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NEW VOICES

and

THE JOURNAL OF LEGAL METRICS

plus a

MICRO-SYMPOSIUM



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GIVING IT AWAY AT *THE STRAND*

A SHORT STORY OF RIGHTS AND RELATIONSHIPS IN INTELLECTUAL PROPERTY

Ross E. Davies[†]

In early 1916, celebrity author Arthur Conan Doyle (the versatile and productive Victorian/Edwardian-era writer remembered nowadays mostly for his Sherlock Holmes stories), sent a package to Herbert Greenhough Smith, his longtime editor at *The Strand Magazine*. The letter Conan Doyle sent with that package covered several topics. One was his gratitude for the return of manuscripts of some of his work that had been published in the *Strand*:

It is very good of you to send me my mss. without raising the legal question. They may mean something to my lads in the future.¹

It is not hard to imagine what those manuscripts might someday mean to Conan Doyle's lads. (He had three sons and two daughters. Why the manuscripts wouldn't be just as meaningful to the daughters is a mystery.) Sentiment about good old dad and his achievements, symbolized by the product of his own laboring hand, would be first,

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¹ Letter from Arthur Conan Doyle to H. Greenhough Smith, Jan. 1916, printed in JON LELLENBERG, DANIEL STASHOWER & CHARLES FOLEY, ARTHUR CONAN DOYLE: A LIFE IN LETTERS 626, 627 (2007); see also *id.* at 627 n.*.

of course. And second would be money. Indeed, Conan Doyle had expressed that very thought a few years earlier:

Your remarks about MSS are bearing fruit and I am having mine bound in vellum by Spealls' so as to be ready for the capricious millionaire whom we all hope for and never see.²

Nor is it hard to imagine what legal question Conan Doyle was glad Smith had left unmentioned. Both of them – the seasoned author and the equally seasoned editor – surely were aware that rights to publish a work and rights in the original physical manifestation of that work were separate under the law (common or statute), though an author and a publisher were generally free to agree to bundle them. And Conan Doyle and Smith surely were just as conscious that disputes over whether authors and publishers had made such agreements in particular contexts had been common sources of litigation and ill-feeling between authors and publishers since time immemorial.³

Why then did Smith and the *Strand* opt to forgo even a chance of retaining manuscripts by one of the most famous authors in the world – valuable items to which they might well have had a legal right, or at least a colorable claim? Who knows? The value of the ongoing commercial relationship with Conan Doyle must have been a factor. The risks and costliness of litigation probably were too. But it is pleasant to imagine that human feeling also was a factor – that there was some shared affection there, and that permitting Conan Doyle to cater to familial posterity was a nice thing to do for an author who had by then been a loyal contributor to the *Strand*, and an occasional helper in other ways, for roughly a quarter-century.⁴

² Randall Stock, *The Trail of the Semi-Solitary Manuscript*, 55 BAKER ST. J. 46, 49, 54 n.8 (Winter 2005) (quoting a December 1913 letter from Conan Doyle to an unidentified recipient).

³ See, e.g., WILLIAM B. HALE, A TREATISE ON THE LAW OF COPYRIGHT AND LITERARY PROPERTY §§ 3, 17, 33, 67, 151, 154 (1917) (citing cases from the U.K and U.S.); see also, e.g., ANDREW LYCETT, THE MAN WHO CREATED SHERLOCK HOLMES: THE LIFE AND TIMES OF SIR ARTHUR CONAN DOYLE 320 (2007) (Conan Doyle on authors' rights).

⁴ See A. Conan Doyle, *The Voice of Science*, STRAND MAGAZINE, Mar. 1891, at 312; A. Conan Doyle, *A Scandal in Bohemia*, STRAND MAGAZINE, July 1891, at 61; see also RICHARD LANCELYN GREEN & JOHN MICHAEL GIBSON, A BIBLIOGRAPHY OF A. CONAN DOYLE 54, 401 (first rev. ed. 2000); LYCETT, *supra* note 3, at 265, 297.

And now, back to the package Conan Doyle sent Smith in 1916. What was in it? Another manuscript! But it was not a new work intended for publication in the *Strand*. It was “The Adventure of the Golden Pince-Nez” – a Sherlock Holmes story the magazine had published back in 1904.⁵ Conan Doyle had inscribed it “to H. Greenhough Smith” as “a souvenir of 20 years of collaboration.” It was a generous gift.⁶

Why did he select that particular story for Smith? Who knows? The great value to Conan Doyle of their long collaboration – the two had practically grown up together in the publishing business – must have been a factor. Thus the choice of a Sherlock Holmes story, a treasure by any measure. But why that one, out of the dozens of Holmes tales he had told for and in the *Strand* over the decades? Could it be that Conan Doyle was having a little fun, making a slightly grim legal joke? He may well have known enough about intellectual property law, or about the history of publishing, to be aware that some of the most important ownership-of-manuscript lawsuits had involved letters and diaries. And in “The Adventure of the Golden Pince-Nez,” the killing of an innocent person happens during a righteous attempt to repossess wrongfully withheld letters and a diary.⁷ Ha ha, Smith might have thought when he opened the package and read the letter from Conan Doyle, is that what would have happened if the *Strand* had opted to lay claim to your manuscripts?

A PLUG FOR THE 2015 GREEN BAG ALMANAC & READER

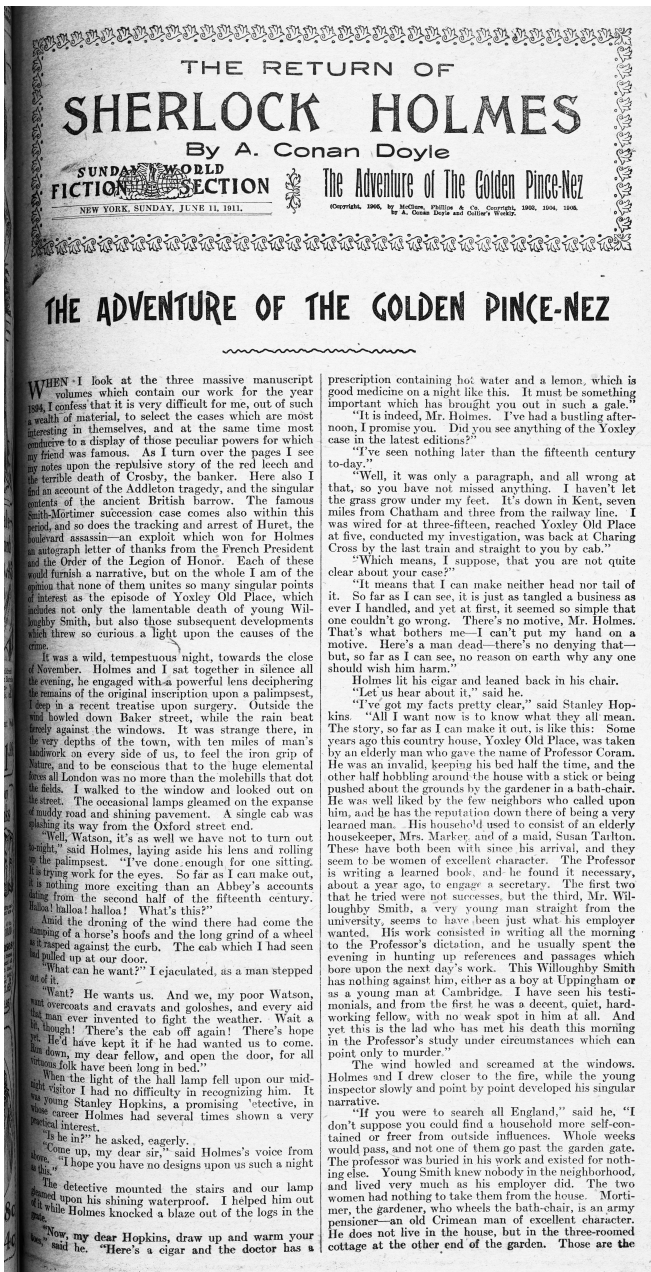
Another interesting version of “Golden Pince-Nez” – discovered by my colleague Cattleya Concepcion – is reproduced on the next few pages.⁸ The 2015 *Green Bag Almanac & Reader*, which will be in print in a couple of months, will be full of other interesting Conan Doyle and Holmes artifacts and scholarship.

⁵ See A. Conan Doyle, *The Adventure of the Golden Pince-Nez*, STRAND MAGAZINE, July 1904, at 3; GREEN & GIBSON, *supra* note 4, at 139.

⁶ See THE WRONG PASSAGE (2012) (Andrew Solberg & Robert Katz, eds.) (complete manuscript, with commentary); see also LYCETT, *supra* note 3, at 386.

⁷ Compare, e.g., HALE, *supra* note 3, at §§ 18, 32, 62, with page 262 *infra*.

⁸ See Holmes, *Coase & Blackmail*, 18 GREEN BAG 2D 93, 94 (2014) (provenance).



Arthur Conan Doyle, *The Adventure of the Golden Pince-Nez*, N.Y. World, June 11, 1911.
 Courtesy of the David M. Rubenstein Rare Book & Manuscript Library at Duke University.

GIVING IT AWAY AT THE STRAND

THE RETURN OF SHERLOCK HOLMES

only people that you would find within the grounds of Yoxley Old Place. At the same time, the gate of the garden is a hundred yards from the main London to Chatham road. It opens with a latch, and there is nothing to prevent anyone from walking in.

"Now I will give you the evidence of Susan Tarlton, who is the only person who can say anything positive about the matter. It was in the forenoon, between eleven and twelve. She was engaged at the moment in hanging some curtains in the upstairs front bedrooms. Professor Coram was still in bed, for when the weather is bad he seldom rises before midday. The housekeeper was busied with some work in the back of the house. Willoughby Smith had been in his bedroom, which he uses as a sitting-room, but the maid heard him at that moment pass along the passage and descend to the study immediately below her. She did not see him, but she says she could not be mistaken in his quick, firm tread. She did not hear the study door close, but a minute or so later there was a dreadful cry in the room below. It was a wild, hoarse scream, so strange and unnatural that it might have come either from a man or a woman. At the same instant there was a heavy thud, which shook the old house, and then all was silence. The maid stood petrified for a moment, and then, recovering her courage, she ran downstairs. The study door was shut and she opened it. Inside, young Mr. Willoughby Smith was stretched upon the floor. At first she could see no injury, but as she tried to raise him she saw that blood was pouring from the underside of his neck. It was pierced by a very small but very deep wound, which had divided the carotid artery. The instrument with which the injury had been inflicted lay upon the carpet beside him. It was one of those small sealing-wax knives to be found on old-fashioned writing tables, with an ivory handle and a stiff blade. It was part of the fittings of the Professor's own desk.

"At first the maid thought that young Smith was already dead, but on pouring some water from the carafe over his forehead he opened his eyes for an instant. 'The Professor,' he murmured—it was she.' The maid is prepared to swear that those were the exact words. He tried desperately to say something else, and he held his right hand up in the air. Then he fell back dead.



"In the meantime the housekeeper had also arrived upon the scene, but she was just too late to catch the young man's dying words. Leaving Susan with the body, she hurried to the Professor's room. He was sitting up in bed horribly agitated, for he had heard enough to convince him that something terrible had occurred. Mrs. Marker is prepared to swear that the Professor was still in his night clothes, and indeed it was impossible for him to dress without the help of Mortimer, whose orders were to come at twelve o'clock. The Professor declares that he heard the distant cry, but that he knows nothing more. He can give no explanation of the young man's last words. The Professor—it was she,' but imagines they were the outcome of delirium. He believes that Willoughby Smith had not an enemy in the world, and can give no reason for the crime. His first action was to send Mortimer, the gardener, for the local police. A little later the chief constable sent for me. Nothing was moved before I got there, and strict orders were given that no one should walk upon the paths leading to the house. It was a splendid chance of putting your theories into practice, Mr. Sherlock Holmes. There was really nothing wanting."

"Except Mr. Sherlock Holmes," said my companion, with a somewhat bitter smile. "Well, let us hear about it. What sort of a job did you make of it?"

"I must ask you first, Mr. Holmes, to glance at this rough plan, which will give you a general idea of the position of the Professor's study and the various points of the case. It will help you in following my investigation."

He unfolded the rough chart, which I here reproduce, and he laid it across Holmes's knee. I rose, and, standing behind Holmes, studied it over his shoulder. "It is very rough, of course, and it only deals with the points which seem to me to be essential. All the rest you will see later for yourself. Now, first of all, presuming that the assassin entered the house, how did he or she come in? Undoubtedly by the garden path and the back door, from which there is direct access to the study. Any other way would have been exceedingly complicated. The escape must have also been made along that line, for of the two other exits from the room one was blocked by Susan as she ran downstairs and the other leads straight to the Professor's bedroom. I therefore directed my atten-

tion at once to the garden path, which was saturated with recent rain, and would certainly show my footmarks.

"My examination showed me that I was dealing with a cautious and expert criminal. No footmarks were to be found on the path. There could be no question, however, that someone had passed along the grass border which lines the path, and that he had done so in order to avoid leaving a track. I could not find anything in the nature of a distinct impression, but the grass was trodden down and someone had undoubtedly passed. It could only have been the murderer, since neither the gardener nor anyone else had been there that morning, and the rain had only begun during the night."

"One moment," said Holmes. "Where does this path lead to?"

"To the road."

"How long is it?"

"A hundred yards or so."

"At the point where the path passes through the gate, you could surely pick up the tracks?"

"Unfortunately, the path was tiled at that point."

"Well, on the road itself?"

"No, it was all trodden into mire."

"Tut! tut! Well, then, these tracks upon the grass, were they coming or going?"

"It was impossible to say. There was never any outline."

"A large foot or a small?"

"You could not distinguish."

Holmes gave an ejaculation of impatience.

"It has been pouring rain and blowing a hurricane ever since," said he. "It will be harder to read now than that palimpsest. Well, well, it can't be helped. What did you do, Hopkins, after you had made certain that you had made certain of nothing?"

"I think I made certain of a good deal, Mr. Holmes. I knew that some one had entered the house cautiously from without. I next examined the corridor. It is lined with coarsetexted matting, and had taken no impression of any kind. This brought me into the study itself. It is a scantily furnished room. The main article is a large writing table with a fixed bureau. This bureau consists of a double column of drawers, with a central small cupboard between them. The drawers were open, the cupboard locked. The drawers, it seems, were always open, and nothing of value was kept in them. There were some papers of importance in the cupboard, but there were no signs that this had been tampered with, and the Professor assures me that nothing was missing. It is certain that no robbery has been committed."

"I come now to the body of the young man. It was found near the bureau, and just to the left of it, as marked upon that chart. The stab was on the right side of the neck and from behind forward, so that it is almost impossible that it could have been self-inflicted."

"Unless he fell upon the knife," said Holmes.

"Exactly. The idea crossed my mind. But we found the knife some feet away from the body, so that seems impossible. Then, of course, there are the man's own dying words. And, finally, there was this very important piece of evidence which was found clasped in the dead man's right hand."

From his pocket Stanley Hopkins drew a small paper packet. He unfolded it and disclosed a golden pipe-axe, with two broken ends of black silk cord dangling from the end of it. "Willoughby Smith had excellent sight," he added. "There can be no question that this was snatched from the face or the person of the assassin."

Sherlock Holmes took the glasses into his hand, and examined them with the utmost attention and interest. He held them on his nose, endeavored to read through them, went to the window and stared up the street with them, looked at them most minutely in the full light of the lamp, and finally, with a chuckle, seated himself at the table and wrote a few lines upon a sheet of paper, which he tossed across to Stanley Hopkins.

"That's the best I can do for you," said he. "If my probe to be of some use."

The astonished detective read the note aloud. It ran as follows:

"Wanted, a woman of good address, attired like a lady. She has a remarkably thick nose, with eyes which are set close upon either side of it. She has a puckered forehead, a peering expression, and probably rounded shoulders. There are indications that she has had recourse to an optician at least twice during the last few months. As her glasses are of remarkable strength, and as opticians are not very numerous, there should be no difficulty in tracing her."

Holmes smiled at the astonishment of Hopkins, which must have been reflected upon my features.

"Surely my deductions are simplicity itself," said he. "It would be difficult to name any articles which afford a finer field for inference than a pair of glasses, especially so remarkable a pair as these. That they belong to a woman I infer from their delicacy, and also, of course, from the last words of the dying man. As to her being a person of refinement and well dressed, they are, as you perceive, handsomely mounted in solid gold, and it is inconceivable that anyone who wore such glasses could

be slatternly in other respects. You will find that the clips are too wide for your nose, showing that the lady's nose was very broad at the base. This sort of nose is usually a short and coarse one, but there is a sufficient number of exceptions to prevent me from being dogmatic or from insisting upon this point in my description. My own face is a narrow one, and yet I find that I cannot get my eyes into the centre, nor near the centre, of these glasses. Therefore, the lady's eyes are set very near to the sides of the nose. You will perceive, Watson, that the glasses are concave and of unusual strength. A lady whose vision has been so extremely contracted all her life is sure to have the physical characteristics of such vision, which are seen in the forehead, the eyelids and the shoulders."

"Yes," I said, "I can follow each of your arguments. I confess, however, that I am unable to understand how you arrive at the double visit to the optician."

Holmes took the glasses in his hand.

"You will perceive," he said, "that the clips are lined with tiny bands of cork to soften the pressure upon the nose. One of these is discoloured and worn to some slight extent, but the other is new. Evidently one has fallen off and been replaced. I should judge that the older of them has not been there more than a few months. They exactly correspond, so I gather that the lady went back to the same establishment for the second."

"By George, it's marvellous!" cried Hopkins, in an ecstasy of admiration. "To think that I had all that evidence in my hand and never knew it! I had intended, however, to go the round of the London opticians."

"Of course you would. Meanwhile, have you anything more to tell us about the case?"

"Nothing, Mr. Holmes. I think that you know as much as I do now—probably more. We have had inquiries made as to any stranger seen on the country roads or at the railway station. We have heard of none. What beats me is the utter want of all object in the crime. Not a ghost of a motive can anyone suggest."

"Ah! there I am not in a position to help you. But suppose you want us to come out to-morrow?"

"If it is not asking too much, Mr. Holmes. There's a train from Charing Cross to Chatham at six in the morning, and we should be at Yoxley Old Place between eight and nine."

"Then we shall take it. Your case has certainly some features of great interest, and I shall be delighted to look into it. Well, it's nearly one, and we had best get a few hours' sleep. I dare say you can manage all right on the sofa in front of the fire. I'll light my spirit lamp, and give you a cup of coffee before we start."

The gale had blown itself out next day, but it was a bitter morning when we started upon our journey. We saw the cold winter sun rise over the dreary marshes of the Thames and the long, sullen reaches of the river, which I shall ever associate with our pursuit of the Andaman Blander in the earlier days of our career. After a long and weary journey, we alighted at a small station some miles from Chatham. While a horse was being put into a trap at the local inn, we snatched a hurried breakfast, and so we were all ready for business when we at last arrived at Yoxley Old Place. A constable met us at the garden gate.

"Well, Wilson, any news?"

"No, sir—nothing."

"No report of any stranger seen?"

"No, sir. Down at the station they are certain that no stranger either came or went yesterday."

"Have you had inquiries made at inns and lodgings?"

"Yes, sir; there is no one that we cannot account for."

"Well, it's only a reasonable walk to Chatham. Anyone might stay there or take a train without being observed. This is the garden path of which I spoke, Mr. Holmes. I'll pledge my word there was no mark on it yesterday."

"On which side were the marks on the grass?"

"This side, sir. This narrow margin of grass between the path and the flower-bed. I can't see the traces now, but they were clear to me then."

"Yes, yes; someone has passed along," said Holmes, stopping over the grass border. "Our lady must have noted her steps carefully, must she not, since on the one side she would leave a track on the path, and on the other an even clearer one on the soft bed?"

"Yes, sir, she must have been a cool hand."

"I saw an intent look pass over Holmes's face."

"You say that she must have come back this way?"

"Yes, sir, there is no other."

"On this strip of grass?"

"Certainly, Mr. Holmes."

"Hum! It was a very remarkable performance—very remarkable. Well, I think we have exhausted the path. Let us go further. This garden fence is usually kept open, I suppose? Then this visitor had nothing to do but to walk in. The idea of this murder was not in her mind, or she would have provided herself with some sort of weapon, instead of having to pick this knife off the writing table. She advanced along this corridor, leaving no traces upon the cocoanut matting. Then she found

herself in this study. How long was she there? We have no means of judging."

"Not more than a few minutes, sir. I forgot to tell you that Mrs. Marker, the housekeeper, had been in there tidying not very long before—about a quarter of an hour, she says."

"Well, that gives us a limit. Our lady enters this room, and what does she do? She goes over to the writing table. What for? Not for anything in the drawers. If there had been anything worth her taking, it would surely have been locked up. No, it was for something in that wooden bureau. Halloa! what is that scratch upon the face of it? Just hold a match, Watson. Why did you not tell me of this, Hopkins?"

The mark which he was examining began upon the brasswork on the right hand side of the keyhole, and extended for about four inches, where it had scratched the varnish from the surface.

"I noticed it, Mr. Holmes, but you'll always find scratches round a keyhole."

"This is quite recent, quite recent. See how the brass shines where it is cut. An old scratch would be the same color as the surface. Look at it through my lens. There's the varnish, too, like earth on each side of a furrow. Is Mrs. Marker there?"

A sad-faced, elderly woman came into the room.

"Did you dust this bureau yesterday morning?"

"Yes, sir."

"Did you notice this scratch?"

"No, sir, I did not."

"I am sure you did not, for a duster would have swept away streaks of varnish. Who has the key of this bureau?"

"The Professor keeps it on his watch chain."

"Is it a simple key?"

"No, sir, it is a Chubb's key."

"Very good. Mrs. Marker, you can go. Now we are making a little progress. Our lady enters the room, advances to the bureau and either opens it or tries to do so. While she is thus engaged young Willoughby Smith enters the room. In her hurry to withdraw the key she makes this scratch upon the door. He seizes her and she, snatching up the nearest object, which happens to be this knife, strikes at him in order to make him let go his hold. The blow is a fatal one. He falls and she escapes, either with or without the object for which she has come. Is Susan, the maid, there?"

"Could any one have got away through that door after the time that you heard the cry, Susan?"

"No, sir, it is impossible. Before I got down the stair, I'd have seen any one in the passage. Besides, the door never opened, or I would have heard it."

"That settles this exit. Then no doubt the lady went out the way she came. I understand that this other passage leads only to the Professor's room. There is no exit that way?"

"No, sir."

"We shall go down it and make the acquaintance of the Professor. Halloa, Hopkins, this is very important, very important indeed. The Professor's corridor is also lined with cocoanut matting."

"Well, sir, what of that?"

"Don't you see any bearing upon the case? Well, well, I don't insist upon it. No doubt I am wrong. And yet it seems to me to be suggestive. Come with me and introduce me."

We passed down the passage, which was of the same length as that which led to the garden. At the end was a short flight of steps ending in a door. Our guide knocked, and then ushered us into the Professor's bedroom.

It was a very large chamber, lined with innumerable volumes, which had overflowed from the shelves and lay in piles in the corners, or were stacked all around at the base of the cases. The bed was in the centre of the room, and in it, propped up with pillows, was the owner of the house. I have seldom seen a more remarkable looking person. It was a gaunt, aquiline face which was turned towards us, with piercing dark eyes, which lurked in deep hollows under overhanging and tufted brows. His hair and beard were white, save that the latter was curiously stained with yellow around his mouth. A cigarette glowed at the tangle of white hair, and the air of the room was filled with stale tobacco smoke. As he held out his hand to Holmes I perceived that it was also stained with yellow nicotine.

"A smoker, Mr. Holmes?" said he, speaking in well-chosen English, with a curious little mincing accent, "Pray take a cigarette. And you, sir? I can recommend them, for I have them especially prepared by Ionides, of Alexandria. He sends me a thousand at a time, and I grieve to say that I have to arrange for a fresh supply every fortnight. Bad, sir, very bad, but an old man has few pleasures. Tobacco and my work—that is all that is left to me."

Holmes had lit a cigarette and was shooting little darting glances all over the room.

"Tobacco and my work, but now only tobacco," the old man exclaimed. "Alas! what a fatal interruption! Who could have foreseen such a terrible catastrophe? So estimable a young man! I assure you that, after a few months' training he was an admirable assistant. What do you think of the matter, Mr. Holmes?"

GIVING IT AWAY AT THE STRAND

THE RETURN OF SHERLOCK HOLMES

2

"I have not yet made up my mind."
"I shall indeed be indebted to you if you can throw a light where all is so dark to us. To a poor bookworm and invalid like myself such a blow is paralyzing. I seem to have lost the faculty of thought. But you are a man of action—you are a man of affairs. It is part of the everyday routine of your life. You can preserve your balance in every emergency. We are fortunate, indeed, in having you at our side."

Holmes was pacing up and down one side of the room whilst the old Professor was talking. I observed that he was smoking with extraordinary rapidity. It was evident that he shared our host's liking for the fresh Alexandrian cigarettes.

"Yes, sir, it is a crushing blow," said the old man. "That is my magnum opus—the pile of papers on the side table yonder. It is my analysis of the documents found in the Coptic monasteries of Syria and Egypt, a work which will cut deep at the very foundation of revealed religion. With my enfeebled health I do not know whether I shall ever be able to complete it, now that my assistant has been taken from me. Dear me! Mr. Holmes, why, you are even a quicker smoker than I am myself."

Holmes smiled.
"I am a connoisseur," said he, taking another cigarette from the box—his fourth—and lighting it from the stub of that which he had finished. "I will not trouble you with any lengthy cross examination, Professor Coram, since I gather that you were in bed at the time of the crime and could know nothing about it. I would only ask this. What do you imagine that this poor fellow meant by his last words? The Professor—it was she?"

The Professor shook his head.
"Susan is a country girl," said he, "and you know the incredible stupidity of that class. I fancy that the poor fellow murmured some incoherent, delirious words, and that she twisted them into this meaningless message."
"I see. You have no explanation yourself of the tragedy?"

"Possibly an accident, possibly—I only breathe it among ourselves—a suicide. Young men have their hidden troubles—some affair of the heart, perhaps, which we have never known. It is a more probable supposition than murder."

"But the eye-glasses?"
"Ah! I am only a student—a man of dreams. I cannot explain the practical things of life. But still, we are aware, my friend, that love gauges may take strange shapes. By all means take another cigarette. It is a pleasure to see anyone appreciate them so. A fan, a glove, glasses—who knows what article may be carried as a token or treasure when a man puts an end to his life? This gentleman speaks of footsteps in the grass, but after all, it is easy to be mistaken on such a point. As to the knife, it might well be thrown far from the unfortunate man as he fell. It is possible that I speak as a child; but to me it seems that Willoughby Smith has met his fate by his own hand."

Holmes seemed struck by the theory thus put forward, and he continued to walk up and down for some time, lost in thought and consuming cigarette after cigarette.

"Tell me, Professor Coram," he said at last, "what is in that cupboard in the bureau?"

"Nothing that would help a thief. Family papers, letters from my poor wife, diplomas of universities which have done me honor. Here is the key. You can look for yourself."

Holmes picked up the key and looked at it for an instant, then he handed it back.

"No, I hardly think that it would help me," said he. "I should prefer to go quietly down to your garden, and turn the whole matter over in my mind. There is something to be said for the theory of suicide which you have put forward. We must apologize for having intruded upon you, Professor Coram, and I promise that we won't disturb you until after lunch. At two o'clock we will come again, and report to you anything which may have happened in the interval."

Holmes was curiously distraught, and we walked up and down the garden path for some time in silence.

"Have you a clue?" I asked, at last.
"It depends upon those cigarettes that I smoked," said he. "It is possible that I am utterly mistaken. The cigarettes will show me."

"My dear Holmes," I exclaimed, "how on earth!"

"Well, well, you may see for yourself. If not, there's no harm done. Of course, we always have the optician due to fall back upon, but I take a short cut when I can get it. Ah, here is the good Mrs. Marker! Let us enjoy five minutes of instructive conversation with her."

I may have remarked before that Holmes had, when he liked, a peculiarly ingratiating way with women, and that he very readily established terms of confidence with them. In half the time which he had named, he had captured the housekeeper's good will, and was chatting with her as if he had known her for years.

"Yes, Mr. Holmes, it is as you say, sir. He does smoke something terrible. All day and sometimes all night, sir. I've seen that room of a morning—well, sir you'd have thought it was a London fog. Poor young

Mr. Smith, he was a smoker also, but not as bad as the Professor. His health—well, I don't know that it's better nor worse for the smoking."

"Ah!" said Holmes, "but it kills the appetite."

"Well, I don't know about that, sir."

"I suppose the Professor eats hardly anything?"

"Well, he is variable. I'll say that for him."

"I'll wager he took no breakfast this morning, and won't face his lunch after all the cigarettes I saw him consume."

"Well, you're out there, sir, as it happens, for he ate a remarkable big breakfast this morning. I don't know when I've known him make a better one, and he's ordered a good dish of cutlets for his lunch. I'm surprised myself, for since I came into that room yesterday and saw young Mr. Smith lying there on the floor, I couldn't bear to look at food. Well, it takes all sorts to make a world, and the Professor hasn't let it take his appetite away."

We loitered the morning away in the garden, Stanley Hopkins had gone down to the village to look into some rumors of a strange woman who had been seen by some children on the Chatham road the previous morning. As to my friend, all his usual energy seemed to have deserted him. I had never known him handle a case in such a half-hearted fashion. Even the news brought back by Hopkins that he had found the children, and that they had undoubtedly seen a woman exactly corresponding with Holmes's description, and wearing either spectacles or eye-glasses, failed to rouse any sign of keen interest. He was more attentive when Susan, who waited upon us at lunch, volunteered the information that she believed Mr. Smith had been out for a walk yesterday morning, and that he had only returned half an hour before the tragedy occurred. I could not myself see the bearing of this incident, but I clearly perceived that Holmes was weaving it into the general scheme which he had formed in his brain. Suddenly he sprang from his chair and glanced at his watch. "Two o'clock, gentlemen," said he. "We must go up and have it out with our friend, the Professor."

The old man had just finished his lunch, and certainly his empty dish bore evidence to the good appetite with which his housekeeper had credited him. He was, indeed, a weird figure as he turned his white mane and his glowing eyes toward us. The eternal cigarette smouldered in his mouth. He had been dressed, and was seated in an armchair by the fire.

"Well, Mr. Holmes, have you solved this mystery yet?" He showed the large tin of cigarettes which stood on a table beside him towards my companion. Holmes stretched out his hand at the same moment, and before them they tipped the box over the edge. For a minute or two we were all on our knees retrieving stray cigarettes from impossible places. When we rose again, I observed Holmes's eyes were shining and his cheeks tinged with color. Only at a crisis have I seen those battle signals flying.

"Yes," said he, "I have solved it."

Stanley Hopkins and I stared in amazement. Something like a snarl quivered over the gaunt features of the old Professor.

"Indeed! In the garden?"

"No, here."

"Here! When?"

"This instant."

"You are surely joking, Mr. Sherlock Holmes. You compel me to tell you that this is too serious a matter to be treated in such a fashion."

"I have forged and tested every link of my chain, Professor Coram, and I am sure that it is sound. What your motives are or what exact part you play in this strange business I am not yet able to say. In a few minutes I shall probably hear it from your own lips. Meanwhile I will reconstruct what is past for your benefit, so that you may know the information which I still require."

"A lady yesterday entered your study. She came with the intention of possessing herself of certain documents which were in your bureau. She had a key of her own. I have had an opportunity of examining yours and I do not find that slight discoloration which the scratch made upon the varnish would have produced. You were not an accessory, therefore, and she came, so far as we can read the evidence, without your knowledge to rob you."

The Professor blew a cloud from his lips. "This is most interesting and instructive," said he. "Have you no more to add? Surely, having traced this lady so far you can also say what has become of her."

"I will endeavor to do so. In the first place she was seized by your secretary, and stabbed him in order to escape. This catastrophe I am inclined to regard as an unhappy accident, for I am convinced that the lady had no intention of inflicting so grievous an injury. An assassin does not come unarmed. Horrified by what she had done, she rushed wildly away from the scene of the tragedy. Unfortunately for her, she had lost her glasses in the scuffle, and as she was extremely short-sighted she was really helpless without them. She ran down a corridor, which she imagined to be that by which she had

come—both were lined with cocoanut matting—and it was only when it was too late that she understood that she had taken the wrong passage, and that her retreat was cut off behind her. What was she to do? She could not go back. She could not remain where she was. She must go on. She went on. She mounted a stair, pushed open a door and found herself in your room."

The old man sat with his mouth open, staring wildly at Holmes. Amazement and fear were stamped upon his expressive features. Now, with an effort, he struggled his shoulders and burst into insincere laughter.

"All very fine, Mr. Holmes," said he. "But there is one little flaw in your splendid theory. I was myself in my room, and I never left it during the day."

"I am aware of that, Professor Coram."

"And you mean to say that I could lie upon that bed and not be aware that a woman had entered my room?"

"I never said so. You were aware of it. You spoke with her. You recognized her. You aided her to escape."

Again the Professor burst into high keyed laughter. He had risen to his feet and his eyes glowed like embers.

"You are mad?" he cried. "You are talking insanely. I helped her to escape? Where is she now?"

"She is there," said Holmes, and he pointed to a high bookcase in the corner of the room.

I saw the old man throw up his arms, a terrible convulsion passed over his grim face and he fell back in his chair. At the same instant the bookcase at which Holmes pointed swung round upon a hinge, and a woman rushed into the room. "You are right!" she cried, in a strange, foreign voice. "You are right! I am here."

She was brown with the dust, and draped with the cobwebs, which had come from the walls of her hiding place. Her face, too, was streaked with grime, and at the best she could never have been handsome, for she had the exact physical characteristics which Holmes had divined, with, in addition, a long and obstinate chin. What with her natural blindness, and what with the change from dark to light, she stood as one dazed, blinking about her to see where and who we were. And yet, in spite of all these disadvantages, there was a certain nobility in the woman's bearing—a gallantry in the defiant chin and in the upraised head, which compelled something of respect and admiration.

Stanley Hopkins laid his hand upon her arm and claimed her as his prisoner, but she waved him aside gently, and yet with an overmastering dignity which compelled obedience. The old man lay back in his chair with a twitching face, and stared at her with brooding eyes.

"Yes, sir, I am your prisoner," she said. "From where I stood I could hear everything and I know that you have learned the truth. I confess it all. It was I who killed the young man. But you are right—you who say it was an accident. I did not even know that it was a knife which I held in my hand, for in my despair I snatched anything from the table and struck at him to make him let me go. It is the truth that I tell."

"Madam," said Holmes, "I am sure that it is the truth. I fear that you are far from well."

She had turned a dreadful color, the more ghastly under the dark dust streaks upon her face. She seated herself on the side of the bed; then she resumed.

"I have only a little time here," she said, "but I would have you to know the whole truth. I am this man's wife. He is not an Englishman. He is a Russian. His name I will not tell."

For the first time the old man stirred. "God bless you, Anna!" he cried. "God bless you!"

She cast a look of the deepest disdain in his direction. "Why should you cling so hard to that wretched life of yours, Sergius?" said she. "It has done harm to many and good to none—not even to yourself. However, it is not for me to cause the frail thread to be snapped before God's time. I have enough already upon my soul since I crossed the threshold of this cursed house. But I must speak or I shall be too late."

"I have said, gentlemen, that I am this man's wife. He was fifty and I a foolish girl of twenty when we married. It was in a city of Russia, a university—I will not name the place."

"We were reformers—revolutionists—Nihilists, you understand. He and I and many more. Then there came a time of trouble, a police officer was killed, many were arrested, evidence was wanted, and in order to save his own life and to earn a great reward, my husband betrayed his own wife and his companions. Yes, we were all arrested upon his confession. Some of us found our way to the gallows, and some to Siberia. I was among these last, but my term was not for life. My husband came to England with his ill-gotten gains, and has lived in quiet ever since, knowing well that if the Brotherhood knew where he was, not a week would pass before justice would be done."

The old man reached out a trembling hand and helped himself to a cigarette. "I am in your hands, Anna," said he. "You were always good to me."

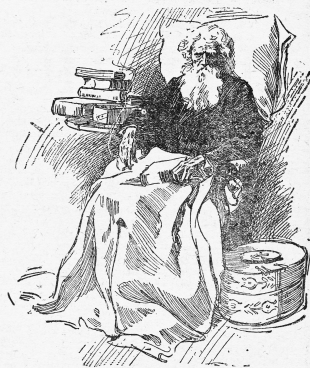
"I have not yet told you the height of his villainy," said she. "Among our comrades of the Order, there was one who was the friend of my heart. He was noble, unselfish, loving—all that my husband was not. He

hated violence. We were all guilty—if that is guilt—but he was not. He wrote for ever dissuading us from such a course. These letters would have saved him. So would my diary, in which, from day to day, I had entered both my feelings toward him and the view which each of us had taken. My husband found and kept both diary and letters. He hid them, and he tried hard to swear away the young man's life. In this he failed, but Alexis was sent a convict to Siberia, where now, at this moment, he works in a salt mine. Think of that, you villain!—now, now, at this very moment, Alexis, a man whose name you are not worthy to speak, works and lives like a slave, and yet I have your life in my hands, and I let you go."

"You were always a noble woman, Anna," said the old man puffing at his cigarette.

She had risen, but she fell back again with a little cry of pain.

"I must finish," she said. "When my term was over I set myself to get the diary and letters which, if sent to the Russian Government, would procure my friend's release. I knew that my husband had come to England. After months of searching I discovered where he was. I knew that he still had the diary, for when I was in Siberia I had a letter from him once, reproaching me and quoting some passages from its pages. Yet I was sure that, with his revengeful nature, he would never give it to me of his own free will. I must get it for myself. With this object I engaged an agent from a private detective firm, who entered my husband's house as a secretary—it was your second secretary, Sergius, the one who left you so hurriedly. He found that papers were kept in the cupboard,



The Professor was seated by the fire.

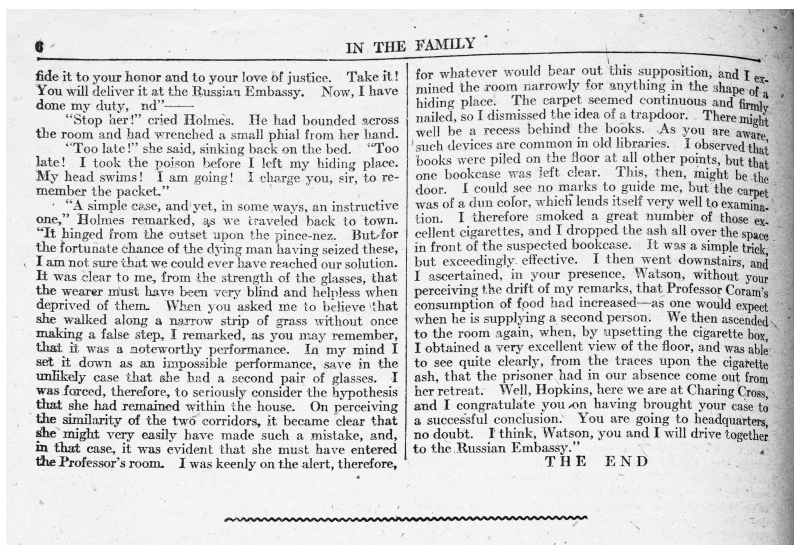
and he got an impression of the key. He would not go farther. He furnished me with a plan of the house, and he told me that in the forenoon the study was always empty, as the secretary was employed up here. So at last I took my courage in both hands and I came down to get the papers for myself. I succeeded; but at what a cost!

"I had just taken the papers and was locking the cupboard when the young man seized me. I had seen him already that morning. He had met me on the road and I had asked him to tell me where Professor Coram lived, not knowing that he was in his employ."

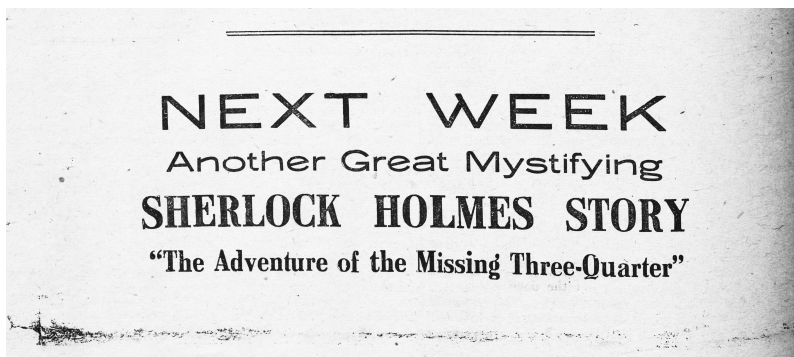
"Exactly! exactly!" said Holmes. "The secretary came back and told his employer of the woman he had met. Then in his last breath he tried to send a message that it was she—the she whom he had just discussed with him."

"You must let me speak," said the woman, in an imperative voice, and her face contracted as if in pain. "When he had fallen I rushed from the room, chose the wrong door, and found myself in my husband's room. He spoke of giving me up. I showed him that if he did so, his life was in my hands. If he gave me to the law I could give him to the brotherhood. It was not that I wished to live for my own sake, but it was that I desired to accomplish my purpose. He knew that I would do what I said—that his own fate was involved in mine. For that reason, and for other, he shielded me. He thrust me into that dark hiding place—a relic of old days, known only to himself. He took his meals in his own room and so was able to give me part of his food. It was agreed that when the police left the house I should slip away by night and come back no more. But in some way you have read our plans." She tore from the bosom of her dress a small packet. "These are my last words," said she; "here is the packet which will save Alexis. I con-

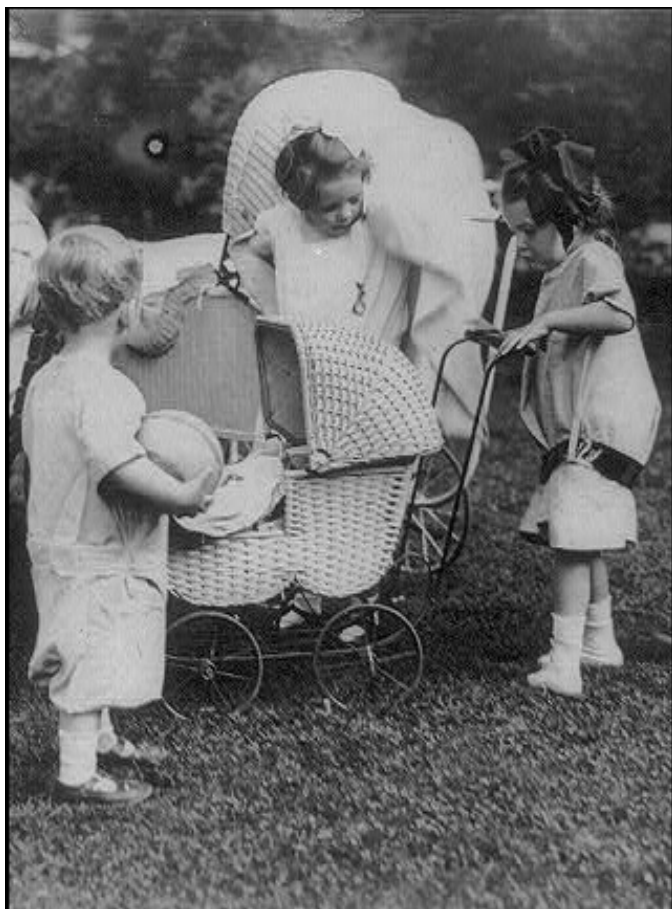
GIVING IT AWAY AT THE STRAND



The image above is the top part of page 6 of the N.Y. World pamphlet, and the image below is the bottom part of page 8. The material between them ("In the Family: A Little Story of Courtship," by Mary Stewart Cutting) is not reproduced here.



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MICRO-SYMPOSIUM

ON SCALIA & GARNER'S

"READING LAW"

PART 2

INTRODUCTION TO
PART 2
OF THE MICRO-SYMPOSIUM ON

SCALIA & GARNER'S
"READING LAW"

The Autumn 2014 issue of the *Green Bag* includes part of our micro-symposium on Antonin Scalia and Bryan Garner's book, *Reading Law: The Interpretation of Legal Texts* — specifically, papers by Brian S. Clarke, Michel Paradis, Karen Petroski, and Christopher J. Walker and Andrew T. Mikac.¹ The rest of the micro-symposium is here, with papers by Eric J. Segall, Jordan T. Smith, and William Trachman, plus a longer study commissioned by Scalia and Garner and written by Steven Hirsch. Unfortunately, even the *Journal of Law* and the *Green Bag* combined could not spare enough space to accommodate all the fine commentary we received. So, we picked a small, representative set. We regret that we cannot do more.

In our call for papers for the micro-symposium we asked for short (1,000 words) essays on *Reading Law* that dealt with "[a]ny theoretical, empirical, or practical commentary that will help readers better understand the book."² The variety of responses was striking. The range of submissions is reflected fairly well in the diversity of topics and outlooks presented here, and in the *Green Bag*. We hope you enjoy both the variety and the quality of the commentary.

— The Editors

¹ *Micro-Symposium: Antonin Scalia and Bryan A. Garner's "Reading Law"*, 18 GREEN BAG 2D 105-123 (2014).

² *Call for Papers: "Reading Law,"* 17 GREEN BAG 2D 251 (2014).

A COMMENT ON
SCALIA & GARNER'S "READING LAW"

INEFFECTIVE INTENT
DENYING A POLITICAL VICTORY
THROUGH LEGISLATIVE INTERPRETATION

William Trachman[†]

In *Halbig v. Burwell*, 2014 U.S. App. LEXIS 13880 (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia ruled that Section 1311 of the Patient Protection and Affordable Care Act (ACA) does not empower the IRS to issue regulations expanding the subsidy regime to exchanges created by the federal government.¹ The dispute concerns whether a provision providing that Congress may subsidize exchanges created by a state makes permissible a regulation that subsidizes an exchange created *not* by the state, but instead by the federal government. See 26 USCS § 36B (covering a "qualified health plan . . . that was enrolled in through an Exchange established by the State under section 1311"); 26 C.F.R. § 1.36B-2(a)(1) (covering individuals "enrolled in one or more qualified health plans through an Exchange.") (emphasis added).

Absent subsidies for individuals with plans under the federal exchanges, the entire ACA would be in jeopardy. Understandably, commentators have written that the failure to include language indi-

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¹ On September 4, 2014, the original *Halbig* decision was vacated by the D.C. Circuit, sitting *en banc*, in *Halbig v. Burwell*, 2014 U.S. App. Lexis 17099 (D.C. Cir.). However, the Supreme Court has granted certiorari with respect to a Fourth Circuit case that was issued the same day as the original *Halbig* opinion, *King v. Burwell*, 2014 U.S. App. Lexis 13902 (4th Cir.). See *King v. Burwell*, 2014 U.S. Lexis 7428 (granting certiorari). The Court will soon hear oral argument in the *King* case and will likely reach a ruling by the end of the October 2014 term.

cating that individuals were eligible for subsidies if they enrolled in a plan *either* through a state *or* federal exchange is a transparent accidental mistake.² To imperil the entire healthcare statute by way of strictly construing a single provision surely does not take into account congressional intent in passing the statute. Indeed, Scalia and Garner – though generally disdainful of the idea that courts ought look to congressional intent – are willing to make an exception where the interpretation relates to the statute’s effectiveness. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) (“The presumption against ineffectiveness ensures that a text’s manifest purpose is furthered, not hindered.”). In the same vein, Scalia and Garner are willing to offer aid to a statute if its interpretation would lead to an absurd result. *Id.* at 235 (“Consider, for example, a provision in a statute creating a new claim by saying that ‘the winning party must pay the other side’s reasonable attorney’s fees.’ That is entirely absurd, and it is virtually certain that *winning party* was meant to be *losing party*.”).

In the case of Section 1311 of the ACA, however, the presumption that Congress passed both a workable and effective statute offers a political victory to the law’s supporters that was denied at the ballot box. In short, Scott Brown’s election to the Senate on January 19, 2010, changed everything. Senator Brown’s victory – on a platform of providing the 41st vote to filibuster the ACA – changed the manner by which legislators could alter or amend the Senate and House bills that had previously been passed, and forced the hands of Democratic leaders who still sought to pass the bill in one form or another.

After Senator Brown’s election, Democrats possessed an insufficient number of votes to overcome a filibuster in the Senate. In response, the House passed the Senate’s version of the bill, and the two were forced to engage in the reconciliation process to avoid filibuster. Moreover, the electoral consequences of their efforts, made clear by the unusual GOP victory in Massachusetts, led Dem-

² To be sure, others have argued that the provision says what Congress intended it to say. See Jonathan Adler & Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA* (Case Legal Studies Research Paper No. 2012-27, 2012), available at ssrn.com/abstract=2106789.

ocrats to rush to pass the legislation before the summer congressional recesses that had included raucous, uncontrollable town halls the prior summer.

The importance of Senator Brown's election cannot be understated. The version of the ACA that was enacted in March 2010 is nothing like the version in place today, even discounting the effect of administrative regulations and revisions by Article III courts.³ To say, then, that the ACA can be fairly read as representing what its supporters actually wanted to include in the legislation is misguided, as an empirical matter. Indeed, some have joked that comparing the legislative process to sausage-making is an insult to sausages; in the context of the ACA, that is surely the case.

How then, should courts treat section 1311, assuming that its omission really is an error? Scalia and Garner note that statutes, like contracts, should be "construed, if possible, to work rather than fail." Scalia & Garner, at 63. Yet in this context, Scalia and Garner's approach would give to Democrats the unique benefit of having *won* the 2010 special election in Massachusetts. In other words, courts may be giving supporters of the ACA the benefit of fixing a statute that, in March 2010, could not actually have been fixed legislatively. To use the example provided by Scalia and Garner, a statute that forces a winning party to pay the attorney's fees of the losing party is absurd, until one realizes that political circumstances made it such that amending that provision was practically impossible.

In all fairness, Scalia and Garner write that the doctrine of absurdity – by which courts may repair flawed statutes – is not meant to "revise purposeful dispositions that, in light of other provisions of the applicable code, make little if any sense." *Id.* at 239. But in the context of the ACA, the absurdity itself may not have been purposeful, but rather only the decision to press forward with passage of a statute in an untraditional and hurried manner. For that reason, regardless of ineffectiveness or absurdity, Scalia and Garner should be reluctant to allow courts to fix Congress's mistake.

³ For instance, as of July 18, 2014, Congress had made 16 legislative changes to the ACA since March 2010. See Hartsfield & Turner, *42 Changes to ObamaCare . . . So Far*, available at www.galen.org/newsletters/changes-to-obamacare-so-far/.

A COMMENT ON
SCALIA & GARNER'S "READING LAW"

FAUX CANONS

Jordan T. Smith[†]

Justice Scalia has been a vocal critic of so-called “faux canons of construction” – judicial statements that have been blessed with canonical status even though most lawyers have never heard of them.¹ His criticism is well founded. One pronouncement does not a canon make, nor one fine rule. At minimum, an interpretive rule must be known and generally accepted to attain the rank of canon.² Unfortunately, Justice Scalia and Bryan A. Garner have etched (at least) one faux canon onto the esteemed monument to constitutional and statutory interpretation that they have built in *Reading Law: The Interpretation of Legal Texts*.

“Most of the canons of interpretation set forth [in *Reading Law*] are so venerable that many of them continue to bear their Latin names.”³ But in Section Twenty, the authors unveil a new canon that was previously unknown to the legal world. And they called it the

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¹ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (Princeton Univ. Press 1997) [hereinafter MATTER OF INTERPRETATION] (“There are a number of other faux canons in Llewellyn’s list . . . Never heard of it.”); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 59 (2012) [hereinafter READING LAW] (“Llewellyn’s supposed demonstration, however, treats as canons some silly (and deservedly contradicted) judicial statements that are so far from having acquired canonical status that most lawyers have never heard of them.”).

² MATTER OF INTERPRETATION at 26 (“[I]t becomes apparent that there really are not two opposite canons on ‘almost every point’ – unless one enshrines as a canon whatever vapid statement has ever been made by a willful, law-bending judge . . . That is *not* a generally accepted canon. . . .”).

³ READING LAW at 51.

"nearest-reasonable-referent canon."⁴ The text explains that this "canon" applies "[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."⁵ This description is the first reported sighting and written account of the nearest-reasonable-referent canon.

Westlaw searches reveal that no reported or unreported case mentions the "nearest-reasonable-referent canon" prior to the publication of *Reading Law* in 2012.⁶ Indeed, the authors fail to cite to any authority that specifically references the nearest-reasonable-referent canon.⁷ On the contrary, *Harris v. Commonwealth*, 128 S.E. 578 (Va. 1925) is cited as an example of a shoddy, result-oriented decision that would have reached the correct conclusion if the court had applied (or known about) the phantom nearest-reasonable-referent canon.⁸ The authors concede that the only other highlighted case, *In re Sanders*, 551 F.3d 397 (6th Cir. 2008), invoked the last-antecedent canon rather than the nearest-reasonable-referent canon.⁹ Justice Scalia has rightly scolded critics of the canons of construction for similar deficient citation of authority.¹⁰

Perhaps to hide the novelty of this new canon, and to excuse the absence of supporting authority, the nearest-reasonable-referent canon comes with a disclaimer: the "principle is often given the misnomer *last-antecedent canon* (see § 18), [but] it is more accurate to consider it separately and to call it the *nearest-reasonable-referent canon*."¹¹ The authors reason that the last-antecedent canon and nearest-reasonable-referent canon should be treated independently because, technically,

⁴ *Id.* at 152.

⁵ *Id.*; see also *id.* at 434.

⁶ Only two cases come close. *IBM Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 147 (2d Cir. 2004) (referring to "nearest *preceding* referent"); *Perrine v. Downing*, No. 260105, 2006 WL 1115981, at *2 (Mich. Ct. App. Apr. 27, 2006) (discussing the "'proximity rule,' which requires a modifier typically to refer to its last antecedent or to its nearest referent" but declining to apply it). Two opaque references do not establish a canon.

⁷ *READING LAW* at 152-53.

⁸ *Id.* at 152-53.

⁹ *Id.* at 153.

¹⁰ *MATTER OF INTERPRETATION* at 26.

¹¹ *READING LAW* at 152.

only pronouns have antecedents, and the [nearest-reasonable-referent canon] also applies to adjectives, adverbs, and adverbial or adjectival phrases – and it applies not just to words that precede the modifier, but also to words that follow it. Most commonly, the syntax at issue involves an adverbial phrase that follows the referent.¹²

According to the authors, the distinction between the two canons has been blurred “in modern practice.”¹³ Nonetheless, the case law reflects that practitioners and courts have historically treated nearest-reasonable-referent cases as a corollary application of the last-antecedent canon. The alleged imprecision is not the modern practice; it has been the *only* practice. Regardless of the desirability, or increased accuracy, of distinguishing between the two syntaxes, the decision to treat them as separate canons is unprecedented.

If, as the authors claim, *Reading Law* was meant “to collect and arrange only the valid canons”¹⁴ and to omit faux canons that are “not genuinely followed,”¹⁵ then it would have been a more accurate statement of existing law to classify nearest-reasonable-referent cases as a subset of, or qualification to, the last-antecedent canon. The authors are undoubtedly skilled enough to explain canonical nuances, and to advocate for differentiation in the future, without needlessly proliferating the number of anointed canons.¹⁶ However, by propping up the nearest-reasonable-referent canon on its own, the authors wrongly suggest that it is already recognized and generally accepted.

Before *Reading Law*, no lawyer had heard of the “nearest-reasonable-referent canon.” Since the volume’s publication, the nearest-reasonable-referent canon has been cited three times and an attribution to *Reading Law* accompanies each citation.¹⁷ It appears

¹² *Id.*

¹³ *Id.* at 432.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 31.

¹⁶ See, e.g., *id.* at 146.

¹⁷ *U.S. Fire Ins. Co. v. Kelman Bottles*, 538 Fed. App’x 175, 180 (3d Cir. 2013); *Goldberg v. Companion Life Ins. Co.*, 910 F. Supp. 2d 1350, 1353 (M.D. Fla. 2012); *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cnty.*, No. 12-0772, 2014 WL 4472616, at *5 (Tex. Aug. 29, 2014).

that *Reading Law* is not only remarkable for its usefulness and superb defense of textualism, but also its ability to launch faux canons into the upper echelon of accepted canons of construction.

A COMMENT ON
SCALIA & GARNER'S "READING LAW"

GRINDING THE CANONS¹

Eric J. Segall

"And a Bob Hope Joke would still be funny if it were sculpted in sand by the action of the desert wind."²

I was working on my submission for the Green Bag's symposium on "Reading Law," but had a few problems. The instructions governing the process stated quite *clearly* "do not waste your time or ours on tiresome anti-Scalia/Garner or anti-Posner ax-grinding."

My plan was to summarize and supplement Posner's persuasive (to me) critique of Reading Law's thesis that the 57 preferred canons of statutory interpretation can in some meaningful way limit judicial discretion. I was going to start with a few of Posner's case law examples and then add a few sharp ideas expressed long ago by the great Karl Llewellyn who, among his other contributions, pointed out that for every canon there is an anti-canon, and judges thus have no choice but to choose. But it occurred to me that such an approach might run headlong into the "tiresome" and "ax-grinding" prohibitions.

To avoid wasting my time, I tried to figure out what the editors actually meant by those limitations. My first thought was that they meant prospective authors could not discuss Scalia, Garner or Posner actually grinding an ax.³ After all, wasn't that the ordinary meaning

¹ Cf Poets of the Fall, "Grinder's Blues," "And if the man he don't tell, I see no way out of hell."

² Interpreting Law, p. 25 (really). This quote has nothing to do with this essay other than *any* book that says this needs to be seriously questioned. See e.g., "I set out to play golf with the intention of shooting my age, but I shot my weight instead!" www.jokes4us.com/people/jokes/comedianjokes/bobhopejokes.html

³ If I grind an ax in a park and cut my wrists and there is a rule prohibiting any "vehicle" in

of the words? I wasn't planning on talking about weaponry (other than maybe when discussing *Heller*) so I figured I was in the clear especially as Canon No. 6 says "words are to be understood in their ordinary, everyday meanings –unless the context indicates that they bear a technical sense."

Upon further reflection, I realized that the editors may have had something different (perhaps "technical") in mind. I googled "Scalia" and "ax-grinding" and to my dismay found *nothing* about him sharpening weapons. I repeated the process for Posner and Garner with the same results. This led me to believe that interpreting the prohibition to mean literally "ax-grinding" would lead to an absurd result (correctible under Canon No. 37) because discussions of the three of them grinding axes could not possibly be "tiresome." Canon No. 27 requires that the "provisions of a text should be interpreted in a way that renders them compatible, not contradictory;" thus my literal interpretation was cast into doubt.

So instead I thought I should focus on the word "tiresome." Scalia and Garner love using dictionaries (maybe because Garner wrote one), so I looked up the phrase. I found two definitions on dictionary.com (which I hope counts as a dictionary).⁴ The first was "causing or liable to cause a person to tire." I couldn't imagine that a 1000 word essay defending Judge Posner's critique could cause the editors of the Green Bag (or readers) to "tire." After all, these are hard-working folks; what's one short essay?

But, then to my dismay, I found the second definition of "tiresome" which was "annoying or vexatious." Now I had a more serious problem. Did the instructions mean that *any* discussion of the Posner/Scalia/Garner feud would be disqualified as *ipso facto* "annoying or vexatious?" Trying to make sense of the instructions as a whole was of course required by the very wise Canon 24 which says that "the text must be construed as a whole."⁵

the park, can an ambulance come into the park to rescue me? Just asking.

⁴ Sadly, it is not listed in Appendix A to the book which deals with proper dictionary use but I am hoping the editors will be more amenable to internet use than Scalia/Garner. Garner's dictionary, by the way, is listed as an appropriate dictionary.

⁵ Note to the DC. Circuit judges who decided *Halbig* based primarily on one sentence in a law with over two thousand pages. See Canon 24. P.S. @JAdler1969.

But then it occurred to me that maybe *only* “tiresome” or “annoying” or “vexatious” “ax-grinding” would be prohibited while “ax-grinding” that was not “tiresome,” “annoying,” or “vexatious,” would be permissible, maybe even welcome. What an achievement it would be for the Green Bag to publish something about the Posner/Scalia/Garner feud that, in fact, wasn’t “annoying” or “vexatious.” This interpretation seemed consistent with the Green Bag’s overall mission and with Canon 4 which says a “textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”

But, alas, then I came across Falsity Number 58 which exposes “the false notion that the spirit of a statute should prevail over its letter.” The “letter” of the instructions seemed to be no discussions of Posner/Scalia/Garner ax-grinding” allowed because such discussions were by definition “tiresome.”

How could I figure out which of these two plausible interpretations was the correct one?

The obvious place to turn was the 57 canons of interpretation (and the “Thirteen Falsities Exposed”) to see if I could find my answer therein. I looked and I looked but sadly no solution was in sight.

Having struck out with Scalia’s and Garner’s 57 (really 70) canons, and worried that citing Posner could disqualify me (Canon No. 49, the Rule of Lenity, probably doesn’t apply here), I decided to rest my case with the wonderful and ahead-of-his-time Llewellyn who said that the use of any canon of interpretation to decide a case must “be sold . . . by means other than the use of the canon.” That bit of wisdom seemed to me to be the sharpest tool in the shed.

A COMMENT ON
SCALIA & GARNER'S "READING LAW"

THE HIRSCH REPORT

Steven A. Hirsch

In the wake of my friend Judge Richard A. Posner's review of the Scalia-Garner book *Reading Law* — a review that accused Justice Scalia and me of manifold distortions and errors despite our extensive fact-checking — I retained a respected San Francisco lawyer, Steven A. Hirsch, to investigate and assess these allegations.

The purpose was to have an independent examination of the extent to which there was any merit in what Judge Posner had said. I arranged this project without Justice Scalia's knowledge in the belief that our second edition would benefit from Hirsch's guidance about any changes that might prove necessary or desirable.

Hirsch received a very modest honorarium of \$500, which he later informed me he turned over to his firm to offset expenses. I chose Hirsch because he had been among the most critical reviewers of our book manuscript, and I knew him to be honest, thorough, and fair.

I asked him to be dispassionate and impartial and to report his findings unflinchingly. You can judge for yourself whether he met that standard.

— *Bryan A. Garner*

Dear Bryan,
As you requested, I have investigated Judge Posner's charge that your book, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) (*Reading Law*), deliberately "misread[s] . . . case after case" to bolster its argument for "textual originalism."¹ Posner argues that *Reading Law* inaccurate-

¹ See RICHARD A. POSNER, *Reflections on Judging* 208 (2013) (*Reflections*).

ly characterizes cases as having turned on the application of a single interpretative canon, when they actually turned on a variety of considerations, including multiple canons, legislative intent, legislative history, societal traditions, common (nondictionary) usage, public policy, etc.²

As a threshold matter, I am not sure whether Posner accurately characterizes your argument, insofar as he suggests that you believe that a *single* interpretative canon can or should resolve each case. *Reading Law* discusses possible conflicts between canons at pp. 59–62, and proposes a metacanon that “No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”³ You admit that it is not always clear what results the principles *produce*.⁴ And some of your other metacanons arguably help judges adjudicate conflicts between canons (for example, “[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored”; “[a]n interpretation that validates outweighs one that invalidates”).⁵ But this attempt to resolve canon conflicts through metacanons validates Posner’s characterization in some measure, because using a metacanon to decide which canon to follow enables you to treat that metacanon as the one controlling canon.

Below, I discuss Posner’s 12 specific examples. For the most part, I do not treat his general jurisprudential or philosophical differences with you and Justice Scalia; nor can I address his unspecific statement that he “could give” three additional examples if he so chose.⁶ If he’s not willing to argue those examples, I don’t see how you can effectively respond.

With respect to each of Posner’s 12 specific examples, I try to answer two questions: (1) Has Posner accurately summarized your treatment of the authority in question? and, if he has, (2) is his criticism of your treatment of that authority both (a) accurate (*i.e.*, is his

² *Id.*

³ *Reading Law* at 59.

⁴ *See id.* at 61 (emphasis in original).

⁵ *Reading Law* at 63–68.

⁶ *See Reflections* at 199 n.55.

description of the reasoning of the case correct, or more nearly correct than yours?) and (b) supportive of his argument (*i.e.*, does the difference between his reading of the case and yours support his thesis that *Reading Law* deliberately misreads cases to bolster the case for "textual originalism")?

I conclude below that in 8 of Posner's 12 examples, Posner's criticisms are unwarranted. In 2 of the 12 examples (#10 and #11), and perhaps in a third (#6), there is arguably some substance to Posner's criticism that *Reading Law* omits a relevant aspect of the case's reasoning – although not in any glaring way that implicates your intellectual integrity as he gratuitously suggests. With respect to the remaining example (#7), I agree with Posner that *Reading Law*, while describing the case accurately, endorses a poorly reasoned decision; but, once again, that kind of disagreement is not a valid ground for attacking the authors' integrity.

On the whole, I am struck by the needlessly *ad hominem* nature of Posner's analysis.

1.

WHITE CITY SHOPPING CENTER, LP v. PR RESTAURANTS, LLC, 2006 WL 3292641 (MASS. SUPER. CT. OCT. 31, 2006),
DISCUSSED IN *REFLECTIONS* AT 199–200.

This is the first of four cases that Posner discusses to make his point that "[d]ictionaries are mazes in which judges are soon lost" and that "[a] dictionary-centered textualism is hopeless."⁷ He charges *Reading Law* with having exaggerated the degree of reliance that these courts placed on dictionary definitions; and he impugns the entire enterprise of using dictionaries to help determine the meaning of words in legal texts.

The issue in *White City* was whether a lessor violated a lease covenant forbidding it to rent space to any store that derived more than 10 percent of its sales revenues from selling "sandwiches." The plaintiff-lessee claimed that "sandwiches" included tacos, burritos, and quesadillas.

⁷ *Reflections* at 200.

Posner charges that *Reading Law* exaggerates the extent to which the *White City* court relied on the dictionary definition of “sandwich.” It is true that, after quoting the dictionary, the court also mentioned that (1) the plaintiff had adduced no evidence that the parties intended the term “sandwiches” to include burritos, tacos, and quesadillas, and (2) the plaintiff would have been prompted to include a special definition if it wanted one, because (a) it drafted the exclusivity covenant, and (b) there were already Mexican-style restaurants nearby at the time of contracting.⁸

It is true that *Reading Law* does not mention these two additional reasons. But you had two good reasons for not doing so.

First, you used *White City* to illustrate the role that interpretation plays in enabling syllogistic reasoning by clarifying the “major premise” (the legal rule) so that it could be applied to the facts. You were not purporting to give a complete description of the case – and in that context had no reason or obligation to give one.

Second, the two additional reasons were logically dependent on and subordinate to the dictionary definition, notwithstanding Posner’s unexplained contention that there were “more persuasive points than the dictionary’s definition of ‘sandwich.’” The truth is that without the definition, neither of the additional reasons would matter.

Had the court not already cited the dictionary to establish that the ordinary meaning of “sandwich” excludes tacos, burritos, and quesadillas, it would have had no basis to assert that the plaintiff-lessee had not met its burden of adducing evidence that the parties intended to depart from that ordinary and accepted meaning. Nor would the proximity of Mexican restaurants at the time of contracting have had any relevance. The court’s reliance on the ordinary meaning of “sandwich” (as reflected in the dictionary) is what made those points relevant.

Moreover, if the dictionary definition *had* encompassed tacos, burritos, and quesadillas, the court’s next point would have been that the *defendant-lessor* – not the plaintiff-lessee – had not met *its*

⁸ 2006 WL 3292641, at *3.

burden of adducing evidence that the parties meant to *exclude* those items from the (broader) ordinary definition of "sandwich." The entire tenor of the court's argument would have been altered, with the burden of proving a deviation from the dictionary definition being shifted from the plaintiff-lessee to the defendant-lessor. Likewise, the proximity of Mexican-style restaurants would have become a prompt to the lessor, rather than the lessee, to bargain for a special (narrower) definition of "sandwich." To say that these subsidiary and logically dependent points were "more persuasive" than the dictionary definition is therefore incorrect.

Although you used *White City* only for the limited purpose of explaining the role of interpretation in syllogistic reasoning, Posner seizes on the case as an opportunity to criticize the use of dictionaries in legal interpretation. But his criticisms fall flat.

Posner does not take issue with the general proposition that it would be useful, in deciding *White City*, to determine the ordinary meaning of "sandwich." His point is that a dictionary is a lousy way of doing that. Let's pause to consider that contention.

One can think of three ways to determine a word's ordinary meaning. The first would be to design a survey instrument and scientifically ascertain what a relevant sample of people thinks "sandwich" means. This method exceeds both the competence and the means of the courts, and Posner does not advocate it here (although he elsewhere advises using Google to trace the changes in a word's meaning over time).

The second way would be to examine dictionaries or, perhaps, style-and-usage manuals. This method isn't perfect, because it's likely to generate more than one definition; and selecting among them may turn out to be a bit like "entering a crowded cocktail party and looking over the heads of the guests for one's friends."⁹ But consulting these reference works may at least help the court identify a core of commonly accepted meaning.

The third way would be for the court to consult its own beliefs about what most people think the word means. In his discussion of

⁹ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

White City, Judge Posner opts unabashedly for the third method. As mentioned above, he deems dictionary definitions and the like to be “hopeless” as a guide to meaning. More specifically, he alleges that the *White City* court “got the definition wrong” and that “Scalia and Garner miss this, too.” Posner does not cite any other dictionary definition or usage manual to prove his point. Instead, he consults himself. Unfortunately, “Posner’s Guide to Modern American Usage” proves to be less well-researched than your work on that subject. Posner writes:

- “A sandwich does not have to have two slices of bread; it can have more than two (a club sandwich), and it can have just one (an open-faced sandwich).”¹⁰ But this ignores the fact that, as everyone knows, burritos, tacos, and quesadillas are made on tortillas, not bread. Tortillas are not “slices” of bread because they are not sliced from a larger loaf. And tortillas are ground meal that is pounded flat; they don’t rise like bread due to the action of yeast. They are about as much like sandwich bread as matzo crackers are. One wonders whether Judge Posner has ever eaten Mexican food or watched it being prepared.
- “The slices of bread do not have to be thin, and the layer between them does not have to be thin either.”¹¹ But this is of no relevance to deciding the *White City* case, since tortillas are, by any measure, thin.
- “The slices do not have to be slices of bread: a hamburger is generally regarded as a sandwich, as is also a hot dog — and *some people regard* tacos and burritos as sandwiches, and a quesadilla is even more sandwich-like.”¹² Really? Can you even imagine this exchange in a restaurant? “*Customer*: Um, I think I’ll have a sandwich. *Waiter*: Great, which one? We’ve got clubs, egg salad, tuna, pastrami . . . *Customer*: I think I’ll make that a . . . a hot-dog sandwich. No, wait. Let’s change that to a taco sandwich. *Waiter*: Sure thing. We also have some great burrito sandwiches and hamburger sandwiches, by the way.” Who would regard this as being a normal conversation?

¹⁰ *Reflections* at 200.

¹¹ *Id.*

¹² *Id.* (emphasis added).

Posner does not actually commit himself to any affirmative definition of what a "sandwich" is. He can't because he has no authoritative basis for including or excluding any particular foodstuff from consideration as long as it contains a layer of something derived from flour or grain, plus something else. By his reasoning, a cake or a bread pudding or a heaping plate of matzo brei (look it up) could be a sandwich. What practical good is such reasoning to a court?

Thus, Posner's disquisition on sandwiches fails to prove that using a dictionary definition to determine ordinary meaning is less useful or less reliable than resorting to an armchair analysis of what the judge thinks "some people regard" a word to mean. If anything, Posner's quirky and unpersuasive discussion proves the opposite: the dictionary definition of "sandwich" much more closely accords with what most real people – as opposed to his imaginary "some people" – regard a sandwich to be.

2.

COMMONWEALTH V. MCCOY, 962 A.2D 1160 (PA. 2009),
DISCUSSED IN *REFLECTIONS* AT 201.

The issue was whether a state penal statute that prohibited "knowingly, intentionally or recklessly discharg[ing] a firearm *from any location into* an occupied structure" encompassed discharging a firearm *from a location within* that structure.¹³ The court concluded that it did not.

Posner faults *Reading Law* for supposedly portraying the entire decision as hinging on the dictionary definition of "into" when the court actually "decided the case on other grounds" – but he doesn't say what those grounds were.¹⁴ It's odd that Posner makes such a big deal of this case. All you said about it was that it demonstrated that dictionaries "can illuminate a question such as the precise contours of *into*."¹⁵ You did not purport to give a full account of the case's reasoning; yet Posner beats you up for not doing so.

¹³ 962 A.2d at 1162 (emphasis added).

¹⁴ *Reflections* at 201.

¹⁵ *Reading Law* at 72 (emphasis in original).

And if one does examine the court's other reasons, one realizes that they could have been plucked right out of *Reading Law*. The court observed that

- “the object of interpretation and construction of statutes is to ascertain and effectuate the intention of the” legislature;¹⁶
- “[a] statute’s plain language generally provides the best indication of legislative intent”;¹⁷
- “[t]he plain meaning of ‘into’ can be gleaned from its dictionary definition”;¹⁸
- based on those definitions, “in the context of spatial relations, the plain meaning of the term ‘into’ requires that the original location is outside of the destination”;¹⁹
- although the court was “unable to turn to a dictionary to ascertain the plain or ordinary meaning of the phrase ‘from any location,’ . . . if considered without relation to the word ‘into,’ the plain meaning of ‘from any location’ encompasses . . . the interior of the occupied structure”;²⁰
- it was impossible to give “full logical effect” to both terms; rather, one must be “interpreted as modifying or limiting the other, and thus *principles of construction are implicated*.”²¹

The implicated “principles of construction” were that

- “[e]very statute shall be construed, if possible, to give effect to all its provisions” (*Reading Law Canon #26*);²²
- “[i]n determining legislative intent, we must read all sections of a statute ‘together and in conjunction with each other,’ construing them ‘with reference to the entire statute’” (*Reading Law Canon #27*);²³

¹⁶ 962 A.2d at 1166.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1167.

²⁰ *Id.*

²¹ *Id.* (emphasis added).

²² *Id.* at 1167–68.

²³ *Id.* at 1168.

- courts “are not permitted to ignore the language of a statute, nor may [it] deem any language to be superfluous” (*Reading Law Canon #26*);²⁴
- “[w]hen there is an interpretation available that gives effect to all of the statute’s phrases and does not lead to an absurd result, that interpretation must prevail” (*Reading Law Canon #26 & #27*);²⁵ and
- “penal statutes ‘shall be strictly construed’” (*Reading Law Canon #49*).²⁶

Applying these principles, the court concluded that it did less violence to the statute’s words to read “into” as “modif[ying] the meaning of ‘from any location’ to include only any location from which the shooter can physically shoot ‘into’ the occupied structure, including other structures, moving vehicles and any other location outside of the occupied structure,” than to read “from any location” as modifying “into” to mean “into, or from within.”²⁷

Thus, in determining which of the partially conflicting terms would modify the other, the court gave primacy to the term whose clear and established dictionary definition otherwise would have been utterly transgressed. Along the way, the court relied on a canon-driven analysis that accords well with the approach urged in *Reading Law*. Should Posner be denounced as intellectually dishonest for failing to mention this? Or can we just have a civil discussion about the interpretation of legal texts?

3.

STATE EX REL. MILLER V. CLAIBORNE, 505 P.2D 732 (KAN. 1973), DISCUSSED IN *REFLECTIONS* AT 201.

The issue was whether a state penal statute that defined and forbade cruelty to “animals” effectively barred cockfighting. The court held that it did not, because, “even though we must recognize

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

that biologically speaking a fowl is an animal; a sentient, animate creature as distinguished from a plant or an inanimate object”²⁸ (a definition for which no dictionary was cited), other considerations proved dispositive – namely:

- Most people think of a chicken as a bird, “not a hair-bearing animal.”²⁹
- Kansas animal-cruelty statutes “traditionally” protected “four-legged animals, especially beasts of the field and beasts of burden” and forbade “overloading, overdriving, overworking, tortur[ing], beating, underfeeding or cruel killing” of them.³⁰
- Kansas prohibited Sunday cockfighting for over a century and, when that law was repealed, instituted no law barring cockfighting at any time, leading to an inference that cockfights could be held “seven days a week.”³¹
- There was nothing “in the record” indicating a legislative intent to include “gaming cocks” within the class of protected animals.³²

Posner says that *Reading Law* gives this decision short shrift by criticizing it for “perversely [holding] that roosters are not ‘animals’” and that the animal-cruelty statute therefore did not bar cockfighting. If he is trying to say that you inaccurately restricted your account of the case’s reasoning to whatever it might tell us about dictionary usage, he is wrong on two counts. First, the only thing you said about the case was that its result was perverse (and you imply that the court could have avoided that perverse result by using a dictionary). That’s all. You did not purport to give a full account of the case’s reasoning. Second, you observed in a parenthetical that the *Miller* court “not[ed] that the cruelty-to-animals-statute had traditionally applied only to four-legged animals” – the second bullet point shown above.³³

²⁸ 505 P.2d at 735.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Reading Law* at 72 n.10.

Posner cites the other rationales that the court gave for its decision; but so what? Your point was that the plain meaning of "animal" *should have* controlled. Unless Posner can show that the court's countervailing reasons were strong enough to overrule plain meaning, his criticism falls flat. He makes no such showing.

4.

KNOX V. MASSACHUSETTS SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS, 425 N.E.2D 393 (MASS. APP. 1981),
DISCUSSED IN *REFLECTIONS* AT 201–02.

The issue was whether goldfish were protected by a state statute forbidding anyone from "offer[ing] or giv[ing] away *any live animal* as a prize or an award in a game, contest or tournament involving skill or chance."³⁴ The court held that goldfish were protected. The court quoted an earlier case – not a dictionary – holding that "[t]he word 'animal', in its common acceptance, includes all irrational beings,"³⁵ and noted that "[t]his broad definition, which accords with most dictionary meanings, leaves us little to contribute by deliberating on any taxonomic scale. We merely conclude, in interpreting this humane statute designed to protect animals subject to possible neglect by prizewinners, that [the statute] applies to goldfish."³⁶ In a footnote, the court cited two dictionary definitions that did not, in fact, equate "animals" with "irrational beings."³⁷

Thus the case had very little to do with dictionary definitions, but rather more to do with ordinary meaning as defined by an earlier decision; and the court checked its result for consistency with the statutory purposes of avoiding animal neglect and forbidding acts toward living creatures that dull the sensibilities and corrupt the morals of humans who observe or know of those acts.³⁸ This extra check for consistency with overall purpose accords well with *Reading*

³⁴ 425 N.E.2d at 395 (emphasis added).

³⁵ *Id.* at 396.

³⁶ *Id.* (footnote omitted).

³⁷ *Id.* at 396 n.4.

³⁸ *See id.* at 395–96.

Law Canon #4 (“[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored”).

Oddly, Posner faults *Reading Law* for failing to properly distinguish *Knox* from *Claiborne*, the Kansas cockfighting case (#3, above). He notes that, “in contrast to the Kansas case, no reason had been given for rejecting the dictionary definition of ‘animal’”³⁹ (by which he apparently means the judicially promulgated “irrational beings” definition). Well . . . exactly! No such reason was cited, and the ordinary meaning was adopted – which is why *Reading Law* prefers this case to *Claiborne*. Note, too, that at least one of the reasons cited in *Claiborne* could have applied equally in *Knox*: apparently there was no evidence in the record of a legislative intent to protect goldfish. In *Knox*, however, that reason was not even mentioned, let alone allowed to trump the ordinary meaning of “animals.” And that’s why (from your textualist standpoint) it’s a better decision than *Claiborne*.

5.

STATE V. GONZALES, 129 SO. 2D 796 (LA. 1961),
DISCUSSED IN *REFLECTIONS* AT 202.

The issue was whether a state statute providing that minors are “emancipated of right” by marriage and may act without the assistance of a curator in any act or proceeding deprived a married 16-year-old girl of the protections of a state penal statute that forbade anyone over the age of 17 from contributing to the delinquency of “any child under the age of” 17 by having sexual relations with that “child.”⁴⁰ The 16-year-old girl in question had been married twice (the second time bigamously) before meeting and having sex with the defendant.

The court applied the maxim that penal statutes “cannot be extended by analogy so as to create crimes not provided for therein” and must be construed “according to the fair import of their words, taken in their usual sense, in connection with the context, and with

³⁹ *Reflections* at 202.

⁴⁰ 129 So.2d at 798.

reference to the purpose of the provision."⁴¹ Accordingly, the word "child" must be given its "ordinary accepted meaning in civil law, that is, a juvenile subject to parental control or guardianship and . . . does not include a minor emancipated by marriage."⁴² The court added that, "[h]ad it been [the Legislature's] design to extend the law to all minors under the age of seventeen, irrespective of their legal status, the lawmaker would have used the word 'person' or 'anyone' under seventeen instead of 'child.'"⁴³ The court observed that, because penal statutes cannot be enlarged by implication or by changes in "social legislation," it was irrelevant that a statute defining the jurisdiction of the juvenile courts had been amended to include minors emancipated by marriage. What mattered was how "child" was understood when the penal statute was enacted.⁴⁴

Posner takes *Reading Law* to task for commending the *Gonzales* court's use of a "technical meaning" of the word "child" to exonerate the defendant. He cites two grounds.

First, he asserts that the ruling "had nothing to do with the meaning of 'juvenile' or 'child' in the criminal statute."⁴⁵ Posner is just flat wrong about this. As *Reading Law* correctly explains, the decision hinged entirely on the technical meaning of "child."

Second, Posner criticizes *Reading Law* for giving *Gonzales*'s reasoning an undeserved endorsement. He argues that the emancipation statute merely allowed married minors to make contracts without the permission of their husband or a judge, and that making contracts has nothing to do with having sex.⁴⁶ He asks, "[i]f children were forbidden to drink liquor, would the court have made an exception for married children? It would not have; but that is the logic of the opinion commended by Scalia and Garner."⁴⁷

But that misses the point. If state law contemplated the marriage of minors at all, it necessarily contemplated that *their spouses*, at least,

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 798–99.

⁴⁵ *Reflections* at 202.

⁴⁶ *See id.*

⁴⁷ *Id.*

could *have sex* with them, as this is a fundamental attribute of marriage. By contrast, being married has no necessary connection with being able to drink liquor. A man above the age of 17 might rationally conclude that he was just as free (or unfree) to commit adultery with a lawfully married and emancipated 16-year-old as with a lawfully married and emancipated 17-year-old. To interpret the statute as more severely punishing adultery with the former might have created the kind of due-process issue that concerned the *Gonzales* court.

One wonders, moreover, why Posner fixated on this particular case. He thinks the case was wrongly decided; you do not. Both positions are supportable. The disagreement may stem from different views about when it is proper to use a definition from one statutory scheme to interpret a different one. But how does that difference of views illuminate the larger interpretative debate between you and him? The answer is not obvious, and Posner does not explain.

6.

BRASCHI V. STAHL ASSOCIATES CO., 543 N.E.2D 49 (N.Y. 1989), DISCUSSED IN *REFLECTIONS* AT 202.

The issue was whether the surviving member of a gay couple was a member of the decedent's "family" for purposes of a state statute providing that, upon the death of a rent-control tenant, the landlord could not dispossess "either the *surviving spouse* of the deceased tenant or *some other member of the deceased tenant's family* who has been living with the tenant."⁴⁸

I think that Posner is right to point out that *Reading Law* omitted important facts about this case. It is pertinent to your exposition, even if not to the court's resolution of the case, that the two men were legally prohibited from marrying but behaved in every way as spouses and were regarded as such by their families. Even if you think that such considerations should not control or even be considered, it is important to acknowledge the cost that an adherence to strict textualism may impose on the parties in a given case. Not to do so makes a difficult decision – and fidelity to your method – look too easy.

⁴⁸ 543 N.E.2d at 50 (emphases added) (citation omitted).

I say "strict" textualism because your designation of true and false canons is purposefully skewed in favor of canons that reduce judicial discretion to do equity or justice in particular cases. For example: You could have approved of the holding in *Braschi* based on the canon that remedial statutes should be liberally construed. But you disapprove of that one.⁴⁹ The remedial-statute canon allows courts to rule equitably in contexts where the Legislature in all probability wanted equity to be done. Only a hypertechnical construction of "family" would allow a court to say that a life partner who sticks with someone literally unto death, but whom the decedent was legally prohibited from marrying, was not part of the decedent's "family." Of course, I recognize that we are not going to agree on that, and that you are in fact likely to view my reasoning as a perfect example of why courts should abandon the remedial-statute canon.

7.

STATE BY COOPER V. FRENCH, 460 N.W.2D 2 (MINN. 1990),
DISCUSSED IN *REFLECTIONS* AT 203.

The issue was whether, in 1990, a state statute barring owners from refusing to rent real property to another because of "marital status" barred an owner from refusing to rent to a woman who intended to cohabit – or "live in sin" – with her fiancé on the rented premises, even though an anti-fornication statute criminalizing extramarital sex remained on the books.

It's important to note that the controversy surrounding this case is *not* whether *Reading Law* misreads the case as being "textualist" when it's not, but rather, whether the book's endorsement of the case as a *good* example of textualism was warranted.

I agree with Posner that the endorsement was not warranted. I find it implausible that Minnesota state legislators in the late 1980s meant to exclude from the "marital status" category the largest and most obvious group of likely beneficiaries (unmarried heterosexual couples) because of the legislators' presumed familiarity with an ancient and completely outmoded anti-fornication statute.

⁴⁹ See *Reading Law* at 364–66.

I agree with Posner's comments about this case, and would go further by stating that housing discrimination *obviously* is based on "marital status" if the owner rents to married couples who might have sex with each other, but does not rent to unmarried couples because they might have (or be thought to have) sex with each other. The only difference between them is their "marital status" and the fact that the unmarried couple's conduct falls within the terms of a "fornication" statute so obviously antiquated (and probably unconstitutional) that the best evidence the court could cite for its continued relevance was a case involving "fornication" *with a minor*.

The majority opinion ignored the obvious legislative intent. Even if one cannot make the case for an implied repeal of the fornication statute, there was at least a change of legislative policy that should inform the way one reads the antidiscrimination statute. How could a legislature that forbade discrimination because of "marital status" continue to countenance the notion that sexual relations between unmarried people is a crime while sexual relations between married people is not? The only known reason why property owners refuse to rent to unmarried heterosexual couples is because those owners disapprove of extramarital sex. So how could the legislature possibly pass this antidiscrimination statute if it believed that anti-fornication laws had any continuing claim on public policy? And what could "marital status" protection accomplish if read so as to accommodate a fornication statute?

The court provides an utterly inadequate answer purportedly based on a plain-language parsing of a later statute providing that marital status means "whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse."⁵⁰

The court explained that "[t]he plain language of this new definition shows that, in non-employment cases, the legislature intended to address only the status of an individual, not an individual's relationship with a spouse, fiancé, fiancée, or other domestic partner."⁵¹

⁵⁰ 460 N.W.2d at 6.

⁵¹ *Id.*

There are three problems with this reasoning.

First, the statute's "employment" clause is strictly limited to discrimination relating to a "spouse or former spouse." The clause has nothing to say, by negative implication or otherwise, about discrimination against unmarried persons. Indeed, the most one could say by negative implication from the "employment" clause is that, in nonemployment cases, the phrase "marital status" does not protect against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse. On its face – as any textualist must admit – the clause provides no clue as to whether the legislature intended to ban discriminating against unmarried couples because they will commit or give the appearance of committing fornication.

Second, the court's individual-versus-relationship distinction doesn't hold water because the factors that the statute recognizes in employment cases – namely, "the identity, situation, actions, or beliefs of a spouse or former spouse" – exist independently of and have nothing specifically to do with the relationship between the employee and the spouse or former spouse. Indeed, it is precisely in recognition of the employee's autonomy that the statute prevents employers from adversely altering that employee's employment conditions based on who the spouse or former spouse is, or what that spouse or former spouse believes or does.

Third, the conclusion that the court reaches is ridiculous on its face – namely, that the legislature could not have intended the phrase "marital status" to have anything to do with "an individual's *relationship* with a spouse, fiancé, fiancée, or other domestic partner." Really? What *did* they think it meant, then? The only type of person who has no "relationship with a spouse, fiancé, fiancée, or other domestic partner" is a single person who is not affianced. By this reasoning, the statute only could bar discrimination based on the status of being single and not affianced – a conclusion at odds with the definition of "marital status" ("whether a person is single, married, remarried, divorced, separated, or a surviving spouse").

The decision gets more traction, in my view, when it talks about infringing on the free-exercise rights of property owners. That is more worrisome. You may not want to rent your former home to

unmarried people who will “fornicate” there; I may not want to rent my former home to Nazi-party members who will hold antisemitic pep rallies there. Maybe the Constitution protects such preferences, at least where the rental property is small and personal in nature and thus arguably less of a public accommodation. But if we are going to talk about the Constitution, what about the fact that the fornication statute in all likelihood violates the constitutional right of privacy? In any event, the decision’s constitutional aspects are not at issue here.

8.

CHUNG FOOK V. WHITE, 264 U.S. 443 (1924),
DISCUSSED IN *REFLECTIONS* AT 203–04.

The question was whether, under Section 22 of the Immigration Act of 1917, an alien ineligible for citizenship under anti-Chinese immigration laws, and afflicted with a dangerous contagious disease, could be detained by U.S. immigration authorities even though she was married to a *native-born* U.S. citizen. Her native-born husband, Chung Fook, argued that this made no sense because a different statute exempted an afflicted spouse from detention if she was married to a *naturalized* citizen. How could the wife of a native-born citizen have fewer rights than the wife of a naturalized one?

The district court denied the husband’s writ of habeas corpus and the court of appeals affirmed, reasoning that the exemption from detention applied to an afflicted spouse who (under yet another statute) had acquired her naturalized husband’s citizenship by marriage – but not to an afflicted spouse who (like Chung Fook’s wife) was ineligible for citizenship although married to a natural-born citizen. Affirming, the Supreme Court was “inclined to agree with this view” but did not adopt it because it found as a purely textual matter that Section 22, the detention statute at issue, “plainly relates only to the wife . . . of a naturalized citizen and we cannot interpolate the words ‘native-born citizen’ without usurping the legislative function.”⁵²

⁵² 264 U.S. at 445.

You used *Chung Fook* as an example of a proper refusal to apply the canon that courts should avoid interpretations that produce absurd results. Posner does not engage you on that point. Instead, he criticizes *Reading Law* for not mentioning the Supreme Court's *dicta* that it was "inclined to agree" with the court of appeal's more "sensible interpretation," and that the high court appeared to adopt the pure textualist approach only "reluctantly."

So what? There is no obligation to discuss *dicta*. Moreover, the Supreme Court's devotion to textualism in *Chung Fook* must be deemed extraordinarily strong because the court adhered strictly to the statutory text *despite* finding the court of appeal's reasoning attractive and *despite* noting that *Chung Fook* had "forcefully contended" that the statute "unjustly discriminat[ed] against the native-born citizen" and was "inhuman in its results."⁵³ The sirens of nontextualism beckoned, but the Supreme Court tied itself to the mast and sailed on. Posner can argue whether this was right or wrong, but he can't accuse *Reading Law* of having misrepresented the holding or reasoning of the case.

9.

MCBOYLE V. UNITED STATES, 283 U.S. 25 (1931), DISCUSSED IN *REFLECTIONS* AT 206.

Posner pounces on a bullet-point about this case ("‘automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails’ – held not to apply to an airplane"⁵⁴), complaining that "[t]he summary distorts Holmes's analysis."

But you weren't trying to summarize Holmes's analysis. You were trying to furnish a list of examples in which courts applied the *ejusdem generis* canon. And the *McBoyle* court did, indeed, apply the canon. Posner himself admits that the decision "alludes to without naming the principle of *ejusdem generis*."⁵⁵

⁵³ *Id.* at 446.

⁵⁴ *Reading Law* at 200.

⁵⁵ *Reflections* at 206.

McBoyle involved a statute called the National Motor Vehicle Theft Act, which defined “motor vehicle” as including “an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.”⁵⁶ The question presented was whether the word “vehicle” in the phrase “any other self-propelled vehicle not designed for running on rails” included an airplane. The Supreme Court concluded that it did not, for the following reasons:

- “[A]fter including automobile truck, automobile wagon and motor cycle, the words ‘any other self-propelled vehicle not designed for running on rails’ still indicate that a vehicle in the popular sense, that is a vehicle running on land[,] is the theme.”⁵⁷ “It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class.”⁵⁸
- “[I]n everyday speech ‘vehicle’ calls up the picture of a thing moving on land.”⁵⁹
- “It is a vehicle that runs, not something, not commonly called a vehicle, that flies.”⁶⁰
- “Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or in the debates in Congress.”⁶¹
- The “motor vehicles” definition followed earlier statutes of other states, including the District of Columbia traffic regulations, which surely did not involve flight.⁶²
- The principle of fair warning in criminal statutes prevented the Court from extending the definition to aircraft “simply because it may seem to us that a similar policy applies, or upon the specula-

⁵⁶ 283 U.S. at 26–27.

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 27.

⁵⁹ *Id.* at 26.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 27.

tion that if the legislature had thought of it, very likely broader words would have been used."⁶³

It is true that only the first of these reasons concerns *ejusdem generis*, the point for which *Reading Law* cited the case. But the second, third, and last reasons are all textual in nature and correspond to *Reading Law* Canon #6, #6 (again), and #49. Again, should Posner be denounced as intellectually dishonest for failing to mention this?

10.

AMARAL V. SAINT CLOUD HOSPITAL, 598 N.W.2D 379
(MINN. 1999), DISCUSSED IN *REFLECTIONS* AT 207.

The issue was whether a statutory exception to a statute that granted hospitals a privilege not to disclose peer-review data could be invoked by doctors who (a) had not yet filed any lawsuit or (b) had filed a lawsuit, but not one challenging a denial of hospital admitting privileges or other adverse action. The privilege was intended to foster candid input from physicians who otherwise might be afraid to say anything that could lead to a defamation action; and there was concern that reading the exception broadly would swallow the rule of privilege.

Posner is correct that this case was not decided based on the "series-qualifier canon"⁶⁴ but rather, on an examination of legislative purpose, the court having given up on the text of the statutory exception as hopelessly ambiguous. Perhaps it would have been better to decide the case based on the canon, but I doubt it. The text of the statutory exception was truly ambiguous, and it could not be read as the plaintiffs urged without undoing the entire statutory privilege scheme and violating the policies underlying that scheme. In this instance, there is some substance to the criticism that the true basis of the court's decision was not accurately stated.

⁶³ *Id.*

⁶⁴ The canon states that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."

11.

PHOENIX CONTROL SYSTEMS, INC. v. INSURANCE CO. OF NORTH AMERICA, 796 P.2d 463 (ARIZ. 1990),
DISCUSSED IN *REFLECTIONS* AT 207–08.

The issue was whether a liability policy that covered “[a]ny infringement of copyright or improper or unlawful use of slogans in your advertising” covered “infringement of copyright” that did *not* occur “in [the insured]’s advertising.” In other words, did the prepositional phrase “in your advertising” modify “infringement of copyright” as well as “improper or unlawful use of slogans”? The Arizona Supreme Court held that it didn’t because, under a canon of interpretation called “the last antecedent rule,” a qualifying phrase applies only to the immediately preceding word or phrase unless a contrary intent is indicated. The court also noted that this interpretation protected the reasonable expectations of the insured; and it cited a treatise’s statement that “[a]n insurance policy is not to be interpreted in a factual vacuum”⁶⁵ (although the court failed to explain how that maxim informed its decision).

Posner faults *Reading Law* for suggesting that the case turned on the rule that ambiguities should be construed against the drafter. He is correct that the court did not mention *contra preferentem* and relied instead on the last-antecedent rule. But he goes too far when he implies that *Reading Law* deliberately fails to mention the last-antecedent rule because it too obviously conflicts with the “series-qualifier canon,” which would have called for the court to apply “in your advertising” to both antecedent terms (“infringement of copyright” and “improper or unlawful use of slogans”). Surely we can disagree with an author’s description of a case without automatically attributing it to bad faith? Here, as elsewhere, one is struck by the excessively harsh nature of Posner’s critique.

⁶⁵ 796 P.2d at 466.

12.

FELIX FRANKFURTER, *SOME REFLECTIONS ON THE READING OF STATUTES*, 47 COLUM. L. REV. 527 (1947),
DISCUSSED IN *REFLECTIONS* AT 217.

Posner's account of Frankfurter's statements about canons of construction is correct; Frankfurter grants them some worth while cautioning against their excessive rigidity and their tendency to mask the indeterminate and judgmental nature of statutory interpretation. But all that is implicit in the brief quotation in *Reading Law* ("insofar as canons of construction are *generalizations of experience*, they all have worth") (emphasis added). To say that *Reading Law* "distorted" Frankfurter's meaning is therefore unwarranted.

Bryan, I hope that you'll find this memo helpful. Feel free to call me to discuss any aspect of it.

Best regards,
Steve

JL

New Voices

Volume 1 • Number 2 • Autumn 2014

With this, our second issue, we move beyond my own students and my own areas of expertise – exactly the direction in which I hope we will continue.

continued inside . . .

New Voices

Volume 1 • Number 2 • Autumn 2014

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Submission information:

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JL

FROM THE EDITOR

Suzanna Sherry[†]

With this, our second issue, we move beyond my own students and my own areas of expertise – exactly the direction in which I hope we will continue.

From a 2014 graduate of George Mason University School of Law comes a sophisticated theoretical paper on the vexing and perennial question of whether the duty of care is owed to the world at large or only to a defined class of individuals. (Think *Palsgraf*, now being re-fought between proponents and critics of the Third Restatement of Torts.) For those in the thick of it, Peter Choi's paper provides a novel take on the question. For those of us who haven't thought about tort law since the first year of law school, he brings us up to date *and* gives us a way to talk knowledgeably with our torts colleagues.

In an entirely different vein, a 2014 graduate of the University of Pittsburgh School of Law tackles one of the very practical litigation issues caused by the meteoric increase in the amount of electronically stored information. Discovery of that information – e-discovery – is expensive, much more so than discovery of ordinary paper documents. Who should pay, and why? Corey Patrick Teitz explains the problem and offers a solution in the form of a proposed amendment to the federal statute that allows a losing party to be taxed for “costs.” Teitz's paper digs into the nitty-gritty of civil procedure and makes it fun and interesting. (And I'm not just saying that because I teach civil procedure – I know how yawn-inducing it is to my colleagues!)

And if your reaction to either paper is “my students produce better work than *that*,” put your money where your mouth is: send me your students' work.

• • •

[†] Herman O. Loewenstein Professor of Law, Vanderbilt University.

JL

THE DUTY OF CARE AS A DUTY IN REM

Peter Choi[†]

with a Preface by Michael I. Krauss^{*}

PREFACE

Peter Choi wrote this paper for my Torts Theory Seminar. He defends the “duty in the air” theory critical of the *Palsgraf* decision and others of its ilk. But he defends it in a different way than do Heidi Hurd and Michael Moore.^a Choi’s claim is that the duty of care is a duty *in rem*.

• • •

INTRODUCTION

Over the course of the twentieth century, the common law has lessened the duty of care – the threshold element of negligence liability¹ – to a “frustratingly inconsistent, unfocused, and often nonsensical”² doctrine that is applied in multiple ways.³ Underlying this confusion and serving as a topic of extensive

[†] J.D. 2014, George Mason University School of Law. I am grateful to my sister and mother for their love and support throughout the writing of this paper. Nicole and Mom – thank you. I would also like to thank Professor Krauss for his assistance and for teaching a thought-provoking course.

^{*} Professor of Law, George Mason University School of Law.

^a Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333 (2002).

¹ The elements of a prima facie claim for negligence are duty, breach, cause in fact, proximate cause, and damages. A duty owed by the defendant must be determined by the court to exist before the other elements of the claim are considered. *See, e.g.*, WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS 217-18 (2d ed. 2009).

² W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91B.U. L. REV. 1873, 1875 (2011) [hereinafter Cardi, *Hidden Legacy*].

³ *See* DAN B. DOBBS, THE LAW OF TORTS § 253 (2000) (“In spite of the fundamental im-

judicial and scholarly debate is the question of how the relational dynamic between the plaintiff and the defendant at the time of the alleged tort bears on the issue of whether the defendant owed the plaintiff a duty of care.⁴ This question has dimensions of both scope and measure.⁵

Questions of scope generally concern the broadness of the population and the wideness of the range of harms that come under the duty of care. For example, does everyone owe everyone else an obligation to take care to avoid causing physical harm in general? Or do particular groups of people owe other particular groups of people an obligation to avoid causing particular types of injuries? Intertwined with questions of scope, questions of measure seek to identify the factors that define the scope of duty. In other words, do social expectations, reasonable foreseeability, or some combination of factors delineate the boundaries within which the parties and harms must fall for a duty of care to exist? In tackling these various questions, both scholarship and case law reveal deep conceptual differences about the proper role of duty in the law of negligence.⁶

In recent years, the drafting and publication of the Restatement (Third) of Torts⁷ and the surrounding exchange among three groups of tort scholars have generated a renewed interest in the longstand-

portance of duty, lawyers and judges have used the term in a variety of different ways, not always with the same meaning.”); see also John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 698-723 (2001) [hereinafter Goldberg & Zipursky, *Place of Duty*] (discussing four different ways courts apply the duty element of negligence liability).

⁴ See, e.g., W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 710-21 (2008) [hereinafter Cardi & Green, *Duty Wars*]; Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 699-709; see also Dilan A. Esper & Gregory C. Keating, *Putting “Duty” in its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1241-46 (2008) [hereinafter, Esper & Keating, *A Reply*].

⁵ DOBBS, *supra* note 3, § 253.

⁶ Compare *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J., majority opinion) (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation[.]”), with *id.* at 103 (Andrews, J., dissenting) (“Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”); see also *infra* text accompanying notes 8-26 for a description of a more contemporary version of the duty debate on which this paper focuses.

⁷ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010) [hereinafter RESTATEMENT 3D].

ing duty debate.⁸ On the view of John Goldberg and Benjamin Zipursky, the primary sense in which negligence law conceptualizes the duty of care is as a relational obligation owed by particular persons to other particular persons to avoid causing particular kinds of harm – including non-physical harms such as economic loss and emotional distress.⁹ According to Goldberg and Zipursky, only if there is such a circumscribed relation between the defendant and the plaintiff does the law recognize a duty of care.¹⁰ They maintain that discerning whether such a relation is present in a given case involves tracing modern societal notions about the care that people owe to one another.¹¹ They suggest that in performing this task, the foreseeability to the defendant of the harm suffered by the plaintiff is important, but not the only consideration for courts to take into account.¹²

Like Goldberg and Zipursky, Dilan Esper and Gregory Keating also see the duty of care as a relational obligation running from one defined class of people to another.¹³ However, Esper and Keating understand duty as being properly informed solely by the concept of foreseeability.¹⁴ On their understanding, the sole purpose of the duty element is to filter out those exceptional cases in which a duty does not exist because the plaintiff's injury was unforeseeable. In proposing a conception under which an actor owes an obligation of care to a broad class of people, Esper and Keating view duty as only "minimally relational."¹⁵ Injuries are rarely so unforeseeable that no care need be taken to prevent them, and thus almost any prospect of harm is sufficient to trigger a duty of care.¹⁶ Esper and Keating also emphasize that the duty of care encompasses harms only to the phys-

⁸ See Cardí & Green, *Duty Wars*, *supra* note 4, at 682-731.

⁹ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 699-709.

¹⁰ John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson* 146 U. PA. L. REV. 1733, 1838 (1998) [hereinafter Goldberg & Zipursky, *Moral of MacPherson*]; Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 727-28.

¹¹ Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 10, at 1744.

¹² Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 727-28.

¹³ Esper & Keating, *A Reply*, *supra* note 4, at 1241.

¹⁴ *Id.* at 1232.

¹⁵ *Id.* at 1242.

¹⁶ *Id.* at 1232.

ical integrity of one's person.¹⁷

Unlike Goldberg and Zipursky, and Esper and Keating, the Third Restatement and its proponents Jonathan Cardi and Michael Green¹⁸ see the duty of care as an obligation owed to an indefinitely large number of people,¹⁹ or as Judge Andrews put it in his dissent in *Palsgraf v. Long Island Railroad*, "the world at large."²⁰ Because on this view, the duty is not owed to any confined class of people, large or small, Cardi and Green emphasize that duty is nonrelational.²¹ The Third Restatement maintains that the presence of a duty of care to avoid creating an unreasonable risk of physical harm – that is, harm to someone else's person or property²² – should be presumed in every case as a substantive rule.²³ To the extent that courts render no-duty

¹⁷ *Id.* at 1236, 1259.

¹⁸ Professor Green was a co-reporter for the Third Restatement and was instrumental in drafting its provisions on duty. See Cardi & Green, *Duty Wars*, *supra* note 4, at 672 n.5.

¹⁹ See RESTATEMENT 3D, *supra* note 7, at §7 reporter's note, cmt. a (discussing Justice Holmes's dictum that tort law involves duties "of all the world to all the world" and the "development of a duty of reasonable care owed to all [that] was critical to the emergence of tort as a discrete subject of law in the 19th century"); Cardi & Green, *Duty Wars*, *supra* note 4, at 713 ("Courts properly decide most duty questions – particularly where the defendant created a risk of harm – from a *nonrelational* perspective, leaving questions of relationality for the jury to contend with in the context of cause in fact and proximate cause." (emphasis added)).

²⁰ *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J. dissenting):

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

²¹ See Cardi & Green, *Duty Wars*, *supra* note 4, at 712-13.

²² The term "physical harm," as used throughout this paper, means injuries to one's person or property. See RESTATEMENT 3D, *supra* note 7, at § 4 ("Physical harm' means the physical impairment of the human body ('bodily harm') or of real property or tangible property ('property damage')."); DOBBS, *supra* note 3, § 120 ("[T]he core of negligence law is about injury to persons and to tangible property.").

²³ RESTATEMENT 3D, *supra* note 7, at § 7(a) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."); W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 770 (2005) [hereinafter Cardi, *Purging Foreseeability*]:

[C]ourts have long recognized the general principle that one must avoid causing physical injury to others. What is revolutionary (if subtly so) about Section 7(a) is that it restates this general principle as black letter law. The ALI thereby urges

or modified-duty decisions, including those extending liability for non-physical harm,²⁴ they should do so only in special circumstances based on categorically applicable principles or policies.²⁵ The Third Restatement also emphasizes that the concept of foreseeability should play no part in courts' duty determinations.²⁶

This paper defends the world-at-large view by proposing a conception of the duty of care as a duty in rem – an obligation owed to people in general (rather than to some defined class) by virtue of every person's ownership of some particular "thing."²⁷ Part I advances an understanding of the duty of care as a risk-based obligation arising out of the fact that we live in a world in which freedom is scarce. Because any person's free pursuit of his own interests necessarily comes with costs in the form of risks of physical harm to others, negligence law strikes a balance between freedom and security by expecting people to take reasonable care in their actions. This Part also appeals to the works of property scholars James Penner, Thomas Merrill, and Henry Smith to provide an overview of two types of normative systems for facilitating the social interactions in which people take part as they pursue their various ends. An in rem system sets rights and duties through the intermediary of a "thing,"

courts to embrace the Section 7(a) duty standard not merely as a default inclination, but as a substantive rule from which courts should depart only in exceptional circumstances.

²⁴ See RESTATEMENT 3D, *supra* note 7, at § 7 cmt. m ("Recovery for stand-alone emotional harm is more circumscribed than when physical harm occurs. These limitations are often reflected in no- (or limited-) duty rules that limit liability.").

²⁵ See *id.* § 7 cmt. j:

A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.

²⁶ See *id.* ("These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability."); Cardi, *Purging Foreseeability*, *supra* note 23, at 774-804 (arguing for the adoption by courts of the duty provisions of the Third Restatement and discussing the benefits of such adoption).

²⁷ JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW 25-31 (2000); see also BLACK'S LAW DICTIONARY 864 (9th ed. 2009) (defining "in rem" as "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing. – Also termed (archaically) *impersonal*."). The phrase "in rem" is Latin for "against a thing." *Id.*

while an in personam system sets rights and duties directly between defined classes of people.²⁸

Part II then explains why the duty of care is best conceived as a duty in rem. Under the conditions of scarcity of freedom in modern society, a person follows his interests within a population comprised of a large number of people who are generally not connected to each other in any socially meaningful way. In such a world – the world of negligence – a duty of care situated within an in rem normative system based on every person's ownership of his "thing" of personal freedom optimizes the information costs associated with establishing rights and duties between private parties so as to best facilitate social interaction. Understood this way, the duty of care is also meaningfully owed to other people as a moral obligation without reference to a defined class.

Finally, Part III returns to the views of Goldberg and Zipursky, and Esper and Keating, for a closer examination. Part III challenges these views by arguing that to different degrees, they conceive the duty of care as an in personam obligation. The essential flaw of an in personam conception of the duty of care is that it tethers its requisite delineation of classes of rightholders and dutyholders to the particular facts of each case. This approach is problematic because it prevents a principled understanding of the duty of care as an issue of law.

I.

NORMATIVE SYSTEMS AND THE SCARCITY OF FREEDOM

A. The Scarcity of Freedom

Tort treatises and casebooks observe that the duty of care is a general obligation to avoid creating a certain degree of risk of physical harm to others.²⁹ Grounded in the creation of such risk, the

²⁸ PENNER, *supra* note 27, at 25-31; *see also* BLACK'S LAW DICTIONARY, *supra* note 27, at 862 (defining "in personam" as "1. Involving or determining the personal rights and obligations of the parties. 2. (Of a legal action) brought against a person rather than property. – Also termed *personal*."). The phrase "in personam" is Latin for "against a person." *Id.*

²⁹ *See, e.g.,* RESTATEMENT 3D, *supra* note 7, § 7(a); DOBBS, *supra* note 3, § 251; FARNS-

duty is understood to be imposed ordinarily by the law on any affirmative actor.³⁰ However, in a world of two or more people, every person, in engaging in any affirmative act, necessarily creates some risk of physical harm to all of the other people.³¹ This risk is costly because it undermines the ability of these other people to act in the pursuit of their own personal ends. Put differently, freedom is scarce because a person's exercise of it is not free.³² The law of negligence, in recognizing a person's liberty to act and use his property in the pursuit of his interests, does not impose a duty to take all possible care to avoid harm to others.³³ But neither does the law omit all obligation to take care since it recognizes the equal right of others to a certain degree of security in their persons and their property so they, too, may freely pursue their ends.³⁴ Rather, the law strikes a natural balance between freedom and security by recognizing a duty to take that level of care that is reasonable.³⁵ Therefore, at its core, the governance of social interactions by the duty of care and the right to security in one's person and property is anchored to the basic problem presented by an infinity of personal pursuits in a world of limited freedom.³⁶

WORTH & GRADY, *supra* note 1, at 218; MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 129 (9th ed. 2011).

³⁰ RESTATEMENT 3D, *supra* note 7, at § 7 cmt. a ("[A]ctors engaging in conduct that creates risks to others have a duty to exercise reasonable care to avoid causing physical harm."); FARNSWORTH & GRADY, *supra* note 1, at 218 ("[T]he law generally imposes duties of care on people when they engage in affirmative acts").

³¹ See Arthur Ripstein, *Philosophy of Tort Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW*, 656, 662-63 (Jules L. Coleman & Scott Shapiro eds., 2004) ("If a risk is not inappropriate . . . its costs simply lie where they fall; it is one of the risks of ordinary life, as opposed to a risk that one person imposes on another.").

³² See HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, *ECONOMIC ANALYSIS FOR LAWYERS* 4 (2d ed. 2006) ("Scarcity means that our behavior is constrained because we live in a world of limited resources and unlimited desires.").

³³ See Percy H. Winfield, *Duty in Torts Negligence*, 34 COLUM. L. REV. 41, 42-43 (1934) ("Before the law every man is entitled to the enjoyment of unfettered freedom so long as his conduct does not interfere with the equal liberty of others." (quoting THOMAS BEVEN, *NEGLIGENCE IN LAW* 7-8 (4th ed. 1928))).

³⁴ See *id.*.

³⁵ *Id.* at 43; Ripstein, *supra* note 31, at 663.

³⁶ See Winfield, *supra* note 3333, at 42-43.

B. Rights and Duties In Rem

James Penner emphasizes that the core feature of a right in rem is that the right is vested in a person by virtue of that person's dominion over some resource, or "thing."³⁷ In modern society, an in rem right avails against an indefinitely large expanse of people because a person's dominion over a given "thing" communicates to all other people not to interfere with the rightholder's use and control of it.³⁸ Accordingly, each person also owes a single, reciprocal duty of abstention to an indefinitely large class of rightholders by virtue of their ownership of different resources.³⁹ An implication of this broad indiscreteness is that rights and duties in rem take on a highly impersonal quality. As Thomas Merrill and Henry Smith illustrate:

[I]f A sells Blackacre to B, this does not result in any change in the duties of third parties W, X, Y, or Z toward Blackacre. Those duties shift silently from A to B without any requirement that W, X, Y, or Z be aware of the transfer, or even of the identities of A or B.⁴⁰

In other words, any individual characteristic of the in rem rightholder is irrelevant to the dutyholder with regard to the fulfillment of his obligation. As the only connection that the dutyholder has with the rightholder is through the "thing" over which the rightholder has dominion, all that matters to the dutyholder is that the "thing" is owned; who owns it is immaterial.⁴¹ Therefore, while an in rem system lays out rights and duties between separate persons, any individual characteristic of these persons have no bearing on what the right consists of or what the duty requires.⁴²

³⁷ PENNER, *supra* note 27, at 25-31; see also Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 786-87 (2001) [hereinafter Merrill & Smith, *Property/Contract Interface*] (further explicating the qualitative distinction that Professor Penner draws between in rem and in personam relations based on the former's, but not the latter's, dependence on the existence of a "thing").

³⁸ PENNER, *supra* note 27, at 29-30.

³⁹ *Id.* at 27; Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 788.

⁴⁰ Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 787.

⁴¹ PENNER, *supra* note 27, at 27.

⁴² *Id.* at 26.

The impersonal nature of an in rem system arises from the exclusionary method of resource allocation that the system applies. An exclusion strategy first identifies a resource, and then specifies a person as the resource's owner.⁴³ As rightholder and manager of the whole resource, the owner enjoys the authority to use, divide, or distribute it at his discretion.⁴⁴ This authority also means that by default, the owner may forbid any person from any use of the resource.⁴⁵ Since the right thereby avails against all people, the boundaries of the right and the corresponding duty must be simply and generally defined.⁴⁶ The upshot of this exclusionary strategy is a normative system that centers on the total "thingness" of a resource rather than the individual ways a resource can be utilized.⁴⁷

C. Rights and Duties In Personam

Qualitatively distinct from rights and duties in rem are rights and duties in personam.⁴⁸ While a right in rem attaches to a large and indefinite class of people through an intermediate "thing," a right in personam attaches directly to a particular person or class of persons.⁴⁹ Correspondingly, the obligation of an in personam dutyholder runs only to the particular person or class who holds the in personam right.⁵⁰ Furthermore, while the directness of in personam relations does not mean that right and duties cannot involve a "thing," it does mean that the existence of these rights and duties is

⁴³ Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 790-91 (contrasting usage-based in personam rights with exclusion-based in rem rights).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 791; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24-42 (2000) [hereinafter Merrill & Smith, *Numerus Clausus*] (proposing that the in rem nature of property rights underlies why *numerus clausus* – the principle that rights must conform to a closed number of forms – applies to property law, but not contract law).

⁴⁷ Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 787.

⁴⁸ *Id.* at 784-87; PENNER, *supra* note 27, at 25-31.

⁴⁹ PENNER, *supra* note 27, at 25-31; Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 784-87.

⁵⁰ PENNER, *supra* note 27, at 27.

not contingent on any “thing.”⁵¹ This is because a right in personam specifies the persons against whom the right avails rather than identifying the “thing” that is involved.⁵² It is for this reason that a borrower’s loss of the book that he owes back to the owner who lent it to him does not extinguish the owner’s right against the borrower to have the book returned.⁵³ Since the measure of in personam rights and duties singles out the rightholder and dutyholder from the rest of the world,⁵⁴ identity beyond basic personhood is essential. When a person borrows a book from another person, a unique duty arises in the former, *as borrower*, to return the book to the latter, *as lender*.

Under an in personam normative system, the resource to which the system is applied is viewed in terms of its different uses rather than its unitary “thingness.” This is because an in personam system is employed not through the exclusion strategy of an in rem system, but through a governance strategy under which the whole of a resource is sliced into narrower use rights.⁵⁵ Accordingly, this strategy entitles a defined class of people to engage with a resource in some particular way and also defines the class against whom this right avails.⁵⁶ Thus, the nuances of a particular use, rather than a general rule, define the boundaries of the right-duty relation.⁵⁷ Consequently, an in personam system gives rise to a relatively detailed description of what a specific use of the resource entails, as well as of the identities of the rightholders and dutyholders whose relation to each other is predicated on this use.⁵⁸

⁵¹ *Id.* at 26-27.

⁵² *Id.* at 30.

⁵³ *Cf. id.* at 30 (quoting P.B.H. BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 49-50 (1985):

If you come under the obligation to give me the cow Daisy . . . it will be impossible to infer from the nature of the right . . . that Daisy’s disappearance . . . will discharge my claim. After all I can still find you and it is still not nonsense for me to maintain that you ought to give me Daisy

⁵⁴ *Id.* at 29.

⁵⁵ Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 790-91.

⁵⁶ *Id.*

⁵⁷ *Id.* at 791.

⁵⁸ *Id.*

D. Information Costs

Merrill and Smith have written extensively on how the law tends towards either an in rem or in personam system depending on which best minimizes the information costs that certain rights and duties produce.⁵⁹ From the perspective of a rightholder, these costs entail the burdens of delineating and communicating the right so that it may be heeded by the relevant dutyholders.⁶⁰ From the perspective of a dutyholder, the costs are comprised of the expenditures borne in identifying and understanding the relevant right.⁶¹ Merrill and Smith observe that when the number of people are few and confined, efficiency allows for greater complexity in the specification of rights and duties since the burden of exercising them is borne only by a small and determinate group of people.⁶² Under such circumstances, an in personam system that allows rightholders and dutyholders to divvy up a resource into particular uses helps to optimize the resource's utility by fostering a variety of customized pursuits at a minimal cost.⁶³ However, as the population increases in number, diversity, and anonymity, the information costs people must bear become better controlled by a simpler and more general delineation of rights and duties that is easily understandable to a vast array of people.⁶⁴ In these situations, cost-effective resource allocation tends to shift towards an in rem system in which the limits of right and duty conform to the boundaries of the entire resource.⁶⁵

⁵⁹ See *id.* at 790-99; Merrill & Smith, *Numerus Clausus*, *supra* note 46, at 24-34; Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1853-57 (2007) [hereinafter Merrill & Smith, *Morality of Property*].

⁶⁰ Merrill & Smith, *Numerus Clausus*, *supra* note 46, at 26-28.

⁶¹ *Id.*

⁶² Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 797-99.

⁶³ *Id.*

⁶⁴ *Id.* at 792-97.

⁶⁵ *Id.*

II.

THE DUTY OF CARE AS A DUTY IN REM

A. Moral and Functional Dimensions

In light of the foregoing comparisons, the duty of care in negligence law is properly conceived as a duty in rem. The world of negligence is a large and impersonal one, comprised of accidents arising out of a vast network of transient interactions that have little to do with any distinctive qualities of the parties involved.⁶⁶ Imagine how an in personam system would operate in such a world. Each person, as part of a specific class of dutyholders, would owe an obligation of care tailored to a specific class of rightholders. The measure by which these classes are defined would have to be based on circumstantial facts since the interaction between the rightholder and dutyholder is otherwise nondescript. Such a system would designate to each person moving about in the world the impossible task of recognizing the fleeting presence of an endless number of specific groups of people, defined in an infinite variety of ways, in order to observe his duty. In other words, the informational burden of adhering to the duty of care while also pursuing one's own interests would be prohibitively high.⁶⁷ As a result, the duty of care would be stripped of its functional value as a norm for the ordering of a society in which a vast array of people pursue a vast array of ends.⁶⁸

⁶⁶ See Vernon Palmer, *Why Privity Entered Tort — An Historical Reexamination of Winterbottom v. Wright*, 27 AM. J. LEGAL HIST. 85, 87-88 n.9 (1983) (observing that the origins of negligence in tort can be traced back to the mid-17th century when “the action on the case started to shed an old privity restriction . . . and was thereby enabled to become a nonrelational remedy for accidents between strangers.”).

⁶⁷ See Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 795 (“[I]n a world that lack[s] such [a simple and universal] organizing idea, [a] citizen [] would have great difficulty following the rules He would have to acquire a detailed knowledge of the rules for each resource and of his rights, powers, liberties, and duties in relation to it.”).

⁶⁸ See *id.* (“[E]xclusion rules, and in particular in rem legal rights, are a critical part of the ‘social glue’ that allows any group of individuals of any size and complexity to function on a day-to-day basis.” (citing BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 116 (1977)); PENNER, *supra* note 27, at 30 (“Norms in rem establish the general, impersonal practices upon which modern societies largely depend. They allow strangers to interact with each other in a rule-governed way, though their dealings are not personal in any sig-

That functional value demands foundations in a common moral understanding that guides, and therefore *precedes*, the actions of all people in society.⁶⁹ Because the cost of legal enforcement is high in such a large and diverse world, a legal regime not rooted in the strength of shared and internalized fundamental values that exist at the outset of social engagement is bound to disintegrate.⁷⁰ An in personam duty of care suffers from exactly that problem. There may be certain incidental circumstances that are sufficiently compelling to justify an assumption of social consensus about the concrete actions that morality demands or prohibits in those particular circumstances.⁷¹ But those circumstances arise spontaneously *during the course* of social interaction. In other words, the ad hoc nature of determining whether a duty of care exists based on moral assumptions rooted in the facts of specific informal situations fails to reflect the simple and general morality on which viable norms in an impersonal world must be based.⁷² In an in rem system, on the other hand, the duty of care is supported by a common moral value in the form of the “thing” of personal freedom to which every person is equally and exclusively entitled at the outset of his pursuits.⁷³ By basing the duty

nificant respect.”).

⁶⁹ See Merrill & Smith, *Morality of Property*, *supra* note 59, at 1854 (explaining that a legal system of rights and duties in rem must align with common moral values to be sustainable).

⁷⁰ See *id.*

⁷¹ See, e.g., *Lauer v. city of New York*, 733 N.E.2d 184 (N.Y. 2000). The facts of *Lauer* involved a father who was mistakenly identified as the chief suspect in an investigation of his son’s death because of a report by the city’s medical examiner erroneously concluding that his death was a homicide — an error which the examiner failed to disclose when he became aware of his mistake. 733 N.E.2d at 186. The duty issue was whether the examiner owed a duty to the father to disclose the error to city authorities. *Id.* at 188. Mainly for policy reasons, the court held he did not. *Id.* The court noted, however, that “[w]ere the issue solely one of ‘humanistic intuition’ or ‘moral duty,’ the result might well be otherwise.” *Id.* at 190. See also *infra* Part III.B for an analysis of Goldberg and Zipursky’s take on this case.

⁷² See Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227, 250-51 (2012):

For the moral particularist, the moral relevance of any feature depends on the context of the one case, features thereby have variable relevance, and “a feature that is a reason in one case may be no reason at all, or an opposite reason, in another.” By this view, moral considerations are decided “on a case by case basis.”

⁷³ See Merrill & Smith, *Property / Contract Interface*, *supra* note 37, at 795.

of care on the total “thingness” of personal freedom, duty’s normative force becomes tied to the moral deference to be accorded by every person to every other person’s exclusive dominion over the free pursuit of his ends, irrespective of circumstance.⁷⁴ The duty of care is thereby instilled with the broad and robust normative force it needs to function amidst the vast impersonality of the world of negligence.⁷⁵

B. Delineating the “Thing” of Personal Freedom

Inasmuch as negligence law expects people to take a level of care in their actions that is reasonable,⁷⁶ delineating the “thing” of personal freedom entails defining its boundaries with a shared notion of reasonable care. Defining the boundary of personal freedom this way precludes an account of duty that is based on a precise formula to determine if an action will create an unacceptable risk of harm.⁷⁷ For in a large and varied society, it is impossible to reduce a norm to an exact calculus so as to guide people in a rigorous, mechanistic way.⁷⁸ As such, the boundary of reasonable care that delineates the

⁷⁴ PENNER, *supra* note 27, at 26.

⁷⁵ Merrill & Smith, *Morality of Property*, *supra* note 59, at 1850-51.

⁷⁶ See *supra* Part I.A.

⁷⁷ See David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, 201, 219-20 (David G. Owen ed., 1997):

Actors must make thousands of choices every day, in which numerous potential abstract interests of known and unknown persons too numerous to count must be identified, valued (in terms of worth and risk), and balanced against a similarly vast set of outcomes desired There can be no safety absolutes in such a rugged, real-world context

Stephen R. Perry, *Risk, Harm, and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra*, at 321, 325-26 (contrasting probability judgments “employing sophisticated statistical techniques, [which] might be particularly appropriate for scientific inquiry” with “the intuitive probability judgments of a reasonable person, [which] might be more suitable for determining moral responsibility” and which is “not coincidentally, reminiscent of the understanding of risk to be found in tort law”); Esper & Keating, *A Reply*, *supra* note 4, at 1229 (acknowledging that the notion of reasonable care at the heart of duty in negligence law “is an extension and special application of the ‘intuitive moral idea’ of reasonableness”).

⁷⁸ See *supra* note 77; see also *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) (“[L]egal duties are not discoverable facts of nature”); William L.

resource of personal freedom is not a hard line, but a broad territory paved with a general layer of knowledge about how a person should behave across a range of situations. This means that the specific actions that do or do not constitute reasonable care will vary according to the circumstances.

However, this relativity does not mean that the boundary lacks the clarity it needs to effectuate an in rem system. It may be futile to try to concretely describe a concept of reasonable care that is applicable to all people in all possible instances of negligence. But from a broader perspective, engagement with society equips people with an intuitive gauge of risk calibrated by “[socially] accepted standards of inductive reasoning and rational belief.”⁷⁹ Different individuals may take different actions even when presented with similar situations. But these actions may all coherently fall within the proper exercise of personal freedom because there is an intelligible way to navigate the rough-and-tumble of day-to-day life, even if that way is not an exact science. Experientially rooted, an intuitive knowledge of reasonable behavior gives the duty of care meaningful content by simply and generally defining the “thing” of personal freedom. The resistance to substantive particularity of an inherently general concept such as the duty of care⁸⁰ does not render the concept vacuous.⁸¹

Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 13-15 (1953) (examining various judicial attempts to reduce duty to a formula and concluding that such attempts have amounted to “shifting sands and no fit foundation”).

⁷⁹ Perry, *supra* note 77, at 343; *see also* Cardi, *Purging Foreseeability*, *supra* note 23, at 752-53 (“Most agree, however, that community consensus regarding day-to-day obligations is an important consideration in the duty analysis.”).

⁸⁰ *See* Dobbs, *supra* note 3, § 253 (“Because [duty rulings] are rules of law having the quality of generality, they should not be merely masks for decisions in particular cases”); Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265, 282 (2006) (“Duty doctrine, properly deployed, assigns to judges the decidedly legal task of articulating the law – of stating general norms for the guidance of conduct.” (citing, *inter alia*, LON L. FULLER, *THE MORALITY OF LAW* 33-62, 46 (rev. ed. 1969) (“The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality.”))).

⁸¹ *Contra* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 708, 730, 736 (arguing that a nonrelational, world-at-large view of the duty of care is “trivial” and “empty”).

C. Special Cases: From In Rem to In Personam in Settled and Confined Relationships

Certainly as particular interactions become more recurrent in society, it may grow easier to implement duties requiring care of a more tailored and formulaic quality. With the number of people smaller and individual identity easier to discern, the cost of delineating rights and duties is reduced, making it more feasible to customize them based on the higher quality of information available for exchange between the parties to the interaction.⁸² The “principle or policy” exception that the Third Restatement carves out of the general duty of care is consistent with this reasoning to the extent that it recognizes that sometimes, “because of [liability’s] impact on a substantial slice of social relations[,] [c]ourts appropriately address whether such liability should be permitted as a matter of duty.”⁸³ Accordingly, the Third Restatement acknowledges, for example, the imposition on certain sports competitors only the limited duty to refrain from engaging in recklessly dangerous conduct,⁸⁴ or on common carriers the expanded duty of “the utmost” or “highest” care for the safety of its passengers.⁸⁵ In addition to these relations, tort law is replete with other formal relationships to which special rights and duties are ascribed based on firmly entrenched norms of social responsibility.⁸⁶ For example, the law has traditionally im-

⁸² See *supra* Part I.D.

⁸³ RESTATEMENT 3D, *supra* note 7, at § 7 cmt. a.

⁸⁴ See, e.g., *Knight v. Jewett*, 834 P.2d 696, 712 (Cal. 1992) (holding that a participant in a social game of touch football, who may have been reckless or over-exuberant, did not breach any legal duty); *Feld v. Borkowski*, 790 N.W.2d 72, 78 (Iowa 2010) (holding that liability of the batter in a softball game requires reckless conduct rather than ordinary negligence).

⁸⁵ See, e.g., *Markwell v. Whinery’s Real Estate, Inc.*, 869 P.2d 840, 845 (Okla. 1994) (quoting state statutory provision that “[a] carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill” (citation omitted)); *Bridges v. Parrish* 742 S.E.2d 794, 797 (N.C. 2013) (“[C]ommon carriers owe a duty ‘to provide for the safe conveyance of their passengers as far as human care and foresight can go.’ ” (citation omitted)).

⁸⁶ See, e.g., RESTATEMENT 3D, *supra* note 7, at § 7 cmt. c (“In deciding whether to adopt a no-duty rule, courts often rely on general social norms of responsibility.”). Some examples of other special relationships that prompt modifications of the general duty of care include doctor-patient, carrier-passenger, innkeeper-guest, and social-host-guest. See DOBBS, *supra*

posed on landowners specialized duties towards persons who come onto their property, duties that also vary depending on whether that person is a trespasser, licensee, or invitee.⁸⁷ Similarly, in a relationship between custodian and ward, the custodian's duty of care can assume such great particularity that the duty may be codified by statute to require specific acts such as supplying the ward with food, clothing, shelter, and medical arrangements.⁸⁸

The foregoing kinds of relations, unlike the circumstantial interactions with which negligence is primarily concerned, are sufficiently settled and confined in society to justify their formalization in law with usage-based duties carved out of the "thing" of personal freedom. The low-cost, high-level information exchange that gives rise to the unique mutual understandings on which these special relations are built – understandings about how each party is expected to tailor the use of his personal freedom in these distinct contexts – take the relations out of the realm of fact and put them into the realm of form, thereby supporting the relations' legal status.

*D. From Special Cases to "Gross Fictions":
In Personam in an Impersonal World*

In contrast to these specialized cases, in a network of interactions between myriad informally connected strangers, rightholder A is just as anonymous to the dutyholder as is rightholder B or C. In other words, any socially meaningful distinctiveness of a particular interaction fades as the interaction become more impersonal. As this occurs, rights and duties in personam grow normatively tenuous because any measure of distinguishing certain interactions from others becomes increasingly fact-specific. In effect, personal freedom is severed into multiple usage-based rights that differ from each other

note 3, §§ 258-270.

⁸⁷ See Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1049 (2009) (describing the delineation, and critique, of common law duties to invitees, licensees, and trespassers). *But see* Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (eliminating the different duties of care owed by landowners to trespassers, licensees, and invitees, and replacing with a general duty of care).

⁸⁸ See, e.g., OR. REV. STAT. § 419B.373 (2011).

depending on incidental circumstances. It is morphed into a patchwork of relationships, each resting on nothing more than a fleeting encounter.⁸⁹ This belies the very foundation of the duty of care as an element of liability originating in law as opposed to privity.⁹⁰ By suggesting that specialized rights and duties between a plaintiff and a defendant can be discovered in the incidental circumstances surrounding the harm at issue, efforts to apply an in personam system in the world of negligence manipulates torts between strangers into “contracts” by using “gross fictions to make it seem that there was a meeting of minds between [the parties].”⁹¹

In sum, a meaningful notion of the duty of care is best captured by an in rem normative system.⁹² Negligence in modern society arises out of a large network of freely moving actors who are not familiar with each other in any socially meaningful way. As such, a normative system that seeks to protect a person’s ability to act in the pursuit of his ends while ensuring the ability of all other persons to do the same, solidifies when built on a simple and general conception of personal freedom as an exclusively managed, holistic “thing.” Taking personal freedom as the measure of the duty of care, it follows that the duty is owed to people in general or “the world at large.”

III.

RELATIONAL DUTY AS A DUTY IN PERSONAM

A. Departing from the General Duty of Reasonable Care

While Goldberg and Zipursky, and Esper and Keating, see duty as a relational concept concerning obligations owed by one discrete class of people to another,⁹³ they also acknowledge the

⁸⁹ Cf. Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) (tracing the intellectual shift from a conception of property as a single, distinct in rem right, to that of a cluster of in personam rights or a “bundle of rights”).

⁹⁰ See *supra* note 66.

⁹¹ *Id.* at 90.

⁹² *Contra* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 678 (arguing that the Third Restatement fails to provide a meaningful conception of duty).

⁹³ See *supra* INTRODUCTION.

presence, at a basic level, of a general duty of care owed by everyone to everyone else.⁹⁴ But despite sharing this conceptual starting point, these two pairs of scholars quickly diverge from each other and from the Third Restatement.

Goldberg and Zipursky claim that it is a mistake to think about the general duty of care as a “duty to the world” because such a notion suggests “an obligation to behave reasonably, period – an obligation owed to no particular persons or class of persons.”⁹⁵ They argue that it may “be appropriate to describe the class as in some sense including each person in the world – but that fact does not render the concept analytically nonrelational [because][t]he defendant still owes a duty to some defined class of plaintiffs.”⁹⁶

Similarly, Esper and Keating assert that duty is “relational in the sense that it is owed . . . by each of us to everyone else,” but that within this sphere, “duty in negligence law is only minimally relational”⁹⁷ since it exists so long as “one person’s actions put another person at reasonably foreseeable risk of physical injury.”⁹⁸ According to Esper and Keating, “[w]e cannot reasonably be asked to guard against harms that we cannot reasonably be expected to foresee.”⁹⁹

On this point, however, Esper and Keating also part ways with Goldberg and Zipursky by claiming that while duty in negligence law “is relational in the sense that it is owed to others and not to some impersonal value,”¹⁰⁰ this relationality neither “requires [n]or entails inquiry into the details of the relations between plaintiff and defendant.”¹⁰¹ Unlike Goldberg and Zipursky, Esper and Keating maintain that duty in negligence law is preoccupied with physical injury to one’s person (not emotional distress or economic harm) and that foreseeability is duty’s only legitimate substantive qualification (not

⁹⁴ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 705; Esper & Keating, *A Reply*, *supra* note 4, at 1242.

⁹⁵ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 706.

⁹⁶ *Id.* at 707.

⁹⁷ Esper & Keating, *A Reply*, *supra* note 4, at 1242.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1233–34.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1242.

one of many).¹⁰² In short, Esper and Keating take issue with the strong particularity of Goldberg and Zipursky's notion of relationality. But their differences notwithstanding, both pairs of scholars fail to persuade because of the in personam character of their theories.

B. Goldberg and Zipursky

Goldberg and Zipursky acknowledge that duty law is "something of a mess."¹⁰³ They claim, however, that the case law reveals an enduring, primary concern for a relational duty of care that the world-at-large view fails to capture.¹⁰⁴ They argue that a duty to the world represents nothing more than the idea that a defendant's acts will be judged against a legal standard of conduct without regard to any defined class of people,¹⁰⁵ and serves as a mere stand-in for policy decisions with "no real conceptual space to occupy within the tort."¹⁰⁶ These arguments, however, are unconvincing for several reasons.

First, the strongly relational, primary sense of duty that Goldberg and Zipursky argue the language of the case law reflects fails to convey any real law that a jurisprudential account of duty can capture. As generality and normativity are definitional components of law,¹⁰⁷ duty's disintegration appears to be the result of over a century of particularized decisions purporting to provide guidance to a sea of strangers by issuing categorical rulings of "law" that are actually confined to specific incidental circumstances. Because in a world of strangers, high information costs prevent fact-specific rulings from being instilled with any normative quality, efforts to extract from these rulings a coherent, restatable jurisprudence appears to be a fruitless exercise. For example, a person is provided little guidance in being told that when he is driving, he "owe[s] [a] general dut[y] of care to other drivers but 'no duty' to change lanes when traveling at a legal speed in either the No. 2 or No. 3 lane of a four-

¹⁰² Esper & Keating, *A Reply*, *supra* note 4, at 1242.

¹⁰³ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 736.

¹⁰⁴ *Id.* at 707.

¹⁰⁵ *Id.* at 706.

¹⁰⁶ *Id.* at 708-09.

¹⁰⁷ See *supra* note 80.

lane freeway at night, on dry pavement, in light traffic and clear weather.”¹⁰⁸ Where such opacity characterizes the state of the law, it is well within the province of a restatement to do “no more than [what] every jurist of the past has individually done” by recommending the adoption of one of multiple competing rules or theories.¹⁰⁹

Moreover, a duty to “the world,” conceived as a duty in rem, does not entail “negligence in the air”¹¹⁰ as Goldberg and Zipursky suggest.¹¹¹ Of course, “[i]n an empty world negligence would not exist.”¹¹² But acknowledgement of this fact concedes the relationality of negligence *liability*, not *duty*.¹¹³ As Judge Andrews argued in his *Palsgraf* dissent, duty and breach may exist absent any damage:

“Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. . . . It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there – a wrong to the public at large.”¹¹⁴

¹⁰⁸ Esper & Keating, *A Reply*, *supra* note 4, at 1226-27 (citing *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168, 176 (Ct. App. 1998)). Esper & Keating also cite other similar examples of highly particularized duty decisions including *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 518 (Ct. App. 1997), which held that mass transit agencies owe a general duty of care to passengers exiting and entering trains, but “no duty” to an inebriated passenger whom it has escorted off the train once he is on the platform; and *Ky. Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1262 (Cal. 1997), which held that businesses owe general duties of care to protect customers on their premises from assault at the hands of third parties but “no duty” to protect a customer’s life by “comply[ing] with the unlawful demand of an armed robber that property be surrendered.” *Id.*

¹⁰⁹ See Arthur Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 27 (1929).

¹¹⁰ *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928).

¹¹¹ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 706.

¹¹² *Palsgraf*, 162 N.E. at 102 (Andrews, J. dissenting).

¹¹³ See Cardo & Green, *Duty Wars*, *supra* note 4, at 712 (“[A]lthough negligence liability is necessarily relational, the element of duty is not.”).

¹¹⁴ *Palsgraf*, 162 N.E. at 102; see also PENNER, *supra* note 27, at 29 n.38:

[T]he defendant’s liability to compensate others who suffer by his lack of care is restricted to those individuals whose harms *have actually occurred* and are ones which a reasonable man would foresee as occurring due to the defendant’s lack of care. The primary duty, however, identifies no specific class of people.

To assert that everyone owes a duty of care to the world at large is not, as Goldberg and Zipursky suggest, to “fallacious[ly] jump”¹¹⁵ from the idea that duty does not rest on contract or some other formal relationship, to the notion that duty is somehow not owed to other people.¹¹⁶ For the world-at-large view, understood as in rem, does not contemplate that negligence occurs in a vacuum, but only that the duty of care is owed to other people through the medium of the same holistic “thing” each person controls. Given that the breakdown of privity as a bar to early common law actions is what gave birth to negligence as a distinct cause of action,¹¹⁷ the absence of any relation between plaintiff and defendant is precisely what makes negligence, negligence.

Finally, the conflation of duty with policy considerations – which Goldberg and Zipursky identify as a major deficiency of the world-at-large view¹¹⁸ – is actually perpetuated by their own strongly relational understanding. Goldberg and Zipursky offer the case of *Lauer v. City of New York*¹¹⁹ as their signature illustration of how framing the question of duty can influence whether a court decides the question in its primary sense or instead as a stand-in for what are actually policy conclusions extraneous to any substantive notion of obligation.¹²⁰ In *Lauer*, a father sued for emotional distress when he was mistakenly identified as the chief suspect in an investigation into the death of his son as a result of a report by the city’s medical examiner erroneously concluding that the death was a homicide – an error which the examiner failed to disclose when he became aware of his mistake.¹²¹ The court held that the examiner could not be found liable because he owed no duty of care to the father.¹²² Affected prominently by concerns about overexposing defendants to liability, the court emphasized that it “must be mindful of the precedential,

¹¹⁵ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 708-09.

¹¹⁶ *Id.*

¹¹⁷ *See supra* note 66.

¹¹⁸ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 733-34.

¹¹⁹ 733 N.E.2d 184 (N.Y. 2000).

¹³⁷ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 733-34.

¹²¹ 733 N.E. 2d at 186.

¹²² *Id.* at 189.

and consequential, future effects of [its] rulings, and 'limit the legal consequences of wrongs to a controllable degree.'"¹²³

Goldberg and Zipursky challenge *Lauer* on the ground that its holding was motivated by concerns about opening the floodgates of litigation – a policy concern irrelevant to the intuitive moral idea of being obligated to behave in a particular way to particular persons.¹²⁴ They argue that if the court had confronted the point that a medical examiner, who knows his report will subject a person to criminal investigation, should be mindful of the profound effect of the report's accuracy on the person's life, then the court could have easily arrived at the conclusion that "the examiner has an obligation to provide the suspect with the relief from the false prosecution that the examiner helped initiate and alone was situated to halt."¹²⁵ To be sure, Goldberg and Zipursky concede that even if the court in *Lauer* had considered the duty question in a strongly relational sense instead of as a mere stand-in for policy concerns, the court's duty decision might still have been the same.¹²⁶ Nevertheless, they "see no reason to doubt that the framing of the question bore on how it was resolved."¹²⁷

However, even if it is assumed that the policy concern underlying the duty question in *Lauer* was dispositive, such concerns are invited into the duty inquiry by the strongly relational view that Goldberg and Zipursky advance. Because the duty of care, on this view, has no categorical boundary in law, it becomes conceptually inundated with variables foreign to any substantive notion of obligation, including factual particulars, judicial policy preferences, and concerns about opening the floodgates of litigation. On this analysis, it is perhaps telling that the court's understanding of duty in *Lauer* reflected a strongly relational view. The court emphasized the need for "the equation [to] be balanced" between "[f]ixing the orbit of

¹²³ *Id.* at 187 (internal citations omitted).

¹²⁴ Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 733-34.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

duty”¹²⁸ and insuring against over-litigation – the need for “the damaged plaintiff [to] be able to point the finger of responsibility at a defendant owing, *not a general duty to society, but a specific duty to him.*”¹²⁹

None of this is to say that policy has absolutely no role to play in making duty decisions. Indeed, Goldberg and Zipursky, Esper and Keating, and Cardi and Green all acknowledge the unavoidability of certain prudential concerns such as over-litigation and judicial economy that, while having little to do with any substantive notion of obligation, must be factored into the analysis if duty is to be institutionalized, adjudicated, and enforced.¹³⁰ But because of the in personam quality it tries to attach to the transient and impersonal nature of negligence, a strongly relational view offers no law to protect duty from being swallowed by prudential considerations and other ancillary factors. Contrarily, by predicating the duty of care on a simply and generally defined “thing,” an in rem system distinctly partitions substantive notions of duty from ancillary concerns, thereby defending against the very conceptual conflation that Goldberg and Zipursky seek to avoid.

Because every person is susceptible to negligent behavior simply by the exercise of freedom in a crowded world, Goldberg and Zipursky’s amorphous, highly particularized approach, even if attempting to trace ordinary moral thought,¹³¹ fails to reflect the simple and general morality necessary to give viability to a norm that

¹²⁸ 733 N.E. 2d 184, 187 (N.Y. 2000).

¹²⁹ *Id.* at 188 (emphasis added).

¹³⁰ See Cardi & Green, *Duty Wars*, *supra* note 4, at 704-05 (“[T]here are, at times, demands on law that it take a certain form that renders it efficacious, capable of being internalized, and amenable to application by judges” (quoting John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1586 (2006))); Esper & Keating, *A Reply*, *supra* note 4, at 1246 (“[W]e think that instrumental considerations do figure in negligence law and properly so in many circumstances.”); see also Cardi & Green, *Duty Wars*, *supra* note 4, at 707 n.217 (listing other tort scholars who concur that extraneous policy considerations have at least some proper role to play in courts’ duty determinations).

¹³¹ See Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 693; Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 10, at 1742.

guides a large and varied population.¹³² Goldberg and Zipursky thus attempt to clean up the “mess” of duty law¹³³ by the very means that makes it.

C. Esper and Keating

Esper and Keating, though espousing a notion of duty that is only minimally relational and limited to physical personal injury, nevertheless fail to convince for many of the same reasons as Goldberg and Zipursky. The relationality of Esper and Keating’s understanding requires, as the sole substantive condition for a finding of duty, that the risk of physical injury to the plaintiff merely have been reasonably foreseeable to the defendant¹³⁴ – a condition that apparently generalizes duty far beyond Goldberg and Zipursky’s understanding. However, a lone foreseeability requirement quickly collapses the law of duty into a particularized analysis much like the strongly relational view.¹³⁵ This is because while Esper and Keating emphasize the generality of the duty of care as an element of law,¹³⁶ they fail to specify any “thing” on which this generality is predicated. Rather, by conditioning the existence of duty on foreseeability at all¹³⁷ – a condition even the regular satisfaction of which will depend on the context of each given case¹³⁸ – Esper and Keating predicate duty on the same sort of situational connection between the plaintiff and the defendant as Goldberg and Zipursky’s strongly relational analysis.

Although Esper and Keating sympathize with the argument for severing duty from foreseeability – conceding that doing so “might well flush out judicial abuses of power masked by the doctrine that

¹³² See *supra* notes 69-75 and accompanying text.

¹³³ See Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 736.

¹³⁴ Esper & Keating, *A Reply*, *supra* note 4, at 1232.

¹³⁵ See Cardi, *Hidden Legacy*, *supra* note 2, at 1885-86 (explaining that in both practice and in theory, the foreseeability inquiry lacks generality because the inquiry necessarily turns on particular classifications or facts).

¹³⁶ Esper & Keating, *A Reply*, *supra* note 4, at 1225.

¹³⁷ *Id.* at 1232.

¹³⁸ See *infra* text accompanying notes 160-64 for discussion of *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715 (Ark. 2003), in which the court, while relying only on the question of foreseeability in deciding duty, nevertheless considered the case’s particular facts in rendering its decision.

duty is a question of law for the courts”¹³⁹ – they ultimately urge against it, claiming that it presents two major problems.¹⁴⁰ One alleged problem is that severing duty from foreseeability ignores modern case law, under which foreseeability plays a vital role in courts’ duty determinations.¹⁴¹ But as Cardi and Green have argued, foreseeability is inevitably abused by the courts when infused with the element of duty as a question of law.¹⁴² For unlike rights and duties based in some “thing,” Esper and Keating’s foreseeability restraint provides little in the way of a principled concept to protect duty against inundation by judicial policy preferences.¹⁴³ Because there is no qualitative difference between the strongly relational and minimally relational views, Esper and Keating’s unspecified insistence that “duty rulings should be rare”¹⁴⁴ serves as a mere verbal barrier against the same fact-heavy analysis and judicial abuse that they denounce. With no real law to summarize, a purely descriptive restatement of modern duty decisions is “an unattainable goal.”¹⁴⁵ Foreseeability having led the law hopelessly astray,¹⁴⁶ the Third Restatement wisely and faithfully returns to duty’s foundations in asserting a world-at-large view.

Nevertheless, Esper and Keating claim that a second major problem with eliminating foreseeability from duty is that doing so holds people legally responsible for failing to prevent harms they could not have anticipated.¹⁴⁷ In effect, they argue that foreseeability’s eradication from the duty of care raises information costs to such a degree that compliance with the duty is rendered impossible in those situations in which a person cannot foresee the consequences of his actions.

¹³⁹ See Esper & Keating, *A Reply*, *supra* note 4, at 1232-33.

¹⁴⁰ *Id.* at 1233.

¹⁴¹ *Id.*

¹⁴² Cardi & Green, *Duty Wars*, *supra* note 4, at 724-25.

¹⁴³ See Cardi, *Hidden Legacy*, *supra* note 2, at 1896 (attributing the “inherent instability” of foreseeability in part to the lack of any principle by which to define its scope).

¹⁴⁴ Esper & Keating, *A Reply*, *supra* note 4, at 1225.

¹⁴⁵ Cardi & Green, *Duty Wars*, *supra* note 4, at 726.

¹⁴⁶ See DOBBS, *supra* note 3, § 256 (listing six primary objections to determining duty based on foreseeability).

¹⁴⁷ Esper & Keating, *A Reply*, *supra* note 4, at 1234.

However, whether a person has an obligation is only one question in the broader inquiry of whether that person is liable.¹⁴⁸ In this regard, Esper and Keating's concern that the Third Restatement's position "holds people responsible for failing to prevent harms they could not reasonably have anticipated"¹⁴⁹ makes more sense in the wider context of liability rather than duty.¹⁵⁰ Indeed, Esper and Keating themselves stress that duty's definitional component of reasonable care is an extension of the concept of reasonableness, the adjudication of which is best left to the jury.¹⁵¹ If this is the case, it would seem to follow that reasonable foreseeability should also be left to the jury instead of bridling the universal scope of a basic moral obligation.¹⁵²

For example, Esper and Keating offer the case of *Monreal v. Tobin*¹⁵³ to illustrate that strongly particular duty decisions, which they reprove, fail to articulate any serious rules about when a duty of care exists.¹⁵⁴ In that case, involving a highway collision, the court held that a driver traveling at the posted speed limit at night, in light traffic, and under clear weather conditions, owes no duty to other vehicles on the highway to change lanes when another driver approaches him from behind at a speed exceeding the posted limit.¹⁵⁵ Esper and Keating argue that this holding distorts the underlying moral intuition that it likely tries to capture – that all things considered, the defendant acted reasonably by not changing lanes as the plaintiffs alleged he should have.¹⁵⁶ Esper and Keating reason that

¹⁴⁸ See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J. dissenting) ("The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." (quoting *Spade v. Lynn & B.R. Co.*, 52 N.E. 747, 748 (Mass. 1899)).

¹⁴⁹ Esper & Keating, *A Reply*, *supra* note 4, at 1234.

¹⁵⁰ See *supra* notes 113-14 and accompanying text.

¹⁵¹ Esper & Keating, *A Reply*, *supra* note 4, at 1229 ("[T]he idea of 'reasonable' care at the heart of negligence law is an extension and special application of the 'intuitive moral idea' of 'reasonableness.'").

¹⁵² See *id.* at 1240, 1244-45, 1255 (referring to the general duty of care as "a matter of genuine moral obligation" "predicated on our common status as human beings").

¹⁵³ 72 Cal. Rptr. 2d 168 (Cal. Ct. App. 1998).

¹⁵⁴ Esper & Keating, *A Reply*, *supra* note 4, at 1227-28.

¹⁵⁵ *Monreal*, 72 Cal. Rptr. 2d at 176.

¹⁵⁶ Esper & Keating, *A Reply*, *supra* note 4, at 1228.

the court's duty ruling distorts this moral intuition because the intuition suggests not that the defendant had no obligation of care under the circumstances, but simply that he was not at fault.¹⁵⁷

But in deciding there was no duty, *Monreal* gave major consideration to the foreseeability of the injuries the plaintiffs suffered as the alleged result of the defendant not changing lanes.¹⁵⁸ The court concluded that it was not reasonably foreseeable that the defendant's failure to change lanes would result in the death of the plaintiffs' decedents because a reasonably prudent person in the defendant's situation (1) would have reasonably assumed that a driver behind him would pass on the adjacent lane pursuant to traffic regulations, and (2) would not have anticipated that this driver would cause the defendant's vehicle to collide with the car in front of him.¹⁵⁹ Yet, Esper and Keating offer no explanation for why this foreseeability determination does not also distort the highly plausible underlying intuition that the defendant simply acted reasonably in not changing lanes.

Esper and Keating may reply that *Monreal* followed a strongly relational approach instead of considering *only* whether the harm suffered was unforeseeable such that no duty could be said to exist.¹⁶⁰ However, there is no reason to suppose that the court would not have engaged in the same sort of particularized analysis even if it followed Esper and Keating's "generalized" approach. For example, in *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, the court, in basing duty solely on the question of foreseeability,¹⁶¹ held that the owner of a concessions trailer owed a duty of care to a school custodian who was electrocuted when he came into contact with the trailer

¹⁵⁷ *Id.*

¹⁵⁸ 72 Cal. Rptr. 2d at 176-78.

¹⁵⁹ *Id.* at 178.

¹⁶⁰ The court in *Monreal* followed a balancing test in making its duty decision, giving consideration to a multitude of factors including "the foreseeability of harm to the plaintiff, the degree of certainty the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, . . . and the availability, cost, and prevalence of insurance for the risk involved." *Id.* at 176-77 (internal citation and quotation marks omitted).

¹⁶¹ See Cardí, *Hidden Legacy*, *supra* note 2, at 1888 & n.42 (identifying handful of states that base duty only on the question of foreseeability).

which the school had rented.¹⁶² In so holding, the court found relevant, among other things, that the owner “had significantly changed the trailer’s electrical system that first had the two-plug, 50-amp cord,” and “had chosen not to install an auxiliary ground system using the eight-foot metal rod and, indeed, had removed the lug nut on the trailer’s tongue.”¹⁶³ Determining, based on these circumstances, that there was a foreseeable risk that members of the public like the plaintiff would be injured if the concessions trailer was improperly grounded, the court held that the duty element had been satisfied.¹⁶⁴ Cases like *Coca-Cola* demonstrate that lacking any principled definition, the question of foreseeability, no matter how supposedly generalized, is vacuous without factual particularities to inform it. The question, therefore, is best adjudicated outside the element of duty.

The purported problem that duty without foreseeability awkwardly expects people to take into account what they cannot anticipate actually stems from the relationality of Esper and Keating’s view. By maintaining that the question of whether or not a duty exists traces the question of whether or not a risk of injury is foreseeable, Esper and Keating invent the very same information-cost problem that they implicitly try to solve. Put differently, they, like Goldberg and Zipursky, fallaciously treat the duty of care as if it were some item to be discovered through the application of a test – an obligation residing in only certain situations.¹⁶⁵ By contrast, an in rem conception of duty avoids this artificial problem in the first instance. In the context of negligence, where the law must give normative guidance to a sea of freely moving actors, information costs are optimized through a set of rights and duties that attach not directly to these actors by virtue of their interrelations, but through the intermediary of a “thing” that each of them exclusively controls. However, because Esper and Keating, like Goldberg and Zipursky, view even the general duty of care as an obligation encompassing a

¹⁶² 100 S.W.3d 715, 723-25 (Ark. 2003).

¹⁶³ *Id.* at 725.

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* note 78.

set of relations directly between defined classes of people,¹⁶⁶ they set foot on a slippery slope from the very outset of their analysis.

CONCLUSION

The Third Restatement does not explicitly endorse an in rem understanding of the duty of care. However, the rule that it articulates, which completely extracts foreseeability and any other particularized analysis from the duty question, is rooted in the very genesis of negligence as a discrete subject of law – a genesis to which the development of a duty owed by “all the world to all the world” was foundational.¹⁶⁷ Contrary to the suggestion of Restatement critics, a duty to the world at large does not entail a nihilistic view under which duty offers no substantive concept of obligation and serves as a mere instrument for issuing policy driven decisions. Rather, properly conceived, a duty to the world is a duty owed to people at large by virtue of the exclusive and moral dominion every person is entitled to exercise over his personal freedom. By measuring the scope of duty on the basis of the “thing” of personal freedom, an in rem conception provides the normative guidance necessary to facilitate the conduct of a vast and anonymous network of people who necessarily impose risks of physical harm on each other in pursuing their various ends.

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¹⁶⁶ See *supra* text accompanying notes 93-98.

¹⁶⁷ See RESTATEMENT 3D, *supra* note 7, at § 7 reporter's note, cmt. a; see also Palmer, *supra* note 66, at 87-88 n.9.

DISCRETION TO TAX E-DISCOVERY COSTS

A NECESSARY REFORM?

Corey Patrick Teitz[†]
with a Preface by Rhonda Wasserman^{*}

PREFACE

Corey Teitz's paper was written for my Electronic Discovery Seminar. In the seminar, I attempt to expose students to the law and rapidly changing technology that have transformed modern-day discovery. For the first eight weeks of the course, I introduce students to the most important cases and rules regulating electronic discovery; to new practices designed to facilitate such discovery, such as e-discovery special master programs and predictive coding; and to articles that explore some of the provocative issues surrounding e-discovery. I bring in guest lecturers – both lawyers and technical experts – who introduce students to the *practice* of e-discovery and offer them a hands-on lesson with an e-discovery review platform.

For his final paper in the seminar, Teitz chose to write about e-discovery costs and cost-shifting. As the volume of electronic discovery has skyrocketed and its costs have spiraled, litigants have sought to shift these costs onto their adversaries. Teitz asks whether Federal Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920 permit the taxation of e-discovery costs against the losing party at the conclusion of a lawsuit. After identifying the various stages of e-discovery and the associated costs, Teitz scrutinizes the text of Rule 54(d) and section 1920. He evaluates alternative

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interpretations of these texts offered by courts, and analyzes a recent Supreme Court decision that supports a narrow reading of the statute. Teitz proposes an amendment to section 1920 to permit greater cost-shifting, which he believes will create incentives for cooperation in e-discovery, reduce overly broad discovery requests, and ultimately reduce the cost of e-discovery.

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I.

INTRODUCTION

This paper proposes that federal district courts should have discretion to tax electronic discovery (“e-discovery”) costs to a losing party in any litigation. An amendment to section 1920 of Title 28 of the United States Code (“section 1920”) is necessary in order to grant this discretion to the courts. The amendment would represent a slight shift away from the traditional “American Rule” that each party pays its own costs in civil litigation. However, this shift is necessary due to the prevalence and ever-increasing costs of e-discovery in modern litigation.

Part II of this Note will discuss how discovery costs have been taxed historically, and the interplay between Rule 54(d) of the Federal Rules of Civil Procedure and section 1920. Part III will discuss how electronically stored information (“ESI”) has affected discovery processes and describe the costs involved with producing ESI in the e-discovery context. Part IV will analyze the alternative approaches that lower federal courts have taken in taxing e-discovery costs and will show that the narrow approach is most consistent with recent Supreme Court precedent.¹ Part V will discuss the benefits of an

¹ A few other articles have identified the alternative approaches taken by courts, but have either advocated narrowing, rather than broadening, the availability of taxation of e-discovery costs, or have neglected the relevance of the recent Supreme Court precedent of *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997 (2012). See, e.g., Patrick T. Gillen, *Oppressive Taxation: Abuse of Rule 54 and Section 1920 Threatens Justice*, 58 WAYNE L. REV. 235 (2012) (advocating narrow approach, based on *Taniguchi*); Jacqueline Hoelting, Note, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a “Loser Pays” Rule for E-*

amendment to section 1920 and will address how the potential chilling effect this amendment may have on parties can be mitigated.

II. DISCOVERY AND TAXATION OF COSTS HISTORICALLY

Discovery is a pretrial phase of litigation that allows each party to request and obtain information from the opposing party.² Prior to the advent of e-discovery, production of documents meant actually handing over physical copies of documents after manually screening them for relevance and privilege. The traditional “American Rule” is that each party pays its own costs of litigation, including the costs involved with requesting and producing information during discovery.³ Limited exceptions to this rule have been established over time through amendments to the Federal Rules of Civil Procedure and related federal statutes.⁴ The following two subsections discuss how these exceptions were applied to litigation prior to the advent of e-discovery.

A. Federal Rule of Civil Procedure 54(d)

Rule 54(d) governs costs that may be taxed to a losing party after a trial has been conducted and the court enters judgment in a case. The rule states: “Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney’s fees – should be allowed to the prevailing party.”⁵ This rule seems to grant district courts broad discretion in allowing all costs other than attorney’s fees. However, the Supreme Court has announced that this discretion

Discovery Costs, 60 CLEV. ST. L. REV. 1103 (2013) (advocating narrow approach, without mentioning *Taniguchi*); Emily P. Overfield, Comment, *Shifting the E-Discovery Solution: Why Taniguchi Necessitates a Decline in E-Discovery Court Costs*, 118 PENN. ST. L. REV. 217 (2013) (advocating narrow approach, based on *Taniguchi*).

² BLACK’S LAW DICTIONARY 533 (9th ed. 2009) (*s.v.* discovery).

³ 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2665 (3d ed. 1998 & Supp. 2012).

⁴ See 28 U.S.C. § 1920 (2012); FED. R. CIV. P. 54.

⁵ FED. R. CIV. P. 54(d)(1).

is limited by federal statute. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Court held that the discretion to tax costs allowed by Rule 54(d) is limited to the categories of costs enumerated in section 1920.⁶

B. Federal Statute Allowing for Taxation of Costs:
28 U.S.C. § 1920

Section 1920 lists six categories of costs that are taxable to the losing party in a case.⁷ The only relevant category for the purpose of this Note is found in section 1920(4): “Fees for the exemplification and the cost of making copies of any materials where the copies are necessarily obtained for use in the case.” Exemplification means an authenticated copy of a document from public records that may be used in the case.⁸ Accordingly, this phrase has no relevance in determining whether courts have discretion to tax e-discovery costs to a losing party. Courts that have decided cases dealing with this issue have focused exclusively on whether e-discovery costs are taxable under the “cost of making copies” language of section 1920.⁹

Prior to its amendment in 2008, section 1920(4) allowed for only “the cost of making copies of papers,” but this section was broadened to allow for the cost of making copies of electronic documents.¹⁰ Some federal district courts have interpreted the 2008 amendments to mean that all costs involved with e-discovery are taxable to the losing party.¹¹ Part IV will explain why the broad approach of taxing all e-discovery costs is incorrect in light of recent Supreme Court precedent. First, however, a quick overview of e-discovery itself is necessary.

⁶ See 482 U.S. 437, 441-42 (1987) (“Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d).”).

⁷ 28 U.S.C. § 1920(1)-(6) (2012).

⁸ BLACK’S LAW DICTIONARY 653 (9th ed. 2009).

⁹ See *infra* Parts IV.A & IV.B.

¹⁰ Joshua A. Haft, Note *Section 1920 and E-Discovery*, 74 U. PITT. L. REV. 359, 370 (2012).

¹¹ See *infra* Part IV.A.

III.

THE RISE OF ESI AND E-DISCOVERY

Advances in technology over the last several decades have led to a rapid increase in the amount of ESI in existence. The sheer volume of ESI has made it impossible for parties to conduct discovery in the manner originally contemplated by the Federal Rules of Civil Procedure (copying or printing paper documents and manual review). For example, in 2011 the total amount of ESI created worldwide surpassed 1.8 zettabytes (1.8 trillion gigabytes).¹² This is the digital equivalent of 500 million billion files or 200 billion high definition movies (assuming a two-hour runtime for each).¹³ To provide further illustration, this amount of information would fill 57.5 billion Apple iPads, each with thirty-two gigabytes of storage.¹⁴ The amount of ESI generated worldwide has more than doubled every two years throughout the last decade and this trend is expected to continue for the foreseeable future.¹⁵ Because of this rapid increase in ESI, e-discovery has become the dominant form of discovery.

A. Costs Involved with Producing ESI

There are many costs involved with the various phases of e-discovery. Generally speaking, litigants categorize costs into three categories: collecting, processing, and reviewing.¹⁶

1. Collecting

This phase involves identifying custodians and sources of relevant ESI and collecting that ESI. “Collecting” can mean making a digital copy of the relevant ESI on physical media or moving it to a secure

¹² JOHN GANTZ & DAVID REINSEL, INT’L DATA CORP. 2011 DIGITAL UNIVERSE STUDY, EXTRACTING VALUE FROM CHAOS 1 (June 2011), *available at* perma.cc/NY4M-T36N.

¹³ Press Release, EMC Corp., World’s Data More than Doubling Every Two Years – Driving Big Data Opportunity, New IT Roles (June 28, 2011), *available at* perma.cc/C2YK-VMWM.

¹⁴ *Id.*

¹⁵ GANTZ & REINSEL, *supra* note 12, at 1.

¹⁶ NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, 12-13 (2012), *available at* perma.cc/TN8R-S7FH.

server or cloud server. Collection can be difficult and costly when a party requests information that is stored only on archival or backup tapes.¹⁷ Costs also increase depending on the number of custodians holding relevant ESI and the number of sources of ESI.¹⁸ In a recent study of large corporate litigants, collection was found to be the least costly for litigants, consuming less than eight percent of e-discovery expenditures on average.¹⁹

2. Processing

The processing phase involves several potential steps to make the ESI easier to review. These steps can include restoration of damaged files, conversion of files to a more usable format, indexing or cataloging files, decrypting secure files, as well as de-NISTing,²⁰ deduplication, and validation.²¹ This phase requires technical expertise, and many litigants hire outside vendors to process their collected data.²² Processing consumes nineteen percent of e-discovery expenditures on average.²³

3. Reviewing

Reviewing is the final phase of e-discovery prior to production. Review can occur either manually or through the use of technology assisted review, also known as predictive coding.²⁴ If the review is manual, attorneys or experienced legal assistants review each piece

¹⁷ *Id.* at 22.

¹⁸ *Id.*

¹⁹ *Id.* at xiv, 20.

²⁰ De-NISTing involves removing all files that are in a database maintained by the National Software Reference Library, a project of the National Institute of Standards and Technology (NIST). These are common files that are found on most computers, such as word processing or internet browsing applications. It is unnecessary to preserve these standard files for review. See NAT'L SOFTWARE REFERENCE LIBRARY, available at perma.cc/V8HV-JEL6 (archived Aug. 27, 2014).

²¹ *Processing Guide*, ELECTRONIC DISCOVERY REFERENCE MODEL, perma.cc/G7WV-AHFQ (archived July 13, 2014).

²² PACE & ZAKARAS, *supra* note 16, at 38.

²³ *Id.* at 42.

²⁴ Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, *3-4 (2011).

of ESI to determine whether it is relevant and whether it is privileged.²⁵ This is a labor-intensive process, which is why this is the most expensive phase of e-discovery. On average, review consumes seventy-three percent of total litigant expenditures on e-discovery.²⁶

Predictive coding is not widely used, and until recently no court approved it as an acceptable review practice.²⁷ The process involves manual review by an experienced attorney in conjunction with a computer that can “learn” what is relevant to the case based on the responses of the attorney.²⁸ This has the potential to save litigants significant amounts of money because the attorney only needs to review a fraction of the total documents that would otherwise need to be manually reviewed.²⁹ Predictive coding is likely to gain traction in the future because of the potential cost savings and the fact that recent studies have shown that it is at least as efficient and effective as teams of manual reviewers.³⁰

B. A Note on Costs

The study used by this paper to detail what percentage of costs is allocated to each phase of e-discovery relied on the self-reporting of costs by litigants.³¹ One major cost driver that was not reported by litigants is the cost of preservation of ESI. The reason for failing to report this cost is twofold. First, the cost of preservation is usually incurred internally, which means that a litigant has already incurred the costs of the people and equipment needed for preservation.³² Second, there is no clear standard defining what costs should be classified as preservation expenses rather than ordinary business expenses.³³

²⁵ *Id.*

²⁶ PACE & ZAKARAS, *supra* note 16, at 41-42.

²⁷ See *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) (endorsing, for the first time in federal case law, the use of predictive coding as an appropriate method of reviewing ESI).

²⁸ *Id.* at 183-84.

²⁹ *Id.*

³⁰ Grossman & Cormack, *supra* note 24, at *3.

³¹ PACE & ZAKARAS, *supra* note 16, at 5.

³² *Id.* at 85-86.

³³ *Id.*

While these costs are not well tracked or managed, some litigants estimated that preservation costs were greater than the costs of collecting, processing and reviewing combined.³⁴ Concerns about these costs have led to a proposed amendment to Federal Rule of Civil Procedure 37(e).³⁵ The proposed amendment provides greater guidance as to when a duty to preserve begins and what must be preserved, and also provides safe harbor to litigants who attempt to preserve in good faith.³⁶ This paper proposes that the cost of preservation should be taxable just as any other cost of e-discovery, provided that the litigant seeking recovery tracks the cost so that the court has a reasonable basis to make an award.

C. Overall Costs and Projection of Future Costs

The global e-discovery market was valued at \$3.6 billion in 2010, \$3.0 billion of which was attributable to the United States market.³⁷ The market is expected to grow to \$9.9 billion by 2017, with \$7.2 billion attributed to the United States.³⁸ The likely reason that the American market for e-discovery products and services dwarfs the rest of the world is the tradition of allowing broad discovery. While this was a boon for attorneys in the days of manual discovery and paper documents, it is now a boon to e-discovery vendors instead.

Attorneys recognize that e-discovery has become unnecessarily expensive.³⁹ Costs have been described as skyrocketing, exploding, and spiraling.⁴⁰ Some attorneys have called for wholesale discovery reform because of the costs involved with e-discovery.⁴¹ While the

³⁴ *Id.* at 87-88.

³⁵ COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 314-28 (2013).

³⁶ *Id.*

³⁷ TRANSPARENCY MARKET RESEARCH, eDISCOVERY (SOFTWARE AND SERVICE) MARKET: GLOBAL SCENARIO, TRENDS, INDUSTRY ANALYSIS, SIZE, SHARE AND FORECAST, 2010-2017, at 4 (2011), available at perma.cc/TAT3-5EAN.

³⁸ *Id.*

³⁹ PACE & ZAKARAS, *supra* note 16, at 1.

⁴⁰ *Id.*

⁴¹ *Id.*

need for some change is obvious, this paper proposes that an overall reduction in e-discovery costs can be achieved through less radical means than wholesale discovery reform.

The next section discusses how courts have taxed e-discovery costs in recent cases and argues that the narrow approach to taxing costs is correct under current Supreme Court precedent.

IV. APPLICATION OF FRCP 54(D) AND § 1920 TO E-DISCOVERY

The federal district courts have used two distinct approaches when deciding whether the costs of e-discovery should be taxed to the losing party: the broad approach and the narrow approach.⁴² These approaches stand in opposition to each other. The broad approach allows the winning party to recover all costs associated with e-discovery.⁴³ The narrow approach allows for recovery of only a small subset of costs involved with e-discovery: the actual costs of duplicating a native electronic document or the costs of converting an electronic document to a PDF, TIFF, or other requested form.⁴⁴ These competing approaches are explained in detail below, and subsection C will explain why the narrow approach is the correct approach.

A. The Broad Approach

Three cases decided after the 2008 amendment to section 1920 espouse the broad approach to taxing e-discovery costs. The first is *CBT Flint Partners, LLC v. Return Path, Inc.*, decided in 2009 by the United States District Court for the Northern District of Georgia.⁴⁵

⁴² See Hoelting, *supra* note 1, at 1119-22.

⁴³ *Id.* at 1121.

⁴⁴ *Id.* at 1119-22. PDFs and TIFFs are the two most-used file formats for the production of ESI. These formats allow the requesting party to view a file as an un-editable static image and also usually include a text-searchability function for ease of use.

⁴⁵ 676 F. Supp. 2d 1376 (N.D. Ga. 2009), *vacated on other grounds*, 654 F.3d 1353 (Fed. Cir. 2011).

There, the court allowed the taxation of \$243,453.02 in fees paid to the defendant's e-discovery vendor in response to plaintiff's discovery requests.⁴⁶ The fees were for services including collecting, searching, identifying and producing relevant documents.⁴⁷ The court's reasoning was based on the facts that plaintiff requested a "massive quantity" of data (over 1.4 million documents) and that the services performed in culling this data were not the type of services normally performed by an attorney in the course of discovery.⁴⁸ The court also mentioned in its justification for allowing taxation that the use of an e-discovery vendor most likely reduced the overall cost of discovery in the case.⁴⁹ The court did not state whether the fees for these services were equivalent to "fees for exemplification or the cost of making copies" for use in the case. Only these or equivalent costs are taxable under § 1920.

The second case supporting the broad approach is *In re Aspartame Litigation*, decided in 2011 by the United States District Court for the Eastern District of Pennsylvania.⁵⁰ In that case the court allowed several defendants to recover costs related to collecting, preserving, processing, sorting, de-duplicating, converting, reviewing and privilege-screening electronic documents.⁵¹ The court relied on reasoning similar to that in *CBT Flint Partners* to justify taxing these costs: there was a massive amount of data involved, the parties agreed that e-discovery was appropriate, the functions performed were not those typically performed by a lawyer in the context of discovery, and the services performed reduced the overall cost of discovery.⁵² The court, like the *CBT Flint* court, did not attempt to reconcile its decision with the statutory language of section 1920.

Lastly, *In re Ricoh Co., Ltd. Patent Litigation* suggests that the United States Court of Appeals for the Federal Circuit may support the

⁴⁶ *Id.* at 1380-81.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 817 F. Supp. 2d 608 (E.D. Pa. 2011).

⁵¹ *Id.* at 614-16.

⁵² *Id.*

broad approach to taxing e-discovery costs.⁵³ In that case the court stated, “The act of producing documents is not so narrowly construed as to cover only printing and Bates-labeling a document.”⁵⁴ The court also noted that it did not consider the costs of hosting an online database for document review “to fall into the unrecoverable category of ‘intellectual efforts.’”⁵⁵ The court did not ultimately decide the question of whether these costs could be properly taxed under section 1920, because the parties in the case entered into a detailed fourteen-page cost sharing agreement prior to trial and the Federal Circuit held that the district court erred awarding costs to the winning party because the agreement was controlling.⁵⁶ The court’s reasoning, however, suggests that it would have upheld the district court’s taxing of costs to the losing party in the absence of the cost-sharing agreement.

B. The Narrow Approach

Several federal district court cases decided after the 2008 amendments to section 1920 support the narrow approach to taxing e-discovery costs,⁵⁷ as do two recent decisions from the Courts of Appeals. This section focuses on these two recent decisions as illustrations of the narrow approach.

In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, the Third Circuit held that decisions allowing taxation of essentially all costs involved with e-discovery “are untethered from the statutory mooring” of section 1920.⁵⁸ The court also pointed out that saving costs is not an appropriate basis for allowing taxation of costs and that section 1920(4) authorizes only the taxation of costs for exemplifica-

⁵³ 661 F.3d 1361 (Fed. Cir. 2011).

⁵⁴ *Id.* at 1365.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1366-67.

⁵⁷ *E.g.*, *Fast Memory Erase, LLC v. Spansion, Inc.*, No. 3-10-CV-0481-M-BD, 2010 WL 5093945 at *5-6 (N.D. Tex. Nov. 10, 2010); *Kellogg Brown & Root Int’l, Inc. v. Altanmia Commercial Mktg. Co.*, No. H-07-2684, 2009 WL 1457632 at *5-6 (S.D. Tex. May 26, 2009); *Fells v. Va. Dep’t of Transp.*, 605 F. Supp. 2d 740, 743 (E.D. Va. 2009).

⁵⁸ 674 F.3d 158, 169 (3rd Cir. 2012).

tion or making copies.⁵⁹ The court upheld the district court's taxation of costs for converting ESI into TIFFs and for converting VHS tapes to DVDs.⁶⁰ These services were viewed as the digital equivalent of making paper copies; therefore taxing these costs was not an abuse of discretion.⁶¹ But, the court held, the district court *did* abuse its discretion in taxing \$95,210.13 in vendor costs for collecting, searching, identifying, and producing electronic documents because they were not the equivalent of making paper copies.⁶²

The second case is from the Fourth Circuit Court of Appeals. In *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, the district court adopted the Third Circuit's reasoning and allowed taxation only of the costs of TIFF and PDF conversion and the cost of copying the digital files to a compact disc.⁶³ The Fourth Circuit affirmed the district court's holding, citing to the plain meaning and legislative history of section 1920.⁶⁴ The court also cited Supreme Court case law holding that there is a presumption that the party producing information must bear the expense of production.⁶⁵ In this case the winning party was able to recover only \$218.59 of \$111,047.75 spent on e-discovery.⁶⁶

C. The Narrow Approach is Correct Under Current Law

The previous discussion shows that federal courts have not yet reached a consensus as to whether the broad or narrow approach to taxing e-discovery costs is correct. However, a recent United States Supreme Court case involving a different subsection of section 1920 indicates that the narrow approach is correct.

⁵⁹ *Id.*

⁶⁰ *Id.* at 167-68.

⁶¹ *Id.*

⁶² *Id.* at 171-72.

⁶³ 718 F.3d 249, 253 (4th Cir. 2013); 28 U.S.C. 1920(6) allows district courts to tax as costs: "Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."

⁶⁴ *Id.* at 260.

⁶⁵ *Id.* at 261 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)).

⁶⁶ *Id.* at 252-53.

1. Recent Supreme Court Decision:
Taniguchi v. Kan Pacific Saipan, Ltd.

Taniguchi involved section 1920(6), which specifically authorizes the compensation of interpreters as taxable costs.⁶⁷ The Court held that section 1920(6) should be read narrowly, and that costs for translation of written documents do not fall under the category of “compensation of interpreters.”⁶⁸ The Court reviewed the legislative history⁶⁹ and amendments to section 1920 as well as the plain meaning of the word “interpreter.” More directly relevant to the broader question of e-discovery, the Court also noted that its decision was “in keeping with the narrow scope of taxable costs” historically,⁷⁰ and that “taxable costs are limited by statute and are modest in scope.” Thus it did not make sense to read a broad definition of “interpreter” into the statute.⁷¹ The Court reasoned in addition that if Congress had intended costs of written translation to be taxable under section 1920(6) it would have stated so explicitly.⁷²

2. *Taniguchi* Ratifies the Narrow Approach

The Supreme Court’s decision in *Taniguchi* interpreted section 1920(6), not section 1920(4), but it is very unlikely that the Court would treat these subsections differently. One commentator has suggested that the Court’s holding in *Taniguchi* is unrelated to the issue of taxing e-discovery costs and that the legislative history of the 2008 amendments to section 1920 supports the broad approach to taxing e-discovery costs.⁷³ Both of these propositions are incorrect. *Taniguchi*

⁶⁷ 132 S. Ct. 1997, 2000 (2012).

⁶⁸ *Id.* at 2006-07.

⁶⁹ One of the main reasons Congress passed the 1853 Fee Act was that losing litigants were facing exorbitant fees in some jurisdictions. The Fee Act was intended to be far-reaching and it specified the exact nature and amount of items that can be taxed in the federal courts. Costs that may be taxed to a losing litigant are limited to those specifically contained in the Fee Act and its successor, section 1920. See *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2001 (2012) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247-48 (1975)).

⁷⁰ *Id.* at 2006.

⁷¹ *Id.*

⁷² *Id.* at 2006-07.

⁷³ See Haft, *supra* note 10, at 371 n.81.

is related to the issue of taxing e-discovery costs because the Supreme Court held that section 1920 as a whole, and not just section 1920(6), should be interpreted narrowly.⁷⁴ *Taniguchi* therefore provides insight into how the Supreme Court would likely interpret *any* provision under section 1920, including section 1920(4).⁷⁵ It is both reasonable and logical to assume that the Court would consistently apply this reasoning and interpret section 1920(4) narrowly when deciding a case involving e-discovery taxation issues.

In addition, the legislative history cited by the commentator as support for the broad approach to taxing e-discovery costs is both weak and inconclusive. There is no doubt that the 2008 amendments to section 1920(4) were intended by Congress to specifically account for some costs associated with e-discovery and that the amendment was titled “Assessment of Court Technology Costs.”⁷⁶ However, these facts do not evidence a clear Congressional intent to break from the longstanding rule that taxable costs under section 1920 are narrow in their scope.⁷⁷ Finally, the commentator relies on the statements of a sole member of the House of Representatives as “strong evidence of congressional intent to allow the taxation of e-discovery costs, despite the legislative history’s lack of clarity regarding the scope of taxation.”⁷⁸ The Supreme Court has used statements made during Congressional hearings and debates as evidence of legislative intent.⁷⁹ But it is unlikely that the Court would

⁷⁴ 132 S. Ct. at 2006:

Our decision is in keeping with the narrow scope of taxable costs. . . . Taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920, which lists such items as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts.

⁷⁵ *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 258 (4th Cir. 2013) (“Although the ordinary meaning of [‘copies’] is expansive, its application is limited by the ‘broader context of [§ 1920] as a whole.’ The Supreme Court has observed that taxable costs under the statute are ‘modest in scope’ and ‘limited to relatively minor, incidental expenses.’” (quoting *Taniguchi*, 132 S. Ct. at 2006; *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir. 2013)).

⁷⁶ See Haft, *supra* note 10, at 370-71.

⁷⁷ See *Taniguchi*, 132 S. Ct. at 2006-07.

⁷⁸ See Haft, *supra* note 10, at 370-71.

⁷⁹ David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legisla-*

find the statements of one member from one branch of Congress to be strong enough evidence to control the interpretation of an admittedly ambiguous statute in a manner that overturns a longstanding rule requiring a narrow interpretation of section 1920. This is especially true considering that the statements themselves are vague and could reasonably be construed as supporting the narrow approach to taxing e-discovery costs.⁸⁰ Accordingly, it is very likely that the Supreme Court would apply the reasoning from *Taniguchi* and narrowly interpret section 1920 in a future case involving taxation of e-discovery costs.

3. Federal Cases Decided Subsequent to *Taniguchi* Support the Narrow Approach

The cases supporting the broad approach to taxing the costs of e-discovery were all decided prior to *Taniguchi*. The two cases decided after *Taniguchi* both support the narrow approach. The first case is *Country Vintner*, discussed above. In that case the Fourth Circuit relied heavily on the reasoning of the Third Circuit in *Race Tires*, but it did cite to *Taniguchi* for the proposition that the plain meaning of “making copies” should be applied.⁸¹ While the Fourth Circuit did not recognize *Taniguchi* as a direct authority on this matter, it did ultimately reach the conclusion that the narrow approach is appropriate.⁸²

tive History, 51 WM. & MARY L. REV. 1653, 1665 (2010).

⁸⁰ Haft states:

Representative Zoe Lofgren of California urged the passage of “noncontroversial measures proposed by the judicial conference to improve efficiency in the [f]ederal courts.” Representative Lofgren also specifically referenced the amendment to § 1920(4) in stating that one of the proposed statutory amendments “mak[es] electronically produced information coverable in court costs.”

See Haft, *supra* note 10, at 370-71. The use of the word “noncontroversial” in the first statement could be interpreted to imply that the amendment is not designed to overturn the longstanding rule that section 1920 should be interpreted narrowly, as overturning the rule would likely lead to controversy. The use of the word “produced” in the second statement could be interpreted to mean that the amendment to section 1920 covers only costs for the production phase of e-discovery, not costs associated with collecting, processing, reviewing, or storing ESI.

⁸¹ *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 258 (4th Cir. 2013).

⁸² *Id.* at 261.

The second case decided subsequent to *Taniguchi* is *Ancora Technologies, Inc. v. Apple, Inc.*⁸³ In that case the United States District Court for the Northern District of California cited directly to *Taniguchi* in holding that storage and hosting costs involved with producing documents are not compensable under section 1920.⁸⁴ The district court stated that even though *Taniguchi* did not address the issue of taxing e-discovery costs, the Supreme Court put forth “the principle that section 1920 does not cover all costs that are necessarily incurred in litigation, but only a narrow subset.”⁸⁵ Accordingly, the court reduced the clerk’s order taxing costs by \$71,611.52, the amount of fees for hosting the documents in the case.⁸⁶

V.

PROPOSED AMENDMENT TO § 1920

In light of the Supreme Court’s decision in *Taniguchi*, the federal district courts are likely to deny the taxation of e-discovery costs unless section 1920 is amended. After proposing specific language for such an amendment, I will consider arguments for and against adopting it.

A. Language of the Proposed Amendment

Below is my proposed amendment to section 1920. The amendment grants federal district judges broad discretion to tax costs related to e-discovery. It also contains provisions that mitigate the potential negative effects of such a rule. Parties can avoid application of this rule by entering into a cost sharing agreement. Losing parties will not be forced to pay the often-high costs of e-discovery if they are unable to do so. Lastly, federal district judges will also have the discretion not to tax e-discovery if justice so requires.

The proposed amendment to section 1920 provides:

⁸³ No. 11-CV-06357 YGR, 2013 WL 4532927 (N.D. Cal. Aug. 26, 2013).

⁸⁴ *Id.* at *3.

⁸⁵ *Id.*

⁸⁶ *Id.* at *4.

§ 1920. Taxation of costs. A judge or clerk of any court of the United States may tax as costs the following: . . .

(7) Fees for the production electronically stored information, including fees for collection, processing, and technology assisted review of such information. These fees may be taxed only if (a) there is no cost-sharing agreement regarding electronically stored information between the parties; (b) the losing party has the ability to pay such costs; and (c) it is in the interest of justice to tax such fees and costs.”

B. Benefits of the Amendment

1. Encourages Cooperation Between Parties Before Discovery Begins

The Federal Rules of Civil Procedure, specifically Rules 16 and 26(f), require the parties to meet and confer regarding the scope of e-discovery.⁸⁷ These meetings have also been used recently to discuss the potential for sharing costs of e-discovery. An amendment to section 1920 allowing district courts to tax e-discovery costs fosters such agreements. It would create an incentive for requesting parties to work with the producing party to find the most cost-effective ways to meet the goals of the discovery request. It would also likely lead to more focused requests in cases in which the parties do not agree to a cost-sharing agreement because the requesting party will know that it might potentially be taxed for the full costs of producing ESI.

2. Promotes Cost-Effective E-Discovery Processes

Part III of this Note showed how litigants spend their money during e-discovery. Allowing courts to tax the costs of e-discovery would likely lead to more focused discovery requests, and costs of collection and processing would be reduced by a corresponding amount. Review constitutes the largest portion of e-discovery expenditures, at seventy-three percent on average.⁸⁸ Under the current system, a requesting party has an incentive to demand manual

⁸⁷ FED. R. CIV. P. 16(b)(3)(B)(iii), 16(c)(2)(F), 26(f).

⁸⁸ See PACE & ZAKARAS, *supra* note 16, at 42.

review, because that review drives up the costs of e-discovery and makes a settlement more appealing to the responding party. Allowing taxation would likely result in more parties agreeing to use predictive coding, because requesting parties would have an incentive to reduce the overall costs of e-discovery: the potential threat of being stuck with the bill. It has been shown that predictive coding is as efficient and effective as manual review, if not more so, while also being less expensive.⁸⁹ Review is by far the most expensive phase of e-discovery, and widespread adoption of predictive coding offers one of the most effective ways to reduce these costs.

3. Promotes the Fundamental Purpose of the Federal Rules of Civil Procedure

Those who oppose granting district courts the discretion to tax e-discovery costs often point to the “American Rule” that each side pays its own costs of litigation. They argue that allowing taxation of e-discovery costs will upset the fundamental balance of power in American law. While this might be true to some extent, allowing taxation of e-discovery costs would serve the fundamental purpose of the Federal Rules of Civil Procedure: “to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁹⁰ As noted, allowing taxation would result in parties choosing more cost-effective e-discovery processes. It would also lead to more just results because it would impair a party’s ability to use extensive e-discovery requests as a tool to force a settlement. Parties are less likely to pursue this strategy if there is a possibility that the costs involved with extensive production could be taxed to them after the court has decided the case. Cases would also likely be resolved in a speedier fashion if predictive coding were to become the standard form of review for e-discovery.⁹¹ In short, Congress should recognize that the discovery process has changed significantly in recent decades due to the volume of ESI and the costs involved with pro-

⁸⁹ See Grossman & Cormack, *supra* note 24, at *3, *43-44.

⁹⁰ FED. R. CIV. P. 1.

⁹¹ See Grossman & Cormack, *supra* note 24, at *2.

ducing it. Litigants must often rely on outside vendors to perform the most basic tasks of discovery such as locating digital files and producing them in a usable form.⁹²

C. Concerns About a Potential Chilling Effect on Plaintiffs Can Be Mitigated

Several law review articles on this topic have argued that the broad approach to taxing e-discovery costs would have a chilling effect on plaintiffs.⁹³ The authors reason that allowing taxation of e-discovery costs might leave a plaintiff with few resources stuck with a large bill of costs that he or she cannot pay. The mere threat of being saddled with such costs might deter some plaintiffs from filing meritorious claims. This is a valid concern, but it can be mitigated.

1. Taxing E-Discovery Would Be Discretionary, Not Mandatory

The proposed amendment to section 1920 would grant discretion to federal district courts to tax the costs of e-discovery but would not require them to do so. It is true that there is a strong presumption in favor of granting all costs allowable under Rule 54(d)(1).⁹⁴ However, the presumption is a policy decision by Congress and can be changed at any time. The proposed language of the amendment (at 7(c)) makes clear that the presumption does not necessarily apply to e-discovery costs. Under that language, courts have discretion to award these costs only if it would be in the interest of justice in a given case.

⁹² See PACE & ZAKARAS, *supra* note 16, at 38.

⁹³ See generally, e.g., Gillen, *supra* note 1; Hoelting, *supra* note 1.

⁹⁴ See, e.g., *Reger v. Nemours Found. Inc.*, 599 F.3d 285, 288 (3d Cir. 2010) (“[T]here is a ‘strong presumption’ that costs are to be awarded to the prevailing party. . . . This is so because the denial of such costs is akin to a penalty.”); *In re Derailment Cases*, 417 F.3d 840, 844 (8th Cir. 2005) (“A prevailing party is presumptively entitled to recover all of its costs.”); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 944-45 (9th Cir. 2003) (“Rule 54(d) creates a presumption for awarding costs to prevailing parties; the losing party must show why costs should not be awarded.”); *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000) (“Rule 54(d)(1) establishes a presumption in favor of a cost award.”).

2. Mitigating the Potential Chilling Effect on Plaintiffs

The proposed amendment also includes two provisions that avoid a potential chilling effect on plaintiffs. The first (in 7(a)) is that costs can be awarded only when no cost-sharing agreement regarding e-discovery exists between the parties. This provision would promote early discussion and agreement between the parties. It would also create certainty for litigants that a cost-sharing agreement would be controlling and they would not be stuck with the full bill of costs if they lose a case. The second provision (7(b)) conditions the award of costs on the losing party's ability to pay. The losing party should have the burden of proving inability to pay; this could be accomplished by any means that the district court finds appropriate. One likely doctrinal development would be to require parties who desire to avoid being liable for costs raise this issue as early in the litigation as possible.

VI.

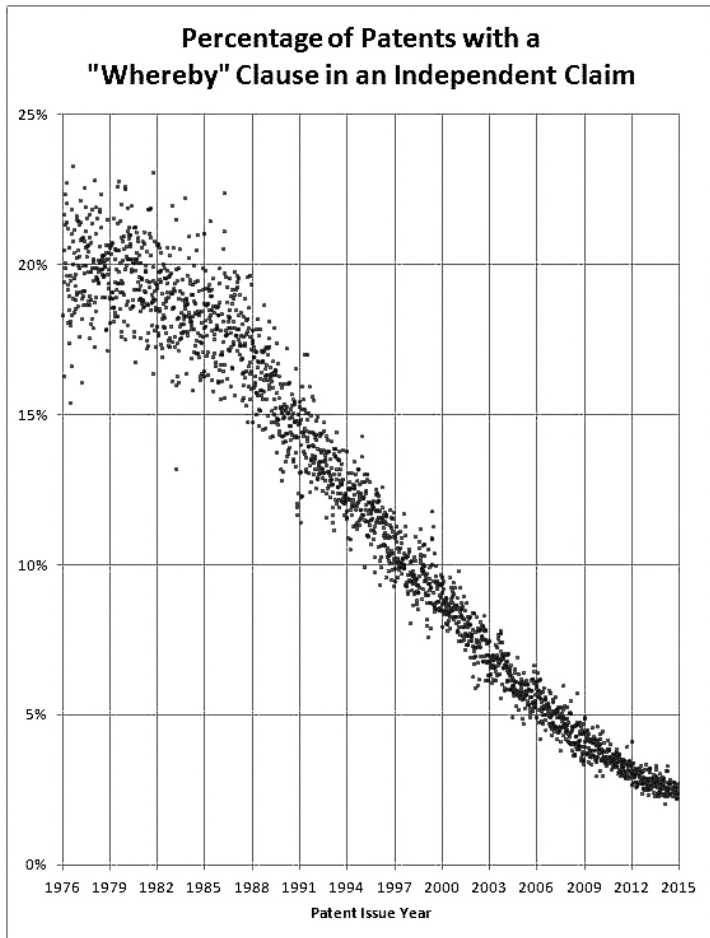
CONCLUSION

The volume of ESI and the corresponding costs of producing it have changed the discovery phase of litigation over the last few decades. The amendment to section 1920 proposed in this paper recognizes this change and deals with the exploding costs the change has created. The proposed amendment is an exception from the general American Rule requiring each party to bear its own costs. But it is consistent with the fundamental purpose of the Federal Rules of Civil Procedure and would lead to reduced costs for litigation overall. We should not adhere blindly to the American Rule in every circumstance when a different rule will produce better results.

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About the cover

We are always keeping an eye out for those who are gathering, interpreting, and presenting interesting data relating to the law. One such person is Professor Dennis Crouch, at the Patently-O blog (patentlyo.com/). In one recent post, he charted the decline of the “whereby” clause in the independent claims of U.S. patents. The “whereby” clause “generally states the result of the patented process. However, when the ‘whereby’ clause states a condition that is material to patentability, it cannot be ignored in order to change the substance of the invention.” 3-8 *Chisum on Patents* § 8.06 n.194. (quoting *Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1329 (Fed. Cir. 2005) (per curiam)). As one can see from the graph on the cover, such claim drafting has fallen notably out of favor in the last 30 years. We will leave the implications of that to the patent scholars, but wanted to share the graph on our cover as another great example of an interesting presentation of legal metrics. Graph credit to Professor Dennis Crouch (patentlyo.com/patent/2014/11/demise-whereby-clause.html) – Eds.

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MEASURING CIRCUIT SPLITS

A CAUTIONARY NOTE

Aaron-Andrew P. Bruhl[†]

INTRODUCTION

Circuit splits and other divisions of authority in the lower courts are interesting and important for a number of reasons, perhaps most of all because a split of authority is probably the single most important factor in triggering Supreme Court review.¹ Although the study of such conflicts is not new, the topic holds renewed interest because scholars have begun publishing improved measures of the Court's behavior in resolving conflicts. The simple observation that the Supreme Court reverses much more often than it affirms — it has reversed about 70-75% of the decisions it has reviewed, in recent years² — actually tells us very little about how well the lower courts fare on review. That is because any particular lower-court decision reviewed by the Supreme Court is usually just one of several conflicting decisions to have addressed the legal question at issue. Therefore, even when the Court reverses the decision directly under review, the Court might be indirectly “affirming” several other lower courts.

A more meaningful measure of the Court's supervision of the lower courts would take this fact of indirect or “parallel” review into account, and that is exactly what several recently published studies

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¹ See, e.g., H.W. PERRY, JR., *DECIDING TO DECIDE* 246 (1994) (“Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.”).

² See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 271 (5th ed. 2012).

aim to do.³ As one of those studies, published in this *Journal*, states, “[o]nce data regarding decisions on parallel review are added to the decisions on primary review, a more accurate – and much different – view of federal appellate court performance emerges.”⁴ Although the figures reported in these studies differ depending on the precise methods and time periods involved, the findings show the Supreme Court agreeing with the lower courts much more often than one would gather from the crude information provided by primary reversal rates.

These new measures improve our understanding of the relationship between the lower courts and the Supreme Court, but we should understand these measures’ limits. Providing an accurate accounting of the Supreme Court’s treatment of lower courts requires that the researcher define which categories of the Court’s cases should be studied, identify those cases on the Court’s docket, and then determine which lower courts are indirectly affirmed or reversed in each of those cases. These tasks turn out to be surprisingly difficult.

The main purpose of this comment is to explain why those tasks are difficult and how the difficulties mar the resulting measurements. Once the difficulties are fully appreciated, researchers can and should adjust their aims, methods, and reporting so as to improve accuracy and reduce the risk of misstatement. But to some degree the culprit is the Supreme Court’s own practices – practices that impede precise measurement and, more worryingly, may introduce systematic bias into researchers’ findings. A secondary goal of this comment is to highlight the limitations of the Supreme Court Database as a tool for identifying Supreme Court cases resolving splits,

³ See, e.g., Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L. (1 J. LEGAL METRICS) 59 (2012) [hereinafter *App. Rev. I*]; Tom Cummins & Adam Aft, *Appellate Review II – October Term 2011*, 3 J.L. (2 J. LEGAL METRICS) 37 (2013) [hereinafter *App. Rev. II*]; Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011); John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S.L.W. 393 (2011). Hansford’s study had the broader goal of determining whether circuits fare better in the Supreme Court in fields in which they have expertise, but answering that question required him first to compile (like the other studies above) a more complete measure of circuit performance.

⁴ *App. Rev. I*, *supra* note 3, at 62.

whether for purposes of constructing measures of reversal rates or for other purposes that may be of interest to lawyers and political scientists.

I.

BRIEF OVERVIEW OF PARALLEL REVIEW AND ITS USES

Before delving into the difficulties, we should begin by briefly introducing the idea of parallel review and its many uses. The basic idea is simple but powerful. Consider a hypothetical Supreme Court that resolves three cases, one each from the Sixth, Seventh, and Ninth Circuits. The Supreme Court affirms in the case from the Seventh Circuit and reverses in the other two, which yields a reversal rate of 67%. In truth, however, the Supreme Court has reviewed not just three decisions but several times that number, because each of those three cases presented legal questions that had divided the lower courts for years. Suppose the legal question in each case can be represented as a binary choice between two options such as *X* or not-*X* (e.g., a limitations period is subject to equitable tolling or is not, the “search incident to arrest” doctrine applies to smartphones or does not). A more complete picture of the Court’s appellate reversal rates would then look like this:

	Case 1 (<i>X</i> or not- <i>X</i>)		Case 2 (<i>Y</i> or not- <i>Y</i>)		Case 3 (<i>Z</i> or not- <i>Z</i>)		Overall reversal rate
Circuit positions on the question	<i>X</i> : 1st, 2d, 9th, DC	Not- <i>X</i> : 3d, 6th	<i>Y</i> : 7th, 5th, 10th	Not- <i>Y</i> : 2d, 6th, DC	<i>Z</i> : 4th, 10th	Not- <i>Z</i> : 5th, 9th, 8th, 11th	
Circuit directly reviewed by S. Ct.	6th		7th		9th		
S. Ct. ruling	<i>X</i>		<i>Y</i>		<i>Z</i>		
S. Ct. disposition on direct review	reversed 6th Cir.		affirmed 7th Cir.		reversed 9th Cir.		67% (2 of 3)
Reversal rate incl. parallel review	33% (2 of 6)		50% (3 of 6)		67% (4 of 6)		50% (9 of 18)

A few important differences between direct and parallel review now become apparent. For one, the full measure of the Supreme Court's reversal rate can differ significantly from the rate on direct review. The figures in this hypothetical – 50% versus 67% – are broadly reflective of the findings of the recent studies, which show that lower courts fare much better once parallel review is considered.⁵ Moreover, accounting for parallel review can alter which lower courts appear best and worst. In this hypothetical, the Ninth Circuit was reversed 100% of the time on direct review (one reversal out of one opportunity in Case 3), but it was indirectly affirmed in Case 1, so perhaps it is not performing badly after all. And the “best” performance – two wins and no losses for the 10th Circuit – came from a court that was not directly reviewed at all.

The concept of parallel review has many uses. The Cummins/Aft and Summers/Newman studies are primarily aimed at measuring parallel review rates and using them to produce better assessments of circuit performance,⁶ a matter of keen interest to observers of the courts. One could also use this comprehensive measure as one step toward answering more complex research questions. For example, if one wants to know whether courts with greater experience in a field (say, the Second Circuit in securities litigation) perform better than non-expert courts, one might consider how often the Supreme Court adopts the view of that expert lower court – and in doing so one would probably want to include cases in which the expert court's rule came up to the Supreme Court indirectly via a different lower court's decision.⁷ Similarly, if a researcher wants to know whether the Supreme Court is influenced or constrained by the rulings of the lower courts, parallel re-

⁵ See *App. Rev. II*, *supra* note 3, at 37-38; Summers & Newman, *supra* note 3, at 3.

⁶ See *App. Rev. I*, *supra* note 3, at 59-60; Summers & Newman, *supra* note 3, at 1-2. For earlier studies using similar methods and pursuing similar goals, though with a focus on the Ninth Circuit in particular, see Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 412-15 (1998); and Stephen L. Wasby, *How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases*, 1 SETON HALL CIR. REV. 119 (2005).

⁷ This, in essence, is the question studied in Hansford, *supra* note 3.

view is much more informative than direct review.⁸ Indeed, a measure of reversal rates that incorporates parallel review is probably the more appropriate measure for *most* research questions.

But whatever use one wants to make of parallel review, one has to proceed carefully. One first has to identify the set of Supreme Court cases one wants to study, which presents both definitional questions as well as practical problems. Then, having defined and identified the relevant Supreme Court cases, one has to determine which lower courts were involved and what the Court did with all of them. Those tasks are harder than they might seem, in part because the Court is, alas, not as attuned to the needs of empirical researchers as one might wish.

II.

COMPLEXITIES OF IDENTIFYING SPLITS

A. Defining the Cases of Interest

An initial question that confronts the researcher, though ultimately not one of the more complicated questions, is how to define the category of Supreme Court cases one wishes to study. Any study of parallel review will, obviously, include those cases involving conflicts in the lower courts. At the other end of the spectrum from the conflicts are the cases involving issues that one and only one lower court has addressed, such as because one lower court has exclusive jurisdiction over the topic (as in some areas of patent law and administrative law, for example) or because the question is so fact-bound that it does not present any generalizable issue of law. An additional, intermediate category is composed of cases in which multiple lower courts have addressed a question, all of them have agreed, and the Supreme Court affirms or reverses all

⁸ This is one of the questions addressed in Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851 (2014). Lindquist and Klein address similar questions in a 2006 article, in which they treated the majority view in the lower courts largely as a proxy for legal correctness, the influence of which they compared to other potential influences like ideology. See Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 141-42 (2006).

of them.⁹ The existence of these various categories raises the question of what one means by “conflicts” and, more broadly, the question of why one might want to study conflicts-so-defined instead of a broader or narrower range of cases.¹⁰ Some or all of the non-splits could be ignored if one is interested in the Court’s resolution of lower-court conflicts *per se*, but it is not so clear that one should ignore them – especially the non-splits involving the unanimous views of multiple lower courts – if one is interested in understanding how the Supreme Court relates to the lower courts, how often it agrees with them, how well the lower courts are performing, etc. Further complications concern whether to study all lower courts or only some of them (most notably the federal courts of appeals) and whether to include the Supreme Court’s summary dispositions as well as fully argued cases. In any event, the decision to include and exclude certain categories of cases should be acknowledged and then supported by some reason rooted in the research question.

B. Undercounting of Splits in the Supreme Court Database

Let us assume that the category of cases to be studied either includes, or is entirely limited to, Supreme Court cases resolving conflicts in the lower courts. There next arises the deceptively difficult problem of finding those cases. One approach, employed by some researchers in the field, is to locate conflicts by relying on the renowned Supreme Court Database (“the Database”) maintained by Harold Spaeth and his collaborators.¹¹ Among the dozens of pieces of

⁹ See, e.g., *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1133-35 (2011) (noting that several lower courts had ruled a particular way and reversing them all); *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1332 (2012) (affirming every court of appeals to have addressed the question); *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) (observing that the lower courts were in accord on one issue in the case and affirming them all). In the cases just cited, I rely on the Supreme Court’s representations that the lower courts were unanimous.

¹⁰ Summers and Newman acknowledge the issue and report reversal rates for different categories of cases, which is helpful. See Summers & Newman, *supra* note 3, at 3.

¹¹ SUPREME COURT DATABASE, scdb.wustl.edu/index.php (last visited Aug. 10, 2014). The initial iterations of the Cummins/Aft studies of parallel review relied primarily on the Supreme Court Database to identify cases. See *App. Rev. I*, *supra* note 3, at 64. Other researchers, especially in political science, have relied on the Database to locate splits for purposes

information collected about each case, the Database includes a variable for “certReason”: the reason, as reported by the Court’s opinion, that the Court granted certiorari. That variable can take on a number of different values, including several corresponding to different types of splits (splits between different federal courts, splits between federal and state courts, confusion in the lower courts, etc.).¹² Someone looking at the Database’s split-related coding would probably realize, if he or she gave the matter some thought, that those codes would not capture cases where there was no division in the lower courts, even if multiple lower courts had ruled on the question. But one might at least assume that one could use the split-related values for the “certReason” variable to identify Supreme Court cases resolving splits. And yet that assumption may be perilous.

Relying on the Database’s coding to identify the universe of splits causes undercounting and a serious risk of bias. Some initial hint of the problem is apparent if one compares the number of cases in which the Database shows the reason for the grant of certiorari as split-related to the total number of cases in the Database for the same year, as follows:

2010 Term:	25 coded splits out of 85 cases (29.4%)
2011 Term:	22 coded splits out of 77 cases (28.6%)
2012 Term:	32 coded splits out of 79 cases (40.5%)
2013 Term:	24 coded splits out of 75 cases (32.0%) ¹³

These figures would strike most observers as low, given the widely shared understanding that a majority of the Supreme Court’s docket is composed of cases in which the lower courts have divided.¹⁴

besides compiling rates of reversal on parallel review. See *infra* note 21 (citing examples).

¹² See Harold Spaeth et al., *Supreme Court Database Code Book* 35, 95 (July 23, 2014), SUPREME COURT DATABASE, scdb.wustl.edu/documentation.php?s=2.

¹³ These figures reflect the sum of “certReason” variable codes 2 through 9, which involve various types of splits or confusion in the lower courts. These figures come from the following version of the database: *2014 Release 01, Case-centered/Citation-organized dataset* (July 23, 2014), SUPREME COURT DATABASE, scdb.wustl.edu/data.php.

¹⁴ See, e.g., Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 521 (2003) (“Currently, about 70 percent of the cases we agree to hear involve deep divisions of opinion among federal courts of appeals or state high courts.”); David R. Stras,

Part of the explanation for these low figures (though, as we will see, only one part) is that the Database's "certReason" variable is coded in a precise, narrow way. Based on my observations of how the coding protocol is applied, the Database does not show a case as involving a split unless the Supreme Court's lead opinion describes that as the *reason* for granting certiorari, *even when the Court reveals the division of authority near the mention of the grant*. If the opinion of the Court says, "We granted certiorari in order to resolve a conflict in the circuits concerning *X*," that will count. But here are a few examples from recent years of cases that were *not* coded as splits:

- *Astra USA, Inc. v. Santa Clara County, Cal.*,¹⁵ coded as "no reason given":

We granted certiorari[FN3] and now reverse the Ninth Circuit's judgment.

[FN3]: U.S. Courts of Appeals have divided on the circumstances under which suits may be brought by alleged third-party beneficiaries of Government contracts. [Several citations provided.]

- *CSX Transportation, Inc. v. Alabama Dep't of Revenue*,¹⁶ coded as "no reason given":

CSX petitioned for a writ of certiorari, arguing that the Eleventh Circuit had misunderstood *ACF Industries* and noting a split of authority concerning whether railroads may bring a challenge under § 11501(b)(4) to non-property taxes from which their competitors are exempt.[FN4] We granted certiorari and now reverse.

[FN4]: [Many citations provided.]

- *Gonzalez v. Thaler*,¹⁷ coded by the Database as granted "to resolve the question presented":

The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 TEX. L. REV. 947, 981 (2007) (concluding that approximately 70% of the Supreme Court's cases from 2003-2005 involved splits in the lower courts).

¹⁵ 131 S. Ct. 1342, 1347 (2011) (citation omitted).

¹⁶ 131 S. Ct. 1101, 1106-07 (2011) (citation omitted).

¹⁷ 132 S. Ct. 641, 647 (2012).

We granted certiorari to decide two questions, both of which implicate splits in authority: (1) whether the Court of Appeals had jurisdiction to adjudicate Gonzalez’s appeal, notwithstanding the § 2253(c)(3) defect;[FN1] and (2) whether Gonzalez’s habeas petition was time barred under § 2244(d)(1) due to the date on which his judgment became final.[FN2]

[FN1]: The Circuits have divided over whether a defect in a COA is a jurisdictional bar. [Citations to several cases.]

[FN2]: The Circuits have divided over when a judgment becomes final if a petitioner forgoes review in a State’s highest court. [Citations to several cases.]

For a different and more subtle kind of example, consider *Riley v. California*, which concerned whether police may routinely search an arrestee’s cell phone without a warrant.¹⁸ The Database lists the case as “no reason given,” but a split of authority is logically discernible within the four corners of the decision: the *Riley* opinion actually decided two consolidated cases, and the Court’s opinion described the two lower courts as coming out on opposite sides of the question presented.¹⁹

The number of facially apparent splits that are not captured by the Database’s coding probably varies from year to year.²⁰ Among the last few Supreme Court terms, the 2010 Term may be especially notable: the Database coding shows twenty-five splits that year, but there are at least ten more cases that the Database does not show as splits but in which a split in authority is evident from the face of the opinions. These cases are listed in the Appendix – Table 1. To be clear, the “missing” splits are not always so obvious as they are in some of the examples shown above, in which splits are mentioned right next to the grant of certiorari. In some cases one has to look at other parts of the majority opinion or at a concurring or dissenting

¹⁸ 134 S. Ct. 2473, 2482 (2014).

¹⁹ Compare *id.* at 2481 (stating that the California Court of Appeal upheld a warrantless search of a cellphone incident to arrest), with *id.* at 2482 (stating that the First Circuit invalidated a similar search).

²⁰ In some cases, it is possible that the coding is simply an error. But there are too many cases for that to provide a full explanation. The protocol is just strict about listing conflicts as the reason for the grant.

opinion to find the evidence. (Here we are not even considering those other cases, discussed in the next section, in which there are splits that one cannot detect within the four corners of the opinions at all.)

In short, although the Supreme Court Database's strict coding rules for the certiorari variable are not inherently objectionable – just about any protocol is fine as long as one understands it – the Database is not a good tool for identifying cases that resolve conflicts, at least if one wants anything like comprehensiveness. Whether one needs a complete list depends, of course, on the aims of one's study. Incompleteness is certainly a problem if one's goal is to provide a precise accounting of how many splits the Court resolved in a given term or to produce a scorecard of how various circuits fared. Mere incompleteness is not necessarily a problem if one's aim is instead to detect empirical regularities in a large- n study of multiple years – though, as discussed in Part II.D, the possibility that the omitted observations are biased in various ways is a real concern.

As a final comment about using the Supreme Court Database to identify splits, I should emphasize that the pertinent limitations of the Database and the limitations of studies of parallel review only partly overlap. Researchers in law and political science can and do rely on the Database coding to locate splits for purposes besides deriving measures of parallel review; depending on what those studies aim to do, the limitations of the Database will be problematic to greater or lesser degrees.²¹ At the same time, one can construct measures of parallel review that do not involve using the Database at all, and some researchers have done just that. But, as I show next, eschewing reliance on the Database hardly solves all of the problems.

²¹ For studies using the Database to locate splits for purposes besides compiling measures of parallel review, see, e.g., Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 164 (2013); Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 546 (2010); Lindquist & Klein, *supra* note 8, at 144. In these studies, the ultimate aim is typically not to catalogue the results of every circuit split, and so the underinclusiveness discussed above is less of a worry. But the existence of certain types of bias in the data, which is a risk addressed in Part II.D, could well be a problem, depending on the aims of the study.

C. Splits Not Revealed in the Supreme Court's Opinions

One can capture additional splits by actually examining the Supreme Court's opinions to look for mentions of the lower courts, which is the approach taken in some other recent studies.²² In many cases, the information about a circuit split is readily locatable near the end of the section of the majority opinion setting forth the case's procedural background. To be more exhaustive, one would need to examine other parts of the majority opinion and separate concurrences and dissents as well, as the evidence of a split is not always in the most obvious location.²³ One can supplement visual skimming by searching the opinions for key words or terms such as "F.," which will find citations to the *Federal Reporter*.²⁴

How many more cases will one find by examining the Supreme Court's opinions? The number may fluctuate from year to year, and it will certainly depend on how closely one scrutinizes the opinions and how one defines the cases of interest. My examination of the Supreme Court's opinions from the 2010 Term revealed numerous splits that the Supreme Court Database did not include, but even my augmented count of splits represents less than half of the Court's docket for that year. Summers and Newman's methodology involved looking at the Court's opinions, and they similarly reported, for the 2005 to 2010 Terms, that fewer than half of the cases reaching the Supreme Court from the federal courts of appeals revealed

²² This is the approach employed in Summers & Newman, *supra* note 3. See *Supreme Court Project*, www.hangle.com/Supreme_Court_Project/ (last visited May 24, 2014) (describing their method). Hansford used Westlaw to search opinions for key terms likely to occur when a split is mentioned ("conflict," "division," etc.). Hansford, *supra* note 3, at 1175. Going forward, Cummins and Aft (now joined by Cumby as a new co-author) will read the opinions rather than relying on the Supreme Court Database as they did in the first two installments of their study – a change for which I commend them.

²³ See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2361 (2011) (not mentioning circuit split as the reason for granting certiorari but mentioning the division of authority shortly thereafter). Compare *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (stating that the Court granted certiorari "to resolve two questions," but not citing conflicting decisions), with *id.* at 1417 (Sotomayor, J., dissenting) (describing the conflicting approaches of several courts of appeals).

²⁴ My own recent study of the Supreme Court's handling of circuit splits combined approaches in this way. See Bruhl, *supra* note 8.

splits, which they defined broadly to include any case in which more than one circuit had addressed a question (even if those courts had not disagreed).²⁵ Depending on one's criteria and methods for defining and identifying splits, one might generate a somewhat higher count, but a figure in the ballpark of 50% still seems low, given what we know of the Court's case-selection practices.²⁶ The figure suggests that some splits are simply not being revealed anywhere in the Supreme Court's opinions.

Such "silent splits" do in fact exist. It is easy to discover instances in which the opinions are silent about conflict despite quite a long history of lower-court disagreement.²⁷ No amount of scouring of the *U.S. Reports* will find these cases. If one remains within the four corners of the decisions, one will totally miss some non-trivial number of resolutions of circuit splits. This compromises our ability to measure many things, including how often the Court agrees with the majority of the lower courts, which lower courts fare best, and the like.

D. Bias in the Omitted Data

Possibly even more distressing, though, is not the fact of undercounting but the risk of systematic bias in the omitted data. That is, the cases that a particular methodology misses might not be a ran-

²⁵ Summers & Newman, *supra* note 3, at 2.

²⁶ See *supra* note 14.

²⁷ For a notable recent example, consider *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), which concerned whether *Chevron* deference applies to an agency's determinations of its own "jurisdiction." That question had been dividing the lower courts for years, but the Court does not reveal this history. See *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012) (citing conflicting cases stretching back for decades), *aff'd*, 133 S. Ct. 1863 (2013). Similarly, the decision in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), which concerned the "cat's paw" theory of liability for employment discrimination, did not reveal that virtually every circuit had weighed in on how to apply that theory under various anti-discrimination statutes, that various tests had developed, etc. See Brief for the United States as Amicus Curiae, *Staub v. Proctor Hosp.*, 2010 WL 942803 at *7-9 (citing conflicting decisions from twelve circuits). There are many other examples of Supreme Court decisions that do not hint at the longstanding conflict that preceded them, and the phenomenon is not new. See Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 436-37 (1996) (noting examples from the mid-1990s and linking the phenomenon to the development of an aloof, "Olympian" Supreme Court); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1167 (2012) (noting this phenomenon in the context of Fourth Amendment law).

dom subset of all cases resolving circuit splits. Bias could arise, for instance, if the Justices differ in their habits regarding whether and how to present splits in the opinions they author. And, in fact, it seems that they do differ in that regard. Justice Scalia has traditionally been especially likely *not* to mention the existence of a split even when one exists.²⁸ Thus, if one captures splits by relying on the opinions themselves, any such sample of cases is likely to underrepresent Scalia opinions.

The skew is even more pronounced if one identifies splits only by relying on the Supreme Court Database because, as discussed above, its protocol for coding the reason certiorari was granted appears to be quite sensitive to how exactly the opinion's author phrases the key language mentioning the grant. It is stunning to say, but the Database's coding for the 2010 through 2013 Terms – four years of decisions – reveals a total of only *three* Scalia majority opinions in which the grant of certiorari was motivated by conflict in the lower courts. Justice Sotomayor, by contrast, has *eighteen* opinions during those same years that are coded as involving splits. Any study of these years that uses the Database to identify splits will therefore include six times as many Sotomayor majority opinions as Scalia majority opinions. Other wide disparities include Chief Justice Roberts on the low side (five cases) and Justice Kagan on the high side (seventeen cases). Appendix – Table 2 provides the full results. To be sure, some of this variation may reflect the fact that the Justices are not assigned equal numbers of cases resolving splits,²⁹ but some of the

²⁸ My assessment is based, in part, on my impression of things after having reviewed many cases. As illustrations, note that *City of Arlington* and *Staub*, discussed in the previous footnote, were both Scalia opinions. My observations about Justice Scalia's stylistic tendencies accord with those of Arthur Hellman, who detected this pattern some years ago. Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 149 (2001). To be clear, this is not to say that Justice Scalia never mentions circuit splits; for recent instances in which he did, see *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1385 (2014); and *United States v. Woods*, 134 S. Ct. 557, 562 (2013). (The Database shows *Woods* as a conflict but not *Lexmark*, probably because the discussion of the conflicting circuit views in the latter was slightly separated from the sentence noting the grant of certiorari.)

²⁹ For example, one might expect that Justice Kagan, as the Court's most junior member, gets more than her share of technical statutory cases that the Court hears only because the

variation simply reflects differences in the Justices' writing styles.

Whether the disparities just mentioned are a serious problem depends on the research question being studied, but it should be a matter of concern for many questions. To give just one example, if Justice Scalia tends not to disclose splits as a matter of writing style, and also tends not to give much weight to the views of lower courts as a matter of methodological principle,³⁰ then those missing cases may feature lower agreement rates between the Supreme Court and the lower courts than one would find in the rest of the Court's cases.

Further, it may be that the Justices, or at least some of them on some occasions, reveal or obscure circuit splits selectively, so as better to bolster their opinions. That is, the authoring Justice (or his or her clerks) could, consciously or not, mention the split when the Court sides with the majority of the lower courts but remain silent otherwise. The presence of a dissent can act as a deterrent to self-serving biases or outright manipulation, or at least draw attention to such behavior, though that would not work when the Court is unanimous. Here I concede that I lack solid proof of strategic revelation of splits, but one need not be extraordinarily cynical to appreciate that it is a psychologically plausible scenario. And like the "Scalia effect" mentioned above, it could easily lead to overstatements of the rate at which the Supreme Court agrees with lower courts. At the same time, one could probably come up with plausible opposing stories according to which the Supreme Court's opinions could understate the rate of agreement.³¹

question has created a deep divide in the lower courts. In contrast, Chief Justice Roberts and Justice Kennedy, by virtue of their respective roles as Chief Justice and frequently decisive "swing Justice," may get a disproportionate share of the assignments in high-profile constitutional cases in which splits are less common (or at least less important in explaining the certiorari decision).

³⁰ That does seem to be the case. *See, e.g.,* *United States v. Tinklenberg*, 131 S. Ct. 2007, 2018 (2011) (Scalia, J., concurring in part and concurring in the judgment); *Brogan v. United States*, 522 U.S. 398, 407-08 (1998) (Scalia, J., dissenting); *see also* Bruhl, *supra* note 8, at 921 (discussing Justice Scalia's aversion to giving weight to lower courts' views).

³¹ Consider this possibility: 1) Unanimous decisions are more common when the Supreme Court agrees with most of the lower courts than when it disagrees; and 2) unanimous decisions are less likely than other decisions to reveal the state of the law in the lower courts (because, perhaps, there is less need to bolster the opinion). If those propositions

E. Beyond the Four Corners

It is not clear how best to identify all of the splits that are not revealed in the Court's decisions. One could read the certiorari petitions, of course, but taking them at face value would likely lead to overinclusion, given that petitioners have a powerful incentive to claim a conflict whenever possible. As a check on that tendency, one could consult the brief opposing certiorari, the lower-court decision under review, amicus briefs (especially from the Solicitor General), and other sources to see whether they agree with the petitioner. For older cases, one might even consult the Justices' papers to see whether a grant of certiorari was motivated by a split of authority or some other factor. The effort required to examine the briefing and other sources poses a severe problem for political scientists trying to conduct a large- n empirical study covering many years. The undertaking is more feasible if one is aiming for a more nuanced treatment of a smaller group of cases (say, a couple terms' worth).

Apart from the time required, there is the unfortunate fact that departing from the Supreme Court's own characterizations multiplies the subjective judgments involved in identifying the genuine conflicts. A thorough examination of the many complexities of identifying conflicts was written by Arthur Hellman in connection with his painstaking research on circuit splits.³² In addition to examining the Court's opinions to see whether they reported conflicts, he reviewed the certiorari briefing (including amicus briefs), the lower-court decisions of which review was sought and, in some cases, additional materials such as other lower-court decisions and secondary sources.³³ It was a major undertaking and one that required – as

are true, and if one makes certain further assumptions about the distribution of unanimous versus divided opinions and the rate at which each type of opinion reveals splits, the state of the law in the lower courts could be less likely to be mentioned when the Supreme Court agrees with most of the lower courts.

³² Hellman, *supra* note 28. A previous, similarly massive effort was the NYU Supreme Court Project. See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 704-709 (1984) (describing the Project).

³³ Hellman, *supra* note 28, at 101-17, 147-53. Hellman looked at cases in which the Supreme Court granted certiorari, and he also looked at cases denied review to determine

Hellman repeatedly acknowledged – plenty of contestable judgment calls.³⁴ (Hellman’s aim was to identify circuit conflicts rather than to count exactly how many courts lined up on each side of a split; the latter task involves even more effort and subjectivity, as we will discuss shortly.)

How far one should go in an attempt to identify splits depends not just on the resources available but also, of course, on the goals of one’s study. If one is interested in how the Court presents itself, one would focus on the opinions. If one is interested in why the Supreme Court grants review, one would focus on the materials that are most certainly before the Court when it acts, namely the certiorari-stage briefing and the lower-court decision at issue.³⁵ If one wants to know how well various circuits predict the Supreme Court’s ultimate decisions or whether the Supreme Court is providing enough guidance to the legal system at large, one might need to look further or look elsewhere entirely.

III. COMPLEXITIES OF COUNTING CASES

Depending on the questions one hopes to answer, the next step after identifying the Supreme Court cases resolving conflicts might be the task of determining how the lower courts lined up on the question presented and which lower courts “won” and “lost.” That is the chore undertaken, for example, by the recent studies of circuit performance mentioned at the outset.³⁶

There are some threshold methodological choices here that can be answered by reflecting on the goals of one’s study. These include questions about which lower-court cases “count” – e.g., whether to include state supreme courts or only federal courts of appeals in

how many of them presented conflicts. The first of those tasks is the more relevant one here, but he used similar methods for both inquiries. *Id.* at 145, 147.

³⁴ See, e.g., *id.* at 103, 108, 111-12, 113-16.

³⁵ See Sup. Ct. R. 14.1(i) (requiring the decision below to be included as an appendix to the petition for certiorari). Of course, the Court’s knowledge is by no means limited to the materials presented to it, especially given modern electronic legal research.

³⁶ See generally *App. Rev. I*, *supra* note 3; *App. Rev. II*, *supra* note 3; Hansford, *supra* note 3; Summers & Newman, *supra* note 3.

one's tallies, whether to include unpublished decisions, and so on.³⁷

Much more vexing is the actual counting of the cases on each side. (The Supreme Court Database, just to be clear, does not attempt to do this even when it codes a case as resolving a split.) An accurate accounting of the size of a split is, like identifying the existence of a split, tougher than it seems. For one thing, even in those cases in which the Court actually refers to a split, sometimes it does not purport to fully document the split but instead writes something like "*Compare, e.g., [case], with, e.g., [another case].*" For instance, the Court's opinion in *Henderson v. United States*³⁸ cites the case being reviewed and only two other circuits in describing the split, but the Solicitor General's brief in response to the petition for certiorari detailed a much broader split.³⁹ As with the decision whether or not to reveal a split, it is plausible that Justices are more likely (whether consciously or not) to list more of the lower-court cases that agree with them than cases that disagree.

Moreover, even when all of the conflicting cases appear to be laid out in the Court's opinions, sometimes the Justices will disagree over how to characterize a split. Consider, to pick one example, *Milner v. Department of the Navy*.⁴⁰ In this case, the majority insisted that the case involved a roughly even division in the lower courts, while the dissent accused the majority of joining the wrong side of a very lopsided split.⁴¹ Which side should we believe?

Given that the Court's opinions offer only incomplete guidance on the breakdown of the lower courts, perhaps the researcher

³⁷ One's choices on these matters can occasionally have striking results. For example, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012), is described by Cummins & Aft as a close split (three courts versus two) because they count only federal courts of appeals. *App. Rev. II*, *supra* note 3, at 47. Yet the two federal courts of appeals on the "minority" side of the split were joined by some *nine* state high courts. See *Perry*, 132 S. Ct. at 723 n.4. So, which is the minority and which is the majority? It depends on whether one is interested in evaluating the performance of the federal courts of appeals in particular (as Cummins and Aft are) or instead studying, more broadly, whether the Supreme Court sides with most lower courts.

³⁸ 133 S. Ct. 1121 (2013).

³⁹ *Compare id.* at 1125, with Brief for the United States, *Henderson v. United States*, 2012 WL 7069951 at *13-15 (citing various circuits).

⁴⁰ 131 S. Ct. 1259 (2011).

⁴¹ *Compare id.* at 1268-69, with *id.* at 1274 (Breyer, J., dissenting).

should independently investigate the underlying case law landscape. Unfortunately, independent investigation would not get at the whole truth either. Going outside the opinions in order to attempt to determine the actual circuit lineups in a split introduces tremendous complexity and subjectivity. The judgment calls include: whether certain cases truly conflict or are instead distinguishable, whether the allegedly conflicting rules are dicta or holdings, whether the lower courts involved in a split would still reach the same decisions today given intervening Supreme Court rulings, how to handle intra-circuit conflicts, how to handle alternate holdings, and so forth. Further, there is no clear stopping point once one departs the four corners of the opinions. Certiorari filings are not necessarily comprehensive and trustworthy. Those petitioning for certiorari may exaggerate conflicts, while respondents minimize or recharacterize them.⁴² Filings by the Solicitor General are more reliable, when they exist, but they are not wholly without guile or agenda. Lower-court opinions often collect cases on either side of a split, but there is no guarantee that those counts are comprehensive or totally evenhanded either. Even the most scrupulous law clerk charged with putting together such a string cite would have to make all of the contestable judgment calls just mentioned. The press of time probably leads the clerks, sometimes, to rely on the litigants' (less scrupulous) characterizations.⁴³ In order to attempt to achieve

⁴² Although Cummins and Aft generally do not consult extrinsic sources to find circuit breakdowns, they do examine the petitions for certiorari in a few instances. *App. Rev. I*, *supra* note 3, at 65 & n.41. If a petition for certiorari claims a conflict as the basis for review and then the Supreme Court grants certiorari, it is reasonable to assume that the case was granted because of the asserted conflict. But it is a different matter to rely on the petition as a source of accurate counts of how exactly the lower courts divided, especially if the petition's assertions are not corroborated by (relatively) more objective sources like the lower-court decision or the Solicitor General. A case that illustrates the risks is *Rehberg v. Paulk*, in which the Court's opinion mentions a split but does not list the participating circuits or how they divided. 132 S. Ct. 1497, 1501 (2012). Cummins and Aft score the decision as a 3-7 split, *App. Rev. II*, *supra* note 3, at 48, apparently in reliance on the petition for certiorari. But the other briefing in the case does not present the case that way, and it is not clear which of the various sources one should believe. After spending some time researching the matter, I am still not sure of the truth. (Part of the difficulty involves the level of generality at which to view the question presented.)

⁴³ An interesting question, suggested to me by Dru Stevenson, concerns *how* a circuit split

a complete and accurate accounting, a researcher would have to investigate all of the legal questions independently, but even a diligent investigation is by no means guaranteed to find an objective answer – indeed, the measurements may become more debatable the deeper one digs.

Take *Fowler v. United States*⁴⁴ as one illustration of the difficulties. That case concerned the interpretation of a witness-tampering statute making it a federal crime to kill a person in order to prevent a communication with federal law-enforcement officers about the commission of a federal offense.⁴⁵ The question before the Court was what, if anything, the prosecution had to prove about the likelihood that the victim actually would have communicated with federal officials.⁴⁶ The majority opinion, by Justice Breyer, did not fully document the split of authority: it cited a couple of clearly conflicting circuit decisions, but then it added a “see also” citation to a few more, without offering a parenthetical attempting to characterize their holdings.⁴⁷ Turning to the merits, the majority charted a middle course between an extreme pro-defendant interpretation advanced by Justice Scalia’s concurrence and an extreme pro-prosecution interpretation favored by Justices Alito and Ginsburg in dissent.⁴⁸ Justice Breyer’s majority opinion clearly departed from at least two circuits’ positions, but it is not exactly clear whether it was agreeing with the others. Having examined the assertions in the parties’ briefs (which are predictably conflicting) and the circuit decisions (some of which

comes to be characterized in a certain way. Each actor in the system engages in some independent research and evaluation of the state of the law, but each actor may also borrow from prior actors’ characterizations. That is, the Supreme Court’s description of a split might rely to a degree on how the certiorari briefing or the lower court presented the split, which might in turn depend in part on how the litigants presented the split in the court of appeals, and so forth. Cf. Pamela C. Corley, Paul M. Collins Jr. & Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31 (2011) (showing, through the use of plagiarism-detection software, that the Supreme Court’s opinions often copy, with or without attribution, from the decision under review).

⁴⁴ 131 S. Ct. 2045 (2011).

⁴⁵ *Id.* at 2048 (citing 18 U.S.C. § 1512(a)(1)(C)).

⁴⁶ *Id.* at 2048, 2050.

⁴⁷ *Id.* at 2048-49.

⁴⁸ *See id.* at 2050-51.

are opaque or internally inconsistent), I am not quite sure how to score this one – and I am not alone in finding it difficult, as the conflicting assessments of other researchers show.⁴⁹

Another discouraging example is *Staub v. Proctor Hospital*.⁵⁰ Although the case involved a question of employment discrimination law that nearly all of the lower courts had encountered, Justice Scalia's opinion for the Court does not reveal this complicated history.⁵¹ One can seek information about the prior law in the briefs and elsewhere (though, again, finding the correct, complete, and impartial truth of the matter is a different story). Yet it remains hard to be sure which side of the split (if any) prevailed in the Supreme Court. In part, that is because Justice Scalia's opinion does not tell us about the different approaches or tell us which circuits are correct. But the nature of the question presented – namely, “the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision”⁵² – is such that the answer does not lend itself to a binary these-circuits-win-and-these-others-lose tally. We know that the Supreme Court rejected the approach of the court below, but it is not so clear what it actually endorsed. The more general lesson is that certain questions could be answered by the lower courts with every color of the rainbow, and yet the Supreme Court sometimes just tells us “not red or orange.”

As the reader can by now probably imagine, many more examples of the difficulties of accurately tallying circuit splits could be brought forth.

⁴⁹ Cummins and Aft score the case as a victory for four circuits and a loss for two. *App. Rev. I*, *supra* note 3, at 75. Summers and Newman score the case as a loss for all six circuits because the Supreme Court did not expressly agree with either of the camps' approaches. *Supreme Court Project*, *supra* note 22.

⁵⁰ 131 S. Ct. 1186 (2011).

⁵¹ Compare *id.* at 1189-90, with Brief for the United States as Amicus Curiae, *Staub v. Proctor Hosp.*, 2010 WL 942807 at *7-9.

⁵² 131 S. Ct. at 1189.

CONCLUSION

At this point the reader may well be convinced that counting circuit splits is complicated. Still, how much does all of this matter?

It depends. The difficulty of achieving precision is certainly a problem if one is attempting to capture the universe of conflict cases and measure that universe accurately. Accordingly, we should be cautious about statements to the effect that a particular circuit had the best record in the Supreme Court for a given term and came out on the winning side in $X\%$ of the splits the Court resolved. For other purposes, some imprecision and undercounting is acceptable, as long as the limitations are made clear to the reader. More worrisome, though, is the risk that the cases captured and then tallied are unrepresentative along certain dimensions. Justices differ in their writing styles, including their practices regarding whether and how they reveal splits in their opinions. All of the Justices, fallible humans as they are, have the incentive, and sometimes the opportunity, to reveal or obscure the state of the prior law selectively so as to make their decisions look most justified. In sum, although examining the phenomenon of parallel review is far more fruitful than simply calculating how often the Supreme Court affirms or reverses in the eighty or so particular cases on its merits docket, researchers and readers alike should exercise care lest they draw conclusions that are stronger than what the underlying methodology supports and what the nature of the enterprise allows.

APPENDIX

Table 1

Ten cases from 2010 Term that are not coded as splits in the Supreme Court Database but in which a split is revealed on the face of the decision. Note: This list does not include cases in which the lower courts were described as unanimous, which the Database also does not capture; see note 9 and accompanying text for some examples of such cases.

Case name/citation	Location where split is revealed	Database coding for cert. grant variable
<i>L.A. County, Cal. v. Humphries</i> , 131 S. Ct. 447 (2010)	131 S. Ct. at 450 (opinion of the Court)	no reason given
<i>CSX Transp., Inc. v. McBride</i> , 131 S. Ct. 2630 (2011)	131 S. Ct. at 2636, 2640 (opinion of the Court)	to resolve question presented
<i>CSX Transp., Inc. v. Ala. Dep't of Revenue</i> , 131 S. Ct. 1101 (2011)	131 S. Ct. at 1106 (opinion of the Court)	no reason given
<i>Astra USA, Inc. v. Santa Clara County, Cal.</i> , 131 S. Ct. 1342 (2011)	131 S. Ct. at 1347 (opinion of the Court)	no reason given
<i>Bond v. United States</i> , 131 S. Ct. 2355 (2011)	131 S. Ct. at 2361 (opinion of the Court)	no reason given
<i>United States v. Tinklenberg</i> , 131 S. Ct. 2007 (2011)	131 S. Ct. at 2014 (opinion of the Court)	to resolve question presented
<i>Freeman v. United States</i> , 131 S. Ct. 2685 (2011)	131 S. Ct. at 2698 (Sotomayor concurrence)	no reason given
<i>Schindler Elevator Corp. v. U.S. ex rel. Kirk</i> , 131 S. Ct. 1885 (2011)	131 S. Ct. at 1890 (opinion of the Court)	no reason given
<i>Cullen v. Pinholster</i> , 131 S. Ct. 1388 (2011)	131 S. Ct. at 1417 (Sotomayor dissent)	to resolve question presented
<i>Ariz. Free Enter. Club's Freedom Club PAC v. Bennett</i> , 131 S. Ct. 2806 (2011)	131 S. Ct. at 2816 (opinion of the Court)	no reason given

Table 2

Cases from 2010 through 2013 Terms that are coded as conflicts by the Supreme Court Database’s “certReason” variable, disaggregated by Justice. As with the figures reported in the text accompanying footnote 13, these figures reflect the sum of “certReason” variable codes 2 through 9, which involve various types of splits or confusion in the lower courts. The figures are derived from the following version of the database: *2014 Release 01, Case-centered/Citation-organized dataset* (July 23, 2014), SUPREME COURT DATABASE, scdb.wustl.edu/data.php.

	Roberts	Scalia	Kennedy	Thomas	Ginsburg	Breyer	Alito	Soto.	Kagan	Total
OT2010	1	1	3	3	3	4	2	3	5	25
OT2011	2	1	1	1	4	2	3	5	3	22
OT2012	0	0	3	4	6	4	6	6	3	32
OT2013	2	1	4	2	1	2	0	4	6	22*
Total	5	3	11	10	14	12	11	18	17	101

* This total for OT2013 does not include two cases that the Database codes as conflicts but with no authoring Justice listed. In both cases the Court’s decision was *per curiam*, though in one of these cases the Database apparently bases its coding on information in Justice Breyer’s dissent. *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting from the Court’s dismissal of the writ as improvidently granted).

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APPELLATE REVIEW III

OCTOBER TERM 2012 AND COUNTING

Tom Cummins, Adam Aft, and Joshua Cumby[†]

Twenty-six percent.¹ In reviewing the judgments of the federal appellate courts during the October Term 2012 (“OT12”), the Supreme Court affirmed the judgment below only 26 percent of the time.² By this measure, the circuits appear to be doing rather poorly on appellate review. But, as we at the *Journal of Legal Metrics* have attempted to show over the past few years, appearances can be deceiving.³

With this brief essay, we are pleased to once again offer our preferred metric of federal appellate court performance. We are also delighted to present in this issue Professor Aaron-Andrew P. Bruhl’s *Measuring Circuit Splits: A Cautionary Note*, which identifies certain improvements that can be made to the metric.⁴ We commend that work, and this, to your attention. Now let’s go back a few years.

[†] Tom Cummins and Joshua Cumby are senior editors of the *Journal of Legal Metrics*. Adam Aft is a co-Editor-in-Chief of the *Journal of Legal Metrics*.

¹ See SCOTUSblog, Stat Pack for October Term 2012 (June 27, 2013), at sblog.s3.sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblog_StatPack_OT121.pdf (“SCOTUSblog Stat Pack”).

² We recognize that federal district courts also have appellate jurisdiction over some matters. We nevertheless use the shorthand “federal appellate courts” to refer to the U.S. Circuit Courts of Appeals having full confidence in the sophistication and intelligence of our readers.

³ Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L. (1 J. LEGAL METRICS) 59 (2012) (“*Appellate Review I*”); Tom Cummins & Adam Aft, *Appellate Review II – October Term 2011*, 3 J.L. (2 J. LEGAL METRICS) 37 (2013).

⁴ As discussed below, certain of those improvements have in fact been made to the metric for the OT stat pack.

I. PARALLEL REVIEW

A few years ago, two of this essay's authors had an idea for a marginally improved way to evaluate the federal courts of appeals' performance: calculate the rate at which the courts' work is tacitly approved of by the Supreme Court in its resolution of circuit splits.⁵

A "circuit split," as we use the term, is when one decision of one federal court of appeals conflicts with another.⁶ For example, assume that the Fifth Circuit decides a particular case using reasoning consistent with an earlier Fourth Circuit decision, but inconsistent with the reasoning of earlier First, Third, and Seventh Circuit decisions. This is a circuit split.

Resolving circuit splits is one of the most frequent reasons that the Supreme Court grants a petition for a writ of certiorari.⁷ Rather than simply calculating how frequently the Supreme Court affirms the specific judgment on which the writ is issued (what we term the "primary review" affirmance rate), we set out to measure how often the Court approves the federal appellate courts' conclusions on issues causing circuit splits.⁸ A mouthful, we know, but really the idea was as straightforward as counting the winners and losers in the circuit split resolutions.⁹ We termed our metric the "parallel re-

⁵ Cummins & Aft, *Appellate Review I*. As discussed in that article, our metric was not entirely novel. See, e.g., Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011).

⁶ Cf. SUP. CT. R. 10(a). In this context, we limit the term "circuit split" to splits between federal appellate courts – more precisely, inter-circuit splits (though we recognize that intra-circuit splits can arise from time to time) – and exclude splits that are limited to disagreements between federal and state courts on an issue (as a semantic matter, we think, these types of splits are not "circuit splits," but lower court splits).

⁷ Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J.L. (3 J. LEGAL METRICS) 361, 361 (2014).

⁸ From the beginning, we acknowledged that the Supreme Court is not right in picking winners losers because it is necessarily correct on the law; rather, it is right because it is last. Or, as Justice Jackson once put the point, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

⁹ As Professor Bruhl points out, while the idea may be straightforward, the application is not. Bruhl, *supra* note 7, at 362.

view” affirmance rate, as it counts not only the Court’s evaluations of the court below, but also its evaluations of the decisions of other federal appellate courts on the question.

Returning to the above example, assume that the Supreme Court grants cert in the Fifth Circuit decision to resolve the disagreement between the Fifth and Fourth Circuits on the one hand and the First, Third, and Seventh Circuits on the other, and that the Court affirms the Fifth Circuit. The “primary review” affirmance rate captures only the Fifth Circuit decision. The “parallel review” affirmance rate measures not only the Fifth Circuit decision, but also the First, Third, Fourth, and Seventh Circuit decisions. In the example, the Fourth and Fifth Circuits are “winners,” while the First, Third, and Seventh Circuits are “losers.”

Our objective in formulating this metric was (and still is) quite simple. Offer a better set of data on federal appellate court performance than that offered by the ubiquitous primary review metric. The shortcomings of that metric have been examined in some detail elsewhere, including in previous installments of our *Appellate Review*. Here, we merely mention two in passing: sample size and selection bias.

In recent years, the Court has typically reviewed about one tenth of one percent of the judgments of the circuit courts.¹⁰ And these cases are not selected with an equal likelihood of affirmance or reversal; rather, a robust body of research suggests that the Court has a “decided propensity”¹¹ to grant certiorari in cases that it intends to reverse.¹² In short, the primary review metric is under-representative and non-random.

The parallel review metric is not perfect, but it is better. In particular, it substantially mitigates the selection bias problem, as resolving

¹⁰ See Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan.-Feb. 2010, at 8 (collecting statistics).

¹¹ Thomas Baker, *The Eleventh Circuit’s First Decade Contribution to the Law of the Nation, 1981-1991*, 19 NOVA. L. REV. 323, 327 (1994) (“The ‘decided propensity’ of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse.”).

¹² See RICHARD FALLON *et al.*, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1469 (6th ed. 2009) (collecting sources).

circuit splits generally involves both winners and losers.¹³ Moreover, the metric compares the courts' performance on the same legal questions. Apples-to-apples, as they say. And the metric compares legal questions of a certain degree of difficulty: those on which the courts have reached conflicting conclusions.

This is not to suggest that the parallel review metric is the only standard by which to measure the review of appellate courts' performance.¹⁴ Rather, it is a marginally improved one. Yet, as Professor Bruhl observes, it is also one that can itself be improved on.

II. THE METHOD

Previously, our data collection started with the Supreme Court Database, which we used to quickly identify Supreme Court opinions addressing circuit splits.¹⁵ From this set, we eliminated opinions that did not both resolve the split and explicitly identify courts involved in the split. Finally, generally confining ourselves to the four corners of the opinion of the Court, we counted up the winning and losing circuits.¹⁶

We recognized that limiting the count this way would likely be under-inclusive. But we did so to provide the most objective data on circuit split resolution.¹⁷ What we did not recognize is that starting

¹³ The resolution "generally," but not always, involves winners and losers. For an example of a resolution from OT12 in which the Court disagreed with both sides of a circuit split and took the law down a third path, see *Ryan v. Gonzales*, 133 S. Ct. 696 (2013). We elaborate on why we characterize this case as a circuit split below.

¹⁴ As two of this article's authors have previously discussed, although parallel review offers an improved review of appellate performance, the metric does not purport to offer a comprehensive assessment of the performance of these courts. Indeed, the metric does not even purport to offer a comprehensive evaluation of the Court's assessment of circuit court performance. For example, evaluating the rate of summary reversals would provide a qualitatively different type of assessment – how often the courts of appeals are getting the answers to straightforward questions, or at least what the Court views as straightforward questions, correct.

¹⁵ *The Supreme Court Database*, scdb.wustl.edu/ (last visited Sept. 24, 2014).

¹⁶ We excluded the Federal Circuit, however, because its jurisdiction is statutorily distinct, and far more limited, than that of the other twelve federal courts of appeals.

¹⁷ In other words, we decided to risk being under-inclusive to eliminate the risk that our interpretative bias would affect the results. The justices' own interpretative biases, if any, were accepted as the least bad solution to the problem of subjectivity inherent in categorizing

with the Supreme Court Database would also be under-inclusive.

Then along came Professor Bruhl.

As the professor powerfully demonstrates, this database is not a wholly reliable source on opinions addressing splits; rather, the database appears to pose a distinct risk of being under-inclusive.¹⁸ Too great a risk for us, in fact. So, with sincere thanks to Professor Bruhl, we have decided to modify our method.

Beginning with our data collection for OT12, we skipped the Supreme Court database and went straight to the opinions themselves. We read them all (78 for OT12, for those keeping track of such things) to identify which resolve circuit splits.¹⁹ In doing so, we found Bruhl's observation holds true for OT12: The Supreme Court Database is both over- and under-inclusive for our purposes. As an initial matter, the Supreme Court Database identifies 23 circuit splits.²⁰ We count 27.²¹ Moreover, we exclude five of the Supreme Court Database's 23 cases because the four corners of the Supreme Court's opinion do not acknowledge the split, identify federal appellate courts on either side, and resolve the split. We also include 10 cases that meet these three criteria that are not identified in the Supreme Court Database.²²

The other components of our method do not change. Specifically, in gathering the parallel review statistics for OT12, we continue

opinions.

¹⁸ Bruhl, *supra* note 7, at 367 n.13 and related text.

¹⁹ Although a more demanding project, the endeavor has been made much more manageable with the addition of the newest member of the *Appellate Review* team, Joshua Cumby. To state the obvious, however, we are neither infallible nor final. See *supra* note 7. Reasonable minds may disagree with our count, perhaps, for some of the cases discussed below in Appendix A.

²⁰ *The Supreme Court Database*, scdb.wustl.edu/ (last visited Sept. 24, 2014).

²¹ The 27 cases are listed in appendix B.

²² The 10 cases are *Bullock v. BankChampaign*, 133 S. Ct. 1754(2013); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013); *Henderson v. United States*, 133 S. Ct. 1121(2013); *Kloeckner v. Solis*, 133 S. Ct. 596 (2013); *Lozman v. The City of Riviera Beach, Florida*, 133 S. Ct. 735 (2013); *McBurney v. Young*, 133 S. Ct. 1709 (2013); *Ryan v. Gonzales* (consolidated with *Tibbals v. Carter*), 133 S. Ct. 696 (2013); *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013); *Salinas v. Texas*, 133 S. Ct. 2174 (2013).

to count the resolution of circuit splits — and only circuit splits.²³ And, as noted, we continue to confine our count to the four corners of the Court’s opinion.²⁴ In light of Professor Bruhl’s thoughtful remarks on these two matters, however, we briefly revisit our reasons for each before turning to the much anticipated (and, admittedly, somewhat delayed) parallel review stats for OT12.

A. Federal Conflicts

Our stat pack for OT12 (for those of you who may have skipped or lightly skimmed the preceding paragraph) includes only the Court’s resolutions of circuit splits. The Court’s resolution of conflicts between federal and state courts are excluded, as are other cases that do not expressly resolve a circuit split. Why exclude these cases? As a threshold matter, comparing one sovereign’s intermediate appellate court to another sovereign’s highest court isn’t necessarily a fair comparison. In general, federal appellate courts share a common role and goals. State courts of last resort have a different role and, perhaps, different goals. Our objective, moreover, remains focused on comparing federal appellate courts’ performance against their peers.

Consequently, for the OT12 stat pack we exclude four federal-state court conflicts: *Evans v. Michigan*,²⁵ *Hillman v. Maretta*,²⁶ *Koontz*

²³ Or opinions, in the case of concurrences or dissents, since our method is confine ourselves to what the justices write (i.e., what is contained within the four corners of the opinions), but not to limit ourselves to only majority opinions.

²⁴ The five excluded cases are *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Horne v. Department of Agriculture*, 133 S. Ct. 2053 (2013); *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); and *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). We exclude *Clapper* and *Horne* because the Court does not expressly acknowledge a split, identify circuits on either side, and resolve the split. We exclude *Genesis Healthcare* because the Court expressly states in the opinion that it is not resolving the split. We exclude *Koontz* for reasons explained below in Appendix A. And we exclude *McNeely* because it was a state court split, not a federal appellate court split.

²⁵ 133 S. Ct. 1069 (2013). For those interested in such things, no circuit would have tallied a “win” in *Evans* and one, the Third Circuit, would have tallied a “loss.”

²⁶ 133 S. Ct. 1943 (2013). For those interested in such things, four circuits would have tallied a “win” in *Hillman*: the First, Second, Tenth, and Eleventh Circuits. None would have tallied a “loss.”

v. St. Johns River Water Management District,²⁷ and *Wos v. E.M.A.*²⁸ Of passing interest, all four raise issues of federalism, expressly or otherwise.²⁹

Likewise, although the data set would contain more information if we included all of the Court's opinions, regardless of whether they resolve a circuit split, it is not obvious to us that these additional data points would provide a better measure of federal appellate court performance. Rather, for reasons outlined above, it appears that this would potentially be clouding the evaluation we strive to present – including oranges, as the cliché has it, in an otherwise apples-to-apples comparison. Accordingly, we continue to limit our stat pack to cases resolving circuit splits.

B. Four Corners

We also continue to generally confine the stat pack data to the four corners of the Court's opinions. That is, we include only those cases in which the Court both resolves a split and explicitly identifies courts involved in the split.

Recognizing that this limitation will be under-inclusive, we continue to think that substituting our judgments about whether the Court's opinion addresses a circuit split (instead of relying on the express statements of the Court on the matter) injects an extra dose of subjectivity that is best avoided. More fully, although it is emphatically not the province and duty of the Supreme Court to say what the circuit split is, we continue to think that what the Court actually says is the most reliable source of information on the question, given the practical limitations that constrain our data collection.³⁰

²⁷ 133 S. Ct. 2586 (2013). For those interested in such things, no circuit would have tallied a "win" in *Koontz* and one, the Ninth Circuit, would have tallied a "loss."

²⁸ 133 S. Ct. 1391 (2013). For those interested in such things, the Fourth Circuit would have tallied a "win" and the North Carolina Supreme Court would have tallied a "loss."

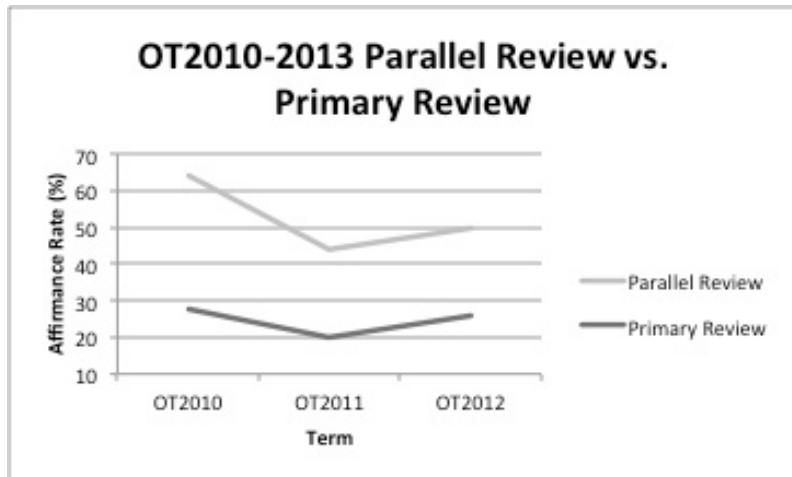
²⁹ *Evans* involved a Double Jeopardy Clause question, *Hillman*, a preemption question, and *Koontz*, a takings question. See, e.g., 133 S. Ct. at 1082 (Alito, J., dissenting).

³⁰ As Professor Bruhl cogently observes, certain justices appear to have a habit of mentioning circuit splits as applicable, while others do not. Bruhl, *supra* note 7, at 373 n.28 and related text.

Consequently, the parallel review stat pack does not include cases such as *Maryland v. King*,³¹ despite the majority opinion observing that “federal and state courts have reached differing conclusions,”³² since neither the majority opinion nor the dissent identify which federal appellate courts reached what conclusions. In short, we are knowingly under-inclusive.

III. THE LATEST RESULTS

This year we are going to let the results largely speak for themselves.³³ Nevertheless, a couple of points merit mention. First, as in years past, we see an overall parallel affirmance rate roughly twice that of primary review.

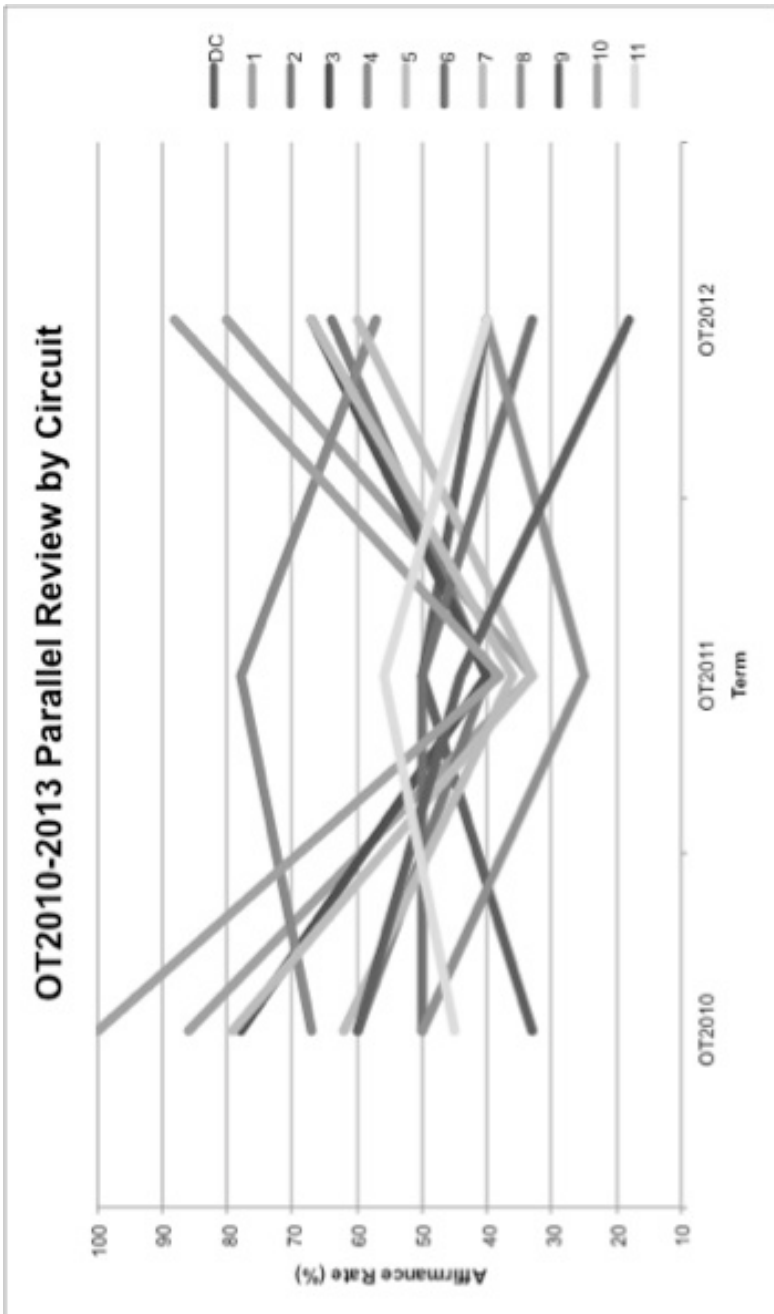


We also continue to see a fairly substantial amount of movement in how the circuits stack up against their peers year-over-year.

³¹ 133 S. Ct. 1958 (2013).

³² 133 S. Ct. at 1966.

³³ This too is due in no small measure to Professor Bruhl’s insights.



And finally, for those interested in rankings, unabashed rankings, without further ado we present the OT12 scorecard:

October Term 2012 Parallel Review Affirmance Rates					
Rank	Circuit	Wins	Losses	AB	Rate
1	10th	7	1	8	88%
2	1st	4	1	5	80%
3	7th	6	3	9	67%
4	2nd	7	4	11	64%
5	5th	6	4	10	60%
6	4th	4	3	7	57%
7	8th	2	3	5	40%
8	11th	4	6	10	40%
9	DC	2	3	5	40%
10	3rd	4	7	11	36%
11	6th	3	6	9	33%
12	9th	2	9	11	18%

After a down year in October Term 2011, the Tenth Circuit has come roaring back to the top of the parallel review rankings. The Ninth Circuit, however, has continued its decline from its lofty start (well, the start of our counting at least) as one of the higher-ranked parallel review circuits. As can be seen on the graph above, albeit busy, many of the other circuits are staying on a similar trend to past years' performances in the parallel review statistics. This observation is one of the more interesting in the context of our long-term tabulation of the parallel review data. If we are able to observe significant trends then we, or other researchers, may be able to look for the meaning behind the trends, what makes a court of appeals more likely to perform well on parallel review cases: homogeneity, heterogeneity, bigger, smaller, large case load, small case load, and many more possible data points to consider in looking beyond the data. To be continued . . .

APPENDIX A: CASE NOTES (I.E., CAVEAT LECTOR)

Our methods of data collection are employed to offer you with the most objective data available. Nevertheless, certain judgments must be made. Three cases included in the OT12 statistics warrant particular explanation.³⁴

1. *Bullock v. BankChampaign*

Some legal issues are readily reducible to a binary yes-no question. The issue in *Bullock v. BankChampaign*³⁵ isn't. The question is how does Section 523(a)(4) of the Federal Bankruptcy Code define "defalcation"? More fully, does defalcation include a scienter requirement? And if so, what type of requirement?

In Justice Breyer's unanimous opinion for the Court, he observes how the question has splintered the federal appellate courts into at least three groups. At one end of the spectrum, the Ninth Circuit finds defalcation to include "even innocent acts of failure to fully account for money received in trust."³⁶ In accord, the Fourth Circuit finds defalcation to occur if "even an innocent mistake" causes misappropriation of money received in trust.³⁷ The Eleventh Circuit, in contrast, requires "conduct that can be characterized as objectively reckless."³⁸ Finally, taking the matter one step further, the First and

³⁴ One case not included in the statistics, *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), also merits a few words of explanation. As an initial matter, the case appears to be a somewhat early example of the Court's developing "faux-nanimity." Roberts writes the opinion of the Court on behalf of five justices, holding that the Alien Tort Statute ("ATS") doesn't have extraterritorial reach. The majority does not identify a circuit split. Breyer's four-justice concurrence reads like a rather vigorous dissent, concurring only in the judgment. Pertinent to our purposes, the concurrence observes that "courts have *consistently* rejected the notion that the ATS is categorically barred from extraterritorial application." *Id.* at 1675 (Breyer, J., concurring) (emphasis added) (collecting cases). In short, no circuit split is identified, although one may well exist (as it appears a split may exist among the justices on the question presented, notwithstanding their ostensible "agreement" in this case).

³⁵ 133 S. Ct. 1754 (2013).

³⁶ *Bullock*, 133 S. Ct. at 1758 (quoting *In re Sherman*, 658 F. 3d 1009, 1017 (9th Cir. 2011)).

³⁷ *Bullock*, 133 S. Ct. at 1758 (quoting *In re Uwimana*, 274 F. 3d 806, 811 (4th Cir. 2001)).

³⁸ *Bullock*, 133 S. Ct. at 1758 (quoting *Bullock v. BankChampaign*, 670 F.3d 1160, 1166

Second Circuits require “something close to a showing of extreme recklessness.”³⁹

Writing for the Court, Justice Breyer concludes that defalcation requires intentional wrongdoing, bad faith, moral turpitude, other immoral conduct, or reckless conduct of the type identified by the Model Penal Code. We count this as a win for the First and Second Circuits and a loss for the Fourth, Ninth, and Eleventh, though we recognize that reasonable minds may disagree with our counting this as a loss for the Eleventh.

2. *McQuiggin v. Perkins*

Similar to *Bullock*, *McQuiggin v. Perkins*⁴⁰ resists ready parallel re-view categorization. The most that we think can be said from the four corners of the opinion is that the Sixth and Seventh Circuits lose, albeit for different reasons.⁴¹

The two questions presented, as framed by the Court, are: (1) whether a claim of actual innocence may be raised in a federal habeas petition after the statute of limitations has expired; and, if so, (2) whether the delay in filing the petition should be considered in the appraisal of the actual innocence claim.

The Seventh Circuit answered no to the first question, and so did not reach the second.⁴² The Sixth Circuit answered yes to the first question, no to the second.⁴³ The Court, in contrast, answered yes to both questions. So we count this as a loss for both circuits, albeit for different reasons.

(11th Cir. 2012), *rev'd* 133 S. Ct. 1754 (2013)) (brackets omitted).

³⁹ *Bullock*, 133 S. Ct. at 1758 (quoting *In re Baylis*, 313 F. 3d 9, 20 (1st Cir. 2002)); *see also Bullock*, 133 S. Ct. at 1761 (quoting *In re Hyman*, 502 F. 3d 61, 69 (2d Cir. 2007)).

⁴⁰ 133 S. Ct. 1924 (2013).

⁴¹ The Court also references decisions of the Second and Eleventh Circuits, but does not unequivocally state agreement or disagreement with either circuit. *Id.* at 1930-31 (citing *Rivas v. Fischer*, 687 F.3d 514, 548 (2d Cir. 2012); *San Martin v. McNeil*, 633 F.3d 1257, 1267-1268 (11th Cir. 2011)). Because we confine our statistics to the four corners of the Court's opinions, we do not include those circuits in the count.

⁴² *McQuiggin*, 133 S. Ct. at 1931 (quoting *Escamilla v. Jungwirth*, 426 F.3d 868, 871-72 (7th Cir. 2005)).

⁴³ *Perkins v. McQuiggin*, 670 F.3d 665 (6th Cir. 2012), *rev'd sub nom* *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013).

3. *Ryan v. Gonzales* (consolidated with *Tibbals v. Carter*)

The question presented in *Ryan v. Gonzales*⁴⁴ is whether death row inmates pursuing federal habeas relief have a statutory right to a suspension of proceedings when found incompetent. The Sixth Circuit held that inmates do, locating the right in 18 U.S.C. § 4241.⁴⁵ The Ninth Circuit agreed that such a right existed, but located it in 18 U.S.C. § 3599.⁴⁶ In short, the circuits split on the question (albeit while reaching the same ultimate answer). The Court consolidated the cases, rejected both approaches, and held that no such statutory right exists. Although reasonable minds may disagree, we count this as a circuit split in which both circuits “lose.”

APPENDIX B:

WINS, LOSSES, AT BATs, AND WINNING PERCENTAGE
(SORTED BY WINNING PERCENTAGE)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court Vote
Levin v. United States	133 S. Ct. 1224	3 to 1	6, 7, 10	9	9 to 0
Sebelius v. Auburn Regional Medical Center	133 S. Ct. 817	0 to 3	None	8, 11, DC	9 to 0
Bailey v. United States	133 S. Ct. 1031	0 to 7	None ⁴⁷	2, 4, 5, 6, 7, 10, 11	6 to 3
Millbrook v. United States	133 S. Ct. 1441	1 to 2	4	3, 9	9 to 0
US Airways v. McCutchen	133 S. Ct. 1537	5 to 2	5, 7, 8, 11, DC	3, 9	5 to 4
Moncrieffe v. Holder	133 S. Ct. 1678	2 to 3	2, 3	1, 5, 6	7 to 2
McBurney v. Young	133 S. Ct. 1709	1 to 1	4	3	9 to 0
Bullock v. BankChampaign	133 S. Ct. 1754	2 to 3	1, 2	4, 9, 11	9 to 0

⁴⁴ 133 S. Ct. 696 (2013).

⁴⁵ *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011), *rev’d sub nom* *Tibbals v. Carter*, 133 S. Ct. 696 (2013).

⁴⁶ *Gonzales v. U.S. Dist. Ct. for Dist. of Ariz.*, 623 F.3d 1242 (9th Cir. 2010), *rev’d sub nom* *Ryan v. Gonzales*, 133 S. Ct. 696 (2013).

⁴⁷ Both the majority opinion and dissent note the circuit split, but neither identifies any courts on the “winning” side of the split. *E.g.*, *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013); *id.* at 1048 (Breyer, J., dissenting).

Case	Cite	Split	Winning Circuits	Losing Circuits	Court Vote
PPL Corp. v. IRS	133 S. Ct. 1897	1 to 1	5	3	9 to 0
McQuiggin v. Perkins	133 S. Ct. 1924	0 to 2	None	6, 7	5 to 4
Henderson v. United States	133 S. Ct. 1121	1 to 2	10	5, DC	6 to 3
Ryan v. Gonzales (consolidated with Tibbals v. Carter)	133 S. Ct. 696	0 to 2	None	6, 9	9 to 0
Amgen Inc. v. Connecticut Retirement Plans and Trust Funds	133 S. Ct. 1184	2 to 2	7, 9	2, 3	6 to 3
FTC v. Phoebe Putney Health System, Inc.	133 S. Ct. 1003	4 to 1	5, 6, 9, 10	11	9 to 0
Marx v. General Revenue Corp.	133 S. Ct. 1166	1 to 1	10	9	7 to 2
The Standard Fire Insurance Co. v. Knowles	133 S. Ct. 1345	1 to 1	10	8	9 to 0
Kloeckner v. Solis	133 S. Ct. 596	2 to 1	2, 10	8	9 to 0
Lozman v. The City of Riviera Beach, Florida	133 S. Ct. 735	1 to 1	5	11	7 to 2
Kirtsaeng v. John Wiley & Sons, Inc.	133 S. Ct. 1351	1 to 2	3	2, 9	6 to 3
Chaidez v. United States	133 S. Ct. 1103	3 to 1	5, 7, 10	3	7 to 2
Peugh v. United States	133 S. Ct. 2072	5 to 1	2, 4, 6, 11, DC	7	5 to 4
Oxford Health Plans v. Sutter	133 S. Ct. 2064	2 to 1	2, 3	5	9 to 0
United States v. Davila	133 S. Ct. 2139	5 to 3	1, 3, 4, 5, 7	6, 9, 11	9 to 0
Salinas v. Texas	133 S. Ct. 2174	1 to 1	11	DC	5 to 4
FTC v. Actavis, Inc.	133 S. Ct. 2223	2 to 1	2, 11	3	5 to 3 (Alito recused himself)
Descamps v. United States	133 S. Ct. 2276	2 to 2	1, 2	6, 9	8 to 1
Vance v. Ball State University	133 S. Ct. 2434	3 to 2	1, 7, 8	2, 4	5 to 4

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