

NORTHEASTERN UNIVERSITY
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Editors' Introduction

In the ten years since its inception, the *Northeastern University Law Journal* has grown and developed in exciting ways, while never losing sight of its public interest roots. Last year, the *Journal* officially departed from the topic-based format typical of “law journals” to a “law review” format, committing to publish articles covering an array of legal topics within each issue. This change has been positive and has led to increased dialogue between students, academics, and practitioners on subjects addressing how to use the law in ways that benefit society.

Throughout our publication's changes over the last decade, it remains dedicated to publishing high-quality legal scholarship from all disciplines consistent with its public interest ideals. Currently, the unsettled political and social climates, as well as the expanding imbalance of power and privilege across different populations, necessitate even deeper conversations within the legal community centered on how to support those who are marginalized. We believe the flagship student-run publication of Northeastern University School of Law — a school founded on the principles of social responsibility — is especially well situated to encourage such discourse.

With that in mind, the Editorial Board continues to push the boundaries of what our publication can accomplish. As such, this issue marks the first edition under our new name, the *Northeastern University Law Review* — a name reflective of the broader format adopted last year. By aligning the *Law Review's* name with its updated structure, we hope to invite further engagement with academic and community leaders, thereby ensuring our place at the center of the critical discussions that will occur over the next several years.

Editorial Board

Northeastern University Law Review

Promissory Estoppel and the Origins of Contract Law

*Eric Alden**

Abstract

Contrary to Samuel Williston's description of the A.L.I.'s formal restatement of contract law as merely presenting the law "as it is, not as a new law," the doctrine of promissory estoppel set forth in Section 90 thereof does not represent an ancient principle of contract law. Rather, it constitutes a relatively recent and largely artificial innovation by Williston and his colleague Arthur Corbin. To overcome potential objections to such novelty, Williston and Corbin advocated for their new doctrine on the basis of specific claims of historical authority therefor. In particular, they asserted that promissory estoppel was doctrinally and philosophically consonant with the origins of English contract law during the Middle Ages. Those claims are not well-founded.

Specifically, Williston, Corbin, and other proponents of promissory estoppel have focused on the fact that, during the period from roughly 1350 to 1600, litigants and courts incrementally turned for the enforcement of contract to the tort writ of trespass on the case sounding in assumpsit in substitution for the use of well-established, preexisting contractual writs. Yet these proponents of promissory estoppel have ignored the underlying reasons for, and limitations of, that historical development. Contrary to their implication, there occurred no fundamental doctrinal rejection of preexisting contract law, to which the doctrine of promissory estoppel would have been wholly alien. Rather, this

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The Author wishes to thank John H. Baker, Sidney DeLong, Christopher Gulinello, Michael Mannheimer, Jean Powers and Jeffrey Standen, as well as Nicholas Zuccarelli and the Chase research librarians. The Author is alone responsible for any errors and for the content of the Article.

circumvention of the preexisting contractual writs by means of assumpsit came to pass as the direct result of specific jurisdictional and procedural limitations that had hobbled the use of those contractual writs.

Moreover, and critically, both prior to and during the period of this creative extension of assumpsit the fundamental principle of reciprocity in contract was repeatedly asserted by the courts and commentators. The major extension of assumpsit in the mid-1500s into the realm of the principal preexisting contractual writ for informal contracts, debt upon contract, was temporally coupled with and limited by this principle, which came to be expressed as the doctrine of consideration. Promissory estoppel, which rejects at its core the principle of reciprocity in contract, is antithetical to this history.

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INTRODUCTION

In the ongoing debate over promissory estoppel, set forth in Section 90 of the American Law Institute's (A.L.I.'s) restatement of contract law,¹ proponents of promissory estoppel have advanced two major claims of historical authority to advocate to the academy and judiciary in favor of Section 90 and to foreclose further discussion as to the section's propriety and advisability. Both of these claims of historical authority are highly questionable.

The first claim is that, at the time the initial Restatement of the Law of Contracts (First Restatement) was published in 1932, there already existed a sufficient number of American cases across a wide enough spectrum of factual circumstances in which promises had been enforced without consideration that it was, as a practical matter, necessary to promulgate Section 90, a provision of stunning breadth which sweeps aside the requirements of mutual assent and

1 The American Law Institute (A.L.I.) was founded in the 1920s for the purpose of producing "restatements" of the various substantive areas of the common law, that is, condensed articulations of the major operative legal principles in each such area. See American Law Institute, *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1-18 (1923).

With respect to contracts, the A.L.I. promulgated its first Restatement of the Law of Contracts in 1932. RESTATEMENT OF THE LAW OF CONTRACTS (AM. LAW INST. 1932). The A.L.I. subsequently revised this restatement, promulgating the Restatement (Second) of Contracts in 1979, published in 1981. RESTATEMENT (SECOND) OF CONTRACTS (1981) [hereinafter RESTATEMENT (SECOND)].

Section 90 of both of these restatements sets forth what is commonly referred to as "the doctrine of promissory estoppel."

In the First Restatement, Section 90 read as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT OF THE LAW OF CONTRACTS § 90 (AM. LAW INST. 1932).

The Restatement (Second) broadened this already extraordinarily expansive provision yet further, to read (omissions indicated by brackets, additions by italics): "(1) A promise which the promisor should reasonably expect to induce action or forbearance [of a definite and substantial character] on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *The remedy granted for breach may be limited as justice requires.* (2) *A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.*" RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

consideration for the enforceability of promise in contract law.² This contention has only recently been subjected to detailed forensic investigation and argumentative rebuttal in a separate, prior article by the Author.³

The second claim of historical authority, and the subject of the present Article, reaches back to the origins of English contract law in the Middle Ages. In short, proponents of promissory estoppel have asserted that promulgation of Section 90 represents a return to the early formative stages of English jurisprudence regarding contractual relationships, before that field of law was, in their view, effectively hijacked and artificially narrowed by imposition of the requirement of consideration, of bargained-for exchange, as a prerequisite to the enforceability of promise.⁴ These academic proponents of promissory estoppel have focused heavily on the historical fact that between roughly 1350 and 1600, the tort writ of trespass on the case sounding in “assumpsit,” that is, the assumption of a duty or commitment by a

2 Samuel Williston, the official Reporter for the First Restatement, advanced this claim. Williston’s written commentaries on his draft First Restatement constituted the principal argumentative document in which he set forth a detailed written explication of the grounds for his various proposals, including Section 90. Samuel Williston, *Commentaries on Contracts: Restatement No. 2* (A.L.I. Mar. 9, 1926) [hereinafter Williston, *First Restatement Commentaries*]. Those commentaries in turn cited frequently to Williston’s own major 1920 treatise on contract law. See, e.g., *id.* at 6 n.1, 7-10, 12-13, and so on. For Williston’s treatise itself, see SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (Baker, Voorhis & Co. 1920). Williston also orally defended his proposed Section 90 in debate with his A.L.I. colleagues. Discussion of the Tentative Draft, *Contracts Restatement No. 2* (Apr. 29, 1926), Proceedings at the Fourth Annual Meeting of the American Law Institute, IV App. A.L.I. PROC. 90 (Apr. 29 to May 1, 1926).

3 Eric Alden, *Rethinking Promissory Estoppel*, 16 NEV. L.J. 659 (2016), <http://ssrn.com/abstract=2601563>.

Jean Powers and Michael Gibson have also criticized promissory estoppel from a doctrinal perspective. See Jean Fleming Powers, *Promissory Estoppel and Wagging the Dog*, 59 ARK. L. REV. 841 (2007); Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659 (1988).

From an empirical perspective, both Robert Hillman and Sidney DeLong have conducted studies showing much lower success rates of promissory estoppel claims in the courts than had been predicted by proponents of the doctrine. See Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998); Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel*, 1997 WIS. L. REV. 943 (1997).

4 See *infra* Part I.

promisor, was incrementally extended ever further in its application to contractual disputes.⁵ Over the course of those two and a half centuries, this creative substitutionary use of *assumpsit* in lieu of the old, familiar contractual writs ultimately led to the acceptance of *assumpsit* as a universal form of action for breach of contract.⁶

The foregoing historical claim is, moreover, intimately connected with a broader intellectual project, namely blurring the contours of contract as a distinct and independent field of law and effectuating its fusion with and into the law of tort. This line of thinking, most clearly articulated and best exemplified by Grant Gilmore in his famous *The Death of Contract*,⁷ more or less openly advances the following subtheses, to wit: that in the development of our law, tort conceptually preceded and gave birth to contract; that the law of contract is — not merely procedurally but in its intellectual and moral core — a mere offshoot or subcategory of tort; and that, from both policy and doctrinal perspectives, it is therefore unobjectionable to fuse contract back into the broader realm of tort from which it sprang by means of propounding what is in effect the tort of promissory estoppel.⁸

5 See *infra* Parts I, III.

6 The final acceptance of *assumpsit* as a nearly universal action for breach of contract occurred in *Slade's Case* in the year 1602. See discussion *infra* Part III.I.

7 GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

8 “We are fast approaching the point . . . where any detriment reasonably incurred by a plaintiff in reliance on a defendant’s assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort.” *Id.* at 88. Gilmore continued:

The most recent, and quite possibly the most important, development in the promissory estoppel or § 90 cases has been the suggestion that such contract-based defenses as the Statute of Frauds are not applicable when the estoppel (or reliance) doctrine is invoked as the ground for decision. This line, if it continues to be followed, may ultimately provide the doctrinal justification for the *fusing of contract and tort in a unified theory of civil obligation*. A remarkable passage in the *Restatement (Second) § 90 Commentary* explains how most “contract” cases, if not all of them, can be brought under § 90 so that resort to § 75 and consideration theory will rarely, if ever, be necessary. By passing through the magic gate of § 90, it seems, we can rid ourselves of all the technical limitations of contract theory.

Id. at 90 (emphasis added) (footnote omitted). As trenchantly noted by Gilmore, by virtue of this official comment “the unresolved ambiguity in the relationship between § 75 and § 90 in the *Restatement (First)* has now been resolved in favor of the *promissory estoppel principle of § 90* which has, in effect, *swallowed up the bargain principle of § 75*.” *Id.* at 72 (emphasis added).

The narrative thus conveyed is that the radical provisions of Section 90 should not be seen as truly revolutionary whatsoever, but rather simply a return to days of yore, picking up the mantle of long-term historical continuity in legal development. In fact, as will be seen below, precisely this argument was made by Samuel Williston at the very inception of Section 90 to legitimate its promulgation.⁹ What might otherwise be viewed by some who have little interest in ancient developments in the law as a refined discursion into niceties of historicity, is thus of central importance to the justification and legitimacy of a radical break in the doctrine of contract law. This historical contention and its polemic use to advance the modern doctrinal cause of promissory estoppel have not yet been challenged in the academic literature. They should be.

This Article addresses that need. First, it is specifically argued here that the foregoing historical account advanced by proponents of promissory estoppel fails to describe the forces in medieval English law, which drove the incremental, substitutionary use of the tort of trespass on the case sounding in *assumpsit* to address contractual disputes.¹⁰ As will be discussed *infra*, English law in the Middle Ages

As Gilmore stated further,

I have occasionally suggested to my students that a desirable reform in legal education would be to *merge the first-year courses in Contracts and Torts into a single course which we could call Contorts*. Perhaps the same suggestion would be a good one when the time comes for the third round of Restatements.

Id. at 90 (emphasis added).

Though his text generally positions itself as positive description rather than normative prescription, Gilmore's approbation of such a potential doctrinal development is manifest throughout.

As to the assertions of Gilmore and other promissory estoppel proponents with respect to the early history of contract law development, *see infra* Part I.

⁹ *See infra* Part I.A.

¹⁰ Prominent and widely cited secondary sources with respect to this history include: James Barr Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1889), reprinted in JAMES BARR AMES, LECTURES ON LEGAL HISTORY 129 (Harv. Univ. Press 1913) [hereinafter AMES]; JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (4th ed. 2007, reprinted 2011); C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT (1949); WILLIAM HOLDSWORTH, 2 A HISTORY OF ENGLISH LAW (Little, Brown 4th ed. 1936); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (Little, Brown 5th ed. 1956) (1929); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (Cambridge Univ. Press 2d ed. 1968) (1895) [as the relevant portions of the text were written by

had been recognizing and enforcing contracts through various contractual actions, conducted through the procedural mechanism of royal “writs,” for centuries before *assumpsit* came into play. However, as review of the historical record in this Article will demonstrate, procedural and jurisdictional limitations on the use of those contractual actions led to a partial failure of justice in which little or no effective

Professor Maitland, hereinafter MAITLAND]; A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* (1975); SAMUEL JACOB STOLJAR, *A HISTORY OF CONTRACT AT COMMON LAW* (1975). Each of these secondary sources covers the entire history of the development of the common law of contract in more or less full detail.

Direct recursion to the primary sources is, however, necessary in this area in order to form a more accurate picture of the thinking of those who lived in medieval times, and of the precise nature and doctrinal content of statements appearing in caselaw, statutes, and other contemporaneous records. Any analysis not ultimately founded upon those primary sources is at risk of drawing unwarranted conclusions, as will be seen in this Article.

During several centuries following the Norman conquest of England, those original, primary sources were written either in Latin or in Anglo-Norman medieval French. The first major statement of English law following the Conquest, dating to the late 1100s, is found in RANULPH DE GLANVILLE, *TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIAE* [A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND] (John Beames trans., John Byrne & Co. 1900) (circa 1188) (English translation) [hereinafter GLANVILLE]. For the original Latin text, see RANULPHO DE GLANVILLA, *TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIAE* (John Rayner ed., London, White & Brooke 1780) (circa 1188) [hereinafter GLANVILLE ORIGINAL TEXT].

The next, appearing roughly 50 years later, is HENRICUS [HENRY] DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* [ON THE LAWS AND CUSTOMS OF ENGLAND] (Sir Travers Twiss ed. & trans., London, Longman & Co. 1878-83) (circa 1235) (Latin original and English translation side by side) [hereinafter BRACON]. Braccon’s text is also available in online format based on Samuel E. Thorne’s translation at the Harvard Law School Library; see HENRICUS [HENRY] DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* [ON THE LAWS AND CUSTOMS OF ENGLAND] (Samuel E. Thorne trans.) (c.1235), <http://bracton.law.harvard.edu/> [hereinafter BRACON ONLINE]. The translations in BRACON and BRACON ONLINE differ from each other in nontrivial manner, each with their own respective strengths and weaknesses. Direct reference to the Latin is therefore advisable if at all possible.

As to caselaw, English translations of the Anglo-Norman medieval French constitute an invaluable research tool. Excellent in this regard and hence frequently cited herein is JOHN H. BAKER & S.F.C. MILSOM, *SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750* (1986) [hereinafter SOURCES]. Similarly FIFOOT, *supra*. For additional records, the Selden Society has over the course of more than a century published grand historical compendia of medieval English caselaw and related materials.

judicial remedy was available for breach of untold numbers of day-to-day “informal” contracts, namely those not evidenced by a formally sealed writing.¹¹ This Article will describe how litigants searched for, and judges helped to fashion, alternative means of achieving justice in such cases by incrementally extending the procedurally far less encumbered tort action of trespass on the case sounding in *assumpsit* ever further until it ultimately provided potential remedies for breach across the full spectrum of contractual disputes.

In other words, the use of the tort of trespass to achieve justice in cases of breach of contract was nothing more than litigational circumvention of otherwise applicable procedural and jurisdictional bars to remedy. Ever more creatively interpreted, tort was used as the vehicle to address contract cases not because its precepts and policies preceded or originated from a source of authority superior to those of contract, but simply because the tort writ of trespass was not procedurally hobbled in the same manner as the various contractual writs.

All of this is already well established in the serious literature of English legal history. Yet the logical implications of this learning have been either ignored or misinterpreted in the American academic literature favoring promissory estoppel. This Article will subject the literature in favor of promissory estoppel to critical analysis in order to illuminate the manner in which partial presentations of the historical record, used for polemic purpose, have had a substantively misleading effect. What will thus be countered is the unjustified implication that concepts of contract, and the equitable and policy considerations which lie at their heart, are a lesser and merely derivative species descended from a primordial forefather of tort.

Second, this Article will demonstrate that during the same period in which *assumpsit* came to be used to address contractual disputes, the principle of reciprocity in contract was asserted by English courts.¹² Indeed, within several decades after the breakthrough of *assumpsit* into widespread and generalized use in the mid-1500s, English courts had universally come to require the presence of consideration as a prerequisite to the use of *assumpsit*.¹³ *Assumpsit*, which had originated in tort, had come to be tempered and limited by the central conceptual underpinning of contract.

11 Though used in different context, credit is due to BAKER, *supra* note 10, at 61, for the felicitous turn of phrase, “failure of justice.”

12 See *infra* Part III.E.

13 See *infra* Part III.G.

Contract was not absorbed into tort. Rather, a single, particular species of tort action, having been dragooned into service to address contractual disputes, was absorbed into contract.

Accordingly, Part I will examine the claims of academic proponents of promissory estoppel in this regard. Part II will address the English law of contract prior to the later expansion of *assumpsit* into the domain of contract. This will include, critically, the various procedural and jurisdictional hurdles, which so often crippled the effective use of the contractual writs to address breach of informal contract. Part III will review the process by which the writ of trespass on the case was creatively borrowed from the domain of tort to address these lacunae in the fabric of justice. Particular attention will be focused on dialogue among litigants, counsel, and judges in the medieval caselaw in which hurdles applicable to the contractual writs are discussed. Part III will also lay out the manner in which English courts repeatedly articulated the principle of reciprocity in contract and formally imposed the requirement of consideration upon the use of *assumpsit*. Part IV will provide a summary of the medieval history so reviewed. In light thereof, Part V will rebut the historical claims of the promissory estoppel proponents. The Article then concludes.

I. Claims by the Proponents of Promissory Estoppel

A. *Williston and the Initial Promulgation of Section 90*

The historical claim that contract is conceptually and doctrinally derivative of tort served quite literally as a foundational cornerstone upon which Section 90 was justified at its inception.

During the First Restatement drafting process in the 1920s, Samuel Williston, the official Reporter for the restatement, wrote extended analytic Commentaries explaining and defending the draft he had presented.¹⁴ These Commentaries constitute the most formal and fully elaborated presentation of the case in favor of Section 90 in the record of the A.L.I.'s deliberations.¹⁵ The very commencement of his case in favor of Section 90 in the Commentaries leads off with the following:

14 See Williston, *First Restatement Commentaries*, *supra* note 2, at 14-21.

15 For extended discussion regarding the A.L.I.'s deliberations in connection with the initial promulgation of Section 90, see Alden, *supra* note 3.

The action of Assumpsit was originally based on reliance by the plaintiff on a promise rather than on a bargain. It was not until the old action of Debt was swallowed and extended by the action of assumpsit that the idea of exchanging consideration as the price of a promise became the predominant one.¹⁶

As authority for this proposition Williston cited three brief passages from Professor James Barr Ames of Harvard Law School:

The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property [etc.]¹⁷

That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases.¹⁸

Both in equity and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.¹⁹

Williston's statement claiming legitimacy on the basis of historical record provides the backdrop for his immediately following assertion as to more recent caselaw: "In a number of cases at the present day, it is still law that reliance on a promise, though there has been no price or consideration paid for it, renders the promisor liable."²⁰ The Commentaries went on to review that recent caselaw in greater detail. This then was Williston's composite argument in favor of Section 90.

The foregoing presentation of the historical record by Williston may thus be distilled to its essential implication as follows:

16 Williston, *First Restatement Commentaries*, *supra* note 2, at 14. The text of the Commentaries refers to Section 88. This was later renumbered as Section 90.

17 *Id.* (quoting AMES, *supra* note 10, at 142).

18 *Id.* (quoting AMES, *supra* note 10, at 143).

19 *Id.* (quoting AMES, *supra* note 10, at 144).

20 *Id.*

The original (and true) basis for the enforcement of promise, he asserted, was the tort-based concept of unbargained-for reliance by the promisee, rather than a bargained-for exchange between the parties. He posited that modern courts were once again returning to what he claimed was the wellspring of contractual liability in the form of unbargained-for reliance, following an extended interregnum during which the doctrine of consideration had held sway. This recursion to the origins of contract, argued Williston, should be enshrined in the doctrine of promissory estoppel set forth in Section 90.

Given that Williston's historical contention as to promissory estoppel and the origins of contract law was based solely on three brief quotations from Ames, it will be important to reprise Ames' work in detail later in this Article following review of the relevant history. As will be seen, the cases analyzed by Ames do not support Williston's thesis. Nor did Williston quote a clear, strong statement by Ames directly contrary to the doctrine of promissory estoppel. As will therefore be argued in Part V *infra*, the use of Ames' work to underpin claims in favor of promissory estoppel is not warranted.

B. Corbin

Williston's principal collaborator in advocating Section 90 to the American Law Institute was Arthur Linton Corbin, who served as official advisor to Williston during the First Restatement drafting process.²¹ As one might thus expect, Corbin's statements on the subject in his subsequent, massive 1950 treatise on contract law were very much in line with those of Williston. For example:

It is now quite clear that an informal promise may be enforceable by reason of action in reliance upon it, even though that action was not bargained for by the promisor and was not performed as an agreed exchange for the promise. This is demonstrated by the decisions of the courts of common law from the very beginnings of the action of assumpsit²²

²¹ See, e.g., GILMORE, *supra* note 7, at 59.

²² ARTHUR LINTON CORBIN, 1A CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW 193 (West rev. ed. 1963) (1950). Corbin does not produce any support for this statement, and the Author has not been able to find support for Corbin's assertion

Similarly:

The action of assumpsit, a variation of the action of trespass on the special case, was the first action used and intended for the enforcement of informal promises.²³ The breach of a promise was regarded as a sort of deceit; and the remedy was compensatory damages for the injury caused by the promisee's action in reasonable reliance. This was one of the germs from which the doctrine of consideration sprung; and from that day to this the courts have been familiar with the idea of reliance on a promise as a reason for enforcement. There is certainly no historical inconsistency in the rule stated by the American Law Institute in section 90.²⁴

Though Corbin's generalizations were even more expansive than Williston's and stated with manifest confidence, his academic support for these claims regarding assumpsit was just as narrow. The sole authority cited by Corbin in support of his claims was the same article by Ames that Williston had cited earlier.²⁵ As will be argued in Part V *infra*, Corbin thus had no more legitimate support for his historical assertions than did Williston.

C. Gilmore

Particularly bold formulations of the revisionist thesis were

in the actual records of medieval English caselaw. See *infra* Part V for a general rebuttal of the claims of the promissory estoppel proponents following review of the historical record.

23 This statement by Corbin could very easily be read to mislead. In fact, as will be discussed *infra*, for centuries prior to the emergence of assumpsit, the writ of debt upon contract had been routinely employed to enforce informal contracts (i.e., those where no formal deed had been executed) where the plaintiff had delivered or performed their side of an agreed exchange — the *quid* — and thus become legally entitled to the as yet undelivered money or property constituting the agreed exchange therefor — the *quo*. See discussion *infra* Part II.C. As to the later extension of assumpsit to bilaterally executory contracts, see *infra* Part III.H.

24 CORBIN, *supra* note 22, at 198-99 (citing AMES, *supra* note 10).
25 *Id.* at 192, 198 n.12. Other references by Corbin in the cited text are not relevant to his claims regarding the early history of assumpsit as providing precedent for the modern invention of promissory estoppel.

put forward by Grant Gilmore, who famously wrote in the early 1970s that, by virtue of the advent of promissory estoppel, “‘contract’ is being reabsorbed into the mainstream of ‘tort.’”²⁶ Without actually discussing or citing to any of the earlier medieval history, Gilmore staked out a sweeping historical claim: “Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability.”²⁷ He maintained that contract had been “artificially separated” from tort a mere “hundred years ago,” and that “[c]lassical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort.”²⁸

D. Restatement (Second)

Roughly contemporaneously with Gilmore, the drafters of the Restatement (Second) of Contracts, developed during the 1960s and 1970s,²⁹ reiterated Williston’s and Corbin’s historical assertion by claiming in their official comments following Section 90: “It is fairly arguable that the enforcement of informal contracts in the action of *assumpsit* rested historically on justifiable reliance on a promise This Section thus states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains.”³⁰ As with Gilmore, no specific historical support for this contention is set forth in the Restatement (Second).

E. Eric Mills Holmes

More recently, in the 1990s Eric Mills Holmes expanded upon and sharpened these assertions, stating explicitly that

the doctrine now labeled “promissory estoppel” is not a modern, twentieth-century development arising from Section 90 of the *Restatements*. Rather, it is a venerable, ancient form of relief with historical

26 GILMORE, *supra* note 7, at 87. Gilmore’s approbation of the doctrine of promissory estoppel is evident throughout his text, particularly in the contempt with which he speaks of doctrine of consideration.

27 *Id.* (footnote omitted).

28 *Id.*

29 Herbert Wechsler, *Foreword to RESTATEMENT (SECOND) OF CONTRACTS* § 90 (AM. LAW INST. 1981).

30 *Id.* § 90 cmt. a.

origins in both the common law action of assumpsit and early equity decisions “[P]romissory estoppel” is an ancient form of consideration pre-dating the modern bargain theory of consideration by about five centuries.³¹

According to Eric Mills Holmes, “[w]ith the triumph of assumpsit over equity in the 1500s, what we now refer to as ‘promissory estoppel’ relief was generally granted at common law.”³²

He went on to argue that unbargained-for detrimental reliance on a promise

could be labeled consideration or, perhaps, reliance consideration, instead of “promissory estoppel.” . . . Based on its origins in ancient equity and assumpsit, judicial relief for detrimental reliance on promises in modern times generally should be classified as consideration. Accordingly, this would eliminate the need for new terminology such as promissory estoppel. However, because of the advent of bargained-for consideration in nineteenth-century America as the presumed primary legal basis for validating and enforcing informal promises, the reliance consideration classification did not happen.³³

In his view, “[r]eliance consideration ultimately was usurped by bargained-for consideration.”³⁴ Section 90, predicated upon unbargained-for reliance, was applauded by Eric Mills Holmes as a return to what he viewed as the doctrine of yore.

As with the claims advanced by Williston and Corbin, Part V will subject these assertions by Eric Mills Holmes to critical analysis and argumentative rebuttal based on the historical record. It is to that record the Author therefore now turns.

31 Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 271-72 (1996) (footnotes omitted).

32 *Id.* at 271 n.10.

33 *Id.* at 272-73 (footnotes omitted).

34 *Id.* at 275.

II. The English Law of Contract: 1066 to 1350

A. The Norman Conquest

Western civilization has generated and in turn been shaped by two great systems of law: the Roman, and the Anglo-American.³⁵ Roman law achieved its zenith in the European hegemony of antiquity, followed by the collapse of empire, then subsequent rebirth during the Middle Ages, carrying down to the present day as the foundation of continental “civil law” systems.³⁶ Anglo-American law was born of the Norman conquest of England in the year 1066 and followed its own largely independent course of development over succeeding centuries.³⁷ The widespread “reception” of earlier Roman law pursued by continental European societies during the Middle Ages did not supplant the formative Anglo-Norman rule of law in its inception nor ultimately take hold in England.³⁸ Precisely in light of the generally independent character of Anglo-Norman legal development, it is interesting to note that both the Romans and medieval Normans developed formulary systems of contract law which bore many striking similarities to each other.³⁹ Moreover, despite the largely autochthonous nature of legal evolution in England, medieval English judges and commentators came to cite routinely, in Latin, a foundational precept of contract law from ancient Rome, as will be discussed *infra*.⁴⁰

Prior to the Norman conquest in 1066, customary and royally decreed law of Germanic cast had of course existed and been administered in pre-Norman Anglo-Saxon society.⁴¹ The arrival of the Normans, however, heralded the advent of a new, centralized political and legal structure superimposed upon the Anglo-Saxons from above.⁴² While the Norman kings initially limited their intervention

35 2 HOLDSWORTH, *supra* note 10, at 144.

36 1 MAITLAND, *supra* note 10, at 1-24.

37 *See, e.g.*, 2 MAITLAND, *supra* note 10, at 193 (stating that as to classical Roman law and church-based canon law, “the influence that they exercise over English law is but superficial and transient”).

38 *See, e.g.*, PLUCKNETT, *supra* note 10, at 298-99.

39 *See, e.g.*, 2 MAITLAND, *supra* note 10, at 558.

40 *See infra* Part III.E.

41 *See generally* 2 HOLDSWORTH, *supra* note 10, at 12. *See also* PLUCKNETT, *supra* note 10, at 254-55, 316-17.

42 *See, e.g.*, PLUCKNETT, *supra* note 10, at 11; HOLDSWORTH, *supra* note 10, at 145-46.

in preexisting legal structures to certain discrete categories and types of situations, over the course of succeeding centuries, the King's central courts came to dominate the entire field of English law.⁴³ It is during and by means of this jurisdictional expansion of the King's central courts that English common law came into being and achieved ever more complete and sophisticated form.⁴⁴

Specifically as to the birth of the English, and thus ultimately American, common law of contract, two broad periods can and should be distinguished: from the Norman conquest to 1350 and from 1350 to 1600.⁴⁵

During the first of these periods, covering nearly three centuries from the conquest to 1350, contract law was administered by means of, and was thus governed by, a handful of contractual "writs." Due to hobbling procedural limitations imposed upon these contractual writs, however, we then witness during the latter period from 1350 to 1600 the ever more creative substitutionary use of the tort writ of trespass upon the case sounding in *assumpsit*, in order to extend the jurisdiction of the central courts and achieve justice in certain cases where there would otherwise be no remedy.⁴⁶ It is during the final century of this second period, from roughly 1500 to roughly 1600, that *assumpsit* finally achieves complete coverage as to all manner of contractual disputes, and that courts articulate and impose the requirement of consideration for the enforceability of "informal," that is, unsealed, contracts.⁴⁷

B. The Writ System

Commencing with the initial three centuries following the conquest, one is immediately struck by the manner in which the superimposition of the Normans' political and administrative structure upon the preexisting legal systems of Anglo-Saxon society led to the pivotal role played by royal writs in future legal development.

43 See generally PLUCKNETT, *supra* note 10. In particular, see *id.* at 80-81.

44 *Id.* For purposes of this Article, references to "the King's central courts" generally indicates Common Pleas and King's Bench.

45 These are approximate rather than precise dates, as will be seen in the discussion *infra*.

46 See *infra* Part II.D.

47 See *infra* Parts III.G, III.H, III.I.

A writ was a formal command in writing from the King to specified persons to take or to refrain from taking some specified action. For example, in an early *praecipe quod reddat*⁴⁸ writ with respect to land holdings (a subject of paramount importance in feudal society), the King would direct the county sheriff to cause the defendant either to return a specified parcel of land to the plaintiff or to appear before the King to show cause why the land should not be returned.⁴⁹

The writ thus functioned as the essential means by which private parties could invoke royal authority to intervene on their behalf. Without a writ, a private litigant had no recourse to the King's central courts and would thus be constrained to pursue their claims at the local level.⁵⁰ Moreover, the crown only chose to issue writs as to matters considered worthy of the attention of the King's officers and the central courts.⁵¹ Although that list of matters was to grow prodigiously over time, and the King's courts were themselves to evolve and develop, the pathways and idiosyncrasies of the writ system had, as will be seen, a profound impact on the course of English legal development.

C. *The Contractual Writs*

Significantly, during this period the crown developed certain writs concerning contractual relationships, including covenant, debt, detinue, and account.⁵² Taken together, they spanned a vast array of contractual relationships of the day.⁵³ Although in the early days much of contract litigation occurred at the local level,⁵⁴ a private litigant who could afford to pay the cost of obtaining a royal writ and who could meet the procedural requirements thereof could call upon the central courts to adjudicate the matter.⁵⁵ This was the common

48 Loosely translated as an "order that [defendant] return [or render]" something. See, e.g., BLACK'S LAW DICTIONARY (10th ed. 2014) (entry appearing as subheading under term "praecipe").

49 PLUCKNETT, *supra* note 10, at 356. For a recitation of many of the early forms of writ, see generally GLANVILLE, *supra* note 10. For a specific example of a *praecipe quod reddat* writ with respect to land, see *id.* at bk. 1, ch. 6.

50 See, e.g., BAKER, *supra* note 10, at 53-54.

51 See, e.g., *id.* at 60-61.

52 For excellent discussion of the various contractual writs and their development, see STOLJAR, *supra* note 10, at 3-15; BAKER, *supra* note 10, at 318-25.

53 STOLJAR, *supra* note 10, at 3-15.

54 *Id.* at 3 ("[M]ost contract work was done in the local courts [the courts of the borough, the manor, the merchants' fair] . . .").

55 *Id.* at 4. As to aspects of the procedural requirements, see, for example,

law of contract in its earliest formulation.

These contractual writs' breadth of substantive coverage may be illustrated by considering them in turn. For these purposes, principal focus will be cast upon the writs of debt and covenant.⁵⁶

The writ of debt came in two flavors, namely debt upon contract (also frequently referred to as "debt *sur contract*") and debt upon obligation ("debt *sur obligation*").

As to debt upon contract, this

was the great exemplar of debt, being the action applicable to the most usual and often entirely informal transactions which, executed on one side, therefore called for the recovery of either money lent, or the price of goods sold, or the rent for land, or the agreed reward for services rendered.⁵⁷

In situations of this kind it is evident that what we would today refer to as consideration was entirely present in the arrangement. Pursuant to an agreed mutual exchange, one side had fully performed while the other side had not yet and was therefore being called to account. It was essential to actions for debt upon contract that the plaintiff be able to demonstrate precisely this *quid pro quo* which had been received by the defendant and which gave rise to plaintiff's just claim for recompense.

That this writ of debt is properly described as contractual is clear. Ranulph de Glanville, writing in Latin in the late 1100s, repeatedly and unambiguously described the transactions underlying debt upon contract as "contract" and the parties thereto as "contracting parties."⁵⁸ He wrote that such contracts arise "from the consent of private individuals."⁵⁹ Similarly, Glanville wrote that a

purchase and sale are effectually perfected from the moment the price is settled between the contracting parties; provided possession of the thing purchased

PLUCKNETT, *supra* note 10, at 383-85.

56 As *detinue* and *account* are less central to the developments described in this Article, they are thus not further discussed here.

57 STOLJAR, *supra* note 10, at 10-11.

58 GLANVILLE, *supra* note 10, at 216-22; GLANVILLE ORIGINAL TEXT, *supra* note 10, at 172-76.

59 GLANVILLE, *supra* note 10, at 221-22; GLANVILLE ORIGINAL TEXT, *supra* note 10, at 176.

and sold be delivered, or that the price, either wholly, or in part, be paid, or, at least, that Earnest be given and received.⁶⁰

In view of the fact that debt upon contract arose by virtue of value actually delivered, it is referred to as a “real” contract.⁶¹ The early common law did not limit itself, however, to the enforcement of real contracts. It also enforced “formal” contracts, namely those in which a party to be bound had not only executed a writing evidencing their obligation, but had affixed thereto their formal, personal seal. Such a sealed writing was generally referred to as a “deed.”⁶² Thus, in addition to debt upon contract, there existed debt upon obligation, that is, an action predicated upon a deed evidencing a debt owed by one party to another.⁶³ In the circumstances of the times, such a deed was considered sufficient in and of itself to evidence and establish a valid legal basis for enforcement of the obligation set forth therein without the plaintiff needing to allege and prove the prior provision of the quid pro quo (the loaned funds) which presumably typically underlay such formal obligations — “the writing itself proved the indebtedness.”⁶⁴

Just as a deed was sufficient to create a basis for the enforcement of debt, it was likewise sufficient to create a basis for the enforcement of covenant in the King’s central courts. The writ of covenant may have originally evolved to enforce leases,⁶⁵ but

60 GLANVILLE, *supra* note 10, at 216 (footnotes omitted); GLANVILLE ORIGINAL TEXT, *supra* note 10, at 172.

61 *See, e.g.*, PLUCKNETT, *supra* note 10, at 633.

62 *See, e.g.*, 2 MAITLAND, *supra* note 10, at 220.

63 *See, e.g.*, BAKER, *supra* note 10, at 323.

64 *See, e.g., id.* at 324-25; STOLJAR, *supra* note 10, at 9 (footnote omitted).

65 *See, e.g.*, John H. Baker, *Deeds Speak Louder Than Words: Covenants and the Law of Proof, 1290-1321*, in LAWS, LAWYERS AND TEXTS: STUDIES IN MEDIEVAL LEGAL HISTORY IN HONOUR OF PAUL BRAND 177, 181 (Susanne Jenks et al. eds., Leiden, Brill 2012) (citing to thesis of David Ibbetson in this regard).

It is important to note that while the King’s central courts came to require a sealed deed as an evidentiary matter in order to recover under the royal “writ of covenant,” the local courts generally imposed no such rule on actions for breach of covenant, i.e., of a contractual agreement. *See, e.g., id.* at 178.

One observes in the transcripts of medieval cases that the term “covenant” simply meant an agreement between two parties, irrespective of whether an action for breach thereof was brought pursuant to a “writ of covenant,” writ of debt upon contract, or otherwise. *See, e.g.*, Fransseys’ Case, YB 21 & 22 Edw., Rolls Series at 599 (circa 1294), translated in SOURCES, *supra* note 10, at 227-28 (remarks of Metingham, stating that if a “covenant,” in the sense

soon came to be applicable across the entire spectrum of mutual agreements between parties. Indeed, the Statute of Wales 1284 stated in sweeping language that “because covenants bind in an infinite variety of ways, it is difficult to mention each in particular”⁶⁶

D. Procedural Limitations on the Contractual Writs

Given that the writs of debt and covenant together were from a substantive perspective so comprehensive in their scope, inquiry naturally arises as to what grounds could have caused parties to seek alternative writs upon which to predicate legal action. The answer lies in certain procedural limitations imposed on these contractual writs along with a vital jurisdictional division between the local and central courts. These legal hurdles furnished the impetus for creative litigational efforts beginning in the mid-1300s to circumvent these impediments.

To begin with, actions for debt upon contract were generally subject to the near-conclusive affirmative defense of “wager of law,” a procedure in which the defendant would simply deny under oath that the defendant owed the sum alleged, backed up by the collateral oaths of a group of “compurgators” stating that they believed the defendant’s oath to be true.⁶⁷

of agreement, is made, plaintiff “may choose whether to demand the money by writ of debt or to demand by writ of covenant”); Watkins’ Case, YB 3 Hen. 6, Hil., fol. 36, pl. 33 (1425) (CP); CUL MS. Gg. 8(10), fol. 34; Bod. Lib. MS. Rawl. D. 363, fol. 35; BL MS. Harley 452, fol. 57; *translated in SOURCES, supra* note 10, at 380-83 (discussing “covenant,” in the sense of agreement, in case involving an action for trespass arising out of nonfeasance); Sloufort’s Case, YB 3 Hen. 6, Pas., fol. 42, pl. 13 (1425) (CP); collated with BL MS. Harley 452, fol. 63; MS. Harley 5155, fol. 34v; Bod. Lib. MS. Rawl. D. 363, fol. 108v; *translated in SOURCES, supra* note 10, at 215, 216 (remarks of Rolf, counsel for plaintiff, referring to a “covenant,” in the sense of agreement, underlying a hypothesized action pursuant to a writ of debt). Whether in any instance the word “covenant” has been used by judges or litigants in the simple sense of contractual agreement, or as a specific reference to an action pursuant to a writ of covenant, is usually readily apparent in context.

66 Statute of Wales 1284, Statutes of the Realm, vol. I, p.65, c. 10 (Eng.), *translated in SOURCES, supra* note 10, at 281. *See also* BAKER, *supra* note 10, at 318 (The writ of covenant “was applicable on the face of it to all consensual agreements . . .”).

67 *See, e.g.,* BAKER, *supra* note 10, at 322-23, 326; PLUCKNETT, *supra* note 10, at 633; STOLJAR, *supra* note 10, at 7-8, 16; T. POWELL, THE ATTORNEY’S ACADEMIE (1623), *reprinted in SOURCES, supra* note 10, at 222-23. However, “[w]ager of law was not possible where the debt arose upon a writing or

Further, in order to bring an action for debt upon contract, the plaintiff need already have furnished the quid pro quo — as a result of which the other party was now obligated in return.⁶⁸ Prior to such time, a contract would not yet be ripe for enforcement under this particular writ.⁶⁹

Moreover and quite significantly, the other principal contractual writs of covenant and debt upon obligation were only enforceable in the King's central courts if the contract had not just been agreed orally or in writing, but had been embodied in a deed, a formal written document bearing the obligor's seal.⁷⁰ A deed both evidenced the terms of an obligation and had of necessity occasioned a formality and solemnity from which obligor's intent to be legally bound could quite reasonably be inferred. As a result, if two parties had entered into an "informal" contract, that is, either orally or in writing but in either case not embodied in a formally sealed deed, and the plaintiff had not yet performed plaintiff's own obligations under the contract (i.e., the contract was still bilaterally executory), the plaintiff was generally without remedy in the King's central courts.

One might at this juncture ask why such a plaintiff could not in the alternative simply bring suit at the local level rather than in the King's central courts. This would appear to be the obvious solution to the jurisdictional limitations the crown had imposed on access to royal enforcement.

obligation, or upon an account, or for rent on a lease" STOLJAR, *supra* note 10, at 8.

68 See, e.g., STOLJAR, *supra* note 10, at 16.

69 See, e.g., BAKER, *supra* note 10, at 322, 326.

70 As to covenant in this regard, see, for example, *id.* at 319-20. Interestingly, the requirement of a deed for the enforcement of covenant in the central courts appears to have come into being in the early 1300s. See *id.* at 319; Baker, *Deeds Speak Louder Than Words*, *supra* note 65, at 177. As discussed *infra*, the deed requirement in covenant was one of the key drivers behind the incentive to make creative use of the writ of trespass commencing around 1350.

As to debt upon obligation in this regard, liability arose by virtue of the deed itself. See, e.g., BAKER, *supra* note 10, at 323-24; STOLJAR, *supra* note 10, at 9.

On the promisor's use of a seal to serve as evidence that the promisor had in fact signed a document, see, for example, E. ALLAN FARNSWORTH, *CONTRACTS* 86-87 (Little, Brown 3d ed. 1990) (formal contract required a written document "sealed by the promisor"; medieval seal consisted of wax "bearing an impression identifying the promisor").

For further discussion of seals, see *infra* Part II.E.2.

Yet here another vital jurisdictional threshold came critically into play. Suits in debt-detinue (the only option practically available where the plaintiff did not have a deed sealed by the obligor and thus could not sue in covenant in the central courts) seeking damages of 40 or more shillings could not be brought locally, but were instead required to be brought in the central courts.⁷¹ Conversely, small debt-detinue cases below 40 shillings in controversy were excluded from the central courts and could only be brought locally.⁷²

The upshot of this jurisdictional division was a situation in which a plaintiff in an informal, unsealed contract over 40 shillings in value under which plaintiff had not yet performed faced a Hobson's choice. The plaintiff could either attempt to bring suit in the central courts and there fail utterly for lack of a deed, or could forego any damages above 40 shillings in order to gain access to the local courts and thus potentially be able to recover at least some portion of the overall damages arising from breach. As one might accordingly expect, the local records are full of contractual cases in which the plaintiff has alleged damages of 39 shillings and 11½ pence.⁷³

E. Examination of the Procedural Limitations at Work

Time and again, one sees counsel and judges wrestling with these various jurisdictional hurdles in contract cases. A few examples provide a window into the types of discussion which occurred in this connection.

1. The 40 Shilling Threshold

As to the 40 shilling jurisdictional threshold, we have for instance *Corbet v. Stury*, a case arising in connection with the

71 For an excellent historical review of the rule and its provenance, see John S. Beckerman, *The Forty-Shilling Jurisdictional Limit in Medieval English Personal Actions*, in LEGAL HISTORY STUDIES 1972: PAPERS PRESENTED TO THE LEGAL HISTORY CONFERENCE, ABERYSTWYTH, 18-21 JULY 1972, at 110 (Dafydd Jenkins ed., 1975).

72 *Id.*

73 *Id.* at 111 ("Helen Cam, reporting her researches on the rolls of hundred courts, wrote of debt claims of 39s. 11½d. recurring there 'with monotonous regularity'."). Baker summarized the situation thus: "The restrictive attitude of the early common law towards contract litigation was calculated to drive plaintiffs elsewhere, to the hundred courts and to the borough and city courts." BAKER, *supra* note 10, at 327.

quintessentially medieval fact pattern of a jousting tournament near Shrewsbury close to the English border with Wales in the year 1292.⁷⁴ The plaintiff gave the defendants a horse to be ridden in the joust, on condition that the defendants would pay for any consequent injury to the horse.⁷⁵ Plaintiff said the horse was maimed in the combat and subsequently died of its wounds.⁷⁶ Defendants claimed to have returned the horse to plaintiff in its original condition, “if not better.”⁷⁷ Defense counsel moved for dismissal of the complaint on the basis that it sought damages above 40 shillings:

Louther [defense counsel]. Sir, it is enacted by statute that no one should be compelled to answer for a debt which amounts to 40s. or more without a [royal] writ; and by this plaint demands £20 without writ; and so we demand judgment⁷⁸

Plaintiff’s counsel conceded that this would be an effective objection by the defense had the case been brought in the local courts.⁷⁹

2. *Requirement of a Sealed Deed*

For contract cases over 40 shillings in value, which could only be brought in the King’s courts, plaintiffs often ran hard into the brick wall of the requirement in all actions pursuant to a writ of covenant for a formal, sealed deed evidencing the contract.

Before turning to an illustrative example in this regard, it is worth considering briefly the conditions of the time. During the Middle Ages, many members of the community may not have been able to read and write, or might not have had the necessary parchment, writing tools, red wax, and seal die (such as a stamp or

74 Shropshire Eyre, before John de Berwick, *record at* JUST 1/740, m. 42d, *first report at* YB 20 & 21 Edw., Rolls Series at 223, from CUL MS. Dd. 7. 14, *second report at* LI MS. Hale 188, fol. 15v (*French text at* YB 20 & 21 Edw., Rolls Series at 487) (1292) (Eng.), *translated in* SOURCES, *supra* note 10, at 282-84 (second name in case appears as “Scurye” in cited source, later corrected to “Stury” by Baker, *Deeds Speak Louder Than Words*, *supra* note 65, at 186 n.43).

75 *Id.* at 282.

76 *Id.* at 282-83.

77 *Id.* at 284.

78 *Id.* at 283 (footnote omitted).

79 *Id.* (footnote omitted).

embossed ring) readily at hand.⁸⁰ It may therefore very often not have been practicable, in the rough and tumble of day-to-day commercial transactions, to pursue the formalities of creating a sealed deed to memorialize an agreement.

This led to situations such as the following case from the year 1321, in which it was alleged that, for a price, defendant had agreed to take delivery of a certain quantity of hay in Waltham and carry it to London.⁸¹ It was further alleged that after receiving the hay, the defendant did not carry it to London and continued to detain it wrongfully. Plaintiff brought a writ of covenant but had no deed, no “specialty,” in the terminology of the day, to evidence the contractual agreement:

Gregory [defense counsel]. What have you [to show] the covenant?

Fastolf [plaintiff’s counsel]. [We are] ready [to aver it].

Gregory. Every covenant depends upon specialty, and you show none. [We ask] judgment.

Fastolf. You do not have to have specialty for a cartload of hay. [*Alternative variant in the records of the case: Sir, a man cannot make a writing for every little covenant like this.*]

HERLE [judge]. And for a cartload of hay we shall not undo the law. Covenant is nothing other than the assent of the parties, which lies in specialty.

And it was adjudged that [the plaintiff] should take nothing by his writ.⁸²

80 On seals generally, see, for example, P.D.A. HARVEY & ANDREW MCGUINNESS, *A GUIDE TO BRITISH MEDIEVAL SEALS* (Univ. of Toronto Press 1996).

81 Anon., *Eyre of London*, YB 14 Edw. 2 (first version) (1321) (Eng.), translated in SOURCES, *supra* note 10, at 285-86, and in 86 SELDEN SOCIETY 286 (1969).

82 SOURCES, *supra* note 10, at 286 (other than indication of speakers’ respective roles, and indication of alternative variant in the records, alterations in original) (footnotes omitted).

3. *Defense by Wager of Law*

Faced with an insurmountable barrier to remedy in covenant, a plaintiff without a deed could, of course, proceed first to fully perform their side of the contract. Once the plaintiff had thus furnished the defendant with quid pro quo, the plaintiff became entitled in the legal theory of the time to the agreed counterperformance and was now entitled to bring an action pursuant to a writ of debt upon contract rather than just a writ of covenant.

Yet it is worth noting that it may not always have been practicable or advisable for a nonbreaching party to proceed fully to perform their own side of the contract as a precondition to bringing suit — to do so would expose the plaintiff to even greater economic risk than the opportunity cost presumably already incurred by plaintiff in foregoing alternative potential transactions with other parties. Moreover, even if the plaintiff had fully performed, defendants could avail themselves of the absolute defense of wager of law for a great many types of contractual agreements.⁸³ A less-than-truthful defendant who could find a group of compurgators willing to swear they believed the defendant's denial could walk away scot-free.⁸⁴

Though grossly archaic by modern standards, wager of law existed in a technologically less advanced period of western civilization, when societal resources and technical means to provide proof of transactions and conduct were much more limited than they are today.⁸⁵ The policy rationale for wager of law was that it applied in circumstances where there had been a private transaction between two parties as to which third parties might not be able to provide

83 For a discussion of when wager of law would lie and when not, see, for example, *A Lecture on Wager of Law*, Reading on Magna Carta, c. 28: CUL MS. li. 5. 43, fol. 40v (15th century), translated in SOURCES, *supra* note 10, at 214.

84 It appears that defendants generally would not be second-guessed as to the truthfulness of their denial of contractual liability, once sworn on their faith. See, e.g., CHRISTOPHER ST. GERMAN, DYALOGE IN ENGLYSSHE/ BYTWYXT A DOCTOURE OF DYUYNTE/ AND A STUDENT IN THE LAWES OF ENGLANDE [DOCTOR AND STUDENT] (1523, 1530), reprinted in 91 PUBLICATIONS OF THE SELDEN SOCIETY 232 (Theodore F.T. Plucknett & J.L. Barton eds., 1974). St. German's work, typically referred to in the academic literature simply as "Doctor and Student," compares and contrasts in pedagogical form the English common law point by point with canon law. For discussion of the impact of St. German's work in his time, see, for example, PLUCKNETT, *supra* note 10, at 279-80.

85 In the immortal words of Maitland, rendered in other context: "Let us not be impatient with our forefathers." 2 MAITLAND, *supra* note 10, at 563.

accurate testimony or evidence as to what had actually transpired, either with respect to communications between the contractual parties or as to what might or might not actually have been performed by either side.⁸⁶ Who was to say that plaintiff's assertion of an agreement, or performance by plaintiff, or nonperformance by defendant, was any more reliable than defendant's denial of the same or assertion of completed payment in full?⁸⁷ To take an example which lies easily at hand, in modern society where the vast majority of larger contract payments are made by means of wire transfer, money order, check, or credit card, it is readily ascertainable whether funds have been transferred by way of payment. Not so during an earlier time when payment may have been made by simply handing over a sack of coins. Furthermore, wager of law initially arose during an era in which an individual's oath before God carried genuine societal and legal weight.

F. The Writ System Frozen in Place

Given the frustrations of plaintiffs one can easily imagine arising from these limitations imposed on the contractual writs of action, it is not amiss to ask why the forms and requirements of the contractual writs were not over time altered to expand their applicability and remove these hurdles to recovery. Yet here, historical evolution had taken a turn, which led to inflexibility in the writ system. While in the earliest days following the Norman conquest, new writs had incrementally been created which widened the scope of the King's jurisdiction; in the year 1258, this process was effectively brought to a halt.⁸⁸ This change was brought about by the Provisions of Oxford, which declared that no new forms of writs could be issued by the King's Chancellor without consent of the King's Council.⁸⁹ "After this period, although occasional innovations were sanctioned by parliament, the categories [of writs] became more or less closed. The effect was momentous If a would-be plaintiff could not find a writ in the register he was without remedy as far as the two benches [king's courts] were concerned."⁹⁰

86 For discussion in this regard, see W. STYLE, PRACTICAL REGISTER 572 (1694), reprinted in SOURCES, *supra* note 10, at 224-25.

87 *Id.*

88 BAKER, *supra* note 10, at 56.

89 *Id.*

90 *Id.*

This ultimately led the pot to boil over. Plaintiffs had to make do with the existing instrumentarium of writs in order to pursue their claims. If the traditional contractual writs offered little to no hope of remedy in a given case, incentive arose to become creative in one's exploration of an alternative course through the legal thicket. Here is where plaintiffs began tentatively to test whether the tort writ of trespass might not be brought to bear on their contractual disputes.

III. The Substitutionary Use of Assumpsit: 1350 to 1600

As is clear from the foregoing history, contract law in England preceded by centuries the later use of trespass in connection with matters of contract, to which we now shall turn. Rigidity of the writ system combined with jurisdictional limitations led a state of affairs in which many bona fide contract plaintiffs might not find effective remedy in the courts, leading to a partial failure of the justice system in this regard.

As discussed below, this failure of justice created an incentive for litigants and judges to begin experimenting with cross-application of the tort writ of trespass to contractual disputes in order to circumvent the procedural and jurisdictional limitations which existed in connection with the contractual writs.

A. *Trespass, Case and Assumpsit*

This process involved significant mutation in trespass itself. In the 1200s, trespass only lay for "wrongs committed 'with force and arms' (*vi et armis*) and 'against the king's peace' (*contra pacem regis*), or which infringed royal franchises."⁹¹ These involved situations such as where "[t]he plaintiff has been beaten, wounded, chained, imprisoned, starved, carried away to a foreign country, and has suffered many 'enormities.'"⁹² Over time, trespass was widened to cover a broader variety of circumstances. The critical moment for our story here came in the 1350s, when courts abandoned the requirement that the plaintiff allege that the wrong had been committed with force and arms.⁹³ This opened the door to actions in trespass for negligence and a host of other tortious fact patterns.⁹⁴

91 *Id.* at 60 (footnote omitted).

92 PLUCKNETT, *supra* note 10, at 465 (footnote omitted).

93 BAKER, *supra* note 10, at 61.

94 *See id.* at 62-63.

This new species of trespass was referred to as “trespass on the case,” as it required the allegation of plaintiff’s “special case” — that is, the particular circumstances, not involving force or arms, now being urged by plaintiff as constituting a tortious wrong.⁹⁵ One particular type of action on the case came to be of cardinal importance for the future development of contract law: A party undertaking to do something, thus assuming upon him or herself an obligation (*assumpsit super se*), and then performing that task in a negligent manner causing harm to the other party with whom the undertaking had been agreed.⁹⁶ This was “*assumpsit*,” which by the 1400s had become “the key phrase used in writs on the case based on undertakings.”⁹⁷ As will be seen, though litigants and judges in many cases continued for some time to use the simple term trespass in their discussions, eventually the term “action on the case,” sounding in *assumpsit*, came to predominate in these circumstances.⁹⁸

Over the course of 250 years, from roughly 1350 to 1600, we see the ever more creative and flexible application of *assumpsit* to contractual relationships. And as *assumpsit* came so to be used, the old and familiar concept of reciprocity in contract, so clearly at work, for example, in the requirement of *quid pro quo* for debt upon contract, reasserted itself in the guise of the doctrine of consideration as a limitation on those circumstances in which *assumpsit* could successfully be asserted.

95 See, e.g., FIFOOT, *supra* note 10, at 68; 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *122 (Wayne Morrison ed., Cavendish Pub. Ltd. 2001) (1765). For an example demonstrating that it was not necessary to allege “with force and arms” in order to bring an action pursuant to a writ of trespass on the case, see the discussion in *The Farrier’s Case*, YB 46 Edw. 3, Trin., fol. 19, pl. 19 (1372); LI MS. Hale 181, fol. 58; MS. Hale 187, fol. 217v; UCO MS. 150, fol. 163; *translated in SOURCES, supra* note 10, at 341.

96 BAKER, *supra* note 10, at 329-30.

97 *Id.* at 330.

98 *Id.* at 63. From review of numerous case transcripts, one generally notices a shift in terminology used in court discussions from “trespass,” to “trespass on the case,” then to “action on the case,” in the early 1400s. See, e.g., *Watkins’ Case*, YB 3 Hen. 6, Hil., fol. 36, pl. 33 (1425) (CP); CUL MS. Gg. 8(10), fol. 34; Bod. Lib. MS. Rawl. D. 363, fol. 35; BL MS. Harley 452, fol. 57; *translated in SOURCES, supra* note 10, at 380 (“trespass”); Anon., YB 14 Hen. 6, fol. 18v, pl. 58 (1435) (CP); BL MS. Harley 4557, fol. 112v; *translated in SOURCES, supra* note 10, at 383 (“trespass on his case”); Anon., 27 Hen. 6, Trin., *Statham Abr.*, *Actions sur le cas*, pl. 25 (1449) (CP); *translated in SOURCES, supra* note 10, at 397 (“action on the case”).

Due to limitations of space, the growth of trespass and its incrementally ever more mutated application to contractual disputes under the rubric of *assumpsit* must appear in highly abbreviated form. For purposes of this Article, the essential highlights are as follows.

B. The Distinction Between Contract and Tort

At the outset, to set the stage for review and analysis of the cases, it is essential to note that medieval jurists were cognizant of and capable of articulating the fundamental distinction between contract and tort, along with how this correlated to the different forms of writs and the requirements for prevailing under each. This distinction between contract and tort is not new, not some invention of modern times. Consider for example, comments in the case of *Somer v. Sapurton* in the year 1428:

[I]t would be unfitting to have trespass and debt for one same thing, because they are contrary: for one begins by contract and consent of the parties, . . . and the basis of the action is an indebtedness [Author’s note: what we could in modern terminology refer to as a counterparty’s obligation arising from the executed consideration therefor];⁹⁹ and the other begins by a wrong, and without the consent of the parties¹⁰⁰

This is a crisp and cogent statement of the essential difference between the respective “heartlands” of contract and tort.¹⁰¹ We will see the discussions of judges and litigants in the cases below reflect this distinction in their own legal analyses.¹⁰²

Because the tort of trespass was founded upon a “wrong,” in the early days of actions for trespass on the case one had to identify such a wrong as the basis for liability. As will be seen, this generally required negligence to have occurred. Only later did the courts finally

99 Modern contract theory of course now admits not just completed performance, but also a promise to perform in the future, as valid consideration. This Article will refer to these respectively as “executed” and “executory” consideration.

100 YB 7 Hen. 6, Mich., fol. 5, pl. 9 (1428) (Eng.), *translated in* SOURCES, *supra* note 10, at 234, 235, and in 51 SELDEN SOCIETY 38 (1933) (remarks of Vampage).

101 Modern tort of course admits certain limited categories for the imposition of strict liability, where no negligence need be pled.

102 See *infra* Part III.C.

cross the rubicon into declaring that simple nonfeasance, as distinct from misfeasance, in and of itself constituted a “wrong” entitling the plaintiff to recovery in *assumpsit*.¹⁰³

C. *Assumpsit for Misfeasance*

The period of experimentation over the course of two and a half centuries with the use of trespass on the case to address contractual disputes where limitations on the contractual writs might otherwise leave the plaintiff without a remedy is generally considered to have commenced in the year 1348 with *The Humber Ferry Case*.¹⁰⁴ A ferryman who operated a ferry service over the River Humber, which runs through the city of York in northern England, agreed to transport a horse in his boat across the river.¹⁰⁵ He overloaded the boat and the horse fell into the waters and was lost.¹⁰⁶ The plaintiff brought a bill of trespass before the King’s Bench alleging 40 shillings in damage.¹⁰⁷

Defense counsel moved for dismissal on grounds that the tort bill of trespass “supposes no wrong in us,” that is, that defendant had not been negligent and tort therefore did not lie.¹⁰⁸ Instead, argued defense counsel, the complaint should have been brought in contract, specifically by writ of covenant.¹⁰⁹ If so, plaintiff would have had no remedy: “Covenant did not then lie in the King’s Bench, and in any case no one used deeds when taking ferries.”¹¹⁰

The court rejected this argument, however, saying “[i]t seems that you did him a trespass when you overloaded his boat so that his mare perished.”¹¹¹ The court record recites that the ferryman was liable because “he lost the aforesaid mare through [his own] fault.”¹¹²

103 See *infra* Part III.D.

104 *Bukton v. Tounesende*, record at KB 27/354, m. 85, report at 22 Lib. Ass. 94, pl. 41 (1348) (KB) (corrected from LI MS. Hale 116), translated in SOURCES, *supra* note 10, at 358 [hereinafter *The Humber Ferry Case*]; alternative translation of record at 82 SELDEN SOCIETY 66 (1965).

As to the historical significance of the *The Humber Ferry Case* as commencing this period of experimentation, see, for example, BAKER, *supra* note 10, at 330; STOLJAR, *supra* note 10, at 29 n.6.

105 *The Humber Ferry Case*, *supra* note 104, at 358.

106 *Id.* at 359.

107 *Id.* at 358.

108 *Id.* at 359.

109 *Id.*

110 BAKER, *supra* note 10, at 330.

111 *The Humber Ferry Case*, *supra* note 104, at 359.

112 *Id.* at 358.

We thus began with a contract between two parties. Had no negligence been present, plaintiff would not have had a remedy in the King's Bench under the procedural and jurisdictional limitations of the time. To impose liability without negligence, in other words on the basis of strict liability, one would have had to proceed in contract, in this case covenant. But because defendant's conduct rose to the level of negligence, the tort of trespass became available and plaintiff prevailed.

A structurally very similar case arose two decades later in *Waldon v. Mareschal*, in which a veterinary surgeon undertook to cure a horse of an illness, yet "so negligently applied his treatment that the horse died."¹¹³ Plaintiff brought a writ of trespass on the case.¹¹⁴ Defense counsel moved for dismissal on familiar grounds, whereupon plaintiff's counsel cut straight to the heart of the problem and the motive for proceeding in tort rather than covenant:

Kirkton [defense counsel]. Since he has confessed that the defendant undertook [Author's note: i.e., there was an agreement] to cure his horse of an illness, he should in that case have had an action of covenant [Author's note: i.e., he should have proceeded in contract, not tort]. So we pray judgment of the writ.

Belknap [plaintiff's counsel]. *We cannot have that* [Author's note: i.e., a covenant] *without a deed*. This action is brought because you performed the treatment so negligently that the horse died, and therefore it is right to maintain this special writ according to the case, rather than to abate it, *for we can have no other writ*.¹¹⁵

Plaintiff had to proceed in tort not because conceptually there had been no contractual agreement, not because contractual remedies, if awarded, would have been inadequate, but for the simple reason that plaintiff could not satisfy the evidentiary and formal assent requirement of a sealed deed, the precondition to use of the contractual writ of covenant.

113 YB 43 Edw. 3, fol. 33, Mich., pl. 38 (1369) (collated with LI MS. Hale 187, fol. 104v), translated in SOURCES, *supra* note 10, at 359.

114 *Id.*

115 *Id.* (emphasis added).

D. *Assumpsit for Nonfeasance*

Thus far we have seen trespass brought into play where the defendant engaged in some affirmative conduct in a negligent manner. But what if defendant had agreed to render some performance, then simply failed to do so? The theoretical jump from liability for misfeasance to liability for nonfeasance marked a significant step in the incremental extension of trespass to cover contractual disputes more broadly.

Doige's Case in the year 1442 stands out as a landmark precedent in this regard.¹¹⁶ The factual particularity present in the mix, so often an aid to caselaw mutation of legal principle, was an allegation of intentional mendacity, of fraud.

William Shipton paid Joan Dogge¹¹⁷ in advance for two tracts of land, but “the aforesaid Joan, craftily scheming to defraud him,” conveyed the land instead to someone else.¹¹⁸ She had thus not committed misfeasance by performing an agreed service in a negligent manner which caused physical harm, but had rather committed simple nonfeasance by failing to perform entirely. The plaintiff Shipton brought a tort bill for “falsity and deceit,” i.e., fraud.¹¹⁹ The defendant moved for dismissal on grounds that the basis for the dispute was an agreement, a covenant, and that therefore the plaintiff was required to proceed in a contract action for covenant rather than a tort action for deceit.¹²⁰ It is reasonably evident from the discussion in the case that plaintiff had no deed, no “specialty,” to show and thus could not have prevailed in covenant.¹²¹

The comments of the judges in the Exchequer Chamber (bringing together the leading judges of both Common Pleas and the King's Bench to hear the case as a unified court)¹²² are tremendously

116 *Shipton v. Dogge, first action at CP 40/725, m. 49d, Pas. (1442) (under name “Shepton” rather than “Shipton”), second action record at KB 27/717, m.111, second action report at YB 20 Hen. 6, Trin., fol. 34, pl. 4 (KB) (1442), translated in SOURCES, supra note 10, at 390 [hereinafter Doige's Case], and second action report translated in 51 SELDEN SOCIETY 97 (1933).*

117 The defendant's name was Joan Dogge, but the case has gone into history under the moniker “Doige's Case.”

118 *Doige's Case, supra note 116, at 390.*

119 *Id.* at 391.

120 *Id.*

121 *See id.* at 391-95.

122 For discussion of Exchequer Chamber, see PLUCKNETT, *supra* note 10, at 162-63.

illuminating as to their understanding of contract law and their grounds for permitting the action for deceit to proceed.

For the leading judges in the case, the core concept at the heart of contract was reciprocity. What counted was the presence of a bargain. If one party to a contract could bring an action and bind the other, then the converse must also be true. Both parties must have agreed to render some performance, both must be bound, and both can be sued for nonperformance. This is diametrically and irreconcilably opposed to the conception of contract asserted to have existed at the time by proponents of promissory estoppel, namely the concept of unilateral obligation predicated upon unilateral reliance without reciprocal obligation to perform.

Several passages from *Doige's Case* illustrate the judges' thinking in this regard:

NEWTON [Chief Justice of the Court of Common Pleas]. . . . Now, when the plaintiff has made a firm bargain with the defendant, the defendant may at once demand her money by a writ of debt *It would be amazing law, then, if there should be a perfect bargain under which one party would be bound by an action of debt but would be without remedy against the other. Therefore the action of deceit clearly lies.*

. . . .

FORTESCUE [Chief Justice of the King's Bench]. If the case put by Newton be law, then there is no question concerning the law in our case: for *if each party to a bargain should be bound by an action, it must follow that this action of deceit is maintainable.*

. . . .

PASTON. *[A] good contract must bind both parties.* What reason is there, then, why one should have an action of debt and the other should not have an action?¹²³

123 *Doige's Case*, *supra* note 116, at 392-95 (emphasis added) (footnote omitted).

The most striking aspect of the judges' reasoning is that they did not commence with a tort analysis of the fraud. Rather, they reasoned from the existence of the bargain, which in their minds necessarily entailed reciprocal obligations and reciprocal liability, and that *therefore* the action for fraud must lie. The dominant paradigm in the case is not tort, but rather contract.

It is of signal importance that at the very moment when *assumpsit* moved decisively beyond the realm of liability for affirmative negligence into liability for simple nonfeasance, the leading judges' analysis was not merely anchored in but directly proceeded from their premise that contracts of their very nature entail reciprocal obligations. At the precise historical moment that *assumpsit* was being extended from negligent misfeasance to simple contractual nonfeasance, it was already inextricably bound up with the concept of reciprocity in contract, the core precept behind the term which came into use a century later in the mid-1500s: consideration.

In the wake of *Doige's Case*, by the 1500s "it was usual to insert a 'craftily scheming to defraud the plaintiff' clause in every *assumpsit* action, even when there was nothing in the facts to justify it; the allegation itself helped to dispose of the technical objection about nonfeasance, and the substance ceased to matter."¹²⁴ The use of *assumpsit* to address cases of contractual nonfeasance had now been solidly established.

It is moreover important to note in this connection that the ever more common pretextual allegation of deceit in order to avail oneself of *assumpsit* was not driven by any rejection of the fundamental principles of preexisting contract law. Rather, "the main reason for the delictual approach was to find a justification for using actions on the case [specifically, *assumpsit*] instead of 'general' writs of debt or covenant" ¹²⁵

E. The Principle of Reciprocity in Contract

The conceptual groundwork underlying the doctrine of consideration can also be observed in the 1477 discussion before

¹²⁴ BAKER, *supra* note 10, at 337 (footnote omitted).

¹²⁵ John H. Baker, *Origins of the "Doctrine" of Consideration, 1535-1585*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 336, 356 (Morris S. Arnold et al. eds., Univ. of North Carolina Press 1981).

judges of the Common Bench¹²⁶ in response to an inquiry posed by the Master of the Rolls, to wit:

[I]f a man promises a certain sum of money to another to marry his daughter or his servant, and [the other] marries her accordingly, will he have an action of debt at common law for that money or not?

Townshend. It seems to me no action [lies] in our law, because it is only a bare promise, and *ex nudo pacto nulla oritur actio*¹²⁷

This Latin phrase, *ex nudo pacto nulla oritur actio*, “no action arises from a nude pact,” is descended directly from the late Roman Digest of Justinian.¹²⁸ The appearance of this maxim in medieval English caselaw is momentous, as can be seen when one considers the origin and meaning of the phrase.

Ancient Rome had, more than a millennium earlier, developed a formulary system of contract law bearing not a few striking similarities to the later English system.¹²⁹ Over the course

126 “Common Bench” refers to the Court of Common Pleas. BAKER, *supra* note 10, at 38.

127 YB 17 Edw. 4, Trin., fol. 4, pl. 4 (1477), translated in SOURCES, *supra* note 10, at 242.

128 Other substantively equivalent variants of the phrase one encounters include “*nuda pacto obligationem non parit*,” “*ex nudo pacto non oritur actio*,” “*nudum pactum non parit actionem*,” and the highly abbreviated shorthand phrase “*nudum pactum*.” The first in this list is the original form, taken from the Digest of Justinian. See *infra* note 133.

129 See generally W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN (Cambridge Univ. Press 2d rev. ed. 1950) (1921); THE ELEMENTS OF ROMAN LAW, R.W. LEE (3d ed. 1952); W.A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE (London, Maxwell & Son 2d rev. ed. 1885); LORD MACKENZIE, STUDIES IN ROMAN LAW WITH COMPARATIVE VIEWS OF THE LAWS OF FRANCE, ENGLAND, AND SCOTLAND (John Kirkpatrick ed., London, Blackwood & Sons 1886); JAMES MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME (Henry Goudy ed., London, Adam & Charles Black 2d ed. 1899); A.M. PRICHARD, LEAGE’S ROMAN PRIVATE LAW FOUNDED ON THE *Institutes* OF GAIVS AND JUSTINIAN (Macmillan 3d ed. 1961) (1906) [hereinafter LEAGE]; 2 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES (Cambridge Univ. Press 1902); 2 CHARLES PHINEAS SHERMAN, ROMAN LAW IN THE MODERN WORLD (New Haven Law Book Co. 2d ed. 1922); RUDOLPH SOHM, THE INSTITUTES: A TEXTBOOK OF THE

of centuries, Roman law had serially articulated a host of specific categories of contractual arrangement which could be legally enforced.¹³⁰ This included, among others, various “real” contracts (such as loans) along with the “formal” contractual promise of *stipulatio*.¹³¹ Agreements not falling within the specifically designated categories of enforceable contractual arrangement were generally referred to as *pacta*, or pacts.¹³² The standard and authoritative reference to Roman law in this regard is to the Digest of Justinian from the year 533 A.D., which states in relevant part:

Ulpian, Edict, book 4: By universal law some agreements give rise to actions, some to defenses. 1. Those which give rise to actions do not have a name of their own but take the proper name of the contract [to which they refer], such as sale, hire, partnership, loan, deposit, and other similar contracts. 2. But even if the matter does not fall under the head of another contract and yet a ground [causa] exists, Aristo in apt reply to Celsus states that there is an obligation. *Where, for example, I gave a thing to you so that you may give another to me, or I gave so that you may do something, this is, Aristo says, a synallagma [Author’s note: Greek word denoting a reciprocal exchange] and hence a civil obligation arises. . . . 4. But, when no ground [causa] exists, it is settled that no obligation arises from the agreement. Therefore, a naked agreement [a nude pact] does not give rise to an obligation*¹³³

HISTORY AND SYSTEM OF ROMAN PRIVATE LAW (James Crawford Ledlie trans., Oxford Univ. Press 3d ed. 1907).

130 See, e.g., BUCKLAND, *supra* note 129, at 405-533.

131 *Stipulatio* was quite similar in its broad scope to the formal writ of covenant of early Anglo-Norman law, with the requisite formality originally achieved through a formulaic *spondesne?-spondeo* question-and-answer exchange between promisee and promisor rather than through the later English use of a wax seal. As to the mechanics and characteristics of *stipulatio*, see, for example, *id.* at 434-43.

132 For discussion of *pacta* and rules related thereto in this connection, see, for example, *id.* at 407, 428, 464, 527-33; LEE, *supra* note 129, at 335-37; HUNTER, *supra* note 129, at 545-50; PRICHARD, *supra* note 129, at 379-81; ROBY, *supra* note 129, at 7-8; SHERMAN, *supra* note 129, at 316-18; SOHM, *supra* note 129, at 414-16. Cf. MACKENZIE, *supra* note 129, at 230; MUIRHEAD, *supra* note 129, at 143.

133 1 THE DIGEST OF JUSTINIAN [DIGESTA SEU PANDECTAE] bk. 2, ch.

The crux of the entire passage is the Greek word *synallagma*, appearing in the original Greek in the Latin text of the Digest and

14, para. 7 (Theodor Mommsen, et al. eds. and trans., Univ. of Penn. Press 1985) (533 A.D.) (first alteration in original) (emphasis added) (with minor modification to English translation of final sentence to reflect sequence of original Latin). The original Latin reads:

ULPIANUS libro quarto ad edictum. Iuris gentium conuentiones quaedam actiones pariunt, quaedam exceptiones. Quae pariunt actiones, in suo nomine non stant, sed transeunt in proprium nomen contractus: ut emptio uenditio, locatio conductio, societas, commodatum, depositum et ceteri similes contractus. Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem. ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias: hoc συνάλλαγμα [*synallagma*] [Author's note: word spelled in its original Greek characters in the Latin text] esse et hinc nasci ciuilem obligationem . . . Sed cum nulla subest causa, propter conuentionem hic constat non posse constitui obligationem: igitur *nuda pacto obligationem non parit* . . .

Id. (emphasis added).

There are, of course, distinctions in phases of the law which arose across the span of a millennium of Roman rule, with particular note to the break between the Republican and Imperial periods. The great body of work codifying and explaining Roman law as it existed at the end of the Imperial period, the *Corpus Juris Civilis*, comprising inter alia the Code and the Digest of Justinian, was central to the study of Roman legal concepts by scholars in the High Middle Ages:

Until the close of the eleventh century, Western Europe had relied principally upon the Theodosian code and abridgements of it for an official text of Roman law . . . Early in the twelfth century the great *Corpus Juris Civilis* of Justinian . . . began to be studied in Italy, where it took a natural part in the great revival then going on in various branches of culture . . . Justinian's books were much larger and much more thorough in their return to classical Roman law than the code of Theodosius . . . To the professors of the Law School of Bologna the books of Justinian came as a new revelation.

PLUCKNETT, *supra* note 10, at 295-96.

Among these professors, and of great significance to English familiarity with Roman legal concepts, were "Azo, from whom Bracton learned a great deal, and Vacarius, who travelled from Italy to the distant University of Oxford. There soon arose a school of glossators whose commentaries upon the books of Justinian were finally summarized in the thirteenth century into one great gloss . . ." *Id.* at 296.

Vacarius' "chief literary work is the *Liber Pauperum* . . . [consisting] of extracts from the Code and Digest" of Justinian. HOLDSWORTH, *supra* note 10, at 149. Professor Holdsworth has described Vacarius as "the first teacher and the real founder of the study both of the civil [based on Roman] law and of the canon [church] law in this country [England]." *Id.* at 147.

denoting a reciprocal exchange between two parties.¹³⁴ In the passage the Digest states clearly that *synallagma*, a reciprocal exchange, constitutes *causa*, i.e., grounds for enforcement, and that *therefore* an enforceable obligation exists.¹³⁵ No other example of *causa* is given.¹³⁶

134 Συνάλλαγμα (from *syn* = with, + *állagma* = thing taken in exchange). For the etymology, refer to the word “synallagmatic” in ERNEST KLEIN, A COMPREHENSIVE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 1558 (Elsevier 1966). The word appears in Greek in the original Latin text of the Digest of Justinian. For translation and learned commentary regarding the same, see, for example, Gottfried Schieman, *Synallagma*, BRILL'S NEW PAULY, <http://referenceworks.brillonline.com/entries/brill-s-new-paully/synallagma-e1127030> (last visited Feb. 1, 2016). Though the term is no longer familiar in day-to-day usage, Professor Stoljar, for example, uses the adjective “synallagmatic” throughout his text to refer to reciprocal exchanges. See STOLJAR, *supra* note 10, at 13, 38, 39, 47.

135 1 THE DIGEST OF JUSTINIAN, *supra* note 133, at bk. 2, ch. 14, para. 7. The Latin word *hinc* in the quoted passage “hoc συνάλλαγμα [*synallagma*] esse et *hinc* nasci *ciuilem* obligationem,” means “hence,” and indicates coming from a given source or cause. See, e.g., LATDICT: LATIN DICTIONARY & GRAMMAR RESOURCES, <http://latin-dictionary.net/search/latin/hinc> (last visited Aug. 12, 2016). That is, because there exists an exchange, therefore, the passage asserts, a civil obligation arises.

136 The passage includes one illustration of synallagmatic exchange, omitted here by ellipsis in the quoted text for brevity.

At the very end of the quoted passage, the original Latin text includes the words *sed parit exceptionem* [but creates an exception], indicating that although a nude pact does not give rise to an obligation, it does give rise to a defense against suit. *Id.* That is, the existence of a nude pact cannot be used offensively by a plaintiff, but if a party has promised — made a pact — not to sue, that pact may be asserted defensively by a defendant. “[A] pact not to sue was a praetorian defence in any action, so that it could destroy an obligation, though it gave no action: *nuda pacto obligationem non parit, sed parit exceptionem.*” BUCKLAND, *supra* note 129, at 527-28.

The passage then continues with discussion of the situation where a pact has “followed immediately” upon the main contract. 1 THE DIGEST OF JUSTINIAN, *supra* note 133, at bk. 2, ch. 14, para. 7. Such “pacts incorporated are those which supply a contract with its terms, that is, those agreed when the contract was originally made,” and will thus be honored as part of the original contract. *Id.* By contrast, “if concluded after an interval, [such pacts] are not incorporated, nor will they avail the plaintiff, should he sue, since an action cannot arise from a pact.” *Id.* Repeatedly, the passage reiterates the general rule that “an action cannot arise from a pact.” *Id.*

The one exception to this discussion which appears in the passage, and does not necessarily appear consistent with the foregoing, is a statement to the effect that a pact may effect the rescission of a contract in whole or in part, and that therefore a plaintiff could offensively use a pact in modification of an already existing contract (though it is not obvious how or how often a plaintiff might as a practical matter ever be able to use a purported rescission in an

This is of course entirely consistent with the later Anglo-American concept of consideration.

Nor is it any surprise to see this foundational precept of Roman contract law appearing in early English caselaw. During the High Middle Ages (1000 to 1300) much had been done by glossators at Bologna to recover and propagate Roman legal principles in medieval Europe on the basis of the Code and Digest of Justinian.¹³⁷ Communication between England and the Continent was active.¹³⁸ In England during the 1200s, the great jurist Bracton, though not specifically stating the principle *ex nudo pacto non oritur actio*, described in his comprehensive overview of English law the types of enforceable contract in terms clearly based on and consistent with earlier Roman law.¹³⁹

Returning now to the question posed by the Master of the Rolls in the year 1477 cited above, we find that the ancient principle from Roman law had found its way into English jurisprudence, and

offensive manner). *Id.* Moreover, this is of course distinct from and does not indicate that a pact could give rise to an enforceable contract in the first place. For further discussion of this distinction, see Alden, *supra* note 3, at 685-87.

137 See, e.g., 1 MAITLAND, *supra* note 10, at 22-23.

138 See, e.g., PLUCKNETT, *supra* note 10, at 297. Plucknett discusses inter alia in this regard Lanfranc, who taught law in Italy and later became Archbishop of Canterbury under William the Conqueror. See also HOLDSWORTH, *supra* note 10, at 147; 1 MAITLAND, *supra* note 10, at 77-78.

139 See, in particular, Bracton's description of contractual obligations under the heading "Of Actions," 2 BRACTON, *supra* note 10, at bk. 3, ch. 2, 2118-19; BRACTON ONLINE, *supra* note 10, at 287, which not only generally uses the same categories but also the identical words in Latin to describe various contracts as found in earlier Roman law.

See also CARL GÜTERBOCK, BRACTON AND HIS RELATION TO THE ROMAN LAW 138-49 (Brinton Coxe trans., Fred B. Rothman & Co. photo. reprint 1979) (1866). Based on meticulous line-by-line textual comparisons between Bracton's work and the *Corpus Juris Civilis*, including the Digest of Justinian, Professor Güterbock stated:

[Bracton's] acquaintance with the *Corpus Juris* and his actual use of it, are proved by a series of quotations expressly made therefrom . . . Much greater, however, is the number of passages of the Roman law, which are incorporated into the text itself, and into the tissue of the author's commentary *without any statement of their source*. These include not only particular *leges*, but also whole connected fragments of the *Corpus Juris* reproduced in an order but slightly modified.

Id. at 50-51 (emphasis in original) (footnote omitted).

Professor Güterbock's overall evaluation was that "[t]he external historical evidence as well as the internal evidence of Bracton's work itself, demonstrate that no inconsiderable part of the Roman law must have been practically applied in England in Bracton's day." *Id.* at 57.

it may well have been in circulation long before.¹⁴⁰ Nor was this articulation of the principle of reciprocity to remain isolated — the phrase *ex nudo pacto non oritur actio*, along with its substantive equivalents in grammatical variation, such as *nudum pactum non parit actionem*, became a staple in contract opinions from the bench.¹⁴¹ Though in many respects the English common law pursued its own course of evolution distinct from contemporary canon law¹⁴² and earlier Roman law, even if independently reproducing many structures similar to those of the latter,¹⁴³ the maxim *ex nudo pacto non oritur actio* successfully crossed the Channel and took hold.

An issue arose at the time, however, as to the proper scope of the term *causa*, denoting the grounds upon which a promise might be enforced. Frederic Maitland has written that the canonists and civilians of the High Middle Ages sought broader enforcement of promise, such that “[e]ven the nude pact should be enforced, at any rate by penitential discipline.”¹⁴⁴ He continued:

In Italy, where the power of the revived Roman law was at its strongest, the development of the new doctrine, which would cast aside the elaborate learning of ‘vestments’ and enforce the naked agreement, was to some extent checked by the difficulty of stating it in a Roman form of plausible appearance, even for the use of ecclesiastical judges, while, on the other side, the problem for the civilian was to find means of expanding or evading the classical Roman rules and of opening the door of the secular tribunal to formless agreements by practically abolishing the Roman conception of *nudum pactum*.¹⁴⁵

140 See, e.g., 2 MAITLAND, *supra* note 10, at 194 (“In the twelfth century the revived study of Justinian’s books . . . tended also to confirm the notion that something more than a formless expression of agreement must be required if an action is to be given. *Nudum pactum non parit actionem* — so much at least was clear beyond a doubt . . .”).

141 For an excellent and detailed review of the use of this phrase in early English case law, see Baker, *supra* note 125, at 1535-85.

142 Canon law was ecclesiastical law, extending inter alia to such matters as marriage. See, e.g., PLUCKNETT, *supra* note 10, at 301-06.

143 As to the extent to which Roman and canonical law may or may not have influenced one or another aspect of the nascent English common law, see *id.* at 294-306 for a detailed discussion. See also BAKER, *supra* note 10, at 27-29; HOLDSWORTH, *supra* note 10, at 3-11, 82-87; 2 MAITLAND, *supra* note 10, at 184-203.

144 2 MAITLAND, *supra* note 10, at 195 (footnote omitted).

145 *Id.* at 195-96 (footnote omitted).

Theodore Plucknett wrote in similar vein:

[T]he canonists declared, in spite of the Roman maxim *ex nudo pacto actio non oritur*, that a simple promise was enforceable. It must have needed a great deal of courage to reach this position when against it was all the authority of Roman law and the custom and practice of most of the other systems of secular law.¹⁴⁶

Yet this novel canonical and civilian approach was not to triumph in England, wrote Maitland.¹⁴⁷ “About one point Bracton and his epitomators are clear — *Nudum pactum non parit actionem*”¹⁴⁸ English law would not enforce a bare promise.

We find the sense of Maitland’s words echoed in our discussion of 1477. Not only was *quid pro quo* required for enforceability of the promise, the contemplated scope of *quid pro quo* for this purpose was of a commercial nature. Although canon law may have admitted a broader conception of what might constitute sufficient *causa* to support the enforceability of a promise, as the phrase was used by the English Common Bench in 1477 clearly a much narrower definition was contemplated, one focused on commercial exchange:

146 PLUCKNETT, *supra* note 10, at 304 (footnote omitted). Certain latter-day writers referring to English legal history have, in their discussions of the term *causa*, taken it only in the broader canonist sense. See, e.g., GILMORE, *supra* note 7, at 63 (“what might be called a Cardozoan definition of consideration — broad, vague and, essentially, meaningless — a common law equivalent of *causa*, or cause”). This has unfortunately caused no little confusion in analyses of the origins of the doctrine of consideration. If one only has the broader canonist sense of *causa* in mind, one may be tempted to conclude that English courts which applied the *nudum pactum* concept in a manner requiring a reciprocal exchange were not following the concept of *causa* in their development of the doctrine of consideration. By going back to the Digest of Justinian, however, and not solely to the simple phrase *nuda pacto obligationem non parit* but to the discussion which precedes and accompanies that phrase, we see that the original and true meaning of the term *causa* was indeed anchored in a reciprocal exchange, a *synallagma*. See *supra* text accompanying notes 133-36. The English courts thus remained true to the original Roman sense, and chose not to follow the broader canonist sense, of *causa* in their application of the principle *ex nudo pacto non oritur actio*.

147 2 MAITLAND, *supra* note 10, at 195-97.

148 *Id.* at 197. Maitland referred to the “canonical *Pactum serva*” (often phrased as *pacta sunt servanda*, or “pacts are to be performed”) as “speculative” and contradictory to the maxim *nudum pactum non parit actionem*. *Id.* at 196-97.

Townshend. [I]n the case at bar the thing that is [undertaken] to be done is spiritual, which can not be sold . . . ; and so it is not right that the other should be charged.

Rogers and Sulyard to the contrary: and as to what is said, that this is only a bare promise, that is not so; for he has *quid pro quo* inasmuch as his daughter . . . is taken to be advanced by the marriage

And then CHOKE and LITTLETON [judges] agreed with the Master of the Rolls that in the principal case no action lies at common law, because the marriage on which the promise was based is a spiritual thing that can not in any way be sold.¹⁴⁹

Later cases would involve debate as to whether the act of marriage might constitute a detriment to the promisee and indirect benefit to the promisor sufficient to constitute valid consideration to support enforceability of a promise.¹⁵⁰ Yet irrespective of one's view as to whether the act of marriage can constitute valid consideration, the fundamental point of the 1477 discussion remains — namely the consensus among all the parties to that particular discussion that in order for a promise to become enforceable, there must be some counterperformance.¹⁵¹ A bare promise was not enforceable, not even in the face of tremendous detrimental reliance thereon by the counterparty. All of this is directly antithetical to the tenets of promissory estoppel.

Though the word “consideration” would not come into use until the mid-1500s, the essential conceptual framework of the doctrine of consideration was thus clearly at work in this discussion. The only point at issue was how broad a definition of consideration, of sufficient counterperformance, was appropriate, with the judges

149 YB 17 Edw. 4, Trin., fol. 4, pl. 4 (1477), translated in SOURCES, *supra* note 10, at 242-43.

150 See, e.g., Anon., YB 37 Hen. 6, Mich., fol. 8, pl. 18 (1458) (CP) (Eng.) (corrected from Bod. Lib. MS. Lat. Misc. C.55, fol. 126v), translated in SOURCES, *supra* note 10, at 236, 237 (remarks of Danvers). See also *infra* text accompanying note 228.

151 This is entirely consistent with the description of doctrine presented by St. German in his Doctor and Student dialogues a half-century later. See *infra* Part III.G.

in our 1477 discussion opting for a narrower, commercial scope for the concept which turned on whether the counterperformance was of a type which could be bought and sold.

F. *Assumpsit as an Alternative to Debt*

As we leave the 1400s and cross into the 1500s, one observes assumpsit increasingly allowed as an alternative course of action which a plaintiff might choose to pursue even though the plaintiff could have brought an action for debt upon contract — the critical difference being that in assumpsit, the defendant could not escape liability by waging their law.

The doctrinal hurdle to be surmounted in this respect was the argument made by not a few judges that if debt upon contract lay in a case, then it was improper to permit the plaintiff to proceed on another basis. The means by which this argument was circumvented was an intellectual sleight of hand once again using alleged deceit as the basis for invoking the tort writ of assumpsit.

Two seminal cases stand out in this regard. First, in 1505 before the Court of Common Pleas in *Orwell v. Mortoft*, a merchant had, near Norwich in East Anglia, bought and apparently paid for a specified quantity of barley.¹⁵² The seller, “scheming fraudulently and craftily to defraud” the buyer, did not deliver the barley and instead converted it to his own use.¹⁵³ Clearly, debt upon contract lay in the case, and the majority of the judges speaking on the record viewed this as precluding any action based on assumpsit. The Chief Justice of the Court of Common Pleas, Frowyk, however, saw things differently, arguing in dissent that

[e]veryone must be punished according to his fault. Therefore, although debt lies for the grain, nevertheless because the defendant has deceived him this is a greater wrong than the withholding of the grain or the non-payment, and he can not be punished for it in any other action than this action [B]ecause the plaintiff is deceived by the conversion of the grain to the defendant’s own use, he thereby has a greater damage than the non-delivery thereof;

¹⁵² *Record at CP 40/972*, m. 123, *report at YB 20 Hen. 7, Mich.*, fol. 8, pl. 18 (1505) (CP) (Eng.), *translated in SOURCES*, *supra* note 10, at 406.

¹⁵³ *Id.*

and for that cause, as I understand it, the action [in assumpsit] lies here.¹⁵⁴

How defendant's conversion of the grain to his own use caused greater injury to the plaintiff than simple nondelivery is not immediately clear. Given the length of time involved in litigation, presumably the plaintiff would have had to cover by purchasing grain at a higher price from an alternative source irrespective of defendant's disposition of the grain following nondelivery.

Although Frowyk's view was a lone dissent in the Common Pleas, his approach appears to have appealed greatly to those judicial colleagues and competitors sitting on the King's Bench who, three decades later in 1532 in *Pykeryng v. Thurgoode*, pushed the envelope decisively further out.¹⁵⁵ A London brewer bought a specified quantity of malt, payment made half in advance and the other half to be paid upon delivery.¹⁵⁶ The seller, "scheming to cause the plaintiff loss in his trade as a brewer," did not deliver the malt as promised, and the brewer had to cover at higher cost.¹⁵⁷ Although Judge Spelman analogized to the earlier cases in which the land or goods had been sold to another or converted to one's own use,¹⁵⁸ no such act was alleged in the instant case. There was simply nondelivery.

[Defense counsel] alleged in arrest of judgment that this action does not lie, since an action of debt lies: and where a general action lies, a special action on the case does not lie in the same case.

SPELMAN [judge]. It seems that the action on the case does lie. For where a man has a wrong done to him, and has suffered damage, he must have an action. Now, *because the defendant has broken his promise and undertaking, he has wronged the plaintiff; and the plaintiff has suffered damage through the non-delivery of the malt: ergo, the law gives him an action*

154 *Id.* at 410.

155 *Record at KB 27/1073, m. 70 (1532) (KB) (Eng.), and at 94 SELDEN SOCIETY 247 (1977), report at 93 SELDEN SOCIETY 4 (1976), translated in SOURCES, supra note 10, at 411.*

156 *Id.*

157 *Id.*

158 *Id.* at 412.

And although Pykeryng could have an action of debt, that is immaterial; for the action of debt is founded on the *debet et detinet*, whereas this action is founded on another wrong, namely, the breach of the promise.¹⁵⁹

With a flick of the wrist, Judge Spelman had thus made assumpsit available at the King's Bench in effectively all debt upon contract cases, the main engine of medieval contract law. As noted by Professor Baker, in the aftermath of *Pykeryng v. Thurgood* “[t]he possibility of suing for debts without the risk of debtors waging their law attracted creditors to the [King's Bench] in droves.”¹⁶⁰

G. The Doctrine of Consideration Fully Articulated

As has been seen, the principle of reciprocity had already clearly been at play in the mid-1400s. By the early 1500s, discussions in this regard had become even more pointed and explicit. Consider the following passage from member of Parliament and barrister John Rastell of Lincoln's Inn, writing in 1525:

‘Contract’ is a bargain or covenant between two parties where one thing is given for another, which is called *quid pro quo*; [as, if I sell my horse for money, or if I make you a lease of my manor of Dale in consideration of £20 that you shall give me, these are good contracts because there is one thing for another]; for if a man make a promise to me that I shall have 20s. and that he will be debtor to me thereof, and after I ask the 20s. and he will not deliver it, yet I shall never have no action for to recover this 20s., for that this promise was no contract, but a bare promise: *et ex nudo pacto non oritur actio*. But if anything was given for the 20s., though it were not but to the value of a penny, then it was a good contract.¹⁶¹

159 *Id.* at 411-12 (first three emphases added).

160 BAKER, *supra* note 10, at 343.

161 JOHN RASTELL, *EXPOSITIONES TERMINORUM LEGUM ANGLIAE* (c. 1525), reprinted in SOURCES, *supra* note 10, at 483 (alteration in original, added in 1579 edition) (footnote omitted).

Even though the word “consideration” did not appear in the passage as initially published (the bracketed text first being introduced into the text in 1579), the essential concept of consideration had already been set forth therein with complete conceptual clarity in 1525.

Similarly, in Christopher St. German’s expository *Doctor and Student* dialogues from 1531, widely known and consulted at the time,¹⁶² we see the same principle stated in unambiguous fashion:

[A] nude contract is where a man maketh a bargain or a sale of his goods or lands without any recompense appointed for it. As, if I say to another, ‘I sell thee all my land (or all my goods)’, and nothing is assigned that the other shall give or pay for it, that is a nude contract and (as I take it) it is void in the law and conscience. And a nude or naked promise is where a man promiseth another to give him certain money such a day or to build him a house, or to do him such certain service, and nothing is assigned for the money, for the building, nor for the service. These be called naked promises, because there is nothing assigned why they should be made. And I think no action lieth in those cases, though they be not performed.¹⁶³

Moreover, it is noteworthy that both of these doctrinal statements embodying the concept of consideration in substance if not yet in name had been penned *before* Judge Spelman in 1532

162 See PLUCKNETT, *supra* note 10, at 279-80; see BAKER, *supra* note 10, at 188-89.

163 ST. GERMAN, *supra* note 84, at 228-29, *reprinted with modern spelling in SOURCES*, *supra* note 10, at 483-84. The original reads:

[A] nude contracte is where a man maketh a bargayne or a sale of his goodes or lands without any recompence appointed for yt. As yf I saye to a nother I sell the all my lande or all me goodes & nothyng is assigned that the other shall gyue or paye for yt/ that ys a nude contracte/ and as I take yt: it ys voyde in the lawe and conscience/ and a nude or a naked promyse ys where a man promyseth an other to gyue hym certayne money suche a daye or to buylde hym an house/ or to doo hym suche certeyne seruyce/ and nothyng is assigned for the money/ for the buyldyng/ nor for the seruyce/ these be called naked promyses bycause there ys nothyng assigned why they shold be made/ and I thynke no accyon lyeth in those cases though they be not perfourmed.

ST. GERMAN, *supra* note 84, at 228-29.

in *Pykeryng v. Thurgoode* for the King's Bench extended assumpsit to cover simple breach in debt upon contract actions.

The explosion of assumpsit in what would otherwise be debt cases in the wake of *Pykeryng v. Thurgoode* appears to have given decisive impetus to articulation of the requirement of consideration as a critical restraint on this form of action. Though assumpsit had been allowed to defeat the requirement of a deed (in covenant) and the defense of wager of law (in debt upon contract), it was not permitted to defeat debt upon contract's requirement of reciprocity. Soon the word "consideration" came into common usage, presumably for the simple reason that it permitted expression of the concept of contractual reciprocity in a concise, compact manner. "[T]he King's Bench held in 1539, and again in 1563, that an undertaking was not actionable without *causa* or consideration. From about 1539 onwards, pleaders accordingly began to insert in *assumpsit* declarations an 'in consideration of . . . ' clause" ¹⁶⁴ By the end of the 1500s, it is categorically clear in the caselaw that consideration is a requirement for the enforcement of promise in contract absent a deed. ¹⁶⁵ Consideration thus came to be imposed as a requirement upon assumpsit during the very same period in which assumpsit came to be applied as an alternative form of action across the realm of debt upon contract.

H. *Bilaterally Executory Contracts*

A penultimate major development in assumpsit was its extension to informal — that is, unsealed — contracts which were bilaterally executory, i.e., promise against promise, without at the time of suit either party having rendered its own performance.

This extension came to pass during the latter half of the 1500s. In *Lucy v. Walwyn* in the year 1561, plaintiff prevailed and recovered damages in a bilaterally executory contract case where the plaintiff had promised to pay a commission to the defendant to obtain an interest in certain real property for plaintiff's benefit, defendant had promised use best efforts to do so, yet the defendant had purchased and retained the interest in the real property for his

¹⁶⁴ BAKER, *supra* note 10, at 340 (footnote omitted).

¹⁶⁵ See, e.g., *Stone v. Withipole* (1589) 74 Eng. Rep. 106; *report in YLS MS. G. R29.6*, fol. 81 (QB) (Eng.), *alternate report in 1 Leon.* 113, pl. 156, *translated and reprinted in SOURCES*, *supra* note 10, at 498, 499; *Slade's Case*, *infra* note 171, at 429.

own benefit.¹⁶⁶ Likewise, in *Strangborough v. Warner* in the year 1589, it was said that “a promise against a promise will maintain an action upon the case”¹⁶⁷

The theory was that each party, by making a promise to the other as part of an agreed exchange, incurred liability therefor, and this liability constituted the incurrence of a detriment sufficient to constitute consideration for the counterparty’s counterpromise:

In the words of Chief Justice Popham [in 1599] in *Wichals v. Johns*, “there is a mutual promise, the one to the other, so that, if the plaintiff doth not [discharge his promise], the defendant may have his action against him; and a promise against a promise is a good consideration.”¹⁶⁸

As a perhaps over-refined philosophical distinction, the common law had thus arguably evolved from a property-based view of the promisee’s right to counterperformance (i.e., the concept that performance by the promisee gave rise to a property right of promisee in goods or funds still in possession of the promisor) to one now founded on general legal liability of the promisor predicated on the mutual exchange of promises. Yet the principle of reciprocity as the foundation of contractual commitment, absent a seal, remained constant throughout.

1. The Unification of Contract Law in Slade’s Case

The invasion by main force of assumpsit into the realm of debt during the 1500s brought the long-simmering jurisdictional tension between the Court of Common Pleas and the King’s Bench to the fore.¹⁶⁹ Common Pleas resisted the incursion by means of assumpsit into the realm of debt upon contract, holding that where

166 *Record at KB 27/1198*, m. 183 (1561), *report at Gell’s reports*, MS. at Hopton Hall, ff. 154v, 158v, *translated in SOURCES*, *supra* note 10, at 485, 487.

167 (1589) 74 Eng. Rep. 686; 4 Leon. 3 (KB).

168 (1599) 78 Eng. Rep. 938; Cro. Eliz. 703; *FIFOOT*, *supra* note 10, at 400 (second alteration in original) (footnote omitted).

169 Jurisdictional competition was characteristic among the English courts throughout much of early common law development, and particularly so between Common Pleas and the King’s Bench. *See, e.g.*, *PLUCKNETT*, *supra* note 10, at 172-73; *MILSOM*, *supra* note 10, at 62-65; *BAKER*, *supra* note 10, at 40-44.

debt lay, *assumpsit* would not.¹⁷⁰ The issue finally came to a head in *Slade's Case*, argued by no less than Bacon on one side and Coke on the other before all the justices of England sitting together in the Exchequer Chamber, which in the year 1602, after fully seven years of intermittent litigation, finally decided the issue for all posterity in favor of the position taken by the King's Bench.¹⁷¹ Henceforth, *assumpsit* was to serve as a nearly universal contractual writ.¹⁷² Contract law had now been unified under the banner of *assumpsit*, through which plaintiffs could, as a general matter, bring an action for breach of contract, either executed or executory, without showing a sealed deed and without risk of the defendant avoiding liability through wager of law.

We also have in *Slade's Case* a clear exposition of the now firmly anchored requirement of consideration and its application to *assumpsit*:

Tanfield [plaintiff's counsel]. . . [A]n assumption is nothing other than a mutual agreement between the parties for something to be performed by the defendant in consideration of some benefit which must depart from the plaintiff, or of some labour or prejudice which must be sustained by the plaintiff. It suffices if some benefit leaves the plaintiff, whether it goes to the defendant or a stranger, for it shall be presumed to have been at the defendant's request.¹⁷³

170 BAKER, *supra* note 10, at 344.

171 *Slade v. Morley* (1602) 76 Eng. Rep. 1072, 1074; *decision at* BL MS. Add. 25203, fol. 607 (1602) (QB) (Eng.), *together with*: (i) KB 27/1336, m. 305, 4 Co. Rep. 91; (ii) Exchequer Chamber, Mich. (1597): Dodderidge's speech from LI MS. Maynard 55, fol. 246; and BL MS. Harley 6809, fol. 45; Coke's reply from BL MS. Hargrave 5, fol. 67v; (iii) Serjeant's Inn, Mich. (1598): BL MS. Add. 25203, fol. 12; (iv) Serjeant's Inn, 13 May 1602: BL MS. Add. 25203, fol. 496; (v) Coke's retrospective summary: 4 Co. Rep. 92; collated with Coke's autograph report, BL MS. Harley 6686, ff. 526-530v; *reprinted in* SOURCES, *supra* note 10, at 420, 438-39 [all of the foregoing collectively hereinafter *Slade's Case*].

172 Debt upon obligation, i.e., a debt evidenced by a sealed deed, remained an exception, for which *assumpsit* would not lay but was also not necessary, as the defendant in an action for debt upon obligation did not have the ability to wage their law. *See, e.g.,* STOLJAR, *supra* note 10, at 84.

173 *Slade's Case*, *supra* note 171, at 428-29.

Likewise:

Coke [Attorney-General]. . . . A man shall not have an action on the case for nonfeasance without consideration¹⁷⁴

That the doctrine of consideration should come to be articulated under that name during the same timeframe that assumpsit came to be applicable to simple breach of promise in debt upon contract should come as no surprise. As has been seen, the principle of reciprocity, reflected in the maxim *ex nudo pacto non oritur actio* and ultimately given the single word moniker consideration, already had firm footing prior to that time. Moreover, the action of debt upon contract had as its absolute and fundamental doctrinal requirement that the plaintiff have furnished quid pro quo, in other words, executed consideration, to the defendant. It was entirely natural that as assumpsit came to be applied across the realm of contract it should become subject to a central concept of that body of law, namely the principle that a naked promise is not enforceable.¹⁷⁵

¹⁷⁴ *Id.* at 427-28.

¹⁷⁵ Oliver Wendell Holmes had likewise made this fundamental observation writing in the late 1800s, connecting the emergence of the doctrine of consideration to the longstanding requirement of quid pro quo in debt upon contract. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 171, 175, 181, 191-92 (A.B.A. 2009) (1881). “If it should be objected that the preceding argument is necessarily confined to debt, whereas the requirement of consideration applies equally to all simple contracts, the answer is, that in all probability the rule originated with debt, and spread from debt to other contracts.” *Id.* at 175.

For an excellent modern analysis in this regard, see Baker, *Origins of the “Doctrine” of Consideration, 1535-1585*, *supra* note 125. Based on detailed review of the actual cases and pleadings, Baker observes “the testimony [the early caselaw discussions] bear to the widespread belief [at the time] that good consideration was synonymous with *quid pro quo*.” *Id.* at 350.

For Keilwey, in 1562, it was only *quid pro quo* that could save a promise from being *nudum pactum*. Likewise, Beaumont, also of the Inner Temple, said in a case about uses a few years later: “In every bargain there must be a *quid pro quo* or else it is *nudum pactum*” And Coke . . . was sure that the consideration required to raise a use was nothing more nor less than *quid pro quo*.

Id. at 355-56.

Again based on detailed analysis of the actual pleadings and caselaw, Baker rejected the alternative theory postulated by Ames:

[W]e must face the near impossibility of linking either the delictual history or the substantive principle with the “doctrine” of consideration

IV. Summation of the Medieval History

Looking back upon the historical landscape now traversed, we see that with respect to the King's central courts, debt upon contract, the "great exemplar of debt, being the action applicable to the most usual and often entirely informal transactions,"¹⁷⁶ was subject to the near-conclusive affirmative defense known as "wager of law." Nor was a claim pursuant to the alternative contractual writ of covenant available unless the plaintiff were able to produce not merely a written document evidencing the contract, but one which had been duly formalized with a wax seal, known as a "deed" or "specialty." All the while, an established rule of law required that contract actions for more than 40 shillings could not be pursued locally but rather must be brought in the King's central courts, in which these limitations on debt upon contract and covenant applied.

By contrast, due to the simple fact that tort generally involves nonconsensual harm to another, no agreement between the affected parties and thus *a fortiori* no sealed writing was required for the admission of trespass cases to the central courts. Nor did the contractual defense of wager of law apply to actions in trespass. Trespass on the case sounding in assumpsit thus beckoned seductively to creative litigators and judges as a means to achieve remedy in cases where the contractual writs were unavailable from a practical perspective as a result of then-prevailing procedural and jurisdictional limitations on the use of those writs.

Moreover, during this period, English courts and commentators articulated the principle that reciprocity was essential to the enforceability of promise in contract. Indeed, within several decades after the breakthrough of assumpsit into generalized use in lieu of debt upon contract in cases before the King's Bench in the mid-1500s, one finds English courts universally requiring consideration in order to render a promise enforceable in assumpsit.

in the way suggested by Hare and Ames. The elements of deceit and consequential loss were never incorporated in the consideration clause, but were destined to wither away as fictions. And in the cases that established "detriment to the promisee" as good consideration, the consideration in question had nothing in common with the earlier deceit cases: it was a reciprocal future act, or a promise to act, by the plaintiff.

Id. at 357.

176 STOLJAR, *supra* note 10, at 10-11.

Grant Gilmore, writing in the 1970s, claimed that “‘contract’ is being reabsorbed into the mainstream of ‘tort’” by virtue of the advent of promissory estoppel.¹⁷⁷ Ironically, however one might view the implications of the modern doctrine of promissory estoppel under Section 90, the most accurate characterization of the historical development of contract law and *assumpsit* in the Middle Ages would be the converse — a specific form of tort action was instrumentalized and absorbed into the main body of contract law. In the process, that form of action not only circumvented certain procedural limitations on the contractual writs but also became subject to a core limitation and restriction of medieval contract law, namely the principle of reciprocity and the maxim *ex nudo pacto non oritur actio*, later referred to by the single word consideration.

That this is so is perhaps best exemplified by the fact that following completion of the evolution described above, *assumpsit* without negligence required consideration (i.e., contract), while *assumpsit* without consideration required negligence (i.e., tort), as the precondition to the imposition of liability.¹⁷⁸ The fundamental conceptual distinction between contract and tort remained alive and well. What had in effect transpired is that *assumpsit* for breach of contract had separated itself from the main body of tort and become a truly contractual action.

177 GILMORE, *supra* note 7, at 87.

178 As to this resultant distinction between two species of *assumpsit*, one requiring consideration and the other requiring negligence, see BAKER, *supra* note 10, at 347:

It must not be thought, however, that all actions of *assumpsit* were the same in form. The historical differences lingered in the pleadings until the procedural reforms of the nineteenth century. *Assumpsit* for misfeasance continued to be brought as an action in tort, without the need for consideration in the contractual sense; and to this day a negligent carrier or private surgeon may be sued in tort or contract at the plaintiff’s election. *Assumpsit* for breach of covenant, for not performing an act as promised, varied from case to case and was therefore labelled ‘special *assumpsit*’. In such actions the details of the promise and the consideration had to be proved . . .

Id.

See also OLIVER WENDELL HOLMES, *supra* note 175, at 192 (“It was long recognized . . . that, in cases where the gist of the action was negligent damage to property [Author’s note: and thus true tort rather than contractual claim], a consideration as not necessary.”).

V. Rebuttal to the Claims of the Promissory Estoppel Proponents

A. *Statements by Ames at the Crux of the Inquiry*

Having thus reviewed the formative history of Anglo-American contract law, it is now possible to reexamine those three brief quotations from Ames which constituted the sole cited support for Williston's assertion that the history of assumpsit validates promissory estoppel. Upon Williston's assertion depends the doctrinal legitimacy of promissory estoppel and the claims in favor thereof later made by Corbin, Gilmore, the Restatement (Second), and Eric Mills Holmes.

In the review below, it will be of vital importance to recall Williston's two fundamental contentions in his First Restatement commentaries on Section 90 embodying the proposed doctrine of promissory estoppel: "The action of Assumpsit was originally based on reliance by the plaintiff on a promise rather than on a bargain."¹⁷⁹ This clearly implies that bargain, thus mutual exchange, thus consideration, was not requisite for the enforcement of promise in assumpsit. Williston then confirmed this interpretation with the following claim, appearing immediately after his citations to Ames regarding assumpsit: "In a number of cases at the present day, it is *still* law that reliance on a promise, though there has been no price or consideration paid for it, renders the promisor liable."¹⁸⁰ As will be seen, a more complete reading of Ames does not support Williston's assertions regarding the history of assumpsit.

1. *First Passage: Consideration Present*

To revisit, the first passage from Ames, as presented by Williston, read as follows: "The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property [etc.]"¹⁸¹

On its face, this appears to be a simple statement regarding cases in which assumpsit was extended through the allegation of deceit. What Williston elided, however, with his cryptic "etc." was the rest of Ames' original sentence, which continued thus: "it was

179 Williston, *First Restatement Commentaries*, *supra* note 2, at 14. See discussion *supra* Part I.A.

180 *Id.* (emphasis added). See discussion *supra* Part I.A.

181 *Id.* (quoting AMES, *supra* note 10, at 142) (alteration by Williston).

obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up.”¹⁸² More tellingly, Williston failed to alert the reader that the partially quoted sentence led off a paragraph which Ames concluded in the following manner: “From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor’s request.”¹⁸³

What Ames was thus expounding was the simple proposition that a requested, thus *bargained-for*, detriment to the promisee constitutes valid consideration, even if the benefit provided by virtue of that detriment runs, at promisor’s request, to a third party rather than back to promisor. So seen, the passage from Ames in no way, shape, or form lends support to Williston’s thesis that *unbargained-for* reliance is sufficient to render the promisor liable in promissory estoppel. Williston’s use of this quoted sentence fragment from Ames as support for promissory estoppel was thus directly misleading.

2. *Second Passage: Promissory Fraud*

The second passage from Ames quoted by Williston read as follows: “That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant’s promise, is reasonably clear, although there are but three reported cases.”¹⁸⁴

It is vital to consider this quotation in the context in which it appears. At that particular juncture in his text, Ames had just finished briefly reviewing the history of cases in Common Pleas and the King’s Bench in which *assumpsit* was broadened into nonfeasance through the allegation of deceit. The quoted passage appears at the point where Ames then turned to address the very same matter in the context of “equity,” that is, the Court of Chancery.

Briefly by way of necessary background, the Court of Chancery stood distinct from the common law courts of Common Pleas and King’s Bench, and provided a forum to which litigants might attempt to turn when they could not otherwise find redress.¹⁸⁵ Chancery

182 AMES, *supra* note 10, at 142.

183 *Id.* at 143 (footnote omitted).

184 Williston, *First Restatement Commentaries*, *supra* note 2, at 14 (quoting AMES, *supra* note 10, at 143).

185 See W. T. Barbour, *The History of Contract in Early English Equity*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 1, 68 (Paul Vinogradoff ed., Farrar, Straus & Giroux 1974).

Common Pleas, the King’s Bench, and the Court of the Exchequer were common law courts, whereas Chancery was one of the King’s “prerogative”

enjoyed authority that descended directly from that of the King, as applied by and through the office of the King's Chancellor, to craft and impose equitable remedies in circumstances where mechanistic adherence to the strict rules of the common law might fail to do substantial justice in a particular case.¹⁸⁶ Hence the appellation "equity." That being said, as explained by Baker:

In matters of contract and tort, the Chancery normally followed the [common] law. There were few equitable torts, nor would contracts be amended to make them less harsh: 'the Chancery mends no man's bargain'. It could be said in 1675, without a hint of paradox, that a contract without consideration was binding in conscience but not in equity.¹⁸⁷

What the passage from Ames quoted by Williston served to do was simply to review cases in Chancery, as Ames had just done for Common Pleas and King's Bench, in which deceit relating to a promise had been alleged. Two signal points stand out in this regard. First, the passage makes clear that Ames had only been able to identify a handful of such cases before 1500. Second, and of great doctrinal significance in this regard, Ames' discussion of these cases reveals that they might more appropriately be understood as early applications of the tort of promissory fraud, rather than promissory estoppel.

Promissory fraud differs critically from promissory estoppel in that promissory fraud requires intentional mendacity at the time of promise — the promisor deliberately and consciously lied at the time the promise was made as to whether the promisor ever intended to perform — while promissory estoppel does not.¹⁸⁸ Promissory fraud, as a species of actual fraud, lies in tort. By contrast, promissory estoppel purports to impose liability upon a promisor without any necessary inquiry into promisor's state of mind — a perfectly honest promisor may find him or herself subject to liability for nonperformance, even without ever having been paid a whit for

courts of more recent vintage which generally did not utilize the common law writ system but rather different procedural mechanisms such as bills and petitions between parties. See generally PLUCKNETT, *supra* note 10, at 170-81. Specifically, see *id.* at 176.

186 See Barbour, *supra* note 185, at 68, 71; BAKER, *supra* note 10, at 102.

187 See BAKER, *supra* note 10, at 110.

188 See generally Ian Ayres & Gregory Klass, *Promissory Fraud*, 78 N.Y. St. B. A'SSN J., May 2006, at 26.

the promise, if the court in its unconstrained discretion concludes that injustice can only be avoided by enforcement of the promise.¹⁸⁹

Ames in his text described the cases as follows:

In one of them, in 1378, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in traveling to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a subpoena to compel the defendant to answer of his "disceit." The bill *sounds in tort rather than in contract* . . . Appilgarth v. Sergeantson (1438) was also a bill for *restitutio in integrum*, *savoring strongly of tort*. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "*grete* deceit." The remaining case, thirty years later, does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpoena.¹⁹⁰

The latter two cases, particularly, are redolent of intentional mendacity of the type which may give rise to liability for the tort of promissory fraud — obtaining money in advance by holding out the prospect of marriage in "*grete* deceit," and secretly taking action to avoid responsibility under a keepwell agreement.

A footnote by Ames to this passage made reference to certain further cases along the same lines.¹⁹¹ Review of those cases demonstrates that Ames viewed them as part and parcel of the same analysis.¹⁹² As with the three cases described above, these additional decisions likewise appear to have been predicated upon affirmative fraud:

In Gardyner v. Keche (1452-1454), Margaret and Alice

189 See *supra* note 1; Alden, *supra* note 3, at 671-74.

190 AMES, *supra* note 10, at 143-44 (emphasis added) (footnotes omitted).

191 *Id.* at 143 n.6 (referring to an article which addresses three further cases, which cases Ames himself directly addresses in his own text at 126).

192 *Id.* at 126.

Gardynner promised to pay the defendant £22, who on his part was to take Alice to wife. The defendant, after receiving the £22, “meaning but craft and disceyt,” married another woman, “to the great disceyt of the said suppliants, and ageyne all good reason and conscience.” . . . In *Leinster v. Narborough* (circa 1480) the defendant being betrothed to the plaintiff’s daughter-in-law, but desiring to go to Padua to study law, requested the plaintiff to maintain his *fiancée*, and a maid-servant to attend upon her during his absence, and promised to repay upon his return all costs and charges incurred by the plaintiff in that behalf. The defendant returning after ten years declined to fulfil his promise In *James v. Morgan* (1504-1515), the defendant promised the plaintiff 100 marks if he would marry his daughter Elizabeth. The plaintiff accordingly “resorted to the said Elizabeth to his great costs and charges,” and “thorow the desavebull comfode” of the defendant and his daughter delivered to the latter jewels, ribbons, and many other small tokens. Elizabeth having married another man through the “crafty and false meane” of the defendant, the plaintiff by his bill sought to recover the value of his tokens, and also the “gret costs and charges thorow his manyfold journeys.”¹⁹³

The references in the first and third cases to “craft and disceyt,” “great disceyt,” and “crafty and false meane,” all appear to sound in actual fraud. As to the second case, although Ames’ summary of the case does not contain such words, the fact pattern, in which a man kept his *fiancée* waiting upon him for fully ten years while he studied abroad, and upon his return refused to reimburse her father-in-law as originally agreed for the expenses incurred during that period, is likewise in and of itself strongly suggestive of fraud.

Of decisive importance in interpreting these cases, Ames himself referred to them as ones in which the promisor had committed affirmative fraud: “It was so obviously just that one who had *intentionally misled* another to his detriment should make good the loss, that we need not go further afield for an explanation of the Chancellor’s

193 *Id.*

readiness to give a remedy upon such parol agreements.”¹⁹⁴

The astute reader may at this juncture recall that in the aftermath of *Doige's Case* in 1442,¹⁹⁵ plaintiffs began routinely to allege that defendant had been “craftily scheming to defraud” the plaintiff as a boilerplate clause in every assumpsit claim “even when there was nothing in the facts to justify it; the allegation itself helped to dispose of the technical objection about nonfeasance, and the substance ceased to matter.”¹⁹⁶ The formalized recitation became divorced from the underlying facts.

Such cases where the boilerplate clause was used without any evidence of actual mendacity in the underlying fact pattern are distinct from those referred to by Ames where the defendant had, in Ames' words, “intentionally misled” the plaintiff. The former category, those cases without fraud, led to the garden-variety assumpsit claims sounding in contract upon which the requirement of consideration came to be imposed. The latter category, those cases involving affirmative fraud, remain actionable in true tort to this day as promissory fraud without any need for the consideration required in contractual claims.¹⁹⁷

What we are left with, then, in Ames' discussion as to the centuries prior to roughly 1500, is not some broad swath of proto-promissory estoppel cases but, instead, a handful of Chancery decisions which may well properly sound, not in promissory estoppel, but rather in promissory fraud.¹⁹⁸ This does not constitute support for claims that

194 *Id.* at 127 (emphasis added).

195 *See supra* text accompanying note 123.

196 BAKER, *supra* note 10, at 337 (footnote omitted).

197 *Cf. supra* text accompanying note 178. *See also* Ayres & Klass, *supra* note 188.

198 Ames built his discussion in this regard around an earlier article by Oliver Wendell Holmes, in which Holmes had cited and discussed two of the three cases later addressed by Ames. *See* Oliver Wendell Holmes, *Early English Equity*, 1 L. Q. REV. 162 (1885).

Holmes did not quote the word “deceit” from the cases in the same manner as Ames. Rather, Holmes described the cases as predicated in effect upon *fidei laesio*, i.e., a breach of faith, stressing that in one case the promise had been made “*per fidem*” and in the other by “affiance.” *Id.* at 172-74. Following the Norman conquest of England in 1066,

royal remedies were afforded at first only by way of privilege and exception, and . . . never extended to all the ancient customs which prevailed in the popular tribunals. But if the King failed the Church stood ready. For a long time, and with varying success, it claimed a general jurisdiction in case of *laesio fidei*.

Id. at 173-74. In Holmes' view, the ecclesiastical Chancellors “were not making reforms or introducing new doctrines, but were simply retaining

contract emerged from a primeval sea of promissory estoppel.

3. *Third Passage: Derivative of First and Second*

The third passage from Ames quoted by Williston read as follows: “Both in equity and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.”¹⁹⁹

Again, the context of this third Ames passage is essential. It follows immediately upon, *and refers to*, the very cases just analyzed in which the promisor had in fact been paid money and thus received consideration (first Ames passage) or had likely committed affirmative fraud (second Ames passage). These are not promissory estoppel cases.

Moreover, as is clear from the context of Ames’ overall text, including both the chapter in which that third passage appears as well as the preceding chapter, the passage did not refer in any way to formal contracts enforceable in covenant or real contracts enforceable in debt upon contract.²⁰⁰ Rather, the third passage simply served as a summation to Ames’ discussion of the expansion of assumpsit by means of alleging deceit. “By a natural transition, however,” Ames then continued, “actions upon parol promises came to be regarded as actions *ex contractu*.”²⁰¹ This is the same history already recounted at length in this Article above.²⁰² As has been seen, that history does not sound in promissory estoppel.

To see just how tenuous it would be to read Ames as support for the proposition, as Williston and the doctrine of promissory estoppel would have it — that consideration was not and should not be required for the enforceability of promise — consider the following passage from Ames, which Williston did not cite:

Promises not being binding of themselves, but only because

some relics of ancient custom which had been dropped by the common law, but had been kept alive by the Church.” *Id.* at 174. It is worth noting, however, that despite their differing emphases, the views of Holmes and Ames are by no means necessarily incompatible with each other. A breach of faith under circumstances involving deceit savors of fraud.

199 Williston, *First Restatement Commentaries*, *supra* note 2, at 14 (quoting AMES, *supra* note 10, at 144). See discussion *supra* Part I.A.

200 See AMES, *supra* note 10, at 122-48

201 *Id.* at 144 (footnote omitted).

202 See *supra* Part III.

*of the detriment or the debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII [1509-1547], if not earlier, it became the practice in pleading to lay all assumpsits as made in consideration of the detriment or debt. And these words became the peculiar mark of the technical action of assumpsit*²⁰³

This passage from Ames speaks for itself. A promise, without more, without recompense, is not binding, as it could easily be in the sole and unconstrained discretion of a judge under the supposed rule of promissory estoppel. A promise only becomes binding when there is a bargained-for exchange — when there is a “detriment or debt” *for which* the promise was given. That is the doctrine of consideration. This passage from Ames stands in direct refutation of claims that the origins of Anglo-American contract law sounded in promissory estoppel.

The logical consequence of these observations for the validity of the claims made by proponents of promissory estoppel is enormous. Williston rested his argument in the First Restatement drafting process as to the history of assumpsit solely upon Ames.²⁰⁴ Corbin did the same.²⁰⁵ This means that one of the two intellectual pillars upon which the doctrine of promissory estoppel was justified in the First and Second Restatements collapses. Further, the other intellectual pillar, claiming authority principally on the basis of a smattering of cases in the decades leading up to the First Restatement in 1932, has already been argumentatively refuted in separate research by the Author.²⁰⁶

As to later proponents, Gilmore in *The Death of Contract* did not delve into the actual early history of contract whatsoever, simply issuing sweeping claims without providing any concrete support therefor.²⁰⁷ Likewise, the Restatement (Second) of Contracts

203 AMES, *supra* note 10, at 147 (emphasis added) (footnote omitted).

204 Williston, *First Restatement Commentaries*, *supra* note 2, at 14.

205 CORBIN, *supra* note 22, at 192-98. Other references by Corbin in the cited text are not relevant to his claims regarding the early history of assumpsit in this regard.

206 See Alden, *supra* note 3, at 678-704.

207 See GILMORE, *supra* note 7; *supra* Part I.C.

provides no authority for its assertions in this regard.

B. *Eric Mills Holmes*

We then arrive at Eric Mills Holmes and his 1996 article entitled *Restatement of Promissory Estoppel*.²⁰⁸ To reprise, in that article, Eric Mills Holmes stated that promissory estoppel “is a venerable, ancient form of relief with historical origins in both the common law action of assumpsit and early equity decisions.”²⁰⁹

1. *Reference to Baker: Deeds and the Procedural Law of Proof*

As to assumpsit, Eric Mills Holmes’ principal citations in support were to a 1979 article and later treatise by Professor John H. Baker.²¹⁰ In those two sources, Baker advanced an argument to the effect that the extension of assumpsit beyond misfeasance to nonfeasance was in essence promissory estoppel.²¹¹ The citations by Eric Mills Holmes to Baker in this regard are thus entirely valid, yet a significant problem emerges with respect to the assertions made in the cited material itself. Certain statements made therein by Baker, though appearing superficially as though they might lend support to promissory estoppel, were in fact founded upon an entirely different and separate line of argument completely unrelated to promissory estoppel. As to certain other statements therein which are indeed on point, and with genuine respect for Professor Baker’s tremendous erudition and learning in the history of the common law of contract, the Author respectfully submits that Baker’s arguments in this one particular regard do not follow logically.

Baker observed in the cases which extended assumpsit to nonfeasance, discussed *supra*,²¹² that the covenant, the underlying agreement, was not enforceable due to the absence of a writing under seal, a deed.²¹³ In his 1979 article, he thus referred to the allegation of

208 See Eric Mills Holmes, *supra* note 31.

209 *Id.* at 271 (footnotes omitted).

210 *Id.* at 271 n.9. See John H. Baker, *From Sanctity of Contract to Reasonable Expectation?*, in *CURRENT LEGAL PROBLEMS 1979* (Lord Lloyd of Hampstead et al. eds., Stevens & Sons 1979); BAKER, *supra* note 10.

211 Baker, *From Sanctity of Contract to Reasonable Expectation?*, *supra* note 210, at 25; BAKER, *supra* note 10, at 339.

212 See *supra* Part III.D.

213 Baker, *From Sanctity of Contract to Reasonable Expectation?*, *supra* note 210, at 25;

deceit by means of which *assumpsit* was extended to nonfeasance as the creation of a remedy for “relying on promises not enforceable in themselves.”²¹⁴ Yet this particular reason for unenforceability — the absence of a deed — in no way indicates an absence of reciprocity, an absence of consideration, in the contractual arrangements at issue. Rather, it was simply an artifact of the rule requiring a deed for enforcing writs of covenant in the central courts. As is evident in a recent 2012 article by Baker and in personal correspondence with the Author, the rule requiring a deed was simply “a rule of proof, quite unconnected with the forms of action or with the law of contract.”²¹⁵ When Baker in the 1979 article referred to “promises not enforceable in themselves,”²¹⁶ this had to do with the absence of written evidence — in the form of a deed — of the words allegedly used by the alleged promisor.

In the earlier 1979 article, Baker then went on to note that the “plaintiff in such actions did not merely recover back his money; he wanted, and received, compensation for the loss caused by committing his money to a frustrated venture when he could have spent it more wisely. The basis of these *assumpsit* cases, therefore, was nothing but promissory estoppel”²¹⁷

It is respectfully submitted that this argument does not follow. The mere fact that the damage calculation was permitted to move beyond mere restitution or reliance to expectancy damages does not in any way indicate that the contractual arrangement at issue lacked consideration or mutual assent. Yet precisely the essential assertion of the doctrine of promissory estoppel, precisely what distinguishes it from true contract, is that liability may be imposed without consideration and without mutual assent. Baker’s contention in this regard is thus logically non sequitur.

Very much the same occurs in the treatise. With reference to *Doige’s Case*, Baker notes prefatorily the discussion of the judges therein to the effect that “bargains ought to be reciprocal: *quid pro quo* was not simply a technical requirement in debt, but the substantive principle

BAKER, *supra* note 10, at 339.

214 Baker, *From Sanctity of Contract to Reasonable Expectation?*, *supra* note 210, at 25.

215 Baker, *Deeds Speak Louder Than Words*, *supra* note 65, at 199. See also email from Sir John H. Baker, Downing Professor Emeritus of the Laws of England, Cambridge University, to Eric Alden, Associate Professor of Law, Chase College of Law, Northern Kentucky University (Dec. 22, 2015, 07:26 EST) (on file with Author).

216 Baker, *From Sanctity of Contract to Reasonable Expectation?*, *supra* note 210, at 25.

217 *Id.* at 26.

behind bargains. An agreement without *quid pro quo* was simply not a bargain.”²¹⁸ This is of course consistent with classical contract law and the requirement of consideration. Nonetheless, Baker then reprised the same argument earlier made in the 1979 article: “[A]ssumpsit did not lie to enforce the covenant, which required a deed . . . [which plaintiff presumably did not have], but redressed the injury suffered by acting or reposing in the belief that it would be kept.”²¹⁹ The imposition of liability to redress the harm arising from disappointed detrimental reliance was “a principle of moral philosophy, closely akin to the modern doctrine of promissory estoppel.”²²⁰

Yet it is a distinction without a difference to say that one is suing on the basis of the promise, seeking to recover for the harm from nonperformance, versus saying that one is suing to recover for the harm from nonperformance of a promise. In both cases, a plaintiff must ultimately prove the existence of the promise, the amount of harm, and causation. Whatever procedural formalities might be involved, no doctrinally substantive difference is to be found here.

This observation leads directly to the fundamental point that the mere fact reliance on a promise is present by no means demonstrates that a case is predicated upon promissory estoppel — every true contract involving mutual assent and consideration will likewise engender justifiable reliance. The feature that distinguishes promissory estoppel from true contract is enforcement in the absence of consideration and mutual assent. There is nothing in *Doige’s Case* that suggests a promissory estoppel fact pattern — Joan Dogge had agreed to convey certain parcels of land to William Shepton, and had been paid to do so.²²¹ Thus, while Eric Mills Holmes validly cited Baker, the cases discussed by Baker are not promissory estoppel cases and do not provide a precedential basis for the imposition of contractual liability in the absence of consideration.

2. Reference to Ames: Promissory Fraud Redux

The Author turns now to Eric Mills Holmes’ reference to early equity. After briefly citing a handful of secondary sources “[c]oncerning the ancient turf battles between developing contract law in the common-law action of assumpsit and equity decisions

218 BAKER, *supra* note 10, at 339.

219 *Id.*

220 *Id.*

221 *Doige’s Case*, *supra* note 106.

protecting the reliance interest by granting ‘promissory estoppel’ relief,”²²² Eric Mills Holmes placed principal reliance on the material from Ames already analyzed above: “In his influential article, Dean Ames explained how ancient equity provided ‘promissory estoppel’ remedies.”²²³ Yet as discussed at length *supra*, the small handful of equity cases referred to by Ames appear to have sounded in promissory fraud rather than promissory estoppel — Ames himself said they involved fact patterns where the defendant had “intentionally misled” the plaintiff.²²⁴ Eric Mills Holmes’ proposition is thus, at its core, no stronger than the claims made by Williston and Corbin.

3. *Reference to Plucknett Citing St. German: Source Does Not Support*

Immediately following his lengthy citation of Ames, Eric Mills Holmes then made the following claim: “With the triumph of assumpsit over equity in the 1500s, what we now refer to as ‘promissory estoppel’ relief was generally granted at common law.”²²⁵

One citation is given by Eric Mills Holmes immediately after this assertion as authority therefor, namely a quotation from Plucknett in turn discussing St. German’s Doctor and Student dialogues: “St Germain regarded it as settled that ‘if he to whom the promise is made have a charge by reason of the promise . . . he shall have an action . . . though he that made the promise had no worldly profit by it.’”²²⁶ Eric Mills Holmes clearly took this to mean that medieval England enforced promises in contract without any need for reciprocity, for consideration.

Because Eric Mills Holmes was quoting solely from Plucknett, Eric Mills Holmes may not have been aware of the full text in St. German’s Doctor and Student dialogues from which Plucknett had cited that fragment. Taken together with its surrounding text, however, the passage from St. German actually reads as follows:

222 Eric Mills Holmes, *supra* note 31, at 271 n.10 (citations omitted).

223 *Id.* (citation omitted).

224 *See supra* Part V.A.2.

225 Eric Mills Holmes, *supra* note 31, at 271 n.10.

226 *Id.* (quoting PLUCKNETT, *supra* note 10, at 643). One sees in various sources more than one spelling of St. German’s family name. This Article uses the spelling indicated in the full text of St. German’s original work as reproduced by the Selden Society. *See* ST. GERMAN, *supra* note 84.

[I]f he to whom the promise is made have a charge by reason of the promise which he hath also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it. *As if a man say to another, "Heal such a poor man of his disease, or make such a highway, and I shall give thee thus much," and if he do it I think an action lieth at the common law.* And moreover, though the thing that he shall do be all spiritual, yet if he perform it I think an action lieth at the common law. As if a man say to another, "Fast for me all the next Lent and I shall give thee £20," and he performeth it, I think an action lieth at the common law. And in like wise if a man say to another, "Marry my daughter and I will give thee £20," upon this promise an action lieth if he marry his daughter. And in this case he cannot discharge the promise, though he thought not to be bound thereby; for it is a good contract, and he may have *quid pro quo*—that is to say, the preferment of his daughter—for his money.²²⁷

227 ST. GERMAN, *supra* note 84, at 230-31, *reprinted with modern spelling in SOURCES, supra* note 10, at 484 (first emphasis added) (footnotes omitted). St. German's text in its original spelling reads:

Yf he to whome the promyse ys made: haue a charge by reason of the promyse whyche he hathe also perfourmed: than in that case he shall haue an accyon for that thyng that was promysed thoughe he that made the promyse haue no worldely profyte by yt. As yf a man saye to an other (hee le suche a poore man of hys dyssease/ or make suche an hyghewaye/ and I shall gyue the thus moche/ and yf he do yt I thynke an accyon lyeth at the comon lawe. And more ouer though the thyng that he shall doo be all spyrytuall: Yet yf he perfourme yt I thynke an accyon lyeth at the comon lawe. As yf a man saye to an other (fast for me all the next Lent & I shal gyue the .&c. And he perfourmeth yt/ I thynke an accyon lyeth at the comon lawe. And in lyke wyse yf a man saye to another mary my doughter and I will gyue the .xx. li. Vppon thys promyse an accyon lyeth yf he mary hys doughter/ and in this case he can not dyscharge the promyse thoughe he thought not to be bounde therby/ for yt ys a good contracte/ and he may haue quid pro quo/ that is to saye/ the preferment of hys doughter for hys money/

ST. GERMAN, *supra* note 84, at 230-31 (footnotes omitted).

It thus becomes clear that St. German in no manner whatsoever stated the supposed rule of promissory estoppel. Rather, he made clear in the Doctor and Student dialogue that if a specific action or forbearance by the promisee (detriment to the promisee, in today's terminology) has been requested and bargained for by the promisor, the performance of that action or forbearance constitutes a good and sufficient basis (*quid pro quo*, in the words of St. German, and consideration in today's terminology) for the enforcement of the promise even if the benefit of the requested detriment runs to an intended third party. The "charge" to which St. German referred in that passage was the bargained-for detriment of true contract, not the unbargained-for detriment of promissory estoppel.

Moreover, as discussed *supra*, St. German had, shortly before the passage quoted by Eric Mills Holmes, stated with absolute clarity the principle that a "naked promise," i.e., one for which the promisee had not given any consideration, was not enforceable.²²⁸

Eric Mills Holmes' extraordinary historical claim in this regard is thus founded in material respect upon a citation that quite simply does not support his proposition.

CONCLUSION

Commencing with the First Restatement drafting effort in the 1920s, a group of highly influential academics have sought to alter the course of western contract law by propagating the novel doctrine of promissory estoppel. They have done so predicated upon claims of historical authority for the same. Upon closer examination, those claims reveal themselves to be at best misleading in their tendency, to at worst simply false.

In particular, a robust English law of contract had long preceded the creative use of *assumpsit* during the late Middle Ages. No fundamental doctrinal rejection of preexisting contract law took place. Rather, the use of *assumpsit* to pursue contractual claims came to pass as the direct result of specific jurisdictional and procedural limitations that had hobbled the preexisting contractual writs and thus led to a partial failure of justice.

Moreover, during the period of this creative extension of *assumpsit* from 1350 to 1600, the principle of reciprocity in contract asserted itself. Reciprocity not only animated the ancient Roman

228 See *supra* text accompanying notes 162-63.

maxim ex nudo pacto non oritur actio which was taken up by common law judges. It was also the very foundation of the principal English contractual writ of debt upon contract. The extension of assumpsit was thus coupled with and limited by the requirement of reciprocity in contract, expressed as the doctrine of consideration. Promissory estoppel, which rejects at its core the principle of reciprocity in contract, is antithetical to this history.

Proponents' Standing to Defend Their Ballot Initiatives: Post-*Hollingsworth* Work-Arounds?

John S. Caragozian and Nat Stern***

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INTRODUCTION

In *Hollingsworth v. Perry*,¹ the United States Supreme Court ruled that state ballot initiatives' official proponents lack standing to defend their enacted initiative in federal courts. This ruling has prompted a broad concern among initiative proponents and other supporters: if proponents lack standing and if state officials — who do have standing — refuse to defend initiatives, then some initiatives may go undefended. Two separate initiatives, Propositions 54 and 60, appeared on California's November 8, 2016, ballot. They attempted to dodge *Hollingsworth* in different ways.

Proposition 60, which failed to pass, would have regulated the adult film industry by, *inter alia*, mandating condom use in films produced in California.² Proposition 60's first standing provision specified that the proponent is to pay a \$10,000 penalty if Proposition 60 is invalidated by a court.³ The prospect of this penalty, the proponent would argue, poses a particularized and concrete injury to him.⁴ Proposition 60's second standing provision specified that the state shall employ the proponent and grant him or her the authority to defend the initiative if the state's attorney general fails to defend the initiative.⁵

Proposition 54, which did pass, was an initiative with constitutional and statutory provisions. It will reform state legislative procedures by, *inter alia*, mandating that any bill be posted on the Internet at least seventy-two hours before the legislature approves it.⁶ One of Proposition 54's provisions eschews the need for actual

1 133 S. Ct. 2652 (2013).

2 *Proposition 60: California Safer Sex in the Adult Film Industry Act*, in CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 148-54 (Aug. 15, 2016), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop60> [hereinafter *Proposition 60*]. California's voters rejected Proposition 60; it received only 46.3 percent of the popular vote. *Statement of Vote Summary Pages*, CAL. SEC'Y OF STATE 12 (2016), <http://elections.cdn.sos.ca.gov/sov/2016-general/sov/06-sov-summary.pdf>.

3 *Proposition 60*, *supra* note 2, § 7.

4 See discussion *infra* Part II-A.

5 *Proposition 60*, *supra* note 2, § 10.

6 *Proposition 54: the California Legislature Transparency Act*, in CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 125-28 (Aug. 15, 2016), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop54> [hereinafter *Proposition 54*]. California's voters approved *Proposition 54*; it received over 65 percent of the popular vote. See <http://elections.cdn.sos.ca.gov/sov/2016-general/sov/06-sov-summary.pdf>.

standing; instead, it mandates that the California Attorney General file a notice of appeal from any judgment that Proposition 54 is invalid.⁷ After such a notice is filed, Proposition 54's proponents — and, perhaps, other interested parties — may participate as intervenors or as amici, even if they lack actual standing as appellants.⁸

This Article considers whether, notwithstanding *Hollingsworth*, one or more of these various provisions — or scholars' variations on them or their future progeny — would confer standing on or otherwise allow participation by initiative proponents in California and elsewhere. Part I reviews *Hollingsworth* and its aftermath against the backdrop of California's initiative process and the Supreme Court's doctrine of standing under Article III of the Constitution. Part II assesses the principal rationales available for sustaining standing under the types of provisions contained in Proposition 60 or under other variations designed to give proponents a sufficiently distinct stake in the outcome of legal challenges to establish standing. Part III assesses whether Proposition 54's requirement that the Attorney General file a notice of appeal allows proponents to defend the initiative even in the absence of standing. The Article concludes that none of Proposition 60's justifications avoid the obstacles to standing created by *Hollingsworth* and the Court's wider standing doctrine. Thus, it appears that proponents of initiatives in California and other states with similar initiative provisions must devise other means of securing a place in court when state officials decline to defend their (the proponents') initiative. One of those other means may be similar to Proposition 54, which may allow proponents some rights to participate, even if those rights are limited.

I. The Impact of *Hollingsworth* on the Law of Standing

The Supreme Court has construed Article III of the United States Constitution to impose requirements for standing that can operate as stringent barriers to access to federal courts. In *Hollingsworth*, failure to meet these criteria defeated the efforts of proponents of Proposition 8 — an initiative to bar recognition of same-sex marriage in California — to serve as its legal defenders. The ruling has evoked strategies for conferring standing on initiative

⁷ *Proposition 54*, *supra* note 6, §§ 6.1(c), 6.1(d).

⁸ See discussion *infra* Part III.

proponents through state law, lest state officials effectively cause disfavored initiatives to fall for lack of defense.

A. *The Requisites of Standing Under Article III*

“Article III of the Constitution grants the federal courts the power to decide legal questions only in the presence of an actual ‘Cas[e]’ or ‘Controvers[y].’ This restriction requires a party invoking a federal court’s jurisdiction to demonstrate standing.”⁹ While a comprehensive discussion of standing is beyond the scope of this Article,¹⁰ its essential elements can be briefly stated. First, a party must show that he or she has suffered a cognizable “injury in fact.”¹¹ Second, that injury must be “fairly . . . trace[able]” to the government action to which the party objects.¹² Third, the plaintiff must demonstrate the likelihood that the relief sought will redress

9 Wittman v. Personhuballah, 136 S. Ct. 1732, 1736 (2016) (alteration in original) (citation omitted). *See also* Raines v. Byrd, 521 U. S. 811, 818 (1997) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976))). Most of the case law and commentary focuses on standing requirements for plaintiffs. *E.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (citing to, *inter alia*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *FW/PBS, Inc. v. Dallas*, 493 U. S. 215, 231 (1990); *Warth v. Seldin*, 422 U. S. 490, 498 (1975)). However, defendants also are required to have standing, including a direct stake in the litigation’s outcome. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 217 (2011) (“One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an ‘ongoing interest in the dispute’ on the part of the opposing party that is sufficient to establish ‘concrete adverseness.’” (citations omitted)); *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (stating that both parties must maintain stake in outcome throughout litigation). *See generally* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 *FORDHAM L. REV.* 1539, 1550-57 (2012).

10 For an overview of Article III standing, see RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* §2.13(f) (5th ed. 2012); William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221 (1998); and Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?* *Lexmark International, Inc. v. Static Control Components, Inc.*, 18 *U. PA. J. CONST. L.* 213, 218-27 (2015).

11 Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560).

12 *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976).

the injury.¹³ As these criteria suggest, parties have the burden of proving their standing to invoke a federal court's jurisdiction.¹⁴

Further, several additional features of standing doctrine are especially pertinent to the question of defending initiatives. First, federal law generally controls whether parties have standing in federal courts.¹⁵ Second, the requisite injury must be "concrete and particularized."¹⁶ Particularization means that the injury affects the plaintiff "in a personal and individual way."¹⁷ To qualify as concrete, an injury may be "intangible"¹⁸ or even "threatened" (as opposed to "actual"),¹⁹ but it cannot be a "generalized grievance," no matter how sincerely held.²⁰ Third, a state always has standing to defend the

13 *Lujan*, 504 U.S. at 561; see *City of Los Angeles v. Lyons*, 461 U.S. 95, 128-29 (1983) (requiring plaintiff to show that "the injuries he has alleged can be remedied or prevented by some form of judicial relief"). The Court has sometimes cast standing requirements in additional ways. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (standing requires "a logical nexus between the status asserted and the claim sought to be adjudicated"). The Court has announced, however, that injury in fact, traceability, and redressability constitute the essential components of standing. See *Lujan*, 504 U.S. at 560-61.

14 See *Susan B. Anthony List*, 134 S. Ct. at 2342; *Lujan*, 504 U.S. at 560-561.

15 *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013). However, this general rule is subject to exception. For example, federal courts may look to state law as to who has standing to represent a corporation organized under the state's laws or who has standing as a guardian to represent a minor child. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-78 (2004); *Sanderling v. Comm'r*, 66 T.C. 743, 750, 751 (1976). See also Karl Manheim, John S. Caragozian, & Donald Warner, *Fixing Hollingsworth: Standing in Initiative Cases*, 48 LOY. L.A. L. REV. 1069, 1105-06 & nn.196-200 (2015). See generally FED. R. CIV. P. 17(b)(2) & 17(b)(3). Also, as set forth in Section III-B-2 *infra*, federal courts look to state law regarding an initiative's severability (i.e., whether one invalid provision in an initiative invalidates the whole initiative or whether the invalid provision can be severed, with the remainder of the initiative surviving).

16 *Lujan*, 504 U.S. at 560. Accord *Susan B. Anthony List*, 134 S. Ct. at 2341-42 (2014); see *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (denying standing where plaintiffs "assert[ed] no particularized stake in the litigation"); *Warth*, 422 U.S. at 501 (requiring allegation that injury to plaintiff is "distinct and palpable"); *Allen v. Wright*, 468 U. S. 737, 756 (1984); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n. 16 (1972).

17 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks and citation omitted).

18 *Id.* at 1549.

19 *Id.* at 1548 (internal quotation marks omitted); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472-73 (1982).

20 *Hollingsworth*, 133 S. Ct. at 2662.

validity of its own laws.²¹ More generally, federal courts may accord states “special solicitude” in connection with standing.²² However, a state’s representative in federal litigation must be a state official, such as the attorney general; under Article III, “private parties” are ineligible to represent a state.²³

B. Proposition 8 and Hollingsworth v. Perry

Most states, including California, allow voters to enact state laws through a ballot initiative.²⁴ In California, an initiative is proposed by one or more registered voters who are formally designated as “proponents.”²⁵ California initiative proponents’ responsibilities include drafting the initiative, submitting it to the State Attorney General (for administrative processing), gathering and submitting the requisite signatures to place the initiative on a statewide ballot, and authorizing ballot arguments in the initiative’s favor.²⁶ Following this procedure, in 2008, State Senator Dennis

21 *E.g.*, *Maine v. Taylor*, 477 U.S. 131, 137 (1986); *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

22 *Texas v. United States*, 809 F.3d 134, 154 (5th Cir. 2015), *cert. granted*, *United States v. Texas*, 136 S. Ct. 906 (2016). *See also* *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (explaining that states “are not normal litigants for the purposes of invoking federal jurisdiction”).

23 *See Hollingsworth*, 133 S. Ct. at 2664, 2668.

24 Twenty-six states allow voters to enact statutory or constitutional additions or changes by direct initiative (where voters bypass the legislature entirely, such as in California) or indirect initiative (where the legislature has a first opportunity to adopt the proposed initiative, but, if the legislature rejects it, then it goes to the voters). *See Initiative and Referendum States*, NAT’L CONF. OF STATE LEGIS. (Dec. 2015), <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx>.

25 *E.g.*, CAL. ELEC. CODE §§ 9001, 9002, 9032 (Deering 2016).

26 *See generally* CAL. ELEC. CODE §§ 9001-9065 (Deering 2016). *See also* *Hollingsworth*, 133 S. Ct. at 2662. The signature requirement is particularly onerous: a statutory initiative requires signatures numbering five percent of the total votes cast for all gubernatorial candidates in the most recent election, and a constitutional initiative requires eight percent. CAL. CONST., art. II, § 8(b). In 2014, approximately 7.32 million votes were cast for all California gubernatorial candidates, meaning that slightly more than 585,000 valid signatures now are required for a constitutional initiative and almost 366,000 for a statutory initiative. *See Statement of Vote*, CAL. SEC’Y OF STATE 6 (Nov. 4, 2014), <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf> (the California Secretary of State’s “Statement of Vote” for the November 4, 2014 general election, which is California’s most

Hollingsworth — acting as a private citizen — and four other private citizens proposed a California constitutional initiative to bar legal recognition of same-sex marriage.²⁷ Known as Proposition 8, the measure was approved by California’s voters in 2008.²⁸

In 2009, two same-sex couples challenged Proposition 8’s constitutionality in the United States District Court.²⁹ However, neither California’s Governor nor Attorney General actively defended Proposition 8.³⁰ Thereafter, Senator Hollingsworth and the other official proponents successfully intervened as defendants in the District Court.³¹ After trial, in which the proponents actively participated, the District Court ruled Proposition 8 unconstitutional on due process and equal protection grounds.³²

Neither the Governor nor Attorney General appealed the District Court’s judgment, but Proposition 8’s official proponents did. When the Ninth Circuit Court of Appeals questioned whether the official proponents had standing to appeal, the proponents responded that they had an individualized interest in defending Proposition 8 and had “an alternative and independent additional basis for standing,” namely, the ability to assert the State’s interest in defending Proposition 8.³³ The Ninth Circuit then certified the standing question to the California Supreme Court: Under California law, do official proponents “possess either [1] a particularized interest in the initiative’s validity or [2] the authority to assert the State’s interest in the initiative’s validity . . . ?”³⁴ For ease of reference, this Article refers to “prong 1” of this inquiry as whether the proponent

recent gubernatorial election). With signature gatherers charging \$3 to \$5 or more per signature, millions of dollars are typically required just to gather signatures. See, e.g., John S. Caragozian, *From Crisis to Solution—California’s Problems in Two Books: A Review of Remaking California and California Crackup*, 44 LOY. L.A. L. REV. 687, 695 & nn.50-51 (2011); *Petition People Gather Big Bucks*, L.A. TIMES, Aug. 10, 2016, at B1, col. 1.

27 For a more detailed account of the passage of Proposition 8 and the litigation that followed, see Manheim et al., *supra* note 15, at 1077-88.

28 See *Hollingsworth*, 133 S. Ct. at 2659.

29 *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); see also *Complaint for Declaratory, Injunctive, or Other Relief, Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292), <https://ecf.cand.uscourts.gov/cand/09cv2292/files/1-1.pdf>.

30 *Schwarzenegger*, 704 F. Supp. 2d at 928.

31 *Id.*

32 *Id.* at 995-1003.

33 *Perry v. Schwarzenegger*, 628 F.3d 1191, 1196 (9th Cir. 2011).

34 *Id.* at 1193.

has standing on his or her own personal behalf and “prong 2” as whether the proponent may assume the State’s standing.

The California Supreme Court unanimously answered “yes” to the Ninth Circuit’s prong 2, accepting the proponents’ assertion of a representative interest, but expressly declined to answer prong 1 regarding personal standing.³⁵ The Ninth Circuit accepted the California Supreme Court’s answer and accordingly held that the official proponents had standing to represent the State in defending Proposition 8.³⁶ On the merits, however, the Ninth Circuit affirmed the District Court’s judgment of Proposition 8’s unconstitutionality.³⁷

The official proponents then appealed to the United States Supreme Court, where a five-to-four majority ruled that the official proponents lacked standing.³⁸ The Court first held that the proponents lacked personal standing — prong 1 of the Ninth Circuit’s certified question to the California Supreme Court on which the California Supreme Court declined to rule.³⁹ According to the *Hollingsworth* majority, once voters approved the initiative, the official proponents lost any unique role in the process.⁴⁰ Instead, the proponents had only a general interest in the initiative, an interest shared by all other state citizens.⁴¹ This generalized interest, in turn, was insufficient to confer personal standing on the proponents.⁴²

As for the Ninth Circuit’s prong 2 — where the California Supreme Court had answered that the official proponents possessed standing to assert the State’s interest⁴³ — the *Hollingsworth* majority rejected the California Supreme Court’s opinion, concluding instead that the proponents were not proper agents of the State.⁴⁴ As a threshold matter, *Hollingsworth* noted that the proponents were not elected officials.⁴⁵ Moreover, the proponents lacked “the most basic

35 Perry v. Brown, 265 P.3d 1002, 1015, 1033 (Cal. 2011).

36 Perry v. Brown, 671 F.3d 1052, 1072-73 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

37 671 F.3d at 1064.

38 *Hollingsworth*, 133 S. Ct. at 2668.

39 *Id.* at 2662-63.

40 *Id.* at 2663.

41 *Id.*

42 *Id.* (internal quotation marks and citations omitted) (stating that after voters approve an initiative, the proponents “have no role” in its enforcement and, apparently, are nothing more than “concerned bystanders,” despite their being “deeply committed” or “zealous”).

43 Perry v. Brown, 265 P.3d 1002, 1033 (Cal. 2011).

44 *Hollingsworth*, 133 S. Ct. at 2667.

45 *Id.* at 2668 (“We have never before upheld the standing of a private party to

features of an agency relationship.”⁴⁶ For example, the proponents had no fiduciary obligations to the State and were not subject to the State’s control.⁴⁷ Further, the majority opinion criticized a policy of granting proponents standing to represent a state, noting that proponents would be “free to pursue a purely ideological commitment to the [initiative’s] constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.”⁴⁸ Given the absence of *Hollingsworth* appellants — the official proponents lacked standing and the State officials (who had standing) refused to appeal⁴⁹ — the Court held that no “case or controversy” existed under Article III.⁵⁰ Accordingly, the Court found a lack of jurisdiction and ordered that the Ninth Circuit vacate its judgment and dismiss the appeal, finalizing the District Court’s judgment of Proposition 8’s unconstitutionality.⁵¹

Therefore, *Hollingsworth* holds that, under Article III, official proponents generally lack standing to defend “their” approved initiatives.⁵² More particularly, proponents qua proponents have

defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”). *See also id.* at 2666-67.

46 *Id.* at 2666.

47 *Id.* at 2666-67.

48 *Id.* at 2667.

49 *Id.* at 2660, 2666-67.

50 *Id.*

51 *Id.* at 2668. In 2015 — two years after *Hollingsworth* — the Supreme Court reached the merits of same-sex marriage bans, holding them unconstitutional. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

52 This general rule is subject to some exceptions. For example, in federal court:

A. Initiative proponents probably have standing to defend their initiatives from challenges before the initiatives are approved by voters. *See, e.g., Hollingsworth*, 133 S. Ct. at 2662-63 (ruling that proponents lost their special role “once Proposition 8 was approved by the voters”).

B. In the Ninth Circuit, parties without standing (presumably including initiative proponents) may have “piggyback” standing: they may intervene as defendants if parties with standing (such as state officials) are also defending the lawsuit. *See, e.g., State of Cal. Dep’t of Soc. Servs. v. Thompson*, 321 F.3d 835, 845-46 & n.9 (9th Cir. 2003). However, other circuits — including the D. C., Seventh, and Eighth Circuits — disallow such piggyback standing. *See Peter A. Appel, Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U.L.Q. 215, 270 (2000).

C. Again, in the Ninth Circuit, initiative proponents may defend their initiative during an appeal if they are appellees (though not as appellants). *See, e.g., Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566, 573

neither personal standing (prong 1) nor a right to represent the State (prong 2). This lack of standing, in turn, may well be dispositive in suits challenging popular initiatives when the state itself refuses to defend. After all, under our adversary system, courts are more likely to invalidate an undefended initiative.

C. Hollingsworth's Aftermath

Various scholars and others have criticized *Hollingsworth* for giving state officials a practical veto over voter-approved initiatives.⁵³ Without a defense, Proposition 8 was — and, critics fear, other state initiatives will be — invalidated by federal courts.⁵⁴

Attempts by recent initiative proponents to avoid *Hollingsworth* involve drafting initiative language appointing themselves “as agents of the people and the State” with authority to defend the initiative “in any legal proceeding.”⁵⁵ This attempt to obtain representational standing is likely to fail for at least two reasons. First, under the California Constitution, “no statute proposed to the electors . . . by initiative, that names any individual to hold any office . . . may

(9th Cir. 2014); *Latta v. Otter*, 771 F.3d 456, 465-66 (9th Cir. 2014).

D. With regard to some initiatives, proponents who would benefit from them — say, by lowered taxes — would have personal standing to defend such initiatives at trial and on appeal, though without reference to their status as proponents. See generally *Manheim et al.*, *supra* note 15, at 1121-22, 1125-27 & n.286.

Likewise, in state court, depending on state law, proponents may have authority to represent the state, thereby having standing to defend their initiatives at trial and on appeal. See *Hollingsworth*, 133 S. Ct. at 2667 (“Nor do we question . . . the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply.”); *Perry v. Brown*, 265 P.3d 1002, 1016-20 (Cal. 2001). See also *Manheim et al.*, *supra* note 15, at 1121.

53 See, e.g., Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives after Hollingsworth v. Perry*, 71 WASH. & LEE L. REV. 229, 280-83 (2014); *Manheim et al.*, *supra* note 15, at 1072 & n.3, 1120-21.

54 See Kafker & Russcol, *supra* note 53, at 242-43.

55 See Jamie Court, *Request for Title and Summary for Proposed Online Privacy Act, No. 14-0007*, INITIATIVE COORDINATOR, CAL. ATT’Y GEN. OFFICE §§ 5(a), 5(b)(1) (Jan. 16, 2014), <https://oag.ca.gov/system/files/initiatives/pdfs/14-0007%20%2814-0007%20%28Online%20Privacy%20V2%29%29.pdf?> Implicit in such efforts is the proposition — also implicit in *Hollingsworth* — that a defendant must have proper standing in order to appear as a formal party in a legal proceeding. The Court has indicated this principle expressly elsewhere. See *Bond v. United States*, 564 U.S. 211, 217 (2011); *Camreta v. Greene*, 563 U.S. 692, 701 (2011). See generally, *Hall*, *supra* note 9.

be submitted to the electors or have any effect.”⁵⁶ Second, under federal law, a bare designation of an initiative’s proponent as a state’s agent — without fiduciary obligations and without the policy responsibilities of resource constraints and other state priorities — is unlikely to satisfy *Hollingsworth*.⁵⁷

Other recent initiatives specify that special counsel must be appointed to defend the initiative.⁵⁸ This solution probably passes *Hollingsworth* muster.⁵⁹ Still, some proponents may resist it, because the special counsel — and not the proponents — would control the initiative’s defense.

II. Seeking to Avoid *Hollingsworth*: Embedding Standing in the Initiative Itself

The solutions discussed above in Part I-C — the rights of proponents or special counsel to represent the state and thus acquire the state’s standing to defend its own laws — are based on prong 2 of the Ninth Circuit’s and Supreme Court’s decisions. A different approach, namely an attempt to create personal standing under prong 1, was illustrated by Proposition 60, the statutory initiative, which appeared — but did not pass — on the November 8, 2016, California ballot.⁶⁰ While Proposition 60 was a California initiative, the standing issues that it exemplifies apply broadly to all states with initiatives.⁶¹ Furthermore, as discussed in Part II-B below, scholars have suggested variations on Proposition 60’s penalty, and those

56 CAL. CONST. art. II, § 12. Other states have this same prohibition. See note 115 *infra*. The prohibition is further discussed at notes 114-17 *infra* and accompanying text.

57 See Manheim et al., *supra* note 15, at 1141.

58 See, e.g., High Quality Teachers Act of 2014, Pub. L. No. 13-0062, § 14(a) (Cal. 2013), [https://oag.ca.gov/system/files/initiatives/pdfs/13-0062%20\(13-0062%20\(Teachers%20V2\)\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/13-0062%20(13-0062%20(Teachers%20V2)).pdf); No Blank Checks Initiative, Pub. L. No. 14-0009 (Cal. 2014), [https://oag.ca.gov/system/files/initiatives/pdfs/14-0009%20\(14-0009%20\(Bond-funded%20Projects\)\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/14-0009%20(14-0009%20(Bond-funded%20Projects)).pdf). See also Manheim et al., *supra* note 15, at 1140.

59 In *Morrison v. Olson*, 487 U.S. 654, 696 (1988), the Supreme Court upheld the right of special prosecutors to represent the United States. The *Hollingsworth* Court reaffirmed *Morrison*’s holding. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665 (2013). For additional analysis and detail (including proposed model language) regarding the appointment of special counsel to defend initiatives, see Manheim et al., *supra* note 15, at 1137-38, 1140.

60 *Proposition 60*, *supra* note 2, § 7.

61 *Id.*

variations also apply beyond California.

Proposition 60 — to regulate the adult film industry in California — was proposed by a single individual and received the requisite number of signatures to qualify for the statewide ballot.⁶² Proposition 60 included two provisions relevant to this new standing approach:

Section 7. Proponent Accountability.

The People of the State of California hereby declare that the proponent of [Proposition 60] should be held civilly liable in the event [Proposition 60] is struck down, after passage, by a court for being constitutionally or statutorily impermissible. Such a[n] . . . impermissible initiative is a misuse of taxpayer funds and electoral resources and [Proposition 60]’s proponent, as the drafter . . . must be held accountable

In the event [Proposition 60], after passage, is struck down . . . in whole or in part, as unconstitutional or statutorily invalid, and all avenues for appealing and overturning the court decision have been exhausted, the proponent shall pay a civil penalty of \$10,000 to the . . . State of California for failure to draft a wholly constitutionally or statutorily permissible initiative No party of entity may waive this civil penalty.⁶³

. . . .

Section 9. Severability.

If any provision of [Proposition 60], or part thereof, . . . is for any reason held to be invalid or unconstitutional, the remaining provisions and parts

62 Michael Weinstein, *Request for Title and Summary for Proposed California Safer Sex in the Adult Film Industry Act, No. 15-0004*, INITIATIVE COORDINATOR, CAL. ATT’Y GEN. OFFICE (Feb. 12, 2015), https://oag.ca.gov/system/files/initiatives/pdfs/15-0004%20%28Safer%20Sex%29_8.pdf?

63 *Proposition 60*, *supra* note 2, § 7.

shall not be affected, but shall remain in full force and effect, and to this end the provisions and parts of [Proposition 60] are severable. The voters hereby declare that [Proposition 60], and each portion and part, would have been adopted irrespective of whether any one or more provisions or parts are found to be invalid or unconstitutional.⁶⁴

Proposition 60's Section 10 also dealt with standing, but unlike Section 7, it was designed to achieve standing via prong 2.⁶⁵ Section 10 would appoint the proponent as a state employee if "the Attorney General fails to defend [Proposition 60] . . . or fails to appeal an adverse judgment" ⁶⁶ Upon the proponent's appointment, he would be: removable only for "good cause" as voted by "each house of the Legislature"; required to take same the oath of office that all state employees take, subject to "all fiduciary . . . duties prescribed by law"; and allowed to defend Proposition 60.⁶⁷ The state would be required to pay for the proponent's "reasonable expenses and other losses incurred . . . in defending . . . [Proposition 60]."⁶⁸ Under Section 10, and upon the Attorney General's failure to defend, the proponent would become a salaried state employee and would be entitled to engage outside counsel — at the State's expense — to appear on behalf of the State in defending the initiative.⁶⁹

64 *Id.* § 9.

65 *Id.* § 10.

66 *Id.*

67 *Id.*

68 Proposition 60's proponent had reason to apprehend that California officials might refuse to defend Proposition 60. The same proponent proposed a similar initiative to regulate the adult film industry in Los Angeles County. That initiative, titled Measure B, was approved by Los Angeles County's voters in 2012, but no county officials actively defended it when its constitutionality was challenged in federal court. *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1121-22 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566, 573 (9th Cir. 2014). *See also* Manheim et al., *supra* note 15, at 1123-27 & nn.281, 286 & 299-300. Instead, the county officials filed an answer that the complaint "presents important constitutional questions that require and warrant judicial determination," but the officials otherwise took "a position of neutrality regarding whether Measure B is constitutional . . ." *Vivid Entm't. v Fielding*, No. 13-00190, 2013 U.S. Dist. LEXIS 54060, at *12 & n.1 (C.D. Cal. Apr. 16, 2013). *See also* Manheim et al., *supra* note 15, at 1123 & n.281.

69 *Proposition 60*, *supra* note 2, § 10.

A. Creating an Individual Stake in the Validity of Proposition 60: Injury in the Form of Penalty

Proposition 60's Section 7 raises a fundamental question of standing to defend initiatives: Does a prospective penalty of this nature give the proponent a concrete interest in the initiative sufficient to confer standing to defend it? The answer is far from certain.

In the event that an initiative with this language were approved by voters and challenged in court, the proponent would argue that he has a concrete interest in defending it because he personally faces a monetary penalty if the initiative is invalidated. This interest is not a general one shared by other state citizens. Accordingly, the proponent, as an individual, also has prong 1's particularized standing.

A plaintiff challenging the initiative might object to the proponent's prong 1 standing argument on at least three independent grounds. First, the proponent would not have the fiduciary obligations and would not meet the policy criteria — such as the resource constraints with which state officials contend — required by *Hollingsworth*. Second, the prospect of the monetary penalty may be insufficiently concrete to serve as a basis for standing. Third, even if the penalty is concrete, a court might conclude that, as a self-inflicted injury, it cannot serve as a basis for standing. Each of these objections is discussed below.

1. Absence of Fiduciary Obligations

One of *Hollingsworth*'s rationales for denying standing to initiative proponents was that proponents lack fiduciary obligations and therefore — unlike state officials — need not account for a state's resource constraints, changes in public opinion, or potential ramifications for other state priorities.⁷⁰ This rationale, in turn, might be used by a plaintiff to object to a proponent's standing, because the monetary penalty does not imbue the proponent with a state official's fiduciary obligations or a state official's resource constraints and other policy considerations.

On the other hand, *Hollingsworth*'s policy rationale here was aimed at prong 2: whether a proponent could represent the state and thereby assume the state's standing. An individual's standing

⁷⁰ *Hollingsworth v. Perry*, 133 S. Ct 2652, 2666-67 (2013).

under prong 1 — the personal standing created *arguendo* by the monetary penalty — would presumably be unaffected by such policy considerations. After all, a litigant with his or her own “particularized” injury would seem, by definition, not to need the fiduciary or policy obligations of a state. Accordingly, an objection based on a proponent’s lack of fiduciary duty and attendant lack of policy constraints appears to be inapposite to prong 1’s personal standing.

2. *Lack of Concrete Injury*

As discussed earlier,⁷¹ the injury in fact must be not only particularized to the party claiming standing (which it is here), but also concrete. A concrete injury may be “threatened” and still be sufficient, but the injury cannot be “abstract.”⁷² In assessing how “real” the “risk” of concrete injury must be, the Supreme Court has looked to tort law, specifically the Restatement of Torts, for principles governing what damages may and may not be recovered by tort victims.⁷³ In other words, whether damages are real enough for purposes of Article III standing may relate to whether such damages are recoverable under tort law.

Unfortunately, but unsurprisingly, the Restatement’s text provides only the most general guidance here. For example, with regard to the “certainty” of damages, a tort victim must “establish[] by proof the . . . adequate compensation with as much certainty as the nature of the tort and the circumstances permit.”⁷⁴ The Restatement’s comments are no more helpful. The victim must prove damages “with reasonable certainty” but, with regard to future harm, “[t]here is no mathematical formula that will determine the chance of the harm occurring”⁷⁵

While the \$10,000 penalty incurred under Proposition 60 might appear on the surface to pose a real threat, Section 7’s actual language creates uncertainty in at least three separate ways. First, if the entire initiative were invalidated, then the proponent would not be penalized, because the only basis for the penalty was a provision in the now-defunct initiative. On the other hand, if — as contemplated

71 See *supra* notes 11-20 and accompanying text.

72 *Spokeo*, 136 S. Ct. at 1548 (internal citations and quotation marks omitted).

73 See, e.g., *id.* at 1549; *Doe v. Chao*, 540 U.S. 614, 625 (2004); *Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424, 439-41 (1997).

74 RESTATEMENT (SECOND) OF TORTS § 912 (AM. L. INST. 1979).

75 *Id.* at cmts. a & e.

under Section 7 — a court invalidates only part of the initiative, it is unclear whether the monetary penalty would survive the *arguendo* invalidity of some or all of the rest of the initiative. To be sure, Proposition 60's Section 9 contains standard boilerplate that all of the initiative's provisions are severable.⁷⁶ However, depending on each initiative's particular circumstances (including its language and what parts are or are not valid), a court may disregard an initiative's severability language⁷⁷ and strike down the entire initiative, including its otherwise valid parts.⁷⁸ The likelihood of the prospective penalty's survival, in turn, affects whether the penalty is sufficiently concrete to support the proponent's standing.

Severability, like damage certainty, is an inexact concept, not capable of precise application.⁷⁹ In general, federal courts look to state law regarding initiatives' severability.⁸⁰ Under California law, a severability clause such as Proposition 60's Section 9, “[a]lthough not conclusive,” provides some support for severability.⁸¹ Among the criteria for severability, courts look to “volitional” severability, which is whether an initiative's remaining provisions (i.e., those provisions not determined to be invalid) are “substantive” and “would likely have been adopted by the people had they foreseen the invalidity

76 See *Proposition 60*, *supra* note 2, § 9.

77 See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 291 (1994) (noting that in *INS v. Chadha*, 462 U.S. 919 (1983), Court treated severability clause under consideration as “raising only a presumption of severability” (citing *Chadha*, 462 U.S. at 932, 934)); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 652 (2008) (discussing discretion exercised by Supreme Court to treat statutes' provisions as nonseverable).

78 See, e.g., *Mulkey v. Reitman*, 413 P.2d 825, 835-36 (Cal. 1966), *aff'd sub nom.* 387 U.S. 369 (1967) (holding an initiative's severability clause to be “ineffective,” because the unconstitutional provisions were “fully integrated and . . . not severable” (citation omitted)); *Ex parte Blaney*, 184 P.2d 892, 900-01 (Cal. 1947) (refusing to use authority under a statute's severability clause, because the statute failed “to differentiate” between protected and unprotected speech).

79 See Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 110-11 (1937) (“[T]he Court is free to decide each case [involving severability] the way it pleases without having its discretion fettered by any restraining doctrine.”); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 749, 777 (2010) (describing severability doctrine as “destructive and manipulable”).

80 E.g., *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 748 n.12 (9th Cir. 1994).

81 *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1256 (Cal. 1989) (quoting *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal.3d 315, 331 (1975); *Metromedia, Inc. v. City of San Diego*, 32 Cal.3d 180, 190 (1982)).

of the [challenged provision]”⁸² It appears, therefore, that a severable and otherwise valid non-substantive provision — such as a monetary penalty on the proponent — might not survive if all of the initiative’s substantive provisions are invalidated.⁸³

A court’s determination of severability becomes more difficult when severability bears on standing. Typically, a court decides severability after trial, when rendering judgment on the initiative’s validity. For example, initiative sections *x* and *y* are adjudged to be invalid, but initiative section *z* is valid and is (or is not) severable.⁸⁴ However, this timing is disrupted when the court must assess severability to determine standing, because standing is a “threshold question”⁸⁵ which is to be determined as early as the pleading stage.⁸⁶ A court, then, in order to determine whether the penalty is “real” enough to constitute a sufficiently concrete injury, would preliminarily assess the initiative’s likely validity and the monetary penalty’s likely severability before trial.⁸⁷ Thus,

82 See *Calfarm Ins.*, 771 P.2d. at 1256 (internal quotation marks and citations omitted); *Gerken v. Fair Political Practices Comm’n*, 863 P.2d 694, 716 (Cal. 1994). See also *League of Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 766-67 (C.D. Cal. 1995).

83 While federal courts look to state law regarding severability, federal courts also should avoid nullifying an entire statute in the absence of a clear legislative intent to withdraw the valid portions of a statute if the challenged provision is struck down. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 & n.15 (1985).

84 See, e.g., *Calfarm Ins.*, 771 P.2d at 1255-56.

85 *Linda R. S. v. Richard D.*, 410 U.S. 614, 616 (1973).

86 *National Organization for Women v. Scheidler*, 510 U.S. 249, 255-56 (1994). See also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (“Where . . . a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’ each element [of standing].” (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975))).

87 With specific regard to Proposition 60, its proponent could be confident that some of Proposition 60’s substantive provisions would have survived constitutional challenge. The same proponent previously proposed Measure B, which was a similar adult-film initiative passed by Los Angeles County voters in 2012. See sources cited *supra* note 68 and accompanying text. Measure B had a condom requirement and other provisions which were challenged by plaintiff adult film producers and actors on free speech and due process grounds. *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1132-34 (C.D. Cal. 2013). When plaintiffs sought a preliminary injunction against the condom requirement’s enforcement, the Ninth Circuit upheld the condom requirement’s constitutionality (at least at the preliminary injunction stage). *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566, 575 (9th Cir. 2014). The same condom requirement, in turn, was copied word for word into Proposition 60. See *Proposition 60*, *supra* note 2, § 4. Accordingly, Proposition 60’s condom

the severability of any of an initiative's provisions depends on the language and circumstances of that particular initiative. Whether the proponent would be able to bear his or her burden of proving standing based on a prospective monetary penalty will vary from initiative to initiative.

Second, even if a monetary penalty survived because it is severable from other provisions' *arguendo* invalidity, Proposition 60's penalty would be imposed only after "all avenues for appealing *and* overturning the court decision have been exhausted."⁸⁸ What does it mean that all avenues for "overturning" — as distinguished from "appealing" — the court decision have been exhausted? For example, if a court invalidated an initiative in such a way that further legislation could cure its (the initiative's) defects, would the introduction of such legislation mean that proponents have yet to exhaust "all avenues," thereby keeping any penalty in abeyance? Likewise, would an additional initiative proposed to cure the invalidity keep a penalty in abeyance? Without answers to such questions, a proponent might be unable to bear his or her burden of proving that such a prospective penalty is sufficiently real.

Third, a monetary penalty along the lines of Proposition 60's Section 7 might have been deemed a bill of attainder in violation of the Constitution.⁸⁹ Bills of attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."⁹⁰ Put another way, the Constitution provides "a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."⁹¹ The specific argument here is that the monetary penalty does not apply to all initiatives' proponents; rather, it only imposes a \$10,000 fine on

requirement would probably have survived a challenge, too. With one of Proposition 60's substantive provisions likely to have been valid, Proposition 60's Section 7 fine would have been likely severable from any invalid provisions. However, the severability issue discussed here is not limited to Proposition 60. In the future, other initiatives may lack the close precedent exemplified by Measure B, so the survival of future initiatives' substantive provisions — and the resulting severability of a fine — would be an open question.

88 *Proposition 60*, *supra* note 2, § 7 (emphasis added).

89 U.S. CONST. art. I, § 9, cl. 3.

90 *United States v. Lovett*, 328 U.S. 303, 315 (1946).

91 *United States v. Brown*, 381 U.S. 437, 442 (1965). *See also* *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867) (acknowledging that punishment for purposes of bill of attainder can be civil as well as criminal sanction).

this one individual proponent and, accordingly, is unconstitutional. Once again, the fine's uncertainty, this time based on concerns that it is a bill of attainder, raises the question: Is the threatened injury — the only basis for the proponent's individual standing — adequately real?

In light of the above uncertainties, whether singly or in combination, might the Supreme Court or other federal courts nonetheless accept an initiative's Proposition 60-type penalty as a sufficiently concrete basis for a proponent's individual standing? On the one hand, a federal court would have to evaluate all of these uncertainties at a lawsuit's beginning — when a proponent first seeks to appear — and *Hollingsworth's* hostility to initiative proponents' standing might auger that proponents have not met their burden. On the other hand, proponents might argue that the Court's citation to tort damages suggests a low level of proof, because “[c]ourts have traditionally required greater certainty in the proof of damages for breach of a contract than in the proof of damages for a tort.”⁹² Oddsmakers might set the line here at “pick ‘em.”

3. *The Bar Against Self-Inflicted Injury*

The Supreme Court has long held that a party cannot base a claim to standing on a self-inflicted injury.⁹³ Accordingly, a party objecting to an initiative proponent's standing here could argue that the proponent manufactured his own injury. The proponent himself or herself drafted the threat of a monetary penalty and then further gathered signatures, approved ballot arguments, and undertook such other legal and political actions as were necessary to obtain the initiative's passage. The proponent might respond that the voters who approved the initiative enacted the penalty and not the proponent (who lacked power to enact anything). The proponent

92 RESTATEMENT (SECOND) OF CONTRACTS, §352, cmt. a (AM. L. INST. 1981).

93 For example, in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), various states, including Pennsylvania, complained about other states' tax policies, because those policies, in combination with the complaining states' tax credits, reduced the complaining states' tax revenues. The Court held that Pennsylvania and the other complaining States lacked standing, because “nothing prevents Pennsylvania from withdrawing that [tax] credit No State can be heard to complain about damage inflicted by its own hand.” *Id.* at 664. See also *Clapper v. Amnesty Int'l USA*, 133 S. Ct. at 1152-53 (finding that parties' “self-inflicted injuries are not fairly traceable to the [defendant]'s purported activities” and therefore do not create standing).

might add that, as a corollary, he or she cannot unilaterally undo — and cannot avoid — the already-enacted penalty. To counter such reasoning, a party objecting to the proponent’s standing might then reply that, but for the proponent’s drafting and other pro-initiative activities, no voter approval would have occurred and no penalty would exist.

There does not appear to be direct precedent shedding light on whether a self-inflicted-injury objection defeats an initiative proponent’s standing. Still, *Clapper v. Amnesty International USA*⁹⁴ is instructive on the Court’s expansive conception of what qualifies as a self-inflicted injury negating standing. There, the Court rejected a facial challenge to a law⁹⁵ that allowed the Attorney General and the Director of National Intelligence to authorize the surveillance of noncitizens thought to be located outside the United States.⁹⁶ Among the plaintiffs were attorneys and human rights organizations asserting that their work involved communications with probable targets of surveillance under the law.⁹⁷ They argued that risk of surveillance had forced them to take “costly and burdensome measures” to keep their communications confidential.⁹⁸ In the Court’s eyes, however, the plaintiffs sought to “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm.”⁹⁹

It hardly seems likely that the plaintiffs in *Clapper* went to the cost and trouble of shielding their communications from federal surveillance simply to create the opportunity to gain access to court. By contrast, Proposition 60’s proponent obviously inserted the monetary penalty into the initiative for the very purpose of securing a place in court. Applying *Clapper*’s approach, a court could well ignore the technical niceties of who enacted the initiative and hold the proponent responsible for bringing the harm on himself or herself.

Additionally, whatever the merits of competing arguments over whether an initiative’s penalty provision creates Article III standing, a broader consideration may prevent creation of standing through this means. For over four decades, the Court has taken a notably restrictive approach to standing.¹⁰⁰ Rigorous enforcement of

94 *Clapper*, 133 S. Ct. 1138.

95 50 U.S.C. § 1881a (2012).

96 *Clapper*, 133 S. Ct. at 1142-43.

97 *Id.* at 1145.

98 *Id.* at 1146.

99 *Id.* at 1151.

100 See, e.g., *Clapper*, 133 S. Ct. 1138; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen*

standing requirements is rooted largely in the Court's commitment to observing the "properly limited . . . role of the courts in a democratic society."¹⁰¹ In light of this philosophy, it seems unlikely that the Court would countenance devices to circumvent *Hollingsworth* by empowering proponents to draft their own Article III injuries. Perhaps the circumstances of *Hollingsworth* are sufficiently infrequent that recognizing an injury constructed this way would not open floodgates to federal litigation on initiatives. Still, it would encourage an increase of the occasions on which federal courts assess initiatives that runs counter to a central aim of modern standing doctrine. Moreover, if accepted, the rationale for standing through this means could open the door to mechanisms with potential to widen the range of individuals with personal standing to defend initiatives.

B. Variations on Creation of Standing via a Penalty

Scholars Scott Kafker and David Russcol propose two variations on Proposition 60's penalty,¹⁰² both intended to create prong 1's personal standing.

1. Variation 1: Bounty

Whether by general state law or as embedded in an initiative, a successful defense of the initiative would entitle the defender to a monetary bounty.¹⁰³ While this bounty proposal might avoid the uncertainty and self-inflicted injury concerns of the penalty discussed above, we doubt whether such a bounty would pass *Hollingsworth* muster. In principle, such a bounty lacks any limits on who could claim standing. For example, an initiative could offer a bounty to any persons — not just proponents — who successfully defend the initiative. Indeed, a bounty could be attached to any law, whether federal or state and whether traditional legislation or initiative, thereby giving everyone prong 1 personal standing to defend an initiative's or other law's validity.

v. Wright, 468 U.S. 737, 750 (1984); *United States v. Richardson*, 418 U.S. 166 (1974).

101 *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

102 *See Kafker & Russcol, supra* note 53, at 291-95. This variation is the obverse of Proposition 60: In the latter, the proponent is penalized for failing to successfully defend his or her initiative; in the former, the proponent is rewarded for successfully defending his or her initiative.

103 *See id.* at 291-92.

To be sure, as Kafker and Russcol have noted, a bounty may bear some resemblance to a traditional *qui tam* action, which does confer standing on the relator (akin to a plaintiff).¹⁰⁴ However, an essential element of a *qui tam* action is that the government and relator share in a monetary recovery: The relator receives “a partial assignment of the Government’s damages claim.”¹⁰⁵ In other words, the government and relator share in a monetary recovery,¹⁰⁶ an element which the bounty lacks. Accordingly, the Supreme Court, with its inhospitality to initiative proponents’ standing, would be unlikely to countenance bounty-based standing given its limitless applicability and its failure to adhere to traditional *qui tam* requirements.

2. Variation 2: Refundable Filing Fee

Some states, as a matter of existing law, may require all initiative proponents to pay a fee upon the filing of the initiative.¹⁰⁷ Under Kafker and Russcol’s variation 2, this filing fee would be wholly or partially refunded to the proponent upon a successful defense of the initiative.¹⁰⁸

An initiative’s refund provision, depending on its exact wording, might or might not avoid Proposition 60’s uncertainty problems. The refund would avoid Proposition 60’s self-inflicted injury problem, because the original fee is required of any proponent who files a proposed initiative. The refund also avoids the overbreadth of variation 1, in that variation 2’s refund would be available only to

104 See *id.* *Qui tam* is a statutory creation, derived from old English law: Under specified statutes and circumstances, a private party — who has suffered no injury — may sue a wrongdoer to recover a penalty owed to the government, with the recovery divided between the private party and the government. See, e.g., *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768-72 & nn.1&3 (2000).

105 *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2665 (2013).

106 E.g., *BLACK’S LAW DICTIONARY* 1414 (rev. 4th ed. 1968).

107 See, e.g., *MISS. CODE ANN.* § 23-17-21 (West 2017); *WYO. STAT. ANN.* § 22-24-302 (West 2016).

108 See Kafker & Russcol, *supra* note 53, at 292-95. Of course, this variation 2 would be unavailable in those states which lack a filing fee for initiatives, because nothing could be refunded. For example, California requires a \$2,000 filing fee, but the fee is refunded if the initiative “qualifies for the ballot within two years . . .” *CAL. ELEC. CODE* § 9001(c) (West 2016). Accordingly, no refund would be available in California, because, by definition, the fee would have been refunded before the enacted initiative’s validity is tested. Without the possibility of a refund, in turn, variation 2 could not create standing in California.

the proponents who paid the original fee, and the refund could not be claimed by just any self-selected defender of the initiative. With these defects avoided, initiative proponents could argue that the refund gives them individual standing: a personal monetary stake which is contingent upon the initiative's validity.

On the other hand, a refund presents a logical tangle. More particularly, this variation 2 might run afoul of the Supreme Court's hostility toward "manufacture[d] standing."¹⁰⁹ The proponent's original "injury in fact" is the filing fee.¹¹⁰ However, this injury is "not fairly traceable to [the challenged law]."¹¹¹ Indeed, the injury and the refund are unconnected, save for the language in which the proponent himself or herself inserted into the initiative.¹¹²

C. Representational Standing Through State Employment

As earlier discussed, Proposition 60's Section 10 sought to gain standing through the separate route of conferring prong 2's representational status on the proponent in the event that the Attorney General fails to defend the initiative.¹¹³ Such a provision raises the question of whether an initiative can delegate the state's standing to a proponent by appointing him or her as a state official. Here, the answer appears to be clearer than with regard to prong 1's personal standing: "No." Three independent reasons undermine Section 10 and, more generally, other proposed prong 2 language.

First, Section 10 would likely run afoul of California's constitution, which bars a proposed initiative from naming "any individual to hold any office"¹¹⁴ — perhaps a violation as well under comparable provisions in the constitutions of other states authorizing initiatives.¹¹⁵ Here, the proponent would become a state employee

109 *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013).

110 *Cf. Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (requiring evidence of the injury in fact).

111 *Clapper*, 133 S. Ct. at 1151.

112 It is true that the Court has recognized standing for a *qui tam* relator under an assignor-assignee rationale. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000). Still, the circumstances there — where the government enlisted private support to recover from a concrete monetary injury that it has suffered — seem well removed from a scheme crafted for the sole purpose of slipping the plaintiff into court rather than to redress a monetary injury to the government. *See id.*

113 *See supra* notes 65-69 and accompanying text.

114 CAL. CONST. art. II, § 12. *See also* discussion *supra* Part I-C.

115 *See, e.g., ARIZ. CONST. art. IV pt. 2, § 19, cl. 13; COLO. CONST. art. V, §25, cl. 8*

if California's Attorney General failed to defend Proposition 60. The contingency of the proponent's status raises the question of whether such a conditional appointment violates the state constitution's prohibition. It seems a fair reading of the California Constitution's prohibition on naming an individual to office that it applies whether the naming is conditional or unconditional. If this argument were to prevail, the California Constitution would then subject the initiative to a pre-election challenge to prevent its "submi[ssion] to the electors."¹¹⁶ Even if this California constitutional violation occurred only when the Attorney General failed to defend the initiative — that is, Proposition 60's Section 10 condition precedent is met — and the proponent's appointment becomes unconditional, plaintiffs could still successfully challenge the initiative.¹¹⁷ Proposition 60's Section 10, then, appears to have been an impermissible naming of the proponent to office.

(barring as "[s]pecial legislation," *inter alia*, laws "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever"); N.J. CONST. art. IV, § 7, ¶ 9, cl. 8 (same); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 721 n.6 (2012) (collecting state constitutional prohibitions of "special" laws); *see generally* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2013-2014) (examining the widespread prohibitions on states' abilities to enact "special laws," including laws which identify particular persons).

116 CAL. CONST. art. II, § 12.

117 *See id.* While the California Constitution's language is that no such initiative "shall have any effect," the California Supreme Court has ruled that an initiative provision which impermissibly names an individual to office might be severed, with the rest of the initiative remaining valid. *See, e.g., Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1263, 1266 (Cal. 1989) (an initiative's identification of a "private corporation" to perform a "function" in violation of California Constitution, art. II, § 12 may be severed, such that the remainder of the initiative is valid). This severability option might not save a proposed initiative which is challenged under CAL. CONST. art. II, § 12 (and other states' similar provisions, *see supra* note 114) before the initiative is enacted by voters. While no case law on this question appears to exist, an initiative's opponents could argue: (a) severability under *Calfarm Ins.* was in connection with an already "enacted" initiative, 771 P.2d at 1249, (b) an initiative's severability language can have no legal effect if the initiative — including the severability language — has not been enacted, and (c) the plain language of CAL. CONST. art. II, § 12 is that no initiative naming "any individual to hold any office . . . may be submitted to the electors . . .," and this pre-election remedy contains no provision for severability. In sum, language such as Proposition 60's Section 10 might doom an entire initiative notwithstanding severability language — if the initiative is challenged before the election.

Second, Proposition 60's Section 10 appeared to conflict with Proposition 60's Section 7. Section 10 would have subjected the proponent to "all fiduciary duties" prescribed by law, presumably including all such duties imposed on state employees. However, Section 7 posed the possibility of a \$10,000 penalty on the proponent if any part of the initiative was invalidated by a court.¹¹⁸ In some instances, a state could benefit from conceding the invalidity of a specific provision: for example, to delete a possibly unconstitutional provision, so as to preserve the remainder of the initiative. Under ordinary circumstances, a state employee might have a fiduciary duty to so concede. However, the proponent would have a contrary personal interest in conceding nothing — that is, defending every single provision of the initiative — lest he or she personally be penalized \$10,000.

Third, under federal law, even if the proponent were technically an agent of the state, he or she would not be a true public official entitled as a matter of policy to assume the state's standing. As set forth in *Hollingsworth*, officials with standing on behalf of the state are subject to the state's "resource constraints, changes in public opinion, or potential ramifications for other state priorities."¹¹⁹ However, an initiative proponent — even if a state employee — is subject to none of these policy considerations. For example, Proposition 60's Section 10 expressly provided that the state must reimburse the proponent's defense expenses, and Section 10 listed no exceptions, even in the face of, say, severe state budgetary constraints.¹²⁰

These policy considerations grow larger and more complex if an initiative has more than one official proponent. For example, as noted earlier, California's Proposition 8 had five proponents.¹²¹ Depending on the initiative's actual language, this multiplicity of proponents could raise vexing issues. Could each of the five proponents become a state employee? If so, would they have to agree on a single counsel, or would each be entitled to appear and engage different outside counsel to defend the initiative? If the former, what if the proponents could not agree on a single attorney? If the latter, the resulting expenses of multiple counsel could be substantial and without a finite cap. In addition, what would happen if the various proponents' defenses conflicted? One proponent might

118 *Proposition 60*, *supra* note 2, § 7.

119 *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).

120 *Proposition 60*, *supra* note 2, § 10.

121 *See supra* note 27 and accompanying text.

interpret a provision in the initiative in a way inconsistent with another proponent’s interpretation. In a similar vein, one proponent might concede the invalidity of a provision, but another proponent might not. If an initiative had five (or more) official proponents, such conflicts might be likely. Would a court be obligated to accept all conflicting positions as representing the state? Thus, it seems improbable that a federal court would accord proponents standing to represent the state in defending initiatives, even if the proponent formally becomes a state employee.¹²²

III. Seeking to Avoid *Hollingsworth*: Allowing Participation in Litigation Without the Need for Standing

Proposition 54, which will reform state legislative procedures by, *inter alia*, requiring that bills are posted on the Internet at least seventy-two hours before being passed, contains the following Section 6.1:

Section 12511.7 is added to the Government Code¹²³
to read:

....

If an action is brought challenging, in whole or in part, the validity of [Proposition 54], the following shall apply:

(a) The Legislature shall continue to comply with [Proposition 54] unless it is declared

122 Apart from Proposition 60’s section 10 problems vis-à-vis standing, Section 10 is also vague — or even defective — with regard to the meaning of the Attorney General’s failure to defend (which is the condition precedent to the proponent’s appointment as a State employee with authority to defend the initiative on the State’s behalf). What if the Attorney General appears to defend the initiative, but concedes the invalidity of critical parts of the initiative? Or the Attorney General appears, but his or her defense lacks “vigor”? See *Perry v. Brown*, 265 P.3d 1002, 1022 (Cal. 2011). See also *Manheim et al.*, *supra* note 15, at 1085-86 & n.92 (opining that a defense lacking vigor may be worse than no defense at all, because the former is subtler than the latter and might allow the non-vigorous official to escape political accountability).

123 This new Section 12511.7 is added under California Government Code Chapter 6 (titled, “Attorney General”), Article 2 (titled, “General Powers and Duties”). Cal. Gov’t Code § 12511.7 (Deering 2016).

unconstitutional pursuant to a final judgment of an appellate court.

(b) Except as set forth in subdivision (c), the Attorney General shall defend against any action challenging, in whole or in part, the validity of [Proposition 54]

(c) If the Attorney General declines to defend the validity of [Proposition 54] . . . , the Attorney General shall nonetheless file an appeal from, or seek review of, any judgment of any court that determines that [Proposition 54] is invalid, in whole or in part, if necessary or appropriate to preserve the state's standing to defend [Proposition 54] in conformity with the Attorney General's constitutional duty to see that the laws of the state are adequately enforced.¹²⁴

The apparent theory of Proposition 54's Section 6.1 is to allow the proponents (though without standing under *Hollingsworth*) to participate in federal litigation if Proposition 54 is challenged.¹²⁵

124 Proposition 54, *supra* note 6, § 6.1. Proposition 54 additionally provides that (i) its "official proponents . . . have an unconditional right to participate, either as interveners [sic] or real parties in interest" in any action regarding Proposition 54's "validity or interpretation" and (ii) if the Governor and Attorney General decline to defend Proposition 54, then the proponents are "authorized to act on the state's behalf in asserting the state's interest in the validity of [Proposition 54] . . ." *Id.* § 6.1(d). In federal courts, both of these additional provisions — i.e., giving the proponents a blanket right to participate or the right to act on behalf of the state — are directly barred by *Hollingsworth*. See *Hollingsworth*, 133 S. Ct. at 2667 (States cannot "simply . . . issu[e] to private parties who otherwise lack standing a ticket to the federal courthouse."). See also *supra* notes 39-51 and accompanying text.

125 A federal court lawsuit over Proposition 54 appears entirely hypothetical, in that Proposition 54 presents no federal issues. Rather, only matters of the state's constitution and statutes are at issue, and those issues would be litigated in state court, where proponents always have standing as a matter of state law. See *Hollingsworth*, 133 S. Ct. at 2667 ("Nor do we question . . . the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply."); *Perry v. Brown*, 265 P.3d 1002, 1016-20 (Cal. 2001). See also *Manheim et al.*, *supra* note 15, at 1121. However, because future initiatives that do present federal issues may contain Section 6.1-type provisions, Part III of this article will analyze whether such provisions would generally allow proponents to participate in federal court.

As long as the state appears as a party — even as an inactive party refusing to file a brief — and as long as Proposition 54 is enforced during the litigation’s pendency, an adverse proceeding may exist. This adverse proceeding, in turn, would allow an initiative’s proponents to defend the initiative, albeit as intervenors or amici without the requisite standing to be an actual defendant.

This theory might have been inspired, in part, by the United States Supreme Court’s holding in *Windsor v. United States*,¹²⁶ decided on the same day as *Hollingsworth*. In *Windsor*, a surviving spouse of a same-sex couple challenged a provision of the federal Defense of Marriage Act (“DOMA”) that denied her certain tax benefits.¹²⁷ The United States Attorney General refused to defend the validity of the DOMA provision, but (a) continued to enforce it by refusing to issue a tax refund to the plaintiff surviving spouse and (b) filed a notice of appeal — though not a brief — after the trial court and court of appeals found it unconstitutional.¹²⁸ At trial and on appeal, a congressional entity, the Bipartisan Legal Advisory Group (“BLAG”), intervened and sought to defend the DOMA provision.¹²⁹ The Supreme Court expressly declined to decide whether BLAG had standing, but it held that the case was justiciable because the United States continued to enforce the DOMA provision and would suffer a real injury upon refunding the tax payment to the plaintiff.¹³⁰

Proposition 54 appears to track *Windsor* in that its Section 6.1 obligates the legislature to continue to adhere to Proposition 54’s procedural mandates until a judgment of its invalidity becomes final and obligates the California Attorney General to file a notice of appeal, even if he or she does not otherwise defend Proposition 54.¹³¹ Thus, in theory, *Windsor*-type justiciability is established, thereby allowing the proponents to defend Proposition 54 in federal court, even if they — like BLAG — might lack actual standing.

However, Proposition 54’s Section 6.1 raises substantial questions under both federal and state law. First, under federal law, it is unclear that initiative proponents are analogous to BLAG. Initiative proponents are private citizens;¹³² by contrast, BLAG was

126 133 S. Ct. 2675 (2013).

127 *Id.* at 2683.

128 *Id.* at 2683-84.

129 *Id.* at 2684.

130 *Id.* at 2686, 2688.

131 See *Proposition 54*, *supra* note 6, § 6.1.

132 See CAL. CONST. art. II, § 8(a) (“The initiative is the power of the electors to propose statutes and amendments to the Constitution . . .”).

a governmental entity.¹³³ *Hollingsworth* held this distinction to be all-important: “We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”¹³⁴ Even if the proponents could be treated as BLAG-type intervenors, Section 6.1 does not require the Attorney General to file an answer in the U.S. District Court. Without an answer, the District Court must enter the defendant’s default.¹³⁵ Proponents may appeal a subsequent default judgment,¹³⁶ but the record on appeal would contain little on which to reverse a judgment of the initiative’s invalidity.¹³⁷ In other words, allowing a proponent to participate in an appeal — via the Attorney General’s notice of appeal — might be a hollow victory, unless the proponent was allowed to develop evidence at trial on which an appeals court could hold the initiative to be valid.

Presumably, proponents could cure this specific problem by redrafting Section 6.1 to provide, in Government Code Section 12511.7(c), that “the Attorney General shall nonetheless file an answer sufficient to prevent entry of a default”¹³⁸ as well as a

133 See *Windsor*, 133 S. Ct. at 2684.

134 *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013). On the other hand, the Attorney General’s filing of a notice of appeal might allow an initiative’s proponents to become amici and thereby assert via written briefs and oral argument the initiative’s validity, despite the proponents’ lack of standing. See FED. R. APP. P. 29. Even if proponents could not appear as amici, an Attorney General’s failure to file a brief only means that the Attorney General “will not be heard at oral argument unless the court grants permission.” FED. R. APP. P. 31(c). The circuit court would still decide the appeal on the merits and would not automatically decide against the party failing to file a brief. See *Carvalho v. Equifax Info. Servs.*, 629 F.3d 876, 887 n.7 (9th Cir. 2010).

135 FED. R. CIV. P. 55(a).

136 See, e.g., *Calumet Lumber, Inc. v. Mid-Am. Indust., Inc.*, 103 F.3d 612, 614-15 (7th Cir. 1997).

137 See FED. R. APP. P. 10(a).

138 Mandating this type of minimal, noncommittal answer is intended to accommodate both of the following: (a) an elected attorney general’s right to refuse to defend an initiative that the attorney general believes to be unconstitutional, and (b) the litigation’s still proceeding on the merits — i.e., without entry of a default — and the initiative’s proponents having an opportunity to intervene. See, e.g., *infra* notes 140-47 and accompanying text. For example, in litigation over Los Angeles County’s Measure B, the defendant County officials did not plead that Measure B was constitutional, but did answer that the plaintiffs’ complaint “presents important constitutional questions that require and warrant judicial determination”; Measure B’s proponents successfully intervened, and the litigation continued on the

notice of appeal. Such a filing is critical in the Ninth Circuit, where an initiative proponent might then be permitted to intervene as a defendant, even if the proponent lacked standing on his or her own.¹³⁹ Still, while this Section 6.1 may be a ticket to the federal courthouse, it nonetheless poses a state law concern: California's Attorney General has a right not to defend a state law. This principle was established in *People ex rel. Deukmejian v. Brown*.¹⁴⁰

In *Deukmejian*, California's Attorney General advised a state agency regarding an underlying state court lawsuit filed against the agency, alleging that the agency was attempting to implement an unconstitutional statute.¹⁴¹ One week after advising the agency, the Attorney General himself sued the agency, also seeking to have the statute declared unconstitutional on the same grounds as the underlying lawsuit.¹⁴² The California Supreme Court enjoined the Attorney General from proceeding, holding that he could not sue his own former client — the state agency — especially after he advised the agency regarding the very law at issue.¹⁴³ However, the court also held that the Attorney General, who is an independently elected constitutional officer, “cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to

merits. See Defendants' Answer to Plaintiffs' Complaint at 1, *Vivid Entm't LLC v. Fielding*, No. CV 13-00190 (AGI) (C.D. Cal. Feb. 27, 2013), ECF no. 21; see also *supra* note 68 (citing *Manheim et al.*, *supra* note 15, at 1123-27 & nn.281, 286 & 299-300); *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1121-22 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566, 573 (9th Cir. 2014).

139 See *State of Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 845-46 & n.9 (9th Cir. 2003). But see *Appel*, *supra* note 52, at 270 (not all circuits allow such piggyback standing). Even in the Ninth Circuit, an intervenor on the defense side might be limited to seeking the same relief sought by the defendants with standing. Cf. *Town of Chester v. Laroe Estates, Inc.*, ___ U.S. ___, 2017 U.S. LEXIS 3555 at *2, *4 (Jun. 5, 2017) (“[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.”) (involving attempt by party to intervene as a plaintiff under Federal Rule of Civil Procedure 24(a)(2)). If the defendants with standing and the intervening proponents seek only the same relief — such as a judgment that the initiative is constitutional — then *Town of Chester's* limitation would be moot. On the other hand, if the defendants and intervenors were to seek different relief — say, the defendants sought only to validate parts of an initiative, while the intervening proponents sought to validate the entire initiative — then *Town of Chester* might limit the intervenors to the relief sought by defendants.

140 624 P.2d 1206, 1207 (Cal. 1981).

141 *Id.*

142 *Id.*

143 *Id.* at 1210.

law, and he may withdraw from his statutorily imposed duty to act as their counsel”¹⁴⁴ This right not to defend the state is based, at least in part, on the Attorney General’s common law powers to protect “the public interest,” which may conflict with the obligation to represent state agencies or officials.¹⁴⁵

Applying *Deukmejian* to Proposition 54’s Section 6.1 poses a fundamental question: May an initiative force an Attorney General to file an answer or a notice of appeal if the Attorney General believes that the initiative is unconstitutional (so that an answer or appeal would be contrary to “the public interest”)? Stated differently, would a court mandate that an Attorney General answer or appeal when he or she believes that no good-faith basis exists for the answer or appeal?

No definitive answer exists. Part of the difficulty here is that *Deukmejian*’s discussion of the Attorney General’s powers cited to both the State constitution and State statutes.¹⁴⁶ Perhaps, then, an initiative that included a constitutional amendment to require the Attorney General to file an answer or notice of appeal would effectively overrule *Deukmejian*, thus compelling filing of an answer or notice of appeal despite the Attorney General’s beliefs about the initiative.¹⁴⁷ Proposition 54’s Section 6.1, however, specifically amends a statute — namely, the Government Code — so it is questionable whether it would override the California Supreme Court’s ruling in *Deukmejian*.

144 *Id.* at 1209.

145 *Deukmejian*, 624 P.2d at 1207, 1209 (citing *D’Amico v. Bd. of Med. Exam’rs*, 520 P.2d 10, 20 (1974)).

146 *Deukmejian*, 624 P.2d at 1209.

147 Proponents seeking to qualify such initiatives (which contain constitutional mandates) for statewide ballots may face practical hurdles in states where constitutional initiatives require more signatures than statutory ones. For example, in California, initiatives amending the state’s constitution currently require almost 220,000 more signatures than statutory initiatives. See CAL. CONST. art. II, § 8(b) (requiring signatures of eight percent of the total votes cast in the most recent gubernatorial election for constitutional initiatives, but only five percent for statutory initiatives); *Statement of Vote*, CAL. SEC’Y OF STATE 6 (Nov. 4, 2014), <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf> (reporting that approximately 7.32 million votes were cast in the most recent gubernatorial election). Accordingly, a constitutional initiative — including one where the only constitutional provision is the Attorney General’s obligation to file an answer or a notice of appeal — might cost \$1 million more than a purely statutory initiative for signature gathering. See, e.g., Caragozian, *supra* note 26, at 695 & n.50 (noting that signature gatherers charge \$3 to \$5 or more per signature).

CONCLUSION

Considerable reason exists for skepticism toward the capacity of Proposition 60's Section 7 — which threatened to fine an initiative's proponent for a partially or wholly invalid initiative — to create personal standing for the proponent. The prospect of a \$10,000 penalty is uncertain, and in addition, courts are likely to deem the penalty self-inflicted. Moreover, there is reason to question the validity of scholars' bounty and refund variations: (1) a bounty would appear to have no limits on who could have standing and also departs substantially from the traditional *qui tam* structure; and (2) a refundable filing fee would be available only in states that impose and retain fees, and further, might be outside the logic of traditional standing.¹⁴⁸ Less ambiguity, however, attends Proposition 60's Section 10, which purports to allow the proponent to represent the state and assume the state's standing. That provision appears to be invalid under (a) the California Constitution's bar on initiatives naming a person to hold office; and (b) Article III in making Proposition 60's proponent a state employee in name only without *Hollingsworth's* substantive attributes such as responsiveness to limited resources and changes in public opinion. Accordingly, initiative drafters in California and other states authorizing initiatives should refrain

148 Until courts rule otherwise, of course, none of these approaches can be categorically dismissed. Also, little disadvantage would appear to result from including such provisions in future initiatives (except for the disadvantage of the proponent perhaps being liable to pay the fine under provisions like Proposition 60's Section 7). Accordingly, absent definitive future case law to the contrary, initiative drafters' best practices might now include language — adapted from Proposition 60 — similar to the following (along with the Proposition 60's Section 9 severability language):

The People of this State hereby declare that the proponent of this [Initiative] shall be held civilly liable in the event this [Initiative] is struck down, after passage, by a court for being constitutionally or statutorily impermissible. Such an impermissible [Initiative] is a misuse of taxpayer funds and electoral resources and the [Initiative]'s proponent, as the drafter must be held accountable.

In the event this [Initiative], after passage, is struck down, in whole or in part, as unconstitutional or statutorily invalid, and all avenues for appealing the court decision have been exhausted, the proponent shall pay a civil penalty of \$10,000 to the State for failure to draft a wholly constitutionally or statutorily permissible initiative. No party of entity may waive this civil penalty.

See *Proposition 60*, *supra* note 2, § 7. Comparable language could be crafted for monetary rewards and refundable filing fees.

from including such representational standing provisions.

Less reason for skepticism exists with regard to the gist of Proposition 54's Section 6.1 mandate that the Attorney General file a notice of appeal. If, as set forth in Part III above, Section 6.1 is revised in two important ways — (1) the mandate is added to the state constitution, not to a statute; and (2) the Attorney General is required to file an answer (even if just a pro forma one¹⁴⁹), as well as a notice of appeal — initiative proponents may participate in federal litigation. More specifically, proponents in circuits that allow piggyback standing, such as the Ninth Circuit, could intervene as defendants at trial, and proponents in all circuits may be allowed to brief and argue as amici on appeal, despite their lack of actual standing. To be sure, such participation would be less robust than that of full-fledged defendants and appellants, but *Hollingsworth's* standing restrictions may leave initiative proponents few alternatives.

149 See *supra* note 138 and accompanying text.

The History, Means, and Effects of Structural Surveillance

*Jeffrey L. Vagle**

Abstract

The focus on the technology of surveillance, while important, has had the unfortunate side effect of obscuring the study of surveillance generally, and tends to minimize the exploration of other, less technical means of surveillance that are both ubiquitous and self-reinforcing — what I refer to as structural surveillance — and their effects on marginalized and disenfranchised populations. This Article proposes a theoretical framework for the study of structural surveillance which will act as a foundation for follow-on research in its effects on political participation.

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I do really take it for an indisputable truth, and a truth that is one of the corner stones of political science — the more strictly we are watched, the better we behave.

Jeremy Bentham¹

Activities which seem benevolent or helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as “subversive” by those whose property interests might be burdened or affected thereby Some of our soundest constitutional doctrines were once punished as subversive.

Justice Robert Jackson²

I. Introduction and Framework

There is nothing particularly new about surveillance. It is a concept that is as old as humanity itself. As our earliest societies discovered, without the ability to make disobedience of social norms difficult or costly through some means of social control, communities of any size would be impossible to maintain.³ But how do we discern between surveillance necessary for healthy, inclusive, and successful communities, and those means that exercise social control to an extent that ultimately endangers community viability? There does not appear to be a bright line that clearly separates these regimes.

To blandly refer to surveillance as the pursuit of societal stability through the encouragement of adherence to social norms, however, does not give full voice to history’s violent efforts to impose or resist these means of social control.⁴ Political, economic,

1 JEREMY BENTHAM, *Farming Defended*, in WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., 2001).

2 Robert Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 19-20 (1940).

3 See *infra* note 66 and accompanying text.

4 See generally JAMES R. BENIGER, *THE CONTROL REVOLUTION: TECHNOLOGICAL AND ECONOMIC ORIGINS OF THE INFORMATION SOCIETY* (1986) [hereinafter *CONTROL REVOLUTION*] (explaining and tracing the origins of the Information Society and its inevitable transition toward the exploitation of that information in the pursuit of societal control); ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE: VOLUME TWO OF A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM* (1985) (applying social theory to understand the development of the modern state, and its means of politics, international relations, and social control); *SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK, AND DIGITAL DISCRIMINATION*

religious, and other social institutions all rise and fall through the assertion of social control within a localized universe of competing and cooperating social units, and through these periods of instability and struggle, social institutions emerge.⁵ These social units then sustain themselves by minimizing instability through means selected for their ordinariness and relative invisibility.⁶ Although some social units, such as families or isolated autonomous communities, are small enough to escape the need for such surveillance, the majority require powerful central administrations and armies of personnel to raise revenue, ensure public safety, provide for national security, and perform the multitude of other functions critical to the life of the modern state.⁷ In the shift to modernity and the information

(David Lyon ed. Routledge 2005) (2003) (examining surveillance through the lens of social differences and government social controls); CATHY LISA SCHNEIDER, *SHANTYTOWN PROTEST IN PINOCHET'S CHILE* (1995) (exploring democratic transition from a grassroots level by examining efforts by oppressed and marginalized populations and their efforts to resist social control); GUILLERMO O'DONNELL & PHILIPPE SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (1986) (examining large-scale social transformations following the collapse of rigid or absolute programs of structural social controls); Henner Hess, *Like Zealots and Romans: Terrorism and Empire in the 21st Century*, 39 *CRIME L. & SOC. CHANGE* 339, 340-41 (2003) (examining and defining the concept of terrorism through historical examples of empires and military opposition to them); Lukas de Blois, *The Third Century Crisis and the Greek Elite in the Roman Empire*, 33 *HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE* 358 (1984) (examining the political, military, financial, and social problems facing the Roman Empire beginning with the reign of Marcus Aurelius, and the subsequent violent methods used by Roman soldiers against citizens, especially those not considered fully "Roman").

5 See MAX WEBER, *ECONOMY AND SOCIETY* 31 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1968); James B. Rule, *Social Control and Modern Social Structure*, in *PRIVATE LIVES AND PUBLIC SURVEILLANCE* 19-43 (1973).

6 "Faced with the problem of securing compliance from a mobile, anonymous public, any regime must do its best to develop techniques to replicate the functions of gossip and face-to-face acquaintance in small-scale social settings." Rule, *supra* note 5, at 23.

7 "The administrative system of the capitalist state, and of modern states in general, has to be interpreted in terms of the coordinated control over delimited territorial arenas which it achieves . . . no pre-modern states were able even to approach the level of administrative coordination developed in the nation-state." ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 57 (1990). See also WEBER, *supra* note 5, at 48. This expansion was not without its early critics. Weber himself described the "order . . . now bound to the technical and economic conditions of machine production

society, these institutions developed new regimes of surveillance and information management using the technological advances that emerged in rapid succession starting in the late nineteenth century.⁸

Too often, however, we rely solely on the use of these advances in technology to identify “good” surveillance from “bad” surveillance. An explosion of innovation has led us to frame the surveillance debate in terms of intrusions specific to a particular use of technology, from the early twentieth century (“Can they really listen in on my telephone conversations?”) to the late twentieth century (“Can they really read my email?”) and beyond (“Can they really build a permanent database of my location data?”).⁹ But as new technologies inevitably become established as integral parts of our daily lives, our comfort with — or grudging acceptance of — advanced surveillance methods tends to stabilize, and the bulk of the surveillance debate turns to the realm of the newly possible.

The exploration and analysis of potential surveillance abuses of new technologies is, of course, an important discussion that needs to take place. But when we put too much focus on the future, we tend to lose sight of the important surveillance issues of the past and present, a phenomenon prevalent in popular media.¹⁰ This

which today determine the lives of all the individuals who are born into this mechanism” as an “irresistible force” and an “iron cage.” MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 123 (Talcott Parsons trans., Routledge 2001) (1930).

8 As Beriger points out:

even the word *revolution* seems barely adequate to describe the development, within the span of a single lifetime, of virtually all of the basic communication technologies still in use a century later: photography and telegraphy (1830s), rotary power printing (1840s), the typewriter (1860s), trans-atlantic cable (1866), telephone (1876), motion pictures (1894), wireless telegraphy (1895), magnetic tape recording (1899), radio (1906), and television (1923).

CONTROL REVOLUTION, *supra* note 4, at 7.

9 See Inga Kroener & Daniel Nyland, *New Technologies, Security and Surveillance*, in *ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES* 141 (Kirstie Ball et al. eds., 2012).

10 See, e.g., Edward Wyatt & Claire Cain Miller, *Tech Giants Call for Limits on Government Surveillance of Users*, N.Y. TIMES (Dec. 9, 2013), http://www.nytimes.com/2013/12/09/technology/tech-giants-issue-call-for-limits-on-government-surveillance-of-users.html?pagewanted=all&_r=0; Justin Fenton, *Baltimore Police Used Secret Technology to Track Cellphones in Thousands of Cases*, BALTIMORE SUN (Apr. 9, 2015), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-stingray-case-20150408-story.html#page=1>; Paul Eckert, *U.S. Sets Up Intelligence Surveillance Technology Review Body*, REUTERS (Aug. 12, 2013), <http://www.reuters.com/>

problem manifests itself in two related ways. First, it tends to mask surveillance means that, over time, fade into the background noise of life to the point that they become essentially invisible to all but the most careful observers. These means, which I collectively refer to in this Article as *structural surveillance*, are technology agnostic, tend to remove the traditional observer from the surveillance equation through an autonomic presence, and are remarkable only in their ordinariness.¹¹ Second, due in large part to their meta-invisibility, these means often provide an excellent blunt instrument of social control, and are therefore prone to abuse.¹² This misuse, of course, can increase the visibility of these means, so they are often reserved for use within marginalized or otherwise disenfranchised segments of the population, who are less empowered to resist them.¹³

One example of this phenomenon (which I will explore further elsewhere in this Article) can be found in the history of the Fourth Amendment to the U.S. Constitution.¹⁴ The fundamental precept of this text — forbidding all types of unreasonable searches and seizures — is deceptively simple in its ambiguity, yet the amendment clearly forbids the use of general warrants, which grant agents of the state broad discretion and authority to search and seize unspecified things, places, or persons, with little to no limitations.¹⁵ Promiscuous government searches under the general warrant originated under early English law and were well established as structural surveillance by the time members of Parliament began to protest their use in the seventeenth century.¹⁶ The source of the MPs' consternation arose out of the Crown's use of the general warrant against "gentlemen and dissenting Protestants" (two politically powerful demographics), when their only appropriate use (according to the MPs) was on "vagrants and Catholics."¹⁷

article/2013/08/12/us-usa-security-review-idUSBRE97BOUT20130812.

11 See *infra* Section II.B.

12 See *infra* Section III.

13 See *infra* Section IV.

14 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

15 See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758, 780 (1994).

16 See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT* 134-40 (2009).

17 See *id.* at 22-23.

The American colonists of the seventeenth and early eighteenth centuries did not immediately inherit this distaste for the general warrant and other structural surveillance, mainly because the articulate elites of these regions were the beneficiaries of these programs, such as the collection of revenue and the suppression of insurrectionists in the colonial North, and the slave patrols of the colonial South.¹⁸ It was not until England transformed in the eyes of elite colonists from Mother Country to Foreign Presence that American political leaders fully turned against the unreasonable searches and seizures of the Crown.¹⁹ In fact, revolutionary America presented something of a paradox with respect to structural surveillance. On the one hand, by the late eighteenth century, the existing constitutions of a majority of the original thirteen colonies contained some sort of provisions against unreasonable search and seizure, with opposition to such searches fading in intensity as one traveled further south.²⁰ On the other hand, the revolutionary governments saw fit to ignore these prohibitions when this structural surveillance presented expedient means to suppress dissent, control trade, crush slave rebellion, generate revenue, or control undesirable populations.²¹ Resistance to general warrants as structural surveillance was finally articulated when antifederalists, recognizing the negative implications of an overly powerful central government, spearheaded the drafting and ratification of a Bill of Rights.²²

So what drives political or social tolerance — or intolerance — for structural surveillance? It is not as if the means of structural surveillance always go unchallenged. While researching the history of claims challenging U.S. government surveillance programs, I had begun work examining the near insurmountable obstacle of Article

18 See *id.* at 371-75.

19 One of the earliest — and most forceful — arguments against British general warrants and writs of assistance arose out of Paxton's Case (1761), where Massachusetts lawyer James Otis denounced the practice as "instruments of slavery" and reflected an absolutism that "cost one King of England his head and another his throne." James Otis, *Against Writs of Assistance, Address before the Superior Court* (1761), in 2 JOHN ADAMS, *LEGAL PAPERS* 134, 139-41 (L. Kinvin Wroth & Hiller B. Zobel eds., Atheneum 1965).

20 CUDDIHY, *supra* note 16 at 603-13.

21 *Id.* at 613-34.

22 See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 506-11 (1929); CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* 24-54 (1966).

III standing facing these claimants.²³ In nearly every one of these cases, courts held that plaintiffs had failed to show injury sufficient to bring a claim in U.S. federal courts.²⁴ For a plaintiff to establish Article III standing, current jurisprudence requires the plaintiff to be able to show injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”²⁵ Under this doctrine, an injury is not sufficient if it is based on a “speculative chain of possibilities,” a difficult evidentiary obstacle to overcome if you are challenging the constitutionality of a secret program.²⁶ Even a showing of a high probability of injury is not enough to meet this requirement.²⁷ The Supreme Court has pointed out that even if a denial of standing would mean that the constitutionality of a government program could never be foreseeably or meaningfully challenged, that fact alone is not enough to find standing.²⁸ A high bar indeed.

My initial research thus began as an exploration of the question of injury in surveillance cases, testing current jurisprudence against the claims of surveillance plaintiffs.²⁹ While reading these cases, it occurred to me that the vast majority of the challenges were to programs that were either highly technological in nature or otherwise exotic or *sui generis*.³⁰ However the concept of surveillance

23 See, e.g., *Laird v. Tatum*, 408 U.S. 1 (1972); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013); *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326 (2d Cir. 1973); *New Alliance Party v. FBI*, 858 F. Supp. 425 (S.D.N.Y. 1994).

24 See, e.g., *Laird*, 408 U.S. at 13-14 (the Court holding that “[a]llegations of a subjective ‘chill’ [due to knowledge of surveillance program] are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm”).

25 *Amnesty Int’l*, 133 S. Ct. at 1147 (citations omitted).

26 *Id.* at 1150.

27 *Whitmore v. Arkansas*, 495 U.S. 149, 156 (1990).

28 *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (“[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.” (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974))).

29 See, e.g., *ACLU v. Clapper*, 804 F.3d 617 (2d Cir. 2015) (challenging the legality of the National Security Agency’s continued mass collection of U.S. citizens’ telephone records during a 180-day transition period); *Amnesty Int’l*, 133 S. Ct. 1147 (challenging the legality of the 2008 expansion of the Foreign Intelligence Surveillance Act (FISA) and the mass collection of U.S. citizens’ electronic records under it).

30 *ACLU*, 804 F.3d 617; *Amnesty Int’l*, 133 S. Ct. 1147. *ACLU* discusses the NSA’s collection of metadata from phones while *Amnesty Int’l* discusses the Foreign

is neither bound to a particular technology nor is it peculiar to a time or place — surveillance is as common as humanity itself. While advances in technology can change the nature of surveillance, why does scholarship and case law tend to focus almost exclusively on recent programs that rely on sophisticated telecommunications networks and advanced computing technologies? Perhaps we are focusing on the wrong subjects when we ponder surveillance harms. Our attention is naturally drawn toward the new and unique, often to the exclusion of the old and common. So what do we call surveillance that no longer meets these criteria?

This research — beginning with this Article — is an attempt to closely examine the means of surveillance that aren't necessarily the most technically advanced methods available, yet still remain, if only as nearly-invisible background noise, and to quantify the individual and societal harms that stem from these common methods and programs. This surveillance, which I describe herein as *structural surveillance*, includes those measures that, through legislation, codification, or cultural habit, have developed or calcified into systems that fit neatly within our accepted societal institutions, and have become so commonplace as to become virtually indistinguishable from the backgrounds of our everyday lives.

My research can be divided into two components. First, through this Article, I will lay out exactly what I mean by structural surveillance, describing its history and means, and beginning an exploration of its effects. From there, my research will turn toward an empirical study of these effects, the results of which will be described in future articles.

II. The Concept and History of Structural Surveillance

A. *Structural Surveillance and Structural Violence*

In his 1969 paper *Violence, Peace, and Peace Research*,³¹ Johan Galtung took on the difficult task of articulating a useful definition of violence. As a basis, Galtung started with the concept that “violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential

Intelligence Surveillance Act, which provides for technical surveillance of non-US persons not located within the US.

31 Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167 (1969).

realizations.”³² Violence, then, “is that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance.”³³ Galtung’s definition operates within the context of influence relations, where the definition assumes an influencer (the subject), an influence (the object), and the mode of influence (the action).³⁴ But how do we reason about violence when there is no direct subject in the standard relational triangle? Does it make sense to consider the case where someone is the object of violent action that is not directly attributable to a specific actor? Galtung reasoned that such a scenario must be accounted for, since there are clear instances of this type of violence that manifest as unequal power and unequal life opportunities.³⁵

The term Galtung coined to describe this category is *structural violence* — violence built into societal structure that is just as meaningful as any other category of violence, yet becomes less visible due to its missing subject-action-object relationship.³⁶ Structural violence becomes associated with a certain stability, and its deceptively “tranquil waters” attract less notice than the overt action (and actors) of personal violence.³⁷ Within a stable society, personal violence — a stabbing, a shooting, a riot — stands out as an aberration, a deviation from the static social order, whereas structural violence is the order.³⁸ Structural violence may indeed be understood and accepted by some as simply the price of stability, even if the costs are borne unequally across social divisions.³⁹

Sociologist Anthony Giddens’s work provides a link between state violence (in the sense Galtung was describing) and state surveillance under a general theory of the sources of power.⁴⁰ Giddens describes a society’s sources of power (and, ultimately, violence) using a container metaphor, where power is generated and stored through the concentration of resources and is strongly

32 *Id.* at 168.

33 *Id.*

34 *Id.* at 169.

35 *Id.* at 171 (pointing to instances of institutional racism as examples of this subjectless violence, citing Stokely Carmichael’s work on the racialization of structural inequities).

36 *Id.* See also SALVOJ ZIZEK, *VIOLENCE* 1-2 (1st ed. 2008)

37 Galtung, *supra* note 31, at 173-74.

38 *Id.*

39 See *infra* Section IV.

40 GIDDENS, *supra* note 4, at 12-14.

influenced by the technologies available to that society.⁴¹ This power creation and “containment” is accomplished via surveillance in two senses. First, surveillance can enable the collection and, more importantly, the storage of “coded information,” which is data that allows the state “to administer the activities of individuals about whom it is gathered.”⁴² The introduction of digital communication has, of course, vastly expanded the possibilities for the collection of coded information, and has opened up new universes in the storage and analysis of that information.⁴³ Second, surveillance is employed in the classical sense, where the activities of one group are directly supervised by another.⁴⁴ These methods can be useful within small societies without the aid of any particular organizational structure, but can only be scaled to larger societies, e.g., the modern nation-state, through the integration of advanced bureaucracies and network infrastructure, factors which are also greatly enhanced through the deployment of advanced technologies.⁴⁵

The piece of Giddens’s work that is most relevant to this research is his linking of surveillance to an organization’s control over the “timing and spacing” of human activities.⁴⁶ Surveillance — specifically, the coding of information describing these activities — is critical to the state’s power/violence monopoly, because it provides a framework for effectively scaling direct supervision to nation-state sizes.⁴⁷ This expansion of surveillance capabilities, as tightly integrated into our modern concept of governance, is thus both the vector through which the modern large-scale bureaucracy is made

41 *Id.* at 13.

42 *Id.* at 14.

43 A topical example of this can be found in the recent (and secretive) construction of the NSA’s massive data center near Bluffdale, Utah. See James Bamford, *The NSA is Building the Country’s Biggest Spy Center (Watch What You Say)*, WIRED, Mar. 15, 2012. Details about the facility are, of course, speculative, but experts have estimated the data storage capacities of the facility to be anywhere from 12 exabytes to 5 zettabytes. Kashmir Hill, *Blueprints of NSA’s Ridiculously Expensive Data Center in Utah Suggest It Holds Less Info Than Thought*, FORBES, Jul. 24, 2013. For reference, 1 zettabyte = 1,000 exabytes = 1 billion petabytes = 1 trillion terabytes.

44 GIDDENS, *supra* note 4, at 14.

45 See Eugene Litwak & Josefina Figueira, *Technological Innovation and Theoretical Functions of Primary Groups and Bureaucratic Structures*, 73 AM. J. SOC. 468, 470-73 (1968).

46 GIDDENS, *supra* note 4, at 46-48.

47 *Id.*

possible, as well as the institutional means through which the state builds and contains power.⁴⁸

B. The Characteristics of Structural Surveillance

Based in part on Galtung's theory of structural violence, and Giddens's links between power/violence and surveillance, I will consider the proposed concept of structural surveillance. As discussed *supra*, links between the state, violence, and surveillance are well established in the literature, and provide a foundation upon which to build this conceptual framework. My goal with this Article is twofold. First, I will develop a theoretical history and language through which one can reason about the means and effects of social control regimes that have become calcified within institutional structures to the point of normalcy. Second, I intend to use this theoretical framework to develop empirical explorations of these systems and their effects on the objects of surveillance.

I define structural surveillance through two core characteristics — self-reinforcement and ubiquity. By *self-reinforcing*, I mean those surveillance systems that have, through legislation, codification, or cultural habit, developed (or calcified) into systems where there is no easily identifiable *watcher*, and which seem to operate on their own outside of normal means of control. By *ubiquity*, I do not necessarily mean that the system is uniform across all communities or populations, but instead refer to systems that have become commonplace to the extent that those outside its gaze either endorse or ignore its existence, and those under its gaze eventually accept it as woven into the fabric of reality. Together, these two characteristics create surveillance systems that appear to violate the usual subject-action-object power relationship, and fade into the background of our daily lives.

Perhaps the best way to illustrate the concept of structural surveillance is through an example. The concept of city planning in America grew out of the demands of rapidly increasing populations, and the associated sudden need for transportation, commerce, public health, and public recreation facilities.⁴⁹ Following an extended period of instability and unrest in American cities in the mid-nineteenth

⁴⁸ *Id.* at 48-49.

⁴⁹ Frederick Law Olmsted, *The Town-Planning Movement in America*, 51 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI.: HOUSING AND TOWN PLANNING 172, 172-74 (1914).

century, Frederick Law Olmsted, a landscape architect and journalist, proposed the creation of parks and other public spaces within cities to act as “social safety-valves,” where people from all socioeconomic classes could meet not only to enjoy common recreational pursuits and escape the stresses of the burgeoning city, but also to engage in civic society with minimal institutional control.⁵⁰ The idea of public spaces has long had a place in the urban setting, but the concept experienced a rebirth in the Victorian city.⁵¹ Haussmann’s Paris provides another example of this philosophy, where public urban innovations, such as the boulevard, expanded access to all of a city’s inhabitants and democratized the public sphere in ways that existing institutions had little control over, a fact that made the governing class somewhat uncomfortable.⁵² The public sphere had turned from an exclusive space to an inclusive space, both figuratively and literally.⁵³

It was not long before concerns over public safety and public health began to temper enthusiasm for public spaces.⁵⁴ These concerns, both real and imagined, found fertile ground in the nineteenth century theories regarding the working classes and the poor generally.⁵⁵ These “dangerous classes” were described as a persistent threat to the established social order, and attempts to alleviate poverty or ignorance were seen by social and economic philosophers as wasted efforts, as it was well understood that the lower classes were victims of their own defects and accommodations such as increased access to public spaces would only serve to “raise the worthless above the worthy.”⁵⁶

It was, of course, true that controlling crime and otherwise maintaining order in public spaces posed a nontrivial challenge for

50 See MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 226-27 (Verso 1990).

51 See Peter G. Goheen, *Public Space and the Geography of the Modern City*, 22 *PROGRESS IN HUM. GEOGRAPHY* 479, 480-81 (1998).

52 See David Harvey, *The Political Economy of Public Space*, in *THE POL. OF PUB. SPACE* 17, 30-31 (Seth A. Low & Neil Smith eds., 2006).

53 See Miles Ogborn, *Ordering the City: Surveillance, Public Space and the Reform of Urban Policing in England 1835-56*, 12 *POL. GEOGRAPHY* 505, 516-17 (1993) (describing the mechanism by which public spaces were folded into the new policing strategy of general surveillance); Goheen, *supra* note 51, at 481.

54 See HENRY MAYHEW, *LONDON LABOUR AND THE LONDON POOR; A CYCLOPAEDIA OF THE CONDITION AND EARNINGS OF THOSE THAT WILL WORK, THOSE THAT CANNOT WORK, AND THOSE THAT WILL NOT WORK* (London: Griffin, Bohn, and Company 1851).

55 See LYDIA MORRIS, *DANGEROUS CLASSES: THE UNDERCLASS AND SOCIAL CITIZENSHIP* 10-11 (Routledge 1994); MAYHEW, *supra* note 54, at 6.

56 MORRIS, *supra* note 55, at 12.

nineteenth century governments, due in part to the fact that the concept of modern policing was only just beginning to take shape.⁵⁷ The notion that a professionalized administrative body could be established not only to react to crimes already committed, but to proactively enforce social control on the streets to ensure “the general organization of city life” was something of a revolution.⁵⁸ The introduction of regular police patrols in nineteenth century cities, along with the creation of related political and administrative mechanisms at all levels, reestablished social order and initiated the concept of modern policing.⁵⁹

This concept — a revolutionary and not uncontroversial innovation at the time — has become a permanent part of the fabric of modern governance, and, with it, the Olmstedian concept of the minimally controlled public space has become increasingly enmeshed in structural surveillance. City squares and downtown streets now offer few, if any, spaces not visible to the gaze of closed circuit television (CCTV) cameras.⁶⁰ Fear of crime, or, more recently, terrorist activity, has driven an increased police presence, including such recent innovations as portable watchtowers, arrays of microphones to triangulate the source of gunfire, electronic communications collection vans, and a general militarization of tactics, weaponry, and other equipment, which has all become surprisingly commonplace in the relatively short time since the tragic events of September 11, 2001.⁶¹

57 See generally CAROLYN STEEDMAN, *POLICING THE VICTORIAN COMMUNITY: THE FORMATION OF ENGLISH PROVINCIAL POLICE FORCES, 1856-80* (Routledge 2015) (detailing the political and social significance of early police forces within English society).

58 See Ogborn, *supra* note 53, at 507.

59 See *id.* (examining London’s Metropolitan Police as an example of how modern policing strategies developed and were implemented); see, e.g., Sascha Auerbach, “*The Law Has No Feeling for Poor Folks Like Us!*”: *Everyday Responses to Legal Compulsion in England’s Working-Class Communities, 1871-1904*, 45 J. Soc. Hist. 686, 686-708 (2012) (examining the effect of compulsory education on the poor and working class in the nineteenth century).

60 Paul Lewis, *You’re Being Watched: There’s One CCTV Camera for Every 32 People in UK*, THE GUARDIAN: SURVEILLANCE (Mar. 2, 2011), <https://www.theguardian.com/uk/2011/mar/02/cctv-cameras-watching-surveillance>.

61 For a general discussion of this topic, see THE NEW POL. OF SURVEILLANCE AND VISIBILITY (Richard V. Ericson, Kevin D. Haggerty, eds., Univ. of Toronto Press, 2006); Radley Balko, *Rise of the Warrior Cop: How Did America’s Police Become a Military Force on the Streets*, 99 A.B.A. J. 44, 52 (July 2013); Daryl Meeks, *Police Militarization in Urban Areas: The Obscure War Against the Underclass*, 35 THE BLACK SCHOLAR 33 (2006); Samuel Nunn, *Police Technology in*

Thus, in the space of about 150 years, the public space has experienced a gradual introduction to surveillance means of widely differing levels of technological sophistication, with a rather sudden increase in methods in the years since 9/11. What we have witnessed in these changes is the establishment of structural surveillance in a particular public sphere. When these means — from the first establishment of regular police patrols to the installation of automated CCTV cameras — were first introduced, they were often noteworthy, if not controversial.⁶² But they were eventually accepted as unremarkable fixtures of everyday life (ubiquity), and were established through legislative or regulatory processes that effectively removed the easily identifiable watcher from the surveillance equation (self-reinforcement).⁶³ As I will explore later in this Article, these means of structural surveillance, in our public spaces and elsewhere, often place a substantial burden on the “dangerous classes,” while the benefits tend to flow to the upper and governing classes.⁶⁴

C. Structural Surveillance as a Natural Result of the Information Society

Of all the innovations that emerged from the Industrial Revolution, the advent of modern bureaucracy may well be the most successful, both in terms of longevity and scope.⁶⁵ A defining characteristic of bureaucracy, and in turn, a strong inclination of modernity, is surveillance.⁶⁶ Surveillance itself is, of course, nothing

Cities: Changes and Challenges, 23 *TECH. SOC'Y* 11 (2001); DIDIER FASSIN, *ENFORCING ORDER: AN ETHNOGRAPHY OF URBAN POLICING* (Polity Press 2013).

62 See Leon Hempel & Eric Topfer, *The Surveillance Consensus: Reviewing the Politics of CCTV in Three European Countries*, 6 *EUR. J. CRIMINOLOGY* 157, 166, 172 (2009).

63 See *supra* Part II.B.

64 See *infra* Section IV.

65 See WEBER, *supra* note 5, at 969-73; CONTROL REVOLUTION, *supra* note 4, at 6; Edward Higgs, *The Rise of the Information State: The Development of Central State Surveillance of the Citizen in England*, 14 *J. HIST. SOC.* 175, 1500-2000 (2001).

66 See GIDDENS, *supra* note 4, at 2, 5; Ulrich Beck, *Risk Society and the Provident State*, in *RISK, ENVIRONMENT AND MODERNITY: TOWARD A NEW ECOLOGY* 27-43 (Scott Lash et al., eds., Martine Chalmers trans., SAGE Publications 1996). Beck describes the need for increased surveillance as a direct result of industrial society, when “the social, political, ecological and individual risks created by the momentum of innovation increasingly elude

new, and it is important to separate the concept of surveillance from any particular era or technological phenomenon.⁶⁷ In fact, social control and the associated means of surveillance have advanced and adapted — often quite radically — over the millennia, in response to cultural and technological changes.⁶⁸ Evolutions in social control become part of a feedback loop with the very structures of the society from which they emerge, a phenomenon I will return to in later sections of this Article.⁶⁹ As communities became societies, as artisans turned to enterprises, as religious groupings emerged and morphed, and as markets emerged and expanded, values and principles evolved, and along with them the means — voluntary and coercive — of enforcement.⁷⁰

In the period from the mid-eighteenth through mid-nineteenth centuries, as industrialization in western nations began to create increasingly complex systems of interdependencies between manufacturing, capital, energy production, labor, and markets, new

the control and protective institutions of industrial society" *Id.* at 27. When these new or expanded risks outstrip the existing capacities of analysis, policy, or regulation to understand or cope with the issue, pressure is created to develop new methods of surveillance and control.

67 A society's self-regulation according to a set of values and principles is achieved through some form of social control. *See* Morris Janowitz, *Sociological Theory and Social Control*, 81 AM. J. SOC. 82 (1975). Societies and civilizations have long used surveillance as a means of effecting social control through relatively simple means, including tax collection, census, and the apprehension of criminals. Higgs argues that the early origins of what we now consider the modern information state can be traced to early sixteenth century England. Higgs, *supra* note 65.

68 *See* CONTROL REVOLUTION, *supra* note 4 at 61-64. Sociobiologists argue that the proto-organization and technology of self-replicating proteins and the molecular ordering of DNA initiated this process. *See generally* RICHARD DAWKINS, *THE SELFISH GENE* (2d. ed. 1989).

69 For example, rural life in pre-industrial England was made up of three classes: landowners, farmers, and laborers. BERTRAND RUSSEL, *FREEDOM VERSUS ORGANIZATION: 1814-1914*, at 51 (1934). Industrial life required only two classes — owners and laborers. *Id.* at 67. While industrialization flattened somewhat the complex class relationships in England and elsewhere, social norms and values increased in complexity, attracting a new generation of political, economic, and social theorists to the tasks of making sense of changes to social order and reestablishing control over existing social structures. *See generally* THOMAS MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION* (Electronic Scholarly Publishing Project, 1998) (1798); JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* (1776); JAMES MILL, *ELEMENTS OF POLITICAL ECONOMY* (1821); DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (1817).

70 *See* WEBER, *supra* note 5, at 26-28, 31-38.

means of communication and control were required to take full advantage of new economies of scale and realize productivity levels unheard of under earlier forms of management and organization.⁷¹ Technological innovations in manufacturing and transportation brought with them new paradigms in social and economic thought and behavior, bringing an end to thousands of years of predominantly agricultural society, and therefore displacing the traditional means of social control without providing an immediately obvious replacement.⁷² The resulting dramatic increases in transactional speeds inevitably outpaced the existing modes of social control and interaction, and began to threaten the viability of incumbent institutions and structures.⁷³

I should note here what I mean when I use the term *control* within the scope of this Article. Here, I refer to control in its most general sense — to influence or direct behavior toward some predetermined goal. This definition is informed by the sociology literature, which examines the social relationship, the organization, voluntary or compulsory social participation, and consensual and imposed order.⁷⁴ Hence, control, in this sense, is primarily concerned with the two elements of influence and purpose, and control theory — in both the sociological and mathematical senses — requires facilities for the communication and processing of information in order to manage behavior through feedback.⁷⁵ I will introduce refinements to this definition in later sections, but for the time being, it will suffice to say that control here refers to any influence guided by purpose, however small.

The nineteenth century crisis of control was not limited to industrial and commercial spheres.⁷⁶ Societal and governmental

71 See CONTROL REVOLUTION, *supra* note 4, at 169-72.

72 *Id.*

73 Beniger characterizes this phenomenon as a “crisis of control,” a period in which a society’s organizational, information processing, and communication capabilities are outpaced by manufacturing and transportation technologies, resulting in a systemic loss of political and economic control which threatens existing social and governmental institutions and structures. See CONTROL REVOLUTION, *supra* note 4, at 8-9, 11-12.

74 See, e.g., WEBER, *supra* note 5, at 46-53.

75 See Richard Bellman, *Control Theory*, 211 SCI. AM. 186 (1964); J.W. Forrester, *Industrial Dynamics: A Major Breakthrough for Decision Makers*, 36 HARVARD BUS. REV. 37, 39-40 (1958); see generally WILLIAM T. POWERS, *BEHAVIOR: THE CONTROL OF PERCEPTION* (1973).

76 Franklin F. Mendels, *Proto-Industrialization: The First Phase of the Industrialization Process*, 32 J. ECON. HIST. 241, 242-46 (Mar. 1972).

institutions were also experiencing their own growing pains due to the transformative effects of industrialization.⁷⁷ The levels of communication and information processing necessary for control in preindustrial institutions could generally be obtained through in-person interactions, and without the need for advanced technologies or extensive communications infrastructures.⁷⁸ These methods did not work at the scales driven by industrialization, and institutions at most levels were seeking a means to restore the levels of control they once enjoyed.⁷⁹

Correlative to the search by industrial, commercial, and governmental institutions for restored levels of control came the (re)emergence of the modern bureaucracy.⁸⁰ The increasing amounts of information deemed necessary to efficiently operate the complex systems newly created by the modern state and commercial enterprise required an overhaul and expansion of the age-old concept of centralized administration, and the importance of bureaucracy as an essential tool in dealing with the modern crisis of control is difficult to overstate.⁸¹ Further, even with the benefit of an organized and centralized bureaucracy, a society is ultimately hamstrung in its

77 See GIDDENS, *supra* note 4. Giddens argues that the crisis of control brought about by industrialization required a dramatic change in the way the state viewed its citizens, as “no pre-modern states were able even to approach the level of administrative co-ordination developed in the [modern] nation-state.” GIDDENS, *supra* note 7, at 57.

78 See Beck, *supra* note 66, at 27 (describing the need for increased surveillance as a direct result of industrial society, when the “social, political, ecological, and individual risks created by the momentum of innovation increasingly elude the control and protective institutions of industrial society”).

79 As Higgs points out, using the census as an example, “The older, parochial system was seen as inadequate” in its protection of property rights during industrialization, and therefore “the new system had to be generalised to all social classes in order to make it comprehensive – as in so many other ways, middle-class property rights had to be portrayed as universal human rights in order to make them enforceable.” Higgs, *supra* note 65, at 181.

80 Acknowledging the existence of bureaucracies and similarly organized administrative bodies prior to industrialization, Weber identifies the modern bureaucracy as a significant point of departure from these institutional types. WEBER, *supra* note 5, at 217.

81 Reinhard Bendix notes that any study of modern bureaucracy must acknowledge both the challenges to and protections of individual freedoms: “[T]he modern critics of the ‘service state’ tend to forget that governmental ‘interference’ has increased individual freedom by promoting social security, just as the earlier governmental aid in the development of corporate enterprise and western expansion increased the freedom of the business man.” Reinhard Bendix, *Bureaucracy and the Problem of Power*, 5 PUB. ADMIN. REV. 194, 195 (1945).

ability to build and contain power by the limits of the technology available to that society.⁸² The limitations on an organization's ability to gather and analyze Giddens's coded information is directly dependent upon its ability to communicate, store, and process that information, a characteristic described by Weber's concept of rationalization.⁸³

The core idea behind rationalization is the proposition that a society's creation and containment of power through control can increase either through increasing the society's capability to process coded information, or by limiting the amount of that information to be processed.⁸⁴ The modern state has modified this concept by maximizing both precepts: increasing information processing capability in order to effectively decrease the amount of information that is processed.⁸⁵ The resulting organizations, processes, and technologies must therefore become part of the state's evolved infrastructure, much as cooperative organ systems became integral to complex organisms. This description should not convey any sort of malign intent on the part of the state or its institutions — it is meant to be descriptive rather than normative, and merely illustrates the functions necessary for an administrative body of scale to operate and survive.⁸⁶

In fact, the state and similar social structures have emerged out of a natural desire to protect and promote societal institutions and their members.⁸⁷ The role of surveillance in these structures is to realize the goals of these structures in practice, taking such early forms as censuses and revenue collections in order to support social order through public safety, public health, and providing for

82 CONTROL REVOLUTION, *supra* note 4, at 8-9.

83 *See id.* at 15-16.

84 *Id.*

85 *See* Connie L. McNeely & Jong-on Hahm, *The Big (Data) Bang: Policy, Prospects, and Challenges*, 31 REV. POL'Y RES. 304, 305-07 (2014).

86 "[L]et all these enterprises be managed in bureaucratic 'order,' introduce state-supervised syndicates, and let the rest of the economy be regulated on the guild principle with innumerable certificates of competency, academic and otherwise; let the citizenry in general be of the rentier paisible type — then, under a militarist-dynastic regime, the condition of the late Roman Empire will have been reached, albeit on a technologically more elaborate basis." MAX WEBER, *GESAMMELTE AUFSÄTZE ZUR SOZIAL- UND WIRTSCHAFTSGESCHICHTE 277* (Marianne Weber 1988), *translated in* ECONOMY AND SOCIETY LVIII-LIX.

87 *See* WEBER, *supra* note 5, at 217-41.

the general welfare of its citizens or members.⁸⁸ The ambiguity surrounding surveillance — especially structural surveillance — is in its dual nature: it acts both as means for a state to enforce rights and privileges granted to its citizens, while at the same time, providing the capabilities for states to use that same infrastructure to curtail those rights.⁸⁹ This ambiguity over surveillance as a means of social control, and its effects as an integral part of our governmental systems, is what this research will explore.

III. The Means of Structural Surveillance

The explicit or implicit establishment of structural surveillance programs can, in almost every instance, be traced to benign social control mechanisms initiated for the benefit of (most of) the community. Challenges arising from growing populations, technological advances, the spread of disease, and external and internal threats to general order act as forcing functions on societies to establish means of meeting these challenges, or at least attenuating unmanageable fluctuations. The modern state arose in large part as an organized response to these challenges, building within itself the administrative and political power necessary to both achieve legitimacy and establish and enforce order within the community.⁹⁰

The late- and post-modern periods were marked by significant socioeconomic and political changes, beginning with western reconstruction efforts following World War II.⁹¹ This seismic shifting brought with it a growing sense of insecurity and fear of risk, a defining characteristic that Ulrich Beck dubbed the “risk society.”⁹² The pathology of this outlook can be found in its self-feeding concept

88 See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCUSSION* (1991) (arguing that by over-emphasizing rights over duties and responsibilities, political discourse can lead to poor understanding of societal goals, resulting in unstable social arrangements with fewer overall rights).

89 See Bryan S. Turner, Nicholas Abercrombie & Stephen Hill, *The Dominant Ideology Thesis*, 29 *THE BRIT. J. SOC.* (1978) 149, 153-55.

90 WEBER, *supra* note 5, at 31-35. Weber’s works examine the concept of a need for new administrative structures to deal with the problems of the modern state, business, and other large organizations. See generally WEBER, *supra* note 5; WEBER, *supra* note 7; WEBER, *supra* note 86.

91 See generally TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2006) (examining the large political, economic, and cultural shifts in Europe following the end of World War II).

92 BECK, *supra* note 66, at 27, 30.

of risk, in which “the social, political, ecological and individual risks created by the momentum of innovation increasingly elude the control and protective institutions of industrial society”⁹³ Thus, unstoppable progress has its own “systematically produced hazards” that will forever be beyond the current capabilities of protecting from these hazards.⁹⁴ This outlook, along with the modernist quest for scientific and industrial innovation, combined to form a social control system that is forever chasing its own tail.

The examples that follow are not meant to be an exhaustive list of all forms of structural surveillance used today. Rather, I present a list of items to best highlight the range of structural surveillance means addressing an array of public concerns. An ongoing portion of this research will continue to catalog surveillance programs and methods to better understand the effects of these programs.⁹⁵

A. Public Safety

Among the earliest societal needs to be addressed by the revolutionary strains of social and economic thought that emerged alongside Western industrialization in the eighteenth and nineteenth centuries was that of public safety.⁹⁶ As populations increasingly migrated to cities in search of work, the resources of metropolitan areas immediately began to feel the strain of such rapid growth.⁹⁷ Existing social control mechanisms were no longer effective at the scales required by burgeoning cities, and there was a deep concern among the upper classes with political disorder, criminality, and threats to the existing social order.⁹⁸ These concerns were often conflated into a general fear and dislike of the *dangerous classes* as the primary source of social disruption.⁹⁹

93 *Id.* at 27.

94 *See id.* at 31.

95 *See infra* Section V.

96 *See generally* CAROLYN STEEDMAN, *POLICING THE VICTORIAN COMMUNITY* (2015) (detailing the political and social significance of early police forces within English society); CHARLES LORING BRACE, *THE DANGEROUS CLASSES OF NEW YORK: AND TWENTY YEARS' WORK AMONG THEM* (1880) (examining poverty in late nineteenth century New York City with a view toward lower classes as a danger to property and society at large).

97 *See* BRACE, *supra* note 96, at 51-53, 57.

98 *See generally* BRACE, *supra* note 96.

99 *See generally* JOE SOSS ET AL., *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* (2011) (examining welfare reform efforts as market-based governance and exploring its effect on

Social reformers, such as Bentham, identified criminality and similar anti-social behaviors as symptoms — addressing these issues would not solve the ultimate problem of regulating the growing instability of industrialized city life.¹⁰⁰ Rather, social order would only be restored by ensuring that the working classes were encouraged to adhere closely to the preexisting social norms.¹⁰¹ This encouragement was described in terms such as “inspection,” “regulation,” and the “general prevention” of undesired conduct.¹⁰² Short of calling in the military, however, states did not have a secure monopoly on the means of violence, which made policing this conduct messy and difficult.¹⁰³

Robert Peel became England’s Home Secretary in 1822, and brought with him experience in policing, having set up the Dublin “Peace Preservation Force” in 1814.¹⁰⁴ While there were various police units operating in London at the time, these forces focused mainly on the protection of property, and did not have the resources or organization to engage in the sort of preventive policing Bentham and others had in mind.¹⁰⁵ Peel argued that the primary goal of his organized police force should be crime prevention and moral order, with a focus on subduing the “dangerous classes,” and that by consolidating the authority within a centralized administrative body, it could pursue

poverty policy). Note the similarities between nineteenth-century and twenty-first-century attitudes toward, and motivations for, poverty policy and the welfare state. As Soss, et al, point out, the modern concept of neoliberalism takes its cues from eighteenth and nineteenth century political thought. *See id.* at 24.

100 *See generally* JEREMY BENTHAM, INTRODUCTION TO PRINCIPLES OF MORALS AND LEGISLATION (1789) (outlining the foundations of utilitarian philosophy, especially with respect to crime and other social issues).

101 *See* MORRIS, *supra* note 55, at 10-14.

102 Ogborn, *supra* note 53, at 507-12.

103 *See id.*; Auerbach, *supra* note 59 (illustrating the gaps between welfare poverty policy and practice between state organizations and their agents); Ogborn, *supra* note 53 (arguing that a “monopoly of policing” was necessary because without it the system was “fragmented” and “defective”); Tadhg O’Ceallaigh, *Peel and Police Reform in Ireland, 1814-18*, 6 *STUDIA HIBERNICA* 25, 25-30 (1966).

104 Galen Broeker, *Robert Peel and the Peace Preservation Force*, 33 *J. MODERN HIST.* 363, 363 (1961); Mike Rowe & Jeffery Ian Ross, *Comparing the Recruitment of Ethnic and Racial Minorities in Police Departments in England and Wales with the USA*, 9 *POLICING* 26, 26-35 (2015). It should be noted here that the Peace Preservation Force, which later become the Royal Irish Constabulary, was a thinly disguised paramilitary body created largely to subdue Irish Catholics. *Id.*

105 STEEDMAN, *supra* note 57, at 13-16.

this goal far more efficiently than the existing models.¹⁰⁶

Here, we see the beginnings of a system of structural surveillance at work. By institutionalizing a public safety role that had largely been left to private interests, ad-hoc local governments, or the Crown (via the military), a consolidated and professionalized preventive police force replaced the identifiable object (watcher) in the surveillance equation with the society (via government) itself (thus causing the surveillance to become self-reinforcing). Further, a regulated police force ensured a uniformity — in action, purpose, and aesthetic — that could not be achieved under the existing systems, which aided public acceptance of the system and ensured its integration into everyday life (ubiquity). As we will see, this system of modern policing, while allowing for effective scales not possible under earlier regimes, encouraged wholesale increases in information collection and management, which increased efficiency but at the same time enabled abuse.

To illustrate these concepts in contemporary terms, I will build upon the public space example I outlined earlier in this Article.¹⁰⁷ The Olmstedian philosophy of public space as democratized geography, where open access to all classes of society was not only allowed, but encouraged, was not without its problems. Crime was certainly present, but there was a deeper concern (held principally by the upper classes) regarding general social disorder.¹⁰⁸ From this general public safety concern arose four interrelated systems of structural surveillance: broken windows policing, widespread CCTV use, suspicionless stop and frisk policies, and algorithmic policing.

In 1982, Wilson and Kelling published their influential “Broken Windows” article, which suggested that police could more

106 See *id.*; James H. Auten, *The Paramilitary Model of Police and Police and Professionalism*, 4 POLICE STUD.: INT’L REV. POLICE DEV. 67 (1981-82); John Lea, *The New Police in England During the Nineteenth Century* (2004) <https://web.archive.org/web/20160306183053/http://www.bunker8.pwp.blueyonder.co.uk/history/36806.htm> (enter <http://www.bunker8.pwp.blueyonder.co.uk/history/36806.htm> into Internet Wayback Machine Archives search bar to access archived version of website no longer available) (last visited August 25, 2016). For additional discussion on consolidation of authority within an administrative body see also Auerbach, *supra* note 59, at 686-708 (illustrating the gaps between welfare poverty policy and practice between state organizations and their agents); Goheen, *supra* note 51, at 489-91; Ogborn, *supra* note 53, at 506-08 (discussing and critiquing the existence of administrative hierarchies and centralization as policing policy).

107 See *supra* Section II.

108 See Goheen, *supra* note 51, at 479-96.

efficiently address crime by targeting social disorder and nuisance crimes directly, thereby breaking the cycle of localized community decline.¹⁰⁹ The basis for this thinking can be found in what has been called the incivilities thesis, which proposes that social disorder in a community leads to an increased fear of crime in that community's residents, which in turn leads to a general civic withdrawal from the community.¹¹⁰ The theory concludes that this withdrawal feeds into a cycle of general community decline in the levels of social control, which leads to increased localized crime and disorder.¹¹¹

The broken windows policing concept took hold quickly among the police departments of major American cities, and is arguably one of the most important changes to policing in recent decades.¹¹² Implementations of broken windows policing have varied in tactics from department to department, which have adopted different strategic approaches ranging in aggressiveness, the most visible example of which was adopted by the New York City Police Department.¹¹³ The "New York style" of broken windows policing was initiated in 1993 as the "quality of life" initiative, focusing on nuisance offenses that had been ignored under earlier regimes, including turnstile jumping, panhandling, and public drinking.¹¹⁴

109 George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, 249 ATLANTIC MONTHLY 3, 29-38 (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

110 Ralph B. Taylor, *The Incivilities Thesis: Theory, Measurement, and Policy*, in MEASURING WHAT MATTERS: PROCEEDINGS FROM THE POLICING RESEARCH INSTITUTE MEETING 65, 68 (Robert H. Langworthy ed., 1999) (citing Kelling & Wilson, *supra* note 109).

111 Kelling & Wilson, *supra* note 109. See also Taylor, *supra* note 110, at 68.

112 See generally Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 271-320 (2006) (analyzing the effects of broken windows policing models using crime data from five cities deploying variants on the broken windows philosophy); Steve Herbert, *Policing the Contemporary City: Fixing Broken Windows or Shoring Up NeoLiberalism*, 5 THEORETICAL CRIMINOLOGY 445, 445-66 (2001) (examining why broken windows policing often supplants community policing as a model where public attitudes and police cultures align with neoliberal ideals); Mike King, "Broken Windows," *Urban Policing, and the Social Contexts of Race and Neighborhood (Dis-)Empowerment*, 21 Critical Criminology 533, 533-38 (2013) (reviewing ROBERT J. SAMPSON, GREAT AMERICAN CITY (2012)) (examining the role of race and class in the rise of broken windows policing regimes).

113 Judith Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171 (1999).

114 Harcourt & Ludwig, *supra* note 112, at 292.

Within a relatively short period of time after the introduction of the new initiative, New York City's overall crime rate began to drop, an occurrence almost universally attributed to broken windows theory and the "crown jewel" of intelligence-led policing, Compstat.¹¹⁵

The perceived success of broken windows policing in New York City inspired other major cities such as Chicago, Los Angeles, Baltimore, and Boston to adopt the practice, each of which soon began to attribute their own success stories to the new approach.¹¹⁶ Proponents of the broken windows policing method pointed to a key component of its success: the full integration of widespread data collection, information technology, and statistical analysis to policing.¹¹⁷ This analytical approach was viewed as an ideal solution to the crisis of control then affecting law enforcement, and was just the sort of enhancement desired (or required) within an information society.¹¹⁸ The data collection effort did not necessarily require any advanced technologies. Simply saturating a particular neighborhood, subway stop, or park with police patrols would generate a massive amount of actionable information, a benefit highlighted by broken windows proponents:

Our experience is that most citizens like to talk to a police officer. Such exchanges give them a sense of importance, provide them with the basis for gossip, and allow them to explain to the authorities what is worrying them You approach a person on foot more easily, and talk to him more readily, than you do a person in a car. Moreover, you can more easily retain some anonymity if you draw an officer aside

115 See John A. Eterno & Eli B. Silverman, *The New York City Police Department's Compstat: Dream or Nightmare?* 8 INT'L J. POLICE SCI. & MGMT. 218, 218-31 (2006).

116 Harcourt & Ludwig, *supra* note 112, at 276.

117 Reed Collins, *Strolling While Poor: How Broken Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL'Y 419, 429 (2007).

118 Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 341 (1998). Arrests for petty offenses jumped more than fifty percent during the early stages of the broken windows policing roll-out in New York City, which, due to the associated increase in data collection, in turn led to a nearly forty percent increase in arrests on outstanding warrants. *Id.*

for a private chat. Suppose you want to pass on a tip about who is stealing handbags, or who offered to sell you a stolen TV. In the inner city, the culprit, in all likelihood, lives nearby. To walk up to a marked patrol car and lean in the window is to convey a visible signal that you are a “fink.”¹¹⁹

A (possibly unexpected) enhancement of the information collection process came directly from the aggressive pursuit of nuisance crimes. Police departments soon discovered that their overall surveillance efforts would benefit from the creation of informants through misdemeanor arrests.¹²⁰ Not only were those arrested possible sources of information on others, their biometric data (fingerprints, DNA) could be collected for indefinite storage and analysis in other investigations.¹²¹ These information collection methods were seen as so successful and necessary that they quickly became the driver of broken windows policies rather than a mere by-product.¹²²

119 Kelling & Wilson, *supra* note 109, at 34.

120 Harcourt, *supra* note 118, at 342.

121 Like many post-Control Revolution organizations, police departments sought more information in order to achieve maximal efficiency. The everyday contact between police officer and citizen appeared to be a natural source of such information, and sociologists, criminologists, psychologists, and others began looking for ways to collect these data on an ongoing basis. *See generally* Harcourt & Ludwig, *supra* note 112 (illustrating the purported links between increased information and decreased crime asserted by police organizations, and some of the problems with this correlation); U.S. DEPT. JUST., OFF. JUST. PROGRAMS, NJC 175703, SPECIAL REPORT: POLICE DEPARTMENTS IN LARGE CITIES, 1990-2000 (2002) (citing the marked increase by police departments of computers, ID systems, and other information gathering and processing systems); John A. Eterno & Eli B. Silverman, *Understanding Police Management: A Typology of the Underside of Compstat*, 5 PROF. ISSUES CRIM. JUST. 11 (2010) (examining the negative effects information and intelligence systems can have within police departments); Beth Pearsall, *Predictive Policing: The Future of Law Enforcement?*, 266 NAT'L INST. JUST. J. 16, (2010) (an introductory look at the benefits of information management in effective policing); James J. Willis et al., *Recommendations for Integrating Compstat and Community Policing*, 4 POLICING 182 (2010) (articulating a number of proposed reforms to Compstat-based information policing); Eterno & Silverman, *supra* note 115 (analyzing the potential flaws of data-led policing).

122 *See* William J. Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177 (1994) (exploring the phenomenon of increased police stops and interactions based on drive for more statistics to show law enforcement efficacy).

Coinciding with the rise of broken windows policing policies came the technological innovation of closed circuit television (CCTV) deployment.¹²³ Rapid improvements in digital camera and information processing technologies made widespread CCTV deployment attractive as a low-cost means of augmenting or replacing police patrols.¹²⁴ Widely adopted by London authorities in the early and mid-1990s, the CCTV system was hailed as the “Friendly Eye in the Sky” to skeptical London residents, targeting only those who acted suspiciously.¹²⁵ Two high-profile events — the unsuccessful bombing assassination attempt against then-Prime Minister Margaret Thatcher, and a grainy CCTV recording of a London toddler being lured away by his 10-year-old killers — fueled general anxiety in England over public disorder, and led to a flood of government spending on the installation of CCTV systems throughout England and Europe generally.¹²⁶

Cities in the United States were slower to adopt CCTV, with only sporadic deployment in the late 1990s, and even then only using them “primarily to monitor pedestrian traffic in downtown and residential districts.”¹²⁷ A combination of technological advances,

123 See Ann Rudinow Saetnan et al., *Controlling CCTV in Public Spaces: Is Privacy the (Only) Issue? Reflections on Norwegian and Danish Observations*, 2 SURVEILLANCE & SOC'Y 396 (2004); BENJAMIN J. GOOLD, CCTV AND POLICING: PUBLIC AREA SURVEILLANCE AND POLICE PRACTICES IN BRITAIN (2004) [hereinafter CCTV AND POLICING]; Heather Cameron, *CCTV and (In)dividuation*, 2 SURVEILLANCE & SOC'Y 136 (2004); Clive Norris & Michael McCahill, *CCTV: Beyond Penal Modernism?*, 46 BRIT. J. CRIMINOLOGY 97 (2006); Benjamin J Goold, *Public Area Surveillance and Police Work: The Impact of CCTV on Police Behaviour and Autonomy*, 1 SURVEILLANCE & SOC'Y 191 (2003); Emmanuel Martinais & Christophe Bétin, *Social Aspects of CCTV in France: The Case of the City Centre of Lyons*, 2 SURVEILLANCE & SOC'Y 361 (2004).

124 See CCTV AND POLICING, *supra* note 123, at 15-19.

125 Duncan Campbell, *Spy Cameras Become Part of Landscape*, THE GUARDIAN (Jan. 30, 1995). See also SURVEILLANCE AS A SOCIAL SORTING, *supra* note 4, at 263 (quoting M. Bulos & C. Sarno, *Codes of Practice and Public Closed Circuit Television Systems*, LONDON: LOCAL GOV'T INFO. UNIT (1996) (“[T]he most neglected area of training consists of how to identify suspicious behaviour, when to track individuals or groups and when to take close-up views of incidents or people. This was either assumed to be self-evident or common sense[.]”)).

126 Clive Norris et al., *The Growth of CCTV: A Global Perspective on the International Diffusion of Video Surveillance in Publicly Accessible Space*, 2 SURVEILLANCE & SOC'Y 110, 111 (2004).

127 Marcus Nieto et al., PUBLIC AND PRIVATE APPLICATIONS OF VIDEO SURVEILLANCE AND BIOMETRIC TECHNOLOGIES 1 (Cal. Research Bureau, CRB 02-006, Mar. 2002), available at <http://www.library.ca.gov/>

dropping costs, and the events of 9/11 finally drove U.S. cities to adopt CCTV in a wide variety of public safety spheres.¹²⁸ A renewed focus on public safety post-9/11 created an environment where

almost all cities have become more frightening to their inhabitants, albeit with the fear often out of proportion to the reality. Increasing mobility of criminals means that no area is safe from crime. Attempts are being made to shield areas and make them as safe as possible, sometimes by cutting them off or controlling them through closed circuit television systems.¹²⁹

The growth of first generation CCTV systems was hindered by the fact that these cameras still required a human being to monitor, interpret, and act on their data.¹³⁰ This created a number of other potential problems, including questions of access, voyeurism, and other potential CCTV abuses.¹³¹ A post-9/11 flurry of video- and image-processing research yielded a second generation of CCTV systems, capable of automating the intelligence gathering process through advanced analysis algorithms.¹³² Not only did these second generation CCTV systems increase the amount of information that could be gleaned from real-time video, but it also addressed some of the other concerns posed by human-in-the-loop monitoring.¹³³ The deployment of advanced CCTV systems gave police departments an inexpensive new source of information for collection and processing,

crb/02/06/02-006.pdf.

128 “Technological advances, declining costs, and heightened security concerns following the September 11, 2001, terrorist attacks have led to rapid diffusion of both CCTV surveillance and biometric technologies. For example, CCTV video surveillance is widely used in public schools to monitor student movement and detect illegal activity, and at street intersections to catch cars running red lights.” *Id.*

129 See CHARLES LANDRY & FRANCO BIANCHINI, *THE CREATIVE CITY 14* (London: Demos 1995).

130 Ray Surette, *The Thinking Eye*, 28 *POLICING: INT’L J. POLICE STRATEGIES & MGMT.* 152, 152-53 (2005).

131 See Laura Huey, *False Security or Greater Social Inclusion? Exploring Perceptions of CCTV Use in Public and Private Spaces Accessed by the Homeless: False Security or Greater Social Inclusion?* 61 *BRIT. J. SOC.* 63 (2010); Surette, *supra* note 130, at 155-56.

132 Surette, *supra* note 130, at 157-64.

133 *Id.* at 164-65.

as well as other unrelated benefits, such as revenue generation, making their ubiquitous adoption a foregone conclusion.¹³⁴

Despite these advances, CCTV still had its limits. CCTV systems could watch, unblinking, for unlimited amounts of time, but even the most advanced systems could not replace the surveillance value of a police officer on the street. Under the broken windows policing model, police departments found that a great deal of useful information could be gathered from the subjects of nuisance crime arrests.¹³⁵ As police departments' information systems demanded additional data from its officers, however, new sources of that information had to be found. In New York City and elsewhere, police departments began to employ an expanded use of *Terry* stops in the mid-1990s, which were legalized in 1968 with the decision of *Terry v. Ohio*, as part of their broken windows toolkit.¹³⁶ These stops, which came to be known as "stop and frisk" searches, fell under a policy of "non-arrest approaches" to citizens, and blended well with an increase in "gun-oriented policing" in multiple departments.¹³⁷ Starting in the 1990s, performance-measurement systems, like that employed by Compstat, incentivized police departments and officers to aggressively employ stop and frisk practices, and effectively lowered the bar for such stops, allowing for an expansive definition of an officer's "reasonable suspicion."¹³⁸

134 See, e.g., Ray Surette, *The Thinking Eye*, 28 POLICING: INT. J. POLICE STRATEGIES & MGMT. 152 (2005) (discussion of the social implications of CCTV); Ilse van Liempt & Irina van Aalst, *Urban Surveillance and the Struggle between Safe and Exciting Nightlife Districts*, 9 SURVEILLANCE & SOC'Y 280 (2012) (examining increase of urban CCTV installations); Randy Lippert & David Murakami Wood, *New Urban Surveillance: Technology, Mobility, and Diversity in 21st Century Cities*, 9 SURVEILLANCE & SOC'Y 257 (2012) (citing the marked increase of CCTV and related video technologies in urban areas).

135 Harcourt, *supra* note 118, at 305-08.

136 *Terry v. Ohio*, 392 U.S. 1 (1968); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 FORDHAM URB. L. J. 457, 461-63 (2000).

137 See Fagan & Davies, *supra* note 136, at 470; Jerry H. Ratcliffe et al., *The Philadelphia Foot Patrol Experiment: A Randomized Controlled Trial of Police Patrol Effectiveness in Violent Crime Hotspots*, 49 CRIMINOLOGY 795-831 (2011); Andrew Gelman et al., *An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias* (Colum. Pub. L. & Legal Theory Research, Working Paper No. 05-95, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=846365.

138 See Eterno & Silverman, *supra* note 121, at 221-222 (examining the often ignored weaknesses of the Compstat system's use of data); Alistair Fraser & Colin Atkinson, *Making Up Gangs: Looping, Labelling and the New Politics of Intelligence-led Policing*, 14 YOUTH JUST. 154, 155-58 (2014) (analyzing the

Of course, once data generated by structural surveillance begins to arrive in increasing amounts, police systems such as Compstat must find a way to make sense of this information. There are two aspects to this process: dynamic analysis, where information is collected, organized, analyzed, and the results disseminated in real-time (or near-real-time), allowing for direct action and deployment; and static analysis, which takes advantage of the fact that digital data storage has become an effectively no-cost operation, and performs pattern analysis retroactively to direct and adjust police deployment strategy.¹³⁹ Neither of these tasks are revolutionary by themselves, but the increased data flows and information processing capabilities that have followed the wake of broken windows policing strategies have facilitated the unprecedented use of analytical tools and algorithmic policing within police departments.¹⁴⁰

Generally speaking, algorithmic policing is nothing more than an automated version of the approach described in Wilson's and Kelling's original article.¹⁴¹ Instead of relying on human-centered processes of surveillance and analysis, it uses information technology to integrate massive amounts of intelligence data from multiple sources, including police reports, arrest records, DNA and fingerprint data, CCTV, and license plate readers, which enables it to provide automated, rapid situational analysis to police and other government agencies.¹⁴² Algorithmic policing is a relatively new

role of UK police agencies and their responses to the 2011 riots, paying special attention to the labeling of certain groups as "gangs" and the intelligence collection processes created around gang policing); Stuart Elden, *Plague, Panopticon, Police*, 1 SURVEILLANCE & SOC'Y 240 (2002) (exploring the historical relationship between epidemiology and policing with respect to data collection processes); Mike King, *supra* note 112, at 534 (analyzing the use of data by police agencies to reinforce existing inequalities between neighborhoods).

139 See Jerry Ratcliffe, *Intelligence-Led Policing and the Problems of Turning Rhetoric into Practice*, 12 Policing and Soc'y 53, 56-57 (2002); David L. Carter & Jeremy G. Carter, *Intelligence-Led Policing Conceptual and Functional Considerations for Public Policy*, 20 CRIM. JUST. POL'Y REV. 310, 316-19 (2009).

140 See Jane Bambauer, *The Lost Nuance of Big Data Policing*, 94 TEX. L. REV. 205 (2015).

141 See Kelling & Wilson, *supra* note 109.

142 See Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 22 (2016); Gary T. Marx, *A Tack in the Shoe and Taking off the Shoe Neutralization and Counter-Neutralization Dynamics*, 6 SURVEILLANCE & SOC'Y 294, 300-01 (2009); Lyon, *supra* note 4, at 16; Torin Monahan, *The Future of Security? Surveillance Operations at Homeland Security Fusion Centers*, 37 SOC. JUST. 84 (2011).

addition to the broken windows policing repertoire, aided in large part through the increasing numbers of “fusion” operations between traditional law enforcement and national security and terrorism agencies.¹⁴³ The resulting blurring of lines between traditional policing and national security concerns has led to skepticism over these new programs, but such operations have continued to grow in the current post-9/11 public safety environment.¹⁴⁴

Here we see the transformation of broken windows policing and associated programs into structural surveillance. By making the information processing system — known as Compstat in New York and emulated elsewhere — the primary and direct consumer of surveillance data, police departments effectively removed the watcher (object) from the surveillance equation. Police officers were encouraged to gather intelligence information not for their own immediate purposes, but to be fed into Compstat for analysis and dissemination.¹⁴⁵ This incentivized the individual police officer to act more like a surveillance collection device and less as a professional trained in crime detection and prevention.¹⁴⁶ Further, the use — and continued justification — of the Compstat system required a supply of ever increasing amounts of information, which drove police departments to increase patrols and nuisance crime arrests, a strategy that generated dramatic increases in the sizes of police departments, an ironic result for a policy meant to make more efficient use of static or shrinking numbers of available officers.¹⁴⁷ When the system required more information, departments turned to high-tech solutions like CCTV as well as additional low-tech

143 See Monahan, *supra* note 142, at 84-85.

144 See Didier Bigo, *Security, Surveillance and Democracy*, in the Routledge Handbook of Surveillance Studies 277, 277-84 (Kirstie Bell et al. eds., 2012).

145 See Jerry H. Ratcliffe & Ray Guidetti, *State Police Investigative Structure and the Adoption of Intelligence-Led Policing*, 31 POLICING: AN INT’L J. POLICE STRATEGIES & MGMT 109 (2007).

146 See William J. Bratton & Sean W. Malinowski, *Police Performance Management in Practice: Taking COMPSTAT to the Next Level*, 2 POLICING 259, 265 (2008) (describing how COMPSTAT changes the dynamics of police performance management); Kevin J. Walsh & Victor E. Henry, *Compstat, OODA Loops and Police Performance Management*, 2 POLICING 349 (2008) (examining Compstat as a police tool, to giving primary consideration to the principles or process of crimefighting prescribed by Compstat and the decision-making process that is the central feature of Maneuver Warfare).

147 See Greene, *supra* note 113, at 182. Aaron Roussell, *Policing the Anticommunity: Race, Deterritorialization, and Labor Market Reorganization in South Los Angeles*, 49 L. & SOC’Y REV. 813, 820-21 (2015).

solutions, like stop and frisk policies. And as the information flow became larger, departments implemented increasingly sophisticated analysis systems, such as algorithmic policing, to manage the increased bandwidth.

Superficially, this approach appears valid because the underlying concerns appear valid, but there is a problem with the theory's asserted essentialism with respect to the perception of disorder. Signals of social disorder are not unambiguous, and there is no agreed-upon natural meaning of disorder.¹⁴⁸ This is not to say that there are not certain signals of social disorder, such as rotting garbage, litter, discarded drug paraphernalia, graffiti, and abandoned cars, that are posited by broken windows theorists as objective measures of disorder or decay, but perceptions of disorder often carry with them an implicit bias, and will directly affect who benefits from broken windows policing, and who bears its burdens.¹⁴⁹ Studies of the effects of broken windows policing and its associated means of structural surveillance on poor and minority populations over the past decade have generated a strong body of empirical evidence showing that these populations bear a significantly disproportionate amount of the burden of these systems.¹⁵⁰ There are a number of reasons behind these results, but chief among them is the implicit linking of social disorder with a limited number of certain kinds of criminal behavior — the majority of which tended to exist only in minority or poor neighborhoods — along with a “zero tolerance” approach to these selected behaviors.¹⁵¹

The result of this policy created a system of structural surveillance with the notional goal of dynamically preventing crime and improving the quality of life and access within a city, but with the ironic result of establishing permanent or static means of surveillance in certain “bad” neighborhoods, containing rather than eliminating disorder, and reinforcing the growth of private or semi-public spaces which curtail the Olmstedian view of public access.¹⁵² These contemporary policies are often justified using many of the same rationales (albeit with carefully softened language) as those

148 See Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 *SOC. PSYCHOL. Q.* 319 (2004).

149 See Gelman et al., *supra* note 137, at 4.

150 See *id.*

151 See Greene, *supra* note 113, at 176-77.

152 See *id.* at 171-87; see also *supra* Section II B (discussing Olmstedian public access).

found in the nineteenth century policies designed to control and subdue the “dangerous classes.”¹⁵³ We thus find ourselves with a growing system of structural surveillance, created in the name of public safety, that certain portions of the population see as necessary and/or nearly invisible, while other portions of the population — those forced to live under its perpetual gaze — are left to choose between grudging acceptance or outright hostility, both of which result in negative individual and societal effects.¹⁵⁴

B. Social Programs

The management of government services and public welfare programs is as old as government itself.¹⁵⁵ The crisis of control that arose with the rapid population growth and urbanization of eighteenth and nineteenth century industrialization inspired governments to seek methods to manage their burgeoning underclasses.¹⁵⁶ The pseudo-sciences of social Darwinism and eugenics gained fast traction in Europe and the United States, bolstered in large part by the widely shared opinion among the governing elites of those nations that the “dangerous classes” were made up of physically, psychologically, and morally inferior beings.¹⁵⁷ This gave governments — and their increasingly efficient bureaucracies — the moral cover they needed to begin the promulgation of social engineering programs on a large scale, meant either to improve those few among the lower classes who could possibly be redeemed through education and hard work, or in the alternative, somehow separate this “residuum” before it

153 See Greene, *supra* note 113, at 176-77 (1999); King, *supra* note 112, at 533-38; Sampson & Raudenbush, *supra* note 148, at 320-21. See also *supra* Section II.C.

154 See *infra* Section IV.

155 One of the chief problems faced by early governments was the provision and management of social services. Records from ancient societies, such as Mesopotamia, and Egypt, identify multiple methods — some more successful than others — to manage economic, financial, and social aspects of public welfare. See, e.g., Salvador Carmona & Mahmoud Ezzamel, *Accounting and Accountability in Ancient Civilizations: Mesopotamia and Ancient Egypt*, 20 *ACCT., AUDITING & ACCOUNTABILITY J.* 177 (2007). In ninth century England, William I’s Domesday Book was an explicit attempt to record the identities and assets of the entire kingdom, thus categorizing his subjects by wealth (and worth). See Paul Henman & Greg Martson, *The Social Division of Welfare Surveillance*, 37 *J. SOC. POL’Y* 187 (2008).

156 See Morris, *supra* note 55, 10-16; JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 24-25 (2001).

157 See Morris, *supra* note 55, at 10-16.

could further corrupt the morally and physically superior “flower of the population.”¹⁵⁸

Early efforts to ameliorate the problem of the underclass in an organized way can be traced to the Poor Law Act of 1601, signed by England’s Queen Elizabeth I to organize a structure in support of local overseers taxing property for the express purpose of aiding the poor.¹⁵⁹ The effect of this law, in conjunction with the English Law of Settlement, was to clearly separate local members of the community from outsiders so that local parishes could satisfy the edict by aiding the poor within their community while being legally — and morally — justified in denying relief to strangers.¹⁶⁰ This legal divide, along with a later set of laws that separated the “deserving” from the “undeserving” poor, set a precedent that our social programs still contain, to varying degrees, today.¹⁶¹ However, this ability for governments to use the structural components of social welfare to alienate based on gender, race, religion, or other categorizations did not scale well beyond the parish until the control revolution brought on by industrialization brought important advances in structural surveillance techniques and technologies.

As societies and politics evolved throughout the twentieth century, reform movements drove early versions of what we would now recognize as modern social welfare programs, while still retaining elements of the deserving/undeserving distinction of earlier regimes.¹⁶² The United States, taking a federalist approach based somewhat on the local, parish-based British model, organized most of its social welfare structure at the state and local level.¹⁶³ Federal government agencies took a more active role during the Great Depression and through the programs of the New Deal, but these

158 *Id.* at 20. There were very few among nineteenth century elites who could muster any sort of sympathy for the growing underclasses. The language found in discussions regarding how to deal with the poor were most often less about providing assistance, and more about ways to make the problem go away — often through brutal means. One does not have to look far in the literature to find words such as “worthless,” “indolent,” “filthy,” “dishonest,” “politically disruptive,” “surplus” or “redundant” population, “degenerate,” “repugnant,” “animalistic,” “savage,” “violent,” “mercilessly cruel,” “shameless,” “unfit,” “small, ill-formed, disease-stricken, hard to kill,” and “hopeless.” *See id.* at 20-25.

159 *See Soss, supra* note 99, at 85.

160 *Id.*

161 *Id.* at 85-87.

162 *See GILLIOM, supra* note 156, at 25; *Soss, supra* note 99, at 86-87.

163 *See Soss, supra* note 99, at 83.

efforts largely became support mechanisms for state and local social service programs.¹⁶⁴ And apart from a brief moment of optimism in 1964 when the federal government expressed its intent “not only to relieve the symptoms of poverty, but to cure it and, above all, to prevent it,” the chief goal of government social welfare was, at best, to act as a means of managing the problem of poverty, and later, to act as a service conduit for the low end of capitalism, providing labor on the employer’s terms, and freezing out those unable to satisfy these “work first” requirements.¹⁶⁵

A key component of managing the poor — as opposed to managing poverty — was the continuous monitoring of those applying for or receiving welfare benefits.¹⁶⁶ Notionally beneficial to the continued improvement of government program efficiencies, these data were also quite useful in the pursuit of social control and the conferment by government of individual identity.¹⁶⁷ Recipients — or “clients” — of these systems were required to become open books for government inspection in exchange for services.¹⁶⁸ This meant that the government’s “friendly visitor,” acting as both counselor and investigator/inspector, was to be given a free hand to complete the required searching examinations.¹⁶⁹ To support this goal, elaborate systems — both technological and otherwise — of structural surveillance were implemented to enforce work requirements, spot fraud, and often stigmatize, humiliate, and alienate social services recipients.¹⁷⁰ The methods include “suitable home” inspections, “man in the house” searches, means testing, labor testing, residency checks, and random drug testing, all without a warrant, and all in the name of social ordering and social control.¹⁷¹

164 *Id.*

165 Robert A. Caro, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 547 (Alfred A. Knopf Incorporated 2012); Soss, *supra* note 99, at 15-16.

166 See Stephen P. Walker, *Accounting, Paper, Shadows and the Stigmatised Poor*, 33 *ACCT. ORGS. & SOC'Y* 453, 461-62 (2008).

167 *Id.* at 462.

168 See *id.* at 462-63, 475-76 (examining the creation of reconstructed identities of social services recipients through accounting regimes with nineteenth century origins).

169 See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 78 (10th ed. 1996).

170 See Walker, *supra* note 166; Soss, *supra* note 99, at 57-58.

171 See Soss, *supra* note 99, at 41, 58, 94, 109, 235; GILLIOM, *supra* note 156, at 27, 32.

Modern social welfare systems have taken an especially disciplinary turn since the late twentieth century, which has had a particularly deleterious effect on minority populations, especially African Americans.¹⁷² While it is obvious that large scale information collection and record keeping is a critical part of any government social service program, current structural surveillance systems also provide the means to stigmatize, scrutinize, and otherwise manage population segments that are least able to resist such methods.¹⁷³ This goes to the heart of structural surveillance — a complex system of information collection and record keeping that, over time, becomes a part of the background noise of society, visible only to those who administer it or who have the misfortune of being under its gaze. As I will show in the following section, these systems can cause significant damage to subsets of society, even when those systems are notionally in place for the benefit of all.

IV. The Effects of Structural Surveillance

As I described earlier in this Article, the self-reinforcement and ubiquity of structural surveillance allows for its uneven application across population segments, which often results in unequal effects across society.¹⁷⁴ As we have seen, these unequal effects are often borne by vulnerable, disenfranchised, or stigmatized populations, which can lead to lasting — and very real — societal, economic, and civic harms. This section is an attempt to characterize and categorize these harms by examining the existing literature relevant to the structural surveillance examples described above.¹⁷⁵ It is not meant to be an exhaustive cataloging of such effects. Rather, I intend it as a springboard for the next phase of this research.

172 See Soss, *supra* note 99, at 59; Sanford F Schram et al., *Deciding to Discipline: Race, Choice, and Punishment at the Frontlines of Welfare Reform*, 74 AM. SOC. REV. 398 (2009) (arguing deviant behavior by black welfare clients are more likely to be sanctioned when widespread welfare rules are implemented).

173 See GILLIOM, *supra* note 156, at 32-37; Schram et al., *supra* note 172; Bjørn Hofmann, *Ethical Challenges with Welfare Technology: A Review of the Literature*, 19 SCI. & ENGINEERING ETHICS 389 (2012); Cf. Walker, *supra* note 166 (examining the creation of reconstructed identities of social services recipients through accounting regimes with nineteenth century origins).

174 See *supra* Section III.

175 See *supra* Section III.

A. *Enforcement of Social Ordering*

Among the chief (ab)uses of structural surveillance throughout history is the practice of establishing and maintaining otherwise artificial social structures.¹⁷⁶ The aggressive attention paid to the “dangerous classes” in Victorian societies is not much abated in today’s environment, although the supporting language has softened somewhat and the uses of structural surveillance are more subtle.¹⁷⁷ As discussed above, in the late nineteenth and early twentieth centuries, modernist optimism toward social control through scientific methods combined with existing fears of a growing underclass and contemporary scholarship, which regarded the poor and working classes as fundamentally flawed, to create social control mechanisms oriented toward the preservation of existing social ordering.¹⁷⁸ Many of these policies were removed or changed through the social reforms of the 1960s and 1970s, only to reappear, dressed in slightly different clothing, in the 1980s.¹⁷⁹

Oscar Gandy referred to the contemporary commercial version of this mechanism, the “panoptic sort,” which used consumer surveillance to sort people based on their value to the marketplace, and suggested that this analysis could be applied to other social spheres.¹⁸⁰ The technological advances of the late twentieth century made social ordering through structural surveillance a particularly serious problem, especially following the increased focus on public safety following 9/11 — the ordering could be economic, political, racial, or based on any sort of slicing and dicing one could do with the growing amounts of available data.¹⁸¹ The effects of this ordering

176 See Clive Norris & Gary Armstrong, *CCTV and the Social Structuring of Surveillance*, 10 CRIME PREVENTION STUD. 157, 158 (1999); Quintan Wiktorowicz, *Civil Society as Social Control: State Power in Jordan*, 33 COMP. POL. 43 (2000); PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* xvi-xvii (2003) (examining the structural forces of market powers and how they stratify populations by social structure); SURVEILLANCE AS SOCIAL SORTING, *supra* note 4.

177 See generally SOSS, *supra* note 99 (describing welfare programs as active market agents which do not attempt to solve the poverty problem, but rather make poor communities more manageable through increased — and more subtle — surveillance methods).

178 See, e.g., Chambliss, *supra* note 122.

179 GILLIOM, *supra* note 156, at 28-34.

180 See generally OSCAR H. GANDY, JR., *THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION* (1993).

181 See Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767,

can be very real, limiting economic and spatial mobility, social and political opportunities, and civic engagement much more effectively than the Victorian legacy methods, due to the speed and mobility of these structural surveillance systems.¹⁸²

Returning to my ongoing example of public space, one can see the effects of social ordering by examining the regulation or closing of public spaces as it relates to the homeless population. As I discussed earlier, the Olmstedian idea of open access public spaces in cities began to slowly erode throughout the latter half of the twentieth century, as American city planners shifted from the (Olmstedian) “planned” city to the entrepreneurial or “post-industrial” city.¹⁸³ Open access public spaces were often redesignated “private” or “quasi-public,” and the introduction of broken windows policing and associated methods led to increased monitoring of these spaces and police (and private) patrolling of de jure and de facto borders.¹⁸⁴ Homeless people — defined loosely here as those who do not have access to their own private space or home — are forced to live their lives in public spaces.¹⁸⁵ As these spaces disappear or become more tightly regulated and patrolled by authorities, the options for the homeless population dwindle.

778-82 (2002); Danah Boyd & Kate Crawford, *Critical Questions for Big Data: Provocations for a Cultural, Technological, and Scholarly Phenomenon*, 15 INFO., COMM. & SOC'Y 662 (2012).

182 See Lobel, *supra* note 181, at 778-82 (highlighting the dramatic increase in police and military surveillance post-9/11 and its efficiencies due to technological advances); Torin Monahan, Editorial, *Surveillance and Inequality*, 5 SURVEILLANCE & SOC'Y 217, 220 (2008) (illustrating the detrimental effects of increasingly invasive monitoring and surveillance in education, healthcare, and commerce); Venkat N. Gudivada, Ricardo Baeza-Yates & Vijay V. Raghavan, *Big Data: Promises and Problems*, 48 COMPUTER 20 (2015) (illustrating the problems that arise with the increased use of data capture from ubiquitous surveillance).

183 DAVIS, *supra* note 50, at 24-25.

184 See DAVIS, *supra* note 50, at 232-34; see generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993) (tracing the systematic creation of segregation policies in the United States, which led to increased levels of racial inequality as well as increased levels of police surveillance within those marginalized communities).

185 Any discussion of the controversy over the concept of homelessness is beyond the scope of this paper. If you wish to look into the topic further, I recommend the following sources: Walker, *supra* note 166, at 460-61; Joe Doherty et al., *Homelessness and Exclusion: Regulating Public Space in European Cities*, 5 SURVEILLANCE & SOC'Y 290 (2008); Harcourt, *supra* note 118.

The effects of social ordering can also be seen in the increased use of stop and frisk and investigatory stops under broken windows policing and the war on drugs.¹⁸⁶ Both of these methods are widely used when a police officer develops a “reasonable suspicion” about the person to be stopped, often supported by an officer’s opinion that the person “looked out of place.”¹⁸⁷ This often means the subject of surveillance is either poor or a racial minority (or both), and is observed in a largely white or upper class community, making this form of surveillance a not-so-distant relative of the illegal redlining policies that were once used to contain the poor and minorities within certain neighborhoods outside of wealthier, whiter areas.¹⁸⁸ The investigatory stop has avoided the racist stigma of redlining — at least in a legal sense — due to the gradual institutionalization of the practice under broken windows policing.¹⁸⁹ The practice has since become a fixture of structural surveillance, and is now considered routine practice among police departments.¹⁹⁰ The irony of these policies, often touted as means of “reclaiming the open spaces” for the safe enjoyment of all, can be found in the resulting reclaiming of spaces for some to the exclusion of others.¹⁹¹

A recent example of this institutionalized practice can be found in Arizona law S.B. 1070, which, under the veil of immigration control, requires local and state police officers to determine the immigration status of anyone stopped, detained, or arrested.¹⁹² This requirement, affectionately deemed the “show me your papers” provision, was upheld by the Supreme Court as constitutional in 2012, with the proviso that officers must first have a “reasonable suspicion” that the individual in question is not in the United States legally.¹⁹³ Like similar investigatory stops, the Arizona provision is likely to incentivize police officers to base their surveillance inquiries on the ethnicity and socioeconomic status of the subject.¹⁹⁴

186 See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457 (2000).

187 *Id.*

188 See Collins, *supra* note 117.

189 See CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 9-12 (2004).

190 See *id.* at 10.

191 Green, *supra* note 113 at, 172-73.

192 See *Ariz. Rev. Stat. Ann.* § 11-1051 (West 2012).

193 *Arizona v. United States*, 132 S.Ct. 2492, 2507 (2012).

194 EPP ET AL., *supra* note 189, at 12-13, 149-50.

There is strong empirical evidence that these “out of place” stops are more likely to happen to “out of place” minorities than “out of place” whites.¹⁹⁵ This pattern conveys strongly to poor and minority populations that their place in society is below white and upper class populations.¹⁹⁶ Studies have shown that the subjects of these stops are often made to feel like second-class citizens whose lives are under the constant scrutiny and judgment of a capricious state.¹⁹⁷

This effect is also clearly visible through government social relief policies, especially since the wave of welfare reforms initiated in the 1980s under the Reagan administration, and again in the 1990s under the Clinton administration.¹⁹⁸ These policies were written to be punitive to existing recipients of public aid, and discouraging to potential applicants, through practices such as means testing, stigmatization, warrantless searches, residency requirements, and even through the enlistment of informants.¹⁹⁹ Recipients of welfare under these programs describe feeling as if they were in prison, powerless, and not worthy of basic human dignity.²⁰⁰ They describe themselves as defenseless subjects of a faceless and often-hostile bureaucracy, stripped of basic privacy rights, and powerless to complain about any of this, as it would likely incur the risk of losing benefits.²⁰¹

Another subtler, yet no less corrosive, result of these policies is a growing fear and mistrust of our fellow citizens. The modern idea of the public sphere depends heavily on our ability to have “ubiquitous and uncontrolled encounters of people and groups” in

195 See Harcourt & Ludwig, *supra* note 112; Harcourt, *supra* note 118, at 382.

196 See Collins, *supra* note 117 (giving a critical take on the NYPD’s move into order-maintenance policing and its effects on marginalized populations); Harcourt & Ludwig, *supra* note 112 (making a reexamination of earlier studies on the effectiveness of broken windows policing, showing evidence that government programs that provide opportunities to marginalized populations have better results in decreasing social disorder); Greene, *supra* note 113, at 176-77 (showing strong evidence that problem-oriented community policing strategies are more reliable means of crime control than broken windows policing policies); Gelman et al., *supra* note 137 (finding that persons of African and Hispanic descent were stopped more frequently than whites under random stop-and-frisk policing programs).

197 See Collins, *supra* note 117; EPP ET AL., *supra* note 189.

198 See Soss, *supra* note 99, at 33, 37.

199 See *id.* at 41, 58, 94, 109, 235; GILLIOM, *supra* note 156, at 27, 32.

200 See GILLIOM, *supra* note 156, 50-52.

201 See *id.*

our shared areas without barriers — both literal and figurative — erected to enforce an artificial social order.²⁰² Hypervigilant concern for matters of ethnic identity and socioeconomic strata has, time and again, led to a fear for physical security that leads to a feedback loop of ordering.²⁰³ Structural surveillance programs in the form of “crime control” very often target racial minorities or the economic underclass largely for the benefit of wealthier citizens. These programs and policies will pit citizen against citizen, leading to fear-based discriminatory choices in education, social services, corrections, and the availability of economic opportunities.²⁰⁴ Even — or perhaps especially — within the quasi-public sphere of the workplace, the deployment and use of structural surveillance creates an atmosphere of mistrust that can prove ultimately counterproductive to the employer.²⁰⁵

B. Fear and Mistrust of Institutions

One of the most dangerous effects of structural surveillance is its role in the loss of trust in societal institutions. An extensive body of literature has been written over the past few decades on the topic of political trust, with a renewed interest following the

202 See Goheen, *supra* note 51, at 479-96, 480-82.

203 *Id.* at 485.

204 See Chambliss, *supra* note 122, at 192-93; Monahan, *supra* note 182, at 217, 223; Radley Balko, *The Ongoing Criminalization of Poverty*, WASH. POST: THE WATCH (May 14, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/05/14/the-ongoing-criminalization-of-poverty/?utm_term=.dc137c746fff.

205 As societies increasingly industrialized throughout the nineteenth century, the growth of larger businesses and concerns required an accompanying growth of employee rolls. The theories of Weber and others that fueled the control revolution gave employers both the tools and motivation to surveil their workforce as a means of tracking productivity, spotting efficiency bottlenecks, and identifying underperforming employees. These practices have expanded and matured to a point where they have become part of organizational doctrine, and are reflected in many employment laws and regulation schemes. See, e.g., Jennifer Luff, *Surrogate Supervisors: Railway Spotters and the Origins of Workplace Surveillance*, 5 LAB.: STUD. WORKING-CLASS HIST. 47 (2008); Kirstie Ball, *Workplace Surveillance: An Overview*, 51 LAB. HIST. 87, 93-94 (2010); Susan Hansen, *From “Common Observation” to Behavioural Risk Management: Workplace Surveillance and Employee Assistance 1914-2003*, 19 INT’L SOC. 151 (2004) (describing how employee assistance programs — one type of modern workplace surveillance — are used to identify and prevent workers from “becoming unproductive” and to address these risks).

events of 9/11.²⁰⁶ Much of this work has concentrated on macro-level studies of confidence in government at its uppermost levels, and the overall effects this has on public support for government action and the allocation of resources.²⁰⁷ For the purposes of this Article, however, I wish to focus on the issue of trust in a wider set of institutions, including the police, public health, and public assistance organizations, which ultimately affects citizens' general attitudes toward government in general. The societal dangers of intense and prolonged cynicism and feelings of alienation are, I believe, best examined from the bottom-up rather than the top-down, since grassroots disaffection can be a slow burning flame, often ignored at the macro level until things go horribly wrong.²⁰⁸

A recent article by African-American journalist Nikole Hannah-Jones describes an example of these effects in detail.²⁰⁹ While celebrating the July 4th holiday with her friends and family on

206 See generally Jack Citrin, *Comment: The Political Relevance of Trust in Government*, 68 AM. POL. SCI. REV. 973 (1974); Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government: A Time Series Analysis*, 64 PUB. OPINION Q. 239 (2000); Jack Citrin & Donald Philip Green, *Presidential Leadership and the Resurgence of Trust in Government*, 16 BRIT. J. POL. SCI. 431 (1986); Jack Citrin & Samantha Luks, *Political Trust Revisited: Déjà Vu All Over Again?*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 9-27 (John R. Hibbing ed., 2001); Arthur H. Miller, *Political Issues and Trust in Government: 1964-1970*, 68 AM. POL. SCI. REV. 951 (1974).

207 See Andrea Hetling et al., *Symbolism Versus Policy Learning: Public Opinion of the 1996 U.S. Welfare Reforms*, 36 AM. POL. RES. 335 (2007); Baruch Fischhoff et al., *Judged Terror Risk and Proximity to the World Trade Center*, in THE RISKS OF TERRORISM 39 (W. Kip Viscusi ed., 2003); Liempt & van Aalst, *supra* note 134; George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders' Views of the New York City Story*, 88 J. CRIM. L. AND CRIMINOLOGY 1217 (1998); JAMES SARGENT CAMPBELL ET AL., LAW AND ORDER RECONSIDERED: REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 81 (1969); Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133 (2004) (examining the renewed focus on surveillance and intelligence gathering post-9/11).

208 See generally DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS (2007); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (illustrating the increased targeting of African-American men through U.S. drug and crime policy, leading to increased surveillance and incarceration in these communities).

209 Nikole Hannah-Jones, *Yes, Black America Feels the Police. Here's Why.*, PROPUBLICA (Mar. 4, 2015), <https://www.propublica.org/article/yes-black-america-feels-the-police-heres-why>.

Long Island, Hannah-Jones and a few others decided to take a walk on the beach. The pleasant evening was interrupted by the sound of gunshots. The shooter quickly disappeared, and Hannah-Jones quickly checked to see if anyone was hurt, and noted that the high school intern who was staying with them at the time was on the phone with the police. This shocked the four adults in the group, who were all journalists with advanced degrees, and also happened to be black — none of them had considered calling 911 due to the “very real possibility of inviting disrespect, even physical harm.”²¹⁰ The group “feared what could happen if police came rushing into a group of people who, by virtue of our skin color, might be mistaken for suspects.”²¹¹

Hannah-Jones points out that her thoughts on this topic are not unique within the African-American and Latino populations, for whom policing and structural surveillance have been a means of social ordering and control.²¹² These means have been well documented in the literature concerning the Jim Crow South and black experiences in Northern cities during the Great Migration.²¹³ As Hannah-Jones’s experiences illustrate, however, the structural surveillance mechanisms that remain can still serve these purposes. Not long after Hannah-Jones’s guest began her 911 call with the police that July 4th, the conversation turned accusatory and adversarial, with the officer asking her “Are you really trying to be helpful, or were you involved in this?”²¹⁴ Hannah-Jones describes the frightening and humiliating effects of being under constant suspicion by a system of structural surveillance that is viewed as benign and/or invisible by the white population, and concludes that, while African-American communities desire a healthy and respectful relationship with the police and the state, the “countless slights and indignities” that stem from our system of structural surveillance will “build until there’s an explosion.”²¹⁵

These effects are not limited to minority populations, of course. We see these same outcomes whenever structural surveillance is deployed to suppress or control marginalized populations.²¹⁶ For

210 *Id.*

211 *Id.*

212 *Id.*

213 See ALEXANDER, *supra* note 208; PROVINE, *supra* note 208; *supra* text accompanying note 208.

214 Hannah-Jones, *supra* note 209.

215 *Id.*

216 See generally GILLIOM, *supra* note 156.

example, Gilliom's work on the surveillance of the poor provides an excellent illustration of the consequences of alienation.²¹⁷ He describes a population of "frightened, often lonely, women and children who live on the edge of hunger and homelessness and in fear of their caseworkers and their neighbors," who "live in a time when the poor are vilified by local and national political leaders," and are "stuck in a cycle of powerlessness."²¹⁸ Due to the nature of the structural surveillance arrayed against them, this population fears the institutions that govern their lives, because of their learned helplessness within a system that will only make things worse if they raise questions.²¹⁹ This state, often accompanied by a Foucauldian "internalization of the gaze" of structural surveillance, is the natural consequence of a system notionally instantiated to provide a benefit, but oriented toward punishment and control.²²⁰

C. Civic Disengagement and Other Chilling Effects

Fear or mistrust of institutions can often lead to complete disengagement from society by segments of the population. This behavior can be viewed as an ongoing struggle between the desire by governments to assess, analyze, audit, order, and discipline its citizens, and the resistance by those segments of the population who are forced to bear the costs as subjects of these structural surveillance programs. One of de Tocqueville's principal observations about the nascent United States was the centrality and importance of civic life, which he attributed to citizen participation and cooperation as "self interest rightly understood."²²¹ This concept was further observed in post-World War II America as the population's "belief that people are generally cooperative, trustworthy, and helpful."²²² The ability for people to work with one another and with our institutions requires a base level of trust that can be easily damaged under inequality enforced under structural surveillance regimes.²²³

217 *Id.* at 90.

218 *Id.*

219 *Id.* at 87-89.

220 *Id.* at 130.

221 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 122-23 (Harvey C. Mansfield & Delba Winthrop trans., Univ. Chi. Press 2002).

222 GABRIEL ABRAHAM ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE* 285 (1963).

223 Eric M. Uslaner & Mitchell Brown, *Inequality, Trust, and Civic Engagement*, 33 *AM. POL. RES.* 868 (2005).

Among the chief goals behind the implementation and administration of structural surveillance regimes is the maintenance of social order,²²⁴ but this power exercise has people on both sides of its equation. Those population segments on the losing side can view themselves as shut out of the realms — physical and otherwise — normally occupied by “respectable classes,” with the obvious implications that go along with that reality.²²⁵ These experiences can be physical, and even violent, as is the case with police interactions, as we have seen over multiple such incidents in Ferguson,²²⁶ Baltimore,²²⁷ and Chicago,²²⁸ or can be more subtly oppressive, as with the case of demeaning questions from social or health services case workers, but they all accumulate to erode the sense of trust in our institutions and one another.²²⁹ The explicit goals of these structural surveillance systems and policies may not be intentionally discriminatory (although they sometimes can be), but their effect can nonetheless be to alienate certain population segments from the mainstream.²³⁰ The results can manifest themselves in a multitude of ways, including decreased political and civic participation,²³¹

224 See *supra* Sections II.B., IV.A.

225 See Ogborn, *supra* note 53, at 505, 507, 516-18.

226 See, e.g., Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

227 See, e.g., Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, ATLANTIC (Apr. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/>.

228 See, e.g., Carrie Sloan & Johnae Strong, *Chicago Has Spent Half a Billion Dollars on Police Brutality Cases*, NATION (Mar. 11, 2016), <https://www.thenation.com/article/chicago-has-spent-half-a-billion-dollars-on-police-brutality-cases-and-its-impoverishing-the-victims-communities/>.

229 See Walker, *supra* note 166 (examining the creation of reconstructed identities of social services recipients through accounting regimes with nineteenth century origins); Hofmann, *supra* note 173 (analyzing the ill-effects of technology in social services distribution and record-keeping); Leda Blackwood et al., *Turning the Analytic Gaze on “Us”: The Role of Authorities in the Alienation of Minorities*, 18 EUR. PSYCHOLOGIST 245 (2013) (exploring majoritarian-led government services and their alienation of minority populations through humiliation, disrespect, and misrecognition); Jeremy D. Finn & Timothy J. Servoss, *Misbehavior, Suspensions, and Security Measures in High School: Racial/Ethnic and Gender Differences*, 5 J. APPLIED RES. ON CHILD. 1 (2015) (examining how strict disciplinary codes in schools can lead to student defensiveness, emotional disengagement, and other detrimental effects).

230 See generally Reinhard Bendix, *Bureaucracy and the Problem of Power*, 5 PUB. ADMIN. REV. 194 (1945).

231 See Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment*

chilled speech,²³² diminished educational opportunities,²³³ and limitations on access to quality health care.²³⁴ Those most likely to feel these deleterious effects are those segments of the population that are most vulnerable to stigmatization — minorities (especially African Americans) and the poor.²³⁵ The means of these effects are often invisible to those not targeted, and even when they are not, these structural surveillance programs become accepted as a necessary part of society, and henceforth become ignorable by this privileged group. This is, at its core, the reason we cannot allow the effects of structural surveillance to be overshadowed by its more technologically advanced — and more visible — cousins.

V. Next Steps: Political Participation and Structural Surveillance

Perhaps one of the most insidious and damaging forms of structural surveillance in the history of the United States can be found in the racist systems put in place following the abandonment of Reconstruction policies by the federal government in 1877.²³⁶ Implemented across the southern United States through a wide array of “Jim Crow” laws, this system was intended to roll back the rights gained by African Americans following the end of the Civil War and Reconstruction.²³⁷ Structural surveillance under Jim Crow was intended to enforce a de facto system of racial segregation

Implications of Surveillance, Beyond Chilling Speech, 49 U. OF RICH. L. REV. 465 (2015) (describing the wide-ranging detrimental effects surveillance has on speech, activities, and associations); Imran Awan, *British Muslims, Trust and the Police Service*, 4 POL. INSIGHT 34, 34-37 (2013).

232 See Kaminski & Witnov, *supra* note 232.

233 See Aaron Kupchik & Thomas J. Catlaw, *Discipline and Participation: The Long-Term Effects of Suspension and School Security on the Political and Civic Engagement of Youth*, 47 YOUTH & SOC'Y 95 (2014) (exploring the alienating effects strict discipline and surveillance programs have in schools).

234 See Kerri Harper, *Stereotypes, Childcare, and Social Change: How the Failure to Provide Childcare Perpetuates the Public Perception of Welfare Mothers*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 387 (2001) (analyzing the alienation that occurs with politicization of social welfare programs); Walker, *supra* note 166, at 461.

235 See Chambliss, *supra* note 122, at 181, 192-93; Monahan, *supra* note 182 (describing how systems of surveillance exacerbate and re-create societal inequalities and further stigmatize marginalized groups); SURVEILLANCE AS SOCIAL SORTING, *supra* note 4; Harcourt & Ludwig, *supra* note 112.

236 See generally ERIC FONER, RECONSTRUCTION (2011) (tracing the economic, societal, and political effects of the massive changes brought about by the end of slavery and the Civil War).

237 *Id.*

and discrimination, which often flew in the face of federal law but was largely ignored by an apathetic (or sympathetic) federal government.²³⁸ Many of these Jim Crow policies remain structurally embedded within our local and state governments by their effects, if no longer by name.²³⁹ My purpose in this ongoing project is to provide a framework to better identify and assess these policies, as seen through the lens of police interactions with racial minorities.

Police departments at the state and local level have recently begun the process of releasing ever larger amounts of information about day-to-day police activities, which include information on the race of those with whom they interact.²⁴⁰ These data present a new opportunity to examine the effectiveness of policing programs and policies as well as to reinforce police accountability. Professor Sharad Goel and his research team at Stanford University's Department of Management Science and Engineering have been collecting and analyzing these data under their Law, Order, and Algorithms project.²⁴¹ In cooperation with Professor Goel's group, I will be using their data to examine the relationships between the various aspects of structural surveillance I have identified in this and other articles, and the effects on marginalized populations within the respective communities in the data set. In coordination with this effort, I will also be conducting an ethnographic study of the relationship between the Philadelphia Police Department and the African-American communities they patrol, paying special attention to the low-tech surveillance methods I identify above. The results of these studies will be published in subsequent articles.

The relevance of such studies can be found in the continued use and worldwide growth of social control policies that are aimed at marginalized populations such as racial minorities, foreign nationals, and those who are seen as economically superfluous. An understanding of the sociology, anthropology, ethnography, and economy behind such programs is necessary, of course, to better

238 *Id.*

239 See generally ALEXANDER, *supra* note 208.

240 See generally Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327 (2015); Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35 (2014).

241 See *Law, Order & Algorithms*, KNIGHT FOUND., <http://www.knightfoundation.org/grants/201652100/>; *Law, Order & Algorithms: Making Sense of 100 Million Highway Patrol Stops*, KNIGHT FOUND. (Oct. 25, 2015), <https://www.newschallenge.org/challenge/data/entries/law-order-algorithms-making-sense-of-100-million-highway-patrol-stops>.

define the parameters of the problem and comprehend the thinking that goes into such policies. However, the most direct method of countering such discriminatory policies is through arguments that are well-grounded in data.

Planning for Density in a Driverless World

Sarah J. Fox*

Abstract

Automobile-centered, low-density development was the defining feature of population growth in the United States for decades. This development pattern displaced wildlife, destroyed habitats, and contributed to a national loss of biodiversity. It also meant, eventually, that commutes and air quality worsened, a sense of local character was lost in many places, and the negative consequences of sprawl impacted an increasing percentage of the population. Those impacts led to something of a shift in the national attitude toward sprawl. More people than ever are fluent in concepts of “smart growth,” “new urbanism,” and “green building,” and with these tools and others, municipalities across the country are working to redevelop a central core, rethink failing transit systems, and promote pockets of density.

Changing technology may disrupt this trend. Self-driving vehicles are expected to be widespread within the next several decades. Those vehicles will likely reduce congestion, air pollution, and deaths and free up huge amounts of productive time in the car. These benefits may also eliminate much of the conventional motivation and rationale behind sprawl reduction. As the time-cost of driving falls, driverless cars have the potential to incentivize human development of land that, by virtue of its distance from settled metropolitan areas, had been previously untouched. From the broader ecological perspective, each human surge into undeveloped land results in habitat destruction, fragmentation, and additional loss of biological diversity. New automobile technology may therefore usher in better air quality, increased safety, and a significant threat to ecosystem health.

Our urban and suburban environments have been molded for centuries to the needs of various forms of transportation. The same result appears likely to occur in response to autonomous vehicles if proactive steps are not taken to address their likely impacts. Currently, little planning is being done to prepare for driverless technology. Actors at multiple levels, however, have tools at their

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disposal to help ensure that new technology does not come at the expense of the nation's remaining natural habitats. This Article advocates for a shift in paradigm from policies that are merely anti-car to those that are pro-density and provides both cities and suburban areas suggestions for harnessing the positive aspects of driverless cars while trying to stem the negative implications.

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I. Introduction

When we talk about sprawl,¹ we talk about cars. Critiques of the low-density and highly consumptive development pattern frequently focus on time lost in traffic congestion and air quality degradation from exhaust emissions.² Cars made sprawl in its current form possible, and suburban development has ensured the continued dominance of the automobile through design centered nearly entirely on its needs. That design has taken a toll on both humans and the environment. As development draws farther away from the city center, “commuters and commerce face barely tolerable and ever-worsening congestion on the highways.”³ In the United States, the time attributed to waiting in traffic in 2014 was 42 hours

- 1 In very general terms, sprawl, or low-density development, is characterized by isolated centers of development, dedicated to single uses and accessible only by car, with residential developments segregated in clusters of units of similar cost. This kind of sprawl development “is limited only by the range of the automobile,” and “[v]ehicular traffic controls the scale and form of space, with streets being wide and dedicated primarily to the automobile” and “[p]arking lots typically dominate the public space.” Andrés Duany & Elizabeth Plater-Zybeck, *The Traditional Neighborhood and Urban Sprawl*, in *NEW URBANISM AND BEYOND: DESIGNING CITIES FOR THE FUTURE* 64 (Tigran Haas ed., 2008).
- 2 See, e.g., Michael Lewyn, *Sprawl in Canada and the United States*, 44 *URB. LAW.* 85, 86-87 (2012) (discussing sprawl in terms of “increased traffic congestion, air pollution, and greenhouse gas emissions”); Judi Brawer & Matthew Vespa, *Thinking Globally, Acting Locally: The Role of Local Government in Minimizing Greenhouse Gas Emissions from New Development*, 44 *IDAHO L. REV.* 589, 598 (2008) (discussing “sprawl problems” as including traffic congestion and poor air quality); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 *SETON HALL L. REV.* 1, 17 (2001) (“[T]he increased commutes created by suburban sprawl cause greater traffic congestion and worse air quality.”); Oliver A. Polard III, *Smart Growth and Sustainable Transportation: Can We Get There from Here?*, 29 *FORDHAM URB. L.J.* 1529, 1554 (2002) (noting that the Atlanta region has “come to epitomize suburban sprawl, experiencing explosive, scattered development, heavy automobile dependence, skyrocketing traffic congestion, and poor air quality”).
- 3 JAMES A. KUSHNER, *THE POST-AUTOMOBILE CITY: LEGAL MECHANISMS TO ESTABLISH THE PEDESTRIAN-FRIENDLY CITY* 7 (2004) [hereinafter KUSHNER, *POST-AUTOMOBILE CITY*]; cf. Selima Sultama & Joe Weber, *Journey-to-Work Patterns in the Age of Sprawl: Evidence from Two Midsize Southern Metropolitan Areas*, 59 *PROF. GEOGRAPHER* 193, 199 (2007) (“The comparison of sprawling and urban areas confirms the prevailing view about sprawl, as average miles, commute time, and drive time are significantly longer for people living in sprawling areas compared to those living in denser urban areas . . .”).

per person, a loss valued at \$160 billion nationwide.⁴ Automobiles are also responsible for approximately half of all carbon monoxide emissions and a sizable percentage of emissions of nitrogen oxides, volatile organic compounds, and particulate matter.⁵ Motivated in part by these adverse impacts, the past several decades have seen population growth and economic revitalization in urban centers across the United States.

Enter the driverless car⁶ — better yet, the electric, driverless car. Changing automobile technology appears poised to produce a car in the near future that is fully electric and fully autonomous; elements of each are already on the road.⁷ These advances are likely to bring about better safety and air quality and offer increased independence to large segments of the population. They are also likely to increase tolerance for time spent in transit. Congestion, gas prices, and the frustrations that come with time spent commuting have long served as an informal cap on sprawl. With those limitations lifted, development of ever-greater swaths of land is foreseeable. Decades of suburban growth have shown that large-scale, low-density development has enormous negative consequences for the environment.⁸ A second major expansion in automobile traffic

4 DAVID SCHRANK ET AL., 2015 Urban Mobility Scorecard 1 (2015), <http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/mobility-scorecard-2015.pdf>.

5 JAMES A. KUSHNER, *HEALTHY CITIES: THE INTERSECTION OF URBAN PLANNING, LAW, AND HEALTH* 98 (2007) [hereinafter KUSHNER, *HEALTHY CITIES*].

6 This Article uses the terms “driverless cars,” “self-driving cars,” “autonomous vehicles,” and “automated vehicles” interchangeably.

7 See, e.g., Bill Vlasic, *Tesla’s New Model 3 Jump-Starts Demand for Electric Cars*, N.Y. TIMES (Apr. 1, 2016), <http://www.nytimes.com/2016/04/02/business/teslas-new-model-3-jump-starts-demand-for-electric-cars.html?ref=collection%2Ftimestopic%2FElectric%20and%20Hybrid%20Vehicles> (describing advances in electric car market); see also, e.g., Rachel Abrams, *Self-Driving Cars May Get Here Before We’re Ready*, N.Y. TIMES (Jan. 21, 2016), <http://www.nytimes.com/2016/01/22/business/dealbook/davos-self-driving-cars-may-get-here-before-were-ready.html> (noting the current availability of autonomous components in many vehicles, and describing the expected advances in technology).

8 See WILLIAM A. SHUTKIN, *THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY* 50 (2001) (detailing the environmental impacts of suburbanization, including air pollution and habitat destruction); see also, e.g., Sarah Fox, *CERCLA, Institutional Controls, and the Legacy of Urban Industrial Use*, 42 ENVTL. L. 1211, 1218 (2012) (describing commonly accepted environmental tolls of sprawl development).

could therefore be devastating to biological diversity and ecosystem health across the United States. Density matters, even in a world of zero emissions and zero productive time lost to driving, because it is the means by which we control the human footprint on the larger ecosystem.

Although the potential impacts of the driverless car on density have been recognized in passing, those impacts have not played a prominent role in the growing conversation around this new technology. Instead, legal scholarship on autonomous vehicle technology has, to date, focused primarily on questions of legality⁹ or issues of liability, privacy, and public safety that will inevitably arise once autonomous vehicles are more broadly adopted.¹⁰ This Article takes a deeper look at the potential implications of this new technology for land use and the environment and emphasizes the importance of planning for dense communities independent of transportation technology. It also proposes possible responses to the driverless car at both the suburban and urban levels. The information-forcing provisions of environmental review statutes, combined with practical ways in which policymakers can plan for the driverless car, may help to prevent another generation of scattered development centered on the needs of the automobile.

9 See generally Bryant Walker Smith, *Automated Vehicles are Probably Legal in the United States*, 1 TEX. A&M L. REV. 411 (2014) [hereinafter Smith, *Probably Legal*] (positing that, because automated vehicles are not expressly prohibited, they are legal without further action by federal or state governments).

10 See, e.g., Sarah Aue Palodichuk, *Driving Into the Digital Age: How SDVs Will Change the Law and Its Enforcement*, 16 MINN. J.L. SCI. & TECH. 827 (2015); Robert Sykora, *The Future of Autonomous Vehicle Technology as a Public Safety Tool*, 16 MINN. J.L. SCI. & TECH. 811 (2015); Katherine L. Hanna, *Old Laws, New Tricks: Drunk Driving and Autonomous Vehicles*, 55 JURIMETRICS J.L. SCI. & TECH. 275 (2015); Orly Ravid, *Don't Sue Me, I Was Just Lawfully Texting & Drunk When My Autonomous Car Crashed Into You*, 44 SW. L. REV. 175 (2014); Sophia H. Duffy & Jamie Patrick Hopkins, *Sit, Stay, Drive: The Future of Autonomous Car Liability*, 16 SMU SCI. & TECH. L. REV. 453 (2013); Alexander Herd, *R2DFord: Autonomous Vehicles and the Legal Implications of Varying Liability Structures*, 5 FAULKNER L. REV. 29 (2013); Jeffrey K. Gurney, *Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles*, 2013 U. ILL. J.L. TECH. & POL'Y 247 (2013); Rachael Roseman, *When Autonomous Vehicles Take Over the Road: Rethinking the Expansion of the Fourth Amendment in a Technology-Driven World*, 20 RICH. J.L. & TECH. 1 (2013); Frank Douma & Sarah Aue Palodichuk, *Criminal Liability Issues Created by Autonomous Vehicles*, 52 SANTA CLARA L. REV. 1157 (2012); Gary E. Marchant & Rachel A. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 SANTA CLARA L. REV. 1321 (2012); Kyle Graham, *Of Frightened Horses, and Autonomous Vehicles: Tort Law and its Assimilation of Innovations*, 52 SANTA CLARA L. REV. 1241 (2012).

Planning for the future is a central component of ensuring the health of human communities and the broader ecosystem.¹¹ As we look ahead to a driverless world, the benefits promised by autonomous vehicles for safety, air quality, and accessibility should not mean an unequivocal embrace of the new technology. Nor should environmental concerns about development prevent the approval or progress of automated vehicles. Instead, the American planning dynamic should shift toward building towns and cities that will not bleed slowly into the ecosystem around them and that will thrive as different forms of transit come and go.

II. Changing Transportation Technology

In the roughly 250 years since its formation, the United States has seen a variety of transportation technologies. With each major shift in the way people travel, “the whole fabric of America’s human geography was shredded and then rewoven in patterns determined by the particular way the new transport technology operated.”¹² Canals, streetcars, railroads, and automobiles have all played a role in shaping the way that people live;¹³ they have increased the speed and ease of travel, and opened up new areas for settlement. The consequent changes in national geography and problems with congestion and sprawl have played out in ways that may have “seemed unpredictable at the time”¹⁴ but which could potentially have been avoided through better planning.¹⁵

11 Cf. JAMES A. KUSHNER, *COMPARATIVE URBAN PLANNING LAW: AN INTRODUCTION TO URBAN LAND DEVELOPMENT LAW IN THE UNITED STATES THROUGH THE LENS OF COMPARING THE EXPERIENCE OF OTHER NATIONS* 243-44 (2003) [hereinafter KUSHNER, *COMPARATIVE URBAN PLANNING*] (noting that environmental issues are inextricable from questions of growth, particularly where that “growth means increasing dependence on oil and energy production” and noting the opportunities for better planning and conservation, including “better architectural design [that] require[s] less energy, planned open spaces utilizing water reclamation, [which] could reduce water consumption and the cost of living,” and more pedestrian- and transit-friendly housing that “could translate into public policy that does not threaten the environment as well as the economy”).

12 Peirce Lewis, *The Landscapes of Mobility*, in *THE NATIONAL ROAD* 3, 11 (Karl B. Raitz & George F. Thompson, eds., 1996).

13 VUKAN VUCHIC, *TRANSPORTATION FOR LIVABLE CITIES* 5-6 (1999); Lewis, *supra* note 12, at 11, 18, 24.

14 Lewis, *supra* note 12, at 11.

15 VUCHIC, *supra* note 13, at 9.

For instance, at their inception, “[i]t was assumed initially that motor-powered vehicles would merely replace horse-drawn vehicles,” and that barns and stables could be used for overnight storage, with curbside parking available during the day.¹⁶ Many predicted that the development of the automobile would reduce overall congestion because of its efficiencies over horse-drawn wagons.¹⁷ But the popularity of the automobile and the space each car consumed soon resulted in clogged streets. In response, many cities began requiring businesses to provide minimum parking spaces for their customers.¹⁸ Although it was perhaps not the initial motivation, minimum parking requirements have mandated and perpetuated sprawl development. Because parking is required, buildings have to be far apart; because the buildings are far apart, cars are required to reach them; because cars are required to reach them, more parking is required.¹⁹ This cycle is responsible, in large part, for the loss of density in American cities and suburbs and its attendant costs.

Above all, minimum parking requirements are a “great planning disaster” — a case of policy recommendations untethered from their environmental and social costs.²⁰ To avoid a similar disastrous fate for driverless cars, it is necessary to weigh their potential costs and benefits at the outset, even if it is impossible to predict the precise ways in which new transportation technologies will develop.²¹ As electric and autonomous cars appear on the horizon, now is the time to use history as an example and consider possible impacts from and responses to these latest transit innovations.

A. *Electric Cars*

Electric cars have a long history in the United States dating back to their competition with gasoline-powered vehicles for popularity in the early twentieth century.²² Struggles to provide

16 JOHN A. JAKLE & KEITH A. SCULLE, *LOTS OF PARKING: LAND USE IN A CAR CULTURE* 19-21 (2004).

17 *Id.* at 19.

18 DONALD SHOUP, *THE HIGH COST OF FREE PARKING* 1-2 (2011).

19 *See, e.g.*, JAKLE & SCULLE, *supra* note 16, at 3, 4.

20 SHOUP, *supra* note 18, at 127.

21 *Id.* at 6 (“A simple projection is often a poor forecast because technology and policy can change.”).

22 *See, e.g.*, DANIEL SPERLING, *FUTURE DRIVE: ELECTRIC VEHICLES AND SUSTAINABLE TRANSPORTATION* 36 (1995) (“[A]t the turn of the century

a battery adequate for long distances stymied the electric car's progress, and the combustion engine quickly overtook its share of the market.²³ Although attempts were made throughout the last century to make the electric vehicle more mainstream,²⁴ automobile manufacturers do not appear to have considered the possibility in earnest until 1990 when the California Air Resources Board released a Zero Emission Vehicle (ZEV) mandate.²⁵ The ZEV mandate required that 2% of new cars produced by large automobile manufacturers have zero emissions by 1998, 10% by 2003,²⁶ and 14% by 2017.²⁷ Incentivized by this requirement, a number of car manufacturers began marketing cars that used at least a hybrid of combustion and electric propulsion mechanisms.²⁸ Car companies, wary of abandoning profit centers attendant to the combustion engine and concerned with permanently heightened emissions standards, may have sabotaged early efforts to bring an all-electric car to market.²⁹ Now, however, all-electric vehicles are poised to make a more widespread introduction to consumers.³⁰

It is true that “[t]he electric [car] does not solve every problem wrought by the automobile, but it solves a few problems well.”³¹ Chief among these is the carbon dioxide emissions typically generated by

when motor cars were a new invention, electric vehicles outnumbered gasoline-powered vehicles.”); MICHAEL BRIAN SCHIFFER, *TAKING CHARGE: THE ELECTRIC AUTOMOBILE IN AMERICA* 57 (1994) (stating that, in 1899, “a wide assortment of electric passenger cars as well as commercial vehicles was being sold by more than a dozen firms”).

23 SCHIFFER, *supra* note 22, at 75.

24 See, e.g., SPERLING, *supra* note 22, at 36-37 (noting research by General Motors and Ford into electric vehicles in the 1960s, 1970s, and 1980s).

25 *Id.* at 37; SCHIFFER, *supra* note 22, at 176.

26 SCHIFFER, *supra* note 22, at 176.

27 CAL. CODE REGS. tit. 1, § 1962.1 (2016).

28 A hybrid vehicle “employs a small internal combustion engine and an electric generator and battery to supplement battery power to the electronic motor drive, thereby increasing the vehicle’s range and reducing the size of the engine and the battery pack.” RICHARD C. DORF, *TECHNOLOGY, HUMANS AND SOCIETY: TOWARD A SUSTAINABLE WORLD* 394 (2001). Hybrid vehicles reduce emissions appreciably, but are not zero emission vehicles. *Id.*

29 See generally WHO KILLED THE ELECTRIC CAR? (Sony Pictures Home Entertainment 2006).

30 See, e.g., Brad Tuttle, *The Case for Buying an Electric Car is About to Get a Whole Lot Better*, TIME (June 29, 2015), <http://time.com/money/3940042/nissan-leaf-chevy-bolt-tesla-driving-range/> (describing advancements in commercially available electric car technology).

31 SCHIFFER, *supra* note 22, at 176.

standard combustion engines. Electric vehicles and electric hybrid vehicles are estimated to produce approximately half the amount of the current annual carbon dioxide emissions produced by gasoline powered vehicles, cutting the national average from approximately 11,500 pounds of carbon dioxide emitted annually to around 5,800 pounds.³² While the unsustainability of many power sources means that electric vehicles are not an environmental panacea,³³ widespread adoption would result in a meaningful decrease in greenhouse gas emissions.³⁴ This is particularly true if the Environmental Protection Agency's (EPA) Clean Power Plan,³⁵ or other efforts to increase the efficiency and availability of renewable energy sources, result in increased use of renewable energy sources by electric car drivers.³⁶

B. Driverless Cars

In very simple terms, self-driving vehicles “are those in which at least some aspects of a safety-critical control function (e.g., steering, throttle, or braking) occur without direct driver input.”³⁷ Driverless

32 See *Emissions from Hybrid and Plug-In Electric Vehicles*, Article in *Alternative Fuels Data Center*, U.S. DEPT OF ENERGY, http://www.afdc.energy.gov/vehicles/electric_emissions.php (last visited Aug. 14, 2015).

33 See, e.g., Mikael Hård & Andreas Knie, *Getting Out of the Vicious Traffic Circle: Attempts at Restructuring the Cultural Ambience of the Automobile Throughout the 20th Century*, in *ELECTRIC VEHICLES: SOCIO-ECONOMIC PROSPECTS AND TECHNOLOGICAL CHALLENGES* 40 (Robin Cowan & Steffan Hultén eds., 2001) (noting that “representatives of environmental movements, who have generally been strongly opposed to the gasoline engine, have tended to disqualify the electric car as the ‘coal car’ or the ‘atomic automobile’” given that electric power has not been generated in a sustainable manner).

34 See, e.g., U.S. DEPT OF ENERGY, *supra* note 32 (noting that, even taking into account “well-to-wheel” emissions for electric vehicles, they contribute approximately half of the emissions of conventional gas vehicles).

35 40 C.F.R. § 60 (2016).

36 See Press Release, greencars.org, More Electric Cars than Ever on Greenest Vehicles List (Jan. 26, 2016), <http://greencars.org/news/press-releases/more-electric-cars-ever-greenest-vehicles-list> (“[T]he electricity sector is slated to become cleaner . . . thanks to the Clean Power Plan . . .”).

37 NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PRELIMINARY STATEMENT OF POLICY CONCERNING AUTOMATED VEHICLES (2013) [hereinafter NHTSA PRELIMINARY STATEMENT], http://orfe.princeton.edu/~alaink/SmartDrivingCars/Automated_Vehicles_Policy.pdf. The National Highway Traffic Safety Administration has designated four levels of automation, ranging from function-specific automation, such as electronic stability control or pre-charged brakes, all the way to full self-driving automation, for which there is no expectation that the driver will be available for control at any time during

cars are developed in two primary camps: those that communicate with other cars, the road, or both to navigate; and those that rely on an internal computer's assessment of road conditions.³⁸ The former navigates via readings from satellites and maps of the terrain.³⁹ The latter relies on satellites, lasers, and a computer program through which the vehicle is painstakingly trained to "recognize" hazards and other elements of driving.⁴⁰

Cars that drive without human control have long been part of the popular imagination. The 1939 World's Fair included an exhibition called "Futurama" that depicted the world of 1960 as one of automated highways and cars capable of making a trip across the United States in 24 hours.⁴¹ Crowds waited in long lines to be shown a world where cars operated on a sophisticated track across the country and where traffic and congestion had been eliminated.⁴² This, promised Norman Bel Geddes, architect of Futurama (and GM, its sponsor⁴³), was the future in two decades.⁴⁴ From there, progress came slowly but steadily. Futurama's 1960s did not come to pass, but that decade did bring dedicated research into driver assistance systems and autonomous vehicles.⁴⁵ Self-driving cars were introduced in some forms by the 1970s⁴⁶ and, by the 1980s, computing and sensing performance had improved sufficiently to allow for better driver assistance systems.⁴⁷ The 1990s brought a big breakthrough in the form of adaptive cruise control and other automated systems such as emergency braking and pedestrian detection.⁴⁸

the trip. *Id.*

38 See Burkhard Bilger, *Auto Correct: Has the Self-Driving Car At Last Arrived?*, THE NEW YORKER (Nov. 25, 2013), <http://www.newyorker.com/magazine/2013/11/25/auto-correct> (describing processes by which autonomous vehicles were developed).

39 *Id.*

40 *Id.*

41 See NORMAN BEL GEDDES, *MAGIC MOTORWAYS* 1, 8-10 (1940).

42 See *id.* at 3-4, 6, 8.

43 See CHARLES MONTGOMERY, *HAPPY CITY: TRANSFORMING OUR LIVES THROUGH URBAN DESIGN* 73 (2013).

44 GEDDES, *supra* note 41, at 9-10.

45 Sven A. Beiker, *Legal Aspects of Autonomous Driving*, 52 SANTA CLARA L. REV. 1145, 1146 (2012).

46 Adam Fisher, *Inside Google's Quest to Popularize Self-Driving Cars*, POPULAR SCIENCE (Sept. 18, 2013), <http://www.popsci.com/cars/article/2013-09/google-self-driving-car>.

47 See Beiker, *supra* note 45, at 1146.

48 *Id.* at 1148.

None of these developments compare to the advances made since the turn of the twenty-first century. Much of the current spate of innovation in driverless cars was jump-started through a contest run by the Defense Advanced Research Projects Agency (DARPA), an agency of the United States Department of Defense dedicated to the development of emerging technologies for use by the military. In an attempt to advance driverless vehicle technology, DARPA sponsored driverless car races known as “Grand Challenges” in 2004, 2005, and 2007.⁴⁹ These Grand Challenges inspired rapid advances in driverless car technology.⁵⁰ In April 2015, a driverless car drove from San Francisco to New York City in nine days, performing 99% of the driving on its own.⁵¹ Most automakers “expect to have cars capable of handling themselves in stop-and-go traffic and on the highway within three to five years. Cars capable of navigating more complex urban environments will follow in the years beyond that, while fully autonomous vehicles are expected to be commonplace by 2040.”⁵² Others predict that more comprehensive autonomous features will exist in vehicles by 2020, 41% of the national vehicle fleet will have some type of autonomous driving mode by 2030, and 75% of vehicles will have fully-automated functions by 2035.⁵³ A large number of

49 Fisher, *supra* note 46.

50 See, e.g., Alex Davies, *This is Big: A Robo-Car Just Drove Across the Country*, WIRE (Apr. 3, 2015), <https://www.wired.com/2015/04/delphi-autonomous-car-cross-country/>. The author notes that, at the 2004 DARPA Grand Challenge, the vehicles tried to complete a 150-mile course. The best result was 7.32 miles, “and that vehicle got stuck and caught fire.” By the 2005 Grand Challenge, five vehicles completed a 132-mile course in seven hours. *Id.*

51 *Id.* This is still a great deal removed from the 24-hour trip by an autonomous vehicle from the Atlantic Coast to San Francisco predicted in Norman Bel Geddes’s *Magic Motorways*, the book accompanying the “Futurama” exhibit. See GEDDES, *supra* note 41, at 151-64.

52 Davies, *supra* note 50.

53 David Alexander & John Gartner, *Executive Summary: Autonomous Vehicles — Self-Driving Vehicles, Advanced Driver Assistance Systems, and Autonomous Driving Features: Global Market Analysis and Forecast*, NAVIGANT RESEARCH (2015), <https://www.navigantresearch.com/research/autonomous-vehicles>; see also *Autonomous Vehicles Will Surpass 95 Million in Annual Sales by 2035*, NAVIGANT RESEARCH (Aug. 21, 2013), <http://www.navigantresearch.com/newsroom/autonomous-vehicles-will-surpass-95-million-in-annual-sales-by-2035>; Alex Davies, *Volvo Will Test Self-Driving Cars With Real Customers in 2017*, WIRE (Feb. 23, 2015) <https://www.wired.com/2015/02/volvo-will-test-self-driving-cars-real-customers-2017/> (noting that Nissan and Mercedes have given themselves a 2020 deadline for putting cars with autonomous features on the market).

major automobile manufacturing companies have announced plans to incorporate driverless technology into upcoming vehicles.⁵⁴ Regulators are also responding to these advances. In September 2016, the National Highway Traffic Safety Administration (NHTSA) issued its long-awaited Federal Automated Vehicles Policy, which set out initial federal safety standards for “highly automated vehicles,” encouraged the implementation of uniform state standards for driverless technology, clarified the process for seeking interpretation of federal rules as applied to automated vehicles, and identified potential new tools that the federal government may use in ensuring the safe implementation of automated vehicle technology.⁵⁵

C. Autonomous Vehicles, for Better and for Worse

Current advances in automobile technology are a feat of human engineering. Along with prompting one to marvel at their ingenuity, however, these automobiles should also inspire reflection about the likely shape of a driverless future. We need only to look at the difference between the landscape of the United States at its inception and today to appreciate that a relatively brief span of time can lead to unimaginable changes in development patterns based on shifting transportation technologies. Acknowledging the potential benefits and possible costs of new transit is important in order to have a complete understanding of how driverless cars could impact the world.

54 See, e.g., Kirsten Korosec, *Elon Musk Says Tesla Vehicles Will Drive Themselves in Two Years*, FORTUNE (Dec. 21, 2015), <http://fortune.com/2015/12/21/elon-musk-interview/>; Charles Fleming, *Ford Driverless Car to Hit California Roads*, L.A. TIMES (Dec. 15, 2015), <http://www.latimes.com/business/autos/la-fi-hy-ford-driverless-car-to-hit-california-roads-20151215-story.html>; Victor Luckerson, *Microsoft Is Developing Driverless Car Technology With Volvo*, TIME (Nov. 20, 2015), <http://time.com/4122084/microsoft-diverless-car-volvo/>; Mike Ramsey, *Nissan Speeds Ahead of Rivals With Plans for Driverless Car*, WALL ST. J. (Oct. 29, 2015), <http://www.wsj.com/articles/nissan-speeds-ahead-of-rivals-with-plans-for-autonomous-car-1446121737>; *Toyota Promises Driverless Cars on Roads by 2020*, BBC NEWS (Oct. 7, 2015), <http://www.bbc.com/news/technology-34464450>.

55 DEPT OF TRANSP. & NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FEDERAL AUTOMATED VEHICLES POLICY: ACCELERATING THE NEXT REVOLUTION IN ROADWAY SAFETY (Sept. 2016) [hereinafter DOT POL'Y], <http://www.nhtsa.gov/staticfiles/rulemaking/pdf/Autonomous-Vehicles-Policy-Update-2016.pdf>.

1. *For Better*

Driverless cars are likely to have many benefits.⁵⁶ First, autonomous vehicles are expected to be, quite literally, lifesaving. In the United States, car accidents killed over 30,000 people in 2013,⁵⁷ and “[t]he medical costs of car collisions are the largest single component of the health care costs” in the country.⁵⁸ As it may well be that “[o]f the ten million accidents that Americans are in every year, nine and a half million are their own damn fault,”⁵⁹ taking the human element out of driving is likely to make travel by car much safer. These safety improvements may not be realized until a majority of vehicles on the road are fully autonomous, given the potential for the dangerous interaction of human reactions and computer programming.⁶⁰ And, to be sure, driverless cars are not failsafe; the first known death due to an error of an autopilot system occurred in May 2016.⁶¹ Nonetheless, driverless cars are anticipated to result in many fewer fatalities than human-operated vehicles.

Air pollution is also likely to decrease in a world of driverless vehicles. Self-driving cars are likely to encourage development of electric car technology by opening up the possibility of centralized charging stations to which cars could drive themselves when not in use. As noted above, electric cars are responsible for many fewer emissions than gasoline-powered vehicles;⁶² however, autonomous

56 NHTSA PRELIMINARY STATEMENT, *supra* note 37 (noting that the benefits of driverless cars include not only safety, but also that “[v]ehicle control systems that automatically accelerate and brake with the flow of traffic can conserve fuel more efficiently than the average driver. By eliminating a large number of vehicle crashes, highly effective crash avoidance technologies can reduce fuel consumption by also eliminating the traffic congestion that crashes cause every day on our roads. Reductions in fuel consumption, of course, yield corresponding reductions in greenhouse gas emissions.”).

57 *Accidents or Unintentional Injuries*, CTR. FOR DISEASE CONTROL & PREVENTION (July 14, 2014), <http://www.cdc.gov/nchs/fastats/accidental-injury.htm>.

58 KUSHNER, *HEALTHY CITIES*, *supra* note 5, at vii.

59 Bilger, *supra* note 38.

60 See, e.g., Jim Kerstetter, *Daily Report: Google’s Driverless Car Learns to Navigate an Imperfect World*, N.Y. TIMES: BITS (Sept. 2, 2015), http://bits.blogs.nytimes.com/2015/09/02/daily-report-googles-driverless-car-learns-to-navigate-an-imperfect-world/?_r=0.

61 See Joan Lowy & Tom Krisher, *Tesla Driver’s Death Using Car’s ‘Autopilot’ Probed by NHTSA*, WASH. POST (July 1, 2016), https://www.washingtonpost.com/politics/tesla-driver-killed-in-crash-while-using-cars-autopilot/2016/06/30/29d740b6-3f22-11e6-9e16-4cf01a41decb_story.html.

62 See *supra* text accompanying note 32.

vehicle technology itself is expected to offer air quality benefits. For instance, the development of driverless cars is predicted to incentivize fuel efficiency because of the expected increase in miles traveled for each individual car.⁶³ Moreover, according to a 2007 survey, traffic congestion resulted in 2.8 billion gallons of fuel burned annually.⁶⁴ Traffic made up of autonomous vehicles is expected to flow more efficiently than traffic in the past, which will contribute to greater fuel efficiency and emissions reductions.⁶⁵ Such air quality improvements will have important environmental and social justice impacts. Indeed, eliminating emissions from vehicles could be an important part of controlling climate change, as “[t]he combustion of fossil fuels such as gasoline and diesel to transport people and goods [was] the second largest source of CO₂ emissions” in the United States in 2014, “accounting for about 31% of total U.S. CO₂ emissions and 25% of total U.S. greenhouse gas emissions.”⁶⁶ These improvements should therefore have important positive impacts for ecosystem health, as well as for environmental justice.⁶⁷

Driverless cars also have the potential to create many positive impacts on both the existence and experience of time spent in traffic. As noted, current estimates state that the average commuter spends 42 hours in traffic congestion each year.⁶⁸ The more efficient flow of vehicles made possible by driverless cars may mean that “traffic jams become a thing of the past.”⁶⁹ The elimination of cognitive requirements while in a driverless car also frees up travel time for productivity or rest,⁷⁰ lowering the time-cost of travel. Further,

63 Jeffery B. Greenblatt & Susan Shaheen, *Automated Vehicles, On-Demand Mobility, and Environmental Impacts*, in 2 CURRENT SUSTAINABLE RENEWABLE ENERGY REP. 74, 79 (MV Chester ed., 2015).

64 Beiker, *supra* note 45, at 1150.

65 Fisher, *supra* note 46.

66 *Overview of Greenhouse Gases*, U.S. ENVTL. PROT. AGENCY (Oct. 6, 2016), <http://www3.epa.gov/climatechange/ghgemissions/gases/co2.html>.

67 Environmental justice refers to “the fair treatment of people of color in the distribution of environmental benefits and burdens.” See Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 389 (1999). Reduction of harmful emissions implicates environmental justice because populations of racial minority are currently “more likely to live in areas with reduced air quality when compared to whites.” See Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1202 (2003).

68 SCHRANK ET AL., *supra* note 4.

69 Fisher, *supra* note 46.

70 See, e.g., Dan Neil, *Who’s Behind the Wheel? Nobody*, WALL ST. J. (Sept. 24, 2012),

autonomous vehicles will provide greater accessibility to segments of the population who are currently unable to drive but live in areas where private vehicles are the only mode of transportation, including senior citizens, teenagers, and those who are disabled.⁷¹

At a more abstract level, driverless cars may also spell the end of private vehicle ownership or may at least help it on its way. Individual automobiles and the freedom of movement that they represent have long been interwoven with a sense of identity for a number of Americans.⁷² That connection to the automobile is likely responsible, at least in part, for much of the resistance to mass transit options and land use controls that counteract suburban expansion. Many predict that driverless cars will result in decreased private vehicle ownership because of the ease of car sharing that would exist in a world where the car can transport itself between users.⁷³ For those who choose to privately own driverless cars, those vehicles may serve a psychological role in bringing about a more gradual shift in thinking about private car ownership. By removing the human element from the chain — a car, not driving, is how you get around — the autonomous vehicle may help to break the tie between identity and personal automobile ownership.⁷⁴ A

<http://www.wsj.com/articles/SB10000872396390443524904577651552635911824> (noting the lack of productivity for drivers during their commutes).

71 See Bryant Walker Smith, *Managing Autonomous Transportation Demand*, 52 SANTA CLARA L. REV. 1401, 1409 (2012) [hereinafter Smith, *Managing Demand*] (“Self-driving cars that do not need human drivers or monitors may substantially increase mobility for those who cannot (legally) drive themselves because of youth, age, disability, or incapacitation.”); see also, e.g., KUSHNER, *COMPARATIVE URBAN PLANNING*, *supra* note 11, at 3-4 (noting that where lifestyles are automobile centered, “[t]he elderly, the young, and the disabled, unable to drive, are captive in their homes and dependent on others for mobility”).

72 See Jake Blumgart, *Whither the Driverless Car?*, NEXT CITY (Jan. 23, 2013), <https://nextcity.org/daily/entry/whither-the-driverless-car> (“Cars have long been indicative of freedom, status symbols connected to what it means to be American.”); but see Neil, *supra* note 70 (objecting to the notion of car-centered identity as a manufacturers’ construct and stating that a majority of Americans view car ownership as an “expensive obligation and necessity” and a “brutal tax”).

73 Some proponents of the autonomous vehicle highlight the potential for a shared fleet of vehicles to replace private vehicle ownership as the predominant means of transport by automobile. See, e.g., *Google’s X-Man: A Conversation with Sebastian Thrun*, 92 FOREIGN AFF. 2, 4 (2013).

74 See, e.g., Dan Neil, *Could Self-Driving Cars Spell the End of Ownership?*, WALL ST. J. (Dec. 1, 2015, 11:16 AM), <http://www.wsj.com/articles/could-self-driving-cars-spell>

reconceptualization of the human relationship to cars may make it possible over time to encourage more efficient, less land-intensive forms of transportation and help to eliminate reliance on personal ownership of vehicles altogether.

2. For Worse

Aside from all of the aforementioned benefits, self-driving cars may also have a substantial downside. A recent study by the EPA observed a leveling-off of the increase in vehicle miles traveled (VMT) per year in the United States.⁷⁵ The report theorized that “travel demand might have reached a saturation point as drivers are unwilling to devote more time to travel, infrastructure improvements no longer allow substantial speed increases, and the marginal benefits of additional trips or travel to additional destinations are not worth the marginal cost.”⁷⁶ Economists too have proposed a “reduced tolerance for commuting” as part of the reason for the increase in urban home values.⁷⁷ Under this theory, the limitations of current transportation technology have brought us to a point of VMT saturation⁷⁸ that has contributed to the renewed urban growth of the past several decades. That growth, changing demographics

the-end-of-ownership-1448986572?tesla=y; but see David Levinson, *Climbing Mount Next: The Effects of Autonomous Vehicles on Society*. 16 MINN. J.L. SCI. & TECH. 787, 802 (2015) (noting that shared vehicle services will work better in urban areas than rural ones). Any such trend may first require overcoming personal preferences that could serve as a barrier to adoption of self-driving cars in any form — reluctance to forfeit control of cars and/or enjoyment of driving. See JANE BIERSTEDT ET AL., EFFECTS OF NEXT-GENERATION VEHICLES ON TRAVEL DEMAND AND HIGHWAY CAPACITY 9 (Jan. 2014), http://orfe.princeton.edu/~alaink/Papers/FP_NextGenVehicleWhitePaper012414.pdf; see also Dorothy J. Glancy, *Autonomous and Automated and Connected Cars—Oh My! First Generation Autonomous Cars in the Legal Ecosystem*, 16 MINN. J.L. SCI. & TECH. 619, 633 (2015) (“Car buyers whose adolescence was culminated by acquiring a driver’s license may not be as eager to leave car operation to the car.”).

75 U.S. ENVTL. PROT. AGENCY, OUR BUILT AND NATURAL ENVIRONMENTS: A TECHNICAL REVIEW OF THE INTERACTIONS AMONG LAND USE, TRANSPORTATION, AND ENVIRONMENTAL QUALITY 26 (2nd ed. 2013) [hereinafter EPA WHITEPAPER], <http://www2.epa.gov/sites/production/files/2014-03/documents/our-built-and-natural-environments.pdf>.

76 *Id.* at 26-27.

77 Eric Jaffe, *Why the Wealthy Have Been Returning to City Centers*, CITYLAB (Nov. 17, 2015), <http://www.citylab.com/commute/2015/11/why-the-wealthy-have-been-returning-to-the-city-center/416397/>.

78 See Levinson, *supra* note 74, at 792.

in the United States, and other factors have led to a decline in the popularity of traditional suburban development.⁷⁹

Driverless cars have the potential to change much of that. Historically, new transportation technologies lead to larger metropolitan areas,⁸⁰ and “time saved from mobility gains is used mostly in additional distance between home and workplace.”⁸¹ With the addition of productive time in the car, the “time-cost of these trips approaches zero,”⁸² resulting in reduced pressure for workers to live near the city center.⁸³ With traffic and travel time no longer a deterrent to living far outside the urban core, “autonomous driving may . . . encourage suburban sprawl by increasing the acceptable commuting distance.”⁸⁴

A 2013 report by the EPA estimates that the United States population will increase 42% between 2010 and 2050.⁸⁵ The EPA estimates that this population increase will require the development

79 See, e.g., Nicholas A. Phelps, *Introduction: From the Modern Suburb to the Post-Suburb of a Second Modernity*, in SEQUEL TO SUBURBIA: GLIMPSES OF AMERICA'S POST-SUBURBAN FUTURE 3 (2015) (“There is certainly enough in present academic and popular debates to realize that much of the shine has come off the outer suburbs of [the] first modernity.”); LEIGH GALLAGHER, *THE END OF THE SUBURBS: WHERE THE AMERICAN DREAM IS MOVING* 192 (2013) (listing factors that may “point to the end of the suburbs as we know them”); see also JEFF SPECK, *WALKABLE CITY: HOW DOWNTOWN CAN SAVE AMERICA, ONE STEP AT A TIME* 21-28 (2012) (describing how demographic trends and shifting preferences are increasing demand for pedestrian-friendly communities and decreasing demand for traditionally car-dependent suburbs).

80 Levinson, *supra* note 74, at 803.

81 *Id.* at 803-04.

82 Smith, *Managing Demand*, *supra* note 71, at 1410. This is particularly true given that some people do not view time spent commuting as unproductive time. See Sultama & Weber, *supra* note 3, at 195 (citing evidence that, even with existing vehicle technology, “people may derive pleasure from the experience of commuting, and will not necessarily perceive a long commute as a burden”).

83 Adeel Lari et al., *Self-Driving Vehicles and Policy Implications: Current Status of Autonomous Vehicle Development and Minnesota Policy Implications*, 16 MINN. J.L. SCI. & TECH. 735, 757 (2015).

84 Smith, *Managing Demand*, *supra* note 71, at 1417; Levinson, *supra* note 74, at 804 (“As acceptable trip distances increase, we would expect a greater spread of origins and destinations (pejoratively, sprawl) . . .”).

85 EPA WHITEPAPER, *supra* note 75, at 31; see also *The Umbrella of Sustainability: Smart Growth, New Urbanism, Renewable Energy and Green Development in the 21st Century*, 42 URB. LAW. 1, 2-3 (2010) (estimating that the United States population will reach 350 million by 2025, which is an increase of 67 million people since 2000).

of 52 million new housing units and many billions of square feet of nonresidential space.⁸⁶ Due to the expansion of the market for residential locations created by driverless cars, developers are likely to press for construction at the urban or suburban fringe where land has been historically cheap.⁸⁷ This cycle is self-perpetuating, since “[a]uto use expands to cover the sprawling development patterns that separate homes from everything else,”⁸⁸ and the expansion of roads due to increased automobile use opens additional areas to development.⁸⁹

“[O]nce built, highways allow easy access to land that was previously difficult to reach,”⁹⁰ and “if you expand people’s ability to travel, they will do it more, living farther away from where they work and therefore being forced to drive into town.”⁹¹ As additional roads are constructed, more vehicles will fill them.⁹² The pattern of mounting traffic produced by additional road capacity is known as “induced demand.”⁹³ Normally, induced demand serves to harness growth to some degree, as the addition of roads and vehicles do not result in shorter travel times. However, if “the [well-connected] car provides an environment that is as enjoyable or productive as the home or office, the time-cost of motor vehicle travel could . . . drop substantially.”⁹⁴ This drop in time-cost can “encourage more dispersed land use patterns that, in turn, [may] increase trip lengths and vehicle dependency, leading to a permanent increase in travel demand.”⁹⁵

86 EPA WHITEPAPER, *supra* note 75, at 31.

87 KUSHNER, *POST-AUTOMOBILE CITY*, *supra* note 3, at 28.

88 JOHN R. NOLON, *PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND* 14-15 (2014).

89 Smith, *Managing Demand*, *supra* note 71, at 1418. Autonomous vehicles are expected to increase the vehicle capacity of existing roads. *Id.* at 1412. This expansion of road capacity may reduce the cost of each trip and create greater short- and long-term demand for trips by car. *Id.* at 1410.

90 William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Capacity*, 68 *FORDHAM L. REV.* 57, 79 (2000).

91 Adam Mann, *What’s Up With That: Building Bigger Roads Actually Makes Traffic Worse*, *WIRED* (June 17, 2014), <http://www.wired.com/2014/06/wuwt-traffic-induced-demand/>.

92 In the short term, increased road capacity “lead[s] to people making more trips, increasing trip length, changing the time of travel, or switching from transit or carpools to driving alone because of improved traffic conditions.” EPA WHITEPAPER, *supra* note 75, at 28.

93 *Id.* at 27-28; *see also* Mann, *supra* note 91 (citing a 2009 study finding a perfect one-to-one relationship between the amount of new roads and the total number of miles driven).

94 Smith, *Managing Demand*, *supra* note 71, at 1410.

95 EPA WHITEPAPER, *supra* note 75, at 28.

The pressure for additional roads created by autonomous vehicles may be an issue not only of dispersed land patterns but also of the increased number of cars on the road at any given time. Autonomous cars allow demographic groups who are currently unable to drive, including children, senior citizens, and those otherwise unable to operate a vehicle, to travel safely by private automobile.⁹⁶ The number of children ranging from 13 to 15 — just below the current legal age for driving in most states — is over 12 million, based on a 2015 estimate.⁹⁷ Moreover, the EPA estimates that the number of senior citizens will double between 2010 and 2050.⁹⁸ Given these additions to the number of Americans who are currently unable to drive, the potential for an overall rise in the number of vehicle trips is clear.⁹⁹ Widespread adoption of driverless cars is predicted to decrease the absolute total of unique vehicles on the road,¹⁰⁰ given the capacity for shared fleets, but is likely to

96 See, e.g., DANIEL J. FAGNANT & KARA M. KOCKELMAN, PREPARING A NATION FOR AUTONOMOUS VEHICLES: OPPORTUNITIES, BARRIERS AND POLICY RECOMMENDATIONS 6 (Oct. 2013), <https://www.enotrans.org/wp-content/uploads/AV-paper.pdf> (“[Autonomous vehicles] may provide mobility for those too young to drive, the elderly and the disabled, thus generating new roadway capacity demands.”).

97 U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SINGLE YEAR OF AGE AND SEX FOR THE UNITED STATES: APRIL 1, 2010 TO JULY 1, 2015, factfinder.census.gov (select “Advanced Search”; follow “Show Me All” hyperlink; insert “Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States” in the “topic or table name query”; follow “GO” hyperlink; follow “Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States: April 1, 2010 to July 1, 2015” hyperlink). This number is cited only as an estimate of increased demand for private vehicles. Autonomous vehicle usage may extend beyond this age subset.

98 NOLON, *supra* note 88, at 13.

99 See BIERSTEDT ET AL., *supra* note 74, at 4 (noting that “availability of robochauffeur for those who would otherwise not be permitted to drive” is likely to increase VMT per capita).

100 See Keith Naughton, *Driverless Cars May Cut U.S. Auto Sales 40%, Barclays Says*, BLOOMBERG BUSINESS (May 20, 2015), <http://www.bloomberg.com/news/articles/2015-05-19/driverless-cars-may-cut-u-s-auto-sales-by-40-barclays-says> (noting that while U.S. vehicle ownership rates will fall, driverless cars will travel twice as many miles as current automobiles during the course of the day); see also Kirsten Korosec, *The Number of Miles Cars Travel is About to Explode*, FORTUNE (Nov. 17, 2015), <http://fortune.com/2015/11/17/1a-auto-show-vehicle-miles/> (citing KPMG report predicting that “U.S. cars will travel one trillion additional miles annually by 2050”).

increase overall VMT.¹⁰¹

These predictions suggest that the driverless world could be one of reduced population density, increased road network, and increased miles traveled. As “[y]esterday’s luxuries” of road capacity and ease of travel are “converted into today’s necessities,”¹⁰² the increased reliance on automobiles and their accompanying infrastructure may become firmly entrenched. In this way, autonomous cars may contribute to renewed sprawl, further untethered from cities. In contrast to the myriad benefits of driverless cars, this kind of increase in growth is likely to lead to a variety of environmental problems.

a. Resource Pressures

First, an increase in demand for undeveloped land will lead to low-density development and will place pressure on already-scarce resources. A 2010 study by the United States Forest Service “forecasts that between 1997 and 2060, 60 to 86 million acres of rural land (as much as the size of New Mexico) will be developed, and between 24 and 38 million acres of forests (as much as the size of Florida), 19 and 28 million acres of cropland (as much as the size of Tennessee), and 8 and 11 million acres of rangeland (as much as the size of Vermont and New Hampshire together) will be lost.”¹⁰³ These forecasts do not incorporate any predictions about driverless car technology. However, pressure from autonomous vehicles for additional roads has the potential to accelerate land development, with potentially devastating consequences for ecosystem health.

Low-density development puts an enormous strain on water supplies. First, sprawl development results in the consumption of large amounts of water, particularly when combined with personal lawns and other water-intensive practices.¹⁰⁴ Ultimately, “there is not enough water to indefinitely sustain the expansion of American

101 See, e.g., FAGNANT & KOCKELMAN, *supra* note 96, at 6 (noting that many of the expected changes from autonomous vehicles “point toward more vehicle-miles traveled (VMT) and automobile-oriented development [and] [a]dded VMT may bring other problems related to high automobile use”).

102 Cf. GEDDES, *supra* note 41, at 290.

103 EPA WHITEPAPER, *supra* note 75, at 32.

104 See, e.g., Sarah Schindler, *Banning Lawns*, 82 GEO. WASH. L. REV. 394, 396 (2013) (“Lawns . . . consume up to sixty percent of potable municipal water supplies in Western cities and up to thirty percent in Eastern cities.”).

cities using water within their watershed.”¹⁰⁵ Climate change may exacerbate that scarcity, as rising temperatures result in higher rates of evaporation and less precipitation.¹⁰⁶ Relatedly, low-density development has negative impacts on watershed functions. Development in previously undeveloped areas “can dramatically change how water is transported and stored” as new construction creates “impervious surfaces and compacted soils that filter less water, which increases surface runoff and decreases ground water infiltration.”¹⁰⁷ Adequate permeable surfaces allow for groundwater supplies to be recharged through rain.¹⁰⁸ Once a certain percentage of impervious cover is reached, however, “it is extremely difficult to maintain pre-development stream quality,”¹⁰⁹ as storm water that flows over pavement and parking lots picks up pollutants before discharging into nearby rivers or streams.¹¹⁰ The deterioration of water supplies affects human communities directly in terms of potable water sources and indirectly as aquatic sources of food and revenue are harmed.

The consequences of low-density development for limited resources extend beyond water. Air quality is also impacted as trees are cut to make room for roads and other forms of development. Trees stabilize land, reduce siltation and erosion, produce oxygen, and sequester carbon dioxide.¹¹¹ Loss of farmland to sprawl development raises a number of concerns about soil degradation and food scarcity,¹¹²

105 Benjamin Houston & Noah D. Hall, *Managing Demand for Water*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE* 171 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

106 Brian Clark Howard, *Worst Drought in 1,000 Years Predicted for American West*, *NAT'L GEOGRAPHIC* (Feb. 12, 2015), <http://news.nationalgeographic.com/news/2015/02/150212-megadrought-southwest-water-climate-environment/>.

107 OFF. OF SUSTAINABLE CMTYS. SMART GROWTH PROGRAM, U.S. ENVTL. PROT. AGENCY, *PROTECTING WATER RESOURCES WITH HIGHER-DENSITY DEVELOPMENT* 4 (2006), http://www.epa.gov/sites/production/files/2014-03/documents/protect_water_higher_density1.pdf.

108 *How Stormwater Affects Your Rivers*, *AMERICAN RIVERS* (2016), <https://americanrivers.org/threats-solutions/clean-water/stormwater-runoff/>.

109 Daniel J. Hutch, *The Rationale for Including Disadvantaged Communities in the Smart Growth Metropolitan Framework*, 20 *YALE L. & POL'Y REV.* 353, 360 (2002).

110 *How Stormwater Affects Your Rivers*, *supra* note 108.

111 William W. Buzbee, *Smart Growth Micro-Incentives and the Tree-Cut Tax Case*, 17 *GA. ST. U. L. REV.* 999, 1003 (2001).

112 *See, e.g.*, Todd W. Daloz, *Farm Preservation: A Vermont Land-Use Perspective*, 12 *VT. J. ENVTL. L.* 427, 432-33 (2011); Tamara Mullen, *The McMansion: Architecture's Role in Facilitating Urban Sprawl and Farmland Loss*, 12 *DRAKE J. AGRIC. L.* 255, 265 (2007).

and pressures on available and desirable land may result in new projects being built on wetlands and floodplains, to the detriment of the resources' ability to cushion the blow of natural disasters.¹¹³ The health of human communities depends on the ecosystem benefits that these resources provide.¹¹⁴ Low-density development spurred by self-driving cars is likely to contribute to further pressure on valuable resources and have negative consequences for the human environment and the broader ecosystem.

b. Biodiversity Losses

Driverless cars may also pose a particular threat to biodiversity. Biodiversity refers to “the sum of the species, ecosystems, and genetic diversity of Earth”¹¹⁵ and is essential because the “number and type of plants and animals in an area determines the very structure and function of ecosystems across the planet.”¹¹⁶ As driverless cars encourage construction of new homes and roads outside the city center, the biosphere faces the twin harms of habitat destruction and habitat fragmentation.¹¹⁷ Roads, tree cuts, and other aspects of suburban development both eliminate places for species to live and “destroy[] much of the ecological interconnectedness that is now believed essential to protecting or fostering biodiversity.”¹¹⁸

When roads bisect habitats, they divide large natural populations into smaller ones,¹¹⁹ and may cut off access to essential parts of a habitat or phases of a migration. For instance, roads adjacent to

113 Patrick Gallagher, *The Environmental, Social, and Cultural Impacts of Sprawl*, 15 NAT. RES. & ENV'T 219, 221 (2001).

114 See, e.g., JOSEPH ALCAMO ET AL., THE MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: A FRAMEWORK FOR ASSESSMENT 57 (2003), <http://www.unep.org/maweb/documents/document.300.aspx.pdf>.

115 LEE HANNAH ET AL., *Biodiversity and Climate Change in Context*, in CLIMATE CHANGE AND BIODIVERSITY 3 (Thomas E. Lovejoy & Lee Hannah eds., 2005).

116 EPA WHITEPAPER, *supra* note 75, at 35.

117 *Id.* at 38-44; Jim Chen, *Across the Apocalypse on Horseback: Imperfect Legal Responses to Biodiversity Loss*, 17 WASH. U. J.L. & POL'Y 13, 23 (2005) (“Among the drivers of biodiversity loss, habitat destruction is by far the deadliest.”); see also Brian Czech, *Chronological Frame of Reference for Ecological Integrity and Natural Conditions*, 44 NAT. RES. J. 1113, 1121 (2004) (“At the population level, habitat fragmentation is particularly problematic.”).

118 Buzbee, *supra* note 111, at 1002-03.

119 RICHARD T.T. FORMAN ET AL., ROAD ECOLOGY: SCIENCE AND SOLUTIONS 4 (2003).

lakes, rivers, and ponds can impede animals' access to water and result in heightened rates of mortality for species trying to cross these barriers.¹²⁰ Species populations isolated by roads may also experience declines in genetic diversity, making them vulnerable to disease, changes in climate, and other impacts.¹²¹ The effects of roads extend beyond the road corridor itself, as roads create new "edge habitats" in their artificial clearings.¹²² These "edge habitats" have different physical and biological characteristics than the surrounding environment, and support different kinds of life. Therefore, they may be less hospitable to species already living in an ecosystem and may serve as a corridor for invasive species better adapted to the road environment. In consequence, "[s]pecies that are sensitive to edge habitat, especially forest interior species, decrease in density and/or may be less likely to survive due to competition with exotic species, edge predators, and overall poor habitat quality."¹²³ Perhaps inevitably, roads also lead to increased human access to previously undisturbed areas,¹²⁴ followed by increased human activity, light, and noise that can have negative impacts on species survival. All of these changes often outpace the ability of the ecosystem to adapt.¹²⁵ As a result, "[h]abitat destruction and degradation contribute to the endangerment of more than 85 percent of the species listed or formally proposed for listing under the federal Endangered Species Act."¹²⁶

Picturing a map of the country in which driverless cars spur increasingly remote development and necessitate roads to connect all of those homes or communities to one another, it soon becomes clear that this expansion pattern will gradually eat away at the distance between the end of one development and the beginning of the next. In this more holistic view, sprawl matters not just for the

120 Jon P. Beckman & Jodi A. Hilty, *Connecting Wildlife Populations in Fractured Landscapes*, in *SAFE PASSAGES: HIGHWAYS, WILDLIFE, AND HABITAT CONNECTIVITY* 3, 8-9 (Jon P. Beckman et al. eds., 2010).

121 *Id.* at 13.

122 Sandra Zellmer, *Wilderness, Water, and Climate Change*, 42 ENVTL. L. 313, 318 (2012) (noting "edge effects" of "erosion, poor water and air quality, noise, and invasive species").

123 Beckman & Hilty, *supra* note 120, at 7.

124 *Id.* at 5.

125 See Francesca Ortiz, *Biodiversity, the City, and Sprawl*, 82 B.U. L. REV. 145, 150 (2002) (explaining that although ecosystems change, they change slowly and "accelerated losses to diversity can tax or collapse ecosystems before they have time to adapt").

126 EPA WHITEPAPER, *supra* note 75, at 35.

city it surrounds, but also for its relationship to nearby developments as well. The expansion of development and roads due to driverless cars, therefore, has the potential to contribute to the national loss of biodiversity. Given this risk and other possible harms, we should endeavor to stave off the more negative aspects of driverless cars from the outset. To ensure a healthy future for ourselves and other species, we must protect the wider ecosystem in which we live and preserve our natural resources and biodiversity.¹²⁷ To do so, we must care about density.

III. Planning for Density

Perhaps the simplest pair of rules that have been articulated regarding ecosystem preservation and management are: (1) “the bigger the better” and (2) “the less intrusion the better.”¹²⁸ In other words, ecosystems are better off when humans take up less space. The development of open land presents a classic tragedy of the commons in which no individual actor internalizes the full social cost of his or her actions. This is particularly the case for driverless cars where, as noted, the impacts of development include not only the depletion of a common resource (land), but also a cumulative impact on other public goods (open space, resources, and biodiversity). It is therefore incumbent on government actors to halt encroachment on habitats through planning for density.¹²⁹

Planning for density by government actors is necessary because, as history has shown, it will not happen on its own. If the way we use our land is a reflection of our values,¹³⁰ the United States

127 Cf. Jamison E. Colburn, *Localism’s Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 *ECOL. L. Q.* 945, 946-52 (2006) (noting importance of habitat protection for preservation of biodiversity, and suggesting solutions for the failings of current policy with regard to habitat protection in the urban and suburban ecosystem); ALCAMO ET AL., *supra* note 114, at 49 (“[C]hanges in biodiversity can influence the supply of ecosystem services.”). Theories regarding the ethical and moral underpinnings of an obligation to preserve natural resources vary widely. Gordon Steinhoff, *Why We Should Protect Natural Areas*, 5 *ARIZ. J. ENVTL. L. & POL’Y* 364, 373-77 (2015).

128 Oliver Houck, *Are Humans Part of Ecosystems?*, 28 *ENVTL. L.* 1, 9 (1998).

129 See, e.g., RICHARD L. REVESZ, *FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY* 4 (Richard L. Revesz ed., 1997) (describing Garrett Hardin’s classic essay on the tragedy of the commons and Hardin’s call for “the use of the coercive powers of government to prevent excessive exploitation of a commons”).

130 See TIMOTHY BEATLEY, *ETHICAL LAND USE: PRINCIPLES OF POLICY AND PLANNING* 3 (1994) (“[S]ocial allocation of land to different uses and

has reflected a convincing devotion to cars. We as a country have a “perverse history of contorting our social patterns to accommodate the needs of the automobile.”¹³¹ Unplanned development and unbridled enthusiasm for the potential of the open road have led to a nation where, even fifteen years ago, “20 percent of all land . . . was within 417 feet of a road, and 50 percent was within a quarter-mile. Only about 18 percent of all land was more than 0.62 miles from a road, and about 3 percent was more than 3 miles.”¹³² Automobile-based planning has led to an unmistakable decline in human population density.¹³³ In consequence, what open land that remains, and the species that have managed to survive, are all the more precious. As the automobile transforms into a driverless vehicle unmoored from historic constraints, the prognosis for the ecosystem of the United States is grim if the automobile continues to dictate the national landscape.

Federal law requires designated metropolitan planning organizations (MPOs) to develop long-range transportation plans and transportation improvement programs to “promote the safe and efficient management, operation, and development of surface transportation systems” that will, among other things, serve mobility and economic needs while considering resiliency, fuel consumption, and air pollution.¹³⁴ Despite the possible impacts of the driverless car on these goals, however, a 2014 survey of MPOs in the nation’s 25 largest metropolitan areas revealed that only one contained even a passing reference to autonomous vehicles in its most recent regional transportation plan.¹³⁵ Many of the planners

activities is fundamentally and inextricably a problem of ethics.”).

131 Paul Goldberger, *It Takes a Village*, THE NEW YORKER, Mar. 27, 2000, at 128; KUSHNER, POST-AUTOMOBILE CITY, *supra* note 3, at 5 (“Nowhere, other than in America, have nations and communities placed so much emphasis on accommodating the automobile and designing cities around the automobile.”); *Google’s X-Man*, *supra* note 73, at 4 (“If you look at the twentieth century, the car has transformed society more than pretty much any other invention.”).

132 EPA WHITEPAPER, *supra* note 75, at 21.

133 See Edward H. Ziegler, *Sustainable Urban Development and the Next American Landscape: Some Thoughts on Transportation, Regionalism, and Urban Planning Law Reform in the 21st Century*, 42 URB. LAW. 91, 95 (2011) (noting that despite an urban renaissance, population densities have declined, and without substantial reforms, metropolitan development will continue to perpetuate automobile dependence).

134 Fixing America’s Surface Transportation (FAST) Act § 1201, 23 U.S.C. § 134(a)(1) (2016).

135 Erick Guerra, *Planning for Cars that Drive Themselves*, 36 J. PLAN. EDUC. & RES.

acknowledged the potentially transformative power of driverless cars¹³⁶ but felt that planning for driverless vehicle technology was difficult due to the unknown nature of the driverless future.¹³⁷ As one planner remarked, “[w]e don’t know what the hell to do about [incorporating autonomous vehicles into planning efforts at our MPO]. It’s like pondering the imponderable.”¹³⁸ Because even “too much hesitation over imponderables becomes its own sort of planning decision,”¹³⁹ it is worth thinking through how best to begin the process of planning for a driverless future.

The discussion below suggests some ways in which governments at all levels might start a conversation regarding planning. While not comprehensive, it suggests some ways to generate understanding of the possible impacts of these vehicles and other tools that could be used to combat negative consequences. For instance, current environmental review statutes might provide an explicit framework to discuss the impacts of driverless cars. State and local governments may also be able to modify planning strategies already in place to develop a preemptive response to autonomous vehicle technology. Additionally, cities can take active measures to welcome driverless technology and draw on that technology to create denser communities. Discussion of the likely impacts of self-driving cars alongside decisions currently being made about the technology, combined with active measures to promote density at the suburban and urban levels, may go a long way toward putting the United States back in the driver’s seat when it comes to technology and land use.

A. *Planning for Environmental Impacts*

Federal and state statutes require consideration of the environmental impacts of certain government actions; such mandatory environmental review is likely the most direct means by which to assess the impacts of the driverless car. Namely, government

210, 211-12 (2015).

136 *Id.* at 214-16 (noting examples of comments from planners that autonomous vehicles could, among other things, draw ridership away from public transit, create the potential for more unified public transit systems, increase the overall number of vehicle miles traveled, and encourage sprawl development).

137 *Id.*

138 *Id.* at 214.

139 Eric Jaffe, *Why Aren’t Urban Planners Ready for Driverless Cars*, CITYLAB (Dec. 8, 2015), <http://www.citylab.com/cityfixer/2015/12/why-arent-urban-planners-ready-for-driverless-cars/419346>.

involvement in driverless car-related projects may subject those projects to the requirements of the National Environmental Policy Act (NEPA)¹⁴⁰ or state and local versions of NEPA. The passage of NEPA in 1969 introduced the idea of environmental impact review at the federal level¹⁴¹ and inspired similar reviews at the state and local levels.¹⁴² NEPA imposes no substantive requirements. Its power lies in its requirement that, for any proposed major federal action¹⁴³ that has the potential to significantly impact the environment, federal agencies must prepare a detailed statement that addresses the “environmental impact of the proposed action, any adverse environmental effects, alternatives to the proposed action, and the relationship between local short-term uses of [the human] environment and the maintenance and enhancement of long-term productivity.”¹⁴⁴ This requirement allows NEPA to serve a crucial role in bolstering the dialogue regarding the expected impacts of government actions.¹⁴⁵

If a project is subject to NEPA, the government agency involved must prepare an analysis of environmental impacts called an “environmental assessment” (EA)¹⁴⁶ that addresses the direct,

140 National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2012).

141 See, e.g., Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 904 (2002).

142 See *id.* at 905, n.7 (noting that NEPA has “inspired dozens of ‘little NEPAs’ at the state and local levels,” but also explaining that certain state statutes differ from the federal NEPA in that they include substantive provisions, while the federal NEPA is purely procedural).

143 See *infra* section III(A)(1) for an explanation of how a federal action may be deemed major.

144 NOLON, *supra* note 88, at 327 (internal alterations omitted).

145 See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 85 (2004) (describing role of NEPA in getting information to environmental advocates and agencies); Karkkainen, *supra* note 141, at 910 (describing information-forcing function of NEPA); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation*, 26 ENVTL. L. 53, 55 (1996) (noting that NEPA has “spawned the largest amount of citizen participation in environmental decision making over the last two decades”).

146 Cf. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 752 (2004) (considering sufficiency of Environmental Assessment regarding Federal Motor Carrier Safety Administration’s safety monitoring requirements for Mexican motor carriers without calling into question that an Environmental Assessment was warranted); cf. *Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 94 (2d Cir. 2000) (upholding agency’s lack of a formal Environmental Assessment under NEPA where its consideration of environmental impacts “functionally

indirect, and cumulative impacts of the federal action.¹⁴⁷ As the federal government becomes increasingly involved in the driverless car sphere, actions for which this kind of NEPA review is mandated may arise. While it is beyond the scope of this Article to provide an extensive discussion of the ways in which NEPA may be implicated by driverless cars, two potential scenarios are outlined below: (1) Fixing America’s Surface Transportation (FAST) Act funds and (2) National Highway and Traffic Safety Administration Safety Standards. There may, however, be other possibilities for this kind of review at the federal, state, and local levels. Regardless of the level at which such review occurs, it may play a critical role in providing government actors and other interested parties with information on the full environmental consequences of driverless cars as decisions about the technology are being made.

1. FAST Act Funds

On December 4, 2015, President Obama signed into law the Fixing America’s Surface Transportation Act (“the Act”), which authorizes federal surface transportation programs through 2020.¹⁴⁸ The overall goal of the Act is to bring about improvements to the United States “surface transportation infrastructure, including our roads, bridges, transit systems, and passenger rail network.”¹⁴⁹ The Act also contains brief references to driverless cars.¹⁵⁰ Notably, it created a grant program for development of advanced transportation technologies, including “accelerat[ion of] the deployment of . . . autonomous vehicles.”¹⁵¹ These grants can be made to “[s]tate or local government[s], transit agenc[ies], metropolitan planning organization[s] representing population[s] over 200,000, or other political subdivision[s] of a State or local government [as

satisf[ied]” NEPA obligations).

147 40 C.F.R. § 1508.25 (2016).

148 U.S. DEPT OF TRANSP., *The Fixing America’s Surface Transportation Act or “FAST Act,”* TRANSPORTATION.GOV (Apr. 8, 2016) <https://www.transportation.gov/fastact>; TRANSP. & INFRASTRUCTURE COMM., JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF THE CONFERENCE, http://transportation.house.gov/uploadedfiles/joint_explanatory_statement.pdf.

149 TRANSP. & INFRASTRUCTURE COMM., U.S. H.R., FAST ACT: INFO PACKET 3, <http://transportation.house.gov/fast-act/#top> (last visited Feb. 12, 2016).

150 Fixing America’s Surface Transportation (FAST) Act § 6004, 23 U.S.C. § 503(c)(4) (2016).

151 *Id.* § 503(c)(4)(B)(viii).

well as to] research institutions.”¹⁵² Eligible entities can use the funds to “deploy advanced transportation and congestion management technologies,”¹⁵³ including driverless cars.¹⁵⁴ In short, Congress made available federal funds for which state and local governments can apply, and which can be used to, among other things, promote driverless car technology.¹⁵⁵ While grants are currently available to no more than ten eligible entities,¹⁵⁶ these funds have the potential to provide a helpful boost to selected communities hoping to integrate driverless car technology into their transportation plans. Additionally, the funds could provide a critical opportunity for state and local governments to ensure that the full environmental impacts of communities’ plans for driverless cars are considered.

Even exclusively state or local projects that receive federal funding can become “major federal actions” subject to the requirements of NEPA. In such a case, the determination of whether a given project is a major federal action will turn on the degree of federal funding for the project¹⁵⁷ and the extent of federal oversight and involvement.¹⁵⁸ The FAST Act allows for federal funding of

152 *Id.* § 503(c)(4)(N)(i).

153 *Id.* § 503(c)(4)(E). These technologies include

(i) . . . traveler information systems; (ii) . . . transportation management technologies; (iii) infrastructure maintenance, monitoring, and condition assessment; (iv) . . . public transportation systems; (v) transportation system performance data collection, analysis, and dissemination systems; (vi) advanced safety systems, . . . (vii) integration of intelligent transportation systems with the Smart Grid and other energy distribution and charging systems; (viii) electronic pricing and payment systems; [and] (ix) advanced mobility and access technologies . . .

Id.

154 *Id.* § 503(c)(4)(E)(vi).

155 *See id.* § 503(c)(4)(E), (N)(i). The FAST Act also makes available grants to regional university transportation centers to further objectives in autonomous vehicles, and calls for a GAO report on autonomous vehicle technology. 49 U.S.C. § 5505(c)(3)(E).

156 23 U.S.C. § 503(c)(4)(D)(i).

157 *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 235 F. Supp. 2d 1109, 1120 (D. Or. 2002) (“There are no clear standards for defining the point at which federal participation transforms a state or local project into a major federal action The matter is simply one of degree . . .”).

158 *See, e.g., Env'tl. Rights Coal., Inc. v. Austin*, 780 F. Supp. 584, 601 (S.D. Ind. 1991) (“[T]he receipt of federal funds by a state or private entity subjects that entity to restraint under NEPA only so long as the federal agency disbursing the funds retains a degree of influence over the project for which the funds are disbursed.”).

eligible projects up to \$12 million,¹⁵⁹ and grants may not constitute more than 50% of the cost of the project.¹⁶⁰ Where “a project is only partially funded by the federal agency, federal courts have in some instances looked to the proportion of federal funding to non-federal funding to determine whether there is a major federal action.”¹⁶¹ Thus, whether these grants are sufficient to transform the project into a major federal action will likely depend on the overall size of the project and amount of funds granted.¹⁶²

Government oversight may also convert a project into a major federal action. The Act does not appear to contemplate direct federal involvement in projects following a grant, but the Secretary of Transportation does retain oversight over these projects. The Act requires that, upon receipt of a grant, the entity must provide an annual report to the Secretary of Transportation describing the costs of the project compared to its benefits and savings, as well as how the project has met expectations.¹⁶³ If, based on that report, the Secretary of Transportation is not satisfied that the recipient is carrying out the grant requirements, the Secretary may cease further grant funding.¹⁶⁴ Continued federal involvement, in the form of funding, may be sufficient to transform a project into a major federal action subject to the reporting requirements of NEPA.¹⁶⁵

159 23 U.S.C. § 503(c)(4) (establishing that the Secretary may award grants to a minimum of five recipients per fiscal year and award those recipients no more than \$60 million for the duration of the project, amounting to a maximum of \$12 million per recipient).

160 *Id.* §§ 503(c)(4)(I)(i), (J), (K).

161 *Sierra Club v. U.S. Dep’t of Agric.*, 777 F. Supp. 2d 44, 61 (D.D.C. 2011).

162 *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 235 F. Supp. 2d at 1120-21 (discussing under what circumstances federal funding would transform the project into a “major federal action” and thereby trigger NEPA obligations).

163 23 U.S.C. § 503(c)(4)(F)(i). Specifically, the report must include “(I) data on how the project has helped reduce traffic crashes, congestion, costs, and other benefits of the deployed systems; (II) data on the effect of measuring and improving transportation system performance through the deployment of advanced technologies; (III) the effectiveness of providing real-time integrated traffic, transit, and multimodal transportation information to the public to make informed travel decisions; and (IV) lessons learned and recommendations for future deployment strategies to optimize transportation efficiency and multimodal system performance.” *Id.* § 503(c)(4)(F)(ii).

164 *Id.* § 503(c)(4)(H).

165 *Env’tl. Rights Coal., Inc. v. Austin*, 780 F. Supp. 584, 595 (S.D. Ind. 1991) (describing the “minimum federal agency involvement that would permit federal court jurisdiction under NEPA” to include “situations in which the cessation of federal involvement would control the destiny of some aspect of

If a project is deemed a major federal action, the federal agency issuing the FAST Act funds would be required to satisfy NEPA by considering the direct, indirect, and cumulative impacts of the funding on the environment.¹⁶⁶ Direct effects are those “caused by the action and [which] occur at the same time and place.”¹⁶⁷ There are unlikely to be any environmental impacts that could accurately be described as being directly caused by and occurring at the same time and place as the receipt of federal funds for implementation of a driverless car program. Indirect impacts of funding autonomous vehicle development, however, arguably include increased usage of autonomous vehicles.¹⁶⁸ Assuming a sufficient causal connection between the funding and increased autonomous vehicles,¹⁶⁹ the relevant agency would have to consider the reasonably foreseeable indirect impacts on “population density . . . and related effects on air and water and other natural systems, including ecosystems.”¹⁷⁰

the project”).

166 See 40 C.F.R. § 1508.25; see also *supra* text accompanying note 148.

167 40 C.F.R. § 1508.8(a) (2016).

168 See, e.g., *City of Davis v. Coleman*, 521 F.2d 661, 675-76 (9th Cir. 1975) (noting that the growth-inducing effects of a highway project were “its *raison d’être*,” and the federal agency was required to consider the environmental impacts of that growth in an environmental impact statement (EIS)).

169 See, e.g., *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004). In *Public Citizen*, the Supreme Court considered the sufficiency of an EA prepared by the Federal Motor Carrier Safety Administration (FMCSA) regarding its publication of safety monitoring requirements for Mexican motor carriers. *Id.* In that case, the “President [had] made clear his intention to lift [a] moratorium on Mexican motor carrier certification following the preparation of new regulations governing grants of operating authority to Mexican motor carriers.” *Id.* at 760. Congress then enacted legislation dictating that no funds be spent to license Mexican trucks until the FMCSA promulgated those safety requirements. *Id.* Plaintiffs argued that FMCSA’s EA regarding the safety requirements was deficient for its failure to consider the environmental impacts of increased truck traffic that would result once the guidelines were issued. *Id.* at 765. The Court held, however, that there was an insufficient causal nexus between increased traffic and FMCSA’s safety requirements to make FMCSA “responsible under NEPA to consider the environmental effects” of that traffic. *Id.* at 768. In particular, the Court looked to the fact that FMCSA had no discretion to control the influx of trucks into the country, nor did it have the ability to refuse to issue the safety guidelines. *Id.* Based on those factors, the Court found no “reasonably close causal relationship” between the environmental effect and the alleged cause that NEPA requires. *Id.* at 767-68.

170 40 C.F.R. § 1508.8.

As detailed above,¹⁷¹ these indirect consequences may be varied and substantial.

Further, the Council on Environmental Quality's implementation regulations for NEPA requires that agencies consider the "cumulative impacts" of their actions.¹⁷² A "cumulative impact" is an environmental impact "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions."¹⁷³ A cumulative impact analysis could provide for consideration of driverless cars' impacts in light of species population in a particular area,¹⁷⁴ habitat destruction,¹⁷⁵ and other land use issues including air pollution, public health, and sprawl development.¹⁷⁶ This piece of the analysis may be important in considering the consequences of each increase in driverless cars, such as may be attributable to federal funding, when combined with a more widespread adoption of the technology. In this way, an EA for projects funded by the FAST Act could provide a comprehensive picture of how federal funding for driverless cars may impact the environment.

2. NHTSA Safety Standards

As stated previously,¹⁷⁷ the Department of Transportation's (DOT) NHTSA recently released its initial guidance on the development of autonomous car technology, which includes: (1) suggested safety standards; (2) recommended state policy; (3) explanations of the process for seeking interpretations of federal rules that apply to autonomous car technology, and; (4) previews of the kinds of new

171 *See supra* sections II(C)(2)(a)-(b).

172 *See* 40 C.F.R. § 1508.25 ("[A]gencies shall consider . . . cumulative effects" in their environmental impact statements.).

173 *Id.* § 1508.7.

174 *See, e.g.,* *Sierra Club v. U.S. Fish & Wildlife Serv.*, 235 F. Supp. 2d at 1130-32 (demonstrating how a cumulative impact analysis related to species population could be applied in courts).

175 *See, e.g.,* *Habitat Educ. Ctr., Inc. v. Bosworth*, 363 F. Supp. 2d 1090, 1102 (E.D. Wis. 2005) (discussing the application of a cumulative impact analysis in the context of a logging and deforestation project).

176 *See, e.g.,* *W. N.C. All. v. N.C. Dep't of Transp.*, 312 F. Supp. 2d 765, 770-73 (E.D.N.C. 2003) (listing the impacts that plaintiffs alleged should have been included in the government's EA as part of its cumulative impacts analysis related to other projects along the I-26 corridor, and finding that the government was required to consider these cumulative impacts of other projects).

177 *See supra* text accompanying note 55.

tools that the federal government may deploy in its regulatory response to these vehicles.¹⁷⁸ As of right now, the safety guidance contained in the NHTSA policy is not mandatory.¹⁷⁹ To the extent that further regulatory measures¹⁸⁰ have legal significance,¹⁸¹ they may constitute a major federal action and trigger the EA requirements under NEPA. Creation of an EA for these guidelines would provide an opportunity for public consideration and discussion of the impacts of both the regulation of and guidelines for driverless cars.

A number of states and localities also have NEPA-like planning statutes that may provide triggers for environmental analyses. To the extent that actions implicating driverless cars are taken on the state and local levels, any required “baby NEPAs” can also help to ensure that the environmental impacts of decisions regarding driverless cars are considered. Again, although these statutes do not require any particular action on the part of planners,¹⁸² they can play an important role in generating discussion and awareness of the kinds of impacts that may accompany widespread introduction of these vehicles.¹⁸³ Indeed, preparation of environmental analyses may help

178 DOT POL’Y, *supra* note 55, at 11.

179 *Id.*

180 *See id.* at 34-35 (assessing possible future regulatory action on safety standards for autonomous vehicles); *see also, e.g.*, David Shepardson & Bernie Woodall, *Tesla Crash Raises Concerns About Autonomous Vehicle Regulation*, REUTERS (July 1, 2016), <http://www.reuters.com/article/us-tesla-autopilot-idUSKCN0ZH4VO> (quoting former NHTSA chief Joan Claybrook as calling for the agency “to set performance standards for electronic systems like Autopilot,” because the world of autonomous vehicles is like the “Wild West. The regulatory system is not being used . . .”).

181 *See, e.g.*, *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1095 (9th Cir. 2014) (noting that courts have found legal significance where an agency decision “determine[s] rights or obligations from which legal consequences will flow” and that as a result, a court has concluded that “an agency’s incidental take statement was the functional equivalent of a permit and therefore . . . trigger[ed] NEPA obligations”); *see also Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996).

182 *W. N.C. All. v. N.C. Dep’t of Transp.*, 312 F. Supp. 2d at 769 (“NEPA does not mandate a particular substantive outcome.”).

183 *See, e.g.*, LAZARUS, *supra* note 145, at 85 (“NEPA’s mandate that agencies disclose the environmental impacts of their actions [has] resulted in substantial changes in agency behavior with positive effects on environmental protection.”); JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POL’Y* 282-83 (2004) (noting that NEPA has “achieved a great deal” in terms of providing information on agency actions to the public, putting pressure on agencies to adopt environmental values, and causing agencies to mitigate adverse impacts).

clarify the connection between driverless cars and development and make clear the task that planners have at hand to better avoid negative outcomes.

B. Practical Steps

Discussions of the impact of driverless cars are important, as they have the ability to provide a comprehensive look at potential environmental consequences should the federal or state government decide to take actions regarding these vehicles. Additionally, there are other steps that can be taken to proactively plan for and promote density as driverless technology becomes more widespread. At the state, regional, or local level, policymakers can focus on ensuring that the master plans that govern zoning and other decisions are updated to eliminate practices that foster low-density development, paying particular attention to the expected impacts of driverless cars. Further, the utility of some traditional land use planning measures already employed may be altered by this new technology. Planners should consider discontinuing those practices that are likely to contribute to sprawl in the wake of driverless cars and consider adopting new tools to help to incentivize denser development.

However, it is not sufficient to be solely anti-sprawl. Successful curbing of the human footprint will also require the creation of better, more appealing, dense developments. To that end, cities can promote density in the face of driverless cars by working to promote a smooth transition to driverless technology. Widespread adoption of driverless vehicles in cities may help, in and of itself, to promote the density-reinforcing aspects of driverless technology, including access to hard-to-reach parts of cities and shared vehicle fleets. Thus, cities should plan ahead for how best to incorporate driverless technology into their respective infrastructures without undermining public transportation — a traditional strength of the American city — or pushing development outward. By combining efforts to contain sprawl and improve density, government actors at all levels will be able to harness the beneficial aspects of driverless technology while avoiding some of the harms.

1. State and Local Plans

Given the potential for driverless cars to undo the past several decades' progress toward density, planning for this new technology

is critical, especially in non-urban areas. States have the ability to define the rules for driverless cars within their borders and should do so in a way that integrates driverless cars into existing comprehensive planning for roads and the environment. The same kind of planning should also be required from local governments. Responsible government bodies in suburban areas should integrate knowledge about driverless cars into tested anti-sprawl theories to evaluate what makes sense for their community. Similarly, federally mandated MPOs must “protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns”¹⁸⁴ by analyzing the likely negative impacts of driverless cars as well as possible solutions to those impacts. The discussion below highlights some of the ways in which responsible parties could adjust established planning techniques for the arrival of driverless cars.

a. Enabling Acts and Master Plans

The regulation of driverless cars is likely to fall primarily to the states.¹⁸⁵ This responsibility may also give rise to a planning opportunity, as localities derive their planning and zoning authority from the state.¹⁸⁶ All states have adopted the Standard Zoning Enabling Act of 1926 in one form or another,¹⁸⁷ which requires that zoning be conducted “in accordance with a comprehensive plan.”¹⁸⁸ Although this zoning requirement has not been consistently interpreted or enforced,¹⁸⁹ the complementary Standard City

184 Fixing America’s Surface Transportation (FAST) Act § 3003(b), 49 U.S.C. § 5304 (d)(1)(E) (2016).

185 Cf. Smith, *Probably Legal*, *supra* note 9, at 500-08 (describing state legislation on driverless cars).

186 See, e.g., *Rapoport v. Zoning Bd. of Appeals of Stamford*, 19 A.3d 622, 635 (Conn. 2011).

187 Although adopted versions of the Standard Zoning Enabling Act vary among the states, “the similarities remain greater than the differences, and the Standard Act remains the most practical point of departure in the examination of state zoning enabling statutes.” PATRICIA E. SALKIN, 1 *AMERICAN LAW OF ZONING* § 2:11 (5th ed. 2016).

188 CHARLES B. BALL ET AL., U.S. DEP’T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT* § 3 (rev. ed. 1926); Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 *URB. LAW.* 75, 75-76 (2003).

189 See, e.g., Sullivan & Michel, *supra* note 188.

Planning Enabling Act¹⁹⁰ gives “cities the power to develop a master plan, including a ‘zoning plan.’”¹⁹¹ Further, “[t]he statutes of every state provide for preparation of the master plan by the planning board or planning commission.”¹⁹² Generally speaking, master plans are “long-term blueprint[s] used as a guiding and predictive force in the physical development of a community.”¹⁹³ They are not themselves legally binding, but are “guide[s] to community development . . . that may be implemented through zoning.”¹⁹⁴

State enabling acts may dictate the required elements of a master plan, including “land use, population density, environmental quality,” and other factors.¹⁹⁵ Thus, as states pass new laws regarding driverless cars, state legislatures could amend their respective enabling acts to require explicit consideration of the technology’s impacts on population density and the environment at local and regional levels. Such a requirement could ensure that driverless cars are adopted only with full consideration of their possible impacts. Master plans can be implemented through zoning, statutes, ordinances, or regulations that elevate them to a “true regulatory device” enforceable in court.¹⁹⁶ Even without such binding obligations, however, there is value in ensuring that local planning authorities will be forced to consider the shape of their communities after adoption of self-driving cars. Establishing a rationale for density promotion in a comprehensive plan may also provide a legal basis for local planning efforts.¹⁹⁷ In making needed alterations to their master/comprehensive plans, localities should consider the aforementioned possible consequences of self-driving cars for their communities¹⁹⁸ and set planning goals accordingly.

190 Charles B. Ball et al., U.S. DEP’T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT § 2 (rev. ed. 1928).

191 Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 98 (2015).

192 ARDEN H. RATHKOPF ET AL., 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 47:2 (4th ed. 2016).

193 PAUL M. COLTOFF ET AL., 83 AMERICAN JURISPRUDENCE ZONING AND PLANNING § 18 (2nd ed. 2016).

194 *Id.*

195 RATHKOPF ET AL., *supra* note 192.

196 *See* Pringle v. Montgomery City Plan. Bd. M-NCPPC, 69 A.3d 528, 534 (Md. 2013).

197 *See* NOLON, *supra* note 88, at 63 (“Communities that wish to adopt aggressive environmental protections are well advised to put the rationale for such regulations in their comprehensive plans.”).

198 *See supra* section II(C)(2).

b. Land Use Planning Measures

Whether part of a comprehensive plan or not, states and localities have a wide array of land use planning tools available to them to promote density. These land use planning measures — including zoning for dense development, implementation of growth boundaries, elimination of parking requirements, transit-oriented development, and others — have been discussed at length elsewhere,¹⁹⁹ and a review of these more traditional anti-sprawl measures is beyond the scope of this Article. It is worthwhile, however, for communities either planning for or already engaged in these kinds of initiatives to consider how self-driving cars may affect those initiatives. To the extent that planning measures are already being employed by a locality, community leaders may be able to build on the momentum surrounding dense development to implement coordinated planning decisions regarding driverless cars. In cities that have not historically embraced such land use controls, driverless cars may offer new incentives to do so. For instance, growth boundaries or conservation easements, while often controversial, may become more compelling where the time-cost of travel no longer serves as a constraint on sprawl. Pushback from community members regarding the elimination of parking requirements may also be alleviated in the face of self-driving cars

199 For a representative discussion of these kinds of measures, see, for example, Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 118-19 (2002) (“To implement these smart growth environmental goals, advocates urge local governments to use a variety of traditional local land use controls such as: transfer of development rights; purchase of development rights and other market mechanisms that can preserve land; coordinate and link local, state, and federal planning on land conservation and development; innovative financing tools to facilitate open space acquisition and preservation (e.g., local property tax incentives); regional development strategies that better protect and preserve open space in edge areas; local green infrastructure plans; designated networks of trails and greenways; cluster development and incentive zoning to preserve open space; promoting agricultural districts as a mechanism to keep private working lands; and partnering with local land trusts and conservancies to acquire and protect open lands (e.g., through conservation easements).”). For more concrete planning suggestions, see generally, for example, STEVE TRACY, *SMART GROWTH ZONING CODES: A RESOURCE GUIDE* (2003); see also AVI FRIEDMAN ET AL., *PLANNING THE NEW SUBURBIA: FLEXIBILITY BY DESIGN* (2002).

that can be used in shared fleets or drive themselves elsewhere to park. The radical possibilities presented by driverless technology warrant a comprehensive reevaluation of planning techniques.

2. Preparation for the Driverless City

People need to live somewhere; thus, to preserve open space, “we must save our cities.”²⁰⁰ As such, one of the best ways to combat sprawl may be to focus on making cities livable and to ensure that cities position themselves to provide workable alternatives to sprawl. Driverless cars are able to facilitate density-promotion efforts — for example, by alleviating parking problems within cities — and are dependent on such efforts for the technology to reduce our dependency on personal automobiles.²⁰¹ There are specific ways in which cities could respond to driverless cars that may make them more vibrant places to live, providing greater opportunities for density and simultaneously promoting new transportation technology. Although the future of driverless cars is unknown, the discussion below attempts to outline some actions that will be useful for cities regardless of the shape of the technology’s future and the length of its timeline.

a. Develop Authorization Measures on the Forefront of Regulation

Whether and where autonomous vehicles will be permitted to drive is currently an open question. Five states and the District of Columbia have enacted bills regarding autonomous vehicles,²⁰²

200 DAVID RUSK, *INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* 196 (1999) (quoting Jack Laurie, president of the Michigan Farm Bureau); *see also* EPA WHITEPAPER, *supra* note 75, at 31 (“Where and how we build new housing and infrastructure needed to accommodate projected population growth will have important environmental impacts . . .”).

201 *See* DAVID SCHLEICHER, YALE LAW SCHOOL, PUBLIC LAW RESEARCH PAPER No. 565, *HOW LAND USE LAW IMPEDES TRANSPORTATION INITIATIVES* (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763696 (“While self-driving cars will permit greater . . . densities, they also need such densities to be useful [in a car-sharing framework]. If such density is not permitted [or present], there will be little incentive to build cars to fit that use. That is, land use laws will partially drive technological development.”).

202 S. 1298, 2015-16 Leg., Reg. Sess. (Cal 2016); Council 19-0931, 2012 Leg., 19th Council Period (D.C. 2012); H.R. 1207, 2012 Leg., Reg. Sess. (Fla.

and regulatory agencies in two states and the District of Columbia have issued or are in the process of issuing regulations related to autonomous driving.²⁰³ A number of other states have proposed similar kinds of legislation.²⁰⁴ The DOT and NHTSA's recently published policy on autonomous vehicles confirms that there are currently no federal barriers to the sale of these vehicles and calls on states to promulgate uniform standards to ensure that consumers and manufacturers are not met with a patchwork of rules regarding their operation.²⁰⁵

There also appears to be fairly widespread acceptance among scholars in this new area that driverless cars are already “probably legal” in the absence of state action.²⁰⁶ A longstanding common law principle provides that anything not prohibited is permitted.²⁰⁷ Therefore, driverless cars' arguable compliance with the three principle applicable legal regimes — the 1949 Geneva Convention on Road Traffic, NHTSA regulations, and the vehicle codes of all 50 states — may mean that states need not take any further action to legalize self-driving vehicles.²⁰⁸ The strength of this argument has yet to be tested on a widespread basis and may ultimately depend on whether lawmakers and courts accept the argument that the “driving” performed by self-driving cars complies with regulations

202); S 0169, 97th Leg., Reg. Sess. (Mich. 2013); S 0663, 97th Leg., Reg. Sess. (Mich. 2013); Assem. 511, 2011 Leg., 76th Sess. (Nev. 2011); S 140, 2015 Leg., 78th Sess. (Nev. 2015); S 313, 2013 Leg., 77th Sess. (Nev. 2013); H.R. 616, 2015-16 Leg., 109th Gen. Assem. (Tenn. 2016); S 598, 2015-16 Leg., 109th Gen. Assem. (Tenn. 2016).

203 See Draft Deployment Regulations Released December 2015, CAL. DEP'T OF MOTOR VEHICLES, <https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/auto> (follow the “Autonomous Vehicles” hyperlinks); Council 19-0931, 2012 Leg., 19th Council Period (D.C. 2012); NEV. ADMIN. CODE § 482A (2016).

204 For a current list of such measures, see Gabriel Weiner & Bryant Walker Smith, *Automated Driving: Legislative and Regulatory Action*, STAN. CTR. FOR INTERNET & SOC'Y (Oct. 2, 2016, 5:06 PM), cyberlaw.stanford.edu/wiki/index.php/Automated_Driving:_Legislative_and_Regulatory_Action (last visited Jan. 5, 2016).

205 DOT POL'Y, *supra* note 55, at 11, 37.

206 See e.g., Smith, *Probably Legal*, *supra* note 9; Spencer Peck et al., *The SDVs are Coming! An Examination of Minnesota Laws in Preparation for Self-Driving Vehicles*, 16 MINN. J.L. SCI. & TECH. 843, 855 (2015).

207 See e.g., *Sparf v. United States*, 156 U.S. 51, 88 (1895) (describing the principle of *nulla poena sine lege* that there can be no punishment without a violation of a law).

208 Smith, *Probably Legal*, *supra* note 9, at 412-13; see also, e.g., Peck, *supra* note 206, at 867-76.

already in place for human operation of vehicles.²⁰⁹ Assuming that driverless cars are legal without state approval,²¹⁰ municipalities may take action to regulate the operation of driverless cars within their jurisdictions.²¹¹ City regulations regarding the operation of driverless cars could foster a sense of security for companies interested in bringing autonomous cars into the marketplace and could potentially prompt state legislatures to institute their own regulatory measures on the subject. Local governments in search of model language for their potential regulations could look to the variety of strategies already selected at the state level,²¹² or look to language proposed by scholars.²¹³

There is a strong possibility that municipal regulation regarding driverless cars would be preempted by any state or federal regulations that follow.²¹⁴ This may give pause to local governments

209 See Peck, *supra* note 206, at 855 (quoting Smith, *Probably Legal*, *supra* note 9, at 420) (describing what it means to “drive” a vehicle “include[ing] a hierarchy of tasks such as ‘selection of destinations and their order (trip), roads to those destinations (route), lanes as well as the turns and merges onto them (path), and speed and spacing within those lanes (position),’ safety related tasks like adjustment of windshield wipers, lights, and turn signals, and adjustment of creature comforts like the climate control”). A recent federal statement supports this analysis. See Alex Davies, *Feds Say They’ll Count Computers as Human Drivers*, WIRED (Feb. 10, 2016) <http://www.wired.com/2016/02/fed-say-theyll-count-computers-as-human-drivers/>.

210 At least one state has accepted this analysis. See Letter from Anne Marie Crosswell, Assistant Att’y Gen., State of S.C., to Warren V. Ganjehsani, Gen. Counsel, S.C. Dep’t of Pub. Safety (Aug. 6, 2015) (on file with Westlaw at 2015 WL 4977735) (noting that, in the absence of action by the South Carolina state legislature on a pending bill regarding driverless cars, testing of autonomous vehicles on the roadways of South Carolina was “permissible so long as the various requirements imposed on drivers and motor vehicles operating on our State’s highways were complied with”).

211 Cf. *Wilton v. Henkin*, 126 P.2d. 425, 428 (1942) (“Until the state acts . . . the field remains subject to municipal regulation, and the State Legislature has no power to forbid the municipality to so act.”); see also R.P.D., Annotation, *Conflict Between Statutes and Local Regulations as to Automobiles*, 147 A.L.R. 522 (1943).

212 For a current list of state action on driverless car legislation, see Weiner & Smith, *supra* note 204.

213 For a draft bill proposed by a legal scholar, see Smith, *Probably Legal*, *supra* note 9, at 508-16.

214 See generally R.P.D., *supra* note 211. “[I]t is well settled as a general rule that municipalities, having the power to regulate the use of their streets, may enact valid rules and regulations for the government of motor vehicles within their precincts, so long as they are not in conflict with or repugnant to legislative enactments governing the use of such vehicles; but that such ordinances are

who fear that time invested in planning and promulgating regulations, and money allocated to any necessary infrastructure, will be wasted on measures that will ultimately be overturned. Driverless car companies, however, may be wary of operating in a regulatory void.²¹⁵ The lack of action at the state and federal level provides local governments with an opportunity to attract driverless cars to their municipalities by providing clear operational frameworks. Even if ultimately preempted, work by municipalities in this area may serve as a catalyst for improved clarity and help to position them to be on the leading edge of this technology.

b. Create a Framework for Density-Promoting Uses of Driverless Cars

In the survey of MPOs discussed above, one concern expressed by planners was the uncertainty of whether and when self-driving automobile technology would become widespread.²¹⁶ For that reason, local governments may be reluctant to provide a full regulatory framework for driverless cars or to commit resources solely to this technology. However, cities can take certain density-promoting actions that would be beneficial even in the interim or absence of driverless vehicles. Focusing on these strategies would facilitate municipal planning for driverless cars without fear of wasting resources should the technology fail to materialize in expected ways or within the expected timeframe.

i. Modified Parking Requirements

Driverless cars are expected to have the ability to drive themselves to remote parking sites when not in use,²¹⁷ creating an opportunity to do away with automobile parking in its current form. Reducing the need for available parking in cities could also create

invalid if they are in conflict with statutes relating to the subject.” *Id.* at (I).

215 Cf. Brian Fung, *Google’s Driverless Cars are Now Legally the Same as a Human Driver*, WASH. POST (Feb. 10, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/02/10/googles-driverless-cars-are-now-legally-the-same-as-a-human-driver/> (describing letter sent by Google to NHTSA requesting clarification on the definition of “driver” under federal law).

216 See *supra* text accompanying notes 136-140.

217 Doug Newcomb, *How Driverless Cars Spell the End of Parking as We Know It*, PC MAGAZINE (Aug. 12, 2016), <http://www.pcmag.com/commentary/346952/how-driverless-cars-spell-the-end-of-parking-as-we-know-it>.

benefits outside of those associated with autonomous vehicles. In many cities,²¹⁸ minimum parking requirements lead to large amounts of unused urban space.²¹⁹ If the automobile market was sufficiently saturated by driverless cars, cities could eliminate much of the parking that occupies urban areas in the form of reserved street spaces and parking garages. This could present new planning opportunities for affordable housing and other amenities.²²⁰ Given the scarcity of urban land, the reopening of large swaths of space to non-automobile uses holds great promise. Planners can currently identify the neighborhoods most impacted by parking requirements and work to reduce those requirements and parking availability even before the driverless car arrives in the streets. Reducing or eliminating minimum parking requirements, along with ending subsidies for parking, could strongly encourage density.²²¹

Importantly, driverless cars are still cars, and they will still need garages, charging stations, and other infrastructure. As seen in the early assumption that horse barns could sufficiently provide for the needs of the automobile,²²² new technologies may require new approaches to space and storage. Cities should plan now for how best to meet the needs of driverless cars, keeping in mind space requirements and potential congestion issues. To facilitate that process, traffic studies and other preliminary steps can be taken to identify possible locations for this infrastructure, and necessary environmental studies can be conducted to determine the impacts of various siting options.

ii. Fleet Abilities

Many envision the future of driverless cars involving shared fleets of vehicles.²²³ Allowing these kinds of fleets to operate in either public or private form could harness many of the potential

218 Cities vary in the amount of parking available in their central business districts. But “[h]igher density leads to a higher quality of life only in cities that restrict rather than require off-street parking,” such as San Francisco and New York City. See SHOUP, *supra* note 18, at 162-65.

219 *Id.* at 111 (summarizing studies that show that parking requirements create underused parking lots in cities).

220 Lari et al., *supra* note 83, at 758.

221 See SHOUP, *supra* note 18, at 591-92.

222 See *supra* text accompanying notes 16-17.

223 Mike Isaac, G.M., *Expecting Rapid Change, Invests \$500 Million in Lyft*, N.Y. TIMES (Jan. 4, 2016), <http://www.nytimes.com/2016/01/05/technology/gm-invests-in-lyft.html?ref=technology>.

benefits of self-driving vehicles, including a density-promoting, ready source of urban transit.²²⁴ A number of municipalities are currently working to establish new rules for ride-sharing services like Uber and Lyft that have gained enormous popularity in the last couple of years.²²⁵ As policymakers hash out the details of these new regulations, they should also consider how driverless cars might fit into this framework in the future and address needed gaps in the law accordingly. For instance, a common regulatory debate concerns background check requirements and other regulations with which drivers for taxi companies must comply and their applicability to the ride-sharing drivers of newer transportation companies.²²⁶ Along with any changes to those rules, local governments and policymakers should include in any new regulations a provision clarifying the requirements that apply only to cars with human drivers. Policymakers could also take the opportunity to reassess all of the laws regarding shared vehicle services and consider adding different liability and insurance rules as needed for driverless fleets. Creating such clarifications in advance of commonplace use of self-driving technology may encourage its more widespread adoption, as the “lack of an effective legal framework can be the main obstacle to innovation and economic growth.”²²⁷

Thus, establishing even a partial regulatory framework could facilitate the eventual use of driverless fleets once the technology matures. It could also present an early opportunity for cities to better prepare additional legislation and consider plans for how to help taxi drivers and others whose livelihood may be affected by a

224 See *infra* section III(B)(2)(c).

225 Douglas MacMillan, *Uber Laws: A Primer on Ridesharing Regulations*, WALL ST. J.: DIGITS (Jan. 29, 2015), <http://blogs.wsj.com/digits/2015/01/29/uber-laws-a-primer-on-ridesharing-regulations/>.

226 See, e.g., Luz Lazo, *D.C. Taxi Drivers Sue D.C. Over Uber Legislation*, WASH. POST (May 22, 2015), <https://www.washingtonpost.com/news/dr-gridlock/wp/2015/05/22/d-c-taxi-drivers-sue-d-c-over-uber-legislation/> (“D.C. cab-drivers and taxi companies have criticized [D.C.] legislation [legalizing Uber and other shared car services] as unfair because they say the drivers for uberX, Lyft and Sidecar don’t have to meet the same licensing requirements, regulations, restrictions and costs as regular cabdrivers.”); Adam Vaccaro, *Massachusetts lawmakers agree on new rules for Uber and Lyft*, BOSTON.COM (Aug. 1, 2016), <http://www.boston.com/news/business/2016/08/01/uber-lyft-state-house-bill> (describing the new legislation in Massachusetts which regulates ride-sharing drivers).

227 Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 444 (2015).

new economy of driverless vehicles.²²⁸ As seen in current conflicts between ride-sharing companies and the taxi cab industry,²²⁹ plans for driverless car fleets are likely to face significant opposition from driver-based modes of transit. Therefore, planning for the possible loss of employment for hundreds of people will be a crucial step toward adoption of driverless cars in any city.

iii. Use Congestion Pricing to Deter Long Commutes

Cities and their policymakers should also consider altering transportation pricing models to deter a driverless-car-fueled migration from cities to suburbs. To date, most commuters bear at least some of the cost burden of time spent sitting in traffic.²³⁰ However, if self-driving cars reduce the time cost of commuting, this system check will be eliminated and may therefore promote sprawl.²³¹ A logical solution to this consequence is congestion pricing. Under congestion pricing, drivers pay a fee to use certain roads during high-travel times.²³² Implementing congestion pricing for driverless vehicles would force commuters to internalize at least some of the costs of sprawl and would reinforce the importance of public transit, as described below.

Congestion pricing shifts the cost burden of a commuter's decision to drive back to the individual.²³³ These costs may include those associated with time, external congestion, and other environmental or governmental costs.²³⁴ Traditionally, there are three congestion pricing models: (1) "facility pricing, which charges fees for use of a bridge, tunnel, or small segment of road"; (2) "road pricing, which assesses a fee along a specific roadway," or; (3) "cordon pricing, which establishes a series of congestion toll collection stations in a ring around a congested area" and for which

228 Cf. Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 101-02 (2015) (discussing Uber's impacts possible impacts on low-wage employees).

229 See *supra* text accompanying note 226.

230 See *supra* text accompanying notes 68-71.

231 See *supra* text accompanying notes 80-84.

232 Gabriel Weil, *Subnational Climate Mitigation Policy: A Framework for Analysis*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 285, 303-05 (2012).

233 Jonathan Remy Nash, *Economic Efficiency Versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 725 (2008).

234 Michael H. Schuitema, *Road Pricing as a Solution to the Harms of Traffic Congestion*, 34 TRANSP. L.J. 81, 93 (2007).

“[c]ommuters are charged a fee as they enter the area.”²³⁵ Under any of these three systems, living on one side of a pricing divide versus another can be quite costly, which often makes the decision regarding how and where to institute congestion fees controversial.²³⁶

The technological and information transmission capabilities of driverless cars, however, could enable sophisticated pricing that may avoid the kind of line-drawing that often concerns businesses and residents and would also better combat sprawl. For example, rather than implementing one of the three traditional congestion pricing models for driverless cars, municipalities could institute a charge per mile based on daily vehicle miles traveled before passing a certain checkpoint. Where there is sprawl, the cost to travel on roads could be greater compared to more developed areas; thus, if calculated appropriately, these charges could provide market incentives for denser development²³⁷

One major critique of congestion pricing is that it may operate as a regressive tax by effectuating a relative tax rate that decreases as individual income increases.²³⁸ Some commentators suggest addressing this concern through forms of credit-based congestion pricing where the revenue generated is redistributed to all drivers.²³⁹ Under such a system, “frequent long-distance peak-period drivers subsidize others, in effect paying them to stay off congested roads.”²⁴⁰ That kind of credit system may help to ease concerns about the regressive nature of congestion pricing. While this policy may focus on redistributing the time of day that drivers are on the road rather than decreasing the number of cars coming into a city, it could be adjusted to respond to driverless cars. For

235 *Id.* at 93-94 (2007).

236 In London, for example, concerns about the boundary for the congestion charge zone related to the “impact that the zone will have on those living around the boundary and the impacts on land use in and around the zone. Many businesses inside the zone say that the extra cost incurred by the charge will result in higher prices for their customers.” See *Congestion Charging Ahead*, ROYAL GEOGRAPHICAL SOC’Y (Feb. 10, 2003), http://www.rgs.org/NR/rdonlyres/7B0651E8-A8CB-4215-ADF7-4CCE74A85F0A/0/SMA_CP_CongestionCharging.pdf.

237 David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1561 (2010) (describing congestion pricing as a “pro-agglomerative policy”).

238 See, e.g., Richard Arnott et al., *The Welfare Effects of Congestion Tolls with Heterogeneous Commuters*, 28 J. TRANSP. ECON. & POL’Y 139, 158 (1994).

239 Kara M. Kockelman & Sukumar Kalmanje, *Credit-Based Congestion Pricing: A Policy Proposal and the Public’s Response*, 39 TRANSP. RES. PART A 671 (2005).

240 *Id.*

instance, instead of generating an overall rebate, cities could use the revenue generated from congestion pricing to fund public transit or to subsidize affordable urban housing. Combined with investments in public transit and the creation of a useful framework for driverless car sharing within cities, congestion pricing has the potential to be another tool with which governments can encourage density development.

c. Public Transit

In tandem with measures supporting a smooth transition to self-driving cars, municipalities should invest in existing and/or planned public transportation options that promote dense development. This suggestion may seem counterintuitive, given that driverless cars could decrease demand for mass transit. However, public transit systems provide the greatest potential for density and the greatest ability to address the needs of a diverse citizenry.²⁴¹ Because opposition to public transit spending is likely to increase as driverless car technology becomes fully developed and those with a financial interest in that technology become more organized and coordinated, cities would do well to invest now in the kinds of public transportation infrastructures that will allow for the growth of urban centers and serve all citizens.

Public transit needs density to flourish and also fosters further density. At the most basic level, it promotes density by using less space per person moved. Some predictions estimate that, during rush hour, “a trip by car may consume up to twenty-five times more time-area than the same trip made by bus, and more than sixty times

241 See generally Hannibal B. Johnson, *Making the Case for Transit: Emphasizing the “Public” in Public Transportation*, 27 URB. LAW. 1009 (1995); see also, e.g., James A. Kushner, *Affordable Housing as Infrastructure in the Time of Global Warming*, 42/43 URB. LAW. 179, 198-99, 201-02 (2011); Patrick Moulding, *Fare or Unfair? The Importance of Mass Transit for America’s Poor*, 12 GEO. J. ON POVERTY L. & POL’Y 155, 164 (2005) (noting that minorities and low-income households account for 63% of the nation’s transit riders); cf. MONTGOMERY, *supra* note 43 at 233-41 (describing importance of transit systems to urban equality). Of course, historic patterns of exclusion with regard to public transit may cut against this access argument. See, e.g., Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1962 (2015) (describing detriment suffered by low-income communities and communities of color with regard to access to employment, recreational, and other activities due to intentional exclusion of transit stops from white, higher-income areas).

the time-area consumed by rapid transit.”²⁴² When citizens use public transportation instead of private automobiles, precious urban space is made available for housing and other needs. By providing alternatives to the personal vehicle, public transit options also help to break ties with the automobile in a much more dramatic way than driverless cars.²⁴³

In addition to furthering density goals, continued investment in public transit creates equal access to transportation. While Sven Beiker, Executive Director of the Center for Automotive Research at Stanford University, has said that “[v]ehicle automation is the point where personal mobility and public transportation come together,”²⁴⁴ private cars are unlikely to serve the needs of all members of the population. Whether a public or private endeavor, any large driverless car network will likely require large amounts of capital inputs for initial purchase. These costs will inevitably be passed on to the consumer. Additionally, users will need specialized technology — such as credit cards or mobile smartphone applications — to access a shared fleet. Therefore, both public and private driverless cars risk excluding segments of the population with low income and reinforce a two-tiered system of transit. While it is possible that shared fleets may provide end-of-line access and private transportation in currently underserved areas,²⁴⁵ public transit is likely to continue to play an important role in ensuring equal access to transportation.

242 Moulding, *supra* note 241, at 162 (citing VUCHIC, *supra* note 13, at 55).

243 See, e.g., JAMES A. KUSHNER, GLOBAL CLIMATE CHANGE AND THE ROAD TO EXTINCTION: THE LEGAL AND PLANNING RESPONSE 182 (2009) (proposing that the foremost goal for local governments planning for more sustainable transportation is to “plan and implement a public transport system that can gradually replace the automobile as the principle means of transport,” and that, to make those plans, “housing settlements, jobs, commercial and recreational destinations should be planned around transport”).

244 David Z. Morris, *Trains and Self-Driving Cars, Headed for a (Political) Collision*, FORTUNE (Nov. 2, 2014), <http://fortune.com/2014/11/02/trains-autonomous-vehicles-politics/?iid=sr-link1>.

245 An Uber-funded study done by third-party researchers suggests that, in terms of response time and cost, its services provide better services to underserved neighborhoods than taxis. See generally ROSANNA SMART ET AL., FASTER AND CHEAPER: HOW RIDE-SOURCING FILLS A GAP IN LOW-INCOME LOS ANGELES NEIGHBORHOODS (2015), <http://botecanalysis.com/wp-content/uploads/2015/07/LATS-Final-Report.pdf>.

The prospect of driverless vehicles may provide an angle, reasoned or otherwise, to oppose expenditures on public transit or to reduce the level of engagement of higher-income, enfranchised advocates.²⁴⁶ For example, the Pinellas Suncoast Transportation Authority in Florida's Pinellas County, which covers the Tampa and St. Petersburg metropolitan areas, created a plan to address the county's transportation problems through expansion of bus service and construction of a 24-mile light rail system.²⁴⁷ When the plan — which would have been funded through a one-cent sales tax — was put up for a referendum in November 2014, it failed by huge margins.²⁴⁸ One of many arguments presented by opponents of the plan was that traditional forms of public transportation would be rendered obsolete by autonomous vehicle technology.²⁴⁹ Indeed, those who disfavor large public works projects would likely support driverless cars because they can be privately owned and require less public funding than do government-based initiatives.²⁵⁰ Planners also may be reluctant to invest limited capital on projects that could soon be rendered obsolete.²⁵¹ These arguments may only gain strength as driverless cars grow in popularity, and investment in public transit may be easier now than in the future.

3. *Pro-Density, Not Anti-Car*

Above all, when considering information about the driverless car's likely impacts and preparing for implementation of this new technology, planners should keep in mind that the driverless car is just the latest iteration in what is likely to be a long line of

246 See, e.g., Anne Lutz Fernandez, *Magic Cars and Silver Bullets: Will the Self-Driving Car Save the World?*, STREETS BLOG USA (June 5, 2013), <http://usa.streetsblog.org/2013/06/05/magic-cars-and-silver-bullets-will-the-self-driving-car-save-the-world/> (noting that “[p]erpetuating the belief that a magic car will be the silver bullet that solves our transportation problems doesn’t just focus too narrowly on automotive solutions to transportation problems—it slows down progress on non-automotive solutions” as detractors of transit can undermine the necessary large investments in public works projects by pointing to the potential of driverless vehicles).

247 Tony Marrero, *Voters Reject Greenlight Pinellas*, TAMPA BAY TIMES (Nov. 4, 2014), <http://www.tampabay.com/news/politics/elections/greenlight-pinellas-doing-poorly-in-early-results/2205105>.

248 *Id.*

249 Morris, *supra* note 244.

250 *Id.*

251 Guerra, *supra* note 135, at 215.

technologies that make it possible to work and live farther apart than ever before. The aforementioned measures may help to facilitate a discussion of the impacts of driverless cars for the environment and assist governments in planning for a denser future.²⁵²

It may be tempting at times to consider simple solutions that address only the driverless car without actually planning for density. For instance, some may propose to simply restrict driverless cars to urban areas. Such an option, even if legally viable,²⁵³ is unwise. First,

252 See *supra* section III(B).

253 A restriction of driverless cars to urban areas would likely provoke a variety of legal challenges. For instance, suburban residents may raise an equal protection complaint regarding their inability to travel in a self-driving car in the same way as their urban counterparts. Generally speaking, the Equal Protection Clause protects similarly situated persons from being treated differently. Where a law does not burden a constitutional right, courts are highly deferential to the legislature, and will look only to whether the law is reasonable and bears a rational basis to a permissible state objective. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Thus, whether action by a state to limit licensure of driverless cars to certain geographic bounds would pass muster under the Equal Protection Clause of the United States Constitution will depend on whether limiting suburban sprawl is a permissible objective and whether a restriction on driverless cars is a rational means of accomplishing that goal. While federal courts have recognized a constitutional right to travel that encompasses the “right to go from one place to another, including the right to cross state borders while en route,” that right does not guarantee access to any particular mode of transportation. *Saenz v. Roe*, 526 U.S. 489, 500 (1999); *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999); *City of Houston v. F. A. A.*, 679 F.2d 1184, 1198 (5th Cir. 1982). Thus, where a town banned an entire mode of interstate transportation — vehicular ferries and high-speed ferries — in the interest of “protect[ing] the welfare of Town residents and the integrity of the local environment,” and nothing in the record suggested that the rule was motivated by preventing traffic from outside the state, the court found that no constitutional right had been burdened. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007). In this case and others, courts have frequently found that both preservation of local character and environmental protection are legitimate interests. The same result could likely be said of the state’s interest in avoiding sprawl and its many negative consequences. Moreover, because the restriction on driverless cars in the suburbs would likely be considered a rational means of attaining that interest, any equal protection claims would be unlikely to succeed.

In a somewhat related context, in 2014 taxi drivers filed suit against the City of Chicago regarding its regulations for transportation network companies (TNCs) like Uber and Lyft. The taxi driver plaintiffs alleged that those regulations, which impose substantially different requirements on TNCs than taxis in terms of insurance, driver qualifications, and others, are unlawful for a number of reasons, including violation of the Equal Protection Clause. See *Ill. Transp. Trade Ass’n v. City of Chicago*, 134 F. Supp. 3d

artificially restricting the marketplace for driverless cars to urban areas (however those areas are defined) would deny the benefits of self-driving cars to those in suburban areas. As noted above, those benefits have the potential to be considerable.²⁵⁴ In particular, crashes outside of urban areas are responsible for approximately half of the deaths from automobile accidents each year,²⁵⁵ and withholding technology that could reduce the number of vehicular fatalities may be ethically questionable. Moreover, the driverless car's potential to weaken the link between car and human may have the greatest impact in the suburbs, given the relatively greater reliance on personal automobile ownership outside of major metropolitan areas. Just as driverless technology should not be restricted to only one area, cities should not restrict their choices about infrastructure to changes that would be desirable or necessary only in the event that driverless cars are the dominant form of transportation.²⁵⁶ Either of these moves

1108, 1110-11 (N.D. Ill. 2015). The judge dismissed all of the taxi drivers' claims but those focused on equal protection, finding that the city had not articulated a rational basis for the difference in treatment. *Id.* at 1114-15. Although the distinction between urban and suburban populations is likely easier to articulate, the lawsuit sounds a cautionary note for regulating new transportation technologies.

A restriction on driverless cars might also be challenged under the Takings Clause of the United States Constitution, which prohibits the taking of property by the government without just compensation. Where government regulations go too far toward impeding reasonable, investment-backed expectations regarding the value of property, a court may find a taking. Here, suburban property owners could potentially argue that the inability to operate their driverless cars deprived them of the total value of their already-purchased property — in the case of those owners who had already purchased self-driving vehicles before the regulations went into effect — or that the impacts of not being able to take advantage of this technology diminished the value of their property. The latter case is unlikely to succeed, as “[d]iminution in the value of property, however serious, is insufficient to demonstrate a taking.” *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1090 (9th Cir. 2015). In the former case, for those property owners who had already purchased a vehicle, there may be a closer call about whether a taking was effectuated. The remedy for a taking is government compensation; however, if these regulations were put in place before driverless car technology was widely disseminated, the cost to the government of replacing the value of affected vehicles may be relatively low.

254 See *supra* section II(C)(1).

255 *Roadway and Environment*, INS. INST. FOR HIGHWAY SAFETY & HIGHWAY LOSS DATA INST. (Feb. 2016), <http://www.iihs.org/iihs/topics/t/roadway-and-environment/fatalityfacts/roadway-and-environment>.

256 Cf. Press Release, Nat'l Ass'n of City Transp. Officials, NACTO Releases Policy Recommendations for the Future of Automated Vehicles (June 23, 2016),

would be part of a long tradition of planning decisions that focus only on the transportation form of the moment.

Cities have long been shaped by transportation. Density generally characterizes older settled areas because of the need to be close to transit, whether by rail, river, or ocean.²⁵⁷ Additionally, development has typically been predicated on the assumption that the form of transportation essential at the time of construction would forever be dominant. Suburban homes, for example, are often constructed based upon the notion that automobiles and road construction will forever satisfy the transit needs of the American population.²⁵⁸ Because transportation systems are intended to be permanent, each phase of transportation planning leaves an enduring mark on the landscape in terms of infrastructure and a “distinct pattern of community design”²⁵⁹ vulnerable to obsolescence. A ban on driverless cars in the suburbs, or a city molded around driverless technology, would simply be a temporary fix to get past the most recent technological wonder, but it would not help us plan for the next round or the one after.

Like the horse, streetcar, and human-controlled automobile before them, still newer modes of transportation are expected to follow driverless cars²⁶⁰ with characteristics and consequences that are difficult to foresee. The environmental necessity of density is the one constant. Density untethered from any particular mode of transit should therefore be the goal, even as technology permits otherwise. “The future is always stranger than we expect: mobile phones and the Internet, not flying cars.”²⁶¹ But it is precisely

<http://nacto.org/2016/06/23/nacto-releases-policy-recommendations-for-automated-vehicles/> (quoting a statement by Janette Sadik-Khan, Transportation Principal at Bloomberg Associates and NACTO Chair (and former Commissioner of the New York City Department of Transportation under Mayor Michael Bloomberg) that “[i]nstead of adapting our cities to accommodate new transportation technologies, we need to adapt new transportation technologies to our cities in ways that make them safer, more efficient, and better places to live and work”).

257 Cf. Buzbee, *supra* note 90, at 64-67.

258 Roger K. Lewis, *Shaping the City: Seeking a New Template for Truly Smart Growth*, WASH. POST (Apr. 15, 2011), https://www.washingtonpost.com/realestate/shaping-the-city-seeking-a-new-template-for-truly-smart-growth/2011/04/15/AFQShSPE_story.html.

259 KUSHNER, *POST-AUTOMOBILE CITY*, *supra* note 3, at 1-3.

260 See Levinson, *supra* note 74, at 790-91 (describing the “S-curve” for transportation technologies over time, through birth, growth, maturity, and decline).

261 Tad Friend, *Tomorrow’s Advance Man: Marc Andreessen’s Plan to Win the*

because we do not know in what form our future transportation needs and technologies will come that land use goals should dictate our transportation strategies, not the other way around. If we do not rethink how we live and engage in difficult planning processes at the regional and local levels to elevate density to a planning goal, we will be heading into the future once again unprepared. For that reason, more comprehensive planning from the outset of this new technology is essential.

IV. Conclusion

Norman Bel Geddes, speaking of his vision of the future of the driverless car, proclaimed that:

[a]n America in which people are free, not in a rhetorical sense, but in the very realistic sense of being freed from congestion, waste and blight — free to move out on good roads to decent abodes of life — free to travel over routes whose very sight and feel give a lift to the heart — that is an America whose inner changes may far transcend the alterations on the surface.²⁶²

Geddes viewed the highway as a mechanism for uniting the country and positive social change.²⁶³ This view is part of a long tradition of the American relationship with the automobile, in which “[t]he essence of the motorway idea is that of new opportunity”²⁶⁴ and of exploring new frontiers.

Part of this romantic vision regarding the automobile stems from a desire to experience an “‘affordable pastoralism’ away from the congestion of the city.”²⁶⁵ Unfortunately, this aspiration has serious repercussions for the larger ecosystem in which we live. “Decisions about how and where we build our communities have significant impacts on the natural environment and on human health.”²⁶⁶

Future, THE NEW YORKER (May 18, 2015), <http://www.newyorker.com/magazine/2015/05/18/tomorrows-advance-man>; see also, e.g., SHOUP, *supra* note 18, at 6 (“A simple projection is often a poor forecast because technology and policy can change.”).

262 GEDDES, *supra* note 41, at 294-95.

263 *Id.*

264 *Id.* at 290.

265 Colburn, *supra* note 127, at 980.

266 EPA WHITEPAPER, *supra* note 75, at i.

Ecosystems in the United States are already experiencing pressure and species loss due to habitat fragmentation and destruction.²⁶⁷ Anticipated population growth in the United States, and the potential for driverless car technology to encourage development far outside metropolitan areas, will likely lead to severe environmental damage if measures are not put in place to instead encourage density.

Americans have long viewed the country as a land without limits²⁶⁸ and the frontier impulse for settlement and the sense of national identity connected to a far-reaching highway system has characterized the country's growth patterns. Perhaps, however, we have arrived at a point where those values can be reframed. Dwight D. Eisenhower, a driving force behind the national highway system, began an address to Congress regarding highway funding by remarking that "[o]ur unity as a nation is sustained by free communication of thought and by easy transportation of people and goods."²⁶⁹ New technologies make questions of communication and access very different, and we now have the luxury, ability, and obligation to plan our growth as a country in ways that will allow for the survival of the natural environment alongside the human population.

Driverless cars are both exciting feats of human engineering and very powerful tools that make traveling longer distances possible, more enjoyable, and in-demand. City and suburban government actors should integrate knowledge of the potential environmental impacts of these vehicles to promote growth in ways that will allow dense developments to flourish regardless of transportation technology. The alternative, allowing unthinking and uncontrolled use of new transportation to dictate the terms of the American landscape, has been, and would now be, an inexcusable mistake. Our journey from horse to driverless car — and its attendant consequences — has taken 200 years; we do not know what technological innovations the next 200 years will bring. What we do know is that ever-greater expansion of the human footprint likely means disaster for the ecosystems in which we live. The coming of new possibilities for automobiles is

267 See *supra* section II(C)(2)(b).

268 Jason C. Rylander, *The Emerging Federal Role in Growth Management*, 15 J. LAND USE & ENVTL. L. 277, 280 (2000).

269 President Dwight D. Eisenhower, Message to Congress Regarding Highways (Feb. 22, 1955) (transcript available at http://www.eisenhower.archives.gov/research/online_documents/interstate_highway_system/1955_02_22_Message_to_Congress.pdf).

the perfect time for reflection on what went wrong with our first car-fueled expansion and to take measures to undo and avoid those harms as we move into an era of new transportation possibilities.

Extension of the Fourth Amendment Exclusionary Rule Through State Application of Target Standing in the Aftermath of *Rakas*

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I. Introduction

This Article seeks to identify the evolution of “target standing” in courts and the nuanced Fourth Amendment constitutional diversions Louisiana, Massachusetts, Alaska, and California have taken. Target standing is a form of standing in criminal law in which a party, who is the actual target of a police search, seeks to exclude evidence based on a violation of a third party’s Fourth Amendment rights.¹ Although target standing was soundly dismissed by the United States Supreme Court in the 1978 case *Rakas v. Illinois*, state courts in a few jurisdictions have chosen to ratchet up constitutional protections by allowing defendants to utilize this powerful addendum to the exclusionary rule. This examination includes a detailed incursion into the Louisiana Supreme Court’s interpretation of Constitutional Convention history, the Massachusetts Supreme Judicial Court’s interpretation of the Massachusetts Constitution’s article XIV — as discussed in their recent decision, *Commonwealth v. Santiago* — Alaska’s common law interpretations, and California’s legislative rejection of target standing. In Massachusetts specifically, the Supreme Judicial Court, while not endorsing target standing, has developed a rather amorphous and broad rule in which such standing is warranted to deter “distinctly egregious” police conduct.² This Article will explore the fundamentally flawed reasoning behind the concept on a federal level while also delving into the methods, standards, and applications state courts have utilized to allow this evidence suppression tool to exist. By flushing out these state rules, the Massachusetts defense bar can achieve a better understanding of this enormously powerful evidentiary tool and advocate for its expanded use in Massachusetts courts.

II. Federal Fourth Amendment: *Jones, Rakas, Salvucci*, and the Federal Floor

The purpose of this Article is not to recite the history of the exclusionary rule generally or target standing specifically. However, the complex nuances in this area of law may be best understood by first looking at its underlying principles. The most important

1 6 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(h) (5th ed. 2014).

2 See discussion *infra* Section IV.B.iii.

of these principles is found in *Jones v. United States*.³ Even before an exclusionary rule bound to the states through the Fourteenth Amendment, the United States Supreme Court had already decided who was, and more importantly who was not, protected by this judicial construct.⁴

Federal narcotics agents in the District of Columbia effectuated a search warrant on an apartment Jones was using with the permission of his friend.⁵ The agents arrested Jones upon witnessing him conceal narcotics in a bird's nest resting on an awning outside one of the apartment's windows.⁶ Arguing that the police obtained the warrant without probable cause, Cecil Jones sought to suppress the evidence.⁷ The United States opposed the motion, stating that since Jones was not a tenant of the apartment and claimed no ownership of the drugs, he did not have standing to exclude the narcotics from evidence.⁸ The Court noted this quirk of law, writing "a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him."⁹ Jones was in a legal black hole in which he would have to admit ownership of the narcotics in order to keep them from being admitted into evidence. To remedy this problem, the Court ruled that defendants charged with possession have automatic standing so they may exercise their right to suppress upon motion.¹⁰ However, in order to have this standing, "one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."¹¹ It was this language, and its ambiguous meaning, that led to the Supreme Court's seminal holding on target standing in *Rakas v. Illinois*.¹²

3 *Jones v. United States*, 362 U.S. 257 (1960), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980).

4 *See* *Mapp v. Ohio*, 367 U.S. 643 (1961); *Jones*, 362 U.S. at 258.

5 *Jones*, 362 U.S. at 259.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 261-62.

10 *Id.* at 264-65; Richard A. Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831, 850 (1979).

11 *Jones*, 362 U.S. at 261.

12 *See* *Rakas v. Illinois*, 439 U.S. 128, 135 (1978).

In 1978, the Supreme Court put a seemingly definitive hold on target standing in American criminal courts.¹³ In *Rakas v. Illinois*, the appellants, Frank L. Rakas and Lonnie L. King, were convicted of armed robbery in Kankakee County, Illinois.¹⁴ While Rakas and King were sitting in the backseat of the getaway vehicle owned by the driver, Illinois police stopped the vehicle.¹⁵ The police searched the car, seized the sawed-off shotgun and ammunition used in the robbery, and arrested both Rakas and King.¹⁶ The trial judge denied their motion to suppress the weapon and ammunition, stating that the defendants had no standing to challenge the evidence because they did not own the vehicle.¹⁷

On appeal, the appellants relied upon the above-mentioned language in *Jones*, suggesting that they should have standing because they were victims of a search and seizure, or they were “one[s] against whom the search was directed.”¹⁸ The Court disagreed, holding that the *Jones* language was “dictum,”¹⁹ and chose to foreclose the use of the exclusionary rule to everyone but defendants with a legitimate property, possessory, or privacy interest in the place searched.²⁰ This privacy interest, a piece of Fourth Amendment jurisprudence unavailable to the *Jones* Court,²¹ enhanced the scope of places potentially protected by the exclusionary rule but did nothing to ease standing requirements.²² Despite this blow to target standing, the *Rakas* court did not explicitly overrule the notion, outlined in *Jones*, that a property or possessory interest in the item seized is sufficient to confer standing.²³

13 See *Rakas v. Illinois*, 439 U.S. 128 (1978).

14 Brief for Petitioner at 3, *Rakas*, 439 U.S. 128 (No. 77-5781).

15 *Rakas*, 439 U.S. at 130-31.

16 *Id.*

17 *Id.*

18 *Id.* at 135-44. See *Jones v. United States*, 362 U.S. 257, 261 (1960).

19 *Id.* at 135.

20 *Id.* at 135, 148-49.

21 See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting expansion of the exclusionary rule to include places where a person has a subjective expectation of privacy and society deems that expectation reasonable). The *Katz* decision occurred seven years after *Jones*. See *Jones v. United States*, 362 U.S. 257 (1960).

22 See David A. Macdonald, Jr., *Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course*, 63 TEMP. L. REV. 559, 567 (1990).

23 *Id.* at 568.

United States v. Salvucci ended this potential final loophole.²⁴ Salvucci and his partner-in-crime, Joseph Zackular, stored twelve checks taken from stolen mail at Zackular's mother's house in Melrose, Massachusetts.²⁵ The Massachusetts State Police raided the house, seized the checks, and placed both defendants under arrest.²⁶ Defendants filed a motion to suppress the seized checks, which was granted by the District Court and affirmed on appeal by the First Circuit.²⁷ The First Circuit held that, according to *Jones*, an individual is conferred automatic standing when such an individual has a possessory interest in the seized property.²⁸

However, even as it affirmed the existence of automatic standing, the First Circuit acknowledged that the decision in *Rakas* and other cases called into question whether the vice of prosecutorial self-contradiction (allowing the government to allege possession as part of the crime charged and yet deny that there was possession sufficient for standing purposes) "alone justifies the continued vitality of the doctrine of automatic standing."²⁹ They were right. On appeal to the Supreme Court, Justice Rehnquist, who had also written the *Rakas* opinion,³⁰ held that the "automatic standing rule of *Jones* has outlived its usefulness in this Court's Fourth Amendment jurisprudence. The doctrine now serves only to afford a windfall to defendants whose Fourth Amendment rights have not been violated."³¹ His reasoning was simple: a reasonable expectation of privacy is the new cornerstone of the exclusionary rule, not possession or property interests.³² Moreover, in a moment

24 *United States v. Salvucci*, 448 U.S. 83, 85 (1980).

25 *Id.* at 85.

26 *United States v. Salvucci*, 599 F.2d 1094 (1st Cir. 1979) *rev'd*, 448 U.S. 83 (1980).

27 *Id.* at 1094-95.

28 *Id.* at 1097.

29 *Id.*

30 *Rakas v. Illinois*, 439 U.S. 128 (1978).

31 *Salvucci*, 448 U.S. at 95.

32 *Id.* at 92-93 ("We find that the *Jones* standard 'creates too broad a gauge for measurement of Fourth Amendment rights' and that we must instead engage in a 'conscientious effort to apply the Fourth Amendment' by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched." (quoting *Rakas* at 142)). The Court also found that the *Simmons* ruling had negated a second reason for automatic standing, avoiding the ugly scenario of defendants choosing whether to waive their 5th Amendment rights to exercise their 4th and vice versa. *Id.* at 89-90.

foreshadowing new state law jurisprudence (and perhaps the premise behind this Article) Rehnquist summarized the argument found in so many Fourth Amendment cases when he quoted the pre-*Rakas* case *Alderman v. United States*:

“[w]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.”³³

III. Target Standing in Louisiana

A. Introduction

Interestingly, in an effort to update its constitution, Louisiana may have inadvertently included language in its legislative journals that was later interpreted by the Louisiana Supreme Judicial Court to support creation of target standing in that state.³⁴ The delegates to the Convention, through their discourse, suggested three different viewpoints regarding the meaning of Louisiana's analogous search and seizure constitutional provision: (1) it was intended to provide target standing; (2) it intended to provide a civil remedy, and; (3) it simply reinforced existing protections granted by the Fourth Amendment.³⁵ The Louisiana Supreme Judicial Court, through its analysis of the plain language in its state constitution, as well as the language in the Official Journal of the Proceedings of the Constitutional Convention, decreed that target standing was extended to citizens of Louisiana.³⁶ Ultimately, it is the delegates' own words in the Convention Transcripts, and not the preceding official legislative journal language, that *should have* proved more dispositive. Below is an analysis of the delegates' discussion of the matter as well as the court's flawed interpretation of that discussion.

33 *Salvucci*, 448 U.S. at 94 (1980) (quoting *Alderman v. United States*, 390 U.S. 377, 393 (1968)).

34 See discussion *infra* Sections III.B, III.C.

35 See discussion *infra* Section III.B.

36 *State v. Culotta*, 343 So. 2d 977, 981-84 (La. 1976); see also LA. CONST. art. I, § 5.

B. Louisiana Constitutional Convention

In 1974, 53 years after its last iteration, Louisiana adopted a new constitution, which included an updated Declaration of Rights.³⁷ Upon its drafting, the delegates of the 1974 Constitutional Convention devised what was thought of at the time as a radical expansion of the right to privacy enumerated in article I, section 5.³⁸ Of particular note is the last sentence of the section, which reads: “[A]ny person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”³⁹ The delegates commented in the Convention Journal that this provision was included in order to ensure that “persons protected against illegal searches and seizures include not only the person whose house or property has been illegally searched but also any other person adversely affected by the illegal search.”⁴⁰ Even more astonishing, the sentence seems to be included specifically for its deterrent effect on unlawful police conduct, something the *Rakas* court would find insignificant five years later when comparing it to the unsavory idea of suppressing probative evidence.⁴¹

Although this last sentence suggests a grant of standing rights beyond what was offered federally in 1974, it is not clear that the language refers to third-party standing. Rather, the intent behind the language could have been provided as a remedy akin to civil liability for lawless police action.⁴²

Evidence in the Committee Documents suggests that the committee charged with developing section 5, the Committee on

37 See LA. CONST. art. I, §§ 1-27; Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 20-25 (1974).

38 See LA. CONST. art. I, § 5; Hargrave, *supra* note 37, at 5.

39 LA. CONST. art. I, § 5.

40 Hargrave, *supra* note 37, at 23 n.107; STATE OF LOUISIANA, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973 OF THE STATE OF LOUISIANA 86 (1974).

41 See *id.* at 5; *Rakas v. Illinois*, 439 U.S. 128, 137 (1978).

42 LOUISIANA CONVENTION RECORDS COMM'N, RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, at 1072 (1974) [hereinafter CONVENTION TRANSCRIPTS]. Delegate Kendall Vick seems to hint at this notion as well. *Id.* (“There are laws; there are laws, indeed. One of them is the Civil Rights Act, and let me tell you, ladies and gentleman, you get very, very short shrift if you file a Civil Rights Act in the United States District Court charging law enforcement with violation [sic] of constitutional rights.”).

Bill of Rights and Elections, viewed the last sentence as an extension to existing Fourth Amendment protections.⁴³ Specifically, the language was an additional protection against illegal searches and seizures when evaluated against the holdings of *Jones* and *Alderman*.⁴⁴ However, the Committee's proclamations were broad. In order to get a better understanding of the types of conduct that the delegates were trying to discourage, and therefore, what protections these constitutional enhancements granted, we turn to the discussions recorded in the actual transcripts of the Convention.

Delegate Kendall Vick, a member of that Committee, as well as a Loyola law professor⁴⁵ and Assistant Attorney General, spoke at length in the Convention Transcripts on the need for additional standing.⁴⁶ Speaking specifically to the last sentence in section 5, Delegate Vick said, "[a]ny person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."⁴⁷ Delegate Vick further stated:

I dare say this last sentence has been included to allow citizens who have been aggrieved, who have had their doors knocked in by law enforcement without a warrant, and who have been terrorized and whose property has been destroyed, a right to go into a court of law and ask for redress of grievances.⁴⁸

Delegate Earl J. Schmitt, a representative from Louisiana's 87th House District, was also concerned about standing, but only to prevent law enforcement from using evidence illegally obtained by private citizens, such as private detective services.⁴⁹

43 See generally LOUISIANA CONVENTION RECORDS COMM'N, RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: COMMITTEE DOCUMENTS (1974), <https://archive.org/stream/recordsoflouisial0louirich#page/115/mode/1up/search/%22adversely+affected%22> [hereinafter COMMITTEE DOCUMENTS].

44 *Id.* at 115-16.

45 Loyola Univ. New Orleans, *Loyola University New Orleans School of Law, Loyola University New Orleans School of Law to establish the Kendall Vick Endowment for Public Law* (June 10, 2002), <http://www.loyno.edu/news/story/2002/6/10/4>.

46 CONVENTION TRANSCRIPTS, *supra* note 42, at 1072-73.

47 *Id.* See LA. CONST. art. I, § 5.

48 CONVENTION TRANSCRIPTS, *supra* note 42, at 1072-73.

49 *Id.* at 1076.

Delegate George E. Warren discussed her approval of the last sentence but provided no insight into whether the intent was to provide a civil remedy or target standing. She stated that

[a] young woman called [her] and told [her] that she was away from [her] home when the police-men kicked her door down and went in it and searched. They found nothing; they just ransacked it and left . . . I am going to ask you to give the average citizen a vehicle by which he can secure his rights in this constitution⁵⁰

Delegate Jack Avant, who was at the Convention representing Wildlife and Conservation, rose in opposition to the amendment and spoke about it generally, stating that “[i]t’s very clear what it means. It means that any person who has been searched, or whose home has been searched, whose property has been seized in violation of the law has the right to question that violation in court.”⁵¹ He then went further to suggest that

[i]f you take this last sentence out, you take away from the law enforcement agencies of this state the incentive that they have to comply with constitutional safeguards before they can take such drastic measures as breaking into a private residence in the middle of the night to conduct a search and seizure because you take away the penalty.⁵²

He also spoke about the about the need to stop law enforcement from breaking down doors, stating “if you take this provision out of this section, you are depriving the people of this state one of their fundamental guarantees” and implying that this provision is precisely what differentiates Louisiana from “Nazi Germany . . . the Soviet Union . . . and Red China.”⁵³ Still, like the other delegates, he added no additional insight into his perception of the intent behind

50 *Id.* at 1075.

51 *Id.*

52 *Id.*

53 *Id.* at 1074.

the last sentence.⁵⁴ He apparently misunderstood that that removal or inclusion of the last sentence would not necessarily remove all exclusionary protections, but rather, would simply keep them akin to the Fourth Amendment.⁵⁵

Delegate Woody Jenkins discussed the last sentence: “Won’t this, if we don’t have this last sentence in there that you would take out, isn’t it really going to mean that there is going to be really no effective barrier against law enforcement officials infringing on the rights of people, breaking down their doors?”⁵⁶ This statement indicates that he believed the inclusion of the last sentence in article I, section 5 was the only protection from this type of police conduct.

The only delegate who seemed to realize that the sentence could be interpreted to include target standing was Delegate I. Jackson Burson, Jr., who, on August 31, 1973, proposed an amendment deleting the sentence.⁵⁷ In his speech introducing the amendment, Delegate Burson postulated that there were two ways of interpreting the sentence: (1) a new civil right of action and (2) target standing.⁵⁸ Delegate Burson suggested, based on a previous conversation that he had with Delegate Chris Roy, that section 5 would allow for third-party evidence suppression.⁵⁹

Delegate Roy, a representative from Louisiana’s House District 26, stated in reply that the last sentence simply reinforced the notion of a motion to suppress; he admitted such motions already existed in Louisiana trial courts.⁶⁰ He also reiterated, without giving an example, that “we want that right, that procedural right, to be accorded to everybody adversely affected,” and that “this does not

54 See generally *id.*

55 See U.S. CONST. amend. IV.

56 CONVENTION TRANSCRIPTS, *supra* note 42, at 1074.

57 *Id.*

58 *Id.* Delegate Burson gave this example to illustrate what he believed would now be inadmissible evidence:

There had been a bank robbery; the culprits are hiding out and there is an illegal search. The house is entered and the evidence seized illegally, let’s say. Is therefore the basis of the prosecution not only against the person whose house has been broken into, but let’s say, his two fellow culprits? I think it is a correct statement of the present law that only the person whose house was broken into illegally could raise the issue in criminal court and could move to suppress the evidence; the other two people could not.

Id.

59 *Id.*

60 *Id.* at 1076.

cover civil suits.”⁶¹ Specifically, Delegate Roy stated:

Let me try and tell you in layman’s language the only thing we are trying to do at this juncture. The last sentence of this section simply provides that anybody who is adversely affected by an unreasonable search may go into court before the trial on the merits of the charge, which stems from the search and determine whether the evidence that was illegally obtained may be used in the trial against him.⁶²

At the debate closing, Delegate Burson, seemingly confused at the connotation that he was somehow in favor of unlawful police searches, renewed his opinion that section 5 “changed the present code of criminal procedure.”⁶³ He further stipulated that he wanted to be clear, without this amendment people still have “the right to raise that in the appropriate criminal court of law right now, if it’s your home that’s been invaded under the Fourth Amendment to the United States Constitution . . . [and that] the issue is if we are going to change our criminal law, then let’s know precisely how we are changing it before we vote.”⁶⁴

The amendment failed, without proper explanation, in a vote 37-72.⁶⁵ As discussed above, the transcripts of the Convention suggest that the last sentence of section 5 was not intentionally added by the drafters to bestow standing on third parties aggrieved by an illegal search and seizure.⁶⁶ So, how did such an expansive reading of section 5 become the law of the State of Louisiana?

61 *Id.*

62 *Id.* at 1075.

63 *Id.* at 1077 (“You know to require certainty in language is different from being against noble aims. I am not a proponent of illegal searches and seizures . . . This is a new term to me in the jurisprudence and that question and I have not yet received an answer even of agreement among the committee members.”).

64 *Id.*

65 *Id.* One scholar has suggested that this is direct evidence of the Convention’s intention to bestow third-party standing. James B. Ausenbaugh, *Louisiana’s Exclusionary Rule Grants Defendants Greater Right to Third-Party Standing than Does the Fourth Amendment*, 27 LOY. L. REV. 623, 632-33 (1981). However, his analysis does not discuss the particulars of the debate which, when analyzed, show little to no understanding of the implications for criminal target standing. *Id.*

66 See discussion *supra* pp. 212-16.

C. The Louisiana Supreme Court Misinterprets the Framers of the 1974 Constitution

Hardy (“Whitey”) and Craig Culotta were arrested in New Orleans for narcotics possession after a warrant-enabled search of a building occupied by the men.⁶⁷ An affidavit with two distinct pieces of probable cause supported the warrant; a confidential informant supplied one piece and a written statement from two third-party individuals (Piazza and Edenfield) supplied the other.⁶⁸ The written statement was a result of a vehicle stop after the police witnessed Piazza and Edenfield leave the aforementioned building with a box and drive away.⁶⁹ The Culotta brothers sought to suppress the evidence based on a theory that the warrant was unsupported by probable cause.⁷⁰ Most notably, the defendants correctly argued that the seizure of Piazza and Edenfield was not supported by probable cause and thus the affidavit supporting the warrant was the fruit of a poisonous tree.⁷¹ The Court held that the new Louisiana Constitution allowed for “standing to third persons aggrieved by the illegality of a search and seizure to contest its validity.”⁷² In support of this *sui generis* ruling, the court cited two sources.⁷³

First, the court argued that section 5 allowed for target standing based on legislative history, referencing the aforementioned language from the Convention Journal entry made on July 6, 1973.⁷⁴ The court stated, “[a]s the committee report of the constitutional convention states, the specific purpose of the broadened constitutional protection against illegal searches and seizures was to afford standing to third persons aggrieved by the illegality of a search and seizure to contest its validity.”⁷⁵ There are some problems with this analysis. As previously

67 State v. Culotta, 343 So. 2d 977, 978 (La. 1976).

68 *Id.* at 980-81.

69 *Id.* at 980.

70 *Id.* at 978.

71 *Id.* at 981-83.

72 *Id.* at 981; Jon Wesley Wise, *State v. Reeves: Interpreting Louisiana’s Constitutional Right to Privacy*, 44 LA. L. REV. 183, 189, 195 (1983).

73 *Culotta*, 343 So. 2d at 981-82.

74 *Id.*; STATE OF LOUISIANA, *supra* note 40 (“[P]ersons protected against illegal searches and seizures include not only the person whose house or property has been illegally searched but also any other person adversely affected by the illegal search.”).

75 *Culotta*, 343 So. 2d at 981 (citing THE OFFICIAL JOURNAL OF THE CONSTITUTIONAL CONVENTIONS OF 1973, at 86 (1973); Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 20-24

noted, the Convention Transcripts from August 31 make it clear that the Convention delegates did not interpret the language “any other person adversely affected” to mean third-party defendants.⁷⁶ Rather, they interpreted this clause to provide protection for one of, or a combination of, three things. First, they interpreted the clause as protection for “citizens who have been aggrieved, who have had their doors kicked in by law enforcement without a warrant, and who have been terrorized and whose property has been destroyed.”⁷⁷ Second, they interpreted the clause as protection against private detectives acting illegally.⁷⁸ Third and finally, they interpreted the clause as an assurance that the exclusionary rule vehicle, the motion to suppress evidence, would exist in the Louisiana Constitution.⁷⁹ In fact, Delegate Vick and Delegate Roy, the two Bill of Rights and Elections Committee members who initially added the last sentence to section 5,⁸⁰ had the opportunity to expressly declare that the last sentence authorized target standing but they failed to do so.⁸¹ Given that the Convention Transcript discussions happened *after* the supposedly dispositive Journal language, and given the fact that the delegate authors failed to confirm the existence of third-party standing when questioned by Delegate Burson, it seems presumptuous of the Louisiana Supreme Court to offer the July 6 Journal entry as evidence of target standing.⁸²

The other source of support the court utilized was a law review article⁸³ by Professor Lee Hargrave,⁸⁴ who was a member of the Convention research staff and later edited the Convention documents as a member of the Louisiana Constitutional Convention Records Commission.⁸⁵ In his article, titled *The Declaration of Rights of*

(1974)).

76 CONVENTION TRANSCRIPTS, *supra* note 42, at 1072-77.

77 Statements of Delegate Vick. *Id.* at 1072-73.

78 Statements of Delegate Schmitt. *Id.* at 1076.

79 Statements of Delegate Roy. *Id.*

80 COMMITTEE DOCUMENTS, *supra* note 43, at 54. Delegate Vick added the sentence and it was tentatively adopted by Delegate Roy. *Id.*

81 CONVENTION TRANSCRIPTS, *supra* note 42, at 1072-77.

82 *See generally* CONVENTION TRANSCRIPTS, *supra* note 42; STATE OF LOUISIANA, *supra* note 40.

83 Elwood Earl Sanders, Jr., Esq., *Fourth Amendment Standing: A New Paradigm Based on Article III Rules and Right to Privacy*, 34 CAP. U.L. REV. 669, 681 (2006); Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 254 (1989).

84 *State v. Culotta*, 343 So. 2d 977, 982 (La. 1976).

85 *See* W. LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION* (Oxford

the *Louisiana Constitution of 1974*, Hargrave states on the very first page that “the Committee on the Bill of Rights and Elections worked from existing federal rights guarantees in drafting most of its proposals, and produced a document that has as its primary background the federal standards in the area.”⁸⁶ As previously mentioned in Section II, the Supreme Court, while never definitively ruling on target standing until its decision in *Rakas* in 1978, had hinted that such standing did not exist.⁸⁷ Thus, based on Hargrave’s contention, it follows that the Committee on the Bill of Rights and Elections probably did not intend to go beyond the strong anti-target standing language found in *Alderman*.⁸⁸

Once again, it is necessary to go to the actual documents of the Convention in order to analyze the intention of the Committee on the Bill of Rights and Elections. There is one instance in which *Alderman* is mentioned. First, the Convention research staff (where, presumably, Hargrave was a member) filed a memorandum answering, among others, the question, “[d]oes the provision granting standing to challenge an unlawful search to any person adversely affected thereby make any significant change in the present status of the standing question?”⁸⁹ The staff correctly identified the *Alderman* holding as the federal standard, but suggested that the new language of section 4 [later renamed to section 5]:

probably extends the protection against unreasonable searches and seizures to defendants whom evidence is gathered as a result of an unlawful search is offered,

Univ. Press 2011) (1990); Lee Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 4, 765 (1977).

86 Hargrave, *supra* note 37, at 1.

87 See *Alderman v. U.S.*, 394 U.S. 165, 174 (1969) (“We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”); *Jones v. U.S.*, 362 U.S. 257, 261 (1960) (“In order to qualify as a ‘person aggrieved by an unlawful search and seizure’ one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.”); *Simmons v. U.S.*, 390 U.S. 377, 389 (1968) (“[W]e have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure.”).

88 See *supra* text accompanying note 87.

89 COMMITTEE DOCUMENTS, *supra* note 43, at 115.

whether or not his right to be secure in his person, house, papers and effects were violated, effecting a substantial change in the status of the law.⁹⁰

This answer suggests that at least the research staff was aware of the potential expansion of the standing doctrine, but it does not indicate that the delegates *intended* to expand it.⁹¹ Moreover, there is no indication in the transcripts that this memorandum was ever utilized.⁹² Given these facts, the authors of this Article conducted interviews with two of the surviving members of the Committee on the Bill of Rights and Elections, Delegates Chris Roy and Woody Jenkins, to better ascertain the intent of the delegates on the Committee.

D. Delegate Roy, Delegate Jenkins, 1974 America and the Happy Accident

As previously noted, Delegate Roy was a state representative and a member of the Bill of Rights and Elections Committee at the 1974 Convention.⁹³ A career lawyer, Delegate Roy was one of the older members of the committee and had practiced law before being appointed.⁹⁴ According to Delegate Roy, the last sentence of section 5 was added by Delegate Vick and adopted by Roy by voice vote in committee during the first half of the Convention.⁹⁵ He remembered no opposition to the sentence in committee.⁹⁶ Delegate Roy recalled that the reasoning behind the sentence had much to do with the condition of Louisiana and the United State as a whole in 1974.⁹⁷ The Convention itself, and especially the Committee, had an unusual amount of social progressives for a southern state in the 1970s.⁹⁸ Many of the delegates were concerned about the amount of unfettered and deleterious police conduct happening within their districts, especially in communities of color.⁹⁹ Combining this

90 *Id.* at 115-16.

91 CONVENTION TRANSCRIPTS, *supra* note 42, at 1072-77.

92 *See generally* CONVENTION TRANSCRIPTS, *supra* note 42.

93 COMMITTEE DOCUMENTS, *supra* note 43, at 54.

94 Telephone Interview with Chris Roy, Attorney, Chris J. Roy Sr. Law Offices LLC (Apr. 14, 2015).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* (suggesting that this was perhaps one of the impetuses of appointing

conduct with the passing of the Civil Rights Act only a few years earlier and the Watergate scandal, the delegates found themselves in a society that was seeking restraints on executive power and protection for innocent citizens.¹⁰⁰ This notion is supported by some of the delegates' speeches during general debate.¹⁰¹ Delegate Roy and Delegate Vick were also quite concerned with what they perceived was an ebbing and flowing Supreme Court, which would bestow Constitutional protections in one decade and take back or curtail them in another.¹⁰²

In response to a question as to why no delegates could specifically counter the hypotheticals posed by Delegate Burson, Delegate Roy suggested that there was a lack of understanding as to the implications of the wording,¹⁰³ and perhaps some inter-convention politics were involved.¹⁰⁴ Delegate Burson was, in the words of Delegate Roy, very connected to law enforcement and the District Attorneys Association.¹⁰⁵ He was also a brilliant man with foresight into the potential outcome of having such broad language in section 5.¹⁰⁶ Delegate Roy suggested that Delegate Burson's connections to law enforcement prompted him to draft the amendment asking for the removal of the last sentence¹⁰⁷ and that this behind-the-scenes information was known to the Convention delegates.¹⁰⁸ Roy also suggested that Lee Hargrave predicted the implications of section 5 simply by examining the broad nature of the text and not from the Committee proceedings, at least not in regards to third-party standing.¹⁰⁹ This skepticism of Burson, coupled with an intention

Alphonse Jackson, a black representative from Louisiana's 2nd District, the chairman of the Bill of Rights and Elections Committee).

100 *Id.*

101 CONVENTION TRANSCRIPTS, *supra* note 42, at 1072-77.

102 Telephone Interview with Chris Roy, *supra* note 94.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* (finding it unsurprising that Delegate Burson predicted section 5's application upon refreshing himself as to the holding of *Culotta*).

107 *Id.*

108 *Id.* However, Chris Roy suggested that around the time of the amendment many of the delegates would have been absent. The reason? Duck hunting season. *Id.*

109 *Id.* (remembering Lee Hargrave provided legal analysis in Committee but that he did not suggest language nor participate in the writing of Hargrave's law review article utilized by the *Culotta* court, though he did receive a personal copy from Hargrave upon completion).

to make section 5 purposely broad, lead to the Louisiana Supreme Court's holding in *Culotta*.¹¹⁰ Ultimately, target standing in criminal courts was not a goal of the Convention, but rather a consequence.¹¹¹

Attached to the citation for Hargrave's article in the *Culotta* opinion is an additional law review article written by Delegate Woody Jenkins.¹¹² Woody Jenkins was a twenty-five year old law school graduate at the time he wrote the article, later becoming a Louisiana Representative and a member of the Committee on Bill of Rights and Elections at the Constitutional Convention.¹¹³ Having never practiced law (Delegate Jenkins has had long career as a Louisiana representative and media professional), Jenkins was unaware at the time of his interview with the authors that the Louisiana Supreme Court had cited his work or that target standing was the law in Louisiana.¹¹⁴ Upon reviewing *Culotta* and his article, Jenkins intimated that he believed he was describing the goals of the Convention and that additional standing to criminal defendants was, therefore, imbedded in the last sentence of section 5.¹¹⁵ It should be noted, however, that Jenkins also suggested the last sentence could be interpreted to mean several different things, including a civil remedy (although he refuted this notion in his article) and additional protections for medical and bank records.¹¹⁶ Regardless, the ultimate goal, according to Jenkins, was to write a self-operative Bill of Rights, one by which judicial interpretations were to be kept at a minimum.¹¹⁷ When questioned as to why target standing was not discussed by anyone other than Burson, even though it was purportedly a goal of the Convention, Jenkins replied that it was probably understood among delegates that "anyone aggrieved" meant third parties.¹¹⁸

Although two of the more prominent members of the

110 *Id.* ("Lee Hargrave went on a limb and the court grabbed it.").

111 *Id.*

112 *State v. Culotta*, 343 So. 2d 977, 982 (La. 1976); Woody Jenkins, *Declaration of Rights*, 21 LOY. L. REV. 9 (1975). See Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 254 (1989).

113 Telephone Interview with Woody Jenkins, Editor, Central City News (Apr. 14, 2015).

114 *Id.* (Woody Jenkins ran two newspapers in Louisiana at the time of the interview).

115 *Id.*

116 *Id.*; Woody Jenkins, *Declaration of Rights*, 21 LOY. L. REV. 9, 30 (1975).

117 Telephone Interview with Woody Jenkins, *supra* note 113.

118 *Id.*

Committee on the Bill of Rights and Elections disagree as to the meaning of the last sentence of section 5, the very fact that there is disagreement suggests that there was not a consensus among even the original drafters. What is known is that the 1974 Louisiana Convention contained concerned delegates with progressive attitudes towards criminal procedure and other civil liberties.¹¹⁹ Even conservative delegates, such as Woody Jenkins,¹²⁰ requested to be added to the Committee roster in order to make their mark.¹²¹ It follows that such expansive concepts like target standing should have been delineated fully, to avoid judicial interpretation (Jenkins' concern)¹²² possibly leading to a curtailment of civil rights (Roy's concern).¹²³ Jenkins specifically mentioned that the majority of his work on the Committee involved section 4, the Right to Property.¹²⁴ This makes sense considering Jenkins' goal of making the Constitution self-operable;¹²⁵ section 4 is, conservatively, five times the length of the comparably diminutive section 5, containing over eight subsections.¹²⁶ Arguably, if Jenkins did not want the Louisiana Supreme Court to interpret the language of section 5, he or someone else should have drafted, or at least suggested, a full amendment to section 5 outlining exactly what they meant. No one did.

Moreover, if target standing was understood among delegates, why did the delegates (including Jenkins and Roy) fail to counter Delegate Burson's hypotheticals? Instead, the delegates suggested the last sentence meant everything but the target standing scenario Burson described.¹²⁷ Thus, the evidence suggests that the delegates to the Convention, including Jenkins and Roy, were concerned *generally* about illegal police conduct, prompting them to write a Right to Privacy section with language broad enough to go beyond the protections of the United States Constitution. However, there is little evidence that any of the delegates knew *specifically* the repercussions of such broad language, save for Delegate Burson.¹²⁸

119 See discussion *supra* pp. 10-11.

120 Telephone Interview with Woody Jenkins, *supra* note 113.

121 *Id.*

122 *Id.*

123 Telephone Interview with Chris Roy, *supra* note 94.

124 *Id.*

125 See Telephone Interview with Woody Jenkins, *supra* note 113.

126 See LA. CONST. art. I, §§ 4-5.

127 See discussion *supra* pp. 4-7.

128 See Jean-Paul Layrisson, *The Exclusion of Unconstitutionally Obtained Evidence and Why the Louisiana Supreme Court Should Reject United States v. Leon on Independent*

This fact, combined with the recollections of Delegate Roy, suggests target standing in Louisiana is the product of a judicial decision based on imprecise interpretations of Convention objectives, undeniably weakening its constitutional foundation.¹²⁹

E. *Post-Culotta Louisiana*

In many ways, *Culotta* and its progeny indelibly marked the expansion of criminal defendant rights in Louisiana. However, as previously noted, the era of progressive jurisprudence was one defined by its place in time.¹³⁰ Justices move on, but criminal defendants remain. As a result, Louisiana courts have not expanded the reach of *Culotta*, rather they have defined its parameters and, in many cases, limited its reach.¹³¹

One particular area where the reach of *Culotta* has been restrained is the search of homes. The Louisiana Supreme Court has found that there is a factual exception to target standing when the defendant in question is an unwanted visitor in the third party's home.¹³² If a police officer were to make an unwarranted entry into said home to apprehend the defendant, the court has ruled that "under these circumstances, permitting the defendant to assert a third party's privacy interests he had violated by his own actions would serve no legitimate purpose."¹³³ In other words, the defendant needs at least a license to be in the dwellings in which he or she is seized. Other Louisiana courts have ruled similarly.¹³⁴

State Grounds, 51 LA. L. REV. 861, 867 (1991) (concluding that the transcripts "do not shed a great deal of light on the intent of the framers").

129 Jon Wesley Wise, *State v. Reeves: Interpreting Louisiana's Constitutional Right to Privacy*, 44 LA. L. REV. 183, 189 (1983) ("A state court is on much more defensible footing when its interpretation is based on clear textual differences and a legislative record reflecting the intent of the drafters to give the provision as broad a reach as that given by the court."). See Telephone Interview with Chris Roy, *supra* note 94.

130 See generally David A. Macdonald, Jr., *Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course*, 63 TEMP. L. REV. 559, 589 (1990).

131 See Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 255 (1989) ("While theoretically removing the barrier of standing, however, Louisiana's highest court has created new difficulties for defendants who challenge seizure of evidence from third parties.").

132 *State v. Walker*, 953 So. 2d 786, 791 (La. 2007).

133 *Id.*

134 See *State v. Brown*, 35 So. 3d 1069, 1073 (La. 2010); *State v. Patterson*, 38 So. 3d 1131 (La. Ct. App. 2010) (holding defendant had no standing while

Perhaps the biggest curtailment of third-party standing in Louisiana is found in *State v. Barrett*.¹³⁵ In this case, the defendant was arrested for possession of narcotics while in the house of an acquaintance.¹³⁶ The police officers were armed with an arrest warrant for the defendant but not a search warrant for the house.¹³⁷ The Supreme Court ruled that the subject of a valid arrest warrant is not “adversely affected” by the taint of the illegal search of the third party.¹³⁸ In other words, a valid arrest warrant obviates the need for a warrant to search and seize evidence in violation of a third person’s rights.

In 1978, Louisiana also changed its burden of proof requirements for the suppression of third-party statements.¹³⁹ Traditionally, the State has the burden to prove that third-party statements used against defendants were not collected through coercion or duress.¹⁴⁰ However, the *Bouffanie*¹⁴¹ court ruled that since such statements or confessions were not being introduced at trial, the burden shifted back to the defendant to prove their involuntariness.¹⁴² One year later, Louisiana courts went even further by ruling that

trespassing onto owner’s property to engage in criminal narcotics activity); *State v. Stephens*, 917 So. 2d 667 (La. Ct. App. 2005) *writ denied*, 937 So. 2d 376 (La. 2006) (holding defendant had no standing to contest seizure of backpack containing narcotics that was found on the screened back porch of an unaware third party); *see also* *State v. Wilson*, 56 So. 3d 375 (La. Ct. App. 2010) (stating Louisiana has also not found standing when evidence is deemed “abandoned” on the property of third parties); *State v. Harper*, 660 So. 2d 537 (La. Ct. App. 1995) *writ denied*, 666 So. 2d 320 (La. 1996); *Cf.* *State v. Jackson*, 42 So. 3d 368, 372 (La. 2010) (“As matter of both federal and Louisiana law, an individual knowingly in possession of a stolen vehicle does not have standing to contest the legality of a seizure and search of the vehicle by the police without a warrant because neither he nor any of his passengers has an objectively reasonable expectation of privacy in the car.”).

135 *See* *State v. Barrett*, 408 So. 2d 903, 905 (La. 1981).

136 *Id.* at 904.

137 *Id.*

138 *Id.* at 905 (“Had defendant been arrested in his own home . . . the arrest warrant would have been adequate to safeguard his constitutional rights. Hence, if we were to agree with defendant’s contention, the result would be that he would enjoy greater protection against ‘unreasonable searches, seizures, or invasions of privacy’ in the house of a third party than in his own home.”).

139 *State v. Bouffanie*, 364 So. 2d 971, 976 (La. 1978).

140 LA. CODE CRIM. PROC. ANN. art. 703 (1989) (“[S]tate shall have the burden of proving the admissibility of a purported confession or statement by the defendant or of any evidence seized without a warrant.”).

141 Defendant sought to suppress statements made by co-defendants that were used to obtain a search warrant of his house. *Bouffanie*, 364 So. 2d at 976.

142 *Id.*; Aussenbaugh, *supra* note 65, at 627.

Fifth Amendment rights were exclusive to the individual and could not be used as means of suppression in a target standing scenario.¹⁴³ Subsequently, by 1980, the Louisiana Supreme Court would transfer the burden for warrantless searches to the defendant in cases where third parties were arrested.¹⁴⁴

However, unlike Massachusetts and Alaska, discussed *infra*, Louisiana, in light of the *Culotta's* interpretation of section 5, approaches searches and seizures with the perspective that defendants have standing *per se* whenever evidence is illegally collected from third-parties.¹⁴⁵ This distinction is fundamental because it obviates a criminal procedural hurdle that, as will be discussed further, many criminal defendants never overcome: the right to suppress evidence. Standing to suppress evidence has been found in a wide variety of cases, including coerced consent of a third party,¹⁴⁶ a “Terry stop” of a third person without necessary indicia of criminality or danger,¹⁴⁷ a warrantless search and seizure of a third party’s vehicle,¹⁴⁸ trailer,¹⁴⁹ apartment,¹⁵⁰ or hotel room,¹⁵¹ and a warrantless arrest of a third party who then gave incriminating statements or produced evidence.¹⁵²

143 State v. Singleton, 376 So. 2d 143, 145 (La. 1979). See State v. Burdges, 434 So.2d 1062 (La.1983); State v. Hawkins, 490 So. 2d 594, 598 (La. App. 2d Cir. 1986) *cert. denied*, 494 So. 2d 1174 (La. 1986); State v. Byrd, 568 So. 2d 554, 563 (La. 1990); State v. Tran, 98-2812 p. 2 (La. App. 1 Cir. 11/5/1999), 743 So. 2d 1275, 1279, *cert. denied*, 762 So. 2d 1101 (La. 2000); Raymond Lamonica, *Pretrial Criminal Procedure*, 41 LA. L. REV. 643, 651 (1981). This exception to target standing also involves identification by third parties, such as police lineups. State v. Harris, 03-1297 p. 9 (La. App. 5 Cir. 3/30/2004), 871 So. 2d 599, 606, *cert. denied*, 885 So. 2d 583 (La. 2004), and *cert. denied*, 885 So. 2d 584 (La. 2004).

144 State v. Smith, 392 So. 2d 454, 458-59 (La. 1980) (“We hold that when a defendant seeks to exclude physical evidence seized pursuant to the arrest of a *third person*, the burden falls upon the defendant to demonstrate that the arrest was not supported by probable cause.”). See LA. CODE CRIM. PROC. ANN. art. 703. Normal motions to suppress (not involving third parties) maintain a burden on the prosecution to prove the constitutionality of warrantless searches.

145 State v. Owen, 453 So. 2d 1202, 1205 (La. 1984). For discussions of target standing in Massachusetts and Alaska, see *infra* Sections IV and V, respectively.

146 State v. Green, 376 So. 2d 1249, 1250 (La. 1979).

147 State v. Temple, 2001-1460 p. 4 (La. App. 4 Cir. 6/19/2002), 821 So. 2d 738, 741, *cert. granted*, 836 So. 2d 55 (La. 2003), and *aff'd*, 854 So.2d 856 (La. 2003).

148 State v. Long, 2003-2592 p. 10 (La. 11/9/2004), 884 So. 2d 1176, 1183.

149 Owen, 453 So. 2d at 1205.

150 State v. Derouen, 2009-0203 (La. App. 4 Cir. 8/19/2009), 17 So. 3d 523.

151 State v. Smith, 42-089 p. 7 (La. App. 2 Cir. 6/20/2007), 960 So. 2d 369, 374.

152 State v. Dakin, 495 So. 2d 344, 346 (La. Ct. App. 1986), *cert. denied*, 498 So.

Despite the existence of target standing in Louisiana, scholars suggest that there has not been an increase in the amount of evidence suppressed by the exclusionary rule.¹⁵³ Moreover, section 5 itself, with its additional protections that go beyond federal mandates,¹⁵⁴ has also not caused an influx of suppression hearings.¹⁵⁵ This evidence demonstrates that the concerns outlined by Rehnquist in *Rakas* do not exist, at least not on the state level.¹⁵⁶ Of course, it was Rehnquist who was a considerable proponent of the “laboratory of the states” view of federalism.¹⁵⁷ This “happy accident” birthing target standing in Louisiana, seems to be a perfect example of lab coat experimentation.

IV. Target Standing in Massachusetts

Complex nuances also exist in common law established by the Massachusetts Supreme Judicial Court that potentially allow for the development of target standing as an extension to the Fourth Amendment exclusionary rule through article XIV of the Massachusetts Constitution (“article XIV”).

United States Supreme Court common law generally exists as the bottom floor for constitutional rights protection,¹⁵⁸ and each state has the ability to confer additional constitutional or common law

2d 752 (La. 1986) (statements); *State v. Gant*, 93-2895 p. 3 (La. 5/20/1994), 637 So. 2d 396, 397 (physical evidence); *State v. Diaz*, 461 So. 2d 1099, 1104 (La. Ct. App. 1984) (physical evidence).

153 Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 255 (1989) (“In actual practice, Louisiana’s expanded standing has not protected defendants any more extensively than the more narrow federal rules.”); Ausenbaugh, *supra* note 65, at 632 (finding that the first seven target standing cases involved no suppression of evidence).

154 See *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982) (“This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.”).

155 *State v. McGraw*, 1 So. 3d 645, 652-53 (La. App. 2d Cir. 2008), *cert. denied*, 21 So. 3d 297 (La. 2009) (“In recent years, however, this higher standard noted in *Hernandez* has not resulted in the suppression of more evidence in Louisiana than is required under a Fourth Amendment analysis, particularly concerning automobile stops, searches and seizures.”).

156 See *Rakas v. Illinois*, 439 U.S. 128 (1978).

157 See *Gonzales v. Raich*, 545 U.S. 1 (2005) (O’Connor, J., concurring).

158 See *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 115 (Mass. 1999).

protections to its citizens.¹⁵⁹ While article XIV, by and large, mirrors the Fourth Amendment to the United States Constitution,¹⁶⁰ the general undertone of its purpose, and therefore its application in Massachusetts courts, is to afford citizens of Massachusetts greater protection.¹⁶¹

Before the United States Constitution was signed and in force, the Commonwealth of Massachusetts adopted article XIV specifically as a mechanism to prohibit or forbid the abuse of official power when issuing writs of assistance and to protect against general warrants, both of which gave officers unlimited discretion to search without special application to a court.¹⁶² “The crux of the colonists’ objection to these legal devices was the unchecked control over the liberty of the people which they vested in law enforcement officers.”¹⁶³

As a result, historically, Massachusetts common law jurisprudence has interpreted article XIV as affording greater protection to the citizens of the Commonwealth than the Fourth Amendment as interpreted by the Supreme Court.¹⁶⁴ Stated more

159 A state must comply with the supremacy of the United States Constitution. A state may not diminish protection afforded by the federal Constitution but a state can add additional protections for its citizens. *See Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). Individual states have authority “to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” *Id.*

160 MASS. CONST. art. XIV (“Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.”).

161 *See Commonwealth v. Mora*, 521 N.E.2d 745, 747 (Mass. 1988) (“[A]rt. 14 ‘may afford greater protections to a person in certain circumstances than those required by Federal decisions interpreting the Fourth Amendment.’” (quoting *Commonwealth v. Ortiz*, 380 N.E.2d 669, 675 (Mass. 1978))).

162 *Commonwealth v. Upton*, 476 N.E.2d 548, 555 (Mass. 1985) (“The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States. In fact, portions of the Constitution of the United States are based on provisions in the Constitution of the Commonwealth, and this has been thought to be particularly true of the relationship between the Fourth Amendment and art. 14.”).

163 *Jenkins v. Chief Justice of the Dist. Court Dep’t*, 619 N.E.2d 324, 330 (Mass. 1993).

164 *See e.g., Commonwealth v. Gonsalves*, 429 Mass. 658, 662-63, (1999) (requiring an officer have, at minimum, reasonable suspicion to order a driver

simply, while the United States Constitution may hold the ground floor for protection against governmental intrusion on the rights of its citizens, the Massachusetts Constitution holds up the ceiling.¹⁶⁵

Interestingly, Massachusetts courts have even gone so far as to reject or broaden some of the Supreme Court's Fourth Amendment jurisprudence. Specifically, Massachusetts courts have rejected the automatic standing analysis discussed above,¹⁶⁶ have rejected the test for probable cause, stating that it is not an "appropriate structure for probable cause inquiries under Article XIV,"¹⁶⁷ have rejected the definition of seizure for purposes of police detainment,¹⁶⁸ and have broadened the standard for probable cause.¹⁶⁹ Thus, Massachusetts

or passenger out of a vehicle, declining to follow the Supreme Court's decision in *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) where the court ruled that a police officer may, as matter of course, order a driver out of a vehicle that has been lawfully stopped for a traffic violation); *Commonwealth v. Stoute*, 665 N.E.2d 93, 96 n.10 (1996) ("It is by now firmly established that, in some circumstances, art. 14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment." (citing *Jenkins*, 619 N.E.2d at 330)); *Commonwealth v. Lyons*, 564 N.E.2d 390, 391-92 (Mass. 1990) (utilizing a "reasonable suspicion" standard to determine probable cause over the "totality of circumstances" standard adopted by the Supreme Court); *Upton*, 476 N.E.2d at 556.

165 See *Gonsalves*, 711 N.E.2d at 115 ("[T]hat the drafters of the Fourth Amendment subsequently chose to replicate the words used in art. 14 cannot support a conclusion that we are compelled to act in lockstep with the United States Supreme Court when it interprets that amendment. Such a conclusion posits a serious misunderstanding of the authority of this court to interpret and enforce the various provisions of the Massachusetts Constitution, particularly those in the area of civil liberties.").

166 *Commonwealth v. Amendola*, 550 N.E.2d 121 (Mass. 1990) (adopting automatic standing for possessory offenses). See *Commonwealth v. Almeida*, No. CR.A. 0073CR0279A-E, 2002 WL 31235489 (Mass. Super. Ct. Oct. 3, 2002).

167 *Upton*, 476 N.E.2d at 556 (rejecting the "totality of the circumstances" test promulgated by *Illinois v. Gates*, 462 U.S. 213, 238 (1983), in favor of the previous United States Supreme Court decisions that set up the *Aguilar-Spinelli* test requiring both a basis of knowledge test, and a veracity test). See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

168 *Stoute*, 665 N.E.2d at 96-97 (declining to adopt the Supreme Court's definition of seizure that for one to occur, there must be application of physical force or a show of authority to which the subject yields articulated in *California v. Hodari D.*, and instead concluding that a person is seized within the meaning of the Massachusetts Constitution when a police officer pursues that person with the obvious intention of requiring the person to submit to questioning).

169 *Lyons*, 564 N.E.2d at 391 (rejecting the "totality of the circumstances" test in favor of reasonable suspicion in the probable cause context).

is not shy about deviating from firmly rooted federal Supreme Court interpretations of the Constitution.

Currently, Massachusetts is grappling with another potential deviation from the federal floor. In the wake of the 1978 *Rakas* decision dismissing target standing, the Massachusetts Supreme Judicial Court decided to retain the possibility of its existence on the theory that facts sufficient for its application may be presented to the court.¹⁷⁰

A. *Massachusetts Common Law Analysis*

Generally, under Massachusetts common law, the analysis for target standing follows this loose pattern: (1) is a stop permissible, (2) is a search permissible, and (3) if the stop and search were not permissible, was the police action sufficiently egregious to allow a target party to assert standing to exclude evidence illegally obtained from the searched party?¹⁷¹ Below is a short analysis of the requisite level of reasonableness required in order to perform a *Terry* stop, the probable cause needed to search, and the components in them that may rise to the level of egregiousness to succeed on a motion to dismiss based on a theory of target standing in Massachusetts.

“In ‘stop and frisk’ cases [the] inquiry is twofold: first, whether the initiation of the investigation by the police was permissible in the circumstances, and, second, whether the scope of the search was justified by the circumstances.”¹⁷² Both inquiries relate to the reasonableness of the police officer’s conduct under the Fourth Amendment and article XIV.¹⁷³ Both must also be addressed in order to have grounds to bring a target standing motion to dismiss.

1. *Terry Stop Standard*

The first step is to address whether or not the stop was permissible and conducted with reasonable suspicion. Whether a *Terry* stop is constitutional depends on the facts known to the police

170 See discussion *infra* Section IV.B.

171 See *Commonwealth v. Santiago*, 24 N.E.3d 560, 563-65 (Mass. 2015).

172 See *Commonwealth v. Gomes*, 903 N.E.2d 567, 571-72 (Mass. 2009) (quoting *Commonwealth v. Wilson*, 805 N.E.2d 968, 974 (Mass. 2004)).

173 See *id.* See also *Wilson*, 805 N.E.2d at 974; *Commonwealth v. Torres*, 745 N.E.2d 945 (Mass. 2001).

at the time of the stop.¹⁷⁴ “The facts and inferences underlying the officer’s suspicion must be viewed as a whole when assessing the reasonableness of his acts.”¹⁷⁵ “Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry.”¹⁷⁶ It is not enough that a person is in “a high crime area,” or that a person “is walking away from police officers,” nor is running sufficient.¹⁷⁷ Additionally, a mere hunch or good faith belief will not be sufficient.¹⁷⁸ “If, however, the police were conducting a threshold inquiry, [the court] must consider whether the police had a reasonable suspicion, based on specific, articulable facts and reasonable inferences, that the defendant had committed, was committing, or was about to commit a crime.”¹⁷⁹ If it seems clear to a reasonable person that the defendant was not free to leave, then according to the Fourth Amendment, and under article XIV of the Constitution of the Commonwealth, there was a seizure of a person implicating constitutional protections against unreasonable seizures.¹⁸⁰

Generally, a suspect is free to leave when officers approach and engage in short conversation,¹⁸¹ when officers light up a cruiser’s

174 See *Commonwealth v. Roland R.*, 860 N.E.2d 659, 665 (Mass. 2007); *Commonwealth v. Quinn*, 862 N.E.2d 769, 773-74 (Mass. App. Ct. 2007).

175 *Commonwealth v. Thibeau*, 429 N.E.2d 1009, 1010 (Mass. 1981).

176 *Commonwealth v. Watson*, 723 N.E.2d 501, 506 (Mass. 2000). See *Roland R.*, 860 N.E.2d at 665.

177 *Commonwealth v. Grandison*, 741 N.E.2d 25, 31 (Mass. 2001).

178 See *Commonwealth v. Walker*, 825 N.E.2d 491, 495-96 (Mass. 2005); *Commonwealth v. McKoy*, 983 N.E.2d 719, 722 (Mass. App. Ct. 2013); *Commonwealth v. Clark*, 836 N.E.2d 512, 515-16 (Mass. App. Ct. 2005).

179 See *Commonwealth v. DePeiza*, 868 N.E.2d 90, 95 (Mass. 2007); *Commonwealth v. Willis*, 616 N.E.2d 62, 64 (Mass. 1993). See also *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968); *Commonwealth v. Bostock*, 880 N.E.2d 759, 763-64 (Mass. 2008); *Walker*, 825 N.E.2d at 495; *Commonwealth v. Lyons*, 564 N.E.2d 390, 392 (Mass. 1990); *Commonwealth v. Wren*, 463 N.E.2d 344, 345 (Mass. 1984); *Commonwealth v. Silva*, 318 N.E.2d 895, 897-98 (Mass. 1974); *Clark*, 836 N.E.2d at 515-16.

180 See *Commonwealth v. Depina*, 922 N.E.2d 778, 782-83 (Mass. 2010) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, (1980)). See also *California v. Hodari D.*, 499 U.S. 621, 624-626 (1991) (holding, pursuant to the Fourth Amendment, a stop occurs when police use physical force or implement their authority and the person yields to it). See generally *Terry*, 392 U.S. at 9, 16; *Commonwealth v. Stoute*, 665 N.E.2d 93, 95-96 (Mass. 1996) (adopting the “free to leave” standard promulgated in *Mendenhall*, for purposes of art. 14); *Commonwealth v. Borges*, 482 N.E.2d 314 (Mass. 1985).

181 See *DePeiza*, 868 N.E.2d at 94-95. See also *Commonwealth v. Gomes*, 903 N.E.2d 567, 572 (Mass. 2009).

blue lights and approach a suspect,¹⁸² or just by an officer's mere presence.¹⁸³ However, when an officer announces his intention to frisk or commands the suspect to "come here," at that moment, a reasonable person would not believe he was free to leave.¹⁸⁴

2. Probable Cause to Search Standard

The second step is to address whether the scope of the search was justified by the circumstances. "[A] Terry-type patfrisk incident to the investigatory stop is permissible where the police officer reasonably believes that the individual is armed and dangerous."¹⁸⁵ One factor considered is past arrests involving firearms.¹⁸⁶ "While the officer need not be absolutely certain that the individual is armed, the basis for his acts must lie in a reasonable belief that his safety or that of others is at stake."¹⁸⁷ "The officer's actions must be based on specific and articulable facts and reasonable inferences therefrom, in light of the officer's experience," just like the facts and reasonable inferences required during an initial stop.¹⁸⁸

Another factor considered is whether the area is high in crime.¹⁸⁹ However, even though the neighborhood might be known as a "high crime area," which can be considered in the total facts and circumstances that together come together to show reasonable suspicion sufficient to warrant a protective frisk,¹⁹⁰ "this factor must be considered with some caution because many honest, law-abiding citizens live and work in high crime areas. Those citizens are entitled to the protections of the Federal and State Constitutions, despite the

182 *Commonwealth v. Pagan*, 829 N.E.2d 1168, 1170 (Mass. App. Ct. 2005). See generally *Gomes*, 903 N.E.2d at 572.

183 *Commonwealth v. Pimentel*, 540 N.E.2d 1335, 1337-38 (Mass. App. Ct. 1989). See generally *Gomes*, 903 N.E.2d at 572.

184 *DePeiza*, 868 N.E.2d at 95; *Barros*, 755 N.E.2d at 743-45. See generally *Gomes*, 903 N.E.2d at 572.

185 See *Gomes*, 903 N.E.2d at 573 (citing *Commonwealth v. Wilson*, 805 N.E.2d 968, 974 (Mass. 2004)). See also *Terry*, 392 U.S. at 23-25; *Commonwealth v. Mercado*, 663 N.E.2d 243, 246-47 (Mass. 1996).

186 *Commonwealth v. Hooker*, 755 N.E.2d 791, 794 (Mass. App. Ct. 2001) (holding reasonable apprehension of danger to police based on knowledge of past arrest was insufficient where the arrests did not involve firearms or other weapons).

187 *Commonwealth v. Silva*, 318 N.E.2d 895, 898 (Mass. 1974).

188 *Wilson*, 805 N.E.2d at 974.

189 *Commonwealth v. Fisher*, 763 N.E.2d 1106, 1110 (Mass. App. Ct. 2002).

190 *Id.*

character of the area.”¹⁹¹ Finally, the degree of police intrusion must be proportional to the articulable risk to officer safety in order for the intrusion to be constitutional.¹⁹²

In the event that the stop was conducted without reasonable suspicion, or the search was conducted absent exigent circumstances or without probable cause, if the police conduct was egregious, then Massachusetts may allow for a third party to assert target standing and suppress the evidence obtained from another, regardless of whether they had the legitimate expectation of privacy required by the Supreme Court to obtain standing.¹⁹³

B. Massachusetts Target Standing Historical Case Law

1. Manning: One Big Fish, One Little Fish

Commonwealth v. Manning, decided in January of 1990, began with a tip to a Waltham detective from an “informant” that a man named James Walsh was going to engage in a drug buy in Framingham.¹⁹⁴ The Waltham detective relayed the information to a Framingham officer and Walsh was arrested for possession of narcotics.¹⁹⁵ Walsh provided information to the Framingham detective about the person he bought the narcotics from, and that information was used for an affidavit in support of a warrant to search the apartment of Roy E. Manning and Kimberly A. Hobson.¹⁹⁶ The apartment was searched, drugs were found, and an additional party, Andrew C. Patey, was added to the list of defendants.¹⁹⁷

The district judge gave standing to the defendants but decided that the information that was provided to Waltham police, then passed on to Framingham police, provided probable cause.¹⁹⁸ The

191 *Commonwealth v. Holley*, 755 N.E.2d 811, 815 (Mass. App. Ct. 2001).

192 *Commonwealth v. Gomes*, 903 N.E.2d 567, 574 (Mass. 2009).

193 *See Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980) (holding there is no expectation of privacy in another’s purse; one needs more than a mere property interest in item seized to establish standing); *United States v. Salvucci*, 448 U.S. 83, 85 (1980) (abolishing federal automatic standing); *Rakas v. Illinois*, 439 U.S. 128, 133, 143 (1978) (overruling legitimately-on-the-premises test along with target standing).

194 *Commonwealth v. Manning*, 548 N.E.2d 1223, 1224 (Mass. 1990).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

informant, James Walsh, was a first-time informer and was therefore not a reliable informant.¹⁹⁹ On appeal, the Supreme Judicial Court considered whether Manning, Hobson, and Patey could challenge the unlawfulness of Walsh's arrest to invalidate the search executed on their apartment.²⁰⁰

The court grappled with the defendants' contention that they were entitled to target standing on the basis that police were "seeking to reach the defendants"²⁰¹ when they performed an unconstitutional search of Walsh.²⁰² The court stated that while it need not decide whether the Commonwealth would expand the protections offered under the Fourth Amendment via the *Rakas* decision regarding the availability of target standing,²⁰³ "[u]nconstitutional searches of small fishes intentionally undertaken in order to catch big ones may have to be discouraged by allowing the big fish[es], when caught, to rely on the violation of the rights of the small fish[es], as to whose prosecution the police are relatively indifferent."²⁰⁴

The court ultimately denied the target defendants' motion to suppress for two reasons: (1) the charges were dropped against the informant Walsh, who was illegally arrested, providing sufficient deterrence of bad police conduct,²⁰⁵ and (2) there was no evidence on the record to show that the detective acted recklessly nor was there any evidence on the record of intentional wrongdoing, or that when the police violated the rights of another the sole or principal goal was to obtain incriminating evidence against another.²⁰⁶ Even though the court denied target standing to the defendants in *Manning*, it opened the door to a series of cases that grappled with when the Commonwealth should apply it.

2. Price: *Intentional Inclusion*

Later that year, *Commonwealth v. Price* was also decided on similar terms.²⁰⁷ The case involved videotapes recorded after a valid warrant, and the central issue was whether probable cause existed for

199 *Id.*

200 *Id.*

201 *Id.* at 1225.

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Commonwealth v. Price*, 562 N.E. 2d. 1355 (Mass. 1990).

troopers to catch drug dealers in the act in a Woburn hotel room.²⁰⁸ The Supreme Judicial Court of Massachusetts, Middlesex, held that the defendant had no privacy right in the hotel room, there was no fundamental unfairness (no automatic standing),²⁰⁹ and there was no serious police misconduct (no target standing).²¹⁰ Again, the court confirmed the potential for application of target standing and left the door open for an appropriate situation in which to apply it.²¹¹

3. Scardamaglia: *Egregious Police Misconduct*

A little over a year after *Price*, the court was again presented with a case concerning the application of target standing. In *Scardamaglia*, police again obtained probable cause to justify the issuance of the search warrant by violating the constitutional rights of another.²¹² In its decision, the Supreme Judicial Court of Massachusetts, Worcester, promulgated in dicta what is possibly the most well-known element for the application of target standing, “distinctly egregious” police conduct.²¹³ The main ruling the court handed down, apart from its rationale, was a linguistic deviation from *Manning’s* “intentional wrongdoing” and “sole principal goal” test.²¹⁴ The court ruled that: (1) no tangible evidence seized in the allegedly unlawful stop was introduced against the defendant; (2) the police conduct was not significantly improper and; (3) the question of whether probable cause existed was “a close one.”²¹⁵

However, the court discussed in dicta its reluctance to grant target standing generally, citing the potential for substantial administrative costs, and that the need to create a police deterrent is not great, “except perhaps in the case of distinctly egregious police conduct.”²¹⁶

208 *Id.*

209 *Id.* at 1358 (citing *Commonwealth v. Amendola* 550 N.E. 2d 121, 126 (Mass. 1990)).

210 *Price*, 562 N.E.2d at 1359 (citing *Manning*, 548 N.E.2d at 1223).

211 *Id.* (“[A] recognition of [target] standing in other circumstances must have a foundation in serious police misconduct (such as described in the *Manning* opinion).”).

212 *Commonwealth v. Scardamaglia*, 573 N.E.2d 5, 6 (Mass. 1991).

213 *Id.* at 8.

214 *See Commonwealth v. Manning*, 548 N.E.2d 1223, 1225 (Mass. 1990).

215 *Scardamaglia*, 573 N.E.2d at 7.

216 *Id.* at 8.

4. *Muddy Waters*

Over the next several years, courts expounded on this vague idea of “distinctly egregious police misconduct,” sometimes declining to find distinctly egregious misconduct,²¹⁷ sometimes finding distinctly egregious misconduct but declining to extend target standing,²¹⁸ sometimes adding additional requirements to the muddy rule,²¹⁹ sometimes reverting back to the language

217 See *Commonwealth v. Waters*, 649 N.E. 2d 724, 726 (Mass. 1995) (holding that a police search of the house and questioning of another person without probable cause, is not distinctly egregious conduct); *Commonwealth v. Santos*, No. 08-P-604, 2009 WL 3232842, at *1-2 (Mass. App. Ct. Oct. 9, 2009) (finding no egregious misconduct where “stopping the jeep and recovering the cocaine from the drivers mouth was sufficient to allow the hunch to ripen into probable cause that the exchange involved cocaine and that the defendant was involved”); *Commonwealth v. Ayala*, 25 Mass. L. Rptr. 358, 2009 WL 997318, at *3 (Mass. Super. Ct. Feb. 18, 2009) (holding sufficient probable cause to seize drugs and evidence from a vehicle, and no egregious police misconduct where search was reasonable); *Commonwealth v. Seeley*, No. 08CR316, 2009 WL 4894559, at *1 (Mass. Super. Ct. Sept. 4, 2009) (holding no distinctly egregious misconduct where vehicle was stopped based on expired registration and search of person revealed oxycontin); *Commonwealth v. Sprague*, 81 Mass. App. Ct. 1132, No. 10-P-1660, 2012 WL 1470298, at *2 n.4 (Mass. App. Ct. Apr. 30, 2012), *rev. denied*, 970 N.E. 2d 333 (Mass. 2012) (decision issued under Rule 1:28 of the Massachusetts Appeals Court Rules For The Regulation Of Appellate Practice: finding no serious, distinctly egregious police misconduct where police had reasonable suspicion for the stop, and probable cause for the search).

218 See *Commonwealth v. Sanchez*, 8 Mass. L. Rptr. 451, 457-58 (Mass. Super. Ct. 1998) (citing *United States v. Payner*, 447 U.S. 727, 733-34 n.5 (1980)). The court found the unlawful search and seizure of the UPS box to be seriously and distinctly egregious, however, citing *Commonwealth v. Payne*, 447 U.S. at 733-34 n.5, declined to extend target standing stating that a sufficient remedy would be to bring this to the “attention of responsible officials,” and that suppression would unnecessarily penalize society. *Id.*

219 See *Commonwealth v. Moore*, No. 94226-94241, 1993 WL 818602, at *3 (Mass. Super. Ct. Sept. 27, 1993) (holding defendant must show they are the actual target); *Commonwealth v. Montes*, 733 N.E. 2d 1068, 1073 n.6 (Mass. App. Ct. 2000) (holding defendant must show that the existing Fourth Amendment protections are not a sufficient police deterrent and that they are the target); *Commonwealth v. Jeffreys*, No. BRRCR2011-0440, 2014 WL 7477703, at *2 (Mass. Super. Ct. Apr. 23, 2014) (holding defendant must be a target and must also prove the police deliberately violated the third party’s rights to obtain evidence against him); *Commonwealth v. Vacher*, 14 N.E. 3d 264, 275 (Mass. 2014) (holding no showing that defendant was target where a defendant was charged with a Hyannis body drop of a 16-year-old after an improper police interrogation of a juvenile leading to defendant’s arrest).

before *Scardamaglia*,²²⁰ sometimes reverting back to relying on *Rakas* and existing Massachusetts law,²²¹ and sometimes, but not often, allowing a motion to suppress based on target standing.²²²

C. Massachusetts Courts Grant Target Standing Twice

While the history of Massachusetts' decisions on target standing is inconsistent at best, most, if not all, Massachusetts

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- 220 See *Moore*, 1993 WL 818602, at *3 (holding target standing requires intentional violation of another's rights "for the sole or principal purpose of obtaining evidence against the defendant"); *Commonwealth v. Cruz*, No. 13-P-1129, 2014 WL 1123707, at *2 (Mass. App. Ct. Mar. 24, 2014) (holding that, in a challenge to a Texas search conducted after a traffic stop where suspicious activity gave rise to articulable suspicion and a positive dog sniff alert provided probable cause for the search, target standing requires: (1) evidence to show defendant was the target and (2) that the police acted intentionally to yield evidence against him).
- 221 See *Commonwealth v. Montes*, 733 N.E.2d 1068, 1073 n.6 (Mass. App. Ct. 2000) (holding target standing is not recognized as a matter of federal law, not explicitly adopted by Massachusetts constitutional law, and finding no evidence that the existing exclusionary rule was not an effective police deterrent in the juvenile proceeding and no evidence that the father was the target of the arrest); *Commonwealth v. Giorgio*, No. 01-P-1045, 2003 WL 102884, at *2, n.2 (Mass. App. Ct. Jan. 10, 2003) (citing *Commonwealth v. Scardamaglia*, 573 N.E.2d 5, 6-8 (Mass. 1991)); *Commonwealth v. Waters* 649 N.E.2d 724, 725-26 (1995); *Commonwealth v. Kirschner*, 859 N.E.2d 433, 440 n. 9 (Mass. App. Ct. 2006) ("'Target standing' . . . has been discussed but not adopted in the Commonwealth." (citing *Scardamaglia*, 573 N.E.2d at 6-8)); *Commonwealth v. Davis-Sanon*, No. 06-P-618, 2007 WL 601932, at *1 (Mass. App. Ct. Feb. 27, 2007) (denying motion to suppress because target standing not recognized in the Commonwealth); *Commonwealth v. Jeffreys*, No. BRCR2011-0440, 2014 WL 7477703, at *2 (Mass. Super. Ct. Apr. 23, 2014) (noting the Supreme Judicial Court has not recognized target standing).
- 222 See *Commonwealth v. Albanese*, No. 0762CR124, 2007 WL 4964342, at *1 (Mass. Dist. Ct. Apr. 24, 2007) (ruling evidence suppressed under target standing where, no reasonable suspicion or probable cause existed to stop and the search was conducted with the intent to obtain evidence against another target); *Commonwealth v. Almeida*, 15 Mass. L. Rptr. 332, 341-42 (Mass. Super. Ct. 2002) (granting motion to suppress under target standing where police engaged in *serious, distinctly egregious misconduct* including a stop blatantly lacking justification, done with the sole purpose of obtaining evidence against another, and subsequently where officers included a false statement in the affidavit to obtain a warrant to gain entry into an apartment without probable cause or exigent circumstances. The deterrent value would not be "only marginal," the conduct was a part of a concerted effort by police to obtain evidence against another without regard to the constitutionality of their conduct).

common law jurisprudence on target standing fairly consistently declines to apply the concept.²²³ There are, however, two courts that have allowed motions to suppress where target standing was granted.

The first motion granted in the Commonwealth that extended target standing to a defendant was in 2002.²²⁴ In *Commonwealth v. Almeida*, a detective obtained information from one previously reliable informant, and from another first time informant, that Almeida operated a drug delivery service.²²⁵ The detective began surveillance on Almeida and found that he frequented 69 Mill Street and drove a red Chevy Blazer.²²⁶ The detective set up a controlled buy, and used the gathered information to apply for and obtain a warrant for the 69 Mill Street apartment (on the east side) and the red Chevy Blazer.²²⁷ Ten officers took part in its execution and were all in communication with each other.²²⁸ After they arrived at the apartment, two cars approached: one red Chevy Blazer carrying Almeida, and another green car carrying Rose (a non-target) as well as another woman.²²⁹ Rose and the woman stayed for 20 minutes and left.²³⁰ The police pulled over the green car Rose was driving at the direction of the Commander, “because he hoped to develop information against the defendant [Almeida].”²³¹ The police also entered the 69 Mill Street apartment on the east side, and found that was not where Almeida stayed; it was actually 69 Mill Street apartment on the west side.²³² The officers found the door to 69 Mill Street apartment on the west side unlocked. They entered, looked in boxes and cabinets, and noted narcotics paraphernalia.²³³

In summary, the court found that: (1) the police pulled over the car belonging to Rose, as it left the 69 Mill street apartment, without reasonable suspicion or probable cause;²³⁴ (2) the police had the wrong apartment and illegally searched an adjacent apartment

223 See cases cited *supra* notes 217-22 and accompanying text.

224 *Almeida*, 15 Mass. L. Rptr. at 342.

225 *Id.* at 333.

226 *Id.*

227 *Id.*

228 *Id.* at 334.

229 *Id.*

230 *Id.*

231 *Id.* at 341.

232 *Id.* at 335.

233 *Id.* at 336.

234 *Id.* at 334, 337, 341.

they suspected was the correct one;²³⁵ (3) the police lied on the affidavit for a warrant to search the correct house,²³⁶ and; (4) finally, after the warrant, which lacked probable cause, was issued, the police entered at night, and among other drug contraband confiscated, confiscated a Movado wristwatch valued at \$4,999.²³⁷

The court granted the defendant target standing to suppress all evidence obtained from the apartment,²³⁸ relying on *Scardamaglia* (significantly improper, egregious police misconduct), *Manning* (intentional police wrongdoing with the sole or principal goal of obtaining incriminating evidence against the defendant), *Waters* (serious and distinctly egregious police misconduct) and *Montes* (noting that target standing has not been explicitly adopted as a matter in Massachusetts common law).²³⁹ The court ruled the seizure was “blatantly lacking any justification” and that it was conducted with the sole purpose of obtaining evidence against the defendant.²⁴⁰ The court found the deterrent value would not be ‘only marginal;’ the conduct was egregious and part of a concerted effort by police to obtain evidence against another without regard to the constitutionality of their conduct.²⁴¹ Finally, the court stated “[t]his case involves both the unconstitutional search of a small fish intentionally undertaken to catch a big fish [*Manning*] and serious, distinctly egregious misconduct [*Scardamaglia*].”²⁴²

Again in 2007, the state district court also allowed a defendant’s motion to suppress through target standing. In *Commonwealth v. Albanese*, officers in an unmarked car were on routine patrol of a low-income residential area and spotted the defendant and Edmands engaging in a hand-to-hand transaction.²⁴³ The police, acting on a “hunch” that the two had engaged in a drug transaction, approached them and effectively placed them in custody as neither was arguably “free” to leave.²⁴⁴ Edmands moved his hand to his mouth and the officers suspected he was trying to swallow the

235 *Id.* at 335.

236 *Id.* at 336.

237 *Id.* at 336-37.

238 *Id.* at 341.

239 *Id.*

240 *Id.*

241 *Id.* at 342.

242 *Id.*

243 *Commonwealth v. Albanese*, No. 0762CR124, 2007 WL 4964342, at *1 (Mass. Dist. Ct. Apr. 24, 2007).

244 *Id.*

drugs.²⁴⁵ The officers grabbed Edmands and observed the drugs.²⁴⁶ The court held the stop void of reasonable suspicion and of probable cause, noting that “a neighborhood should never be allowed to play a major role in reasonable suspicion or probable cause.”²⁴⁷ The court further noted that while target standing has not yet been applied by the appellate courts, lower courts have applied it on a few occasions, citing *Almeida*.²⁴⁸ The court concluded that target standing applied in this case because Edmands was searched with the intent to obtain evidence to convict Albanese, signifying that Albanese was the intended target, and that the location played a major role in the decision to stop the defendant.²⁴⁹

These two cases mark the only two incidents where Massachusetts courts have allowed motions to suppress based on target standing. In fact, in 2015 the Massachusetts Supreme Judicial Court again declined to extend target standing in *Commonwealth v. Santiago*, noting, however, that there may still be a set of factual circumstances where the court will extend target standing.²⁵⁰

D. A Notable Denial of Target Standing: Hernandez

Despite the courts’ reluctance to grant motions to suppress or dismiss that are crafted based on target standing, this facet of criminal law is currently impacting high-profile criminal litigation. A recent notable denial of target standing occurred during the Aaron Hernandez trial; Hernandez was indicted on August 22, 2013 for first-degree murder and was found guilty on April 15, 2015.²⁵¹

During the initial investigation, police found car rental keys that belonged to Hernandez in the pants pocket of the victim, which led police to Hernandez, who then agreed to drive to the police station

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.*

249 *Id.*

250 *Commonwealth v. Santiago*, 24 N.E.3d 560, 562 (2015).

251 *Commonwealth v. Hernandez*, No. BCR2013-00983 (Mass. Sup. Ct. Aug. 15, 2015); *Ex-Patriot Hernandez Indicted on Murder Charge*, WGBHNEWS (Aug. 22, 2013), <http://news.wgbh.org/post/ex-patriot-hernandez-indicted-murder-charge>; *Ex-Patriots Player Aaron Hernandez Convicted of 1st-Degree Murder*, WGBHNEWS (Apr. 15, 2015), <http://news.wgbh.org/post/ex-patriots-player-aaron-hernandez-convicted-1st-degree-murder>.

to speak with officers.²⁵² Shayanna Jenkins, a girlfriend of Hernandez, drove him to the station.²⁵³ As Jenkins left the headquarters, a trooper followed Jenkins out of the parking lot, flashed the car's blue lights, and pulled her over.²⁵⁴ Upon questioning by the police, Jenkins gave them information, including that Hernandez was not home on the night of the murder and that they had surveillance equipment set up at the home.²⁵⁵

Hernandez's legal team filed a motion to suppress under a theory that there was insufficient probable cause to support the issuance of a warrant inclusive of video surveillance footage taken by Hernandez's home system, as well as suppression under a theory of target standing for statements made by Jenkins after an unlawful police stop.²⁵⁶

The motion to suppress urged the court to apply the doctrine of target standing to this seizure and to allow Hernandez to assert standing to challenge the stop of Jenkins and any information obtained pursuant to that unlawful stop, citing *Almeida*, *Scardamaglia*, *Manning*, and *Kirschner*.²⁵⁷

The court's response to the standing portion of this motion first addressed the constitutionality of the stop, stating: (1) "[t]he activation of a police cruiser's blue lights behind a citizen's vehicle is a display of authority, equivalent to a command to stop, which signals to a reasonable person that she is not free to leave";²⁵⁸ (2)

252 Memorandum of Decision and Order on Defendant's Motion to Suppress Fruits of June 18, 2013 Search (Digital Video Recorder, Hard Drive, and Cell Phone with Specified Number) at 2, *Commonwealth v. Hernandez*, No. BRCR2013-00983 (Mass. Super. Ct. 2014), <https://www.documentcloud.org/documents/1385786-7-14-14-cw-v-hernandez-bristol-superior-court-88.html>.

253 Memorandum of Law in Support of Defendant's Motion to Suppress Fruits of June 18, 2013 Search at 3, *Commonwealth v. Hernandez*, No. BRCR2013-00983 (Mass. Super. Ct. Aug. 15, 2015), <https://www.documentcloud.org/documents/1385759-5-15-14-cw-v-hernandez-bristol-superior-court-58.html>.

254 *Id.*

255 *Id.* at 4.

256 *See generally* Memorandum of Law in Support of Defendant's Motion to Suppress Fruits of June 18, 2013 Search, *Commonwealth v. Hernandez*, No. BRCR2013-00983 (Mass. Super. Ct. Aug. 15, 2015), <https://www.documentcloud.org/documents/1385759-5-15-14-cw-v-hernandez-bristol-superior-court-58.html>.

257 *Id.* at 8-9.

258 Memorandum of Decision and Order on Defendants Motion to Suppress Fruits of June 18, 2013 Search (Digital Video Recorder, Hard Drive, and Cell Phone With Specified Number) at 8, *Commonwealth v. Hernandez*, No. BRCR2013-00983 (Mass. Super. Ct. Aug. 15, 2015), <https://www.documentcloud.org/>

this type of stop can be conducted if there was “reasonable suspicion, based on specific, articulable facts, that an occupant committed, was committing, or was about to commit a crime”;²⁵⁹ (3) there was no indication that the trooper witnessed any traffic violation, or had any specific, articulable facts leading him to believe that Jenkins was involved in a crime;²⁶⁰ (4) the purpose of this stop was to obtain information relating to the defendant’s connection to the murder²⁶¹ and; (5) therefore there is no indication that it was proper procedure to stop her.²⁶²

The court further stated “Hernandez, however, is not entitled to have the information obtained from Jenkins excised from the warrant affidavit unless he has standing to raise the violation of Jenkins’s constitutional rights.”²⁶³

With regard to the applicability of target standing, the court stated that while “[t]he Supreme Judicial Court has not ruled out the possibility of recognizing target standing as a remedy for egregious police misconduct . . . to date the Supreme Judicial Court has not decided whether to adopt target standing.”²⁶⁴

Finally, the court in its decision declining the motion to suppress stated, “[a]ssuming, without deciding, that target standing is a viable doctrine, Hernandez cannot avail himself of it here.”²⁶⁵ The court explained that the trooper’s conduct was not serious, distinctly egregious misconduct, and no tangible evidence was seized

documents/1385786-7-14-14-cw-v-hernandez-bristol-superior-court-88.html.

259 *Id.*

260 *Id.* at 9.

261 *See* Memorandum of Decision and Order on Defendants Motion to Suppress Fruits of June 18, 2013 Search (Digital Video Recorder, Hard Drive, and Cell Phone With Specified Number) at 9; *see also* Memorandum of Law in Support of Defendant’s Motion to Suppress Fruits of June 18, 2013 Search at attached affidavit 4-5, *Commonwealth v. Hernandez*, No. BR2013-00983 (Mass. Super. Ct. Aug. 15, 2015), <https://www.documentcloud.org/documents/1385759-5-15-14-cw-v-hernandez-bristol-superior-court-58.html>.

262 Memorandum of Decision and Order on Defendants Motion to Suppress Fruits of June 18, 2013 Search (Digital Video Recorder, Hard Drive, and Cell Phone With Specified Number) at 9, *Commonwealth v. Hernandez*, No. BR2013-00983 (Mass. Super. Ct. Aug. 15, 2015), <https://www.documentcloud.org/documents/1385786-7-14-14-cw-v-hernandez-bristol-superior-court-88.html>.

263 *Id.* (citing *Commonwealth v. Mubdi*, 923 N.E.2d 1004, 1011 (Mass. 2010) (“[D]iscussing standing requirement”) and *Commonwealth v. Krischner*, 859 N.E.2d 433, 440 (Mass. App. Ct. 2006) (“Fourth Amendment and art. 14 rights are personal rights that cannot be asserted vicariously.”)).

264 *Id.* at 10.

265 *Id.*

from Jenkins.²⁶⁶ The court stated in its opinion that the evidence sought to be seized must be tangible and cannot be in the form of oral remarks.²⁶⁷

E. Santiago: Door to Target Standing Still Open

The facts in *Santiago* should come as no surprise, as they are quite similar to the case law cited above.²⁶⁸ The defendant, Angel Santiago, was riding a bike in a known drug neighborhood and officers saw what they suspected was a hand-to-hand drug transaction with Edwin Ramos.²⁶⁹ The officers stopped and detained the two, reached into Ramos's pocket, and recovered a small packet of cocaine.²⁷⁰ No drugs were found on the defendant.²⁷¹ Both of the men were arrested and charged; Santiago was charged with distribution and Ramos was charged with the possessory offence of the same narcotics.²⁷²

The trial court granted target standing and held that the police did not have probable cause to search Ramos based on their observations alone, that there were no facts suggesting reasonable suspicion for a *Terry*-type stop, and even if there were, there was no safety concern necessitating the reach into Ramos' pocket.²⁷³ Finally, the court concluded that the search was conducted with the goal of obtaining evidence against both Ramos and the defendant, that the police actions were intentional and egregious, and that no deterrent was available because Ramos resolved his case with a guilty plea.²⁷⁴

On appeal, the court briefly stepped through the existing jurisprudence and affirmed *Scardamaglia*.²⁷⁵ The court once again stated that target standing may apply in cases where police conduct is distinctly egregious and done in an effort to obtain evidence against the target defendant.²⁷⁶ However, the court again declined to find the facts of the case sufficient to apply the protection/deterrent

266 *Id.*

267 *Id.* See *Commonwealth v. Waters*, 649 N.E.2d 724, 725 (Mass. 1995); *Commonwealth v. Scardamaglia*, 573 N.E.2d 5, 7 (Mass. 1991).

268 See discussion *supra* Section IV.C.

269 *Commonwealth v. Santiago*, 24 N.E.3d 560, 562 (Mass. 2015).

270 *Id.*

271 *Id.*

272 *Id.*

273 *Id.* at 562-63.

274 *Id.*

275 *Id.* at 564.

276 *Id.*

of target standing.²⁷⁷ The appellate court disagreed with the trial court regarding the absence of probable cause and stated that the officers' training and skills, the location, and the transaction were sufficient for reasonable suspicion that the incident was a drug transaction, and this *Terry*-type stop was appropriate.²⁷⁸ The court stated that, assuming the *Terry*-type stop was justified but there was no probable cause for a search or arrest, and where nothing in the situation suggested that exigent circumstances were present to warrant the search, there was "no justifiable reason, after stopping the two men, to reach immediately into Ramos' pocket without making any inquiry first."²⁷⁹ Remarkably, the court opined that the "existence of probable cause was close" and therefore there was not an intentional violation of Ramos' rights when the police conducted "this brief, limited, search."²⁸⁰ Finally the court touched on who the actual target was, stating that the target was both Santiago, as the defendant, and Ramos.²⁸¹

The court discussed *Terry* searches that led to a question of probable cause. The court in *Santiago* stated that 'close calls' regarding whether probable cause exists to search do not amount to egregious police behavior sufficient to apply target standing.²⁸² As noted above in the *Terry* Stop Standard Section and the Probable Cause Section, when a stop occurs without reasonable suspicion that a crime has, is, or is going to occur, the stop is unconstitutional under the Fourth Amendment and article XIV.²⁸³

When there is probable cause to suspect the crime has, is, or is going to take place, then after obtaining a warrant upon a showing of probable cause to a magistrate, or upon incident to arrest, or if there are exigent circumstances, the police can search in a limited manner.²⁸⁴ Conversely, when the search is conducted absent a warrant, the search is not incident to arrest, and there are no exigent circumstances to justify the search, then the search violates the purpose and plain language of the Fourth Amendment and article

277 *Id.*

278 *Id.* at 564-65.

279 *Id.* at 565.

280 *Id.*

281 *Id.*

282 *Id.*

283 See discussion *supra* Section IV.A.

284 See discussion *supra* Section IV.A.ii.

XIV.²⁸⁵ As stated above in Section II, the United States Constitution sets the floor.²⁸⁶ The plain language of the Fourth Amendment states that the Amendment “shall not be violated.”²⁸⁷ The plain language of article XIV states that “[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person.”²⁸⁸ How then is the conduct of reaching into Ramos’s pocket a close call for the purposes of probable cause and not egregious misconduct?²⁸⁹

F. A Rule for Applying Target Standing Going Forward

Regardless of the court’s legal analysis in *Santiago*, one truth remains. The court has still left the door open for the application of target standing in certain circumstances.²⁹⁰ Through the muddy water of legal opinions after *Manning*, a general, yet complex, rule developed in Massachusetts from 1990 through 2015 with the decision in *Santiago*. Traversing the case law’s factual nuances and holding rationales, the cases decided thus far provide a somewhat workable rule outlined below to follow in order to grant or deny target standing based motions to suppress.

As it stands today, when certain police activity — a stop without reasonable suspicion or a search and/or seizure without

285 The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

286 See discussion *supra* Section II.

287 See U.S. Const. amend. IV.

288 Mass. Const. art. XIV

289 See U.S. CONST. amend. IV; MASS. CONST. art. XIV; *Commonwealth v. Santiago*, 24 N.E.3d 560, 565 (Mass. 2015). See, e.g., *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 111-12 (Mass. 1999); *Commonwealth v. Stoute*, 665 N.E.2d 93, 96 n.10 (Mass. 1996); *Commonwealth v. Lyons*, 564 N.E.2d 390, 391 (Mass. 1990); *Commonwealth v. Upton*, 476 N.E.2d 548, 555 (Mass. 1985).

290 *Santiago*, 24 N.E.3d at 564 (“We reaffirm the view stated in *Scardamaglia*, 410 Mass. at 380, 573 N.E.2d 5, that in a case where the police engage in ‘distinctly egregious’ conduct that constitutes a significant violation of a third party’s art. 14 rights in an effort to obtain evidence against a defendant, it may be appropriate to permit the defendant to rely on the standing of the third party to challenge the police conduct.” (quoting *Scardamaglia*, 573 N.E.2d at 8)).

probable cause²⁹¹ — results in the seizure of tangible evidence,²⁹² a Massachusetts court may grant a defendant target standing where the conduct was: (1) for the sole purpose of arresting the target defendant;²⁹³ (2) intentionally²⁹⁴ directed toward a person other than the target²⁹⁵ and; (3) distinctly egregious.²⁹⁶ Additionally, applying target standing must be the only means of deterring police misconduct,²⁹⁷ and deterrence must outweigh the need for “highly relevant evidence of guilt.”²⁹⁸

It is important to note that while each case rests on a variation of the elements above, almost none of the cases cited above contain them all. It is clear that if a defendant can show all

291 *Id.* at 564-65.

292 *See* *Commonwealth v. Waters*, 649 N.E.2d 724, 726 (Mass. 1995); *Scardamaglia*, 573 N.E.2d at 7.

293 *Manning*, 548 N.E.2d at 1225. *See Scardamaglia*, 573 N.E.2d at 8; *Cruz*, 2014 WL 1123707; *Vacher*, 14 N.E.3d at 274.

294 *Commonwealth v. Kirschner*, 859 N.E.2d 433, 440 n.9 (Mass. App. Ct. 2006). *See Commonwealth v. Cruz*, No. 13-P-1129 2014 WL 1123707 (Mass. App. Ct. Mar. 24, 2014); *Commonwealth v. Jeffreys*, No. BRCCR2011-0440 2014 WL 7477703, at *2 (Mass. Super. Ct. Apr. 23, 2014).

295 *Commonwealth v. Vacher*, 14 N.E.3d 264, 274 (Mass. 2014) (quoting *Commonwealth v. Manning*, 548 N.E.2d 1223, 1225 (Mass. 1990)). *See Commonwealth v. Cruz*, No. 13-P-1129 2014 WL 1123707 (Mass. App. Ct. Mar. 24, 2014); *Commonwealth v. Jeffreys*, No. BRCCR2011-0440 2014 WL 7477703, at *2 (Mass. Super. Ct. Apr. 23, 2014).

296 *Commonwealth v. Almeida*, 15 Mass. L. Rptr. 332, 342 (Mass. Super. Ct. 2002). *See also Scardamaglia*, 573 N.E.2d at 8; *Commonwealth v. Santos*, No. 08-P-604, 2009 WL 3232842 (Mass. App. Ct. 2009); *Commonwealth v. Seeley*, No. 08CR316, 2009 WL 4894559 (Mass. Super. Ct. 2009); *Commonwealth v. Sprague*, 970 N.E.2d 333 (Mass. 2012); *Commonwealth v. Ayala*, 25 Mass. L. Rptr. 358 (Mass. Super. Ct. 2009); *Commonwealth v. Burgos*, 965 N.E.2d 854, 866 (Mass. 2012). Courts have found police activity to be distinctly egregious where the conduct involved reckless actions, *Manning*, 548 N.E.2d at 1225, misstatements, *id.*, significantly improper conduct, *Scardamaglia*, 573 N.E.2d at 5, a stop blatantly lacking justification, *Almeida*, 15 Mass. L. Rptr. at 341, and a concerted effort by police to obtain evidence against another without regard to the constitutionality of their conduct, *Almeida*, 15 Mass. L. Rptr. 332. This effort included the entry into the west side apartment for the purpose of finding incriminating evidence that might support an application for a search warrant, the glaring lack of either probable cause or exigent circumstances to enter the west side apartment, the failure of the police to limit their activity, upon entry, to performing a protective sweep of the apartment, and the inclusion of a false statement in the affidavit for a search warrant as to what was observed in that apartment. *Id.*

297 *Commonwealth v. Santiago*, 24 N.E.3d 560, 563-64 (Mass. 2015); *Commonwealth v. Sanchez*, 8 Mass. L. Rptr. 451 (Mass. Super. Ct. 1998).

298 *Scardamaglia*, 573 N.E.2d at 8.

elements, they stand a good chance of succeeding in their motion to dismiss, though all elements may not be required for success.²⁹⁹ However, in the two motions that were granted, not all elements were required. The decision in *Albanese* merely rested on lack of reasonable suspicion or probable cause and intent to obtain evidence against another target.³⁰⁰ The decision in *Almeida* relied on a bit more in order to grant standing, including: (1) the misconduct was serious and distinctly egregious; (2) the search was done with the sole purpose of obtaining evidence against another; (3) the officers included a false statement in the affidavit to obtain a warrant; (4) no probable cause or exigent circumstances existed; (5) the deterrent value would not be “only marginal” and; (6) the conduct was a part of a concerted effort by police.³⁰¹

V. Target Standing in Alaska

In comparison to the models of target standing discussed so far, Alaska’s adoption of target standing is more in the mode of the Massachusetts court system. Unlike Louisiana, target standing in Alaska is a court-made construct.³⁰² Not surprisingly, the Supreme Court of Alaska examined the same exclusionary rule arguments found in Massachusetts decisions and ultimately came to the same conclusions as to the extent of such an expansion.³⁰³ In examining two cases where the exclusionary rule could be applied in special circumstances post-trial,³⁰⁴ the Alaska Supreme Court found that

299 See *Commonwealth v. Albanese*, No. 0762CR124, 2007 WL 4964342 at *1 (Mass. Dist. Ct. 2007); *Commonwealth v. Almeida*, 15 Mass. L. Rptr. 332, 341-42 (Mass. Super. Ct. 2002).

300 See *Albanese*, 2007 WL 4964342, at *1 (Mass. Dist. Ct. 2007).

301 *Almeida*, 15 Mass. L. Rptr. at 341-42.

302 See *Waring v. State*, 670 P.2d 357 (Alaska 1983).

303 See *generally id.*; *Scardamaglia*, 573 N.E.2d 5; *Commonwealth v. Santiago*, 24 N.E.3d 560 (Mass. 2015).

304 *State v. Sears*, 553 P.2d 907, 914 (Alaska 1976) (“We can conceive of circumstances which would lead to the application of the exclusionary rule to revocation of probation proceedings. E.g., *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). In short, police misconduct which shocks the conscience, or is of a nature that calls for the judiciary, as a matter of judicial integrity, to disassociate itself from benefits derivable therefrom, would lead us to invoke the exclusionary rule.”); *Elson v. State*, 659 P.2d 1195 (Alaska 1983) (evidence obtained illegally for sentencing purposes was admissible if: (1) the illegal evidence is reliable; (2) the police did not obtain the evidence as a result of gross or shocking misconduct and; (3) the evidence was not obtained for purposes of influencing the sentencing court).

evidence collected as a result of illegal police conduct could be suppressed if the conduct was deliberately directed towards a specific defendant or the conduct was “gross or shocking.”³⁰⁵ In a near total repudiation of Rehnquist’s reasoning in *Rakas*, the court concluded:

Underlying this exception to the standing requirement is our refusal to condone improper police conduct. If a defendant were not given standing to assert the knowing violation of a co-defendant’s rights,³⁰⁶ police could be encouraged to intentionally violate the rights of persons who will not be prosecuted in the hopes that the illegally obtained evidence could eventually be used against another defendant. Refusing to permit standing would represent “an open invitation to adopt such procedures as a standard method for the solution of particular crimes or for conducting generalized crime hunts.”³⁰⁷

Considering that the criteria for target standing in Alaska are quite similar to that from the assortment of Massachusetts cases,³⁰⁸ the question is, have they been similarly applied? The answer is yes. The court in the *Waring* case, which brought target standing to Alaska, did nothing on remand to help Waring suppress his confession, which was ultimately given as a result of an illegal detention of his co-defendants.³⁰⁹ Other illegal police conduct against co-defendants, such as trespassing in order to peer through windows,³¹⁰ an unconsented search of a vehicle,³¹¹ and an illegal

305 *Waring*, 670 P.2d at 362.

306 Although not specifically spelled out by any Alaskan appeals court, several courts have indicated that third-party standing does not exist solely for co-defendants but for any third party. See *Fraiman v. Dep’t of Admin.*, Div. of Motor Vehicles, 49 P.3d 241, 245 n.18 (Alaska 2002); *Beltz v. State*, 221 P.3d 328, 344 n.21 (Alaska 2009).

307 *Waring*, 670 P.2d at 362-63 (quoting *Dimmick v. State*, 473 P.2d 616, 623 (Alaska 1970)). See *Rakas v. Illinois*, 439 U.S. 128 (1978).

308 See discussion *supra* Section IV.

309 *Waring v. State*, No. A-1476, 1987 WL 1358677, at *1 (Alaska Ct. App. Mar. 4, 1987); *Waring*, 670 P.2d at 362-63.

310 *Ellis v. State*, No. A-11118, 2014 WL 2716145, at *3 (Alaska Ct. App. June 11, 2014); Brief for Appellant at 6, *Ellis v. State*, 2013 WL 7208071 (No. 3PA-06-02999 CR).

311 *Marshall v. State*, 198 P.3d 567, 573 (Alaska Ct. App. 2008), *rev’d*, 238 P.3d 590 (Alaska 2010).

arrest resulting in incriminating statements,³¹² has not been deemed “gross or shocking.” Seemingly, there has been a dearth of actual cases where outrageous or deliberate conduct against a third party has been found.³¹³ As with Massachusetts, the problem seems to lie with the lack of a concrete definition of gross, shocking, and deliberate conduct.³¹⁴ However, Alaska, while rarely invoking third-party standing, has nevertheless expanded the type of evidence that could be suppressed by suppressing statements that are made as a result of a violation of a third party’s Fourth Amendment rights.³¹⁵ This expansion remains good law despite the *Patane* ruling.³¹⁶

VI. Target Standing in California

California’s Supreme Court took quite the opposite track from Massachusetts common law jurisprudence where courts seem reluctant to provide target standing.³¹⁷ In California, from 1955 up until 1985, the California Supreme Court specifically granted target standing until it was forced to revoke it by its own legislature.

A. *Martin Decision*

Before the Supreme Court’s Decision in *Rakas*, California granted target standing through its common law, beginning first in *People v. Martin*.³¹⁸ In *Martin*, the defendant, a bookie living on

312 *Newcomb v. State*, 779 P.2d 1240, 1244 (Alaska Ct. App. 1989) (finding no deliberate illegal conduct against defendant even though the defendant “alleges that the state troopers were extremely interested in apprehending him” when questioning the co-defendant).

313 *See Christianson v. State*, 734 P.2d 1027, 1029 (Alaska Ct. App. 1987) (suggesting that a defendant has standing to assert the violation of a co-defendant’s rights only in very limited situations).

314 *See Giel v. State*, 681 P.2d 1364, 1367 n.3 (Alaska Ct. App. 1984).

315 *See id.* at 1366; *Newcomb*, 779 P.2d at 1244.

316 Federally, evidence collected through or as the result of *Miranda* violations is generally not inadmissible. Louisiana, discussed *supra*, follows *Patane* in its Fifth Amendment jurisprudence in the realm of target standing (i.e., Louisiana criminal defendants *do not* have target standing to suppress coerced statements made by third parties or statements made pre-Miranda by third parties). *State v. Singleton*, 376 So. 2d 143, 145 (La. 1979). *See United States v. Patane*, 542 U.S. 630 (2004); *Giel*, 681 P.2d at 1366.

317 *See discussion supra* Section IV.

318 *People v. Martin*, 290 P.2d 855, 856, 859 (Cal. 1955) (holding under California law that defendant could object to evidence obtained in violation of another’s rights).

Ventura Boulevard in Los Angeles, was charged with two counts of horse-race bookmaking and two counts of keeping and occupying premises for such purposes.³¹⁹ On April 10, 1955, three officers, including a bookie expert, went to the Ventura Boulevard residence and looked inside through a mail chute, where they saw what appeared to be horse-race bookmaking material.³²⁰ The defendant let them in and the officers stayed for about an hour answering the frequently ringing telephones.³²¹ Six days later the officers went to another residence on Ventura Boulevard at 11:30 a.m.³²² They looked through the rear window of the building and saw the defendant and similar paraphernalia.³²³ When the defendant refused to let the officers in, they crawled in through the window.³²⁴ Again, the phones rang frequently, the smell of smoke was in the air, and a blackboard with chalk and a wet rag sat strewn on the floor.³²⁵

The officers entered both locations without a warrant.³²⁶ The Attorney General contended that the defendant had no standing to challenge the search because he had no interest in the property.³²⁷ However, the California Supreme Court disagreed and found that the defendant had standing to challenge the search based on California's common-law third-party standing doctrine.³²⁸ The court reasoned that the Fourth Amendment exclusionary rule was intended to deter lawless enforcement of the law, and "other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers."³²⁹ The court ruled that evidence obtained as a result of an unlawful search, or leads, cannot be used as indirect support of another conviction, stating that "all these methods are outlawed, and convictions obtained by means of them are invalidated, because

319 *Id.* at 855.

320 *Id.* at 855-56.

321 *Id.* at 856.

322 *Id.*

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.* at 856-57.

329 *Id.* at 857.

they encourage the kind of society that is obnoxious to free men.”³³⁰

After finding that third-party standing existed, and thus allowing the defendant the ability to challenge the unlawful violation of another’s rights, the court found that both arrests, the first where police were invited in and the second where police went in through a window, were lawful and thus denied the defendant’s motion to suppress.³³¹

The court, though it dismissed the defendant’s motions, purposefully and specifically adopted greater protections than those offered by the federal courts, stating:

In adopting this vicarious exclusionary rule in *Martin*, [the court] explained again that the exclusion of unlawfully seized evidence was necessary both because other remedies had been ineffective in deterring unlawful police misconduct, and because admission of the evidence involved the court in an implied condemnation of that conduct. “This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extend nullified. Moreover such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them.”³³²

The court stated that this rule was specifically implemented “because other remedies have completely failed to secure compliance with constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.”³³³

330 *Id.*

331 *Id.* at 858-59.

332 *In re Lance W.*, 694 P.2d 744, 750 (Cal. 1985) (quoting *Martin*, 290 P.2d at 857).

333 *Id.* (quoting *People v. Cahan*, 282 P.2d 905, 911-12 (Cal. 1955)).

B. Legislative Response to Martin

After the revolutionary declarations in *Martin*, it appears the legislature attempted to curtail the court's interpretation and application of target standing by adopting section 351 of the Evidence Code, which states that "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."³³⁴ The court in *Kaplan v. Superior* was tasked with deciding whether this provision operated as a legislative repeal of the "vicarious exclusionary rule" adopted by the court in *Martin*,³³⁵ and interpreted the newly enacted Evidence Code section 351, which contained almost identical language to that of section 28(d) of the California Constitution,³³⁶ as language that did not repeal the vicarious exclusionary rule announced in *Martin*.³³⁷

In 1982, Proposition 8, also known as the Victims' Bill of Rights, drafted by Senator John Doolittle, Senator Alister McAlister, and Senior Assistant Attorney General George Nicholson, was placed on the ballot and approved by 56.4% of the voters.³³⁸ The California legislature passed an amendment to its constitution through Proposition 8 that added section 28, subdivision (d) to article I of the California Constitution.³³⁹ That section provides:

Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court.*³⁴⁰

334 CAL. EVID. CODE § 351 (West 1995).

335 *Kaplan v. Super. Ct. of Orange Cty.*, 491 P.2d 1, 4 (Cal. 1971).

336 *Id.* ("Except as otherwise provided by statute, all relevant evidence is admissible." (quoting CAL. EVID. CODE § 351 (West 1966))). See CAL. CONST. art. I, § 28(f)(2).

337 *Kaplan*, 491 P.2d at 4-5.

338 J. Clark Kelso and Brigitte A. Bass, *The Victims' Bill of Rights: Where Did it Come From and How Much Did it Do?*, 23 PAC. L. J. 843, 862-63 (1992). See CAL. CONST. art. I, § 28(d).

339 *In re Lance W.*, 694 P.2d 744, 747 (Cal. 1985).

340 CAL. CONST. art. I, § 28(f)(2) (emphasis added). See *In re Lance W.*, 694 P.2d at 750, 753 ("Moreover, not only the language of that section but also accepted canons of statutory construction and available 'legislative' history confirm our conclusion that the electorate intended to mandate admission of relevant

C. *Judicial Interpretation of Proposition 8*

Fourteen years after the court in *Kaplan* ruled section 351 of the Evidence Code did not abrogate the vicarious exclusionary rule promulgated in *Martin*, the court in *In re Lance W.* held that the same language found in Proposition 8 and article I, section 28(d) did repeal the rule, indicating the court's acceptance of the legislative response.³⁴¹

In *In re Lance W.*, police were on patrol in a known drug area and saw what looked to be a drug transaction between 16-year-old Lance W. and the drivers of two vehicles.³⁴² The police saw Lance W. drop what appeared to be drugs in the window of a pickup truck.³⁴³ The two officers, without permission of the occupants, opened the door to the pickup truck, found a bag of marijuana, and arrested Lance W.³⁴⁴ At trial, Lance W., relying on established California common law, moved to suppress the evidence against him based on third-party standing, challenging the warrantless search of the third parties' pickup truck.³⁴⁵

In stating its reasons for its historical application, the Court in *In re Lance W.* was tasked with determining whether the passage of Proposition 8 and adoption of the amendment to section 28(d) effectively removed the additional Thirteenth Amendment exclusionary protections that the state had adopted to provide protections above the Supreme Court's interpretation of the Fourth Amendment.³⁴⁶

The court considered whether the amendment conflicted

evidence, even if unlawfully seized, to the extent admission of the evidence is permitted by the United States Constitution.”). See also *Legislature of California v. Deukmejian*, 669 P.2d 17, 25 n.14 (Cal. 1983) (“Ballot summaries and arguments are accepted sources from which to ascertain the voters’ intent and understanding of initiative measures.” (citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978))). See also *In re Lance W.*, 694 P.2d at 755 n.10 (“In addition to the ballot summary and arguments noted above, such intent is reflected in the preamble to the initiative, section 28(a) which states in the final paragraph that ‘broad reforms in the procedural treatment of accused persons’ are necessary to achieve the goals of the proposition.” (citation omitted)).

341 See *Kaplan*, 491 P.2d at 4-5; *In re Lance W.*, 694 P.2d at 747-48; CAL. CONST. art. I, § 28(f)(2); CAL. EVID. CODE § 351 (West 1966); John L. Segal, Note, *Proposition 8 and the California Supreme Court: Interpretation Run Riot?*, 60 S. CAL. L. REV. 540, 564-65 (1987).

342 *In re Lance W.*, 694 P.2d at 747-48.

343 *Id.*

344 *Id.* at 748.

345 *Id.*

346 *Id.* at 747.

with the Supreme Court's interpretation of the Fourth Amendment and found that Proposition 8 merely removes target standing, not the protections afforded by the United States Constitution.³⁴⁷ The court relied on the information in the ballot literature that said "[t]he measure could not affect federal restrictions on the use of evidence" as evidence of legislative intent indicating that even though the express language was not clear, the intent of the voter base was.³⁴⁸

The court also considered whether the legislative intent of the amendment was to abrogate the California exclusionary rule and found that the omission of any mention of the exclusionary rule in the ballot itself or the ballot materials was not dispositive.³⁴⁹

The California Supreme Court ruled that, although it continued to find the reasoning of *Martin* persuasive, the subsequent amendment to the state constitution had abrogated target standing by narrowing the grounds on which relevant evidence could be excluded.³⁵⁰ Specifically, the court stated that "we conclude that Proposition 8 has abrogated . . . the 'vicarious exclusionary rule' under which a defendant had standing to object to the introduction of evidence seized in violation of the rights of a third person . . ." ³⁵¹

The court further noted that while it was its belief that:

exclusion of evidence obtained in violation of state and federal constitutional guarantees was a necessary, judicially declared, rule of evidence "because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers"³⁵²

and that not providing this additional protection, "virtually invites

347 *Id.* at 752. This proposition seems flawed because if one looks at the express language of the statute, as the court did to make this determination, then any reading of "[r]elevant evidence shall not be excluded in any criminal proceeding" cannot be read to not consider the evidence excluded in violation of the 4th amendment. *Id.* (quoting CAL. CONST. art. I, § 28(d)).

348 *Id.* at 753.

349 *Id.* at 751-55.

350 *Id.* at 747.

351 *Id.*

352 *Id.* at 750 (quoting *People v. Cahan*, 282 P.2d 905, 911-912 (Cal. 1955)).

law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them,"³⁵³ it was bound to honor the decisions of the people, because "[w]hether they are wise in that decision is not for our determination; it is enough that they have made their intent clear."³⁵⁴

Opinion on the accuracy of this interpretation of legislative intent is not entirely consistent. Justice Mosk held in dissent to *In re Lance W.* that he could not:

accept the argument that such a firmly established and fundamental rule, incorporated in section 13 and section 24 as a basic provision of California constitutional law, was impliedly overruled by the broad, nonspecific language of Proposition 8. Nothing on the face of section 28(d) or the ballot materials assertedly explaining it explicitly mentions section 24, section 13, or the exclusionary rule.³⁵⁵

Similarly, scholars postulate that it may be time to revisit the shaky holding in *In re Lance W.* due to the recent decline in federal Fourth Amendment protections.³⁵⁶

VII. Conclusion

Ultimately, Massachusetts has developed a framework for target standing that is entirely impractical. With over seven elements, the method of obtaining third-party standing in a Massachusetts criminal court is oblique at best and nonexistent at worst.³⁵⁷ However, as Alaska's model demonstrates, a straightforward rule for target standing does not signify an influx of suppressible evidence.³⁵⁸ Furthermore, when a state like Louisiana grants such a standing right through its constitution, evidence suggests it has minimal negative

353 *Id.* at 762-63 (quoting *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955)).

354 *Id.* at 752, 757.

355 *Id.* at 765.

356 Christopher T. Whitten, *Federalism—The Exclusionary Rule and the California Constitution*, 14 WHITTIER L. REV. 763, 765-66 (1993).

357 See discussion *supra* Section IV.

358 See discussion *supra* Section V.

impact on the court system and society at large.³⁵⁹

Then, why is there hesitation in Massachusetts courts? Certainly, the Supreme Judicial Court has never shied away from boasting the additional protections of article XIV.

Massachusetts has long believed in providing more Fourth Amendment protections through its article XIV. Specifically by, disregarding *Jones* and granting automatic standing,³⁶⁰ by requiring a stricter probable cause standard,³⁶¹ and by providing a less strict definition of “seizure” than required federally by *Hodari D.*, for purposes of determining when article XIV protection attaches,³⁶² and broadening the standard for probable cause utilizing a reasonable suspicion standard, rather than the totality of the circumstances test used federally.³⁶³

Massachusetts has also routinely suggested to observers that the Massachusetts Constitution is the older and decidedly wiser brother of the US version.³⁶⁴ The reasons given by the Supreme Judicial Court for not typically allowing target standing are the same outlined in *Rakas*; a concern about judicial efficiency and the necessity of probative evidence at trial.³⁶⁵

Nevertheless, as Louisiana and Alaska jurisprudence suggests, probative evidence is usually admitted, either by the result of the limitations imposed by the courts (such as the burden shifting inversions by the Louisiana Supreme Court) or the fact that standing does not remove the obligation to disprove that a warrantless search or seizure might still be constitutional.³⁶⁶

However, it does allow the defendant to get his or her foot in the door, and that is what matters. Although the Louisiana delegates at the

359 See discussion *supra* pp. 224-27.

360 Commonwealth v. Amendola, 550 N.E.2d 121 (Mass. 1990).

361 Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985).

362 Commonwealth v. Stoute, 665 N.E.2d 93, 97-98 (Mass. 1996). See California v. Hodari D., 499 U.S. 621, 629 (1991).

363 Commonwealth v. Lyons, 564 N.E.2d 390, 391-92 (Mass. 1990).

364 See e.g., Commonwealth v. Gonsalves, 429 Mass. 658, 667-68 (1999) (“The Declaration of Rights was adopted in 1780, as part of the Massachusetts Constitution, some seven years before the United States Constitution was approved.”); *Stoute*, 422 Mass. at 785-86, 96 n.10; *Lyons*, 409 Mass. at 18 (utilizing a “reasonable suspicion” standard to determine probable cause over the “totality of circumstances” standard adopted by the Supreme Court); *Upton*, 394 Mass at 372 (“The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States.”).

365 Commonwealth v. Scardamaglia, 573 N.E.2d 5, 7 (Mass. 1991).

366 See discussion *supra* Sections III, V.

1974 Convention might not have entirely realized the repercussions of their drafting, they did understand the importance of protecting innocent citizens and curtailing the powers of law enforcement.³⁶⁷ It seems that section 5 works in its limited way, as there are no calls from the law enforcement community to overturn it.

Similarly, when California had target standing, the state conducted a study that found that while the state allowed this vicarious standing, only 2.35% of the felony arrests in California were dismissed or had evidence suppressed which resulted in loss of the case.³⁶⁸

We contend that such an application of target-standing in Massachusetts will work similarly. It will protect citizens, ensure better and fairer police investigation and eliminate the struggle of trial courts to apply esoteric standards to every motion to suppress involving a third party.

367 See discussion *supra* Section III.

368 See David A. Macdonald, Jr., *Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course*, 69 TEMP. L. REV. 559, 588 n.229 (1990) (citing Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of the "Lost" Arrests*, 8 A.B. FOUND. RES. J. 611, 621 (1983)). See also *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984).

Making the Best of a Bad Beginning: Young New York Lawyers Confronting the Great Recession

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Abstract

In this Article, we utilize both quantitative and qualitative data to examine the impact of the 2007-2009 recession on lawyers who were admitted to the New York State Bar in 2008. This research examines the experiences of lawyers from a range of practice settings: large law firms; mid-sized firms; in-house corporate positions; federal, state, and local government; and public interest organizations. This variation allowed us to capture differences in experiences. We found that overwhelmingly the recession created financial and career insecurities for most lawyers in all practice settings, albeit in different ways. Particularly, while some large law firm lawyers experienced layoffs and deferrals, government lawyers experienced budget cuts that impacted their practice, and some public interest lawyers could not launch their careers altogether. In addition, the new lawyers in this study challenged the belief that a law degree is flexible and broadly applicable beyond conventional law settings. Further, in addition to feelings of job and income insecurity, these lawyers reported experiencing variable health consequences, including concerns about weight gain, depression, and alcohol dependence. Young lawyers working in law firms reported that their health was poorer than lawyers working in other

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settings, while young lawyers who indicated that they had chosen alternative professional career paths reported comparatively better health.

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INTRODUCTION

The recession that began at the end of 2007 and lasted until 2009 is often referred to as the Great Recession because it was the most serious financial crisis in the United States since the Great Depression.¹ The recession affected organizations, individuals, and communities, and its effects are still felt today.² It is not surprising then that the Great Recession impacted the practice of law, legal organizations, and lawyers broadly.

The goal of this empirical research is to shed light on the experiences of lawyers who were admitted to the New York State Bar and practiced law in the New York metropolitan area during the recession. Recent studies about lawyers and the recession typically

1 Mark S. Mizruchi, *The American Corporate Elite and the Historical Roots of the Financial Crisis of 2008*, in 30 *MARKETS ON TRIAL: THE ECONOMIC SOCIOLOGY OF THE U.S. FINANCIAL CRISIS* 405, 406 (Michael Lounsbury & Paul M. Hirsch eds., 2010). Some scholars estimate that the recession lasted beyond 2009. For example, Heejung Park, Jean M. Twenge, and Patricia M. Greenfield estimate that the recession occurred between 2008-2010. See Heejung Park, Jean M. Twenge & Patricia M. Greenfield, *The Great Recession: Implications for Adolescent Values and Behavior*, 5 *SOC. PSYCHOL. & PERSONALITY SCI.* 310, 310 (2014). However, according to the National Bureau of Economic Research, the recession began in December 2007 and ended in June 2009. See *The NBER's Recession Dating Procedure: Frequently Asked Questions*, NATIONAL BUREAU OF ECONOMIC RESEARCH, http://www.nber.org/cycles/recessions_faq.html (last visited Mar. 10, 2016); Chris Isidore, *Recession officially ended in June 2009*, CNN MONEY (Sep. 20, 2010), http://money.cnn.com/2010/09/20/news/economy/recession_over; see, e.g., *THE GREAT RECESSION* (David B. Grusky, Bruce Western & Christopher Wimer, eds., 2011); Sheldon Danziger, *Evaluating the Effects of the Great Recession*, 650 *ANNALS AM. ACAD. POL. & SOC. SCI.* 6 (2013); Thomas Cushman, *The Moral Economy of the Great Recession*, 52 *SOC'Y* 9 (2015).

2 Empirical research in a wide range of fields shows that the effects of the recession span micro, mezzo, and macro levels of society. See, e.g., Tim Slack & Candice A. Myers, *The Great Recession and the Changing Geography of Food Stamp Receipt*, 33 *POPULATION RES. & POL'Y REV.* 63 (2014) (finding that the Great Recession has been distinctive in driving up unprecedented levels of participation in the Supplemental Nutrition Assistance Program); Ariel Kalil, *Effects of the Great Recession on Child Development*, 650 *ANNALS AM. ACAD. POL. & SOC. SCI.* 232 (2013) (showing that the Great Recession may ultimately have negative effects on child development); Allard W. Scott, Maria V. Wathen & Sandra K. Danziger, *Bundling Public and Charitable Supports to Cope with the Effects of the Great Recession*, 96 *SOC. SCI. Q.* 1348 (2015) (suggesting persistent need among poor and near-poor households after the Great Recession, as well as the reality that many low-income households draw upon multiple sources of public assistance even when working).

rely on survey data.³ This study is unique because in addition to survey data, we also present findings from 31 in-depth interviews with young New York lawyers who were admitted to the New York bar in 2008 and essentially entered the practice of law at the onset of the recession.⁴

Another unique aspect of this empirical research is that, unlike similar studies of lawyers that primarily focus on the experiences of lawyers who practice in large law firms,⁵ this study covers the broad landscape of lawyers' experiences by examining these experiences in a variety of practice settings: large, midsized, and small law firms; in-house legal departments; federal, state, and local governments; and public interest organizations. There are significant nuances in the experiences of the lawyers in these different private settings. Principally, we found that the recession had negative effects on the careers of new lawyers. However, as we demonstrate, since lawyers are generally individuals with social, economic and cultural capital, the respondents in our study were hopeful that lawyers would be able to revive their careers despite the economic downturn.

Significantly, we do not find support among our young New York lawyer respondents for the conventional assumption that a legal education well equips law graduates for a wide range of employment possibilities — that is, we do not find evidence to support the J.D. Advantage. The new lawyers in this study challenged the belief that a law degree is flexible and broadly applicable beyond conventional law settings, providing a broad blanket of occupational protection

3 While empirical research on the effects of the Great Recession on lawyers is limited, most available research relies exclusively on quantitative data and methodologies. See, e.g., Deborah Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 3 MICH. L. REV. 1043 (2015); but see Samantha Robbins, *From Big Law to Legal Education: The Trickle Down Effect of the Recession*, 27 GEO. J. LEGAL ETHICS 841, 841-58 (2014).

4 Three of our interview respondents were admitted to the New York State Bar in 2009 and 2010. See *infra* note 22 in the research design and methods section for further explanation.

5 See, e.g., Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289 (2010); Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 135, 135-53 (2009); Steven A. Boutcher, *Rethinking Culture: Organized Pro Bono and the External Sources of Law Firm Culture*, 8 U. ST. T. L. J. 108, 108-28 (2010-2011).

in a time of economic malaise. Nonetheless, like many previous studies, a large majority of the sampled New York lawyers indicated that they were generally satisfied with their careers in law, even during a serious recession.⁶ Our findings provide insight into this apparent contradiction.

We further find that a significant number of lawyers in our study reported that they chose “alternative” professional career paths as a result of the recession, and that this resulted in their feeling physically healthier than their peers. In contrast, those who decided to stay on in conventional career tracks, such as in large law firms, tended to report being in worse health than their peers. Curiously, these traditionally inclined young lawyers generally reported being no less satisfied by sticking to their more traditional career path. This sacrifice of good health in pursuit of apparently still-satisfying careers in law is a focus of our attention.

This Article is organized in four parts. In Part I, we discuss prior research and scholarship on lawyers and the Great Recession. Part II is dedicated to explaining our research design and methods. In Part III, we delve into the impact of the recession on lawyers’ careers with particular focus on lawyers who were admitted to the New York State Bar in 2008. Additionally, we discuss the experiences of lawyers in different practice settings, and the health and wellness consequences of the choice of lawyers’ career paths. In Part IV, we address the aftermath of the recession, noting some positive consequences that some of our interview respondents provided. We also discuss lawyers’ ability to weather the economic storm. Finally, we report our finding that young lawyers believe that a legal education is worthwhile for the practice of law, rather than the belief that a law degree could potentially open doors of opportunity in non-law related careers. We conclude by noting that despite the negative experiences of the young New York lawyers in this study, the majority of these lawyers reported being satisfied with the circumstances and possibilities of their career paths, even if these pathways exposed them to elevated health risks in comparison to their peers.

6 Although some studies have found some dissatisfaction among lawyers, a range of studies have found that lawyers are generally satisfied with their careers. See generally Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC’Y REV. 1 (2007); see also David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251 (1989); Sterling & Reichman, *supra* note 5, at 2299.

I. Prior Research on Lawyers and the Great Recession

The National Bureau of Economic Research reported that over 7.4 million jobs were lost during the Great Recession, causing the national unemployment rate to jump from 5% to over 9%.⁷ The causes of the Great Recession are diverse and difficult to untangle. However, by mid-2009, the crisis led financial institutions to collapse, causing a severe economic contraction, a major decline in foreign trade, price deflation, and ultimately, a rise in unemployment.⁸

The Great Recession was therefore a major factor that impacted external relationships and internal processes within organizations, including law practice and the overall organization of the legal profession.⁹ Business activities at most law firms slowed down considerably. Firms began shedding support staff, freezing and reducing salaries, changing compensation mechanisms, deferring offers of employment, cutting down on associate positions, and even laying off partners.¹⁰

In 2009, LexisNexis conducted a survey of 450 lawyers and 100 law students to uncover some of the impact of the 2008 recession on the legal profession.¹¹ Of the 550 respondents surveyed, 300 were law firm lawyers, 150 were in-house corporate counsel, and 100 were law school students.¹² According to the survey, law firms took a number of steps by 2009 to respond to the changing economic climate: 43% of the private firms laid off lawyers, 41%

7 William M. Rodgers III, *The Great Recession's Impact on African American Public Sector Employment* 1, 3 (Nat'l Poverty Ctr., Working Paper No. 12-01, 2012).

8 Mauro F. Guillén & Sandra L. Suárez, *The Global Crisis of 2007-2009: Markets, Politics, and Organizations*, in 30 *MARKETS ON TRIAL: THE ECONOMIC SOCIOLOGY OF THE U.S. FINANCIAL CRISIS* 225, 256 (Michael Lounsbury & Paul M. Hirsch eds., 2010).

9 See generally Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 *MD. L. REV.* 341 (2011); Robbins, *supra* note 3; Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 *FORDHAM L. REV.* 2051 (2010); Allan B. Diamond, Andrew E. Jillson & E. Lee Morris, *Law Firm Insolvencies and Bankruptcies*, Presentation at the University of Texas School of Law CLE: Jay L. Westbrook Bankruptcy Conference (Nov. 20-21, 2014).

10 See Veronica Root, *Retaining Color*, 47 *U. MICH. J. L. REFORM* 575, 583-84 (2014); Sterling & Reichman, *supra* note 5, at 2297-98. The Great Recession also facilitated the dissolution of partnerships and the bankruptcy of law firms. See generally Diamond, Jillson & Morris, *supra* note 9.

11 See LEXISNEXIS, *STATE OF THE LEGAL INDUSTRY SURVEY: COMPLETE SURVEY FINDINGS* (2009).

12 *Id.*

offered alternative fee arrangements, 33% imposed hiring freezes, 29% deferred employment start dates, and 26% reduced salaries.¹³ Therefore, most law firms made economic decisions that impacted their employees — with the ostensible goal of successfully weathering the recession.¹⁴

In a second study, Deborah Merritt used publicly available online employment data to explore the impact of the recession on lawyers admitted to the Ohio State Bar in 2010 as compared to the class of 2000.¹⁵ Merritt found that even after some years in practice, the class of 2010 struggled to secure jobs following admission to the bar, whereas the class of 2000 did not.¹⁶ She also found that those who secured law firm positions in the class of 2010 more often worked as staff attorneys instead of as conventional associates, and as a result they earned lower salaries.¹⁷ Merritt's research also suggests that the demand for new lawyers had not increased, but supply exceeded demand.¹⁸

To the best of our knowledge, there is no widely accessible research that examines (with in-person and open-ended field interviews) the actual experiences of lawyers admitted to the bar during the 2008 Great Recession. In addition, no research during this period comprehensively considers the wide range of legal practice areas that includes the private sector, government, and public interest lawyers. The newly admitted lawyers to the New York bar whom we studied were on the front line of the legal profession and experienced the economic collapse at the very outset of their legal careers. The experiences of this unique and compelling cohort are worthy of investigation not only because the legal community did not fully understand the impact of the recession on lawyers' careers, but also because the experiences of these lawyers inform us about the current and future landscape of the legal profession.

13 *Id.*

14 Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 28-29 (2011) (reporting that "from January 1, 2008 through January 31, 2010, the Law Shucks website documented 14,347 people laid off by 'major' law firms." In addition, "the total number of attorneys in the NLJ 250 decreased 4.3% in 2009 compared with 2008, and another 1.1% in 2010, only the second period since the National Law Journal started compiling these statistics in 1979 that the total has decreased").

15 *See generally* Merritt, *supra* note 3.

16 *Id.* at 1073.

17 *Id.* at 1074-75.

18 *Id.* at 1110.

II. Research Design and Methods

This research includes both survey data and 31 in-depth interviews of young New York lawyers who experienced the recession at the beginning of their legal careers. Modeled after the widely cited 2000 *After the JD* study — which several scholars have utilized in the study of lawyers and the legal profession¹⁹ — we developed the sampling frame from the New York State Office of Court Administration database. For the survey sample, we included everyone with an address in New York City or in New York City's primary metropolitan statistical areas (PMSAs). The sampling frame included the following eight counties: Bronx, Kings, New York, Putnam, Queens, Richmond, Rockland, and Westchester. We randomly selected 1,757 lawyers who were newly admitted to the New York State Bar in 2008 as our sampling frame — a frame that with an approximate 10% response rate would yield 100-200 young lawyers who entered the profession during the Great Recession. The survey phase of the project lasted from July to December 2014.

In addition to the usual problems of public survey fatigue and the unique challenges of sampling a busy professional group, we were sampling a group still in the midst of the daunting stress and discouragement of the recessionary period. As New York City was the epicenter of the 2008 financial collapse, our expectation was that the New York metropolitan area might be the most difficult of U.S. regions to survey. For example, a parallel and recently published post-recession 2010 mail-back national survey study of lawyers from four representative regions of the United States yielded an overall response rate of 12.7%, with a regional range of 8.8-15.8%.²⁰ Therefore, our response survey response rate of 10.8%

19 See, e.g., RONIT DINOVIETZ, BRYANT G. GARTH, RICHARD SANDER, JOYCE STERLING & GITA Z. WILDER, *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* (Janet E. Smith et al. eds., 2004); RONIT DINOVIETZ, ROBERT NELSON, GABRIELE PLICKERT, REBECCA SANDEFUR & JOYCE S. STERLING, *AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* (Janet E. Smith et al. eds., 2010); RONIT DINOVIETZ, ROBERT NELSON, GABRIELE PLICKERT, REBECCA SANDEFUR & JOYCE S. STERLING, *AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* (Janet E. Smith et al. eds., 2014); Sterling & Reichman, *supra* note 5.

20 Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO WASH. L. REV. 554, 570-71 (2015).

was perhaps surprisingly high given the economic problems of the New York financial and legal sectors. Indeed, one of the interview respondents in this study asked about our response rate and offered this interpretation of the result:

I think people who generally had bad experiences don't always want to share them. So you went after this target group because it was a stressed group, but I think you saw suffering. If people had had a great experience and you went after people in 2001, you might have had the normal return of surveys — if you had sent out 1,700, you might have gotten 30-40 percent back, which would have been a good yield . . . People don't necessarily want to share their woes.²¹

Despite the 10.8% response rate for this group of respondents, we were concerned about how representative the respondents would be. The New York State Office of Court Administration database contained useful information on three dimensions — gender, work organization, and law school ranking — to comparatively assess the representativeness of our sampled lawyer respondents relative to the sampling frame from which they were drawn. In terms of each characteristic compared in **Table 1**, the results were encouraging. The gender composition of the sample replicated nearly exactly the sampling frame, and the proportion of top-tier law graduates was only slightly different in composition. The law firm practice representation in the sampling frame was somewhat greater than in the sample, but not by a large number. Overall, the sampled population of New York lawyers entering the practice of law in 2008 was highly representative — half were female, half were practicing in law firms, and about a quarter graduated from a top-tier (top 10) law school.

21 Interview 28, in New York, N.Y. (July 6, 2015) (on file with authors).

TABLE 1

Comparison of Entering New York Lawyer Sampling Frame and Sample, Circa 2008 Great Recession

Characteristics	Sampling Frame (n)	Sample (n)
Gender (Female)	47.2% (819)	48.7% (92)
Organization (Law Firm)	55.2% (967)	47.1% (89)
Law School (Top Tier)	25.4% (442)	22.2% (42)

We focused on four main subject areas in our survey: (1) effects of the 2008 recession; (2) the new lawyers' work experiences; (3) their demographic characteristics, and; (4) their work-life experiences. Our research design included a mailed introductory announcement letter, two paper surveys, and two reminder postcards, coordinated with access to an individualized online version of the paper survey. We hired a web hosting company to design the electronic survey and to manage the survey website in coordination with American Bar Foundation project directors.

Of the respondents who completed the paper survey, 28 were willing and available for an in-person interview during the spring and summer of 2015. We then included 3 additional respondents from the class of 2009 and 2010 making for 31 total respondents.²² Interviews were conducted either in respondents' offices or in coffee shops. The length of interviews ranged from 25 minutes to about 1 hour and 15 minutes with the average interview lasting for approximately 30 minutes. As planned, both the interviewed and surveyed lawyers had a variety of legal experiences, ranging from large law firms,²³ to in-house legal departments or banks, state and local government agencies, midsized law firms,²⁴ small firms,²⁵ public interest lawyers, and one lawyer who no longer practices law.²⁶ Interviews were conducted in person and audio recorded with

22 Of the 31 lawyers interviewed, 28 were admitted to the New York bar in 2008, 1 was admitted to the New York bar in 2009, and 2 were admitted in 2010. To capture the experiences of lawyers who graduated from law school during the recession (2008-2009), but were admitted to the New York bar in other years, we asked some of our respondents who were admitted to the bar in 2008 to refer us to individuals who were admitted to the bar in 2009 and 2010. We obtained the 3 respondents who were admitted to the bar in 2009 and 2010 as a result of these referrals.

23 We define large law firms as those with 150 or more lawyers.

24 We define midsized law firms as those with 50-150 lawyers.

25 We define small law firms as those with 10 or fewer lawyers.

26 Of the 31 interviews, 7 were large law firm lawyers, 2 worked at midsized law

the consent of the participants and transcribed verbatim. Interviews were coded using ATLAS.ti qualitative data software.

III. Impact of the Recession on New Lawyers

A. Effects Across Sectors

Most of the lawyers in this study graduated from law school in 2007 and were admitted to the New York State Bar in 2008. Interviews indicate that in comparison to bar classes 2009 and later, the bar class of 2008 may have been somewhat less affected, since it took a while for the legal profession to feel the full financial fallout of the recession. For example, one law firm associate from the 2008 class explained that, “[t]his was not a time when the [effect of the] recession was fully foreseeable.”²⁷ The same associate elaborated:

I came in at a . . . good time to weather [the recession]. If it had been a year later, I probably wouldn’t be sitting here. If it were any different in time it would have made a big difference. In fact, if I had taken a year to go clerk or taken a year to do public interest work, I probably wouldn’t be sitting here, because it was just a matter of timing.²⁸

Nonetheless, another respondent observed that by the end of 2007, “all of a sudden, the market completely crumbled,”²⁹ and he wondered whether he was entering “a dying industry.”³⁰

Table 2 shows the impact of the recession on entry into the legal profession. 95% of respondents reported that the recession negatively impacted them. This was typically the feeling for lawyers working both in firms and in other settings.

firms, 2 worked at small law firms, 8 worked in house within corporations, 8 worked in various government agencies, including federal, state and local government, 3 worked for public interest organizations, and 1 no longer practiced law. The lawyer who no longer practiced law is now a legal recruiter.

27 Interview 15, in New York, N.Y. (March 23, 2015) (on file with authors).

28 *Id.*

29 Interview 26, in New York, N.Y. (July 28, 2015) (on file with authors).

30 *Id.*

TABLE 2

Perceived Impact of 2008 Great Recession on Entering New York Lawyers Practicing in Law Firms and Other Settings

Impact	Law Firms	Other Settings
Impact Negative	95.5% (85)	94.0% (6)
Adversely Affected Loans	23.6% (21)	16.0% (16)
Chose Alternative Professional Path	9.0% (8)	19.0% (19)*
Struggled to Find Job	41.6% (37)	33.0% (33)
Learned to Spend Efficiently	25.5% (20)	16.0% (26)
Focused on Building Networks	16.9% (15)	14.0% (14)
Delayed Family Formation	16.9% (15)	23.0% (23)
Delayed Investment and Saving	37.1% (33)	32.0% (32)
Pursued Non-Work Interests	3.4% (3)	2.0% (2)
Focused on Family	4.5% (4)	2.0% (2)
Chose Non-Profit Work	4.5% (4)	4.0% (4)
Chose International/Non-Profit Work	0% (0)	2.0% (2)
Temporarily Left Law	3.4% (3)	3.0% (3)
Permanently Left Law	1.1% (1)	4.0% (4)
Changed Geographic Area	1.1% (1)	4.0% (4)

* $p < .05$.

Thus, despite the fact that, in theory, the bar class of 2008 lawyers were somewhat insulated from the recession, some — such as those who lost the jobs they worked hard to find — became early casualties of the recession. For example, a young lawyer who was initially hired as a summer associate in a large firm, was retained and then summarily laid off. This attorney stated:

I was really honestly angry, disappointed. The reality is once you get into a big law firm you kind of feel you're set for a while and I got in during the good times of 2007 and I was doing really well so it was really frustrating to be part of the layoff.³¹

31 Interview 1, in New York, N.Y. (July 28, 2015) (on file with authors).

More than one third of the respondents depicted in Table 2 reported that they struggled to find their first positions after graduating law school. As such, many of the lawyers in the bar class of 2008 were highly motivated to keep their jobs for fear of not being able to find another position.³² A lawyer from the bar class of 2008 explained: “While I wasn’t feeling entirely happy with my first job, it was discouraging to think about doing a job search because I knew how bad it was out there; it was unlikely I would be able to find something else, so I probably had more anxiety about what opportunities were available to me than I would have otherwise.”³³ New lawyers at this time were understandably disinclined to abandon their jobs in pursuit of alternative positions. This may be important to remember when considering our findings about young New York lawyers who chose to pursue alternative professional career paths.³⁴

A further source of anxiety during the Great Recession related to student loans. About one fifth of respondents reported distress over the loans they took out in order to go to law school.³⁵ Student debt is a pervasive issue for many,³⁶ and as the data from this study indicates, the recession exacerbated this financial stressor for young lawyers who struggled to find employment or who lost jobs. In

32 See ROBBINS *supra* note 3, at 848 (observing that the fear of losing employment is also a reality for lawyers who graduated from law school after 2009).

33 Interview 1, in New York, N.Y. (July 28, 2015) (on file with authors).

34 See *infra* III.C. In this study, we left the young lawyers responding in the survey to decide what exactly choosing “an alternative professional path” meant to them, rather than defining the parameters of that choice. It would not have been possible to come up with and cogently define the terms “alternative” and “conventional” as used throughout this article since the term “alternative” has variable yet real meanings, and the consequences of these variable meanings are real in their consequences, as we demonstrate. This idea is known by sociologists as the “Thomas Effect,” developed by W.I. Thomas. The Thomas effect essentially states that “if men define situations as real, they are real in their consequences.” See Robert K. Merton, *The Thomas Theorem and the Matthew Effect*, 74 SOC. FORCES 379, 380 (1995).

35 See *supra* Table 2.

36 Student debt is not unique to law students and the legal profession. High student debt has been reported for medical school students as well. See, e.g., Paul Jolly, *Medical School Tuition and Young Physicians’ Indebtedness*, 24 HEALTH AFFS. 527 (2005); Louis Weinstein & Honor Wolfe, *A Unique Solution to Solve the Pending Medical School Tuition Crisis*, 203 AM. J. OBSTETRICS & GYNECOLOGY 19 (SPECIAL EDITION) 1 (2010). Outside of professional degrees, college students also experience high debt. See, e.g., Josipa Roksa & Richard Arum, *Life After College: The Challenging Transitions of the Academically Adrift Cohort*, 44 CHANGE 8, 10 (2012).

addition to creating financial stress, many respondents commented that student loan debt diminished the value they attached to their law degrees, and that their legal education failed to provide the financial return they expected.³⁷ For example, two private sector lawyers — one who worked for a bank and one who worked for professional a service firm — commented on this.³⁸ The lawyer who worked for a bank explained that:

If all goes according to plan, I'll probably be finishing paying off my loans when I'm my parents' age now That burden, I say it's like being shackled to a corpse because you're just dragging it around; it does nothing, but [it] dictates what you can and can't do. In all likelihood, if I'd had the choice after I lost my job, I would have cut my losses and never looked at law again . . . it's just left me in a bad kind of thinking as to the profession as a whole.³⁹

The lawyer who worked for a professional service firm added:

I'm in a good spot, and I make good money, but the people who didn't get jobs, they're still struggling. It's a new reality [for them] — working contract

37 This finding is consistent with research conducted by Professor Creola Johnson. See CREOLA JOHNSON, *IS A LAW DEGREE STILL WORTH THE PRICE?: IT DEPENDS ON WHAT THE LAW SCHOOL HAS TO OFFER YOU* (2014). A recent study by Gallup and Access Group also had similar findings. See GALLUP & ACCESS GRP., *LIFE AFTER LAW SCHOOL: A PILOT STUDY EXAMINING LONG-TERM OUTCOMES ASSOCIATED WITH GRADUATING LAW SCHOOL AND THE VALUE OF LEGAL EDUCATION* 8 (2016), http://www.enr-corp.com/photodir/USR1024139_171035_GallupReportLifeAfterLawSchoolFINAL.pdf. The study included interviews with alumni of seven southeastern U.S. law schools (Campbell Law School, Elon Law, Mississippi College School of Law, Nova Southeastern University (NSU), Shepard Broad College of Law, Samford University's Cumberland School of Law, University of Richmond School of Law, and Vanderbilt Law School) to understand perspectives on law school experiences and evaluate the influence of a legal education on postgraduate outcomes. 39% of participants said that their law degree was worth the cost; however, this percentage varied significantly by the total loan amounts graduates accumulated to procure their law degree and how recently they obtained it. See *id.*

38 See Interview 12, in New York, N.Y. (July 29, 2015) (on file with authors); Interview 3, in New York, N.Y. (July 30, 2015) (on file with authors).

39 Interview 12, in New York, N.Y. (July 29, 2015) (on file with authors).

jobs, doing doc review — it's insane. They paid all this money for a professional degree, and they're doing what you don't need to be a lawyer [to do]. They're just reading documents . . . I feel bad [sic], it's unfortunate, I don't feel optimistic at all.⁴⁰

The first respondent above explained that his student loans were a huge burden to his career.⁴¹ He explained the restrictive nature of student debt by comparing carrying the weight of his loans to being “shackled to a corpse.”⁴² Although the second lawyer felt his own situation was satisfactory, he empathized with other lawyers who were forced to take undesirable jobs that did not require a law degree because of the recession.⁴³

Government and public interest lawyers also experienced recession-based setbacks involving student loans. For example, raises for government attorneys were eliminated or reduced during the recession, which made loan repayment difficult.⁴⁴ A public interest lawyer explained that loan forgiveness would only help if she remained a public interest lawyer for at least 10 years.⁴⁵

As indicated in **Table 2**, about one-third of respondents, both in firm practices and in other work settings, reported that they had delayed saving money or making investments because of the recession. Additionally, about one-fifth of respondents reported they had been forced to learn how to more efficiently spend the money

40 Interview 3, in New York, N.Y. (July 30, 2015) (on file with authors).

41 Interview 12, in New York, N.Y. (July 29, 2015) (on file with authors).

42 *Id.* The recent Law School Survey of Student Engagement (LSSSE) of more than 20,000 students attending 80 law schools in the U.S. and Canada, which is conducted annually by Indiana University's Center for Postsecondary Research, found that law students who expect to owe more than \$80,000 in student loan debt by the time they graduate are at an increased risk of experiencing high levels of stress or anxiety while attending school. *See generally* AARON N. TAYLOR ET AL., HOW A DECADE OF DEBT CHANGED THE LAW SCHOOL EXPERIENCE: 2015 ANNUAL SURVEY RESULTS 19 (2015) <http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE-Annual-Report-2015-Update-FINAL-revised-web.pdf>.

43 Interview 3, in New York, N.Y. (July 30, 2015) (on file with authors).

44 Interview 30, in New York, N.Y. (Mar. 24, 2015) (on file with authors) (explaining that when he did not get a raise because of the recession, his actual income was even lower because of monthly loan repayments).

45 Interview 14, in New York, N.Y. (July 28, 2015) (on file with authors) (stating that if she were to leave public service prior to completing the required 10 years, repaying her loans even over the course of her life would be impossible).

they were earning. They felt more efficient but simultaneously less secure than they had hoped and expected.

Prior to the recession, it was standard practice — particularly for those from elite law schools — to work in a law firm after graduation.⁴⁶ These new attorneys often chose to work at law firms because of the rewards of money, prestige, and training. They also worked in firms for the opportunity to work on matters involving challenging legal questions, and to make constructive contributions to clients and their law firms.⁴⁷ However, the recession brought new insecurities to practicing law at a large firm. Even lawyers who did not experience layoffs or have student loan problems felt uncertain about their positions, especially as they learned about members in their cohorts losing their jobs.⁴⁸ For example, a 2008 bar class attorney reported:

I remember around that time people would share rumors at work, about “big layoffs coming.” . . . It definitely negatively impacted the work environment . . . everyone was on their toes, doors were closed, people were just not happy. People were freaking out if they weren’t billing a certain number of hours — they thought if there’s a big layoff coming, whoever is not billing over x number of hours will automatically get laid off. I felt there was this negative energy at the office for a good amount of time.⁴⁹

Large law firm lawyers greatly felt the negative energy described by the lawyer above. Many attorneys in this study reported feeling dispensable and working harder than they had before the recession to show that they deserved to keep their jobs. A large law firm lawyer described the situation:

Working in a law firm, particularly during a recession, has taught me that I was dispensable. I think you leave

46 Sterling & Reichman, *supra* note 5, at 2302.

47 Dilloff, *supra* note 9 at 342; William C. Kelly, Jr., *Reflections on Law Morale and Public Service in an Age of Diminishing Expectations*, in *THE LAW FIRM AND THE PUBLIC GOOD* 91 (Robert A. Katzmann ed., 1995).

48 Interview 11, in New York, N.Y. (July 26, 2015) (on file with authors) (An attorney from the bar class of 2008 explaining that “nothing [was] secure, and what you thought when you went to law school [was] basically not true anymore”).

49 Interview 10, in New York, N.Y. (June 25, 2015) (on file with authors).

law school thinking, “Oh yeah, I’m special, I’m doing this, I’m doing that.” No, you are very dispensable. You need to turn in quality work, turn it in quickly without complaining. I think it taught me how to do high-pressure work under strict timetables.⁵⁰

Most study participants reported working hard as a hedge against fears about the economic future.

B. Impact by Professional Setting

While our survey data revealed considerable evidence of similarities between the experiences of lawyers in firm and non-firm settings, it would be misleading to lump together the experiences of lawyers from all practice backgrounds without highlighting some of the differences in their experiences resulting from the recession. Important points of difference became apparent in our field interviews with lawyers in private, government, and public interest settings.

1. Private Sector Lawyers

Private sector employers — law firms and in-house legal departments — found ways to cope with the recession, including laying off employees, deferring hiring commitments, retracting offers, reducing hours, and cutting pay.⁵¹ A lawyer described her experience as a deferred large law firm associate, an experience that involved taking professional detours that she, along with others, had not expected:

Luckily, one of my friends who was working at a different firm had a relationship with the county district attorney’s office and through her, I found out that the office was actually hiring a full class of deferred associates. So all of us — almost 30 of us — were big firm hires who were all deferred, three of us were only deferred for a few months, most of us were

50 Interview 7, in New York, N.Y. (Mar. 23, 2015) (on file with authors). See also Interview 10, in New York, N.Y. (June 25, 2015) (on file with authors) (explaining “I would say it definitely made me work harder, because I was so scared just to not have a job”).

51 See generally LEXISNEXIS, *supra* note 11, at 6.

deferred for a year or more, so they brought us on for a whole year and it was free labor for them. They didn't pay us anything, they didn't have to worry about benefits for us.⁵²

As this account indicates, some law firms paid deferred associates' salaries in government and public interest positions, but these alternative salaries were characteristically a fraction of what their earnings would have been had they moved into firm positions as initially expected. One law firm associate explained:

So in my case, around March 2009, two months before graduation, they approached us and they offered a voluntary deferral. I didn't have to do it but they had partnered with a lot of agencies and [law firm] was very close with the [] District Attorney's office through a program they had for mid-level associates . . . so I took the deferral and worked in the [] DA's office for one year. So my entire first year, under that arrangement [law firm] actually paid us, not our big law salary, but they paid us half of that, which frankly was still more than what first year ADAs got paid so that was a good experience.⁵³

Law firms also rescinded offers made to law students prior to the recession. One associate in the bar class of 2008 explained how his employment offer got rescinded:

It's January of 2007 and I go to my career counselor at the law school and I say "I don't know what to do; they're not answering my phone calls, not returning my emails" . . . so she phoned the firm and the firm said "we're not giving any offers to anybody," the reason behind which no one really knew.⁵⁴

52 Interview 9, in New York, N.Y. (July 26, 2015) (on file with authors).

53 Interview 3, in New York, N.Y. (July 30, 2015) (on file with authors). At the time of this study, the largest law firms in New York paid their associates a starting salary of \$160,000. See Marc Galanter & William Henderson, *Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1870 (2008).

54 Interview 17, in New York, N.Y. (July 27, 2015) (on file with authors).

Law firms also took other seemingly less drastic measures in response to the recession. A large law firm associate explained that she did not get laid off, but was transferred from the litigation department to the bankruptcy department, and one of her friends who had taken a year off to clerk for a judge “had to take a couple of years cut in her rank, so she went in a couple of years below.”⁵⁵ As this associate explained, some large law firms decided to give some of their associates a year off with pay:

They had all these associates who they had on payroll that weren’t working; they offered some of them half of their salary and a year off; they didn’t have to do anything, they kept their benefits, they could travel the world, they could work for a nonprofit, and they were still employees [of the firm].⁵⁶

Another associate at a different large law firm got a reduced salary in order to keep his job:

I remember it — the word had kind of gotten out that layoffs were happening. Everybody was sitting in their office just waiting for the knock on their door, which was excruciating that day. And actually they came and knocked on my door, and the partner — the sense of dread I felt as soon as I saw him . . . but they essentially told me, “You were slated to be laid off, but if you can reduce your time we can keep you.” And so I went on reduced 3/4 time . . . which was about a 25% drop in salary.⁵⁷

A third large law firm associate noted that some firms that hired judicial law clerks stopped doing so as a result of the recession. Essentially,

[S]ome people had gone to clerk when the market was good with the understanding that they would have a job, and [then] everything turned upside down, and the firms wouldn’t consider deferring or waiving a clerkship

55 Interview 7, in New York, N.Y. (Mar. 23, 2015) (on file with authors).

56 *Id.*

57 Interview 18, in New York, N.Y. (Mar. 23, 2015) (on file with authors).

bonus or any of those sorts of things and other similar large firms just wouldn't take people back.⁵⁸

A parallel literature on the impact of the recession on small and mid-sized law firms is comparatively sparse but still informative. Ward Coe III observed that several managing partners at mid-sized firms reduced or delayed their compensation to avoid firm layoffs.⁵⁹ Our interviews indicated that mid-sized law firms experiencing the effects of the recession used strategies that negatively impacted their associates, including lowering salaries and engaging in layoffs.⁶⁰ An associate in a mid-sized law firm believed that his employer took advantage of the recession to pay subpar salaries to associates: "The firm . . . knew that once the market crashed and there were no jobs, they could take advantage of people and get away with some stuff that they normally wouldn't — I was making \$45,000."⁶¹ The same lawyer explained how other associates at his firm also experienced pay reductions: "They said 'the recession has now hit us, now we'll be taking back the raise that we gave you, and everyone is getting a two percent pay cut across the board' . . . and two months later layoffs started happening."⁶² A lawyer who worked as an in-house counsel for an interior design company said that her corporate employer "asked [her] to come in for fewer hours for a few months and then [the lawyer] came back full time again."⁶³

Therefore, our findings show that lawyers in the private sector experienced negative career outcomes as a result of the recession; the difference is a matter of degree. Generally, lawyers who retained their jobs in the private sector experienced a range of modifications

58 Interview 22, in New York, N.Y. (July 22, 2015) (on file with authors).

59 See Ward B. Coe III, *Profound "Nonchanges" in Small and Midsize Firms*, 70 MD. L. REV. 364, 371 (2011). Coe III's article focuses on firms in the state of Maryland and addresses how small and mid-sized firms were equipped to survive the Great Recession. Some of the reasons discussed in his article include the fact that smaller and mid-sized firms engage in minimal borrowing and maintain leaner staff. Coe III also explains that because of the recession, investors in the subprime market have turned to small and mid-sized firms for their legal representation needs rather than relying on large law firms. *Id.*

60 See *id.* It is likely that there is a difference between our findings and Coe III's findings because Coe III focuses mainly on firms in Maryland, while our findings are primarily from New York. *Id.*

61 Interview 17, in New York, N.Y. (July 27, 2015) (on file with authors).

62 *Id.*

63 Interview 2, in New York, N.Y. (July 30, 2015) (on file with authors).

to their employment structures or pay, whether they practiced in large firms, mid-sized firms, or as in-house counsel.

Specifically, as discussed above, large law firm lawyers were more likely to experience deferrals, but also experienced layoffs or minor modifications to their work structures. Mid-sized law firm lawyers experienced pay cuts and layoffs, while in-house counsel were more likely to retain their employment, but also received modified employment structures. The next section examines the experiences of government lawyers during the recession.

2. *Government Lawyers*

Unlike private sector employees who experienced layoffs and deferrals, government lawyers from the bar class of 2008 were better shielded from losing their jobs as a result of the recession. A lawyer for the City of New York described experiencing a reprieve that benefited many government lawyers, “I work for the city government, I think overall city employees were not really affected by the recession . . . I was working for the same office when I graduated and became admitted, so I wasn’t worried . . . absolutely, nobody was fired in city government because of the recession.”⁶⁴

Still, government employees experienced difficulties associated with budget cuts and financial strains within departments, with some employees experiencing pay freezes. There were other difficulties as well, such as finding other government employment opportunities. A government lawyer from the bar class of 2008 explained:

There’s just not as many options and while I have a good job now, I’m very hesitant to try something else because if you make the wrong decision you might not be able to get a job or a very good job in the future . . . I was actually just offered a different job two weeks ago within the government organization and I turned it down in part because I was concerned that if it was the wrong move, it’s very hard to necessarily rectify or get a good position.⁶⁵

64 Interview 30, in New York, N.Y. (Mar. 24, 2015) (on file with authors).

65 Interview 31, in New York (July 30, 2015) (on file with authors).

Another government lawyer remarked:

In government, there was a feeling of “well we should be grateful there aren’t any layoffs” but at the same time, are they really being completely honest, am I really getting the best deal or are they taking advantage of the situation and just not giving us other benefits or really using this as an excuse to not address other concerns that are going on here?⁶⁶

The above government lawyer spoke about wondering whether his government employer took advantage of the recession to withhold certain employment benefits or pay.⁶⁷ A federal government lawyer from the bar class of 2008 explained that normally, on average, they would receive a 2% to 3% annual pay increase, but a pay freeze began in 2008 that saw no salary increases until the freeze was lifted in 2012.⁶⁸ State government lawyers also experienced pay freezes. One state government lawyer reported that “there was a complete freeze and we were not keeping up with inflation and we were not getting any percentages. I had been promoted twice within that time period and my salary did not increase with those promotions, so I was thinking ‘I am doing more work for less money.’”⁶⁹

In addition, government employers used other means besides layoffs to reduce their workforce during the economic crisis. A state government lawyer explained how a workforce reduction and hiring freeze limited her ability to move across departments: “They didn’t lay anyone off but they really shrunk the entering class to almost no one, and there was also for a while no movement within. You couldn’t switch to a different department because no one was leaving and they weren’t hiring new people.”⁷⁰

Another state government lawyer explained how hiring freezes and budgetary constraints impacted her legal practice:

The recession definitely impacted my work in a lot of ways because [my agency] had particular hiring

66 Interview 22, in New York, N.Y. (July 22, 2015) (on file with authors).

67 *Id.*

68 Interview 25, in New York, N.Y. (July 2, 2015) (on file with authors).

69 Interview 29, in New York, N.Y. (July 26, 2015) (on file with authors). The feeling of being undercompensated during the recession was prevalent among government lawyers, especially on the state and local government levels. *See id.*

70 Interview 32, in New York, N.Y. (July 1, 2015) (on file with authors).

freezes, so they weren't hiring new attorneys for a bit . . . my job was mostly affected by the various time constraints, the high caseloads that we were carrying because they weren't hiring as many attorneys to replace attorneys who were leaving.⁷¹

Therefore, while government lawyers may not have experienced layoffs as a result of the recession, government employers were not hiring many new lawyers and used pay freezes to cope financially in a manner that impacted their lawyers' legal practices.

3. *Public Interest Lawyers*

For the purposes of this study, a public interest lawyer practices law in a legal aid organization providing legal services to the poor.⁷² The recession had a major impact on the careers of public interest lawyers. Many public interest employers lost funding, and there was an active transfer of employees from the private sector to the public interest sector, compromising the careers of lawyers who wanted to work and advance in the public interest field.

A lawyer described how the budgetary constraints on public interest employers affected their employees: "Funding for many nonprofits was really dicey during that time. There would always be 'we have limitations, on who we can hire,' there was always the question about whether there would have to be a layoff or something, and so that was an issue."⁷³ Another lawyer who was unable to launch his public interest career observed that, "nonprofits were hit really, really hard by the recession, so actually before I graduated, I was doing volunteer work for a couple of legal aid projects for about three domestic shelters; a number of those closed down, [and] they stopped some of the projects."⁷⁴

71 Interview 16, in New York, N.Y. (July 13, 2015) (on file with authors).

72 Leonore F. Carpenter, *"We're Not Running a Charity Here": Rethinking Public Interest Lawyers' Relationships with Bottom-Line-Driven Pro Bono Programs*, 29 *BUFF. PUB. L. J.* 36, 44 (2011). See generally, JOEL F. HANDLER, BETSY GINSBERG & ARTHUR SNOW, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (B. A. Weisbrod, J. F. Handler & N. K. Komesar eds.) (Univ. of Cal. Press) (1978).

73 Interview 1, in New York, N.Y. (July 28, 2015) (on file with authors).

74 Interview 27, in New York, N.Y. (July 29, 2015) (on file with authors).

However, the biggest and most unexpected impact the recession had on public interest lawyers involved the transfer of employees from private firms to the public interest field. The legal profession is metaphorically described as consisting of two hemispheres—divided between lawyers representing individual clients and lawyers who represent large corporations.⁷⁵ This split between the private and public hemispheres of the legal profession was bridged in an unusual way as a result of the recession: Large law firms deferred the employment of new incoming lawyers and instead asked them to take government and especially public interest positions—usually for a year.⁷⁶

Thus, the economic downturn blurred divisions between the hemispheres of the legal profession, with private sector lawyers briefly representing public interest clients who were typically poor. A public interest lawyer recalled that, “during the recession a lot of the organizations, legal aid type stuff, had no money . . . what was happening was a lot of the people who got associateships at big corporate law firms were being paid by the firms to take a year off to work at a nonprofit, because the firms didn’t have work.”⁷⁷ Law firm lawyers asked to spend a year working for public interest organizations suddenly flooded the public interest sector to an extent that those lawyers seeking more permanent employment in public interest positions were pushed aside. Essentially, “the jobs were all taken by people who had no interest; they were just doing it for a year. I mean it’s great for the organizations, they got free labor, qualified people, definitely, but for those of us who wanted that as a career track, no real option; we weren’t sponsored.”⁷⁸

Lawyers who wanted to work in public interest positions had to combat a newly competitive situation in the public interest sector. As described by one lawyer:

There were enough people being turned away from jobs because of the recession that they started flooding into those public interest positions, shortly thereafter,

75 See, e.g., JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); Dana Remus, *Hemispheres Apart: A Profession Connected*, 82 FORDHAM L. REV. 2665, 2665 (2014).

76 See Interview 3, in New York, N.Y. (July 30, 2015) (on file with authors); Interview 9, in New York, N.Y. (July 26, 2015) (on file with authors).

77 Interview 6, in New York, N.Y. (July 29, 2015) (on file with authors).

78 *Id.*

and then there were definitely times when I was at that position when I was applying for fellowships in my field and I understood that those were flooded with highly qualified applicants who had either been laid off from their firms or were in between jobs, so it made it difficult to find a public interest fellowship or position because there were so many highly qualified people out of work who wouldn't necessarily be interested in public interest jobs except that there was nothing else available.⁷⁹

Since public interest organizations, which rely on financial assistance from government and private funders, have limited means to pay attorney salaries, receiving deferred law firm associates to represent public interest clients seemed like a windfall. However, some scholars have argued that when law firms do *pro bono* work with public interest organizations, public interest organizations may not necessarily be advantaged.⁸⁰ While the phenomenon that occurred during the recession was technically not *pro bono*,⁸¹ it was nevertheless another way by which law firms aided public

79 Interview 1, in New York, N.Y. (July 28, 2015) (on file with authors).

80 See Leonore F. Carpenter, *supra* note 72, at 38-39. Other scholars have argued that lawyers' and particularly law firms' commitment to provide pro bono service is not just about what is good for the public, but also about what is good for lawyers' reputation, experience, contacts and relationships. For a discussion on this point, see Deborah L. Rhode, *RETHINKING THE PUBLIC IN LAWYERS' PUBLIC SERVICE: STRATEGIC PHILANTHROPY AND THE BOTTOM LINE* in *Private Lawyers and the Public Interest*, 251-52 (2009).

81 In the legal profession, the term *pro bono publico*, which means "for the public good," entails providing free legal services to individuals, groups, and organizations that cannot otherwise afford legal representation. See Scitt L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION* 183 (Robert Granfield & Lynn Mather eds., 2009). Large law firms are perhaps the most important contemporary source of resources for the delivery of free legal services to the poor — a single large firm can contribute as much as \$1 million per year in terms of resources and labor — and many public interest organizations rely on large law firm resources to successfully represent their poor clients. See Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in *12 ACCESS TO JUSTICE* 145, 151-52 (R. Sandefur ed., 2009); Martha F. Davis, *Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation* 9 *AM. U. J. GENDER, SOC. POL'Y & L.* 119, 126-27 (2001).

interest organizations. Our research suggests that public interest organizations invested significant time and experience training and mentoring young associates who from the outset typically had “one foot out the door” of these programs. The windfall had immediate benefits for public interest organizations from a staffing standpoint. However, public interest organizations bore the costs of having to train young lawyers who left the organizations within a short amount of time.⁸²

C. Choices and Consequences

The lawyers in the different practice environments we have described often needed or wanted to make career choices during the recession. Of course, their choices were constrained by the recessionary circumstances they confronted. Nonetheless, there remained the possibility of choosing to do something different. Some lawyers in particular chose to pursue an “alternative professional path.” We left the young lawyers responding in the survey to decide what exactly choosing “an alternative professional path” meant.

We wanted to determine what difference the choice to pursue an alternative compared to a more conventional professional path might make. Somewhat to our surprise, given the youthfulness of our sample, our interviews revealed that these consequences notably involved perceived health effects.

Thus, in addition to feelings of job and income insecurity, lawyers who were admitted to the New York State Bar during the financial crisis reported experiencing variable health consequences.⁸³ Prior research anticipated this possibility, despite the youthfulness of the sample. The loss of a job, the threat of losing one’s job, and

82 For example, Scott Cummings and Deborah Rhode’s study shows that the primary impetus for the placement of associates in public interest organizations was economic — “Each deferred associate is estimated to save the firm between \$60,000 and \$100,000 because the salaries and support for these junior lawyers would exceed the profit they generate at current billing rates.” Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2410 (2009-2010).

83 Current research shows that lawyers who have practiced for fewer years have significant levels of depression, anxiety, and stress. “In terms of career prevalence, 61% reported concerns with anxiety at some point in their career and 46% reported concerns with depression. Mental health concerns often co-occur with alcohol use disorders” See Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 *J. ADDICTION MED.* 46, 51 (2016).

the specter of losing significant income are all well known to have adverse effects on individuals' health and well-being.⁸⁴

The lawyers in our study often expressed their health concerns in ways that made sense intuitively. One recalled:

I couldn't afford, or I didn't want to pay for a one bedroom in Manhattan without a job. I got depressed, I gained 25 pounds over a course of a year . . . it's depressing, especially then you get into winter and then you're in denial and all of that.⁸⁵

Another lawyer talked about abstaining from alcohol so as not to become dependent on it, remarking that "there was even at one point, I was just like, I'm not even going to try to drink anything, like alcohol, because I was afraid that I was going to get addicted."⁸⁶ Concerns about over-eating and excessive drinking were common among lawyers working long hours in large firms where food was often available.

In response to our survey's explicit question about the impact of the recession, 19% of those working in non-firm settings reported they had chosen an "alternative professional path," while only 9% of respondents in law firms indicated they had made such a choice. This was one of the clearest differences we found in our survey between young lawyers working in law firms in contrast

84 See generally Sarah A. Burgard, Jennifer A. Ailshire & Lucie Kalousova, *The Great Recession and Health; People, Populations, and Disparities*, 650 ANNALS AM. ACAD. POL. & SOC. SCI. 194 (2013); Jane E. Ferrie, Martin J. Shipley, Michael G. Marmot, Stephen A. Stansfeld & George D. Smith, *An Uncertain Future: The Health Effects of Threats to Employment Security in White-collar Men and Women*, 88 AM. J. PUB. HEALTH 1030 (1998); Philip Bohle, Michael Quinlan & Claire Mayhew, *The Health and Safety Effects of Job Insecurity: An Evaluation of the Evidence*, 12 ECON. & LAB. RELATIONS REV. 32 (2001).

85 Interview 3, in New York, N.Y. (July 30, 2015) (on file with authors). See Figure 1.

86 Interview 12, in New York, N.Y. (July 29, 2015) (on file with authors). Recent research has shown that men who become unemployed because of economic downturns have the highest rate of alcohol use. See, e.g., Bor Jacob, Sanjay Basu, Adam Coutts, Martin McKee & David Stuckler, *Alcohol Use During the Great Recession of 2008-2009*, 48 ALCOHOL AND ALCOHOLISM 343, 347 (2013) (showing that during the Great Recession, frequent binge drinking was highest among non-Black, unmarried men under 30 years who were unemployed for less than one year). In addition, recent research found that 20.6% of the lawyer participants in a study scored at a level consistent with problematic drinking. See Krill, Johnson & Albert, *supra* note 83 at 48.

with those working in other settings. In addition, our survey data provided some further surprising evidence of how consequential, in health terms, the choice between professional paths could be and how this was associated with the work of the young lawyers in firms.

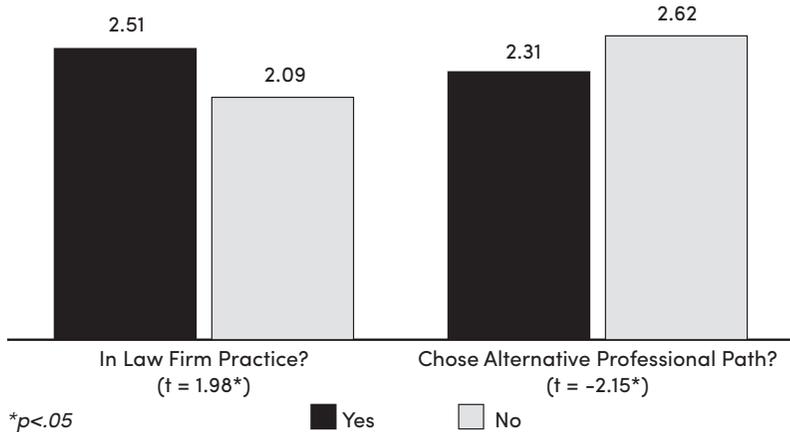
We asked the young lawyers in our survey, “Compared to most people your age, how would you rate your health?” We ranked responses from 1 to 5, with 5 being “much worse” and 1 being “much better.” The results presented in **Figure 1** indicate that young lawyers working in law firms scored significantly higher in ill health (2.51) than lawyers working in other settings (2.09). As noted by the lawyers’ comments above, the comparative feelings of ill-health may have been caused by work experiences involving food, alcohol, and the time or inclination to exercise.⁸⁷

As noted above in relation to **Table 2**, the non-firm lawyers were also more likely to report that they chose an alternative professional career path as a result of the recession, and this choice may have been influenced by the recession in various ways. In any case, in **Figure 1** below, we see the lawyers who chose an alternative career path in our sample also scored significantly lower in ill health (2.31) compared to those who chose a conventional path (2.62).

87 Numerous studies in medicine and health have found that food, diet and exercise contribute to negative health outcomes. See, e.g., Karen White & Paul H. Jacques, *Combined Diet and Exercise Intervention in the Workplace: Effect on Cardiovascular Disease Risk Factors*, 55 AM. ASS’N OCCUPATIONAL HEALTH NURSES J. 109, 113 (2007) (finding that interventions focused on diet, exercise, and monthly workshops reduced risk of cardiovascular disease); see generally Jeanette R. Christensen et al., *Diet, Physical Exercise and Cognitive Behavioral Training as a Combined Workplace Based Intervention to Reduce Body Weight and Increase Physical Capacity in Health Care Workers — A Randomized Controlled Trial*, 11 BIOMED CENT. PUB. HEALTH 671 (2011) (noting that high rates of obesity are correlated with a number of health-related problems); COMM. ON DIET AND HEALTH ET AL., *DIET AND HEALTH: IMPLICATIONS FOR REDUCING CHRONIC DISEASE RISK* (1989) (explaining that diet, food, food groups, and dietary patterns are relevant for the maintenance of health and the reduction of risk of chronic diseases).

FIGURE 1. *Self-Reported Ill Health Compared to Most People of Same Age***Compared to most people your age, how would you rate your health?**

(1) Much Better; (2) Somewhat Better; (3) About the Same; (4) Somewhat Worse; (5) Much Worse



The pattern revealed in **Figure 1** — with firm lawyers and lawyers who did not choose alternative careers both reporting feeling in worse health — raises the question of whether it is the agentic sense of choosing an alternative professional path that statistically accounts for the better health among non-firm lawyers in the New York recession era sample. To examine this possibility, we conducted the regression analysis presented in **Table 3**.

TABLE 3

Predictors of Self-Reported Ill-Health Among New York Lawyers Entering Workforce During 2008 Great Recession

Predictors	Eq. (1)				Eq. (2)			
	B	b	SE	Sig.	B	b	SE	Sig.
Law Firm Practice	.348	.185	.151	.02*	.259	.138	.153	.091
Gender (Female)	.163	.087	.150	.281	.107	.057	.151	.481
Law School Tier	.020	.025	.061	.745	.007	.009	.061	.907
Adverse Student Loan					.335	.141	.204	.103
Chose Alternative Path					-.450	-.163	.222	.044*
Struggled to Find Job					.100	.051	.170	.555

* $p < .05$.

The first results estimated in **Table 3** indicate that with gender and law school tier included in the equation, practicing in a large law firm setting has a notable statistically significant effect ($B = .348, p = .02$) that predicts comparative ill health. However, the results estimated next in **Table 3** indicate that adding three additional plausible correlates of health — adverse student loans, choosing an alternative professional career path, and struggling to find a job — reduces the effect of practicing in a large firm below statistical significance ($B = .259, p = .09$). Among the added new variables, choosing an alternative professional path has a large *negative* and statistically significant effect ($B = -.450, p = .04$), and it is this variable that reduces firm practice to statistical non-significance. These regression results are consistent with the conclusion that a *sense of actively choosing an alternative professional path* is salient in explaining the comparatively better health of non-firm lawyers.

Given the negative health consequences of staying with the conventional path, one that notably includes work in law firm settings, why didn't more of these firm lawyers choose alternative professional paths? Tentative answers suggested by our interviews were linked to income and insecurity, despite some prior research to the contrary.⁸⁸ However, in contrast with prior research,⁸⁹ our interview results summarized above indicate that lawyers who entered the legal profession during the recession experienced a significant sense of insecurity about their future legal career prospects, and as suggested previously above, this may have been determinative of their career choices. A private sector lawyer from the bar class of 2008 explained:

Because of the layoffs during my first job, I'm super aware of that always being a possibility and for various reasons: you might hit a recession, or funding — like at my other job, funding you were expecting doesn't

88 After the recession, Will Atkinson conducted research indicating that highly skilled professionals, such as lawyers, downplayed the effects of the economic crisis on their futures. Atkinson's research examined the consequences of the recent economic downturn and government spending cuts in the United Kingdom on employees in the UK. See generally Will Atkinson, *Class Habitus and Perception of the Future: Recession, Employment Insecurity and Temporality*, 64 BRIT. J. SOC. 643 (2013). Location may account for the differences between his findings and ours.

89 See generally *id.*

come through so then they have to rework how they're going to do this program or eliminate it altogether.⁹⁰

A private sector lawyer from the bar class of 2008 provided further insight regarding feeling financially insecure even after the recession ended:

It was kind of a mental shift . . . I still maintain very large emergency savings that I never had before and I've been trying to reduce debt and expenses as much and as quickly as possible for that reason. It definitely has given me a new mindset; parts of it [have] lingered and still persist.⁹¹

These firm lawyer interviews reflect a majority belief that choosing an alternative professional path might be recklessly perilous in financial terms. While alternative career paths had fewer adverse health consequences, these firm lawyers chose financial security over physical well-being, at least at this early stage of their professional lives. There were further plausible reasons to make this materially influenced choice, as we discuss in the next section.

IV. The Aftermath of the Great Recession

Although the 2008 recession was, by any measure, severe, and therefore a difficult time to enter the legal profession, it also brought unexpected opportunities that sometimes made staying on a conventional career path more understandable. This section describes how the recession led to some unexpected favorable possibilities, such as the creation of employment opportunities and work in areas of legal practice related to the economic downturn. At the same time, lawyers also spoke about and indicated in our survey some of the difficulties of moving outside traditional law-linked careers with a law degree, rejecting the optimistic belief that law school is good preparation for many other — including some “alternative” — kinds of work.

90 Interview 7, in New York, N.Y. (Mar. 23, 2015) (on file with authors). This lawyer worked in a large law firm during the recession and currently works for the local government.

91 Interview 18, in New York, N.Y. (Mar. 23, 2015) (on file with authors).

A. *The Recession as a Positive Factor*

Some scholars have argued that the financial crisis may create opportunities for the legal profession.⁹² Some of our interview data supports this line of argument. For example, a law firm associate suggested that “the recession was helpful to [his] career because of the kinds of cases that . . . arose out of the financial crisis.”⁹³ Another associate working in the compliance department of a major bank explained:

Without the recession you wouldn’t have seen all the new regulations that created the opportunities that are out there. Even now the hiring — we read about this all the time — one of the biggest hiring areas in the financial sector is really regulatory, so because of all the new regulations you have a lot more job opportunities.⁹⁴

Paradoxically, the recession also created opportunities for some lawyers when some employers rushed into excessively large-scale layoffs, creating unplanned gaps and needs. A law firm lawyer reported:

I was one of the few who were left of my class after all the dust settled . . . I ended up with a tremendous amount of opportunity after that because once business picked back up there weren’t a lot of people of my seniority so we were in very high demand, both internally within the firm as well as quite frankly the lateral moves.⁹⁵

92 See e.g., Wald, *supra* note 9 at 2052. Wald explains that points of significant distress are at the same time moments of great opportunity in the legal profession. Using the example of the Great Depression in the early 20th century, Wald concludes that the legal profession may end up stronger than ever, since after the Great Depression lawyers emerged as architects and leaders of the New Deal and as principal actors in the administration of government. *Id.*

93 Interview 5, in New York, N.Y. (June 30, 2015) (on file with authors).

94 Interview 23, in New York, N.Y. (July 27, 2015) (on file with authors).

95 Interview 3, in New York, N.Y. (July 30, 2015) (on file with authors).

The positive experiences were not limited to the private sector. Some government lawyers also believed that the recession created opportunities for them personally and for employment opportunities in their fields. For example, a federal government lawyer explained:

It actually provided a unique opportunity for me working here at [federal government agency]. I was at the heart of trying to address the financial crisis and so our group actually grew exponentially. When I came, we were a group of ten people and we grew to about forty, with the special programs that were set up . . . because there were very few people around, I was given a lot of responsibility and it helped me gain — no one would have known about me in the organization if I wasn't working on that. So, that was a career changing responsibility that I had and so — even after the financial crisis my career has plateaued a little bit more, cause they're more in the steady state of things. During the financial crisis I had a more dramatic line.⁹⁶

Therefore, although the recession resulted in layoffs, job insecurity, and health concerns, it also created opportunities for some lawyers in the private sector as well as in some government agencies.

B. The Supplemental Capital of Lawyers

It is also important to acknowledge that lawyers are often individuals with resources. These resources include *cultural* capital of non-legal forms, *social* capital consisting of networks and contacts, and *economic* capital that could make new employment possibilities happen.⁹⁷ A law firm lawyer elaborated on this point:

96 Interview 25, in New York, N.Y. (July 2, 2015) (on file with authors).

97 In his 1986 essay, Bourdieu enumerates three types of capital that determine an individual's position in the social structure. The first is economic, which is essentially money and property. The second, cultural capital, includes education and training. The third form is social capital, which is associated with a strong social network of personal relationships and memberships in groups. See Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RES. FOR THE SOC. OF EDUC., 241-58 (John G. Richardson ed., 1986). See also Atkinson, *supra* note 88, at 657-58. Atkinson's research indicates that

Because these are people who had up until that point for the most part been really successful in their academic life and probably never felt this kind of rejection before, so in many ways it might have hurt more, but at the same time they're not people without resources. They have the ability to push forward and find their way and think through issues and are motivated to still pursue success.⁹⁸

Thus, although the recession continued to create feelings of insecurity about the future among private and public sector lawyers alike, these lawyers were not without resources, which helped to assuage feelings of financial insecurity, and at the same time may have helped keep many of these lawyers on conventional professional pathways.

C. *Legal Education as an All-Purpose Credential*

Some scholars have claimed that a law degree can open up opportunities for employment outside the legal profession.⁹⁹ However, the young lawyers in the New York sample were dubious,

lawyers (as well as other professionals in medicine and teaching, for example) have social, economic and cultural capital. Other scholars have applied Bourdieu's conception of capital to lawyers and the legal profession. See, e.g., Fiona M. Kay & John Hagan, *Raising the Bar: The Gender Stratification of Law-firm Capital*, 63 AM. SOC. REV. 728, 730 (1998) (applying Bourdieu's cultural capital to law firms); Harris H. Kim, *Networks, Information Transfer and Status Conferral: The Role of Social Capital in Income Stratification among Lawyers*, 50 SOC. Q. 61, 64, 80-81 (2009) (examining how and to what extent social networks contribute to income inequality among legal service providers, and finding that lawyers benefit not only from having access to social capital that provides timely and novel information related to solving work-related tasks, but also from endorsement by high-status network partners).

98 Interview 7, in New York, N.Y. (Mar. 23, 2015) (on file with authors).

99 See, e.g., RENNARD STRICKLAND & FRANK T. READ, *THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION* 123 (2008); Cynthia E. Nance, *The Value of a Law Degree*, 96 IOWA L. REV. 1629, 1630-31, 1641, 1643-44 (2011). These authors argue that lawyers can often move into non-legal careers in business, nonprofit organizations, politics, and entertainment. This is the so called J.D. Advantage that Burk discusses in his paper. See Bernard Burk, *What's New about the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 FLA. ST. U. L. REV. 542, 555-56 (2014). Our interview respondents questioned the notion of a JD Advantage, or that a JD Preferred job is a good reason to seek a law degree. See *infra* notes 100-02.

reporting that a law degree was actually of limited value in opening up alternative opportunities outside the practice of law. **Table 4** below indicates that only between one-fourth and one-third of lawyers thought a law degree was a good investment, or would choose to go to law school if they were deciding again. A similarly large part of the sample suggested they could have benefited from more business-oriented teaching in law school. Only about five percent thought that they received good skills training or were well prepared as a result of their legal education.

TABLE 4

Retrospective Views of Law School and New York Lawyers Entering the Profession During 2008 Great Recession

Criteria	In Law Practice	In Other Settings
Well-Prepared for Work	6.5% (5)	8.0% (7)
Too Theoretical	15.8% (12)	18.2% (16)
Third Year Superfluous	13.0% (10)	18.2% (16)
Wanted Business Training	22.4% (17)	25.3% (22)
Good Investment	29.9% (23)	23.9% (21)
Would Choose Again	33.8% (26)	28.4% (25)
Good Skills Training	3.9% (3)	1.1% (1)
Satisfied Being a Lawyer	65.5% (55)	71.5% (55)

A government lawyer further explained:

I don't really think there's any need to spend so much money on [a law] degree if you don't want to practice . . . or if you don't want to do something very legal, like teach law or work in law or something like that, and I say that because my transition has been tough, because people don't get it. People say that to you, "You can do anything with a law degree," but most people out in the world say, "Why aren't you being a lawyer? I don't understand."¹⁰⁰

¹⁰⁰ Interview 7, in New York, N.Y. (Mar. 23, 2015) (on file with authors). However, some law schools report non-legal jobs as part of their employment statistics. See, e.g., Elizabeth Olson, *Law Graduate Gets Her Day in Court, Suing Law School*, N.Y. TIMES, Mar. 6, 2016.

Two other lawyers who worked at private banks elaborated. The first lawyer put it this way:

That's the biggest crock there is, just saying that it's flexible, especially in this day and age, and that's why I have told the people who have asked me about law, that "*if you want to go to law school, you better want to be a lawyer,*" because they may be trying to sell you on "you can use it for anything," but that's not the case. People are going to look at that and say, "Why is this person applying for this job? They have a law degree; something's got to be wrong with that person."¹⁰¹

The second lawyer further explained:

I'd say it's not as wide based as they'd like you to think . . . I will say the downside that they don't tell you about is a lot of places, if you're not going to go into legal, and if you have that J.D. on your resume, they're not going to look at you, because they're going to assume you're looking to jump, so it can be a downside.¹⁰²

As described above, many of the respondents felt strongly about the fact that a law degree makes it difficult to obtain a non-legal job. On the other hand, some of our interview respondents saw notable benefits to having a law degree for interests beyond the traditional practice of law.¹⁰³ For example, one private sector lawyer from the bar class of 2008 argued that lawyers are trained to think creatively, which is valued in the business sector: "I think the J.D. training allows you to be able to think outside of the box, people who are J.D.s think differently. They're more efficient; you don't have to teach them the efficiency part, and they're innovative

101 Interview 12, in New York, N.Y. (July 29, 2015) (on file with authors) (emphasis added).

102 Interview 23, in New York, N.Y. (July 27, 2015) (on file with authors).

103 Other scholars have noted non-economic reasons for earning a law degree, including for career satisfaction. They advise that prospective law students ought to understand what entering the legal profession entails before attending law school. See R. Lawrence Dessem & Gregory M. Stein, *The True Value of a Law Degree, or, Why Did Thurgood Marshall Go to Law School?*, 65 HASTINGS L. J. VOIR DIRE 11 (2013).

thinkers.”¹⁰⁴ Another private sector lawyer commented, “The way of thinking about a set of facts and how they relate to each other and get applied, you bring that process to bear on a lot of what you do, so even perhaps leaving aside practice, I could see law school being directly relevant.”¹⁰⁵

Several respondents mentioned that they tell young people who are thinking about going to law school that they are probably going to struggle to find jobs upon graduation, and that they should be prepared for the possibility of this struggle before they start their legal education.¹⁰⁶ Some of our respondents advised aspiring law students to consider business school as an alternative to law school, suggesting that a business degree is a better investment.¹⁰⁷

Given the skepticism about legal education we have just summarized, the final row of **Table 4** above presents a possibly surprising finding. Two-thirds of our survey respondents, regardless of job setting, expressed satisfaction with being a lawyer. This is the same high level of job satisfaction found in previous studies of lawyers,¹⁰⁸ but here it is perhaps counterintuitively observed among young New York lawyers, about a third of whom struggled to find a job when they entered the profession during the recession.¹⁰⁹ In the

104 Interview 13, in New York, N.Y. (Mar. 25, 2015) (on file with authors).

105 Interview 21, New York, N.Y. (July 6, 2015) (on file with authors). The value of thinking like a lawyer has been advanced by legal scholars. *See, e.g.*, Michelle M. Harner, *The Value of “Thinking like a Lawyer,”* 70 MD. L. REV. 390, 392 (2011) (internal quotations omitted) (explaining in an essay that despite the recession, the idea of thinking like a lawyer remains viable. “Thinking like a lawyer includes using ‘key analytical skills to reference a particular set of abilities: spotting and dissecting issues, identifying applicable tools and potential barriers, embracing ambiguity, and thinking creatively to resolve issues . . .’ as these skills are important for being a successful lawyer”).

106 *See, e.g.*, Interview 14, in New York, N.Y. (July 28, 2015) (on file with authors); Interview 26, in New York, N.Y. (July 28, 2015) (on file with authors); Interview 5, in New York, N.Y. (June 30, 2015) (on file with authors). This is despite the fact that scholars have shown that a law degree is a significantly better financial investment than a bachelor’s degree alone and that a law degree is still a worthwhile investment. *See generally* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014); Nance, *supra* note 99.

107 *See, e.g.*, Interview 26, in New York, N.Y. (July 28, 2015) (on file with authors); Interview 5, in New York, N.Y. (June 30, 2015) (on file with authors).

108 *See, e.g.*, Dinovitzer & Garth, *supra* note 6 (studying career satisfaction among lawyers); John Monahan & Jeffrey Swanson, *Lawyers at Mid-Career: A 20-Year Longitudinal Study of Job and Life Satisfaction*, 6 J. EMPIRICAL LEGAL STUD. 451, 452 (2009).

109 Our findings are consistent with a current study conducted by Gallup and

following concluding section, we argue that although the findings of this research point in several different directions, they nonetheless can help to explain the career paths chosen by young New York lawyers during the recession, and how they feel about the results to date.

CONCLUSION: CONSIDERING THE ALTERNATIVES

The young lawyers studied in this Article reported the impact of the recession across their respective practice settings to be overwhelmingly negative. Lawyers in the private sector experienced layoffs, deferrals, and reductions in work hours. Government lawyers were generally able to hold on to their jobs, but experienced pay and hiring freezes and other limitations related to budget cutbacks. Both public interest and government lawyers experienced reduced job opportunities when “deferred hires” from large law firms accepted reduced salaries to work temporarily in these non-firm sectors.

The recession did create some limited job opportunities among employers who precipitously laid off more lawyers than needed. Some lawyers in the financial sector and some government agencies also found new opportunities resulting from work on compliance, regulation, and commercial matters. Still, the recession created financial and career insecurity for most lawyers.

About one-fifth of the new lawyers in our survey reported that because of the recession, they chose alternative professional career paths that resulted in their perception of being in better health than their peers. In contrast, those who decided to stay on conventional career paths, usually in law firms, tended to report feeling in worse health. Still, the traditionalists who stayed on in their conventional career paths generally reported satisfaction in doing so. Why did so many young New York lawyers who were confronted with the insecurity of the legal profession in the aftermath of a severe recession not choose healthier alternative professional possibilities?

Some lawyers remarked that they feared they would not be able to find as good or better positions if they gave up the legal positions they had often struggled hard to find. Others explained

Access Group, where researchers found that a majority of study participants reported that if they could go back and do it all over again, they would still get a law degree, despite the fact that only 39% of the study participants said that their law degree was worth the cost and 48% said that it is challenging to obtain a “good job” upon graduation from law school. See GALLUP & ACCESS GRP., *supra* note 37, at 6, 8, 24.

they saw promising opportunities worth pursuing despite problems in their positions. Some probably just felt lucky to be doing work they were trained for in a period when many of their peers did not even have jobs.

We did not find support among our young New York lawyer respondents for the optimistic assumption that a legal education and law degree equipped law graduates for many non-legal jobs in other sectors of the economy. These young lawyers mostly did not agree that their law degrees were a flexible means of entry into careers outside law. Nonetheless, like many previous studies on lawyer satisfaction,¹¹⁰ we found that — even in the midst of a serious recession — most of the young lawyers in New York were generally satisfied with their careers.

Our study affirms that the practice of law is a venerable if also vulnerable profession.¹¹¹ Most of the young lawyers we studied were satisfied with the circumstances and possibilities of the traditional career paths they chose to pursue — even if these pathways were exposing them to elevated health risks compared to their peers.¹¹² At the same time, other young lawyers on alternative professional paths chosen in response to the 2008 recession reported that, relative to their peers, they were experiencing better health. In the aftermath of the Great Recession, both the conventional and the alternative groups of young New York lawyers may simply have been making the best of a bad beginning.

110 See generally Dinovitzer & Garth, *supra* note 6 (studying career satisfaction among lawyers).

111 See John P. Heinz, Kathleen E. Hull & Ava A. Harter, *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 755 (1999). Heinz, Hull, and Harter have memorably observed that after considering the alternatives, “It is not immediately apparent why one should expect lawyers to be more disgruntled than people who sell cars or fix teeth.” *Id.*

112 A study by Cameron Anderson, Michael W. Kraus, Adam D. Galinsky and Dacher Keltner shows that sociometric status — the respect and admiration one has in face-to-face groups (e.g., among friends or coworkers) — has a stronger effect on subjective wellbeing than does socioeconomic status. See Cameron Anderson, Michael W. Kraus, Adam D. Galinsky & Dacher Keltner, *The Local-Ladder Effect: Social Status and Subjective Well-Being*, 23 PSYCHOL. SCI. 764 (2012). Using correlational, experimental, and longitudinal methodologies, this study found consistent evidence indicating that sociometric status significantly predicted satisfaction with life and the experience of positive and negative emotions. See *id.* If individuals who choose traditional career paths consider themselves to have sociometric status in light of this study, then one can surmise that satisfaction and subjective well-being — even if not actual wellbeing — would follow.

