*

90. *See id.* at 9.

91. *Id.*

92. *See* Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 711 (Fed. Cir. 1983) (citing Harries v. Air King Prod. Co., 183 F.2d 158, 162 (2d Cir. 1950) (L. Hand, C.J.)). The issue of patent validity is often "as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts . . . . If there be an issue more troublesome, or more apt for litigation than this, we are not aware of it." *Harries*, 183 F.2d at 162.

often unclear whether a patent is invalid.[93] Therefore, given the uncertainty regarding invalidity, it is often unclear whether rendering a given NCC unenforceable would facilitate the elimination of an allegedly invalid patent. Furthermore, as to the second point, PAEs are not the only type of entity that holds invalid patents.[94] There has been relatively little research conducted regarding PAEs and the patents that they wield in litigation.[95] As law professor Gerard Magliocca put it, "Like most fresh legal questions, the debate on patent trolls is long on passion and short on proof."[96] At any rate, although the criteria by which invalidity is judged entail some subjectivity, invalid patents do exist, and they are sometimes licensed to licensees. Thus, a question is raised: May licensees successfully challenge the validity of the licensor's patent?

II. BRIEF HISTORY OF THE DOCTRINE OF LICENSEE ESTOPPEL

The ability of patent licensees to challenge the validity of the licensed patent is extremely important, especially in light of the expense of patent litigation and licensing agreements.[97] From the licensor's perspective, the stakes of fending off a licensee's validity suit are extremely high.[98] If a patent is adjudged invalid just once, then, thanks to the doctrine of non-mutual defensive collateral estoppel, the patent holder may be estopped from bringing successful infringement suits against *any* alleged infringer in the future.[99]

A. Overview of Licensee Estoppel and its History in Pre-Lear Cases

Again, it is already known how Martha Stewart deals with offers to enter into licensing agreements.[100] Stewart unsheathes the sword of litigation.[101] But, when a party actually decides to enter into the licensing agreement with a PAE—or any entity, for that matter—and that licensing agreement includes an NCC, has the licensee no hope of ever challenging the validity of the entity's patent in the future?

Prior to 1969, such a challenge would have been completely out of the

---

93. The United States Patent and Trademark Office, *About Patents*, USTPO.GOV, http://www.uspto.gov/patents/litigation/What_is_a_patent.jsp (last modified Feb. 20, 2014, 8:36 AM).

94. Risch, *supra* note 15, at 481.

95. *Id.* at 459.

96. Gerard Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1810 (2007).

97. Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won't Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 BERKLEY TECH. L.J. 943, 964 (2004).

98. *Id.*

99. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 325 (1971).

100. *See* Lee, *supra* note 1.

101. *See id.*

question.[102] The prevailing body of case law militated against the right of licensees to challenge the validity of the patentee's patent after entering into a license agreement.[103] In 1950, the U.S. Supreme Court handed down its decision in *Automatic Radio Manufacturing Co. v. Hazeltine Research*, arguably the best-known case regarding licensee estoppel.[104] According to *Hazeltine*, "[t]he general rule [of licensee estoppel] is that the licensee under a patent license agreement may not challenge the validity of the licensed patent."[105] This rule has harsh consequences for licensees trying to get out from under a licensing agreement. Under *Hazeltine*'s rule, the inclusion of an NCC in the licensing agreement is irrelevant to the agreement's preclusiveness of subsequent validity challenges.[106] Just by virtue of receiving the benefits of the licensing agreement, the licensee loses all hope of challenging the validity of the underlying patent.[107] Of course, patent holders, including PAEs, stand to benefit from *Hazeltine*'s holding because it increases the enforceability of the licensing arrangements to which alleged infringers often agree.[108]

Under the doctrine of licensee estoppel, "a licensee of intellectual property 'effectively recognizes the validity of that property and is estopped from contesting its validity in future disputes.'"[109] In essence, licensee estoppel prohibits a party to a patent licensing agreement from simultaneously benefiting from and challenging the agreement.[110]

The licensee's inability to challenge seems counterintuitive at least in part

---

102. *See* Bowers Mfg. Co. v. All-Steel Equip., Inc., 275 F.2d 809, 812 (9th Cir. 1960) (reasoning that "[t]he licensee has bought temporary peace by agreeing to the license, and should be required to abide by his bargain"); Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 836 (1950) (holding that "the general rule is that the licensee under a patent license agreement may not challenge the validity of the licensed patent in a suit for royalties due under the contract"); United States v. Harvey Steel Co., 196 U.S. 310, 317 (1905); Kinsman v. Parkhurst, 59 U.S. 289, 292-93 (1855); *see also* Lorelei Ritchie, *Reconciling Contract Doctrine with Intellectual Property Law: An Interdisciplinary Solution*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 105, 122-23 (2008).

103. *See Bowers Mfg. Co.*, 275 F.2d at 812; *Hazeltine*, 339 U.S. at 836; *Harvey Steel Co.*, 196 U.S. at 317; *Kinsman*, 59 U.S. at 292-93; *see also* Ritchie, *supra* note 102, at 122-23.

104. *See Hazeltine*, 339 U.S. at 827.

105. *Id.* at 836. The doctrine of patent licensing estoppel showcased in *Hazeltine* is a species of estoppel by contract. According to *Black's Law Dictionary*, estoppel by contract is "[a] bar that prevents a person from denying a term, fact, or performance arising from a contract that the person has entered into." BLACK'S LAW DICTIONARY, *supra* note 16, at 630.

106. *Hazeltine*, 339 U.S. at 836.

107. *Id.*

108. *Id.*

109. Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 167 (2d Cir. 2012) (quoting Idaho Potato Comm'n v. M&M Produce Farm & Sales, 335 F.3d 130, 135 (2d Cir. 2003)), *cert. denied*, 133 S. Ct. 932 (2013).

110. *See id.*

because patents are never definitively valid.[111] True, the issuance of a patent by the USPTO creates a presumption of validity,[112] but the patent's validity can still be challenged.[113] In general, a party accused of patent infringement can fight back in two ways. First, if the alleged patent infringer is sued, then he can attack the patent's validity in court as an affirmative defense.[114] Second, the would-be patent infringer can go on the offensive and file a "declaratory judgment action" asking the court to declare the patent in question invalid.[115] Again, the doctrine of licensee estoppel, if it is still viable, forecloses both of these options.

Almost two decades after *Hazeltine* was decided, however, the U.S. Supreme Court expressly overruled *Hazeltine* in the seminal decision *Lear, Inc. v. Adkins*.[116] As result, the Court propelled patent licensing agreements into the modern era.[117]

B. All Hail King Lear*!*

In 1969, the death knell sounded for the doctrine of licensee estoppel. The U.S. Supreme Court handed down its decision in *Lear,* rejecting the doctrine of licensee estoppel and upholding the right of licensees to challenge the validity of patents.[118] At its core, *Lear* stands for a bedrock principle of patent law: "that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent."[119] This decision warrants a relatively in-depth exegesis because its central doctrine—the so-called "*Lear* doctrine"—is often referenced in modern case law regarding patent licensee estoppel.[120]

The stage of *Lear* is set in the aviation industry during the mid-20th century.[121] As planes became faster in the 1950s, a demand emerged for more accurate gyroscopes—devices used by pilots to monitor the direction and altitude of the plane. [122] An inventor named John Adkins developed an improved version of the gyroscope. In an effort to capitalize on his discovery, Adkins licensed the

---

111. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 338 (1971).

112. 35 U.S.C. § 282 (2012).

113. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 32, at 8.

114. *Id.* at 9 n.21.

115. *Id.*

116. Lear, Inc. v. Adkins, 395 U.S. 653, 671 (1969) (declaring that *Hazeltine* was "itself the product of a clouded history, should no longer be regarded as sound law with respect to its 'estoppel' holding, and that holding is now overruled").

117. *Id.*

118. *Id.*

119. *Id.* at 668.

120. *See* Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013); Baseload Energy, Inc. v. Roberts, 619 F.3d 1357, 1361 (Fed. Cir. 2010); Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1368 (Fed. Cir. 2001); Foster v. Hallco Mfg. Co., Inc., 947 F.2d 469, 474 (Fed. Cir. 1991).

121. *Lear*, 395 U.S. at 655.

122. *Id.*

invention to an aviation company called Lear, Inc. ("Lear") by way of a written agreement.[123] Per that agreement, Lear (the licensee) agreed to make royalty payments to Adkins (the licensor) at defined intervals.[124] At the time, Adkins had applied for, but had not yet been granted, a patent on the gyroscope.[125]

The agreement did not contain a typical NCC because none of its provisions expressly precluded Lear from challenging the validity of the gyroscope patent.[126] The agreement did, however, state that Lear reserved the right to terminate the agreement if the USPTO rejected the application or if the patent was ever declared invalid.[127] In a sense, this term is similar to an NCC because it precludes the licensee from terminating the agreement *for any reason*.[128] In other words, by the letter of the agreement, not only is the licensee prohibited from terminating the agreement based on a validity challenge, but also from terminating the agreement based on any type of challenge whatsoever.[129] Therefore, this contract term is analogous to the type of NCC that PAEs and other patent holders insert into their licensing agreements. As a result, in *Lear*, Adkins plays the role of a PAE in the sense that he owns an invention and attempts to contractually bind Lear, an entity seeking to practice the invention.[130]

Several years after signing the agreement, Lear became convinced that the invention failed the statutory requirement of novelty because it added nothing to the existing knowledge of gyroscopes.[131] As a result, Lear stopped paying royalties, alleging that Adkins' pending patent application would never be granted because his would-be patent was invalid.[132] Much to Lear's chagrin, however, Adkins eventually obtained a patent for his invention.[133] And sure enough, an all-out battle ensued, ultimately reaching the steps of the U.S. Supreme Court.[134] Adkins, patent in hand, promptly brought suit against Lear for infringement.[135] During the course of the litigation, Lear challenged the validity

---

123. *Id.*

124. *Id.*

125. *Id.* at 658.

126. *Id.* at 657-58.

127. *Id.* at 657.

128. Nicholas Roper, *Limiting Unfettered Challenges to Patent Validity: Upholding No-Challenge Clauses in Pre-Litigation Patent Settlements Between Preexisting Parties to a License*, 35 CARDOZO L. REV. 1649, 1651 n.8 (2014).

129. *Id.*

130. *Lear*, 395 U.S. at 655.

131. *See id.* at 659. Using patent law shoptalk, Lear would argue that Adkins' inventive concept was "anticipated" (i.e., preempted) by the "prior art" (i.e., the existing knowledge in the field). ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 226 (2007).

132. *Lear*, 395 U.S. at 659.

133. *Id.* at 660.

134. *Id.* at 655.

135. *Id.*

of the patent.[136]

In its holding, the Court not only allowed Lear the opportunity to challenge the validity of the gyroscope's patent, but also allowed Lear to avoid payment of all royalties accruing after the PTO granted Adkins' patent.[137] The beauty of the opinion, however, lies in the logic that the Court invoked on the way to this holding. In *Lear*, as other circuit courts have done in modern cases addressing the validity of a no-challenge clause, the Court engaged in a balancing act.[138] The Court balanced the interest in encouraging competition and the free exchange of ideas against the goals of contract law and the interest in settling to avoid the high costs of litigation.[139] The Court decided that the former interest was weightier because it better furthered the central objective of patent law enshrined in the U.S. Constitution—"to promote the Progress of Science and useful Arts."[140] In other words, an invalid patent is not entitled to any protection whatsoever because its invalid claims belong to the public domain and may be dedicated to the common good.[141] *Lear* gave at least four reasons for allowing licensees to challenge validity, and all four are still relevant today, especially in light of the increasing prevalence of the invalid patent problem.[142] First, the ability to challenge a patent's validity must be preserved because the USPTO is not infallible, and indeed, the Patent Office often makes its decisions in an ex parte proceeding, without the aid of opposing arguments.[143] Second, by statute, a patent's validity is never definitively established.[144] Third, the patent holder is already shielded by a presumption of validity.[145] Fourth, licensees are often uniquely situated as the only entities with enough financial stakes in the matter to challenge an invalid patent, so they are the only capable champions of the public interest.[146] The Court reasoned that if licensees are restrained from challenging validity, then the licensors of invalid patents may continue to exact tribute from the public without resistance.[147]

---

136. *Id.* at 657-60.

137. *Id.* at 674.

138. *Id.* at 669-70; Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 171 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013); *see* Baseload Energy, Inc. v. Roberts, 619 F.3d 1357, 1361 (Fed. Cir. 2010); Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1368 (Fed. Cir. 2001).

139. *Lear*, 395 U.S. at 670-71 ("Surely the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain . . . . We think it plain that the technical requirements of contract doctrine must give way before the demands of the public interest in the typical situation involving the negotiation of a license after a patent has issued.").

140. U.S. CONST. art. I, § 8, cl. 2; *Lear*, 395 U.S. at 670.

141. *Lear*, 395 U.S. at 670.

142. *See id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.*

To be clear, the inventor, Adkins, was not a PAE because he actually conceived of his gyroscope and endeavored to use it.[148] However, if a practicing inventor's patent was vulnerable to a validity challenge, a PAE's patent is even more vulnerable. The *Lear* Court valued the quid pro quo justification for extending patent protection, and thus, it arguably would not sympathize with a PAE that fails to compensate society for giving it a monopoly.[149]

As discussed below, *Lear* has received mixed treatment from several courts. Many courts have adopted the *Lear* balancing test.[150] Some courts disagree about the relative weights that should be attached to the competing interests.[151] Other courts attempt to distinguish *Lear* on the facts, contending that no-challenge clauses are inviolable when their underlying settlement agreements were entered into *after* the litigation begins.[152] Admittedly, it is true that the licensing agreement in *Lear* did not contain an NCC.[153] This Note argues, however, that the main arguments of *Lear* also justify a licensee's breaching of an NCC before litigation begins, even where that NCC is "clear and unambiguous."[154] To understand why, it is necessary to examine the four possible outcomes in a patent dispute, as referenced in the Second Circuit Court of Appeals' majority opinion in *Rates Tech., Inc. v. Speakeasy, Inc*.[155]

III. FOUR ENDGAMES OF A PATENT INFRINGEMENT DISPUTE

In 2012, the Second Circuit had before it a case that demanded clarification regarding the preclusiveness of an NCC that was entered into before the commencement of any patent litigation between the parties.[156] But rather than analyzing the preclusiveness of NCCs in the abstract, the Second Circuit analyzed the preclusiveness of NCCs as they might appear in the four potential resolutions of patent disputes.[157]

A. Court Entering Final Judgment After Full Litigation

In this first scenario, a court enters a final judgment on the merits against a

---

148. *Id.* at 655.

149. *See id.* at 670.

150. *See* Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013); Baseload Energy, Inc. v. Roberts, 619 F.3d 1357, 1361-62 (Fed. Cir. 2010); Idaho Potato Comm'n v. M&M Produce Farm & Sales, 335 F.3d 130, 135 (2d Cir. 2003); Foster v. Hallco Mfg. Co., Inc., 947 F.2d 469, 481 (Fed. Cir. 1991).

151. Alfred C. Server & Peter Singleton, *Licensee Patent Validity Challenges Following MedImmune: Implications for Patent Licensing*, 32 HASTINGS SCI. & TECH. L.J. 245, 438-39 (2010).

152. Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1370 (Fed. Cir. 2001).

153. *Id.* at 1368.

154. *See Lear*, 395 U.S. at 653.

155. *Rates Tech., Inc*., 685 F.3d at 169-71.

156. *Id.* at 164.

157. *Id.* at 169-71.

patent infringer in a fully litigated lawsuit. It is well-settled that following such a judgment, the patent's validity is treated as res judicata, and the patent infringer is not permitted to further challenge the validity of the patent.[158] The doctrine of res judicata "embod[ies] the public policy of putting an end to litigation."[159] At bottom, res judicata "holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[160]

The *Lear* decision, strong as it was, does not allow a licensee to challenge patent validity after losing on the merits in a full-fledged patent infringement suit.[161] Although the *Lear* Court did not directly address this scenario, the principle of res judicata—the public policy of putting an end to litigation[162]—is paramount, arguably even in the field of patent law. Courts would be useless to society, and particularly to patent holders who properly seek to vindicate their rights, if "conclusiveness did not attend the[ir] judgments . . . in respect of all matters properly put in issue and actually determined by them."[163] More to the point, if alleged patent infringers could call for a mulligan after losing a final judgment, then patent ownership would become truly unpredictable and patent holders would be unfairly subject to multiple trials. For these reasons, no court has entertained the possibility of stretching the *Lear* doctrine to suspend the principle of res judicata after a final judgment on the merits.[164]

B. Court Issuing Consent Decree Containing an NCC After Some Litigation

The second endgame occurs when there is no final judgment on the merits in a patent lawsuit, but opposing parties decide to settle the dispute by signing off on the judge's consent decree.[165] Like an entry of judgment after full litigation, it is well-settled that a consent decree operates as res judicata, and thus precludes a patent infringer from subsequently challenging the patent's validity.[166] Only infrequently have courts failed to uphold the preclusiveness of NCCs contained

---

158. *See id.* at 169.

159. Foster v. Hallco Mfg. Co., Inc., 947 F.2d 469, 475-76 (Fed. Cir. 1991).

160. Monahan v. N.Y. City Dep't of Corr., 214 F.3d 275, 284 (2d Cir. 2000).

161. *See Foster*, 947 F.2d at 476.

162. *Id.* at 475-76.

163. *See id.* at 476 (quoting Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 49 (1897)).

164. Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 169 (2d Cir. 2012) (citing *Foster*, 947 F.2d at 476), *cert. denied*, 133 S. Ct. 932 (2013).

165. According to *Black's Law Dictionary*, a consent decree is a "court decree that all parties agree to." BLACK'S LAW DICTIONARY, *supra* note 16.

166. Siegel v. Nat'l Periodical Publ'ns Inc., 508 F.2d 909, 913 (2d Cir. 1974); *see* United States v. S. Ute Tribe or Band of Indians, 402 U.S. 159, 174 (1971); United States v. Swift & Co., 286 U.S. 106, 115 (1932); Interdynamics, Inc. v. Firma Wolf, 653 F.2d 93, 97-98 (3d Cir. 1981); Am. Equip. Corp. v. Wikomi Mfg. Co., 630 F.2d 544, 547-48 (7th Cir. 1980); Kiwi Coders Corp. v. Acro Tool & Die Works, 250 F.2d 562, 568 (7th Cir. 1957).

within patent consent decrees.[167] For the purposes of licensee estoppel, modern courts treat consent decrees and judgments similarly.[168] Consent decrees generally estop parties from attacking a patent's validity subject to one important nuance—that the decree includes stipulations to both validity *and* infringement.[169] The underlying rationale is that if the parties to the decree only agree that infringement did not occur, then the alleged infringer does not have strong incentives to contest the patent's validity, which is presumed anyway.[170] As one court put it, "judicial decrees disposing of issues in active litigation cannot be treated as idle ceremonies without denigrating the judicial process."[171] At the same time, however, consent decrees should be narrowly construed in order to effectuate the ideals highlighted by *Lear*.[172]

C. Parties Agree to an NCC as Part of a Settlement Agreement During Litigation

Under the third endgame, the parties initiate litigation, and at some point, enter into a settlement agreement.[173] If the settlement agreement does not contain an NCC, then the licensee is most likely not estopped from subsequently challenging the underlying patent's validity.[174] The U.S. Supreme Court has never confirmed this, but the Second Circuit handed down an opinion holding as much in *Warner-Jenkinson Co. v. Allied Chemical Corp*.[175] If, on the other hand, that mid-litigation settlement agreement does contain an NCC, and there has been an opportunity to conduct discovery regarding patent validity, then patent validity may not be subsequently challenged by the patent holder's counterparty to the settlement agreement.[176] There is no controversy surrounding this situation.[177] Because settlement agreements accompanied by dismissals with prejudice are afforded the same preclusive effect as consent decrees, the equities weigh overwhelmingly in favor of estopping licensees from reneging on their NCCs.[178]

One might well wonder why the powerful pro-licensee rationale of *Lear* is

---

167. Kraly v. Nat'l Distillers & Chem. Corp., 502 F.2d 1366, 1368 (7th Cir. 1974).

168. *Rates Tech., Inc*., 685 F.3d at 169.

169. *Foster*, 947 F.2d at 483.

170. *See Wikomi*, 630 F.2d at 547.

171. Wallace Clark & Co. v. Acheson Indus, Inc., 532 F.2d 846, 849 (2d Cir. 1976).

172. *See Foster*, 947 F.2d at 480.

173. *See* Farrell & Merges, *supra* note 97, at 955.

174. Warner-Jenkinson Co. v. Allied Chem. Corp., 567 F.2d 184, 188 (2d Cir. 1977).

175. *Id.*

176. Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1370 (Fed. Cir. 2001). It bears mentioning that the enactment of mid-litigation settlement agreements only precludes the parties to the agreement from subsequently challenging patent validity. *See id.* It does not preclude third-parties who have nothing to do with the settlement agreement. *See id.*

177. *See* Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 170 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013); *see Flex-Foot, Inc*., 238 F.3d at 1370.

178. *Flex-Foot, Inc.*, 238 F.3d at 1367-68.

not strong enough to overcome the policy of res judicata and to allow licensees to challenge patent validity in spite of a settlement agreement containing an NCC. The *Lear* Court, however, simply did not consider the policy of res judicata.[179] The facts of *Lear* involved a pre-litigation licensing agreement—not a mid-litigation settlement or consent decree—and the Court nowhere intimates that its rationale can be extended to situations beyond pre-litigation licensing agreements.[180] More to the point, no court has ever ventured to hold that the *Lear* doctrine is strong enough to trump res judicata,[181] and this Note does not either.

In 2012, the United States Court of Appeals for the Federal Circuit handed down a case entitled *Flex-Foot, Inc. v. CRP, Inc.* in which the court stated the circumstances under which mid-litigation settlement agreements and consent decrees are preclusive and the rationale for that preclusiveness.[182] Basically, the court held that an NCC does not suddenly become preclusive just because the parties to a patent lawsuit write it into a settlement agreement at some point during the litigation.[183] Rather, to become preclusive as to further validity challenges, the NCC must be written into a settlement agreement that is reached *after the patent licensee has an opportunity to engage in discovery regarding the patent's validity*.[184] The Federal Circuit did not explicitly state the rationale underlying this rule.[185] Presumably, though, a licensee who agrees to an NCC after having an opportunity to conduct discovery regarding patent validity is making a relatively *informed* decision. Also, the Federal Circuit did not expressly elaborate on exactly how much discovery must be performed regarding a patent's validity.[186] The court did, however, approve of its previous decision in *Hemstreet v. Spiegel, Inc.*, in which it found an NCC to be preclusive even though the underlying settlement agreement was reached just *one week* into the litigation.[187]

The rationale for *Flex-Foot*'s rule is that a party to patent litigation should only get one swing at the piñata.[188] The efficiency of patent litigation would suffer immensely if parties could freely challenge patent validity after making an informed decision to sign a document promising to do the opposite. In short, the

---

179. *See* Lear, Inc. v. Adkins, 395 U.S. 653 (1969).

180. *See id.*

181. Foster v. Hallco Mfg. Co., Inc., 947 F.2d 469, 476 (Fed. Cir. 1991); *see Flex-Foot, Inc.*, 238 F.3d at 1369.

182. *See Flex-Foot, Inc.*, 238 F.3d at 1370.

183. *See id.*

184. *Id.*

185. *See id.*

186. *See id.*

187. *Id.* at 1369 (referring to Hemstreet v. Spiegel, Inc., 851 F.2d 348, 349 (Fed. Cir. 1988)).

188. It is more commonly stated that a party to litigation should only get "one bite at the apple." Randy D. Gordon, *Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration*, 18 FLA. J. INT'L L. 549, 550 n.1 (2006). One commentator even went as far as to say that that a litigant should only get "one kick at the cat." *See id.*

policy of res judicata trumps the *Lear* doctrine.[189] So far the *Lear* Doctrine is 0-for-3 in allowing challenges to patent validity.[190] In the next section, however, this Note argues that challenges to patent validity must be allowed despite mutual agreement to an NCC at some point before the initiation of litigation.

D. Parties Entering into Licensing Agreement Before Litigation

The real controversy—and indeed, the circuit split—implicates the enforceability of licensing agreements that are entered into *before* the initiation of any litigation.[191] Imagine, for example, that Martha Stewart capitulates to Lodsys' offer to sign a pre-litigation licensing agreement that includes an NCC. If litigation somehow breaks out[192] regarding the licensed patent and Stewart breaches the NCC by challenging the patent's validity in violation of the NCC, that challenge would have a different result depending on the federal circuit in which the challenge was brought. The Second Circuit would extend the *Lear* doctrine to void the pre-litigation NCC.[193] The Federal Circuit, on the contrary, would enforce the pre-litigation NCC as long as it is clear and unambiguous.[194] Although there is currently a circuit split regarding the enforceability of NCCs entered into before litigation begins, courts agree that the issue boils down to a balancing act of competing interests.[195]

1. Federal Circuit Approach: Off with King Lear's Head.—In 2010, the Federal Circuit revealed its willingness to enforce pre-litigation NCCs under certain circumstances in a case called *Baseload Energy, Inc. v. Roberts*.[196] In *Baseload*, Bryan Roberts (the "licensor") held a patent to a flying wind turbine that resembled a kite.[197] The licensor eventually entered into a joint business venture with David Resnick (the "licensee"), a venture capitalist interested in wind energy projects.[198] As part of that venture, the licensor licensed the patent rights in the turbine to the licensee.[199] Unfortunately, their business relationship

---

189. *See Flex-Foot, Inc*., 238 F.3d at 1370.

190. *See id.*; Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 174 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013); Foster v. Hallco Mfg. Co., Inc., 947 F.2d 469, 483 (Fed. Cir. 1991).

191. *See Rates Tech. Inc.*, 685 F.3d at 170; Baseload Energy, Inc. v. Roberts, 619 F.3d 1357, 1363-64 (Fed. Cir. 2010).

192. Litigation could break out for a variety of reasons. Stewart could bring a declarative action suit asserting the invalidity of Lodsys' patent on the grounds that Lodsys was not the first to invent it. *See* Lear, Inc. v. Adkins, 395 U.S. 653, 659 (1969). Lodsys could bring a patent infringement suit against Stewart seeking to enjoin her from producing a new app, and Stewart could allege patent invalidity as a defense. *See* Magliocca, *supra* note 96, at 1814 n.20.

193. *Rates Tech. Inc*., 685 F.3d at 174.

194. *Baseload*, 619 F.3d at 1363.

195. *Rates Tech. Inc*., 685 F.3d at 167-68.

196. *See Baseload*, 619 F.3d at 1357.

197. *Id.* at 1358.

198. *Id.*

199. *Id.*

crumbled, and the licensee sued the licensor for breach of contract.[200] The parties entered into an expansive settlement agreement that provided, inter alia, that the licensee releases the licensor "of and from any and all losses, liabilities, claims, expenses, demands *and causes of action of every kind and nature*."[201] The licensee, however, was not apparently intimidated by this settlement agreement's apparent preclusion of a subsequent lawsuit.[202] When the licensee ran out of funds to pay the licensing fees, he brought a declaratory judgment action against the licensor, alleging that the turbine's patent was invalid and unenforceable.[203] Predictably, the licensor moved for summary judgment on the grounds that the settlement agreement precluded the licensee from bringing a cause of action "of every kind and nature," including one challenging the turbine patent's validity.[204]

The court allowed the licensee to challenge validity in the suit notwithstanding the NCC.[205] Even though the agreement at stake in *Lear* did not contain an NCC, the court imported *Lear's* balancing act analysis.[206] On one hand, the court noted that it could promote settlement and efficient resolution of litigation by enforcing the licensing agreement's NCC.[207] On the other hand, the court held that the licensor could not rely on a pre-litigation licensing agreement to seal his monopoly on a potentially invalid patented turbine.[208] The doctrine of res judicata is of no use to the licensor because the NCC in question had never been the subject of litigation.[209]

In dicta, however, the court weakened the central holding of *Lear* by suggesting a way that, *hypothetically*, an NCC could be enforceable.[210] The court relied on its rationale in *Foster v. Hallco Manufacturing Company, Inc.*—a case involving a consent decree—to state that a licensing agreement's NCC may be enforceable as long as its language is "clear and unambiguous."[211] Unfortunately, the *Baseload* court offered very little guidance as to what it would take for an NCC to be "clear and unambiguous."[212] In the most pertinent part of the decision, the court specifically noted that a "clear and unambiguous" NCC would contain "specific language . . . making reference to invalidity issues," and the court held that the NCC in question did not satisfy that standard.[213]

This dictum regarding the enforceability of NCCs is not persuasive and

---

200. *Id.* at 1359.
201. *Id.* (emphasis added).
202. *See id.* at 1360.
203. *Id.*
204. *Id.*
205. *Id.* at 1358.
206. *Id.* at 1361.
207. *Id.*
208. *Id.* at 1364.
209. *Id.* at 1363.
210. *See id.* at 1361-62.
211. *Id.* (relying on Foster v. Hallco Mfg. Co, 947 F.2d 469 (Fed. Cir. 1991)).
212. *See id.* at 1362-64.
213. *Id.* at 1363.

should not be adopted in future cases. How, one might ask, did the court come to derive the specific rule that "clear and unambiguous" NCCs must be enforced? Apparently, the court figured that because consent decrees are enforceable as long as they are clear and unambiguous, licensing agreement NCCs must be enforceable as long as they are clear and unambiguous as well.[214] This reasoning, though, is unsound.

Without more, the fact that the court held in a different case that consent decrees are sometimes enforceable does not mean that the *Baseload* court should rule that pre-litigation licensing agreements are sometimes enforceable too. Mid-litigation consent decrees and pre-litigation licensing agreements are two very different deals brokered at two very different points in the life of a patent dispute.[215] The main reason that consent decrees were held enforceable was that the extraordinarily powerful policy of res judicata tips the *Lear* balance in favor of estoppel.[216] Pre-litigation licensing agreements, however, have absolutely nothing to do with res judicata.[217] Therefore, the *Baseload* court could not rely *exclusively* on the case involving a consent decree, as it did, to support its dictum.[218] The equities underlying pre-litigation licensing agreements simply cannot outweigh the equities associated with patent validity challenges. Lacking further substantiation, *Baseload's* pro-NCC argument must bow to *Lear's* maxim that "removing restraints on commerce caused by improperly-held patents should be considered more important than enforcing promises between contracting parties."[219] In short, the *Lear* doctrine survived the *Baseload* ruling but, as a most unfortunate result of the Federal Circuit's dictum, the doctrine did not escape unscathed.[220]

2. Second Circuit Approach: All Hail to King Lear.—The Federal Circuit Court of Appeals is not the only court to weigh in on the subject of estoppel in patent licensing.[221] In 2012, the Second Circuit handed down an opinion in *Rates Tech., Incorporated v. Speakeasy, Incorporated,* which conflicted with the Federal Circuit's ruling in *Baseload*.[222] At stake in *Rates*, just as in *Baseload*, was a pre-litigation licensing agreement.[223] Rates Technology Inc. ("RTI") owned two patents for inventions that pertained to the automatic routing of telephone calls.[224] When RTI noticed that a telecommunications company called Speakeasy was potentially infringing those patents, RTI (the licensor) offered to

---

214. *Id.*

215. *See* Taylor, *supra* note 17, at 240 n.168.

216. *Id.*

217. *See* Roper, *supra* note 128, at 1651 n.22.

218. *See* Baseload Energy, Inc. v. Roberts, 619 F.3d 1357, 1357 (Fed. Cir. 2010).

219. Warner-Jenkinson Co. v. Allied Chem. Corp., 567 F.2d 184, 188 (2d Cir. 1977).

220. *See Baseload*, 619 F.3d at 1357.

221. *See* Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 163 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013).

222. *Id.* at 173-74.

223. *Id.* at 172.

224. *Id.* at 165.

license Speakeasy (the licensee) the right to use its patents for a one-time fee of $475,000.[225] The companies entered into a pre-litigation licensing agreement, which contained an extremely specific NCC that stated, inter alia, that "Speakeasy will not anywhere in the world challenge . . . the validity of any of the claims of [RTI's] Patents."[226] In the event of breach, the agreement provided for liquidated damages on the order of $12 million.[227] As fate would have it, and just like the licensee in *Baseload*, Speakeasy filed an action for a declaratory judgment that RTI's patents were invalid and unenforceable.[228]

Like the Federal Circuit in *Baseload*, the Second Circuit held the pre-litigation NCC unenforceable.[229] The difference, however, lies in the fact that the Second Circuit held that a pre-litigation NCC is void and unenforceable *on its face.*[230] That is to say, the Second Circuit did not bother writing dicta suggesting creative ways in which licensors might draft enforceable NCCs.[231] The court here based its pro-licensee holding on *Lear's* principle that discovering invalid patents is a goal superior to avoiding high cost patent litigation.[232] Again, RTI could not hide behind the shield of res judicata because the validity of its patents had not been tested on the battlefield of litigation.[233] Thus, none of the *Flex-Foot* factors applied.[234] The parties had never before conducted discovery on validity issues and the licensing agreement had never received the imprimatur of a court.[235] Furthermore, the Second Circuit expressly rejected the dicta in *Baseload*.[236] Unlike the vague release of "any and all…claims" at stake in *Baseload*,[237] the NCC in *Rates* was an incredibly specific agreement not "to challenge[ ] the validity of any of the claims of the *Patents*" in particular.[238] Thus, although the *Rates* NCC "clear[ly] and unambiguous[ly]" purported to prevent challenges of

---

225. *Id.*

226. *Id.* In full, the NCC read as follows: "Speakeasy hereby warrants and represents to RTI that on and after the execution date of this Covenant Speakeasy will not anywhere in the world challenge, or assist any other individual or entity to challenge, the validity of any of the claims of the Patents or their respective foreign counterpart patents applications, except in defense to a Patent infringement lawsuit brought under the Patents against Speakeasy, its [products and services], except as otherwise required by law." *Id.*

227. *Id.*

228. *Id.* at 166.

229. *Id.* at 174.

230. *See id.*

231. *See id.* at 163.

232. *Id.* at 172.

233. *See id.*

234. *See id.*; *see also* Flex-Foot, Inc. v. CRP, Inc., 238 F.3d 1362, 1370 (Fed. Cir. 2001).

235. Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013).

236. *Id.* at 173-74.

237. Baseload Energy, Inc. v. Roberts, 619 F.3d 1357, 1362 (Fed. Cir. 2010).

238. *Rates Tech. Inc*., 685 F.3d at 165 (emphasis added).

the patent's validity, the court held that it could not accomplish that purpose.[239] Although the *Rates* court justified its decision to decline *Baseload's* invitation on the fact that *Baseload's* rationale was dicta, there are additional reasons to abandon *Baseload*.[240] These arguments will be expounded, and their rebuttals addressed, in the next section, which addresses the circuit split by arguing in favor of holding pre-litigation NCCs unenforceable *per se*.

IV. RESOLVING THE CIRCUIT SPLIT IN FAVOR OF KING *LEAR*

A fault line, therefore, has ripped through American patent licensing agreement jurisprudence. On one side, the Federal Circuit in its *Baseload* dicta clutches to the notion that NCCs generated pre-litigation may be enforceable if they are "clear and unambiguous."[241] On the other side, the Second Circuit in *Rates* and the Ninth Circuit in *Massillon* hold that pre-litigation NCCs are always unenforceable.[242] In 2013, the U.S. Supreme Court had an opportunity to resolve this circuit split when it encountered a petition for writ of certiorari for the Second Circuit's decision in *Rates*. [243] The Court, however, denied that petition with no comment, thereby leaving the issue unsettled.[244]

A. How Should the Circuit Split Be Addressed?

In a duel between *Rates* and *Baseload's* dicta, *Rates* should carry the day. That is to say, a court should not enforce a pre-litigation NCC even when that NCC is "clear and unambiguous." At the outset, it should be noted that *Rates* was not a pioneer in stretching the *Lear* doctrine to hold pre-litigation NCCs unenforceable.[245] As early as 1971, just two years after *Lear* was handed down, the Ninth Circuit had already extended *Lear's* logic to hold pre-litigation NCCs unenforceable.[246]

The first basis for holding pre-litigation NCCs unenforceable comes from *Lear* itself. Certainly, in some situations, it is important to hold licensees to the "technical requirements" of contract law.[247] When set against each other, however, the interest in enforcing contracts must yield to the superior interest in guarding the public domain from invalid patents.[248] Property within the public

---

239. *Id.* at 173-74.

240. *Id.* at 173.

241. *Baseload*, 619 F.3d at 1363.

242. *Rates Tech. Inc*., 685 F.3d at 174; *see* Massillon-Cleveland-Akron Sign Co. v. Golden State Adver. Co., 444 F.2d 425, 427 (9th Cir. 1971).

243. Rates Tech. Inc. v. Speakeasy, Inc., 133 S. Ct. 932 (2013).

244. *Id.*

245. See *Massillon-Cleveland-Akron*, 444 F.2d 425.

246. *Id.* at 427. *Massillon* also held that the enforceability of pre-litigation agreements containing NCCs should not turn on whether the contract is referred to as a "settlement agreement" or "licensing agreement." *Id.*

247. Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969).

248. *Id.*

domain should not be susceptible to being contracted away by a private party who lacks valid ownership of that property. Likewise, an individual should not be able to legally license the rights to an invention if that individual does not hold a valid patent in the invention. And, certainly, if a licensing agreement is entered into and the licensee seeks to challenge[249] the patent's validity, he should not be barred from doing so.

There is at least some support for the proposition that *Lear* does not even apply to the context of pre-litigation NCCs.[250] As several commentators correctly point out, *Lear* allowed a licensee to renege on a licensing agreement that *did not expressly include an NCC*.[251] That is to say, the licensing agreement in *Lear* did not contain an absolute requirement that the licensee never challenge the gyroscope patent's validity.[252]

The fact that *Lear* lacked an NCC, however, is not material.[253] The important fact in *Lear* is that the licensing agreement contained a clause that, like an NCC, provided extremely limited circumstances under which the licensee could terminate the agreement.[254] The clause provided that the licensee could terminate the agreement only if the USPTO refused to grant the pending patent application or if the patent was subsequently declared invalid.[255] Therefore, the agreement operated like an NCC in the sense that it could not be terminated on the basis of a validity challenge unless either of the two conditions was met.[256] When neither of the two conditions was met and the licensee terminated the agreement and challenged the patent anyway, the Court held that the challenge was properly

---

249. As a practical matter, licensees do not have problems acquiring standing to challenge the validity of the licensed patent. In 2007, the U.S. Supreme Court ruled that a licensee is able to establish standing to bring a declaratory judgment action challenging validity *even if the licensee does not cease making royalty payments* under the licensing agreement. Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136 (2007) (holding that a licensee is "not required . . . to break or terminate its . . . license agreement before seeking a declaratory judgment in federal court that the underlying patent is invalid, unenforceable, or not infringed"). Therefore, post-*Medimmune*, a licensee incurs much less risk in challenging the PAE licensor's patent because the licensee does not have to breach the agreement before litigation, which would otherwise leave him vulnerable to liquidated damages and other penalties. Alex S. Li, *Accidentally on Target: The Mstg Effects on Non-Practicing Entities' Litigation and Settlement Strategies*, 28 BERKELEY TECH. L.J. 483, 513-14 (2013).

250. Melissa Brenner, *Slowing the Rates of Innovation: How the Second Circuit's Ban on Nochallenge Clauses in Pre-Litigation Settlement Agreements Hinders Business Growth*, 54 B.C.L. REV. E-SUPPLEMENT 57, 65 (2013).

251. M. Natalie Alfaro, *Barring Validity Challenges Through No-Challenge Clauses and Consent Judgments: Medimmune's Revival of the Lear Progeny*, 45 HOUS. L. REV. 1277, 1287-88 (2008); Brenner, *supra* note 250, at 62.

252. *See Lear*, 395 U.S. at 657-58.

253. *Id.*

254. *See id.* at 657.

255. *Id.*

256. *Id.*

brought.[257] Therefore, *Lear's* holding confirms that pre-litigation NCCs are unenforceable, and the full force and precedential value of *Lear* must be imported to the balancing act concerning such NCCs.[258] If one would like to argue, as did the Federal Circuit in *Baseload*, that pre-litigation NCCs are enforceable under certain circumstances, then one must disregard the spirit of *Lear*. Many courts, nevertheless, have wisely chosen to recognize *Lear's* applicability to NCCs.[259]

The second basis for holding pre-litigation NCCs unenforceable comes from the fact that doing so would not unreasonably damage judicial economy. Granted, it is a safe bet that enforcing NCCs embedded in pre-litigation settlement agreements would streamline patent lawsuits to some extent.[260] Again, promoting settlement is an enormously important goal of patent law.[261] As Judge Posner articulated, "[t]he general policy of the law is to favor the settlement of litigation, and the policy extends to the settlement of patent infringement suits."[262] Even though, by definition, litigation has not formally commenced at the time a pre-litigation licensing agreement is reached, the avoidance of litigation is sometimes the motivation for the parties' decision to include the licensing agreement.[263]

Regardless, there are at least three reasons why the value of judicial economy is not strong enough to compel a rule holding pre-litigation NCCs enforceable. First, just because licensing agreements are sometimes motivated by the desire to avoid litigation does not mean that all of their clauses, no matter how destructive of the values of patent law, must be honored. Judicial economy is important, but it is not of *paramount* importance when private actors (i.e., licensors) threaten to appropriate inventions within the public domain. Again, licensees may be among the few individuals who are sufficiently motivated to challenge the licensors of potentially invalid patents.[264] After all, by buying a license to a patent, licensees have proved themselves economically interested in the invention. [265] Also, licensees are arguably more familiar with related inventions in the field, and this familiarity is essential to the ability to make an informed decision regarding whether to challenge patent validity.[266]

Second, judicial economy is still preserved by the fact that NCCs should still be enforceable under certain circumstances in three situations—namely, mid-

---

257. *Id.* at 674.

258. Server & Singleton, *supra* note 151, at 408.

259. Panther Pumps & Equip. Co. v. Hydrocraft, Inc., 468 F.2d 225, 231 (7th Cir. 1972); Massillon-Cleveland-Akron Sign Co. v. Golden State Adver. Co., 444 F.2d 425, 427 (9th Cir. 1971); Bendix Corp. v. Balax, Inc., 421 F.2d 809, 821 (7th Cir. 1970).

260. Baseload Energy, Inc. v. Roberts, 619 F.3d 1357, 1361 (Fed. Cir. 2010).

261. Asahi Glass Co. v. Penetech Pharms., Inc., 289 F. Supp. 2d 986, 991 (N.D. Ill. 2003) (Posner, J., sitting by designation).

262. *Id.*

263. *See Massillon*, 444 F.2d at 425.

264. *See* Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969).

265. *See id.*

266. Taylor, *supra* note 17, at 224.

litigation settlement agreements, consent decrees, and final judgments after litigation on the merits.[267] Unsurprisingly, there is little disagreement among the courts that NCCs are preclusive when entered into during those situations.[268] In those mid- and post-litigation agreement situations, the concern about the negative effects of silencing licensees is attenuated. True, licensees who are involved in litigation regarding patents are probably relatively motivated to challenge patent validity.[269] But, after the initiation of litigation, licensees have the opportunity to conduct discovery about the validity of the licensor's patent.[270] Therefore, licensees can make an *informed* decision regarding whether to sign an enforceable NCC. Finally, the concern regarding judicial economy is somewhat misguided because patent-holding licensors are protected by a presumption of validity in civil litigation.[271] Thus, even if pre-litigation NCCs are not preclusive, a licensee still might be deterred from initiating litigation by the fact that patents, once issued, are entitled to a presumption of validity.[272]

The third reason for denying the preclusiveness of pre-litigation NCCs is that such preclusiveness opens the door to abuse of the patent law system itself. It is important to remember that when patent holders send settlement demand letters to potential infringers, the patent holders are claiming—either indirectly or not-so-indirectly—that they can successfully hit the letter's recipient with a lawsuit rooted in a patent statute.[273] For example, when Lodsys sent a settlement demand to Martha Stewart in the summer of 2013, Lodsys implied that Stewart was infringing its iPad app patent under federal law.[274] Essentially, these patent holders are relying on the patent law system to make their litigation threats credible *even when their patents are invalid*.[275] To even the playing field, patent licensees should have the option of challenging patent validity prior to litigation.

One might argue that if courts hold pre-litigation NCCs unenforceable and mid-litigation NCCs enforceable, then licensors seeking to make their NCCs enforceable will unnecessarily undertake "the formality—perhaps even the charade—of filing an infringement action" to seal the deal.[276] This is an interesting and imaginative concern, but not a substantial one. It is unlikely that parties to a patent dispute will go out of their way to undertake costly discovery for the sole purpose of reaching a settlement agreement that contains a binding NCC.[277] On a related note, one might argue that if courts establish a rule that pre-

---

267. *See* Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 169-71 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013).

268. *See id.*

269. Taylor, *supra* note 17, at 224.

270. Roper, *supra* note 128, at 1651.

271. 35 U.S.C. § 282 (2012).

272. *See id.*

273. The United States Patent and Trademark Office, *supra* note 57.

274. *See* Lee, *supra* note 1.

275. The United States Patent and Trademark Office, *supra* note 57.

276. Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 173 (2d Cir. 2012).

277. *See id.*

litigation NCCs are unenforceable, then licensees will take advantage of licensors by entering into NCCs without any intention of respecting the NCC. This argument ignores the fact that, in reality, licensors will be privy to the new rule as well. Therefore, licensors will not rely on the notion that such NCCs may be enforced in litigation. More to the point, this argument basically laments the fact that licensors would rely less on NCCs, but that is precisely the objective advocated by this Note.

B. New Ways to Exterminate Bad Patents Under the America Invents Act

Although one might argue that holding pre-litigation NCCs unenforceable is unnecessary in light of alternative modes of challenging patent validity, those alternative modes are inadequate to the task. A comprehensive explanation of the two most prominent avenues—inter partes review and post-grant review—would fall beyond the scope of this Note.[278] It is appropriate, however, to evaluate how well these mechanisms can alleviate the problem of licensee estoppel in patent disputes and to see why they fall short.

On September 16, 2011, the America Invents Act (AIA) was enacted.[279] The AIA facilitates challenges to a patent's validity through inter partes review and post-grant review.[280] Basically, either route can be utilized by anyone other than the patent holder.[281]

One might argue that it is unnecessary to afford patent challengers the ability to ignore pre-litigation NCCs because these AIA procedures already provide formidable weapons. Indeed it cannot be disputed that the AIA procedures provide patent challengers a more favorable burden of proof for establishing invalidity. Specifically, a patent validity challenger in either inter partes review or post-grant review has to prove invalidity only by a preponderance of the evidence.[282] This burden stands in stark contrast with the clear and convincing evidence standard that applies to any patent licensee who challenges validity in civil litigation.[283] Still, the fact that some individuals might find it relatively easy to attack a patent's validity using inter partes or post-grant review does not mean that a pre-litigation NCC should estop a licensee from attacking a patent's validity.

---

278. For a detailed explanation of inter partes and post-grant review, see D. Christopher Ohly, *The America Invents Act: USPTO Implementation—Inter Partes and Post-Grant Review*, 45-OCT MD. B.J. 4 (2012). For example, these procedures entail different timing requirements, different grounds for invalidity, different fees, different availability of discovery, etc. *See id.*

279. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 125 Stat 284 (2011).

280. *Id.*

281. *See* 35 U.S.C. §§ 311(a), 321(a) (2012).

282. *Id.* at §§ 316(e), 326(e).

283. *See* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2242 (2011). The "clear and convincing" burden of proof does not have a statutory basis, but it was confirmed in a U.S. Supreme Court decision rendered in 2011. *See id.*

The primary reason for this is mentioned in *Lear* itself.[284] Patent licensees are often the only persons sufficiently motivated to challenge patent validity,[285] but if NCCs are enforceable, then the new AIA procedures are unavailable to those licensees. To avoid a challenge under inter partes review or post-grant review, a licensor could simply fashion an NCC that precludes any type of validity challenge, as did the licensor in Rates.[286] Or the licensor could draft an NCC that precludes specific types of validity challenges, including challenges brought under the new AIA procedures. True, inter-partes review and post-grant review are available, in theory, to anyone other than the patent holder.[287] But as Justice Harlan stated in *Lear*, "[l]icensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled the public may continually be required to pay tribute to would-be monopolists without need or justification."[288] In other words, because patent licensees usually directly compete with their licensors (hence the licensing agreement), they have a relatively strong interest in challenging the validity of the licensors' patents.[289] Therefore, the new AIA procedures might well be beneficial, but unless pre-litigation NCCs are held unenforceable, those new procedures are of relatively little use.

CONCLUSION

Not only do invalid patents exist, but their owners derive substantial profit from licensing them to others. As Martha Stewart knows all too well, PAEs and other entities frequently offer licensing agreements to others based on vague patents of questionable validity. Relying on the *in terrorem* effect of licensing demand letters, these entities have convinced individuals to pay tribute for using a given invention. Thankfully, however, this unfortunate reality is not unavoidable.

Courts should not go out of their way to establish roadblocks preventing licensees from challenging the patents of their licensors. On the contrary, given the strong rationale in *Lear* and the even stronger rationale in *Rates*, the courts should be paving the way for licensees to challenge patent validity. Specifically, patent licensees should only be prohibited from challenging patent validity when such validity has already been established by a consent decree or final court order or when an NCC has been entered into mid-litigation, after the parties have had an opportunity to conduct discovery. The Federal Circuit, through its dicta in *Baseload*, has attempted to sand the teeth of the *Lear* doctrine by suggesting that NCCs in pre-litigation licensing agreements are enforceable as long as they

---

284. *See* Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969).

285. *See id.*

286. *See* Rates Tech. Inc. v. Speakeasy, Inc., 685 F.3d 163, 165 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 932 (2013).

287. *See* 35 U.S.C. §§ 311(a), 321(a) (2012).

288. *Lear*, 395 U.S. at 670.

289. *Id.*

contain "clear and unambiguous" terms. Although not normally the go-to court for patent disputes, the Second Circuit's decision in *Rates* features the better argument, and should serve as the lodestar by which future courts guide their approach to patent licensing.