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CHAPTER ONE

THE JOURNAL OF LEGAL METRICS

and

THE POST

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> Lawrence B. Solum, *Legal Theory Lexicon: Legal Theory, Jurisprudence, and the Philosophy of Law*, Legal Theory Blog, Apr. 24, 2011, 1 J.L. (1 The Post) 417 (2011).
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IN SEARCH OF HELPFUL LEGAL SCHOLARSHIP, PART 2

SHALL WE DANCE

Ross E. Davies[†]

In the last issue of the *Journal of Law* I said, "In Part 2 of this paper I will either celebrate the launch of an amicus briefs of scholarship program by the AALS or *JOTWELL* or some other worthy entity, or I will outline a plan that might be used by some other fearless and energetic souls."[1] I have not heard from the AALS or *JOTWELL*. So, here is an outline of a plan that might be used by some other fearless or energetic souls to make legal scholarship more helpful to members of the Supreme Court, and maybe other people too.[2] The plan has four main parts: (1) polling about helpful scholarship (starting now); (2) polling about conventional scholars' amicus briefs (starting sometime soon); (3) amicus briefs of scholarship[3] (starting someday); and (4) a cumulative roster of scholarly amici (also starting sometime soon but perhaps not quite so soon). There will inevitably be tinkering along the way, but I do hope that what follows below is the start of something helpful, and scholarly.

This little article deals with part 1 of the plan: polling about helpful scholarship. More on the other parts later.

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*. Thanks to Paul Haas, Dan Markel, and Donny Truong.

[1] Ross E. Davies, *In Search of Helpful Legal Scholarship, Part 1*, 2 J.L. 1, 10 (2012).

[2] As Professor Stephen Bainbridge has pointed out, scholars who aspire to influence judges should invest where there is some chance of a return, such as courts on which the judges are "engaged with the legal academy." Stephen Bainbridge, *The search for "helpful legal scholarship" ought to start in Delaware*, PROFESSORBAINBRIDGE.COM (July 22, 2012).

[3] Davies, 2 J.L. at 8-10 (describing an "amicus brief of scholarship").

I. THE PROBLEM

One way to view the challenge facing judges and scholars when it comes to the reading (by the former) and writing (by the latter) of helpful legal scholarship is to recall a pair of suggestions made last year, one by a thoughtful judge and one by a thoughtful scholar. Here is Chief Justice John Roberts, responding to a question about whether "our judiciary, on all levels, and the practicing bar are unfortunately too disconnected from our academies, from our law schools":

> There *is* a great disconnect between the academy and the profession. Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I am sure was of great interest to the academic that wrote it, but isn't of much help to the bar. . . . [I]f the academy is interested in having an influence on the practice of law and the development of law, that they would be wise to sort of stop and think, is this area of research going to be of help to anyone other than other academics. You know, it's their business, but people ask me, what the last law review article I read was, and I have to think very hard before I come up with one.[4]

And here is Professor Gerard Magliocca, reacting to Roberts's response:

> I think that everyone in legal academia should start sending reprints of their articles to the Chief Justice until he relents and reads one.☺[5]

Both expressions of half-humorous (but no more than half, I suspect) hyperbolic willfulness are telling. When it comes to scholarship, the judge says "nothing" and the professor says "everything." Neither approach is likely to make judges more knowledgeable or scholars more influential, but each is sustainable by its advocate. So there!

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[4] *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN, www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/ at 28:50 (June 25, 2011).

[5] Gerard Magliocca, *Response, in Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS, www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html (July 1, 2011).

They bring to mind the scene in the 1937 film *Shall We Dance*, in which Fred Astaire famously sings to Ginger Rogers,

> You say either and I say eyether,
> You say neither and I say nyether
> Either, eyether, neither, nyether
> Let's call the whole thing off.
> You like potato and I like potahto
> You like tomato and I like tomahto
> Potato, potahto, tomato, tomahto.
> Let's call the whole thing off . . .

Those lines in turn bring to mind the perhaps slightly less-famous ones that come next:

> But oh, if we call the whole thing off
> Then we must part
> And oh, if we ever part,
> Then that might break my heart
> So if you like pyjamas and I like pyjahmas,
> I'll wear pyjamas and give up pyajahmas
> For we know we need each other so
> We better call the calling off off . . .[6]

That is how Fred saves their marriage: by giving an inch to gain a mile. And who cares if his confidence in his conciliatory move is based in part on what might be a delusion that Ginger needs him as much as he needs her?[7] The ending is happy, and good.

Professor Magliocca (and other scholars) should play Fred to Ginger as played by Chief Justice Roberts (and other judges). There are reasons for optimism about reconciliation between scholars of Bulgarian evidence (and of other subjects of legal scholarship) and the Chief Justice (and other judges who do not read law review articles). For starters, there is the fact that while some Justices do grouse about the alleged uselessness of legal scholarship, all of them – even the Chief Justice – do in fact find some scholarship useful,[8] as well

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[6] George Gershwin and Ira Gershwin, *Let's Call the Whole Thing Off*, *in Shall We Dance* (1937).

[7] *See generally Shall We Dance* (1937). Maybe it is just behavioral economics at work. *See* Ian Ayres, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 653-54 & n.201 (2005).

[8] Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court*

some scholars, even.[9] Then there is the fact that over a long span of years, many reputable legal scholars have acknowledged that "[s]ome scholarship is simply bad,"[10] and therefore presumably should not be imposed on anyone, even judges.

All of which suggests that if reasonable scholars are willing to (1) concede, even if only implicitly, that some scholarship is useless and (2) identify the good and useful stuff – the truly helpful legal scholarship – reasonable Justices will be willing to read it.

II. THE POLLS

Conciliatory triage for scholarship at the Supreme Court points to the need for some way to reach Justices who do not trust scholars' briefs – some alternative for those Justices who seem to have all but given up on scholars as direct participants in litigation. Consider this passage from *Making Your Case: The Art of Persuading Judges*, by Justice Antonin Scalia and legal lexicographer Bryan Garner:

> An increasingly popular category of amicus brief is the academic brief – "Brief on Behalf of Legal Historians," or "Brief on Behalf of Professors of Securities Law." These are usually drafted by a few professors and then circulated from law faculty to law faculty, seeking professorial sign-ups. Advocacy and scholarship do not go well together, which is why many academics never lend their names to professorial amicus briefs. Some judges, however, may give these filings undue weight. An easy way to cut them down to size is to run a literature check under the names of the signatories. You'll often find that most of them have produced no scholarly publication on the point in question or sometimes even in the field at issue. Point this out to the

Justices: An Empirical Analysis, 4 DREXEL L. REV. 399, 409 (2012).

[9] *See, e.g., Bond v. United States*, 131 S.Ct. 589 (2010) ("Stephen R. McAllister, Esquire, of Lawrence, Kansas [and professor of law at the University of Kansas School of Law], is invited to brief and argue this case, as amicus curiae, supporting the judgment below.").

[10] Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 109 (2008); *see also, e.g. (and the many articles, books, and opinions they cite),* Paul Horwitz, *"Evaluate Me!"*, 39 CONNTEMPLATIONS 38, 47-49 (2007); Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 57-58 (2006), Patrick J. Schiltz, *Legal Ethics in Decline*, 82 MINN. L. REV. 705, 788-90 (1998); Stephen L. Carter, *Academic Tenure and "White Male" Standards*, 100 YALE L.J. 2065, 2081-82 (1991).

> court. And if it is so, point out that some academic publications (by professors who remain, perhaps, too immersed in their scholarship to hustle up an advocacy brief) favor your side of the case. If the academic brief seems particularly damaging, you might take the trouble to check the scholarly writings of the signatories; some professors have been know (*O tempora, O mores!*) to join a brief that flatly contradicts their own writings. By noting this, you'll help both the court and the academy.[11]

And it is not difficult to imagine Scalia's clerks getting the message, by order or inference, that treating scholars' briefs this way is an appropriate clerical exercise as well.[12] How then might legal scholars pitch helpful scholarship to Scalia and like-thinking Justices and their clerks without triggering this perhaps insurmountable skepticism?

Maybe by hewing more closely to the scholarship itself – by presenting scholars as scholars and their work as scholarship, rather than scholars as practitioners and their work as partisanship.[13] After all, it does not take a lot of literary sensitivity to read between the lines in the passage quoted above: Scalia thinks more highly of the work of "professors who remain . . . immersed in their scholarship" than he does of the work of professors who "hustle up an advocacy brief." Right or wrong, agreeable or disagreeable, these are distinctions that must be dealt with by a scholar who wants to entice Scalia the judge[14] to read what that scholar believes to be the best scholarship on a controversy that is before the Court.

So why not just tell Scalia and his ilk what they ought to read?

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[11] ANTONIN SCALIA AND BRYAN A. GARNER, MAKING YOUR CASE 104-05 (2008).

[12] *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 742 (9th ed. 2007) (citations omitted): "Not all amicus briefs are read by all the Justices. The number is so great that most of the Justices have their law clerks sift out the briefs or parts of briefs that they think add enough to the parties' briefs to be worth reading."

[13] *See* Richard H. Fallon, *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 265 (2012) ("[W]hen we attempt to influence public matters, we almost inevitably seek to trade on the credibility that we – and our predecessors and colleagues – have earned in the roles of scholar and teacher. Those roles create obligations of responsibility, trustworthiness, and confrontation."); *see also* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 8 (2012) ("We rely on expert 'knowledge' precisely because it has been vetted and reviewed by those whose judgment we have reason to trust.").

[14] Not Scalia the scholar. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

That is what the "Helpful Scholarship Recommendation Form" on the facing page is designed to facilitate.

The plan is to conduct an ongoing poll of scholars for every case pending before the Court. Actually, it is not just a plan: the polls are open now at the "Helpful Scholarship Project."[15] Here are the basics:

1. For any case before the Court on the merits, any qualified scholar (for now, anyone tenured in a law school[16]) may recommend up to seven works of legal scholarship that the Justices ought to read before deciding that case – up to five works by other scholars and up to two of the scholar's own. (This is no place for false modesty. A scholar whose own works are among the most helpful should say so, for both ethical and practical reasons that require no elaboration here.[17])

2. A scholar makes those recommendations by completing and submitting either the form on the facing page or the online version on the *Green Bag*'s "Helpful Scholarship Project" website.

3. There is no limit to the number of cases for which a scholar may recommend helpful works of scholarship (by submitting a form for each case), nor is there a limit to the number of scholars who may make recommendations for any particular case.

4. Each scholar's recommendations appear in two places: (1) on a webpage for the case for which the recommendations are made, tallied with all other scholars' recommendations for that case, with all works ranked by the number of recommendations they have received, and (2) on a webpage for that scholar, where all of his or her recommendations in all cases are listed.

5. The polls for a case remain open until the Court decides it.

The product of these continually accumulating individual exercises of scholarly judgment will be a convenient, impartial, transparent catalog of up-to-date academic opinion about scholarship likely to be helpful in cases pending before the Supreme Court.

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[15] *See* www.greenbag.org/helpful_scholarship/helpful_scholarship.html.

[16] *See* note * below.

[17] *See, e.g.,* ARISTOTLE, NICOMACHEAN ETHICS, book IV, ch. 7, 1127a21-1127b32, *in* THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION (ca. 350 B.C.; 1984 prtg.) (Jonathan Barnes, ed.; W.D. Ross, trans. (rev. J.O. Urmson)).

HELPFUL SCHOLARSHIP RECOMMENDATION FORM

If you are a law professor,[*] you may use this form to recommend: (A) up to five works of legal scholarship (by authors other than yourself) that ought to be read by any Supreme Court Justice deciding the case you specify and (B) your own best relevant work as well. Your recommendations will be listed on the "Helpful Scholarship Project" page on the *Green Bag*'s website.[†]

Your name: _____

Law school in which you are tenured: _____

Caption and number of a case pending before the Supreme Court:

_____

A. Others' works of helpful legal scholarship (author, title, publisher, date) that will help the Justices decide the case specified above:

1. _____
2. _____
3. _____
4. _____
5. _____

B. Your own most helpful relevant works (author, title, publisher, date):

1. _____
2. _____

Questions? Comments? Ideas? Changed your mind about your recommendations? Please email us at editors@greenbag.org.

Mail to: The Green Bag, 6600 Barnaby St. NW, Washington, DC 20015. If you prefer pixels to paper, please use the online version of this form at www.greenbag.org/helpful_scholarship/helpful_scholarship.html.

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[*] If you are a scholar in a field other than law (or a legal scholar not yet tenured in a law school), please be patient. We are starting small and hope to cover other fields soon. We also hope to come up with or be shown a marker of scholarliness that is more accurate and reliable than tenure. We welcome your suggestions.

[†] *See* www.greenbag.org. To prevent fraud, your recommendations will be posted only after someone from the *Green Bag* emails/telephones you at the address/number we find on your faculty page at your school's website to verify that it really is you who completed this form.

III. PROS AND CONS

Pros and cons of these "Helpful Scholarship" recommendation polls abound. Consider the following, which surely do not exhaust the possibilities but may represent the range:

1. There is no opportunity for the full argumentation or sense of authorship that comes with writing a scholars' amicus brief. True, but there is nothing preventing a scholar from both writing briefs and making recommendations. Perhaps more importantly, for the scholar who is not writing a brief but is instead invited to sign onto someone else's, the "Helpful Scholarship" recommendations route could be a good alternative or additional means of scholarly expression. You are free to endorse only specific works you approve of, rather than having to endorse – all or nothing – a brief that may well be a collection of arguments, authorities, and methods of analysis only some of which you believe in.[18] Even the primary author of a brief written for a committee or crowd might find some value in expressing an undiluted individual opinion as well.[19] And then there is the matter of late-breaking thoughts about a case, including, for example, thoughts expressed in scholarly works completed after oral argument in a case. Chances for amici to file briefs after the initial merits round are nearly nil.[20] Recommendations, however, can be made at any time before a case is decided. And they are cheaper and easier to produce (at least for an expert who knows the relevant scholarship).

2. There is little chance of knowing whether any of these recommendations will matter at the Supreme Court. Probably true, especially given the unlikelihood that a Justice or clerk will reveal any specific reliance on the Helpful Scholarship Project. But that uncertainty has never been a deterrent to knowledgeable, interested scholars, many

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[18] *See, e.g.,* Fallon at 228-235, 257-58, 265. Reasonable minds do differ about the propriety of signing such briefs. *Compare, e.g., id. with* Amanda Frost, *In Defense of Scholars' Briefs* at 4 & passim, papers.ssrn.com/sol3/papers.cfm?abstract_id=1978337.

[19] *Cf.* Fallon at 226 (citation omitted) (pointing out that of the three scholars' briefs cited by the Supreme Court in its 2010 Term, "two . . . were submitted by single law professors on behalf of themselves alone, and the other had only two signatories").

[20] S. Ct. R. 25.5-.6, 27.3(a); *see also* GRESSMAN ET AL. at 744-45; *but see* S. Ct. R. 28.7 (permitting counsel for an amicus to argue by leave of the Court); GRESSMAN ET AL. at 753 (describing Court practice regarding appointed amicus counsel).

of whom speak and write about Supreme Court cases in a variety of ways when appropriate opportunities knock – in litigation itself, in the news media, in public forums and academic ones, and so on. And they engage in those activities knowing both (a) that theirs are only a few of the many voices seeking to be heard by the Court and (b) that influence on the development of the law is tricky to predict and rarely accompanied by public or even private recognition. (If mentions in Supreme Court opinions were issued like merit badges of influence, then Ronald Coase's *The Problem of Social Cost* and P.T. Barnum's admonition about suckers would be equals.[21]) We can only hope that someone at the Court will take note of – and make good use of – a convenient, impartial, transparent catalog of scholarly opinion about relevant scholarship.[22] In addition, there are other audiences – judges on other courts, legislators, bureaucrats, practitioners, journalists, scholars in law and other fields – who, like the Justices, might benefit from "Helpful Scholarship" recommendations and might or might not be in position to acknowledge them.

3. These polls will be susceptible to manipulation, like the U.S. News law school reputation polls. Yes, it is possible to manipulate them. But probably not in the pejorative sense – "[t]o manage, control, or influence in a subtle, devious, or underhand manner"[23] – sometimes associated with the *U.S. News* polls. Those polls feature secret data

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[21] *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 864 n.3 (1975) (Brennan, J., dissenting) (only Supreme Court mention of *The Problem of Social Cost*); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 357 n.2 (1989) (only Supreme Court mention of P.T. Barnum on the birth of suckers). *The Problem of Social Cost* is widely regarded as the most-cited law review article of all time, and one of the most important and influential. *See, e.g.*, Fred R. Shapiro and Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012); William M. Landes and Sonia Lahr-Pastor, *Measuring Coase's Influence*, 54 J. L. & ECON. S383, S396-98 (2011). It has been cited in at least 19 Supreme Court briefs, including a scholars' brief signed by Coase himself, to no citeable avail. *See* Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) at 13 n.17; search in Westlaw's database of Supreme Court briefs for "Coase w/20 'social cost'" conducted several times in July and August 2012 with the same result every time – 19 hits.

[22] *See* Eugene Volokh, *Scholarship, Blogging and Trade-offs: On Discovering, Disseminating, and Doing*, WASH. U. L. REV. 1089, 1095-96 (suggesting similar possibilities for blogs). Maybe their influence, like true love, will be known when it is seen. *See* note 7 above.

[23] manipulate, *v.*, 3. *trans*. a., OXFORD ENGLISH DICTIONARY (online ver. June 2012).

and black-box analysis, enabling the polled to anonymously boost themselves and undercut the competition (and *U.S. News* to manipulate poll results with impunity as well), although of course everything might be on the up-and-up, but that too is impossible to know here on the ignorant side of the *U.S. News* veil of secrecy. Instead, manipulation of "Helpful Scholarship" polls should be of the constructive sort – "[t]o process, organize, or operate on mentally or logically; to handle with mental or intellectual skill"[24] – in which the identities and choices of the polled (that is, the scholars and their recommendations) are public. These polls will enable a Justice (or anyone else) to evaluate and manipulate recommendations based on the characteristics of the recommenders, as well as on the quality of the recommended works and the gross number of recommendations. Conversely, new and not-famous experts may be able to improve their reputations by making recommendations that show they can tell helpful scholarship from dross.[25]

The only source of clearer answers to these concerns and others like them will be a scholars' test drive of, say, five or ten years' duration. Let it begin. Please visit the Helpful Scholarship Project when you have recommendations for the Justices about scholarship they ought to consult before deciding a case. You might do some good.

• • •

In this issue of the *Journal of Law* we present the second issues of three fine journals: (1) *Chapter One* (edited by Robert C. Berring), featuring a chapter of Frederick Hicks's classic *Men and Books Famous in the Law*, accompanied by contemporary and modern commentary; (2) the *Journal of Legal Metrics* (edited by Adam Aft and Craig Rust), featuring what might be characterized as an empirical manifesto for the law school transparency movement; and (3) *The Post* (edited by Anna Ivey), featuring what will become, I hope, its customary selection of eloquent, intriguing, and provocative post-publications.

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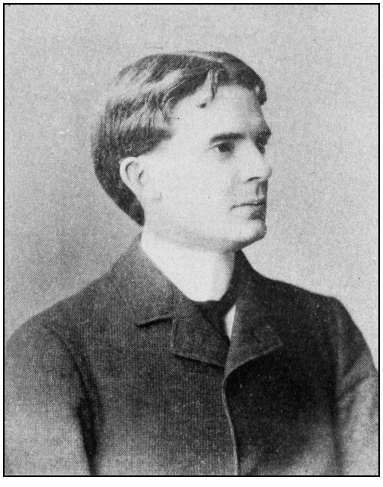
[24] manipulate, *v.*, 2. *trans.* a., OXFORD ENGLISH DICTIONARY (online ver. June 2012).

[25] Participation in Helpful Scholarship polling might itself be a fruitful field of study. *Cf.* Lawrence B. Solum, *A Tournament of Virtue*, 32 F.S.U. L. REV. 1365, 1388 et seq. (2004); Michael Abramowicz, *On the Selection of Judges in International Figure Skating*, 6 GREEN BAG 2D 339, 345-48 (2003).

CHAPTER ONE

A JOURNAL OF LAW BOOKS



Frederick C. Hicks

SUMMER 2012

CHAPTER ONE

Robert C. Berring, Editor

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A FAMOUS BOOK ABOUT FAMOUS BOOKS

MEN AND BOOKS FAMOUS IN THE LAW, BY FREDERICK HICKS

Robert C. Berring[†]

"Some books there are, however, which have romantic stories of their own, have passed through unusual vicissitudes, and have survived disaster. The life of these cannot be shown by annotated lists, but must be told in connected narratives which bridge the gaps between successive editions."[1]

Chapter One was created to tempt the reader. We want you to sample the first chapter of a book, then to feel compelled to seek out the whole work. To qualify for Chapter One, a book must carry meaning, be well written and hold the reader's interest. This time the choice is a special one. Instead of simply presenting a book that carries value, we offer Frederick Hicks's *Men and Books Famous in the Law*, a book that tells the story of books that hold value. Though this approach brings on mind an M.C. Escher print, with a book about books that are about books in an endless regression, this book is worth the risk. Professor Hicks chooses well, and tells the tale of these books with relish and clarity. The book is a good read and afterwards one feels much smarter. That is a heady combination by anyone's lights.

Fred Hicks has long been one of my heroes. Hicks presents us with a beguiling blend of legal scholar, innovative teacher, master

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[†] Walter Perry Johnson Professor of Law, Berkeley Law School.

[1] Hicks, Men and Books Famous in the Law, (Lawyers Coop, 1921) p. 25. I will not provide pin cites to any other parts of the Chapter. After all, my goal is for you to read the whole thing.

law librarian and prolific author that is difficult to match. Just as Professor Hicks was an extraordinary man, so too is *Men and Books Famous in the Law* sui generis. As the Chapter reprinted in this issue demonstrates, Hicks has a special take on famous law books. He saw each book, and its author, in context. This made for a new kind of work. As Dean Harlan Fiske Stone cautions in his Preface, "No pretense is made of giving an adequate picture of the contents of the books. . . . Nor is a complete picture of the authors of the books given."[2] Is Dean Stone damning with faint praise? No, he is pointing out that this book is built around a novel idea.

Hicks strives to catch each book in its moment in time and to focus on why the book came to matter. Instead of eruditely parsing through the cobwebbed legal arguments that are the content of each work, or belaboring the reader with biographic details of the author's grandfather's life, he comes at each book in an entirely different manner. In each case Hicks describes why the author is important in the context of the book and how the book fits into the grand scheme of the development of the law. It is a hybrid form of scholarship, which, though seldom seen, has much to offer. Why do some books last, withstanding the ravages of time? What makes an important book into a timeless classic? How can a book which cost its author his position, or which was still barred from publication in the United States at the time Hicks wrote be deemed a classic?

Hicks wrote in 1921. He was reaching back to the centuries before, trying to save a place in the minds of contemporary lawyers for the great works that he feared were slipping away. At some point, the great thinkers of the past become dusty intellectual relics. The authors names may be carved into the wall of a building, the name of the book may ring a faint bell of recognition in the mind of the listener, but no one actually goes back and reads the book. Hicks wanted to breath life back into a few of law's touchstones.

Having twice offered a seminar at Berkeley Law School that is a bit pretentiously titled "Elegance in Legal Writing, Elegance in Le-

[2] We include the Introduction by Dean Stone as it appeared in the first edition. Do not be dismayed by the eminent Dean's prose, let it serve as a reminder of the felicity of Professor Hicks's prose.

gal Thought" that acquaints the law student of the 21st Century with the great legal thinkers of the 20th Century, I can empathize. I offer the seminar in 2012, awash with the same concerns that Hicks must have felt in 1921. If we lose the substance of the great works that went before us, we can never truly understand the legal milieu in which we live. Snapshot considerations of legal theory, or assessments of legal practice, that do not consider the root system that produced the contemporary world, are dangerous.

It is arresting to consider that the books that we read as part of the seminar, Holmes, Cardozo, Frank, Llewellyn, Fuller et. al were part of the contemporary intellectual landscape of Hicks's day. *Men and Books Famous in the Law* presents us with the books that Cardozo's generation was in danger of losing. The wheel turns.

Given his times, and the much more limited collection of works from which to choose, Hicks reaches back far beyond the preceding century. He casts his net as far back as 1422 to sweep in Lord Coke. The breadth of his learning cannot fail to impress.

Before these books became classics, they represented the efforts of authors caught in the swirl of events of their own day. Judgments made slowly over the passage of time anointed them as permanent parts of the legal firmament. But time grinds everything down. Today's trendy theory is tomorrow's object of ridicule. Hicks chooses only those books that endured for the long haul, books that represent breaks in intellectual tradition, books that made a difference, books that set us on our modern path.

Blackstone, Kent, Coke, Littleton, Livingston, Cowell and Wheaton were names that any law student could once have rattled off. Even these books, which most likely are now ensconced in Rare Book Rooms, or roughly scanned into jumbo data bases, have something to tell us. Some are still quite readable, some were hardly readable in their own time, but all matter. Professor Hicks was on a mission to preserve them as important markers in the law.

While stylistic taste is an individual matter, Hicks's style remains fresh. He is an acute and objective observer. The prose flows well, the meanings are clear. This is a book to read so that one can understand the true value of famous books that one will likely never read.

(Though I contend that Blackstone is still an invigorating text, and that Wheaton sadly sketches out problems that we have yet to solve). Reading *Men and Books Famous in the Law* is a treat and it makes you wiser. Such a powerful combination should be good motivation for the reader.

To sweeten the pot in this edition of Chapter One, we include a short biographical essay on Professor Frederick Hicks, authored by Stacy Etheredge of the West Virginia University Law Library. Ms. Etheredge paints a picture of a man of many talents who changed both legal education and law librarianship. We also include two contemporary book reviews, drawn from the law reviews of the day.

Men and Books Famous in the Law is still in print, a good sign for a 92 year old imprint about books that were old when it was written.[3] You can even find a digital version via HeinOnline. The point is, give this chapter a read and see if you are game for more give the whole book a try. If you only read the chapters on Blackstone and Wheaton, you will the better for it. ❶

[3] The book has been reprinted by Gryphon Press, Rothman and Legal Exchange. All appear to be straight-forward copies of the original text. It can also be found for free at the Google Books site and, for those who have access to HeinOnline, the full text can be found there.

FREDERICK HICKS

THE MAN BEHIND *MEN AND BOOKS*

Stacy Etheredge [†]

Professor Fred Hicks stands as a giant in the world of legal education in general, and law libraries in particular. To overstate his importance in both is really not possible.

Frederick Charles Hicks was born in the small community of Auburn, New York, in 1875. He must have heard the siren's call of librarianship early, as he started work in the Manuscripts Division of the Library of Congress after graduating from Colgate University in 1898. As an early example of a lifelong vigor for work, he also attended Georgetown University Law School while working full-time, graduating in 1901. Hicks practiced law for a year back in his hometown but then returned to librarianship and never looked back, working first at the Naval College and then at the Brooklyn Public Library, until finally arriving at Columbia University. Although he worked at Columbia's main library, records indicate that he may have had dealings with the law school's library as early as 1913. He was officially moved to the Columbia School of Law and appointed Law Librarian (director of the library, in today's parlance) in 1915. For the next thirty-one years Hicks was to play a hugely influential role in the law libraries of two of the country's most important law schools, first at Columbia and then Yale, where he worked from 1928 until his retirement as an Emeritus Professor of Law in 1945.

Hicks proved to be an especially able player in the fine art of library administration, systematically overhauling the libraries and

[†] Reference and Instruction Librarian, West Virginia University's George R. Farmer, Jr., Law Library. The author wishes to thank Bob Berring for long-ago introducing her to Frederick Hicks – from old articles come new delights.

transforming them in terms of facilities, collections, organization, and efficiency. Just one of his major endeavors was to spearhead an increase in the volumes of books held by the libraries at both law schools, increasing the numbers held to an incredible three times the original size. But while normally a huge marker of success for any other 20th Century library director, this was one of Hicks's lesser accomplishments. Much more important than the elevation in the collections' quantity, was the elevation in their *quality*. Building quality in a collection requires an individual who is truly dedicated to both their craft and their institution. It necessitates the stewardship of someone, like Frederick Hicks, who has both the skill and the fortitude to embark on the arduous journey of changing the tone of a library from adequate, to superlative. It calls for a deep base of learning and the ability to foresee the developing fields of legal scholarship. Building a collection that anticipates the needs of the researcher is a daunting challenge, one that Hicks took on with enthusiasm.

Hicks moved both the Columbia and Yale law libraries forward, and thus both law schools, by understanding the distinction between a regular law library and a *university* law library whose true function was education. He felt that an academic law library needed to serve two purposes. It needed to be a working library, one that prepared students for the professional practice of law. But it also should be a research library, one that encouraged and supported the pursuit of academic scholarship. Therefore, while he made sure the core collection of Anglo-American law was there, he also brought in the related subjects that he believed were critical to a broader scholarly understanding of the law (such as English legal history, and Roman and Canon law). Hicks also understood the changes that were happening globally during the heady years between the world wars, and thus saw the importance of collecting foreign, international, and comparative materials. And after observing that the courses offered in law schools were involving fields of knowledge that touched the broader reaches of the law, he realized that this was a new movement in legal education and began collecting in subjects such as economics, history, political science, philosophy, and sociology. All of

these collection development decisions, each ahead of their time, helped move the law libraries into the echelon of first-rate institutions.

Another giant step set in motion by Hicks was the development of the role that legal research played in law schools. In 1913, he wrote his first major work on the subject, *Aids to the Study and Use of Law Books*. Sensing that the students at Columbia Law School needed help, his intent was to "select material practically helpful to all users of law books."[1] Thus, *Aids* was not a legal research manual but a concise bibliography of books about law books. The masterpiece came in 1923, when Hicks wrote the first authoritative volume on American legal research and bibliography, *Materials and Methods of Legal Research*. The book was a seminal text because of Hicks's approach to explaining legal research, which focused as much on literary criticism as on the practicalities of teaching it. It fulfilled a much-needed role as a teaching manual and reference tool by both discussing the use of law books and providing extensive bibliographies of legal resources. And, unlike any other text, it went much further in educating the reader by discussing the historical development and classification of law books, a theme that was personally important to Hicks. The most significant tribute to *Materials* may very well be the longevity of its existence, appearing in three editions over a span of twenty years (1923, 1933, and 1942). It was considered for decades to be "standard equipment in any working law library"[2] and, incredibly, was still being utilized well into the 1980s, a full sixty years after the first edition.

Hicks also had a huge impact on the legal world by being the primary force behind the nascent movement of teaching legal research in law schools. He was interested in setting up formal classes of instruction in legal bibliography, and when he arrived at Columbia Law School he began work on his "experiment," as he called it, almost immediately. He started by taking notes on the types of questions the law students were asking in the library, seeking to "appreciate the attitude of mind of the student, and the underlying

[1] FREDERICK C. HICKS, AIDS TO THE STUDY AND USE OF LAW BOOKS at 5 (1913).
[2] Miles O. Price, Book Review, 35 LAW LIBR. J. 503, 503 (1942).

conceptions or misconceptions of which the specific questions were illustrations."[3] The notes were then classified into types of problems and fashioned into a presentation format that would help students learn the types of legal aids that could solve the problems. During one October week in 1915, Hicks presented six lectures on legal research and bibliography. He had feared a lack of participants due to the students' crowded curriculum, but that fear turned out to be groundless as an average of 129 students attended each lecture. Encouraged by this success Hicks proceeded with the second part of his experiment, forming weekly seminars "for the purpose of acquiring experience in the use of law books."[4] More than a hundred students immediately signed up and the first session (of fifty-seven) was held one week later, in groups of students and around their schedules. When those ended Hicks offered additional seminars in the spring semester, which would continue on from the fall's material. This time, though, he had to reduce the number of seminars and arrange the student groups around his schedule. Still, sixty-five students registered and attended regularly, with forty-eight sessions held in all.

The approach Hicks took to his lectures and seminars followed a philosophy of teaching legal research that he would advocate and use for the rest of his life. The lectures were meant to be chiefly bibliographical and historical in nature. He thought it important to begin by tracing the development of law books, from their early beginnings in England to contemporaneous publications, in order to help the students "gain perspective in regard to the literature of the law, enabling them to use books intelligently."[5] The seminars were organized around a different method of teaching altogether, as they were meant to be practical work in legal research. After first outlining a specific problem and discussing what legal aids he would use to solve it, he would then give the students their own problems, each a different one, and send them off to the library to solve theirs. The

[3] Frederick C. Hicks, *Instruction in Legal Bibliography at Columbia University Law School*, 9 LAW LIBR. J. 121, 121 (1916).
[4] *Id*. at 122.
[5] *Id*. at 121.

"experiment" that Hicks embarked on turned out to be a magnificent success. Dean Harlan Stone approved of the courses and they continued each year on a voluntary basis, until eventually they were required. In 1921, as an official acknowledgement of his achievement, the law school rewarded Hicks with the faculty rank of associate professor of legal bibliography. But most likely the greatest reward to Hicks was watching the teaching of legal research in law schools become standard practice during his lifetime.

On top of all these accomplishments in law librarianship, Frederick Hicks also had a wide-ranging intellect and artistic bent. He was a dedicated musician and played first flute in the Business and Professional Men's Orchestra of New Haven. A skillful painter in both watercolors and oils, he had several of his paintings exhibited; he also loved photography and was a prizewinner in the New Haven Camera Club competitions. Hicks was a genuine scholar in the truest sense of the word. He was blessed with a vast intellectual curiosity, described as having an "overwhelming zeal for learning and progress".[6] Probably nowhere is this more evident than in his written output, where even the adjective "prolific" seems lacking. He wrote or edited more than 20 books, and published 52 articles or bibliographies in 23 different periodicals (and this is not counting over 40 miscellaneous pieces, such as book reviews, pamphlets, and articles in encyclopedias and essay collections).

Where his scholarship really astounds, though, is in the incredible breadth of what he wrote. His work went well beyond the expected books and articles on librarianship and legal bibliography. Like the very epitome of the Renaissance man he was, he would write about anything that struck his fancy – history, biography, finance and economics, legal ethics, esteemed orations, famous closing arguments, international issues, and the unauthorized practice of law, among others. He wrote an article questioning whether Shakespeare was a lawyer, authored a biography of former President Taft's tenure as Professor of Law at Yale, compiled and annotated a book covering 300 years of Bermudan poetry, and penned a fictional

[6] Lawrence H. Schmehl, *Who's Who in Law Libraries: Frederick C. Hicks, Librarian of the Yale Law School Library*, 37 LAW LIBR. J. 16 (1944).

novel based on a real-life trial involving a "too many bodies in the life raft" scenario. Whatever got his curiosity stirred up was fair game. Some of the work that illustrates his diversity includes:

> • *A Topographical Description of Virginia, Pennsylvania, Maryland, and North Carolina; reprinted from the original edition of 1778 by Thomas Hutchins* (1904). Hicks was responsible for its reprinting and also contributed the first-ever biographical "sketch" (which, contrary to its name, was not brief) of Hutchens, the first and only appointed "Geographer of the United States."
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> • *Famous American Jury Speeches* (1925). Here he reaches back into history (including two speeches from his favorite, Joseph Choate) and mines contemporaneous arguments as well (e.g., Clarence Darrow's oration in the Leopold and Loeb case). He felt that these addresses to the jury "are not merely speeches, but they are human documents in the development of American life"[7] and "retain the essence of true oratory, which is to make the auditor think and feel as the speaker thinks and feels."[8]
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> • *High Finance in the Sixties: Chapters from the Early History of the Erie Railway"* (1929). Hicks edited this book of essays on the Erie Railway scandal and litigations, originally written between 1869 and 1872 (including three by Henry and Charles Francis Adams). As Hicks so humbly put it, ". . . [t]heir essays have become classics which cannot be superseded. To reprint them is a better service than to rewrite them. . . . extensive comments would only weaken their force."[9]
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> • *Organization and Ethics of the Bench and Bar: Cases and Other Materials* (1932). What may very well be the first law school casebook concerning professional responsibility for lawyers. The text was written by Hicks as a response to the then-new trend of states including legal ethics questions on their bar examinations, which had prompted some schools to start offering courses.

Frederick Hicks loved the history of law and law books and law men (for law was, up until his time, certainly male-dominated). The

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[7] FREDERICK C. HICKS, FAMOUS AMERICAN JURY SPEECHES (1925), at 4.

[8] *Id*. at iii.

[9] FREDERICK C. HICKS, HIGH FINANCE IN THE SIXTIES: CHAPTERS FROM THE EARLY HISTORY OF THE ERIE RAILWAY (1929), at 2.

quintessential work of this personal and professional affection is probably his *Men and Books Famous in the Law*. Published in 1921, *Men and Books* is still in print which, given the realities of the publishing world, is high praise, indeed. It is a collection of biographical sketches of the authors of Anglo-American legal literature and their classic works, what one reviewer called a "happy combination of biography, bibliography and gossip."[10] In short, they are Hicks's own love letters to the men and books that occupy a unique place in the development of our history and traditions.

And thus, *Men and Books Famous in the Law* is a perfect little book because it is a perfect little encapsulation of Frederick Hicks, the man and scholar who loved his chosen work – The Law (writ large). ❶

[10] Floyd R. Mechem, Book Review, 22 COLUM. L. REV. 195 (1922).

MEN AND BOOKS FAMOUS IN THE LAW

PREFACE

Frederick C. Hicks[†]

The following sketches have been drawn as illustrations of the appeal which law books have when considered as the product of human needs, experience and environment. Out of the hundreds of authors and books that might have been considered, the selection of these few has been made almost at random – because they happened to be of special interest to the author. Nevertheless, it will be found that most of the great classes of law books are discussed or referred to, as well as the problems that have arisen in the progress of law-book publication. Statute law is represented by Livingston's Code, law reports by those of Blackstone, Coke, Dyer, Peters, Plowden and Wheaton; digests by Viner's Abridgment, dictionaries by Cowell's Interpreter; institutional works by Coke, Cowell, Blackstone and Kent; monographs by those of Littleton and Wheaton.

These studies deal only with Anglo-American law books. They are the outgrowth of lectures and seminar work given by the author in the Columbia University Law School, in a course on Legal Bibliography, and lectures to students in Library Economy and several Library Schools.

No pretense is made of giving an adequate picture of the contents of the books. That would require a technical presentation

[†] When *Men and Books Famous in the Law* was first published in 1921, he was Associate Professor of Legal Bibliography and Law Librarian at Columbia University Law School. Numbers in {brackets} indicate pagination in the 1921 edition, in which this Preface began on page 7.

which would defeat the end sought. Nor is a complete picture of the authors of the books given. The studies are merely impressionistic sketches of men and books famous in the law, with glimpses here {8} and there of the events and people of the time in which the books were written, published and read. The last word is not said on any of the men and books treated. To some readers unacquainted with the law, this book will be the first word on the subject; to others it will be only a reminder of things already known; and to others it will supply details on matters already generally understood. To all, it is hoped that the book will give some inspiration to look further in the realms of legal literature.

Grateful acknowledgment is made to Professors John Bassett Moore, Nathan Abbott and Henry F. Munro for reading portions of the manuscript, and to Dean Harlan F. Stone for reading all of it.

Frederick C. Hicks.
Columbia University,
May 11, 1921. ❶

MEN AND BOOKS FAMOUS IN THE LAW

INTRODUCTION

Harlan F. Stone[†]

The development of law study in the United States since 1870 constitutes a remarkable chapter in the history of education. When in 1794 Kent, who stands out as in many respects the most gifted and attractive figure in the annals of American jurisprudence, began his law lectures in Columbia College, they were attended by "seven students and thirty-six gentlemen, chiefly lawyers and law students who did not belong to the college." Three years later he abandoned his professorship for want of students. When in 1823, after a distinguished judicial career during which he had achieved a national reputation as a liberal scholar and jurist, he returned to his professorship, the maximum attendance at his lectures was "thirty-three gentlemen and fourteen private students." Even in the heyday of the Dane Law School, later the Harvard Law School, under the leadership of Parker, Parsons, and Washburn, that school had little to identify it, either in methods of work or in the number of its students, with our modern system of legal education wherein numerous schools scattered throughout the country are thronged with eager students who devote three and often more years to the purely academic study of their chosen profession.

It is not the purpose of this brief introduction to inquire into the causes for this surprising development. They have been too often and too thoroughly dis{10}cussed to require any elucidation here.

[†] When *Men and Books Famous in the Law* was first published in 1921, he was Dean of Columbia University Law School. Numbers in {brackets} indicate pagination in the 1921 edition, in which this Introduction began on page 9.

It will suffice if the attention be directed to certain outstanding characteristics of the new order which make the production of this little volume by Professor Hicks an extremely interesting and valuable experiment.

With the very general adoption of the case method of instruction in American law schools, the day of law study from institutes and authoritative treatises as original sources was at an end. For nearly a generation now, law study in all the important centers of legal learning has been dominated by the scientific spirit which rejects the dogmatic statement of legal doctrine and demands that every legal principle be traced to its original source in judicial precedent, and be re-examined in the light of its relation to social utility. The new order began with the insistence upon the study of precedent as the original and practically the only source of legal knowledge, but it did not stop there. In our own time there has been a growing recognition of the fact that precedents cannot be justly valued and intelligently applied without some adequate understanding of the social and economic conditions out of which they sprang and to which in our own day they must be applied; and of late there has been a marked tendency toward a more searching analysis of the fundamental concepts on the basis of which our legal structure is reared, and greater emphasis upon a more precise and exact use of legal terminology. These are all manifestations of the scientific spirit which in every field of human endeavor is giving us more exact knowledge and increased capacity for its utilization.

In such a scheme of things there is small scope for the authoritative pronouncements of any individual, {11} however penetrating his intellect and however gifted he may be in his powers of expression. It rejects the pedantry of Coke, it sets little store by the artificial reasoning of Blackstone, and it prefers the opinions of Kent the judge and the chancellor to the mellifluous passages of Kent the commentator. It is not surprising therefore that the figures of the great lawyers and commentators treated of in this volume, so vivid and outstanding to law students of an earlier day, are becoming shadowy and indistinct to the students and the lawyers of this generation. In this interesting and valuable series of studies Professor

Hicks challenges the attention with the query whether we have done well to let them become so.

That, by the application of scientific methods to law study, legal knowledge and juristic science have been the gainers, no one familiar with the work carried on in the great centers of legal study in this country can doubt. How great the gain is no one can now say. At least another generation must pass before we can begin to gather its fruits in abundance and to form some estimate of what we may hope to be accomplished by it. But this great gain has not been without some attendant loss. The modern law student has gained in the exactness of his legal knowledge, in his familiarity with the history of legal doctrine, and above all in his power of analysis and his capacity to apply legal principles to new states of fact. But he is the loser in his lack of intimate contact with the precision and thoroughness of Littleton and Coke, with the literary style of Blackstone, and the liberal and enlightened spirit of Kent. In our passion for science we have been prone to overlook the human element in the development of law. {12} After all, law is the product of human experience. Into its warp and woof have entered human interests, human needs, human emotions, and notions of ethics and philosophy which are the product of our racial experience.

At intervals during the eight or nine centuries since the Common Law began to take form, there have appeared the figures of the great commentators. One can almost count them on the fingers of one hand – Bracton, Glanville, Littleton, Coke, Blackstone and Kent. They and some others of lesser note have definitely and visibly influenced the development of our law. What that influence has been, what manner of men they were, how their work was done, and what were the vicissitudes of their publications in those centuries are questions of vital interest to every lawyer and student of the law, and the answer to them is of positive educational value. Without abatement of the scientific spirit, we can do much to humanize law and law study. We can no longer study Coke and Blackstone and Kent as the very foundation stones of the law, but we can glean much from their lives and work and from the lives and work of those who, like them, have permanently influenced legal thought, to

give to law study its human interest and to increase its real value. This the author has done; and in doing it has rendered a service to every earnest student of the law, who will find in his pages inspiration to know more of the makers of the great law books.

Of especial interest to American Law students are the author's accounts of Livingston and Wheaton. They did not affect the current of legal thinking in the same manner or to the same extent as did Kent, or indeed any of the other subjects of these essays, but Wheaton gave the first great impetus to the study of international {13} law in this country. His writings have been widely read abroad and have exercised a potent influence there.

Livingston, whose life, judged by the immediate results of his work, has been counted as almost a failure, united in his extraordinary mentality legal knowledge, practical idealism and a unique capacity to give concrete expression to it in legislation which gave him a positive genius for codification. He was fully a century in advance of the legal thought of his time, but as the problems of law improvement through legislation and codification press more and more upon us we shall turn more often to his life and work for guidance and inspiration. The lives of both men are replete with human and dramatic interest. They are interwoven with our legal history and touch at innumerable points the lives of those famous in the chronicles of our law.

One could wish that other masters of legal literature had been included in the list selected by the author, and express the hope that the success of this volume may encourage the production of a second in which they may be included. ❶

MEN AND BOOKS FAMOUS IN THE LAW

CHAPTER I: THE HUMAN APPEAL OF LAW BOOKS

Frederick C. Hicks[†]

To transmute base metals into fine gold, to reconcile the irreconcilable, these are vain attempts. Why then seek elements of human appeal in law books? Is there any such thing? The majority of people would answer at once that the question contains a contradiction in terms. As well suppose that there is human interest in a treatise on differential calculus as in a law book! It is true that to those who know the story of the development of mathematical science and its connection with the progress of civilization, even calculus has an appeal all its own, but to the general reader, the proposition is not self-evident. Neither is it self-evident that law books have any interest that is not purely utilitarian. When seen in a lawyer's office, or on the shelves of a great library, law books appear to be only the uninteresting tools of a trade. They lack that diversity of form which attracts the eye and arouses the curiosity. There they stand, row after row, uniform in binding, in color, and in size, distinguishable from each other only by different stages of dilapidation and decay. And if the layman has the hardihood to look into these books on pleasure bent, and not in pursuit of necessary information, is any better impression given? Perhaps he has selected one of the Year Books (the earliest reports of law {16} cases)

[†] When *Men and Books Famous in the Law* was first published in 1921, he was Associate Professor of Legal Bibliography and Law Librarian at Columbia University Law School. Numbers in {brackets} indicate pagination in the 1921 edition, in which Chapter I began on page 15.

and he finds that it is written in a mongrel kind of French, and printed in a type that confuses the eye. Or he has hit upon some modern law report containing the opinions of judges who delight in technical terms and use an involved style which repels the intellect. Or he attempts to read a statute, and finds that in construction it rivals the intricacies of the longest German sentences, and in the profuse use of synonyms puts Walt Whitman to shame, while wholly lacking his imagery. Or he takes down a ponderous digest, which is apparently made up of a hodge podge of unrelated paragraphs, grouped under mysterious headings, and ornamented with hieroglyphics of combined letters and figures. Or he has in hand a treatise, the title of which conveys no meaning to him and the contents of which seem to defy comprehension. So far, it must be admitted that law books are forbidding, in whatever superficial way we look at them. They do not have the attraction of a brightly jacketed novel, nor are they "easy reading" to the uninitiated.

Granting all this, it does not follow that, to the discerning reader, law books are devoid of human appeal. Overcome the natural repugnance of the layman to law books, examine them at first hand, think of their authors as living men, give even so brief attention to technical terms as is required of the operator of an automobile, and law books take on a new aspect.

Law books have a human appeal because of what they contain, and what they represent in the history of society; because of their place in English literature, because they are impressive historical and biographical documents; and because of the vicissitudes through which some of the great books have passed. {17}

THE CONTENTS OF LAW BOOKS

A distinguishing characteristic of law is its universality. Avoid the law as we will, it nevertheless creeps into the language and thought of our daily lives, and becomes part of our domestic, social and political environment. Throughout the ages, it has been a progressive, mobile thing, the result and expression of civilization rather than its source. Law is not divorced from life; it is an intimate part of it. Law is a subject which every era forms an essential stra-

tum in the structure of society. Cleave down through any part of this structure, seeking the foundations upon which modern philosophy, religion, history, economics, and sociology are built, and you come to a layer of law – not lawyer's law alone, but the people's law,– which is the product of human experience. That there is a legal side to nearly every subject of investigation and research is a conclusion that cannot be escaped.

And so, law books, which are the tangible of evidences of what the law is, can no more be set aside as things remote from life, than can the law itself. They are not merely technical books which have application only to a special science of restricted scope, but they have played and continue to play a part in the development of the enduring things of life,– philosophy, religion, social concepts, justice, humanitarian interest, political organization. They record history in its most authentic form. In the statute books are laid down rules for the benefit of all in the preservation of rights, the punishment and correction of wrongs, and the administration of government. The great charters are beacon lights of human progress. In law reports are the conclusions reached by judges in actual controversies between living persons. {18} Motives are shown. Error, enmity, weakness, cupidity, crime are there; but also purity, openness, goodwill and strength of purpose. Life is there with the gloss rubbed off,– tragedy, comedy, sordidness, meanness, manners, customs, superstition, tradition. All are truly pictured here by contemporary evidence. Back of the arguments of contending counsel, back of the opinions and decisions of the judges, is always some story of human interest. It may be only the sordid story of a mismated husband and wife, or of a trivial neighborhood quarrel; but it may be the epic of "big business," or of the tragedy of treason, or of the heroism of a prize crew in a captured vessel. In treatises and commentaries, we find reasoned statements of the law under which men live, discussion of legal concepts; of human significance and philosophical import, reflecting the best thought of the time in which they were written, and sometimes filled with the personality of their authors.

LAW BOOKS AS LITERATURE

That law books as a class are not *belles-lettres* may be taken for granted. As we know them today their chief characteristics are not beauty of thought or elegance of style, but accuracy and clarity of statement often at the expense of style. Yet law and the politer forms of literature are in their origins closely akin. Before the use of writing, the poet, lawyer and historian were one. It was by act of memory, and by constant repetition, that the story of battles, of unusual events, and the record of customs were handed down from generation to generation. To assist the memory, says Jeudwine (The Manufacture of Historical Material, p. 14), "the help of rhythm, of musical sound, of polished verse, was called in, in all the literatures of all the nations of which we {19} have knowledge, to make endure in the mind of the bard the doubtful wanderings of the law, the uncertain event of the battle, the remote birth and origin of the race." Thus the poet, lawyer and historian were combined, and the poet, by the very act of putting customary laws into verse for the purpose of preserving them, was an interpreter and often a creator of law. The poetic character of early oral versifications of law has survived the advent of printing, and we find that many charters, famous statutes, forms of pleading and judicial oaths in use to-day in the courts of law, flow from the tongue in poetic metre. They have the same musical quality and rhythmical cadence as have chants and responses in the English prayer book. A serious attempt to use rhythm and rhyme to assist the memory and emphasize the chief points of law is found in the "Reports of Sir Edward Coke, Kt. in Verse," published in 1742, in which each case in eleven volumes of his Reports is put into a couplet.

The language and style of the great English law books, while affected by the technical character of their subject-matter, and by the development of law as a profession, are no more complex and disconcerting than the language and style of theology, philosophy or ethics. The books take their characteristics from the period in which they were written. For example, in the statutes, reports, and treatises of Elizabeth's reign, we have the prose of writers contemporaneous with Shakespeare. The law books of the next reign are in the

style of the King James version of the Bible. The involved, fulsome, florid style of Coke was not his creation, but was in common use by the learned.[1] {20}

Conceiving of literature as made up of books which "are marked by elevation vigor and catholicity of thought, by fitness, purity, and grace of style, and by artistic construction," many of the great law books in every period since the beginning of law printing are found to come within this definition. They possess much more than mere accuracy and c1arity. Their style and rhetorical construction are influenced by the nobility, dignity, and rugged originality of their subject-matter. Examples of legal writings of high literary quality may be found in forensic oratory, and many judicial opinions are without doubt works of literature. They have breadth of view, vision, sympathy, and lofty perception, expressed in a pure and facile style. The prefaces of law books – reports, treatises, digests,– are often fine examples of the art of the essayist. The Bills of Rights in written constitutions embody noble concepts in noble language. The preambles of the early American and English statutes, though sometimes fulsome, are yet fine products of moral, religious and patriotic thought. The Commentaries by Blackstone and Kent, and the monographs by Bigelow, Holmes, Robinson, Odgers and Sugden, are the work of masters of English style.

LAW BOOKS AS HISTORICAL AND BIOGRAPHICAL DOCUMENTS

One of the mistakes of those who have not cultivated an acquaintance with law books is to assume that they are products of the labors of extraordinary persons who have little in common with the rest of humanity. How absurd this is, is seen as soon as we admit the universal application of the law, the consequent scope of law books, and the many attributes of literature which they possess. {21} How comes it that such books have been written, if there are not great personalities back of them? Not negligible as persons are those who have drafted the great charters and statutes, who in great

[1] *See* Beer, Thomas: Coke Literature, Ohio State Bar Association, 30: 182-206.

judicial causes have written epoch making opinions and reached enduring decisions, who have composed with creative genius the classical treatises of the law. Nor were they mere clerks who compiled the great law dictionaries, abridgments and digests based on the source-books of the law. Even those men were notable in their times, some of them judges and dignitaries of state. And so it is that if we inquire when, where, and by whom the great English and American law books were produced, we find ourselves in the realm of history and biography. For instance, to provide a historical setting for the books whose story is told in subsequent chapters it has been necessary to range superficially through a period of more than 450 years, from 1422, when Littleton was born, to 1881, when ended the great suit of Lawrence v. Dana. The story of Littleton begins in a tiny village in England of the Wars of the Roses. It is not yet ended. Cole and Cowell draw us into the London era of Elizabeth, James I., Charles I. and the Protectorate. They were contemporaries and associates of a group of men and women whose names are by-words of history, literature, politics and religion – Shakespeare, Marlowe, Bacon, Archbishops Bancroft and Laud, and the Duke of Buckingham. Cosell was a representative of the Civil and Ecclesiastical Law, and held a chair at Cambridge. In the combined story of Cowell, Coke and Bacon we come into contact with two great legal controversies – that between the Church and the common Law, and that between the latter and the Courts of Chancery. In the political arena, {22} they illustrate the contest between the Crown, with its prerogatives, and the House of Commons. With Blackstone we visit Oxford, see a picture of academic life in the early years of the eighteenth century, and learn how University teaching of the Common Law in England began. The influence of Blackstone reached across the Atlantic, and his work, was taken up by James Kent. In following his career, and that of Livingston, we learn something of Revolutionary days in the Colonies, of interruption to the education of college students by the advent of war, of readjustment when war had ended, of the creation and development of the United States as a sovereign state, of development of courts of law and equity in this country of politics and the play of personal forces. Blackstone's

Commentaries are the product of Oxford lectures, Kent's are the product of legal teaching in the early days of Columbia University. In his own account of these lectures and the book which grew out of them, we have a first-hand view of college life in America before 1830. Livingston and Wheaton were contemporaries of Kent, and all three were associates of Hamilton, Adams, Jefferson, Webster, Jackson and the other great figures of the time. Livingston's story includes life in New York City, in New Orleans just after the Louisiana Purchase, in Washington, and in the court of France during the time of Louis Philippe. Livingston's great controversy with Jefferson over the Batture lands produced classic examples of controversial literature, which in spite of the bitterness of the parties are models of learning, argument and deduction. And throughout his life he was possessed of a great purpose to reform the system of criminal law in the United States. His purpose found expression in a work the influence of{23} which spread to the whole world. Henry Wheaton, a student, lawyer, writer and diplomat, leads us, in the events of his life, from Providence to New York, thence to Washington, thence to Copenhagen and to Berlin. The story of his books is the story of his daily life in the realms of literature, history, and private and public law. His United States Supreme Court Reports form a chapter not only in his own life but in that of a great body of Federal judges during the formative period of the United States government. His great work on international law was the subject of a bitter personal quarrel and legal battle between two men famous in their own right in American annals, William Beach Lawrence and Richard Henry Dana.

Great law books are so much a part of the social fabric of their times that they are in themselves historical documents. They are as truly biographical documents in the lives of their authors, most of whom are men of note quite aside from their fame as law writers. Easily obtained evidence leads to the conclusion that these men were not "mere lawyers," and that the human side of their characters was developed to an unusual degree by contact with life in all of its kaleidoscopic aspects. And while they influenced the world through their books, their own lives were often very much affected

by them. For instance, Cowell's life was ruined by his dictionary, Coke lost his Chief-Justiceship partly on account of his law reports, Blackstone would probably have been a mediocre practicing attorney to the end of his days had he not had the impetus to lecture and to write. He became a judge on the strength of the reputation derived from his Commentaries. Kent changed the *decrescendo* of forced retirement from the chancellorship of New York, into a {24} *crescendo*, in the waning years of his life, by writing his Commentaries. Livingston preserved himself from despair and the evil effects of rancor in the face of financial disaster and a generation's unsuccessful struggle with fortune, by the pursuit of an ideal. While he succeeded eventually as a lawyer, statesman, and diplomat, it was his Louisiana Penal Code, the expression of a humanitarian ideal, which made his success something more than a personal victory.

THE STORY OF THE BOOKS THEMSELVES

If, in the following chapters, the error is made of bestowing fulsome praise upon the men about whose books the sketches are written, it is because the initial appeal grows as one studies their work, and realizes that these men wrote, hampered by all those human limitations which most of us use as excuses for lack of accomplishment. With two exceptions, the books were written while their authors were under the stress of other labors. Bibliography would be a dry and uncongenial task if it were not for biography. Bibliography, in its present meaning, is the systematic description of books with special reference to their authorship, titles, publishers, dates, history, editions, subject-matter and value either material or intellectual. A list of books, however great they may be, however many editions they have run to, and however accurately they may be described, makes no very readable page. But biography adds the leaven of sympathy which lightens for the booklover the sad loaf of bibliography. Some books there are, however, which have romantic stories of their own, have passed through unusual vicissitudes, and have survived disaster. The {25} life of these cannot be shown by annotated lists, but must be told in connected narratives, which bridge gaps between successive editions. It was not mere chance

that made it a tradition in the Inns of Court to read Littleton's Tenures completely through each Christmas day, just as many read Dickens' Christmas Carol. The book was the product of a universal human impulse. It was written by a famous judge for the use of his son in the study of the law. It had and still holds the quality of fatherly advice. Poor Cowell's Dictionary, which compassed his ruin, has the distinction of having occupied the attention of King James I., both Houses of Parliament, several impressive committees, and the Court of King's Bench for upwards of a month. It was "suppressed" by proclamation under the King's hand, survived the ordeal, and in a new edition became a participant in the trial and condemnation of Archbishop Laud. Each time that it was attacked, new champions rose up in its defense. Coke's Reports were never suppressed; but they were adjudged by the King in Council and by a special committee of judges to be filled with error put there with calculated purpose. Coke was commanded to revise and correct them. This he never did, and so, if Coke really invented some of the opinions, he was not only an interpreter of law on the bench and a reporter of decisions, but in his own private person a lawgiver. Coke's Institutes also went through vicissitudes. The first, Coke Upon Littleton, was published in Coke's lifetime, but the manuscript of it, together with that of the second, third and fourth parts, was seized by Royal command while their author was on his deathbed. They were not published until ten years later, but one of them is said to have played a part in the preliminaries to overthrow {26} of Charles I. To Viner's Abridgment, a ponderous work produced by great industry, but yet only a humble index, the world is indebted for the establishment of the chair at Oxford which Blackstone occupied when he wrote his Commentaries. The latter, far from being unconnected with life, raised a religious and political controversy the literature of which fills a whole volume. The book itself, extravagantly praised and cordially hated, "created by repulsion the later English school of jurisprudence" Livingston's Louisiana Code, the work of a lifetime, was destroyed by fire on the very night when it was completed. The author rewrote it, and then suffered the disappointment of having it rejected by the state for which it had been prepared. Wheaton's

Elements of International Law was the cause of a controversy which suspended until the present its career as an American publication. It has thus far been republished only in England.

Such events in the life of books give personality to them. They are, in themselves, characters in history, members of society, chief citizens in the commonwealth of literature.

Law books have a human appeal because of their contents and the pictures of life which form their background, because they are elemental forms of literature, because they tell the story of men and events, and because they have themselves undergone and survived vicissitudes. For other reasons, which cannot here be dwelt upon, great books of the law should be known to every cultured person. Philosophy, religion, science, the fine arts, engineering, medicine, all have their literary heroes. So has the law, and legal literature is in the first rank in point of time and of importance in the progress of {27} human society. In the infancy of bookmaking, law and lawyers vied with theology and the priesthood. In the study of the history of printing, law books form an essential element; and in the history of thought, they challenge attention. To such names as Aristotle, Machiavelli, Bacon, Hume, Locke, Beethoven, Michael Angelo, Cellini, Shakespeare,– to select a few at random,– there must be added those of Glanville, Bracton, Littleton, Coke, Blackstone, Kent and Story.

The preceding general allegations undoubtedly need to be supported by a bill of particulars. Some such requirement the following chapters are intended to meet. But dealing with only a few books, they will not illustrate every phase of the human appeal which has been attributed to law books. The method of presentation does not admit of extended discussion either of the contents of the selected books or of their literary qualities. It does, however, allow the books to speak for themselves as personalities which have survived the test of time, and have existed as the associates of great men and events. ❶

BOOK REVIEW

MEN AND BOOKS FAMOUS IN THE LAW

Henry deForest Baldwin[†]

This small volume traces in the broadest outline the lives of a few law writers, and more especially the story of their legal writings, the inception, production, and vicissitudes of works which for the most part have become classics in legal literature. It contains chapters on Cowell's Interpreter, Lord Coke and the Reports, Littleton and Coke upon Littleton, Blackstone and his Commentaries, James Kent and his Commentaries, Edward Livingston and his System of Penal Law, and Henry Wheaton, together with an appendix containing bibliographical suggestions. The book is also illustrated with portraits of the writers who are the subjects of the chapters. The chapters which deal with American authors seem on the whole better than those which deal with English authors. One might question the selection of authors and books, yet criticism is disarmed at the outset, for Mr. Hicks frankly admits that "out of the hundreds of authors and books that might have been considered, the selection of these few has been made almost at random – because they happened to be of special interest to the author" (p. 7).

Indeed to measure adequately the function of the book requires an appreciation of what the author has consciously undertaken. In Mr. Hicks's own words, "no pretense is made of giving an adequate picture of the contents of the books. That would require a technical presentation which would defeat the end sought. Nor is a complete picture of the authors of the books given. The studies are merely impressionistic sketches of men and books famous in the law, with glimpses here and there of the events and people of the time in

[†] This review originally appeared at 31 Yale L.J. 793 (1922).

which the books were written, published, and read" (p. 7). It seems to be assumed that the present methods of legal instruction are producing a body of lawyers who, while more scientific than their predecessors, are becoming progressively ignorant in the classics of their profession. "The figures of the great lawyers and commentators treated of in this volume, so vivid and outstanding to law students of an earlier day, are becoming shadowy and indistinct to the students and the lawyers of this generation" (p. 11). The purpose of the book is to inspire students to know more of the makers of the great law books, to the end that much of educational value may be gained from a study of the men and books that have influenced to a marked degree Anglo-American legal development. The author goes further and maintains that law books have a human appeal and should be a part of the general knowledge of every cultured person. The book, therefore, is directed to two essentially different classes of readers. The attempt is worthy of praise; its success is open to question. The chapters are too sketchy to give any real sense of satisfaction to a reader trained in the law. Even a student of law is worthy of more substantial mental diet. Sketchy as the chapters are they are not calculated to appeal to the general reader. The book is too much of the commentary and too little of the informative, and the commentary is upon matter of which the lay reader is usually ignorant. One might go further and take issue with Mr. Hicks on his fundamental proposition that law books have a universal human appeal. The law itself is catholic; its subject matter embraces all human activities, touches all the social relations, but it does not follow that books about the law have a general human interest. It is to be feared that Bracton, Glanvill, Littleton, Coke, and even Blackstone will continue to be of interest almost solely to the historian. ❶

BOOK REVIEW

MEN AND BOOKS FAMOUS IN THE LAW

William Edward McCurdy[†]

Hamilton Odell, a distinguished member of the New York Bar, who died a few weeks ago in his eighty-eighth year, is said to have found keen enjoyment during his last years in reading the Advanced Sheets of the New York State Reports. But it takes a long life devoted to the law to enable a man to find enjoyment and relaxation in such a pastime. A taste for law literature is a cultivated taste. The flood of new law literature, which is overwhelming to a practicing lawyer of to-day, has made the task of keeping up with even the latest decisions an immense one, and discourages lawyers, young and old, from seeking general improvement or relaxation in the reading of reports. I have no doubt Mr. Odell had read Coke's Reports, but I doubt if there are half a dozen of his survivors practicing in New York City who have done so. Except for selected cases, there are probably few lawyers to-day who have any precise familiarity with the ancient literature which instructed the able lawyers who distinguished our profession in the early half of the last century.

Professor Hicks has performed a great service to the legal fraternity, and indeed to the educated public at large, in giving us this thoroughly entertaining little volume. We have here an easy and pleasant means of obtaining a little knowledge of certain legal writings which are monuments in the history of the law. And the sketches of the seven great lawyers whose fame has been perpetuated to our time because of their authorship of these historic documents supplies a need of the profession. This book will fit into a fair

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[†] This review originally appeared at 35 Harv. L. Rev. 354 (1922).

sized pocket. It contains interesting and human facts about the men and books it tells about. It will shorten a railroad journey for any educated person, even if he has not had the advantages of pursuing the law as a calling, and will make a lawyer during a quiet evening forget about a dissatisfied female client or the lack of intelligence displayed by a jury.

The great men whose famous books have led Professor Hicks to draw them to our attention were not closet students remote from the great world. Indeed the writings of three of the four Englishmen he treats of, got them into considerable political trouble.

The prerogatives of the King; a disposition in some quarters to extoll the excellence of the Civil Law in comparison with the Common Law of England; the powers of the Court of Chancery to take jurisdiction of cases which had already been decided by the Court of King's Bench; and the "liberties of Parliament" aroused violent feeling among politicians as well as among lawyers during the seventeenth century. It involved some personal peril to write law books in those times.

John Cowell wrote a book on the Common Law of England which won for him some fame. He then proceeded to write another work called *The Interpreter* which was a law dictionary. It is reported that this book gave great offence because of a few statements therein contained. It was brought up in Parliament and received the attention of the King, the Lords Spiritual, the House of Lords, and the House of Commons during a considerable period in 1609 and 1610. All the fuss resulted in the King issuing a proclamation from which we quote a few clauses expressing in the quaint wording of the period sentiments which are not unfamiliar at the present day. After reciting the disposition of "this later age and times of the world wherein we are fallen," "such an itching in the tongues and pens of most men, as nothing is left unsearched to the bottom, both in talking and writing"; "whereupon it cannot otherwise fall out, but that when men go out of their element, and meddle with things above their capacity, themselves shall not only go astray and stumble in darkness, but will mislead also diverse others with themselves into many mistakings and errors; the proof whereof we have lately had

by a book written by Dr. Cowell called 'The Interpreter."' Wherefore, to prevent the said errors and inconveniences his Majesty "resolved to make choice of Commissioners, that shall look more narrowly into the nature of all those things which shall be put to the press."

But it was not much easier to suppress a published book in 1610 than it is to-day. While Cowell was put under technical arrest during the investigation of his work, he was not actually restrained of his liberty. "Like a wise man he took his leave of the press, and retired to his colledge, and his private studies." A generation later his book figured in the trial of Archbishop Laud, it being charged that Laud had connived at its being printed in 1637.

Lord Coke's character and stiff-necked defiance of the King and his Lord Chancellor have made his career as a judge and politician as famous as his reports and his annotations of Littleton. When the King asked him whether if at any time in a case depending before the judges which his Majesty conceived to concern him, either in power or profit, and thereupon required to consult with them, and that they should stay proceedings in the meantime, they ought not to stay accordingly, the Lord Chief Justice of the King's Bench said for answer that "when that case should be, he would do that which should be fit for a Judge to do."

In a land where we have so many elected judges who receive their positions on the bench from some powerful politician, this famous story cannot be repeated too often or made too familiar.

But Coke was removed from his office as chief justice. He suffered for his judicial courage and integrity, just as judges in our own time have been refused a re-election, because of their unwillingness to yield to the demand of some powerful politician. It is pleasant to learn, however, that having been retired as a judge he was elected to Parliament and immediately became a leader and an advocate of the "liberties of Parliament." That it was as dangerous to incur the disfavor of the King in Parliament as on the bench is shown from the fact that at the dissolution of Parliament he was arrested and confined in the Tower for nine months.

Blackstone's reputation was based on his *Commentaries*, first is-

sued in 1765, and still largely used by law students. Yet he too had his human side. Professor Hicks tells us that the Commentaries were written late in the evening with a bottle of wine before him "in order to correct or prevent the depression sometimes attendant upon close study." He acknowledged and lamented his bad temper.

Kent's *Commentaries* were but a small part in the busy life of the judge. We are told that the lectures upon which they were based were delivered to a very small assemblage of a few students and lawyers. In the winter of 1794-5 he delivered twenty-six lectures, two a week, to seven students and thirty-six gentlemen, chiefly lawyers and law students who did not belong to Columbia College, where he was Professor of Law. The next year only two students put in an appearance and to these he read thirty-one lectures.

Our author has given us a few pages of Kent's notes written upon his copy of Edward Livingston's *Penal Code* which show how Kent annotated what he read. This is both interesting and instructive.

Edward Livingston occupied many distinguished positions. As a young man he was elected to Congress. Shortly afterward at the age of thirty-seven he became Mayor of New York City, and United States Attorney for the District of New York by appointment of President Jefferson, and he held two of these offices, if not all three of them, at the same time. Later he became again a member of Congress and a United States Senator from Louisiana. President Jackson appointed him Secretary of State in 1831, and two years later he was appointed American Minister at Paris. He attained all this recognition notwithstanding the fact that his career was burdened through the defalcation of a subordinate in his office as Mayor of New York. He resigned his office of Mayor and accepted responsibility although none of the missing funds had passed through his hands. The debt was finally paid, principal and interest, but not until within a few years of his death. This misfortune led to his removal to New Orleans where his abilities were promptly recognized. While there he found time to prepare a Civil Practice Act which was adopted by the legislature in 1805. He was a member of a Commission to revise the Civil Code of the state, whose work for the most part was adopted by the legislature. But his great interest which oc-

cupied him during his whole life was in the preparation of a penal code. This work challenged the attention of the foremost thinkers of the world and is his great monument. Although his penal codes were never formally adopted in the United States "they constitute a thesaurus from which the world has ever since been drawing ideas and principles."

Professor Hicks' book serves to remind us that the law offers fame of an enduring sort for scholarly and literary talent as well as for judicial eminence and brilliant advocacy. ❶

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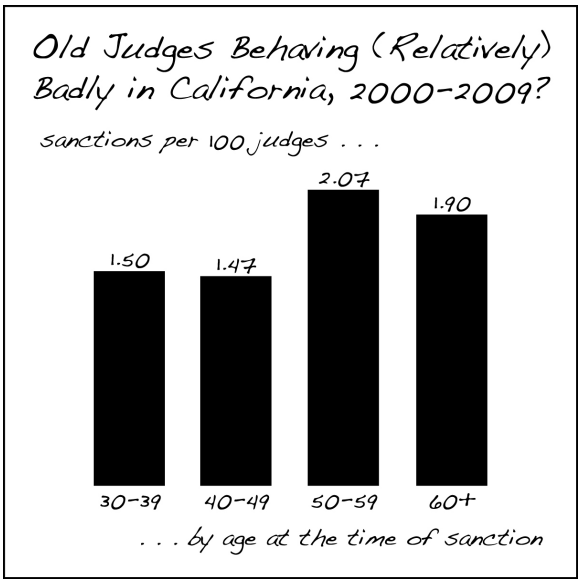

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About the cover

Old Judges Behaving (Relatively) Badly in California, 2000-2009?

By Ross E. Davies. Source: State of California Commission on Judicial Performance, *Summary of Discipline Statistics 1990-2009* at 11 (2010) (Table 5: Age at Time of Misconduct), cjp.ca.gov/res/docs/miscellaneous/Statistical_Report_1990-2009.pdf (vis. July 8, 2012).

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INTRODUCTION

Adam Aft & Craig D. Rust[†]

With our second issue it is our pleasure to publish two new articles. First, we present *Take This Job and Count It: An Analysis of Law School Employment Data*, written by Kyle P. McEntee and Derek M. Tokaz, two members of "Law School Transparency," an organization dedicated to encouraging and facilitating the transparent flow of law school consumer information. Second, we are publishing *A Medical Liability Toolkit, Including ADR*, a study authored by Professor Michael Krauss, a leading scholar in the field.

Law School Transparency's "primary goal is to help inform prospective law students about the value of a U.S. law degree, using dialogue and advocacy to improve the quality and presentation of post-graduation employment outcomes."[1] Part of achieving this goal involves harnessing the power of data and making it accessible. With that end in mind, Mr. McEntee's and Mr. Tokaz's article compiles newly released law school employment data in a manner which we believe prospective law students will find both eye-opening and invaluable in making informed decisions about which schools to attend, or even about whether they should pursue a law degree at all. The authors observe startling trends in the data, such as how a law school admits a median student in the 90th percentile in test scores, yet leaves its graduates with little better than a coin flip's chance of obtaining legal employment after law school. They also challenge the utility of the *U.S. News* law school rankings in predicting employment opportunities. Their presentation is visually stunning and their data based legal observations are right at home in the JLM.

Professor Michael Krauss's *Toolkit* deals with data in a more ab-

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[†] Co-Editors-in-Chief of the *Journal of Legal Metrics*.

[1] www.lawschooltransparency.com/about/mission/.

stract sense. Data, after all, are not limited to charts and graphs – but comes in tabular form too. The *Toolkit* is a comprehensive review of the status of medical malpractice reforms in the 50 states in table form, allowing scholars and practitioners in the field to get a macro sense of developments in their industry. While the JLM's core mission will continue to be publishing excellent scholarship analyzing more traditional "metrics," this piece accomplishes many of the same goals by removing the focus from the minutiae of legal debate and discourse and using data to analyze what is actually happening in insurance markets across the country, on which we imagine individuals ranging from other scholars to policymakers will rely.

We hope you enjoy reading these two articles as much as we have.

# # #

TAKE THIS JOB AND COUNT IT

Kyle P. McEntee[†] *& Derek M. Tokaz*[*]

Each year, tens of thousands of people decide to attend a law school in the United States. There are currently a few hundred options, with around 200 accredited by the American Bar Association ("ABA").[1] ABA-approved schools share considerable similarities with one another when it comes to the basic model for delivering legal education. There are, however, considerable differences in size, location, culture, class credentials, and most notably, job outcomes and reputation at the local, regional, and national levels. ABA accreditation operates only as a floor for quality assurance, signaling that a school meets minimum standards.[2] Prospective students must find other means to compare programs and decide where to apply and attend. Much to the chagrin of legal educators, prospective law students often turn to *U.S. News & World Report's*

This article is meant to be read in full and in context, any partial excerpt of this article will not provide an accurate portrayal of the authors' ideas or proper representation of their work. Prior to utilizing any portion of this work please download a complete copy available at the Law School Transparency Website (www.lawschooltransparency.com/score-reports/) and the Journal of Legal Metrics Website (www.journaloflegalmetrics.org/). © Law School Transparency 2012.

[†] Executive Director and Co-Founder, Law School Transparency, J.D., Vanderbilt University Law School. Law School Transparency ("LST") is a nonprofit legal education policy organization. Its mission is to improve consumer information and to usher in consumer-oriented reforms to the current law school model.

[*] Research Director, Law School Transparency, J.D., New York University School of Law. The authors would like to thank Patrick J. Lynch for his valuable contributions to this Article as well as to improving transparency in U.S. legal education.

[1] More specifically, the ABA's Section of Legal Education and Admission to the Bar ("Section of Legal Education") accredits law schools. *About the Section of Legal Education*, AMERICAN BAR ASSOCIATION, www.americanbar.org/groups/legal_education/about_us.html (last visited June 27,2012).

[2] The minimum standards provided by the ABA in its accreditation process fail to address a number of measures of a program that affect quality and would be important for applicants to know in deciding whether or where to attend law school. This article focuses on graduate employment outcomes as one critical set of criteria that are incredibly important for evaluating programs but for which there are no minimum standards set by the ABA.

"Best Law School" rankings as their primary sorting mechanism.[3]

But, best at what? With all due respect, *U.S. News* does not say. Even without a robust and clear ranking objective, *U.S. News* enjoys immense power by combining "best" with easy-to-consume output. Simplicity makes the rankings appear authoritative and valuable. The rankings rat race makes them a fixture of obsession and derision for deans cast under their spell, further justifying their authority and value (albeit in a backwards sort of way).[4] Although these rankings are omnipresent in both casual and sophisticated conversations about attending law school, they are not immune to competition. In particular, packaged post-graduation employment data can (and, we argue, *should*) compete with the *U.S. News* rankings. A competitor will most likely succeed if its quality obviously eclipses that of the *U.S. News* rankings, while remaining simple enough to capture the intuition and attention of those making application and enrollment decisions.[5]

As it happens, the quality of the *U.S. News* ranking system suffers from being too simple. It incorporates a heap of data into composite figures, and then orders schools from highest to lowest. The ordinal structure encourages a relativistic analysis. *Is this law school better than that law school?* Under the *U.S. News* system, value is defined as relative superiority over another program. No ABA-approved law school is left out, providing that "enough key statistical data" suffices for inclusion as part of the "best law school" picture.[6] By their design,

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[3] For an extensive discussion of some tools prospective law students use, *see* Kyle P. McEntee and Patrick J. Lynch, *A Way Forward: Improving Transparency at American Law Schools*, 32 PACE L. REV. 1 (2012).

[4] The rat race further supports the belief that these rankings are relevant to sound consumer choice. In other words, if the law schools pay attention to it, then *it must signal real value*.

[5] Only recently has employment data transparency become a priority in legal education. Today, far more employment data exist for public consumption than ever before. Some of this has happened through voluntary disclosures by schools following immense external pressure, but most has been as a result of the ABA deciding to more carefully regulate law school employment data collection, reporting, and disclosure.

[6] *See Methodology: Law School Rankings*, U.S. NEWS & WORLD REPORT, www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings?page=3 (last visited June 27, 2012) ("Unranked means that *U.S. News* did not calculate a numerical ranking for that law school. The school or program did not supply *U.S. News* with enough key statistical data to be numerically ranked by *U.S. News*. Schools or programs marked as Unranked are listed alphabetically and are listed below

these relative rankings serve to rubberstamp decisions by prospective students who already decided to attend law school and just need help in deciding where to apply or enroll. The effective message is the same as the ABA's stamp of approval: one of these choices is the right one for you (although some may be more right than others).

In relying on the ABA's accreditation standards to determine fitness-for-rank, the *U.S. News* rankings assume that the expected benefits of the programs exceed their costs. If we reject the premise that ABA approval automatically renders every school a sound pursuit of time and money, then it follows that there may exist some number of schools that are ABA-approved yet unfit for attendance – their expected costs exceed the expected values of degrees that they confer. But the *U.S. News* ranking system does not contemplate leading some users down a path that does not end at a law school. While neither implicitly nor explicitly suggesting alternatives sounds perfectly reasonable for law school rankings, it runs counter to the equally commonsense notion that some choices may simply be unwise.

For all the influence of the *U.S. News* rankings, lacking an internal risk signal is an enormous structural flaw.[7] A proper law school sorting mechanism should come equipped with an exit – put differently, it should cause the reader to consider whether it might make sense to simply not attend law school. While *U.S. News* assuredly considers its structure a feature rather than flaw, and encourages students to use other tools in addition to their rankings,[8] there is no exit to the sorting system.

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those marked as Rank Not Published.").

[7] This sense of the rankings being 'flawed' is quite different from the normal criticisms levied against the magazine, usually in the name of law schools or the ABA. We do not reject the idea that an independent third party should be in the business of comparing law schools or influencing how they manage their programs. If it is clear that neither law schools nor the current regulatory system is capable of informing prospective law students in a fair and accurate manner, then someone else should do the job. Our critique is that the rankings do not adequately identify schools that provide sufficient value, or those which should be avoided. This is problematic from a consumer choice perspective, particularly given the projected debt levels for people who choose to pursue a juris doctorate ("J.D.").

[8] Bob Morse, *Law School Rankings Too Powerful, Writers Say*, MORSE CODE BLOG (Feb. 23, 2012), www.usnews.com/education/blogs/college-rankings-blog/2012/02/23/law-school-rankings-too-powerful-writers-say.

For all of its flaws, prospective law students use the *U.S. News* rankings to find the school that best meets their personal and career objectives. One popular belief is that the *U.S. News* rank of a law school is strongly correlated with the first job it affords graduates. The lack of transparency and meaningful analysis of school-specific job outcomes for years has propagated this myth. Fortunately, we now have access to data that allows us to review actual employment outcomes rather than supposing that the *U.S. News* rankings work as a reliable proxy. Our new tool utilizes graduate employment data to help prospective students make application and enrollment decisions.

For many prospective students, deciding whether to attend any given law school requires two considerations. First, is attending law school, in general terms, better than other education and professional paths? We believe that before deciding which law school is the best option, prospective students should ask which schools, if any, make sense. Second, do any of the specific schools they have been admitted to fulfill their reasons for wanting to attend law school generally? Relativistic rankings do not encourage prospective students to ask this question, instead jumping to the question of which of the options is best, hiding the possibility that the student may actually be deciding which of the options is least bad.

We do not want to make this mistake. Rather than using a ranking system to determine worth, we use numbers that correlate to the chances of becoming a lawyer and chances of underemployment to sort schools. Our new tool's "escape hatch," so to speak, stems from the tool's structure. If the chances get too low for a user's taste, he or she is immediately confronted by this fact. In other words, the tool signals value by outcomes, rather than by being relatively better than another program.

Part I introduces our new online tool, the Law School Score Reports, and the methodology and reasoning behind its three core scores: the Employment Score, the Under-Employment Score, and the Unknown Score. Part II summarizes the scores from 195 ABA-approved law schools.[9] Part III discusses the problems with the *U.S.*

[9] 195 law schools reported employment data to the Section of Legal Education. Three Puerto Rican schools did not report data; other ABA-approved schools, including the

News rankings as a proxy for employment outcomes using the Employment Scores and Under-Employment Scores. Finally, Part IV discusses how to use the tool. Ultimately we hope to have produced a tool that legitimately impacts and helps application and enrollment decisions.[10]

I. LAW SCHOOL SCORE REPORTS

The Score Reports use employment data to help prospective students sort schools. Very few law schools are legitimately national schools, so the sort function operates on job destination data. In short, the Score Reports are a collection of reports designed to home applicants in on the schools and locations with a synergetic history. Instead of putting all schools on the same scale, we encourage prospective students to think more narrowly about schools based on the career objectives that the schools can help the students achieve. Unless our tool can help prospective students make decisions based on their personal needs, the tool will fail normatively and practically. Each piece of the Score Reports has been designed with this objective in mind.

To begin, users first indicate where they want to work. For example, if a user wants to work in New York, she will pull up the New York Score Report, which includes all schools known to place graduates in New York.[11] Likewise, if a user wants to work in Tennessee, she will pull up the Tennessee Score Report. Once the search is narrowed geographically, users can sort the relevant schools using a variety of simple metrics. While the Score Reports include cost data, admissions data, and other critical information, the reports star three proprietary scores based on employment data: the Employment Score, the Under-Employment Score and the Un-

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Judge Advocate General's law school and University of California – Irvine, did not graduate any J.D. students for the class of 2011.

[10] The data underlying our tool is available on our website (www.lawschooltransparency.com/) and the *Journal of Legal Metrics*' website (www.journaloflegalmetrics.org/).

[11] A school is considered to place in a state or region if at least 5% of its graduates obtained a job in that location. It is important to note that schools get credit for *any* graduate working *any* job in a state or region. This could change if schools instead presented data as outlined in the LST Proposal. *See supra* n. 3, at 51. We discuss this weakness *infra* Part IV.C.

known Score.

The Employment Score represents the percentage of graduates who have successfully started a career in the practice of law, though it does not judge the quality of that start. The Under-Employment score represents the number of graduates underusing their skills and credentials, not having successfully started any professional career nine months after graduating law school (shortly after their first loan payment was due). The Unknown Score rounds out the trio, showing how many graduates either did not report what sort of job they had or an employment status at all.[12]

Each of these scores helps to answer a different question. We foresee prospective students using the Employment Score to answer, "What are the chances I will have a legal career?" while the Under-Employment Score answers, "And if I'm not on track out of the gate, what are the chances that I underutilize the skills and credentials I obtain through law school?" The Unknown Score interacts with the two other scores by indicating their degree of completeness and reliability. Each score boils complex data into a single percentage so users can see intuitive, upfront approximations of risk. Whether a user decides a school is too risky because so few graduates successfully enter the legal profession, because so many are underemployed, or because so many are conspicuously absent from the dataset, the user can decide whether a particular score resides in dangerous territory using their judgment, not ours. The underlying structure of the Score Reports recognizes that the ABA's approval does not preordain sound choice, while projecting intuitive information that effectively guides applicants through the admissions process.

From here users begin the process of unbundling the school's outcomes and value. By combining the scores with geographic lookups, the Score Reports help users begin to understand how well

[12] The three scores will not add up to 100% because there are jobs that do not fit within the Employment or Under-Employment Scores, such as jobs that require professional skills or training, or where the J.D. is a demonstrable advantage. Little is known about these jobs, including what the graduates are actually doing and whether graduates would have considered them to be an acceptable outcome when making the decision to attend law school.

individual schools facilitate entry into the legal profession in various markets. This only reflects the beginning for prospective students. They will still want to understand the kind of legal jobs graduates obtain, how much these jobs pay,[13] and how much attending a school will actually cost. They will want to know whether they can get in, whether the education they receive will be high quality, and whether the education they receive will be relevant to their career aspirations. There is no magic potion that can reduce the relevant data into a single metric, but by coupling basic sorting with more detailed information in individual school profiles[14] we can simplify things to a useful and less overwhelming degree. Using this framework for choosing schools can help prospective law students apply with a more secure idea of how well different schools meet their individual career objectives. Nevertheless, at the end of the day, prospective students will need to continue investigating for themselves.

The remainder of this Part explains our scoring system more thoroughly. In particular, we discuss the reasoning behind each score, the steps we take to calculate each score, and a brief discussion about some job categories we notably included/excluded from the Employment Score and Under-Employment Score.

A. The Employment Score

We want our Employment Score to have value for the majority of prospective law students, so we start with the conventional assumption that the bulk of people attend law school aiming to pursue

[13] A note about salaries: the Employment Score does not distinguish jobs based on salary. First, salary response rates are too low, especially among lower paying jobs, so we cannot adequately distinguish jobs on these grounds. Further, the acceptability of certain salaries varies widely by person. A job paying $45,000 may be perfectly acceptable to one who has graduated without debt, especially if the job is in the practice setting and/or area the graduate prefers. The same job may be ruinous to a student who has graduated with $250,000 of debt. The salary situation is further compounded by government hardship programs and school-provided loan repayment assistant programs. We think it makes the most sense to leave it out of the score, and to make it easily accessible for students to make their own judgments.

[14] Individual school profiles include all of the raw employment data we have for the school, along with various summaries of placement, additional scores, some basic rates, and as much salary information as we have collected.

a career practicing law. As such, the Employment Score reflects employment outcomes that proxy a successful start to a legal career. This is not a measurement of whether the graduate is in a position to repay his or her debt, or whether the outcomes justify the cost of attendance. Further, it is not measurement of the preferability of job outcomes. The score is about practicing law and becoming a member of the profession in more than a nominal sense.

i. Score Calculation

1. Start with jobs that require bar passage. This is the intuitive starting point, since people in these jobs are generally engaged in the practice of law.

> **Employed – Bar Passage Required**
> A position in this category requires the graduate to pass a bar exam and to be licensed to practice law in one or more jurisdictions. The positions that have such a requirement are varied and include, for example, positions in law firms, business, or government. However, not all positions in law firms, business, or government require bar passage; for example, a paralegal position would not. Positions that require the graduate to pass a bar exam and be licensed after beginning employment in order to retain the position are included in this category. Judicial clerkships are also included in this category.[15]

2. Remove graduates in Part-Time positions. These graduates are underemployed, as explained in the Under-Employment Score section.

> **Part-Time**
> A part-time position is one in which the graduate works less than 35 hours per week.[16]
>
> **Full-Time**
> A full-time position is one in which the graduate works a minimum of 35 hours per week.[17]

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[15] Art Gauido, *Memorandum Regarding Reporting of Law School Placement Data*, AMERICAN BAR ASSOCIATION (Nov. 8, 2011), www.americanbar.org/content/dam/aba/administrativee/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2011_questionnaire_memo_re_placement.authcheckdam.pdf.
[16] *Id.*
[17] *Id.*

3. Remove graduates in Short-Term positions. These graduates are underemployed, as explained in the Under-Employment Score section.

> **Short-Term**
> A short-term position is one that has a definite term of less than one year. Thus, a clerkship that has a definite term of one year or more is not a short-term position. It also includes a position that is of an indefinite length if that position is not reasonably expected to last for one year or more. A position that is envisioned by the graduate and the employer to extend for one year or more is not a short-term position even though it is conditioned on bar passage and licensure. Thus, a long-term position that is conditioned on passing the bar exam by a certain date does not become a short-term position because of the condition.[18]
>
> **Long-Term**
> A long-term position is one that does not have a definite or indefinite term of less than one year. It may have a definite length of time as long as the time is one year or longer. It may also have an indefinite length as long as it is expected to last one year or more. The possibility that a short-term position may evolve into a long-term position does not make the position a long-term position.[19]

Note: Jobs that are both short-term and part-time have only been deducted once.

4. Remove Solo Practitioners. We exclude these from the score because starting a sustainable practice shortly after graduating law school is unlikely. This is not to say it is impossible, but we do not know enough about their successes to include it. We do know that these jobs do not come with benefits and that solo practitioners struggle with fee collection, especially early on; thus, these positions have low to no income to start out, in addition to the capital costs required to hang a shingle.

> **Law Firm – Solo Practice**
> The category of "solo practice" applies to a graduate who has truly established his or her own solo practice. It does not apply to a

[18] *Id.*
[19] *Id.*

> graduate who is unemployed, but who may be willing to take an occasional client while still seeking employment.[20]

Note: Solo practitioners that are either short-term or part-time have already been deducted.

5. Divide by the total number of J.D. graduates. The result (a percentage) is the Employment Score.

ii. Notable Exclusions

1. Alternative Careers

There are certainly people who attend law school with other aims, and they may find desirable work outside of the practice of law. By not including these jobs we are not saying they are bad jobs, only that they are not jobs in the practice of law. We also contemplated how including alternative careers would affect the utility of the scores.

For people interested specifically in a non-legal career, including these jobs in the Employment Score would not make the score more meaningful. Such a mixed score would be determined primarily by legal job placements, and as such a mixed legal/non-legal score does not really tell prospective students about alternative job placement. For people interested in only a legal career, the addition of non-legal jobs greatly depreciates the value of the score by including a number of jobs they are not interested in.

The only group that would be well served by a mixed score is a group who would be okay with pretty much any job upon graduation. While there may be some third-year students and recent graduates scrambling for any job they can obtain, we believe few people have such an attitude before entering law school. Further, this group needs only to add the Employment Score with whatever other job classifications they find satisfactory. We feel it is easier for prospective students to add in additional numbers than to try to slice our score apart to find the sector they are interested in.

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[20] *Id.*

2. Solo Practitioners

We chose to exclude solo practitioners from the score for much the same reason as we exclude people taking non-legal jobs. Including solo practitioners makes the score less meaningful for people who are planning to seek traditional employment practicing law. At the same time, including solo practitioners would not make the score more valuable for people who plan to have a solo practice upon passing the bar – employment rates are not terribly meaningful to people planning to be self-employed.

However, solo practitioners may represent opportunities lost for law schools in terms of people who could have been counted in the Employment Score, but self-selected into solo practice. Schools may object because self-selection away from other jobs into solo practice reduces how well the score reflects a school's opportunities. Yet, we submit that people are far more likely to open a solo practice when they do not have other opportunities. If a school prides and sells itself on its ability to incubate solo practitioners, it ought to find another way to prove its graduates are different. We would like to think schools in this category would want to do this.

iii. Debatable Inclusions

1. Judicial Clerkships

Although graduates taking clerkships are not engaged in the practice of law, these jobs count as "Bar Passage Required," and even though they have a definite duration, they count as long-term employment. The reason for treating clerkships this way is that they have long been understood as being even more competitive than law firm employment and leave the graduate with strong career options. Indeed, some judicial clerks receive offers during law school to work at a firm once the clerkship is complete. It is worth noting that there are insufficient published data to support the common understanding of post-clerkship employment, and some anecdotal evidence suggests that even graduates in prestigious one-year federal clerkships are having trouble finding gainful employment these days.[21]

[21] Law schools, with some exceptions, do not typically release data regarding post clerkship

However, at this time we have decided to hold with conventional wisdom on the matter. This is despite the precarious employment situation that results from a clerkship's definitive end date. (In fact, this point applies to our inclusion in the Employment Score of any graduate with a long-term, legal job that has a definite instead of indefinite duration.) At least these jobs grant the graduate an extra year to search for employment. Additionally, the clerkship experience should aid the law graduate in his or her job search, which the graduate can undertake in the open and with immense job security.

2. School-Funded Jobs

> **School-Funded Jobs**
> A position is law school or university funded if the law school or the university of which it is a part pays the salary of the graduate directly or indirectly and in any amount. Thus, a person employed by the law school in the law library or as a research assistant, research "fellow," or clinic staff attorney has a law school funded position. Similarly, if the position is in the university's library, the position is university funded.
>
> The position is funded directly if the graduate is on the payroll of the law school or the university. The position is funded indirectly if the law school or the university funds another entity in any way and in any amount to pay the salary. The position is also funded indirectly if it is paid through funds solicited from or donated by an outside supporter. Thus, a position in the law library is funded directly by the law school. A position in a legal services office or a law firm that is funded in any amount by the law school is funded indirectly by the law school.[22]

School-funded jobs present an interesting issue for any measurement of employment outcomes because they can span a range of jobs from the desirable to the illusory. On one end are year-long, full-time appointments in jobs that involve substantive legal work, provide valuable experience, and genuinely advance a recent gradu-

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outcome. Yale is an example school that does. *Career Development Office – Employment Statistics*, YALE LAW SCHOOL, www.law.yale.edu/studentlife/cdoprospectivestudentstats.htm (last visited June 23, 2012).

[22] Gauido, *supra* n. 15.

ate's career. On the other end are part-time positions that last only a short time and are timed to coincide with the nine month employment survey. With increasing attention drawn to school-funded jobs, and several schools employing more than 10% of their graduates, any measurement of employment outcomes would be remiss if it did not take these positions into consideration.

Our Employment Score makes no adjustment for short-term and part-time jobs funded by the school because none is needed. These jobs – often created with an eye towards inflating employment statistics – are already accounted for when we discount for short-term and part-time jobs. For full-time, long-term jobs funded by the school, we could not exclude jobs in this category even if we wanted. First, we cannot justify the assumption that all (or a critical mass) of long-term, full-time jobs funded by the school require bar passage – non-legal jobs have already been excluded and we do not want to risk excluding graduates twice.

Second, some of these jobs might actually be jobs with an indefinite term instead of a definite, one-year term. (It might be tempting to exclude definite-term jobs because of the likelihood that these jobs were structured to inflate employment statistics.) Jobs in clinics, as librarians, as writing instructors, or as professors each could have an indefinite term. Overall, the uncertainty here demonstrates how critical it is that schools disclose significantly more data on school-funded jobs.

3. Law Firm – 2-10 Attorneys

Calling this debatable is an overstatement, but it warrants discussion nevertheless because there is a certain amount of skepticism about these jobs. To start, if a group of recent graduates band together to start their own firm, each counts in this category instead of as a solo practitioner. What causes us to exclude solo practitioners, then, would also cause us to exclude this segment of the 2-10 Attorneys category. But, because we do not have adequate data to create an assumption that a certain percentage of attorneys in this group should be excluded, and generally disfavor internalizing estimations, we do not make any adjustments to the Employment Score. We do caution Score Reports users to pay attention to the

salary response rates for this category as it provides some insight (albeit imperfect) into how these graduates are faring.

B. The Under-Employment Score

Our Under-Employment Score represents graduates who are underusing their skills and credentials. These graduates have not started a professional career, legal or otherwise. It is composed of unemployed graduates seeking work, those in any part-time or short-term job, those in non-professional jobs, and those pursuing another advanced degree.

i. Score Calculation

1. Start with unemployed graduates.

> **Unemployed – Start Date Deferred**
> The graduate has accepted a written offer of employment by the February 15th reporting date, but the start date of the employment is subsequent to February 15th. In order to qualify in this category, the start date must be identified with certainty, or the employer must be compensating the graduate until actual employment begins.[23]
>
> **Unemployed – Not Seeking**
> As of February 15, 2012, the graduate is "not seeking" employment outside the home and is not employed. Graduates who are not seeking employment because of health, family, religious, or personal reasons are included. A graduate who is performing volunteer work and is not seeking employment is included. Also included is a graduate who is offered a position, turned it down, and is not seeking further employment as of February 15, 2012.[24]
>
> **Unemployed – Seeking**
> As of February 15, 2012, the graduate is "seeking" employment but is not employed. A graduate who is performing volunteer work and is seeking employment is included. Also included is a graduate who is offered a position, turned it down, and is seeking another position as of February 15, 2012. A graduate who is studying for the bar exam and is not employed as of February 15, 2012, is considered to be seeking employment unless classification of the graduate as "not seek-

[23] *Id.*
[24] *Id.*

> ing" can genuinely be supported by the graduate's particular circumstances. A graduate who is employed as of February 15, 2012 but seeking another job should be reported in an employed category.[25]

2. Remove unemployed graduates for whom their start date is after February 15, 2012. We do not know enough about these graduates' career paths, although they have something lined up, to consider them underemployed.

3. Remove unemployed graduates who are not seeking work. They are not wholly attached to the labor force.

4. Add graduates in Short-Term and Part-Time positions. These jobs fall within the common usage of the term "underemployment." We further believe that such underemployment is accurately described as less than a successful start to a career. Some of these jobs may eventually lead to long-term, full-time employment, but that would require a significant change from the status quo attitudinally, by those in the profession, and substantively through significant job creation.

Note: We do not add a graduate with a part-time, short-term job twice.

5. Add graduates in Non-Professional positions. These jobs are not part of a career path.

> **Employed – Non-Professional**
> A position in this category is one that does not require any special professional skills or training.[26]

Note: We do not add a graduate working in a non-professional capacity twice.

6. Add graduates enrolled in advanced degree programs. These graduates have not yet started a professional career, but are instead in the process of acquiring further credentials.

> **Pursuing Graduate Degree Full Time**
> The graduate is pursuing further graduate education as of February

[25] *Id.*
[26] *Id.*

> 15, 2012. Such academic programs include degree-granting and non-degree granting programs. Whether a graduate is enrolled full time is determined by the definition of full time given by the school and program in which the graduate is enrolled.[27]

7. Divide by the total number of J.D. graduates. The result (a percentage) is the Under-Employment Score.

ii. Notable Inclusions

1. Advanced Degree

People seeking an additional advanced degree span a wide range of scenarios. Some graduates are in highly competitive PhD or SJD programs and will later gain a coveted tenure-track professorship. Others are merely waiting out a bad job market by spending another year in school, or hoping to enhance a degree that has proven insufficient for finding suitable work. Regardless of what drives graduates to pursue further education, people seeking an additional degree have not yet started a full-time professional career any more than someone who just started law school has become a lawyer. Unlike those in the "not seeking" category, these people's removal from the job force has more to do with insufficient credentials rather than personal reasons. They are not ready to seek employment.

iii. Debatable Exclusions

1. Unemployed – Not Seeking

Though graduates in this category are unemployed, they are unemployed in a way that makes their status of little interest to a prospective student looking at employment outcomes. A prospective student looking at employment statistics is almost certainly planning to seek work after graduation and is thus primarily interested in outcomes of other people who are seeking work. While we exclude these graduates from our Under-Employment Score due to the category's definition, we must note that the category raises serious concerns and is ripe for abuse.

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[27] *Id.*

For 2010 graduates, 2.9% were not seeking work, and for 2011 graduates, 2.4% were not seeking work either. These are rather high percentages for a group like law school graduates, especially compared to the 1.7% of the national workforce not actively seeking work.[28] Part of the reason may be that the category combines two very different groups – people who have voluntarily opted out of the labor force and people who want to work but have become discouraged and given up (however the school defines this). While a prospective student would not be concerned with people who voluntarily leave the work force, they would be very interested in people who have had such a bad experience seeking work that they have lost hope.[29]

Despite our concerns, we have decided that our suspicions are not enough to go on, and thus we assume for now that schools do not abuse the category. However, to guard against opportunism, we will flag Under-Employment Scores when the "not seeking" category is suspicious.

C. The Unknown Score

Our Unknown Score points out the holes in the data. It tells how many graduates either did not report what sort of job they had, or did not report an employment status at all. If we do not know these employment outcome characteristics, we do not know whether to

[28] In February 2012, there were 2.6 million people not seeking work but "marginally attached" to the workforce; that is, they had sought work in the last year but were not actively seeking work at the time of the survey. The total size of the workforce at the time was approximately 154 million. *The Employment Situations – February 2012*, BUREAU OF LABOR STATISTICS (Mar. 9, 2012), www.bls.gov/news.release/archives/empsit_03092012.pdf.

[29] The Bureau of Labor Statistics ("BLS") uses a categorization of "marginally attached" that would be useful for law schools to replicate. In BLS employment data, people who are not presently seeking work but have sought work in the last twelve months are considered marginally attached. Those who have sought work in the last year but not in the last four weeks are further categorized as "discouraged." Law schools could adopt a similar categorization to avoid this problematic aggregation. *See BLS Glossary*, BUREAU OF LABOR STATISTICS, www.bls.gov/bls/glossary.htm#M. (last visited July 3, 2012) (defining "Marginally attached workers" as "Persons not in the labor force who want and are available for work, and who have looked for a job sometime in the prior 12 months (or since the end of their last job if they held one within the past 12 months), but were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey. Discouraged workers are a subset of the marginally attached.").

put these graduates in the Employment Score or Under-Employment Score. Nor do we know enough about what these graduates are doing post-graduation to consider them part of that murky middle category that resides between legal employment and underemployment.

1. Start with graduates for whom no employment data were gathered.

> **Employment Status Unknown**
> The law school does not have information from or about the graduate upon which it can determine the graduate's employment status.[30]

2. Add graduates who were employed, but details were unavailable about whether the job fell into the Bar Passaged Required, J.D. Advantage, Professional, or Non-Professional category.

> **Employed – Job Category Undeterminable**
> The graduate is employed, but there is insufficient information available to determine into which [] categories the position should be placed. This category should rarely be used and then, most often, only when the career services office knows nothing more than the fact of employment.[31]

3. Divide by the total number of J.D. graduates. The result (a percentage) is the Unknown Score.

II. SUMMARY OF SCORES

These summaries of our three scores provide insight into the status of employment and underemployment on a national scale. While these summaries are of almost no value to prospective students, and should not be used in application or enrollment decisions, we believe they are useful for understanding the overall legal employment situation and for informing legal education policy decisions. Prospective students will be well served by looking to placement data in a regional Score Report. We provide an abridged example of a report below in Part III.

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[30] *Id.*
[31] *Id.*

A. The Employment Score

According to the national Employment Score, 52.9%, many graduates from the class of 2011 significantly struggled to find ES Jobs.[32] The employment market affected law schools across the spectrum, whether public or private, or at traditionally high and low ranking schools. Simply put, law schools graduate too many students each year, and ES Jobs rarely appear from thin air. The following tables illustrate the distribution of these historically low rates.

TABLE 1

	Percentile						
Min	10th	25th	50th	75th	90th	Max	Avg.
16.70%	34.00%	41.10%	51.10%	60.30%	68.70%	94.70%	51.80%

TABLE 2

Employment Score	# Schools	% of All Schools
< 25%	4	2.1%
< 33%	16	8.2%
< 40%	46	23.6%
< 50%	89	45.6%
> 50%	104	53.3%
> 52.9%	89	45.6%
> 67%	24	12.3%
> 75%	15	7.7%
> 90%	3	1.5%

Some schools, especially among the top performing ones, did manage to create ES Jobs from thin air. For example, the law schools at George Washington University, New York University, and the University of Virginia created jobs for 80 (15.4%), 56 (12.0%), and 64 (17.0%) members of their graduating classes, respectively. These school-funded jobs are long-term, full-time positions and were all or mostly all bar passage required, qualifying them for the Employment Score.

[32] "ES Jobs" are jobs that count towards the Employment Score, defined in Part I.A., *supra*. These jobs are long-term, full-time jobs that require bar passage, excluding solo practitioners.

Traditional gauges, such as LSAT scores and undergraduate GPA, do not appear to indicate a successful rate of obtaining ES Jobs, mostly due to simple market saturation. The University of Washington, for example, places at the 50th percentile of Employment Scores, with only 51.1% of graduates finding ES Jobs. The median student at Washington has an LSAT in the 90th percentile (164), a 3.67 GPA, and attends the highest ranked school in the state, yet this student's chances of an ES Job outcome by nine months after graduation are only slightly better than a coin flip.

Looking at schools at the top of the curve, there is not much improvement. Baylor and Emory are at the 90th percentile for Employment Scores, with 68.8% and 68.4% of their graduates finding ES Jobs. Baylor's median LSAT (162) is at the 86th percentile, while Emory's (165) is at the 92nd percentile. These schools have median GPAs of 3.69 and 3.70.

Comparing employment outcomes to admissions data shows that law schools accept the brightest of college graduates without offering them bright employment prospects. Put bluntly, the quality of law school applicants far outpaces the quality of law school employment outcomes. It is not a stretch to say it is bad for the U.S. economy to have many smart, hard workers sitting on the sidelines for three years while obtaining mountains of debt for a degree they will not directly use.[33]

B. The Under-Employment Score

According to the national Under-Employment Score, 26.4% of 2011 graduates were underemployed. As with the Employment Score, schools across the spectrum had many underemployed graduates.

TABLE 3

	Percentile						
Min	10th	25th	50th	75th	90th	Max	Avg.
3.10%	13.40%	19.70%	26.60%	34.30%	40.00%	61.00%	26.90%

[33] In fact, this is a view shared by at least one Supreme Court Justice. *See* Ashby Jones, *Scalia: 'We Are Devoting Too Many of Our Best Minds to Lawyering*, THE WALL STREET JOURNAL LAW BLOG (Oct. 1, 2009, 8:40 AM), blogs.wsj.com/law/2009/10/01/scalia-we-are-devoting-too-many-of-our-best-minds-to-lawyering/.

TABLE 4

Under-Employment Score	# Schools	% of All Schools
< 2%	0	0.0%
< 5%	5	2.6%
< 10%	15	7.7%
> 10%	180	92.3%
> 20%	144	73.8%
> 25%	109	55.9%
> 26.4%	99	50.8%
> 33%	57	29.2%
> 40%	20	10.3%
> 50%	4	2.1%

At the 50th percentile of Under-Employment Scores, the University of Southern California had 26.6% of its graduates underemployed nine months after graduation. Despite more than a quarter of graduates winding up underemployed, admissions standards at USC are extremely tight, with a median LSAT of 167 (95th percentile) and median GPA of 3.69. At the 90th percentile are Northeastern and the University of Oregon, with underemployment rates of 39.6% and 40.2% respectively. The median LSATs are 162 and 159. These students have done quite well academically prior to law school. Yet, despite being in the top quarter of LSAT takers, two out of five will find themselves underemployed.

Only five schools have Under-Employment Scores of less than 5%, and the lowest median LSAT of these schools is 170, at both University of Virginia and Stanford. While these underemployment rates are low compared to other schools, compared to the cost of attendance the rates are still quite high. Without scholarships, the lowest cost of attendance of these schools is the $245,000 paid by a University of Virginia student receiving an in-state tuition discount.[34] At the high end is Columbia's $289,000 cost. Looking at

[34] We use 2011-2012 tuition & fees prices and 2011-2012 indirect costs (room & board, etc.) to project debt owed by Class of 2015 graduates. *E.g. American University Washington College of Law School Profile*, LAW SCHOOL TRANSPARENCY, www.lawschooltransparency.com/clearinghouse/?school=american (last visited June 23, 2012). These projections assume a 3% annual tuition increase and 2% annual indirect cost increase each year. Interest calculations are time-sensitive – based on semester disbursement periods – and use a blended interest rate. The first $10,250 each semester is weighted at 6.8%, the rest at

Columbia's *U.S. News* ranking of #4 and seeing that it is the best school nationally in terms of underemployment might make it seem like a no-brainer. However, a 3.1% chance of underemployment is a significant risk for someone who will owe nearly $300,000 when that first loan payment comes due.

C. The Unknown Score

As usual, law schools did a very good job collecting data about their graduates. Nationally, only 3.9% of graduates had an unknown employment status or had a known status but an unknown type of job. The national score is 33% lower, only 2.6%, if we exclude the 15 outlier schools with scores over 10%. Because the Unknown Score is a reliability indicator, it shows that the Employment Scores and Under-Employment Scores are generally very reliable.

TABLE 5

	Percentile						
Min	10th	25th	50th	75th	90th	Max	Avg.
0.00%	0.00%	0.60%	2.00%	4.60%	7.30%	31.60%	3.40%

TABLE 6

Unknown Score	# Schools	% of All Schools
0%	32	16.4%
<1%	66	33.8%
<2%	97	49.7%
<3%	123	63.1%
<5%	154	79.0%
<10%	183	93.8%
<15%	189	96.9%
<20%	191	97.9%
>20%	4	2.1%

7.9%. The result is debt owed when a law school graduate must make their first loan payment six months after graduation.

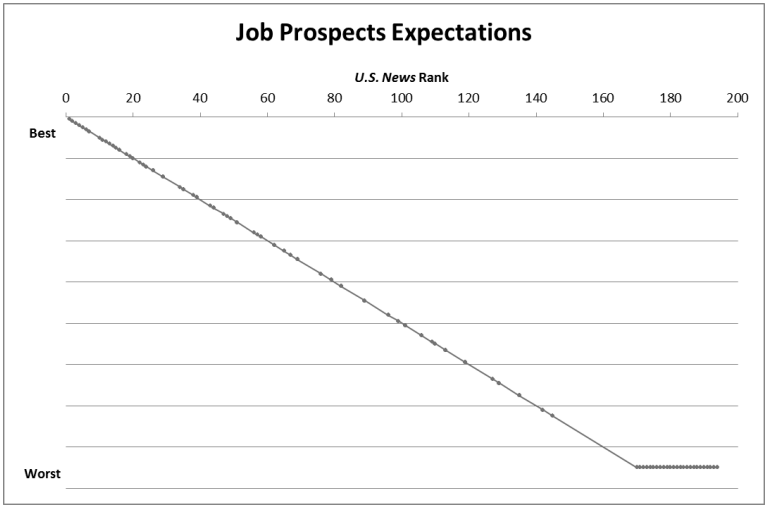
III. JUDGING THE *U.S. NEWS* RANKINGS AS A SORTING MECHANISM

"[M]ost applicants know that there is a direct correlation between where a student graduates from [and] their starting salary and career prospects, which is likely why rankings are consistently the most important consideration by far."

– Jeff Thomas, director of pre-law programs, Kaplan Test Prep[35]

Sometimes finding the school that best meets one's personal and career objectives proves so challenging that seeking a shortcut actually becomes a rational path. The following chart illustrates how somebody would compare schools when holding the belief that *U.S. News* approximates expected job outcomes. As a school's ranking goes down, so too do expectations about how well the school's graduates fare in the entry-level marketplace.

GRAPH 1



The average applicant applies to 7 schools.[36] Some are reach or safety schools, in terms of admission chances, while others are targets. This variety commonly results in the dilemma: *should I take the*

[35] Karen Sloan, *Survey suggests prospective law students still have stars in their eyes*, NAT'L L.J. (June 19, 2012), www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202560100618.

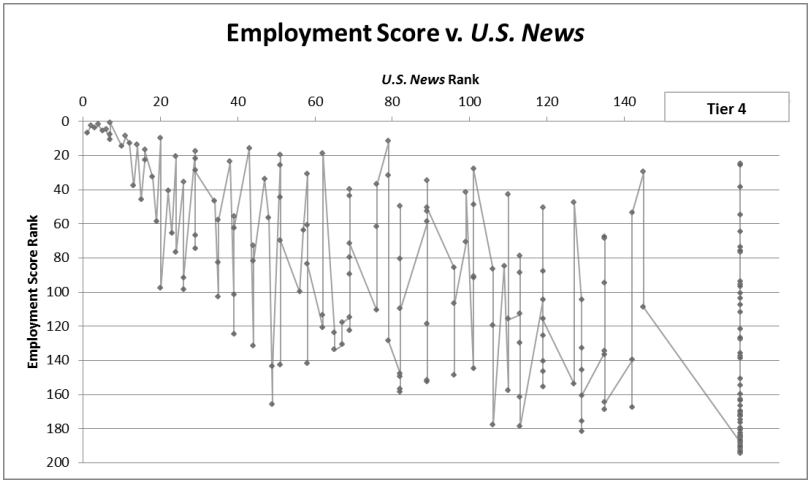
[36] *LSAC Application Volume Summary*, LAW SCHOOL ADMISSION COUNCIL, www.lsac.org/LSACResources/Data/lsac-volume-summary.asp (last visited July 4, 2012).

higher ranked school with little or no scholarship money over the lower ranked school with substantially more scholarship money? This is foremost a question because of the ranking disparity, though we could expect prospective students to think that schools willing to offer greater discounts on tuition offer worse job prospects or educational quality. The decision then boils down to whether the additional ranking spots justify the price difference.

As it turns out, the *U.S. News* rankings do not correlate well to job outcomes past the very top-ranked schools.[37] Neither do the *U.S. News* rankings correlate well to predicting underemployment. The *U.S. News* rankings fail in two critical ways. First, ranking does not correspond to job outcomes in the legal profession. Second, the margin between the ordinals of two schools does not predict the margin in job outcomes. Both failings make it inadvisable to use the *U.S. News* rankings as a way to pick schools when job outcomes are a concern.

A. Predicting Job Outcomes

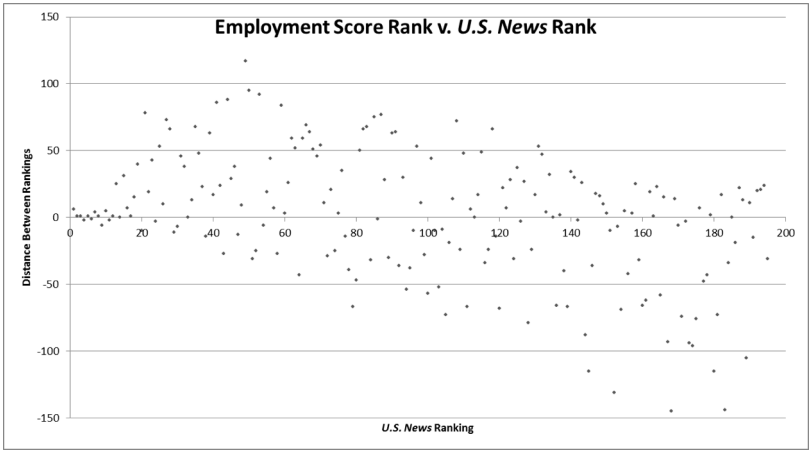
GRAPH 2



[37] Because *U.S. News* does not rank the bottom 49 schools, we assign these schools all a rank of 170, a point between the total number of schools (195) and the last ranked school (145).

GRAPH 3

GRAPH 4



Graph 2 shows many wild swings between the Employment Score ranking and the *U.S. News* rankings by plotting the two rankings for each school. Graph 3 likewise shows many wild swings when comparing the Under-Employment Score rankings to the *U.S. News* rankings. While the common belief about *U.S. News* as a job prospects proxy does not explicitly contemplate underemployment, it is a natural corollary to the outcomes captured by the Employ-

ment Score. If *U.S. News* did well for either, the relevant graph would look much more like Graph 1.

Graph 4 captures the degree of difference between the *U.S. News* rankings and a ranking of schools by Employment Score. It plots the positive and negative difference values, underscoring the (lack of) connection between the *U.S. News* rankings and job outcomes. The further a dot is from the zero line, the less connected the *U.S. News* ranking is to real job outcomes. The graph emphasizes that using the *U.S. News* rankings to gauge job prospects carries substantial risk. Considering that students use small ranking differences to drive application and enrollment decisions, anything more than a five spot difference will upset informed decision making. Just 30 schools fall within five spots of their *U.S. News* ranking. If we exclude the top 18 schools, only 18 schools differ by five spots or fewer.

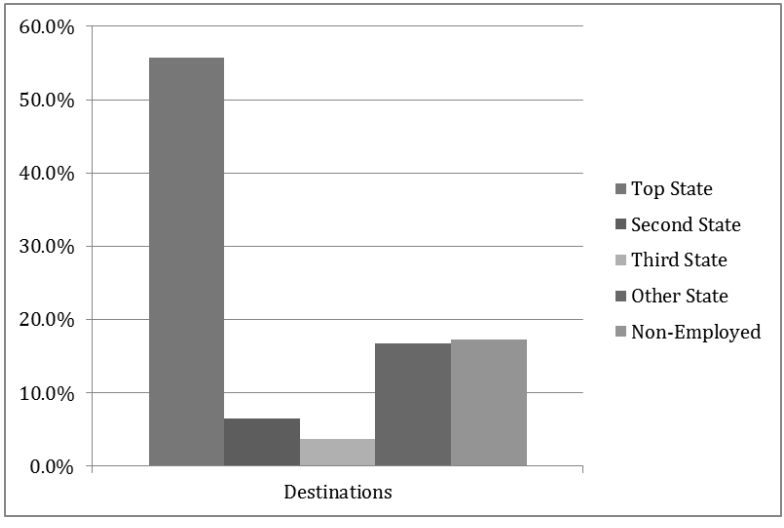
It is possible that we have simply chosen a bad measure of employment outcomes, or that *U.S. News* captures longitudinal differences in job prospects that the available employment data just cannot capture. Perhaps the latter is true, but we see no evidence anywhere to support that proposition, nor does *U.S. News* suggest that this is the case. As for using the Employment Score and Under-Employment Score to judge whether the *U.S. News* rankings successfully track job prospects, no short-term measure adequately tracks them. We compared the *U.S. News* rankings to large firm employment, federal clerkship employment, and even the employment rate that *U.S. News* integrates into its methodology.[38] None of these metrics resulted in *U.S. News* aptly predicting job outcomes.

We think *U.S. News* fails to predict job outcomes because it places all ABA-approved law schools on a single, national scale. Law schools tend to place locally or regionally. So within each region – a moving target to be sure – schools fit into a hierarchy that is captured by outcome measures like employment and underemployment. These regional hierarchies are lost on a national scale. Rare is the school that sends graduates all over the country. One hundred and thirty-two schools place at least half of their graduates in one

[38] *See* Appendix A.

state, almost always the state in which the school is located. The top state destination for each school accounts for 67.4% of employed graduates. A much smaller 7.8% of employed graduates go to a school's second most popular destination, with just 4.5% of employed graduates working in the third most popular destination. This means that only 20.2% of employed graduates (16.7% of the entire class) end up in a state other than the top three.

GRAPH 5



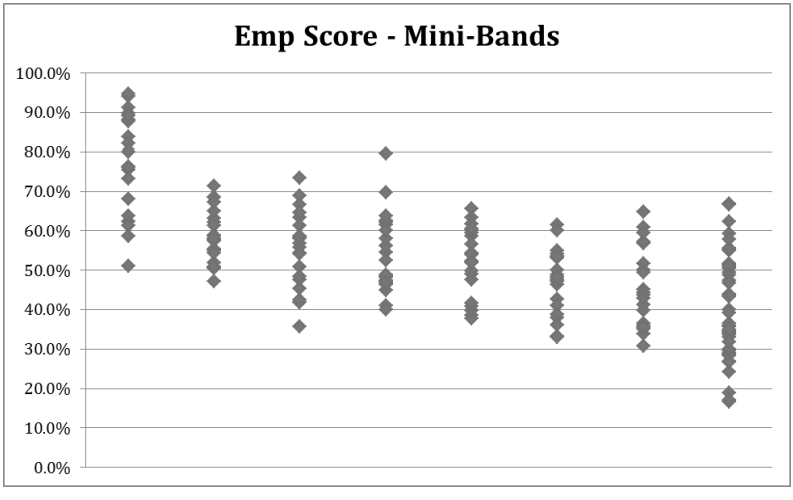
This renders national comparisons barely relevant for prospective students and probably causes them to consider schools that make little or no sense for them individually. Students who would like to work in any of Atlanta, Nashville, or Birmingham should not be particularly concerned with how Emory, Vanderbilt, and the University of Alabama compare to the University of Minnesota or Arizona State, though our experience indicates that this is all too common. That Arizona State passes Emory in *U.S. News* shortly before deposits are due should be of no concern to applicants who rationally choose among schools. Yet we can rest assured that applicants who were admitted to both will lie awake at night wondering what a ranking change means.

B. Ordinal Margins

Even if we were to suppose that it makes sense to rank law schools on a single scale, the *U.S. News* ordinal rankings do not indicate the degree of difference between schools.[39] That is, the rankings do not tell users how near or far apart the schools are, making it very difficult to serve as a useful proxy. This leads users to believe that the margin between the schools ranked #60 and #70 is the same as the margin between the schools ranked #70 and #80. Combined with the common belief illustrated in Graph 1, this translates to treating the margin in expected job prospects similarly.

As it turns out, the *U.S. News* rankings grossly overstate the ordinal distance between schools for job outcomes. Graph 6, below, demonstrates this fact. We segment schools into eight bands (Groups 1-8), according to *U.S. News* ranking, and plot the Employment Score. The first six bands include 21 schools; the seventh band includes 20 schools; and the eighth band includes the 49 unranked schools. Table 7 provides each band's distribution.

GRAPH 6



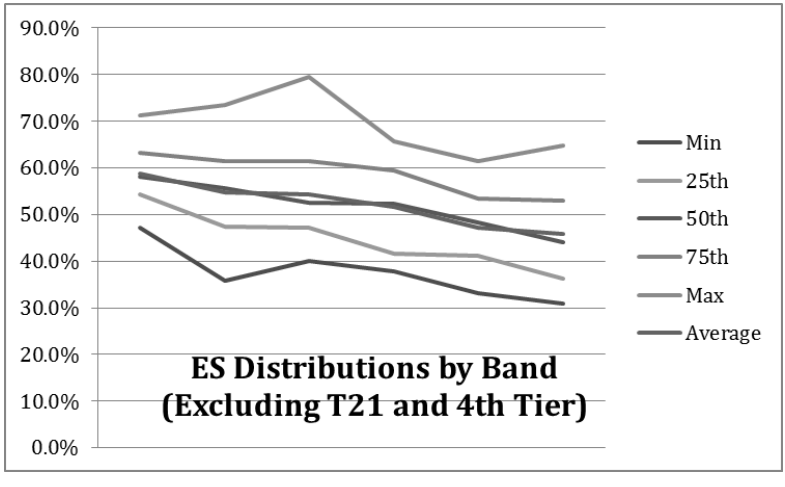
[39] *U.S. News* does provide each school's score, but it is available only with a paid subscription, and is rarely referenced. *See also infra* n.40

TABLE 7

Group	Average	Min	25th	50th	75th	Max
#1	77.5%	51.1%	68.1%	80.0%	88.2%	94.7%
#2	58.7%	47.1%	54.4%	58.0%	63.2%	71.3%
#3	54.7%	35.8%	47.5%	55.7%	61.4%	73.4%
#4	54.3%	39.9%	47.3%	52.6%	61.4%	79.5%
#5	51.6%	37.8%	41.6%	52.2%	59.5%	65.6%
#6	47.1%	33.1%	41.1%	48.3%	53.4%	61.5%
#7	45.7%	30.9%	36.3%	44.0%	53.0%	64.7%
#8	40.1%	16.7%	29.9%	36.0%	50.5%	66.9%

While there is a slight downward trend in outcomes, that trend is eclipsed by the overwhelming overlap between Groups 2-8. Every one of these groups has a non-negligible number of schools that performed better than the Group 2 median (58.7%). At the same time, Group 2 had five schools perform below the medians of Groups 3, Group 4, and Group 5. Except for one outlier in Group 3, American University (35.8%), each band progressively adds worse performing schools. However, the middle 50 percent, band by band, remain remarkably consistent. This is especially stark upon removing the first (top 21 schools) and last band (49 unranked schools) from consideration, leaving 135 schools in a cluttered middle (Graph 7).

GRAPH 7



Ordinal ranking invites purely relativistic comparisons, *i.e.,* that a school is better or worse than some other school, or some number of other schools. This marginalizes the role of thinking about the value of law school in real terms. Knowing that one school is better than another does not tell a prospective student whether either school, or perhaps neither, is a wise decision for that particular individual. The latter consideration is of greater importance as the cost of attending law school increases and the job market remains weak.

A relative ranking can also give the impression that a school has changed in quality based solely on changes in closely ranked schools. It is impossible to tell just from Stanford replacing Harvard as the #2 school whether Stanford improved, Harvard declined, Stanford improved and Harvard declined, or that both schools moved in the same direction but to different degrees. In other words, when schools increase tuition every year, the *U.S. News* rankings do not indicate if the school has also increased its value. Deciding where, and if, to attend requires carefully weighing costs and benefits, a process that cannot be done with only relativistic rankings.[40]

IV. AFFECTING APPLICATION AND ENROLLMENT DECISIONS: HOW TO USE THE SCORE REPORTS

Our goal with the Score Reports is to help prospective law students make informed application and enrollment decisions.[41]

[40] Likewise, the ordinal ranking may hide very real changes at schools that did not result in a rank change. For instance, in 2011 Yale placed 33.2% of graduates in federal clerkships compared to 30.0% in 2010. *Yale Law School Profile*, LAW SCHOOL TRANSPARENCY, www.lawschooltransparency.com/clearinghouse/?school=yale (last visited June 30, 2012). Of course, Yale's rank stayed at #1 instead of climbing to #0.95. Yale not being able to receive an A++ may seem trivial, but ordinal ranking does make a difference when there are large market shifts. During the recession, the Top 50 contained the same number of schools as it did during the hiring boom of the mid-2000s (save for some minor differences due to ties), despite the value of these schools undergoing significant changes. Looking at school scores for *U.S. News* rather than ranks is no better in this regard. *U.S. News* normalizes the scores, so it always places the top school at 100 and the bottom school at 0. Should Yale remain in the top position next year it will keep the same score of 100 regardless of any improvements or declines in actual quality. While this is not relevant for somebody thinking relativistically about law school choices, it is extremely important for somebody doing a cost-benefit analysis.

[41] Though we focus on employment data, we do not believe this is the only factor prospec-

We sort law schools by significant placement in a target location because the vast majority of law schools operate all-but-exclusively in a local, state, or regional bubble. Once narrowed, we sort for users based on the Employment Score. From here users can begin unbundling a school's outcomes and value to make application and enrollment decisions.

The decision process is complex. *Can I get in? What kind of jobs can I get? What's the cost? Can I afford the loans? What else should I think about?* And despite the desire, there is no formula that can reduce the relevant data into a single, useful metric. Knowing this, the best a prospective student can hope for is an intuitive sorting tool that integrates a few related factors, plus the opportunity to navigate more detailed information. The Score Reports help prospective students through the imperfect process, allowing them to eliminate irrelevant comparisons and streamline evaluation. The result is concentrated attention on the differences between schools that ought to be competing.

A. Geographic Lookup

Start with a prospective student, Gary, interested in practicing law[42] in Georgia. He will select the Georgia Score Report and find a list of nine schools: Atlanta's John Marshall, Emory University, Faulkner University, Georgia State University, Mercer University, Samford University, University of Alabama, University of Georgia, and University of Tennessee. These schools are known to LST to have at least 5% of their 2011 graduates working in Georgia.[43] Depending on Gary's LSAT score, GPA, and other factors, he may apply to all or some of these schools.

B. The State Score Report

The Georgia Score Report takes these nine schools and separates them into two groups (Table 8). The first group is the batch that has

tive students should consider, and we do not represent that the Employment or Underemployment Score gives a definitive answer on application or enrollment decisions.

[42] This detail is quite important, as our Score Reports are aimed at students planning to practice law and may be of less value to students with other career goals.

[43] Schools have been given the opportunity to provide LST with additional state and regional data. As of the end of June, we only have the top three state destinations for each school.

Georgia as its top destination. The second group is the batch that has Georgia as its second most popular destination.[44] By default, we sort the schools within each by the Employment Score, though Gary can override the default sort by clicking another column. For example in Table 8, Gary can sort by the non-discounted cost for a debt-financed degree, or by how many graduates are employed in Georgia. The live, online version includes significantly more data for comparison, including but not limited to admissions data like LSATs and GPAs, tuition, financial aid, bar passage, and specific job categories such as federal clerkships, large law firms, and public service.

TABLE 8

School	Emp. Score	UES	UNK Score	% in Georgia	Projected 2015 Cost
Emory University	68.4%	22.2%	0.4%	44.0% / 99 (#1)	$253,131
Georgia State University	64.5%	11.3%	2.2%	83.9% / 156 (#1)	$185,029
Mercer University	61.5%	23.8%	4.6%	56.9% / 74 (#1)	$200,318
University of Georgia	61.2%	27.3%	0.0%	66.5% / 151 (#1)	$186,688
Atlanta's John Marshall	28.8%	34.1%	0.0%	73.5% / 97 (#1)	$208,940
University of Alabama	71.3%	7.9%	1.2%	7.9% / 13 (#2)	$175,886
Samford University	59.5%	19.6%	3.4%	8.1% / 12 (#2)	$206,609
University of Tennessee	56.2%	24.7%	2.7%	6.8% /10 (#2)	$195,927
Faulkner University	49.5%	23.8%	0.0%	12.9% / 13 (#2)	$198,132

Now imagine that Gary, a South Carolina resident, applies to and is admitted to the University of Georgia and Mercer.[45] Gary has

[44] Based on the present data, Georgia is not the third most popular destination for any school.

[45] This hypothetical is based on an actual Georgia-based (and presumably Georgia-bound) applicant who has anonymously registered on Law School Numbers, a website that that distributes self-reported application data. The user, "al01727," self-reports as a female African American applying for enrollment in 2012 with a GPA of 3.5 and an LSAT score of 159. It is worth noting that this LSAT score places her in perhaps the top 77th percentile of

been offered an unrestricted full tuition scholarship from Mercer of $36,830 per year and no money at UGA. Gary views the Georgia Score Report with his general career objectives in mind. He sees that the Employment Scores for UGA and Mercer are nearly the same and that UGA fared worse in underemployment, but that Mercer had an unknown score that may be masking a higher rate of underemployment. He also notices that more UGA graduates tend to leave the state, though he does not know why and should note that he needs to research further.

Ignoring the cost of attendance still, it would be reasonable to consider these two schools close in terms of job outcomes, even though UGA is ranked considerably higher in *U.S. News* (#34 vs. #110). In such a situation taking a full ride at Mercer would appear to be a no-brainer, but without drilling down into the Employment Scores and Under-Employment Scores, Gary would be stopping short of understanding the outcomes at each school. As luck would have it, he can do that here. He can click through to each school's individual school profile, which includes a wealth of employment information for recent graduating classes, including salary information and the type of employers, including law firm size, to round out his understanding of these two schools.

Using *U.S. News*, along with the common belief about its predictive power for job outcomes (Graph 1), Gary might think a 76 rank disparity is too much to overcome, even with a full ride at Mercer. Fortunately, by looking at actual outcomes instead of hypothetical outcomes based on a proxy, Gary might see that the schools are closer on the job outcome measure than commonly thought. He might still determine that UGA is the better choice, but it will be far more informed than slavishly following the rankings. Perhaps

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all test takers, and that both her GPA and LSAT are well above what it takes to get into an ABA-approved law school. For example the lowest median LSAT of an ABA-approved school, currently at 145 for Southern University Law Center, roughly equates to the 26th percentile of all test takers. With an LSAT score at the 50th percentile, a 151, applicants with a 3.5 GPA and who identify as an underrepresented minority (such as al01727) become competitive for admission to over 130 of the 200 ABA-approved law schools. A 159 LSAT is therefore very competitive when taking into consideration the full spectrum of test takers who end up being accepted to an ABA-approved school.

more importantly, by engaging the user in this fashion, we hope that Gary will now be asking important questions about what distinguishes the two schools and will give more thought to which fits his objectives rather than relying on one size fits all ranking.

C. Score Reports Weaknesses

Ultimately the Score Reports suffer from a variety of weaknesses and applicants need to be conscious of what the data do and do not mean. Many of these problems are due to inadequacies with the underlying data, which will hopefully be reduced in the future. Despite these limitations, the Score Reports are still an better tool to use than relativistic rankings that follow no clear guiding principle. These weaknesses have only to do with the scores as being a reliable indicator for their purpose, rather than whether or not these scores solve all of the problems in want of a solution.

i. Self-Selection

While prospective students are concerned with the job options they will have upon graduation, schools do not collect those data. Instead we have information about actual employment outcomes, and must use those outcomes as a proxy for opportunities. Consider New York University. 43.1% of 2011 NYU graduates went to work for firms with 101 or more attorneys, and 24.9% of the class went to work in public service.[46] We do not know how many graduates working in public service could have worked for a large firm, nor how many graduates at large firms could have gone into public service. That information would be valuable – perhaps more valuable than outcomes – to a prospective student. Ultimately, opportunities and outcomes are not necessarily the same, so the risk is that relying exclusively upon outcomes neglects very real differences in job prospects.

There is the additional problem of geographic self-selection. By facilitating state and region-based sorting using a single year of geographical outcomes, we risk under and overestimating placement by

[46] *New York University School of Law Profile*, LAW SCHOOL TRANSPARENCY, www.lawschooltransparency.com/clearinghouse/?school=NYU (last visited July 1, 2012).

location. For any number of reasons, a school may have more or fewer graduates in a location in a given year. This is not ideal, though the problems will only be at the edges because schools only show up on geographic reports if the total number of graduates working in a location meets a minimum threshold.

ii. Not All Law Jobs Created Equal

With the Employment Score, we treat all long-term, full-time legal jobs the same. For example, a job with a large law firm counts the same as a job with a very small law firm, even though we have data for this distinction. We do not, however, have data for distinguishing among lawyer jobs in large law firm jobs. Wide variances in by pay, prestige, practice settings, and practice specialties exist. Neither do we have data that distinguish among placement in alternative internal staffing tracks, e.g. staff attorneys versus associates at law firms.

iii. Incomplete Picture of Outcomes

Because data are collected nine months after graduation and published four months later the data are perpetually outdated and may not accurately reflect the present employment situation.[47] There may be no feasible solution to this problem, but it is a weakness that prospective students ought to know. The data also give only a snapshot, showing placement in first jobs without looking further into a graduate's career. Some graduates in temporary jobs will have found permanent work, while some permanent jobs will unexpectedly come to an end. Though the first job is extremely important, the picture is incomplete. This flaw could be largely remedied if additional surveys were conducted, such as at 3 years and 6 years after graduation.

Similarly, the Employment and Under-Employment Scores only reflect school-wide data. It is plausible, and quite likely, that a school will have differing levels of success in different states, so

[47] Emphasis squarely focuses on outcomes immediately following graduation in part because roughly 9/10 graduates debt-financed at least some of their J.D. education. Initial loan payments are due shortly after graduation, whether or not the graduate's outcome reflects the successes he or she will find or lose throughout a career.

placement in other states may either inflate or deflate the scores. Using Georgia as an example, the Employment Scores for UGA and Mercer may not match the success rate for Georgia. The scores could be higher or lower if we could instead focus only on those graduates obtaining work in Georgia.[48]

V. CONCLUSION

When prospective students decide which law school to attend, they often look to the *U.S. News* rankings to gain an idea about both the school's overall quality as well as to proxy job prospects. While the *U.S. News* rankings might serve some purpose, such as providing an annual stimulus to law blog traffic, we believe, and have demonstrated, that it cannot be used as a proxy for employment outcomes. With application decisions being as important as they are challenging, we think it is important that prospective students have a better tool to assist them when making choices about where to apply and whether to enroll.

Law school websites do not fill this role. Indeed, they have not done a better job than *U.S.* News in helping prospective students make informed decisions. The familiar joke, "Two lawyers, three opinions," fits law school websites quite well. Look at ten law school websites, and you will find employment statistics represented in a dozen different ways.[49] Some will on their surface be rather

[48] Were the data available, the scores would still suffer from the self-selection problem. For instance, graduates may be inclined to move across state lines only after having received a job offer. This would create a very high Employment Score within that state, but would not take into account students who want to move but have not found jobs. Likewise, students may cross state lines because they have been unable to find work in their preferred state and believe another state presents better opportunities.

[49] For instance, Pace University School of Law has a "Quick Facts" publication which contains some employment data, and also has Employment Data sheets under its Career Development tab. Pace Quick Facts, www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/futurestudents/QuickFacts.pdf (last visited June 5, 2012); Pace Law School Employment Data, www.pace.edu/school-of-law/career-development/employment-data (last visited June 5, 2012). The Quick Facts provides a list of job categories with the number of graduates in each, while the Employment Data page provides mostly the same information, but in a pie chart form with percentages of the class represented. Both sources combine the "Bar Passage Required" and "J.D. Preferred" categories without stating how many graduates are in either group; neither page discloses that 15% of the class of 2010

useful, others so opaque or outright misleading as to be useless. Though law schools should make their website as useful and honest as possible, prospective students cannot wait for schools to figure out how to upload a PDF.[50]

Similarly, prospective students cannot bide their time until certain reforms intended to address some of these problems instituted by the ABA Section of Legal Education take effect. In particular, the Section is attempting to combat hard-to-compare, sometimes dishonest employment reporting tactics through two key initiatives. First, the Section makes employment data available on a website.[51] The site provides individual school profiles with tabular employment data, as well as a spreadsheet with data from all law schools.[52]

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was unemployed, creating an overly optimistic and misleading impression about job placement.

Pace's publication of opaque and misleading information is the rule rather than the exception. These problems are replicated across many law school websites and recruitment materials. Among other things, law schools differ on the grouping of job types, reporting of part-time and short-term work, and the sorts of salary information made available. For Pace's part, the Employment Data sheet for the class of 2011 is much improved, containing far more data and in a format similar to the NALP report.

[50] Consider NYU, a school which claims to be making great strides in providing employment information. Following a third request that NYU make its NALP report for the class of 2010 available, on March 28, 2012 NYU's Dean Ricky Revesz told us following:

> I expect you are aware that, since the end of last year, we have added a substantial amount of employment data to the NYU Law website. If there is more information that would be suitable and helpful for us to provide, we are happy to consider doing that. For example, we are now looking into posting data of the type found in Table 12 of the NALP form (Source of Job by Employer Type), since that would likely be of interest to prospective and current students.

Dean Revesz Email on Mar. 28, 2012 to Law School Transparency (on file with Authors); *also* Derek Tokaz, *NYU Plays Hide the Ball*, LAW SCHOOL TRANSPARENCY, www.lawschooltransparency.com/2012/05/nyu-plays-hide-the-ball-with-employment-data/ (last visited June 30, 2012). Table 12 represents just one of seven data sets contained in the NALP report but not shared publicly by NYU. The table shows how graduates found jobs (*e.g.*, on campus recruiting, returning to a prior employer, direct mailing) on a simple, 8x7 table. The data had been in NYU's possession for 14 months when Dean Revesz said the school was looking into publishing it. NYU has since then added data for the class of 2011 to its website. As of July 1, 2012, the Table 12 information is still absent. *Employment Data for Recent Graduates*, NYU LAW, www.law.nyu.edu/careerservices/employmentstatistics/index.htm (last visited July 1, 2012).

[51] *Section of Legal Education – Employment Summary Report* , AMERICAN BAR ASSOCIATION, placementsummary.abaquestionnaire.org/ (last visited June 5, 2012).

[52] *Id*.

Second, the Section of Legal Education will adopt a new Standard 509 – a consumer protection standard – that requires schools to disclose on their websites the same tabular data and also requires that schools follow certain guidelines in advertising employment outcomes.[53] These initiatives are important and remarkable, but they still fail to provide a tool that is convenient for prospective students, leaving them with little more than a mountain of data.[54] Tabular data can be difficult to make heads or tails of, and it is even more difficult to use when making direct comparisons between schools without significant intermediate steps.[55]

Our Score Reports aim to provide students with the most relevant data to help them make their enrollment decisions, *i.e.,* employment data as compared against other schools that are placing graduates in the same market. Though we present the data in a form that is easily digestible, we are also conscious of differences among student career objectives and provide additional information that allows students to disaggregate and drill down into the data. We will be the first to tell prospective students that the Score Reports should only be the beginning of their research, and we hope that the

[53] For links to the proposed Standard 509 and its accompanying chart, as well as LST's public comment to the Section of Legal Education council, *see Update to the ABA Accreditation Standards*, LAW SCHOOL TRANSPARENCY, www.lawschooltransparency.com/2012/03/updates-to-the-aba-accreditation-standards/ (last visited June 30, 2012).

[54] Yes, we argued for this. It is important that schools are transparent about the data they have collected. But we have always envisioned third-parties, be it the ABA, LST, or a for-profit entity, entering the market to inform people using these data. Step one for informed decision-making (and broader legal education reform) had to be uncovering the data which underlie the basic employment rate and salary information.

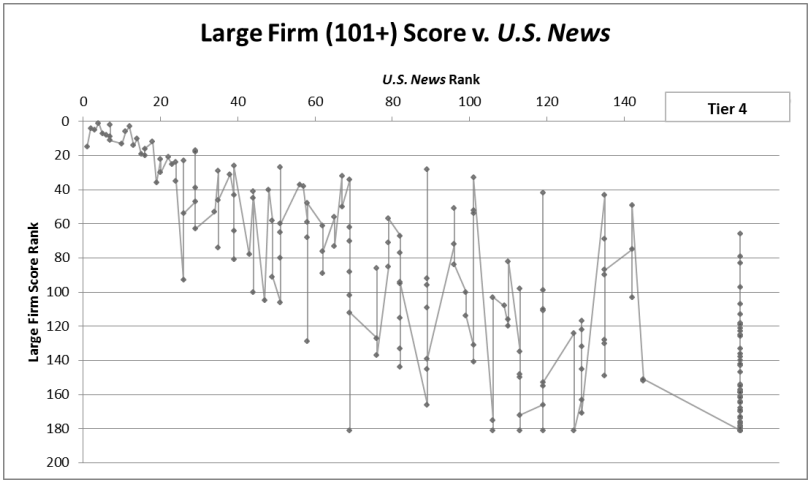
[55] In 2010 we launched a Data Clearinghouse that attempts to add color and meaning to tabular data from previous years, presenting the data in a format that demonstrates gaps in information and allows consumers to draw comparisons across programs. *Data Clearinghouse*, LAW SCHOOL TRANSPARENCY, www.lawschooltransparency.com/clearinghouse (last visited June 27, 2012). We think, and have been told by many, that the Clearinghouse significantly helps prospective students. But a lack of simplicity affects the breadth of its influence, with especially pronounced limits as to initial application decisions. In other words, by the time someone has learned enough about graduate employment to fully understand what the clearinghouse demonstrates, they are usually already far along in the application process and no longer open to the possibility that their best option may be choosing a different school than the ones they applied to, or choosing not to attend one at all.

Score Reports prompt them to ask meaningful questions and undergo significant financial planning and introspection before they select a school.

The Score Reports must be understood as not the culmination of transparency efforts, but a launching point for more sophisticated ways of thinking about law school. The technology is first generation, and certain to undergo many functionality changes. The idea of providing honest and complete employment data is also young, with the vast majority of schools still refusing to show their cards.[56] We fully expect the Score Reports to improve as more data become available and more resources (whether financial, intellectual, or technological) are dedicated to helping prospective students make informed decisions about their careers.

APPENDIX A

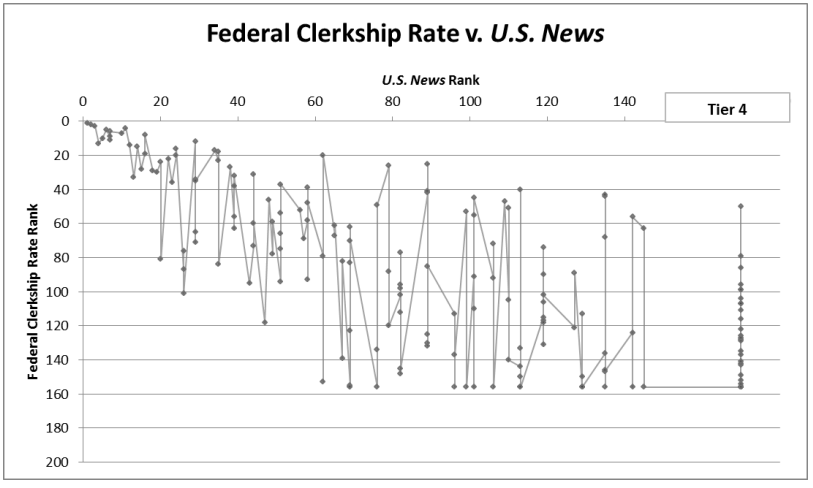
LARGE FIRM (101+ ATTORNEYS) SCORE[57] RANK V. *U.S. NEWS* RANK



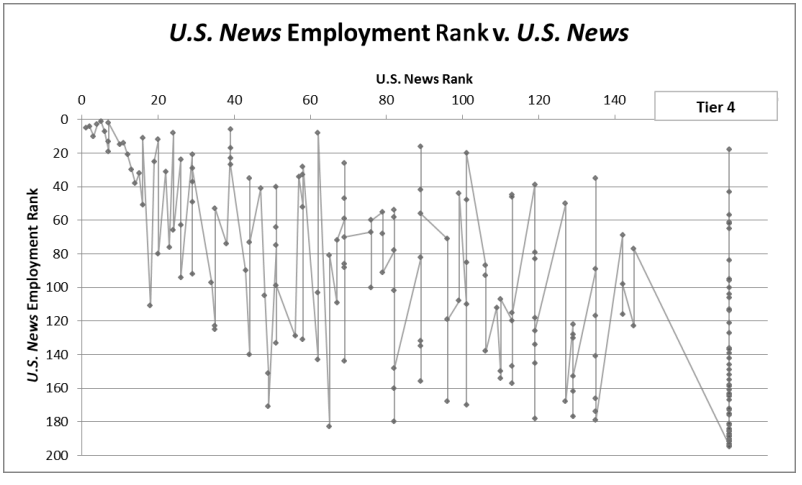
[56] To date, 50 schools have made their class of 2010 NALP reports public. *Class of 2010 NALP Report Database*, LAW SCHOOL TRANSPARENCY, www.lawschooltransparency.com/clearinghouse/2010-nalp-report-database/ (last visited June 29, 2012).

[57] Total graduates employed long-term and full-time by a law firm with at least 101 attorneys divided by total graduates. The score, however, includes non-attorneys, staff attorneys, and associates. Better data are not publicly available.

FEDERAL CLERKSHIP RATE[58] RANK V. *U.S. NEWS* RANK



U.S. NEWS EMPLOYMENT RATE[59] RANK V. *U.S. NEWS* RANK



# # #

[58] Total graduates employed in full-time, long-term federal clerkships divided by total graduates.
[59] Total employed graduates divided by all graduates.

A MEDICAL LIABILITY TOOLKIT, INCLUDING ADR

Michael I. Krauss[†]

PART I: THE NATURE OF TORT LAW

1. The Cost of Tort Litigation

"A billion here, a billion there, and pretty soon you're talking about real money." When the late Sen. Everett M. Dirksen from Illinois offered his famous quip about government spending almost 50 years ago, no one imagined that the same words might be used today to describe the American tort system. Fifty years ago medical malpractice insurance premiums were minuscule, and product liability coverage was thrown in as a "freebie" for manufacturers who insured their premises. Not so today. In 2000, a Florida jury awarded punitive damages of $145 billion to a class of plaintiffs.[1] Two years later, a California jury delivered a $28 billion tort verdict to a single individual.[2] In 1998, four major cigarette companies agreed to the mother of all settlements: a quarter-trillion-dollar sum to reimburse states for the costs to them of smoking-related illnesses. People are living longer than ever, though (i.e., life is less risky than before) – so either the increase in tort liability is unwarranted or tort liability in the past was lacking, and we are only now taking up the slack.

The U.S. Chamber of Commerce charges that the tort system is wrecking our economy. From 1930 until 1994, growth in litigation costs has been four times the growth of the overall economy.[3] Over

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[1] The verdict, *Engle v. Liggett Group,* was eventually overturned by the Florida Supreme Court, else it would have bankrupted the defendants. Individual "Engle suits" continue against Big Tobacco in Florida.

[2] J. Broder, *California Jury Allots Damages Of $28 Billion To Ill Smoker*, NEW YORK TIMES, Oct. 2, 2002, *available at* query.nytimes.com/gst/fullpage.html?res=9500E4D7173BF936A35753C1A9649C8B63 (last visited Dec. 11, 2011).

[3] R.W. Sturgis, *Tort Costs Trends: An International Perspective*, 1995.

the last 50 years, tort liability in the U.S. has increased more than a hundredfold, while overall economic production (as measured by gross domestic product) has grown by a factor of 37 and population has grown by a factor of less than 2. The Chamber reports that federal class actions have tripled over the past 10 years, while similar filings in state courts ballooned by more than 1,000 percent.[4] The estimated aggregate cost of the tort system in 2004, including the administrative costs of dealing with claims, was $246 billion[5], or roughly $1,000 for every man, woman, and child in America, according to the Tillinghast group of Towers Perrin, a respected actuarial firm that works for many insurance companies. The share of this cost that goes to trial (i.e., plaintiffs') lawyers – roughly $40 billion – is 150 percent of the annual revenues of Microsoft or Intel, and twice those of Coca-Cola.[6] The cost of our tort system represented 2.23 percent of the nation's gross domestic product, or the equivalent of a 5 percent tax on wages.[7] This cost of $845 per American in 2004 compares to a cost of $12 per American in 1950.[8] In real dollars, the cost of tort has increased 929% since 1950.

Medical malpractice liability (either for misfeasance during a procedure or for failure to obtain "informed" consent before undertaking the procedure) has been particularly affected by recent trends. Since 1975,[9] the increase in medical malpractice costs has actually outpaced the significant increases in overall U.S. tort costs. From 1975 until 2004, medical malpractice costs have risen an average of 11.8% per year, compared to an average annual increase of 9.2% per year for all other tort costs.[10] The compounded impact of this 29-year difference in growth rates is that medical malpractice

[4] *See* Tresa Baldas, *Verdicts Swelling from Big to Bigger*, NAT'L L.J., November 25, 2002.
[5] Tillinghast (div. of Towers Perrin), *U.S. Tort Costs: 2004 Update, Trends and Findings in the Cost of the U.S. Tort System,* January 2005.
[6] *Trial Lawyers Inc.*, Center for Legal Policy, Manhattan Institute, 2003.
[7] Hechler, *Study Sees Rise in Cost of Tort System. Is It Right?* NAT'L L.J., December 22, 2003, at 12.
[8] *Id.*
[9] 1975 is chosen because it is the first year for which insured medical malpractice costs were separately identified by A.M. Best, the worldwide insurance rating and information agency.
[10] Tillinghast (Div. of Towers Perrin), *U.S. Tort Costs: 2004 Update, Trends and Findings in the Cost of the U.S. Tort System*, January 2005, at 10.

costs have increased by a factor of 23 since 1975, while other tort costs have grown by a factor of 12. At nearly $27 billion in 2003, direct medical malpractice costs (not including indirect costs to be discussed below) themselves translated to $91 per person. This compares to $5 per person in 1975.[11]

The upsurge in med-mal litigation (and the concomitant rise in insurance premiums) has had the expected incentive effects in a system where patients do not directly pay for duplicative care. More than 90% of Pennsylvania doctors surveyed admit to engaging in medically unnecessary behavior as a defensive guard against malpractice suits, according to an exhaustive article published in 2005 in the *Journal of the American Medical Association*.[12] Fifty-nine percent said they often order more diagnostic tests than were medically needed, while 52% said they refer patients to other specialists even when such referrals were not indicated by sound practice guidelines. A large majority of nurses (66%) and hospital administrators (84%) who participated in a 2002 survey of health care professionals reported that they deliver or order unnecessary or excessive care to avoid groundless litigation.[13] In 2002, economists Daniel Kessler and Mark McClellan found that 5 to 9 percent of total health care expenditures for heart disease patients are due to unneeded defensive medicine.[14]

That the cost of tort in general, and of medical malpractice in particular, in America has been rising is not seriously questioned. But some scholarship maintains that there are still too *few* tort suits, and that litigation is only beginning to catch up to harms wrongfully inflicted. One 1991 study, for example, concluded that for every eight instances of medical error leading to harm in America, only one malpractice suit is filed – and that one suit, likely as not, is launched in a case without merit.[15] The New York City-based

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[11] *Id*. at 2.

[12] Studdert *et al.*, *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609 (2005).

[13] Harris Interactive, *Fear Of Litigation: The Impact On Medicine*, April 11, 2002, at 19.

[14] Daniel Kessler & Mark McClellan, *How Liability Law Affects Medical Productivity*, 21(6) J. HEALTH ECON. 491, 491-522 (2000).

[15] PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL (1991); *See also, e.g.*, Studdert *et al.*, *Can the United States Afford a 'No-Fault' System of Compensation for Medical Injury?,* 60 LAW &

Committee to Reduce Infections maintains that hospital infections rank as the fourth-highest cause of death in the country, killing more people than AIDS, breast cancer, and auto accidents combined.[16] The Centers for Disease Control and Prevention confirm that approximately two million Americans are sickened, and that 100,000 die, each year from infections contracted in healthcare facilities – many apparently caused by unclean hands and inadequately cleaned equipment, according to a recent study by Boston University.[17]

It is far from clear that these medical "errors" equate to legal *negligence*, of course: humans are not robots, and even careful behavior will stochastically result in missteps.[18] What is increasingly clear, however, is that medical liability is both more frequent and (to a significant extent) random. Indeed, medical liability insurers generally do not even "experience rate" their policies (*i.e.*, a physician's future premiums are in general not a function of past individual claims), meaning that actuaries find that lawsuits are like lightning strikes: uncorrelated with the quality of care likely to be provided by the insured physician.[19]

2. Why Have Medical Liability?

Public law is that subset of our legal system that regulates rights and obligations between citizens and the state. Various types of public law are, in essence, common knowledge. Constitutional litigation (where citizens attack executive and legislative action that is allegedly in breach of our higher law) makes headlines. Judicial attitudes toward public law dominate confirmation hearings. Criminal trials

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CONTEMP. PROBS. 1 (1997); Paul C. Weiler, *Fixing the Tail: The Place of Malpractice in Health Care Reform*, 47 RUTGERS L. REV. 1157 (1995); PAUL C. WEILER *ET AL.*, A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION (1993) ; Richard L. Abel, *The Real Tort Crisis–Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); and PHILIP SLAYTON AND MICHAEL J. TREBILCOCK, THE PROFESSIONS AND PUBLIC POLICY (1978).

[16] *Your Hospital Stay Could Kill You*, ABC NEWS REPORT, March 30, 2006, abcnews.go.com/GMA/OnCall/story?id=1785701 (consulted on 12/11/2011).

[17] P. C. Carling, MD *et al., Identifying Opportunities to Enhance Environmental Cleaning in 23 Acute Care Hospitals*, 29 INFECT. CONTROL HOSP. EPIDEMIOL. 1 (2008).

[18] *See, e.g., Rinaldo v. McGovern*, 587 N.E.2d 264, 267 (N.Y. 1991) ("even the best professional golfers cannot avoid the occasional 'hook' or 'slice' . . .").

[19] Sloan, *Experience Rating: Does It Make Sense for Medical Malpractice Insurance?* 80 (2) AM. ECON. REV. 128 (May 1990).

(where governments sue citizens for breach of conduct) are also prime-time fodder. Notwithstanding this valid interest in public ordering, however, in a free society *private law* issues are more vital.[20]

Private law (roughly, rules regulating the allocation of rights and the sharing of risks among citizens) and private ordering (the possibility for people to "self-determine" through interaction amongst themselves) are in fact arguably what distinguish free societies from totalitarian ones.[21] All countries have public law institutions – prisons and police and legislatures of some kind. But only in free countries is the private law of contract, property, tort, and family law the principal way to acquire and exchange rights and obligations. Private law does this by allowing citizens to transfer entitlements (and to assume risks) voluntarily (through contract law) or involuntarily in one of two ways: when one's choices wrongfully cause harm to another (tort) and through blood or marriage ties (family law). Most of us will never have a serious run-in with the police or with any government agency. But all of us interact daily in the private sphere – we work, we buy, we sell, we parent families, and sometimes we "collide" with others doing the same thing. Tort law, which assigns obligations to wrongdoers who cause harm to others in those "collisions" and which includes medical malpractice as a subset, is an essential component of private ordering.

2-1. What Tort Is Not

What is the essence of tort?[22] This important question is perhaps best broached by sketching what tort law is *not*:

Tort law is not insurance against unfortunate losses.

Tort law does not exist in order to provide protection against risks. Free societies have a "thick" (*i.e.*, competitive) contractual market for insurance policies that does just that.[23] Most losses happen without any tort – lightning may strike us, we may get sick and

[20] *See, e.g.*, RANDY BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).
[21] *See, e.g.*, FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); BRUNO LEONI, FREEDOM AND THE LAW (1991).
[22] ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1995).
[23] Peter Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177 (1990); Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820 (1995).

miss work, or a medical procedure may fail through no fault of the physician. Homeowners' insurance, health insurance, and life insurance (commonly called "first-party insurance" because they protect the insured party against losses she suffers) are widely available and administratively inexpensive.[24]

If insurance against catastrophic loss is the desired goal, it can be obtained through contract law and a competitive first-party insurance market. If "free insurance" (otherwise known as "social insurance") for the poor, or for all, is desired, then public law (modifications to welfare law, tax law, and the like), *not* tort law, is the appropriate vehicle. Public law socializes risk, removing it from the realm of private ordering. We should and do debate how many risks should be socialized – removed from private ordering and borne by the state. But neither socialized risk nor personally assumed risk has anything to do with tort law. However, if a loss is one of those rare ones that result from a wrongful act by a third party (including a physician), the victim may recover from that third party, called the tortfeasor.[25] That *third-party* liability is tort law, and if potential tortfeasors wish to insure against such liability they purchase "third-party insurance."

Tort law is not a national compensation scheme for innocent victims.

Tort's essence is not compensation for all innocent "casualties" (although tort does compensate certain victims in certain circumstances). Rather, the essence of tort law is to reallocate risks when one person has wrongfully and without consent caused harm to another.[26]

Many innocent people suffer losses that, though tragic, do not and should not lead to a tort recovery. Indeed, the vast majority of

[24] The loading cost of first-party insurance is roughly 10 percent; that is, of every dollar in premium paid about 90 cents go to cover losses. The remainder covers administrative fees and profit.

[25] Of course, the victim may not recover from the tortfeasor if the victim has already been paid by her first-party insurer and has transferred her tort entitlement to that insurer. If that transfer (called subrogation) has not taken place, the victim has a suit against the person who has wrongfully harmed her.

[26] *See* Ernest J. Weinrib, *The Special Morality of Tort Law,* 34 MCGILL L. REV. 403 (1989).

good people to whom bad things happen should have no recourse in tort. The pedestrian killed in an earthquake, the merchant who loses everything she owns to a more efficient business competitor, the baby born with a congenital birth defect, the patient who dies on the operating table despite heroic efforts by medical staff, and many, many others, are all deserving of our compassion. But this compassion can and should find no solace in tort law. Just because something sad has happened does not mean tort law should provide a remedy. *Tort law is not an equalizer of risks.* Only replacement of tort law by social insurance could equalize chances and compensate all innocent victims.[27]

Tort law is not a creation of state "public policy."

Government is not a party to a tort suit – unless, of course, the government (through one of its employees, say) has either committed a tort or suffered damage to its property (as when a motorist negligently runs into a government building). Though of course state courts may be called on to decide tort disputes, they do this by neutrally applying private law principles, not by enacting legislative policy.

Instead, public policy is a quintessential yield of public ordering. Every citizen has the right to intervene in the legislative process that produces public policy, but only parties directly involved in a tort suit are permitted to intercede in that suit. Our legislative process, which guarantees to all the right to voice their views, is the constitutional forum for policymaking. Common law judges are not public policymakers.[28]

Tort suits are not a mechanism to express public outrage.

Vindication of public outrage is the province of criminal law, a

[27] New Zealand has abolished tort law for unintentional harms, and has replaced it with government compensation of victims, funded through traditional tax sources. For a defense of the replacement of tort law with such social insurance, *see* Michael Whincup, *Compensation for accident victims: The exemplary model of New Zealand*, 7 J. CONSUMER POL'Y 497, 497-405 (2004).

[28] Misunderstanding of this distinction used to be rare among judges, though it occasionally reared its head: *see, e.g.*, Warren A. Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950). Today, especially in certain states, the confusion of roles is both common and quite damaging. *See* Michael Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U. L.J. 623 (1992).

leading component of public ordering.[29]

Tort law is not about punishment.

Criminal adjudication, a branch of public law replete with constitutional protections, punishes violators of public order; common law torts, on the other hand, require compensation or rectification of the wrongfully imposed risk, not punishment.[30]

Tort law is an inappropriate vehicle for redistribution of resources.

Redistribution is the province of tax and welfare law, components of public ordering. Coerced transfer through public ordering is typically based on conceptions of *distributive* justice – the view that certain citizens have "too much" and others "not enough." In tort, however, forced transfers are based on notions of *corrective* justice – the view that when a defendant has wrongfully caused a loss to a plaintiff, the plaintiff should receive compensation for that loss. The notion of corrective justice has no distributive punch; that is, if a defendant – no matter how poor and pitiful – wrongfully[31] harms a victim – however rich and powerful – the victim is owed compensation in tort.

Tort law is, in sum, essential to private ordering. To see this, imagine that tort were replaced by social insurance, as has to some extent taken place in New Zealand. This would signify, in essence, that every loss is a "public" loss, with government providing protection against risks in life. Imagine also that government proceeds to sue (*i.e.*, prosecute) all those who cause such "claims" on its resources. In such a society there would be no need for tort law – government recoupment of its payouts would consist of fines or other criminal

[29] JULES COLEMAN, RISKS AND WRONGS (1992).

[30] It is true that modern-day some products liability suits are characterized by significant punitive damages – here some kind of public regulation is arguably being attempted. Punitive damages are extremely rare in other tort adjudication, including medical malpractice. *See* Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 1996 Tort Trials and Verdicts in Large Counties* (2005).

[31] Some may object that strict liability (the rule for products liability, but not for other torts) does not require wrongdoing for tort liability. But even in products cases, defendant's liability requires some misbehavior (poor design, poor instructions) or breach of contract (in defective manufacturing cases).

penalties.[32] There would also be no meaningful property law in a world where all risks are borne by government, since ownership as we understand it entails the assumption of the risk of loss.[33]

Socialization of risks substitutes public for private ordering. In other words, socialization of risk substitutes regulations and criminal liability for contract and tort. Wrongs against persons in a free society become offenses against the state. Political processes, not private conduct, determine who secures and loses entitlements in a publicly ordered society.

2-2. Torts And Contracts as Risk Assignment Mechanisms

It is of the essence of private ordering that transfer of risks through tort be subjugated to consensual transfer through contract. If I assume a risk voluntarily, through contract, trying to force that risk (if it materializes) on my co-contracting partner amounts to a repudiation of my word. If I purchase a home in a one-industry town, I may not blame my seller two years later if the factory has shut down and my house has lost most of its value, for I assumed that risk through contract by buying the house.

When a victim expressly or implicitly assumes a risk of loss through contract, tort should decline to shift that risk. Medical procedures are inherently risky, and patients should be fully informed of reasonably significant risks before consenting to a procedure.[34] Medicine is not like plumbing: the extent of our knowledge is much more limited and therefore outcomes are always more probabilistic. The mere fact that an operation is not always successful is often trag-

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[32] In 1992, New Zealand was obliged to reinstitute many aspects of a fault-based (*i.e.*, tort) system after 20 years of experimentation with social insurance because government costs were spiraling out of control. For a summary of developments, *see* Colleen M. Flood, *New Zealand's No-Fault Accident Compensation Scheme: Paradise or Panacea*, 8 HEALTH L. REV. 3 (2000).

[33] "Owners" would in fact become "tenants" of government in such a system; the only party that would truly absorb a loss would be government. But a new risk would emerge in such a system: the risk that government would decide that one's holdings more properly belonged to someone else. This political risk of publicly ordered societies has proven to be one of the downfalls of Marxist collectivism.

[34] "Full" warning by physicians before operating is neither possible (not all risks are known) nor socially desirable. *See, e.g.,* B.M. Patton, *Death Related to Informed Consent*, 72 TEX. MED. 49 (December 1978).

ic, but tragedy is not sufficient basis for a tort remedy. Yet, when a medical procedure has been less successful than was hoped and anticipated, the undesired result is typically used as evidence (under the doctrine of *res ipsa loquitur*) of the physician's or medical center's negligence, as is discussed below in the illustrative case of obstetrics.

PART II: MEDICAL MALPRACTICE LAW IN CRISIS

3. Manifestations of "Crisis"

Medical malpractice has been more prone to cries of "crisis" than many other areas of tort law. Manifestations of the alleged medical liability crisis are, among others:

Significant increases in medical liability costs

Since 1975, when insurers first began to itemize tort costs attributable to medical liability, those costs have grown at a compound annual rate of 11.8 percent, which is fully 28 percent more rapidly than the 9.2 percent annual increase already bemoaned for all U.S. tort costs.[35] Those medical liability costs have been translated into uneven, sometimes drastic, increases in medical liability premiums, as liability insurers periodically hemorrhage money – for every dollar of premium earned in 2001, for example, insurers paid out $1.38 nationally. In addition, the much-publicized 2002 decision by St. Paul, the nation's biggest single medical liability insurer, to cease writing new medical liability policies contributed to a drop of approximately 15 percent of the premium-writing capacity of the industry nationwide.[36] Median malpractice premiums rose faster than the increase in total health care spending from 2003 to 2005, perhaps as a result of the drop in supply.[37] For medical malpractice cases going to trial, median jury awards more than doubled from $280,000 in 1992 to $682,000 in 2005 (a 60% greater rise than would be anticipated by inflation alone).[38]

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[35] *U.S. Tort Costs – 2003 Update*, published by Tillinghast–Towers Perrin.

[36] James D. Hurley, "A New Crisis for the Med Mal Market?", 2002/4 *Emphasis* at 2 (Tillinghast, Div. of Towers Perrin, quarterly magazine).

[37] Insurance Information Institute, *Medical Malpractice*, May 2007, *available at* www.iii.org/media/hottopics/insurance/medicalmal.

[38] *Civil Bench and Jury Trials in State Courts, 2005* (Bureau of Justice Statistics, U.S. Depart-

A rise in mammoth claims and awards

According to one database, the percentage of payments over $1 million sextupled, to slightly more than 21 percent of medical liability claims, from 1995 to 2005.[39] In several specialties, including obstetrics-gynecology ("OB-GYN"; see below), the *average* claim is now over $1 million. Mammoth claims affect medical liability insurance rates and insurability much more than do smaller claims, as they significantly increase risk for insurers and therefore increase their desire to engage in "nuisance settlements" of dubious or even invalid claims (in order to avoid the small risk of a massive award).

Widespread anecdotal allegations of alienation of physicians

These anecdotes include stories of massive "early retirement," of restriction of practice to existing (and new low-risk) clientele, and of reduction in supply of certain specialty fields, especially OB-GYN, in many states.[40]

Exacerbation of medical inflation

This is said to occur not only because high liability awards are directly factored into insurance premiums and therefore into fees for services, but also and quite importantly because redundant and expensive tests, procedures, and referrals are said to be performed by physicians (and strongly encouraged by malpractice insurers) as prophylactics against medical liability. A survey by Aetna Insurance reported that 79% of physicians polled in 2002 ordered more tests than they felt were medically appropriate (these tests are, of course, paid for by patients' insurance carriers, so patients don't typically object to them) in order to provide a buffer against malpractice liability.[41] One telling illustration of this in a particularly afflicted field of medical practice is highlighted immediately below.

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ment of Justice 2008).

[39] *Id.* at 5.

[40] *See*, *e.g.*, U.S. Department of Health and Human Services, *Addressing the New Health Care Crisis*, March 2003, at 3-4, for representative examples.

[41] Insurance Information Institute, *Medical Malpractice Insurance*, INSURANCE ISSUES SERIES, Vol. 1, No. 1 (June 2003).

4. Obstetrics: A Case Study

A two-volume study from the National Institute of Medicine ("IOM") in 1990 illustrates the medical liability crisis in striking detail. The study, entitled *Medical Professional Liability and the Delivery of Obstetrical Care*, contained the findings of an interdisciplinary committee that investigated the effects of litigation on the practice of obstetric medicine. The study IOM conducted had no institutional bias toward physicians or patients. It commissioned over 20 research papers and reviewed more than 50 existing surveys, as well as other scholarly research.

The study found that greater than 7 in 10 obstetricians had been sued at least once. Suits invariably followed "imperfect" births, which constitute (depending on one's definition of "imperfect") upwards of 5 percent of all births today. Plaintiffs in such cases typically claim that had the obstetrician delivered the baby earlier, by Caesarian section, the baby would have been "perfect." Such claims are rampant; the IOM committee found, for instance, that in Massachusetts fully 80 percent of obstetrical malpractice claims included a charge of failure to perform a Caesarian section.

Such claims, based on hindsight and unsupported by any individualized evidence of wrongdoing or causation, never would have been filed in earlier times – the baby likely would have died in childbirth, an occurrence that was frequent enough to be culturally accepted and which, of course, had relatively little economic cost. But today children with cerebral palsy survive and need expensive care – and suits against doctors have been allowed to go to juries, who often suspect that the defendant physician is insured against liability. That knowledge, coupled with a fear of mammoth awards for pain and suffering to parents, leads insurers to propose settlements that result in substantial increases in medical liability premiums, even for physicians who have done nothing wrong.

Today, thankfully, babies with neurological problems can be saved and maintained throughout their lives. But these maintenance costs are extremely high, and of course handicapped babies have limited prospects for earning income when they reach adulthood. Whereas in the past parents were wont to conclude that divine will,

or in some cases the parents' own misbehavior during pregnancy, were likely causes of their child's "defect" or death, today very large amounts of money are at stake. As a result, it is much easier to convince an anguished parent that someone else is to blame for their misfortune. Plaintiffs' lawyers in "bad baby" cases are often anxious to get before a jury and ask for compensation for the innocent baby from the doctor's large, faceless medical liability insurer. Infant neurological claims against obstetricians accounted for the absolute majority of suits against OB-GYNs in many states by the time the IOM study was published.

Typically, OB-GYN medical liability suits seek millions and often tens of millions of dollars in damages (the cost of rearing a "defective" child). Classically, the plaintiff's claim is that the obstetrician failed to monitor the fetus adequately, which in turn led to the failure to perform a Caesarian section.

Not surprisingly, the IOM study found a distinct relationship between the medical liability system and Caesarian sections. The study documented a startling increase in the number of Caesarian section births as defensive medicine. By 1990, Caesarians accounted for 25 percent of all deliveries in the country, easily the highest rate in the world and a fivefold increase from the 5 percent rate in 1970. The nationwide billing for unnecessary Caesarian section deliveries was estimated at $1.15 billion per year in 2005 dollars, not including any of the costs of negative side-effects of surgery.

The expansion of OB-GYN liability prompts the question: have doctors become more negligent over time, or has technology afforded a greater opportunity for "perfect hindsight"? Electronic fetal monitoring, or "EFM," was developed in 1972. The idea was that by monitoring the fetus, the doctor could detect distress and intervene (typically by Caesarian section) to ensure a normal birth. Cerebral palsy claims quickly became "negligent failure to monitor" claims. Even by 1990, however, the IOM knew that most cases of fetal brain damage were not due to delivery events. *Widespread use of fetal monitoring strips has not reduced the incidence of cerebral palsy*, as the strips are prone to many and costly "false positive" results. The IOM report concluded that overwhelming evidence establishes that "EFM

[with subsequent Caesarian section] has not reduced neonatal morbidity and death, and . . . has not reduced the frequency of developmental disability."[42] Yet EFM not only remains in (costly) use, but it is still considered standard procedure if an obstetrician hopes to defend against charges of negligence.

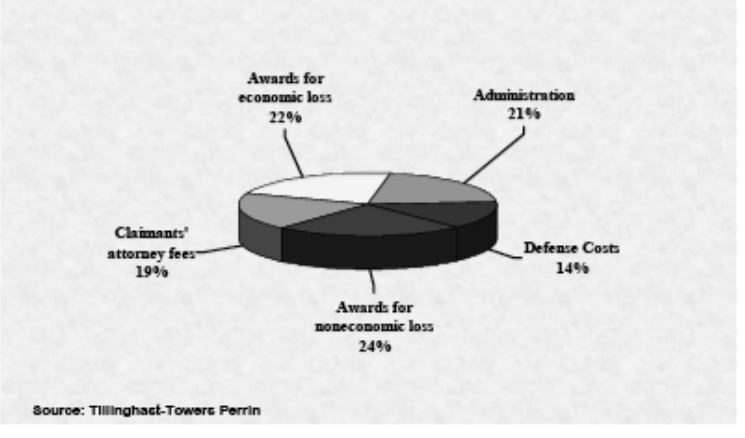
Consider, for example, a settled case that resulted in what was at the time the largest medical liability payout in the history of Connecticut: *Sabia v. Humes*. This case is the subject of Barry Werth's thorough case study, *Damages*.[43] Despite an utter absence of evidence of any causal negligence on her part, the Sabia's OB-GYN and her insurer agreed to a multi-million dollar settlement of a "bad baby" case. Nothing special about Connecticut law allowed *Sabia* to happen. Indeed, "*Sabias*" happen, as it were, across the country every month. Recently, the award in *Sabia* was dwarfed by another Connecticut case where, again, the jury found that a baby suffering from cerebral palsy should have been delivered by C-section following fetal monitoring. The baby was present at trial, and the jury forewoman commented, "we all wanted to reach out and hug him."[44] This baby received $36.5 million, even though, to repeat, most clinicians do not believe that babies acquire cerebral palsy from the failure to be delivered by C-section.[45]

The IOM committee found that in every state, sizeable numbers of family practitioners had eliminated obstetrics from their practice by 1990. They did so because the increase in liability insurance premiums made the obstetric part of their practice unprofitable. Obstetrical specialists, for their part, reduced or eliminated services to high-risk women. One common way for OB-GYNs to screen out high-risk pregnancies is to cut Medicaid caseloads. This is because, statistically, Medicaid patients are more likely to have engaged in poor prenatal care. In addition, the pro-rated cost of obstetric liabil-

[42] Institute of Medicine, 2 MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 79 (1989).
[43] Barry Werth, *Damages*, (1999).
[44] Stephanie Reitz, "Hospital, Doctor Faulted: Boy Suffered Brain Damage During Birth", Hartford *Courant*, Nov. 29, 2005, A1
[45] Alastair MacLennan *et al.*, *Who Will Deliver Our Grandchildren: Implications of Cerebral Palsy Litigation*, 294 JAMA 1688 (2005).

ity insurance all by itself is often greater than Medicaid reimbursement OB-GYN's can expect to receive for a delivery.

This is clearly perverse. The purpose of private ordering (see above) is not achieved by transferring a risk from a possibly[46] innocent parent to an equally innocent doctor. This is not tort law – this is forced third-party insurance, increasingly used in the United States as an extraordinarily inefficient financing mechanism for gravely injured children. Verdicts and settlements are paid for out of physicians' medical liability insurance, which of course is third-party insurance. But third-party insurance has a direct load effect of over 100 percent – that is, it costs more than $2 in premiums to get $1 to a needy person. Indeed, only 22 cents of the medical liability insurance dollar goes to litigants to pay for their actual economic losses. Much of the remainder gets parceled out to lawyers, expert witnesses, and the like. This insurance is paid for by practitioners, of course, and carves out a considerable portion of their gross income. This is shown in Exhibit 1, below:



This forced insurance thwarts many doctors' idealistic career goals. Inevitably, a doctor who has been sued (an absolute majority

[46] Poor pre-natal care and failure to inform one's physician of risky incidents make the mother's "innocence" less than certain in some cases. In the *Sabia* case, for example, the pregnant mother never reported a violent attack by her husband to the OB-GYN. Nor was the mother's alcohol and marijuana consumption strictly monitored or reported to her doctors.

of OB-GYNs have been sued) will often, despite her best intentions, subconsciously consider patients as future adversaries, not as "friends" in need of loving care. The doctor who treats patients as potential adversaries cannot provide the caring healing *which itself increases cure rates*. By increasing the alienation doctors feel from patients, the medical liability explosion actually contributes to the injury rate. Overuse of knowingly needless and expensive procedures and equipment (like EFMs), just because they exist and because an "expert" is prepared to argue, Monday-morning quarterback style, that they were needed, is one of many ways in which medical liability's costs filter down to the entire population. Demoralization of the healing arts is another way in which this misdeed is done. The first type of cost can be captured in actuarial studies. The second type of damage is hidden and possibly more insidious.

It is crucial to understand that advances in technology constantly provide new ammunition for those in search of a "reason" for a bad medical result. ("Why didn't you use this device or that technique? It might *possibly* have made a difference.") The ubiquity of third-party malpractice insurance surely eases jurors' pain in assigning blame, even if deep down they know that causal negligence has not been established by a preponderance of the evidence.[47]

And such negligence is apparently quite rare, despite studies indicating that "medical errors" abound. In the famous Harvard Medical Practice Study in New York state, alluded to above, researchers put 31,000 randomly selected hospital records from 51 New York hospitals through a two-stage review process to identify the rate of negligent medical injuries among that sample. The two sets of reviewers (who had no axe to grind and were not paid by any party) identified the same negligently caused injuries only **four times** in 318 potentially flagged (adverse outcome) cases.[48] This concurrence emerges far less frequently than do plaintiffs' medical liability ver-

[47] The bankruptcy of Virginia's principal med-mal insurer has left many providers "bare" (*i.e.*, vulnerable in their personal assets) for past coverage. I am very reliably informed that the success rate of med-mal suits against physicians who are left "bare" is considerably lower than it is for insured physicians.

[48] Troyen A. Brennan *et al.*, *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 324 NEW ENGLAND J. OF MED. 370 (1991).

dicts and pro-plaintiff settlements.

In addition, as mentioned above, a tremendous indirect load of inappropriate liability, not captured in Figure 1, is the "common pool" of "CYA" redundant and inefficient care paid for by health insurers (first party insurance) and ultimately by patients themselves. The real losers are, thus, doctors and patients alike, who suffer a decline in supply and an increase in the price of medical services. In ways similar to that afflicting obstetrics, other specialties and even general practice have been afflicted by this desire of juries to turn tort law into health insurance. This is a perversion of private ordering. Only tort reform can cure it.

PART III. STATE LIABILITY MEDICAL MALPRACTICE REFORM

5. Impact of State Legislative Reform

Almost all 50 states have enacted some kind of tort reform applicable to medical liability. In some states, the reform enacted was general (*i.e.*, it was applicable to all tort suits), while in others the reform applied only to medical liability. Appendix A contains an up-to-date compendium of several of these reforms, state-by-state.

The experience of our most populous state is an instructive introduction. California, once seen as a tort plaintiff's paradise, enacted the Medical Injury Compensation Reform Act ("MICRA") in the 1980s. Now, with a $250,000 cap on non-economic loss and several other reforms, the Golden State has among the lowest medical liability insurance costs of states with 10,000 or more physicians. California's average claim payment, reflecting MICRA, is consistently below that of many states not considered to be lawyers' paradises. California's malpractice insurance premiums, as compared to average medical liability premiums across the nation, have been dropping ever since its courts upheld the constitutionality of MICRA in 1985. Between 1985 and 2001, California malpractice premiums decreased from 16.9 percent to 9.1 percent of total malpractice premiums paid across the country. Med-mal premiums paid did rise from $350 million to $500 million from 1976-2000, but these pre-

miums increased from $1 billion to over $5.5 billion in the rest of the country during the same period. [49] In the same time, California's population increased slightly as a percentage of the national population, from 11 percent to 12 percent. In California there has been a decrease in both the chance a physician will be held liable and the extent of damages the physician will have to pay if held liable.

It is useful to canvass eight principal types of reforms that have been adopted, noting the advantages and drawbacks of each proposed reform as I see it.

6. Types of State Legislative Reform

6-1. Compulsory Non-Binding Alternative Dispute Resolution

This reform typically mandates that would-be plaintiffs first seek relief through some alternative adjudication process (such as nonbinding arbitration of the claim by an expert panel of medical professionals) before any medical liability suit can be brought. The panel can recommend or not recommend compensation, but its recommendation does not prevent the "losing" party from filing a tort suit. The goal, presumably, is to nip in the bud the most frivolous lawsuits by showing the plaintiff's lawyer that he has no hope of success, and to do this at very low cost to innocent physician defendants. The thinking is that if an arbitration result is relatively certain and relatively cheap, the defendant's insurer will be less likely to offer generous "nuisance settlements" that drive up premiums. Moreover, with a reduced prospect of any such settlement, a contingent fee attorney will more likely drop a losing claim rather than invest hundreds of hours of his own labor in it. Many states have incorporated a version of this reform. Other states have statutory language appearing to strongly recommend this route.

Most versions of this reform have proven somewhat ineffectual. Parties tend to consider required arbitration a delaying tactic. Plaintiffs who "lose" before the medical panel tend not to feel terribly disadvantaged when the panel's report is produced at trial, so long

[49] U.S. Department of Health and Human Services, *Addressing the New Health Care Crisis*, March 2003, Figure 1, at 24.

as they are able to find an expert who disagrees with the panel and who agrees with their assessment of defendant's behavior: such expertise is typically obtained before trial has begun. Of course, *binding* arbitration through tort reform (*i.e.*, precluding any trial after the panel has rendered its sentence) is not allowed, as 49 states and the federal system all constitutionally guarantee their citizens the right to a jury trial of judiciable civil disputes. Plaintiffs often feel comfortable going forward with their expert before a jury even if a panel has not found in their favor.

One proposed reform arguably would have a substantial impact if it is adopted. An example is "Bill 902," adopted by the North Carolina Senate in September 2003. The bill gives trial judges discretion to order mandatory non-binding arbitration before a panel of three expert "referees," one chosen by each side, and a third jointly or by the judge. After reviewing a medical liability case, the panel would either recommend that the defendant settle (if the plaintiff's case had merit) or that the plaintiff drop his or her suit if the case was without merit. The bill provided that if a party (the plaintiff in most cases) loses before the arbitration panel *and again before the jury*, that party is liable for all court costs, including the lawyers' fees of the winning side. Such a provision, were it enacted and upheld against the expected constitutional challenge,[50] would arguably dissuade a plaintiff's lawyer from pursuing a dubious suit after an adverse arbitral sentence.[51] Of course, settlements could not be easily subjected to the "loser-pays" rule, so a significant number of last-minute settlement offers from the losing party would likely ensue. On the other hand, insurers would be far less likely to advocate nuisance settlements when their bargaining position is fortified by a fee-shifting threat.

6-2. Limiting Contingent Fees

Some jurisdictions have capped plaintiffs' lawyers' contingent

[50] Litigants would likely have claimed that the fee-shifting provision "chilled" the plaintiff's exercise of his or her right to a jury trial. Some states' courts have upheld analogous challenges to tort reform, while others have not.

[51] I assume that contingent fee attorneys will bear this cost (*i.e.*, they will agree to "hold harmless" their clients against any claim of attorney's fees by the defendant physician).

fees at 33 percent or some lower figure derived from a sliding scale as the amount obtained through judgment or settlement increases. Such caps on fees have often (though not always) been upheld by state courts applying their own constitutions. For its part, the United States Supreme Court has not found fee caps to adversely affect any federal right to counsel.[52]

But there is question of whether this reform results in a perverse incentive for plaintiffs' attorneys. Some researchers believe that caps on contingent fees lead attorneys to inflate the amount they demand for non-economic damages (especially in states that have not capped such damages) in order to emerge with the same fee (a lower percentage applied to a higher amount) they previously received. There is insufficient empirical research to properly evaluate this claim, which actually seems a bit odd (why would a jury cooperate to increase a plaintiff's lawyer's take?). Presumably attorneys could also equalize their income by taking more (and therefore less valuable or founded) cases and spending less time on each case. Another potential effect of contingent fee caps, like all price controls, is to induce unethical "side payments" to attorneys who are particularly in demand and who would otherwise equilibrate supply and demand by increasing the contingent fee. State bar associations need adequate additional enforcement resources to prevent such side-payments.

Little known to tort reformers is that, even under current law, many contingent fees are arguably violations of states' ethics codes. Virtually all states' Rules of Professional Responsibility require that contingent fees be "reasonable" (*i.e.*, given the work invested by the lawyer and the true risk of non-recovery assumed by the attorney) and the clear implication is that contingent fees must also be subsidiary (*i.e.*, that a client who prefers to pay an hourly or fixed fee be given that option). Many contingent fees fail one or both of these tests, and are therefore vulnerable to challenge as unethical and therefore unenforceable.[53]

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[52] *See, e.g.*, *In re Berger*, 498 U.S. 233 (1991) (capping fees for capital defendant's attorneys practicing before the Supreme Court).

[53] *See, e.g.*, Peter Passell, *Windfall Fees in Injury Cases Under Assault,* N.Y. TIMES, February 11, 1994 at A1; LESTER BRICKMAN ET AL., RETHINKING CONTINGENT FEES: A PROPOSAL TO

6-3. Modifying the "Collateral Source" Rule

To understand the common law "collateral source" rule, assume a patient is wrongfully injured by a physician, and suffers $10,000 in damages. Before the plaintiff can sue, neighbors organize a benefit car wash, and make good the $10,000 loss. Should the patient nonetheless have the right to sue the physician for $10,000?

Common law's collateral source rule does not allow a tortfeasor to deduct from what he owes his victim most sums given to the victim by third parties.[54] Originally, this provision was meant to ensure that gratuities made to, or insurance policies purchased by, the victim benefitted the victim, not the tortfeasor.[55] Thus, if a doctor negligently disabled a patient, causing him to miss a day's work, but the patient's employer then gratuitously donated to the patient his or her salary for the missed day, the patient could nonetheless recover the lost salary by suing the physician.[56] Insurers (in their first-party insurance policies), employers, and all other benefactors who indemnify victims are of course free to require "subrogation" (*i.e.*, assignment of the victim's rights) as a condition of their policy, in which case the victim is liable to reimburse the benefactor for sums paid out after he or she has been made whole by the tortfeasor.

The proliferation of third-party payments has made the collateral source rule look like a boondoggle for plaintiffs in some cases. For example, in a case from Virginia, an employee-doctor of *Kaiser Permanente*, which was both the victim's health care provider and his first party insurer, bungled an operation. A second procedure was required to repair the damage caused by the Kaiser doctor's negligence. Kaiser offered to pay for this second operation (which was performed by an outside physician) – but it would have had to pay

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ALIGN THE CONTINGENCY FEE SYSTEM WITH ITS POLICY ROOTS AND ETHICAL MANDATES (1994).

[54] *See* Michael Krauss & Jeremy L. Kidd, *Collateral Source: Explanation and Defense*, 48 LOUISVILLE L. REV. 1 (2010).

[55] If the victim's first-party insurance policy has a subrogation clause (*i.e.*, a clause allowing the insurance company to recover its payment from any available tortfeasor), then that clause will be enforced and the insured will not be "paid twice." The collateral source rule applies, therefore, to third-party payments that are not made subject to subrogation clauses.

[56] *Bullard v. Alfonso*, 595 S.E.2d 284 (Va. 2004).

for this operation, tort or no tort, since it was the victim's first-party insurer. The victim underwent the second (successful) procedure and then sued Kaiser Permanente for its commercial value (*i.e.*, what the victim would have had to pay for that second operation at market rates)! Kaiser was ordered to pay a second time for this operation under the collateral source rule.[57] Another example of the modern workings of the rule: plaintiffs have been allowed to sue hospitals for the very high "list price" cost of additional medical procedures made necessary by a physician's negligence, even though the costs they paid for such procedures was far "under list" because their health insurer had obtained "discount" rates – the discount is seen as a collateral benefit.

Blanket abrogation of the collateral source rule, as has occurred in some states, will reduce liability payouts – at least in the short run. But in the long run, such receipts (for example, gifts to the victim or insurance payments received by the victim) would likely be contractually modified to require subrogation or reimbursement to the benefactor/insurer if a solvent tortfeasor becomes available. That is because neither the donor nor the purchaser of first-party insurance typically wishes to benefit a solvent tortfeasor. In that sense, the common law collateral source rule reflects the situation that would likely prevail in its absence.

6-4. Periodic Payments ("Structured Settlements")

Under this very common reform, a defendant may pay accrued future economic damages (typically, medical payments) on a periodic basis, instead of paying a lump sum of present and estimated future damages as the common law provides. Proponents of mandatory structured settlements believe that they will reduce exaggerated damage claims by the plaintiff and overly generous lump sum awards by the jury. But periodic payment reforms have not proven very popular. In practice, they must be accompanied by detailed bonding provisions, because the defendant must give some guarantee that he will not dissipate his assets between this year's and next

[57] *Karsten v. Kaiser Foundation Health Plan*, 808 F. Supp. 1253 (E.D. Va. 1992). Kaiser obviously had no subrogation clause, else it would have been subrogated against itself, so to speak, and could cancel its debt.

year's tort payments. The guarantee must be a bond or an annuity, the purchase of which requires a lump sum payment by the defendant – this payment of course goes to the provider of the bond (typically an insurance company), not to the plaintiff. This is cumbersome administratively, and requires an estimate of future damages by someone (the insurance company, who will charge for this service) as well as the annual administrative cost of having that year's damages calculated by a jury. Additionally, periodic payments encourage patients to malinger (so as to maximize next year's payment); the yearly disbursement has the same perverse incentive as welfare payments. Malingering is discoverable, of course, but is costly to discover. On the other hand, lump sum awards encourage plaintiffs to get well as soon as possible – even sooner than was predicted when the award was made, as plaintiffs will receive a windfall for so doing. It is in society's interest to have potentially productive citizens back in the workforce sooner rather than later. Periodic payment provisions have thus not caught on where they have been made optional by law.

6-5. Damage Caps

This is the most typical type of tort reform. Caps come in many different varieties, but it is useful here to outline two general species:

6-5.1. Non-Economic Damage Caps

Just over half of the amount received by tort victims who obtain final judgment compensates for non-economic damages, also known as "general damages" or "pain and suffering." Some studies indicate that non-economic damages currently make up *well over* 50% of med-mal awards.[58] Pain and suffering are real phenomena, and a wrongdoer should not have *carte blanche* to inflict them on innocent victims. On the other hand, pain and suffering are impossible to objectively quantify, because no explicit market for pain infliction

[58] The Florida Department of Insurance Closed Claims Database revealed that non-economic damages comprised 77% of 2002 awards. In Texas, 70% of the average ($2.1 Million) judgment is apparently now for non-economic damages. *See* U.S. Department of Health and Human Services, *Addressing the New Health Care Crisis*, March 2003, at 13 (and notes 71 and 72).

or pain relief exists. Are the physical pain and the anxiety caused by a second operation (required because of a physician's negligence) "worth" $5,000, or $500,000, or $5,000,000? Is a mother's suffering while raising a child paralyzed by a physician's negligence worth $50,000 or $50,000,000? Is the suffering occasioned by a patient's knowledge that he or she is scarred "worth" $10,000, or $1 million, or $100,000,000?

Despite ingenious attempts by economists to quantify pain and suffering, the fact remains that these efforts are very tentative. In any case, juries are not instructed on economic theory, and the amounts demanded for pain and suffering are often more a function of the physician's liability coverage than of any objective calculation. It is not surprising therefore that jury awards for non-economic damages vary enormously. For economic damages (lost wages, the cost of past and future operations and physical therapy, etc.), on the other hand, market evidence is more robust; thus it is easier for a judge to strike down jury awards that are beyond the pale of the evidence. If a patient loses a week's salary because of a doctor's negligence, the judge will not allow the jury to award the patient two months' pay. But a judge who personally believes that a scar is "worth" $10,000 of "suffering" cannot honestly strike down a jury award of $1 million, as scars in particular, and suffering in general, have no consensus market value.

A cap on non-economic damages through common law (as was done by Canada's Supreme Court in 1978[59]) or legislatively (as has been done in a majority of states[60]), can chop one extreme tail off this curve. Capping non-economic damages only affects a small number of awards. But this small number of huge awards affects liability insurers' expected payout significantly. High variance awards therefore have a very significant effect on willingness to settle,[61] so caps on non-economic damages are meaningful in the ex-

[59] The imposed cap was CDN$100,000, adjusted annually for inflation which equates to about CDN$375,300 today. The cap was imposed in a trilogy of cases: *Arnold* v. *Teno* (1978) 83 D.L.R. (3d) 609, *Andrews et al. v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 and *Thornton* v. *School District No. 57* (1978) 83 D.L.R. (3d).

[60] See Appendix A for a table of state liability caps.

[61] The higher the variance of awards, the greater the risk for the defendant and his/her

treme. A cap of $250,000, like the one in place in California under MICRA, may be insufficient these days; not only are extreme cases of excruciating pain perhaps "worth" much more than $250,000 as a pure matter of corrective justice (the victim might have valued his freedom from suffering more than that amount of money, or might now have to pay that amount or more to deal with the psychological trauma his injury has wrought), but practically the lower the legislated cap, the greater the likelihood that a state court will find that plaintiffs have been denied their constitutional right to seek full redress for harm wrongfully caused.

Some state legislative caps on non-economic damages have been quashed as running afoul of state constitutional prohibitions against limiting damages to be recovered for injuries or death.[62] In many other states, plaintiffs' lawyers have challenged non-economic damage caps on "due process" grounds. In a few states (like Ohio), such challenges were broadly sustained on the ground that courts, not the legislature, are entrusted with compensation of tort victims. But in the majority of states, reasonable legislative caps on non-economic damages have survived state constitutional scrutiny.

A cap on non-economic damages, while allowing total recovery for all economic damages (lost pay, cost of future care, etc.) remains the single best way to reduce variance and increase certainty of risk for physicians' insurers. California's MICRA contained nearly a dozen reforms of tort law, but the Government Accountability Office report on medical malpractice demonstrated that it was the cap on non-economic damages that had the single greatest effect in reducing liability insurance premiums.[63] States with caps on non-economic damages experienced an average medical liability insur-

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insurer, and therefore the greater the likelihood of high nuisance settlements, for instance.

[62] *See, e.g.*, § 54 of Kentucky's constitution, as currently interpreted. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995).

[63] *See* Nicholas M. Pace, Daniella Golinelli & Laura Zakaras, *Capping Non-Economic Awards in Medical Malpractice Trials California Jury Verdicts Under MICRA* (Rand 2004), *available at* www.rand.org/pubs/monographs/2004/RAND_MG234.pdf (MICRA's non-economic damages cap reduced the overall liabilities of the defendants by 30 percent. In death cases, defendants' liabilities were reduced by 51 percent, compared with a 25 percent reduction in non-fatal injury claims. The median reduction in noneconomic awards was $366,000.).

ance premium increase of 12% in 2001, compared with 44% for states with no caps.[64]

6-5.2 Comprehensive Medical Liability Caps

Virginia has no cap on non-economic damages. But it, and to some extent several other states, has enacted a cap on *total* medical liability damages, whatever their source. Given a comprehensive medical liability cap of, say, $2 million (the current Virginia number), no judgment may be obtained for more than that amount, even if a negligent physician caused a patient to require 10 remedial operations at a cost to the patient of $5 million. Under Virginia's cap, the patient and (via bankruptcy and Medicaid) third parties (from the taxpayer, to the patient's creditors, to the hospital that provides the remedial services), not the negligent physician, will assume the economic cost incurred as a result of the physician's negligence.

A comprehensive medical liability cap is difficult to defend. It surely reduces maximum awards, but only by making victims of the most egregious injuries, and (as discussed immediately above) third parties, bear part, or most, of the damage caused by the negligent provider. This is not compatible with the nature of tort law, as I have tried to show in the first part of this toolkit. Why should a negligent doctor compensate a minimally injured victim of medical malpractice for 100 percent of her injuries, while a dreadfully injured person gets, say, only 25 percent of her damages? This inequality has resulted in the quashing of several comprehensive caps, usually on "equal protection" grounds. In Virginia itself, the global med-mal cap is under increasing legislative attack.[65]

6-6. No-Fault Compensation (Elimination Of Tort Law)

One effort to stem the abuse of tort law in the OB-GYN field entails removing recovery from tort law and treating the issue as

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[64] Robert Hartwig *et al.*, Insurance Information Institute, *Medical Malpractice Insurance*, INSURANCE ISSUES SERIES, Vol. 1, No. 1 at 8 (June 2003) (citing the Department of Health and Human Services).

[65] Peter Veith, *Med-mal cap fight on horizon for 2009*, 23 VIRGINIA LAWYERS' WEEKLY 1 (August 4, 2008). For example, in 2011 Virginia amended the cap with a table of increases, increasing the cap by $50,000 a year. VA Code Ann. § 8.01-581.15.

one of social insurance having nothing to do with negligence. Virginia implemented this solution in 1987 with its *Birth-Related Neurological Injury Compensation Act*.[66] That act created the Birth-Related Neurological Injury Compensation Fund, often referred to as the "bad baby" fund.

Participation in the Virginia program is not mandatory for either physicians or hospitals. Obstetricians who wish to participate pay $5,000 each year, while all other physicians licensed in the state (including those who do not practice obstetrics and who do not participate in the fund) are assessed $250 per year. Participating hospitals pay $50 multiplied by the number of deliveries made the prior year, with a cap of $150,000 per hospital per year. If the fund's assets are inadequate to maintain it on an actuarially sound basis, a premium tax of up to one-quarter of one percent of net direct medical liability premiums written in the state will be assessed on liability insurance carriers (and presumably passed on to all physicians). All these sums go directly into the compensation fund, which is designed to be self-sufficient.

If a participating hospital or physician is sued for a neurological birth-related injury (defined as an injury "occurring in the course of labor, delivery or resuscitation necessitated by a deprivation of oxygen or mechanical injury that occurred in the course of labor or delivery"), the hospital or physician may elect to refer the case to the fund. Upon a determination by Virginia's Workers' Compensation Commission that an infant comes within the terms of the act, the commission awards a remedy limited to "net" economic loss (deducting all amounts received from collateral sources). The award is paid out periodically, rather than as a lump sum. In addition to reasonable medical expenses, the award compensates for other reasonable expenses, including modest attorney's fees and loss of earnings from the age of 18 onward. No non-economic (pain and suffering) damages are allowed, and no recourse to a court is permitted. If a newborn dies soon after birth, the commission may award up to $100,000 even if there were no economic damages. On the other

[66] Florida has similar legislation. FLA. STAT. §§ 766.301-316.

hand, if economic damages are quite substantial, there is no ceiling on recovery once the act is invoked: Virginia's comprehensive medical liability cap of $2 million, discussed in the previous section, does not apply.

Interestingly, the Birth-Related Neurological Injury Compensation Fund has not proven very popular among OB-GYNs in Virginia. Many have opted not to pay the $5,000 per year for the coverage the fund affords, perhaps because any medical liability award would be limited by the state's comprehensive medical liability cap. To complicate matters further, much litigation has centered on whether a given baby's injury qualifies as a "birth related neurological injury";[67] a skillful plaintiff's attorney intent on obtaining common law tort relief can characterize a child's injury in ways that maximize the chance that the commission (intent on minimizing payoffs to ensure solvency of the fund) will turn down the physician's referral. Additionally, since the mother (but not the father) of a neurologically impaired infant may sue her OB-GYN in a common law court for the mother's own injuries, including pain and suffering (these are not covered by the fund), the statute has not been fully successful in thwarting access to common law courts. Only a half-dozen claims per year, on average, have been resolved through the fund.[68] Those tend to be mammoth economic damage suits, where the plaintiff uses the Fund to skirt Virginia's comprehensive medical liability cap.

In essence, Virginia has attempted to transplant the rationale of workers' compensation into medical malpractice. As is typically the case under workers' compensation, the fund results in partial com-

[67] The statute requires that the following conditions be met: (1) the infant was born alive; (2) an injury occurred to the spinal cord or brain; (3) the cause of injury was deprivation or mechanical injury during labor, delivery, or resuscitation; (4) the infant is permanently disabled as a result and is "in need of assistance in all activities of daily living; (5) the injury was not caused by "congenital or genetic abnormality, degenerative neurological disease, or maternal substance abuse"; and (6) the injury was either caused by a physician participating in the program or occurred in a participating hospital. As the *Sabia* case described by Werth in *Damages* shows, however, the cause of the child's damage is precisely what is disputed in virtually all these cases.

[68] Randall R. Bovbjerg *et al.*, *Administrative Performance of 'No-Fault' Compensation for Medical Injury*, 60(2) LAW & CONTEMP. PROBS. 71 (1997).

pensation only (because of the ban on non-economic damages) and has no disincentive effect on truly negligent parties (indeed, a physician who has reason to believe he is very likely to be negligent has a greater incentive to enroll in the program). On the other hand, unlike workers' compensation (workers themselves are at fault in many of their compensated injuries; for other injuries employers are at fault, and yet cannot be sued in tort, presenting a dual moral hazard), newborn babies are surely not to blame for their birth-related traumas, and so this insurance scheme presents a moral hazard only on one side of the equation.

6-7. Stop-Loss Fund

One reform that has received considerable attention is Maryland's (among other states') recent implementation of "insurance stabilization," often referred to as a "stop-loss" fund. The fund is to absorb all insurers' costs in excess of the (presumably low) medical liability premiums insurers charge physicians. Those who provide revenue for the fund are HMO customers (Maryland imposed a tax on HMOs to provide for the fund, thereby indirectly increasing costs for its poorest citizens, who tend disproportionately to be HMO clients).

From a political standpoint, the Maryland plan placates both physicians (it effectively caps liability insurance premiums) and the plaintiffs' bar (it allows attorneys to continue to obtain high judgments, which will henceforth be indirectly paid by taxpayers instead of by physicians through insurance premiums). From the perspective of private law theory, this is another version of the New Zealand plan, though not as overt. Establishing a stop-loss fund retains the form and stigma of private law liability while in fact placing state government in the role of *uber*-insurer. The implication seems to be that private insurance companies are not doing their jobs adequately; but there is little if any evidence that the insurance market has broken down in Maryland or in any other state implementing a "stop-loss" fund.

6-8. Statute Of Limitations Reform

Every state has a "statute of limitations" that governs the time af-

ter an injury during which a civil suit may be filed. The typical statute allows victims of medical malpractice to launch a suit up to one year from the date a wrongfully caused injury was discovered or should have been discovered. A cause of action involving an infant, however, is often "tolled" (*i.e.*, the one-year deadline does not begin to run) until the infant reaches age 18.

The "discovery" rule can have devastating effects on OB-GYNs. Alleged negligence at birth can be raised for the first time 19 years later, when a physician's ability to defend him or herself is much weaker. As one physician stated, in reaction to a tolling provision, "I've known gray-haired obstetricians who were sued based on something they did during their residency – and the attending physician [who could testify that the obstetrician had behaved correctly] had long since died."[69] "Tail insurance" for retiring physicians must now take into account the possibility of these delayed lawsuits. Indeed, the "discovery rule" permits suits by former children even when their parents were aware of negligence and failed to act. But it accomplishes this at the expense of fairness to physicians who are placed in the position of trying to explain and defend actions that were taken as long ago as 19 years ago, in the face of stale evidence. In case a patient dies, however, even if the patient was a minor or a newborn baby, a legal representative must typically be appointed within a year of the wrongful death and a suit filed within a year of the appointment for the right of action to be preserved. Thus, for wrongful death of a newborn, for example, at most two years would be allowed for suit.[70] It seems incongruous to allow at most two years for a malpractice suit in the case of infant death (when distraught parents might easily neglect to consult an attorney, and therefore to appoint a personal representative for the deceased child, in a timely manner), and up to 19 years in case of survival.

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[69] C. Dolinski, *Liability Obligation Could Last 21 Years After Patient's Birth*, GAZETTE NEWSPAPERS, Baltimore, July 2, 2004 at 1.

[70] *See Ky. Baptist Hosp. v. Gaylor*, 756 S.W.2d 61 (Ky. App. 1997).

PART IV. FEDERAL TORT REFORM IN THE MEDICAL FIELD

7. *Constitutional Issues*

The Constitution provides that Congress can "regulate Commerce . . . among the several States." Over the past 65 years, courts have read the Commerce Clause broadly, using it to uphold federal legislation concerning non-commercial activity. Would that power include pre-empting state tort law through federal reforms?

One possible justification for substantive federal intervention might be that state laws, including tort rules, "affect" commerce. However, the fact that a state law affects commerce is not typically enough to justify federal intervention unless such laws actually impede the flow of trade among the states. In 1995 the Supreme Court reaffirmed this important principle in *United States v. Lopez*, which held that the Gun-Free School Zones Act of 1990 (which banned the possession of firearms within 1,000 feet of any school) exceeded Congress's authority under the Commerce Clause.[71] In 2000, the Court extended *Lopez* in *U.S. v. Morrison*, which held that a federal tort action for sexual battery under the Violence Against Women Act was unconstitutional, even though Congress had issued findings that sexual assaults affected interstate commerce.[72]

Obviously, state laws regularly affect interstate commerce without raising constitutional concerns. California, for example, requires special catalytic converters on cars sold in that state, a permissible use of California's police power that doesn't directly affect interstate trade. If California tried to regulate catalytic converters on every car that crossed its state boundary, however, that would make federal intervention to preserve interstate travel more legitimate, for cars traveling interstate would have to stop at the border and turn back – clearly a burden on interstate commerce. California also requires that those who practice medicine in the state be admitted to the California Medical Association, a clear limitation on the ability to cross state lines to practice one's trade – but just as clearly

[71] 514 U.S. 549 (1995).
[72] 529 U.S. 598 (2000).

a constitutional limitation with which the federal government should not lightly tamper.

8. Types of Federal Malpractice Reform

Can federalism and the federal government's legitimate concern to protect the citizens of one state from laws adopted in another state be squared with federal medical malpractice reform ideas? Presumably this depends on the type of tort reform envisaged.

Federal intervention is rarely authorized for the purpose of altering substantive rules of state tort law. This is because most medical malpractice suits involve "internal" activities. Such suits typically pit an in-state individual plaintiff against an in-state individual defendant. When litigated in a state court before a local jury, this type of case creates no intrinsic predisposition against either party. What is sometimes termed a "public choice" problem, which creates a prisoners' dilemma hostile to interstate commerce, is absent: the plaintiff cannot persuasively ask the jury to bring "outside" money into the locality without harming anyone locally.

A second type of tort suit – exemplified by negligence claims invoking *respondeat superior* (suits against an employer for damages caused by wrongful behavior by its employee)[73] – usually sets in-state *individual* plaintiffs against in-state *corporate* defendants. Because juries are always composed of individuals and never of corporations, corporate defendants might experience systemic prejudice: a jury may be tempted to transfer wealth from an entity that does not "feel pain" to a suffering real person with whom it can identify. But such temptations are typically offset by the jury's desire to maintain employment and economic activity in the state, especially if the defendant corporation maintains a large local presence. It is hard to predict how offsetting incentives will ultimately unfold in a specific case. In any event, those problems derive from the *corporate* nature of the defendant, not its state of domicile. States are unlikely to want existing employers to pack up and leave.

Early product liability suits tended to be of the intrastate kind.

[73] *Respondeat superior* holds an employer vicariously liable for negligent behavior by an employee while on the job. *Hern v. Nichols*, 91 Eng. Rep. 256 (Ex. 1708).

Most products were manufactured near their place of consumption, as transportation costs made far-flung markets unreachable. Thus, local individual plaintiffs filed lawsuits against local corporate defendants concerning allegedly defective products.[74] But with the advent of "paradigm shifters" such as assembly-line production, interstate highways, and electronic auctions, markets for goods (though not yet services) have today become largely national. Modern product liability suits characteristically set in opposition an *in-state* individual plaintiff and a corporate *out-of-state* defendant. In a typical suit today, a consumer purchases a product, is allegedly injured while using it, and sues its far-off manufacturer to recover damages. Most purchases take place close to home; almost all product use takes place near the home or the workplace; and no state is home to a majority of manufacturers' head offices or factories. The confluence of those factors means that a plaintiff ordinarily files a product liability suit in her home state, which is also the state where she was injured and where she purchased the allegedly defective product. In the vast majority of cases, however, the product was designed and manufactured in another state. Assume for a moment that the victim sues in her home state. There, the court agrees it has jurisdiction to try the suit and concludes that its own product liability law applies to resolve the dispute. Such a suit would now pit a local individual against an out-of-state corporation, in the local plaintiff's court and subject to the local plaintiff's state law. That situation creates a risk of bias that is unlikely to be remedied by political and economic forces within the state. Such a situation is ripe for federal tort reform.

Medical malpractice is closest to the first type of tort situation – a suit by an in-state patient against an in-state hospital or physician. Most people do not cross state lines to visit their physician or hospital. To the extent that abusive state medical liability practices oper-

[74] *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, AM. U.L. REV. 41, 369, 408–9 (1992) (attorneys responding to a survey indicated that out-of-state status was more frequently the cause of jury bias than corporate status or type of business) *and* Alexander Tabarrok *et al.*, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 161–64 (1999).

ate like a tax on productive activity, the greater the abuse, the greater the decline in productivity or wealth. Customers will pay more for in-state services if the providers of those services have to pay for injuries they did not wrongfully cause. Physicians will avoid practicing in jurisdictions with unreasonable malpractice rules. These kinds of tort pressures are endemic to the states: for instance, local children and their parents will suffer if playgrounds are not built because park authorities fear being held liable for every accident. The costs incurred when local services are no longer provided produce powerful in-state lobbies for tort reform. As stated above and detailed in Appendix A, since the first "liability crisis" in the mid-1980s, almost every state has enacted some form of medical malpractice tort reform.

9. Justification for Federal Substantive Intervention in Medical Liability

Defense of federal intervention in the medical liability field in particular appears to be twofold. First, federal limitations on medical malpractice suits are allegedly warranted because the federal government spends money on health care; after all, the Constitution's spending power[75] presumably allows Congress to impose conditions on parties that benefit from federal expenditures. Not only does the federal government fund Medicare and Medicaid, it also provides direct care to members of the armed forces, veterans, and patients served by the Indian Health Service, as well as tax breaks to workers who obtain health insurance through their employers. The administration projected budget savings of at least $25 billion a year if proposed medical malpractice reforms in 2005 were put in place. It does

[75] Technically, there is no "spending power" in the Constitution. Some authorities believe that the spending power is implicit in the power to tax; *see* U.S. CONST. Art. I, § 8, cl. 1. Other authorities, myself included, believe that spending is authorized only if it is necessary and proper; *see* U.S. CONST. Art. I, § 8, cl. 18, for executing powers enumerated elsewhere in the Constitution. We need not resolve that controversy here; the constitutionality of federal spending for medical care in the context of malpractice reform has not been challenged. The dispute here is not whether federal medical spending is legitimate but whether malpractice reform can be and has been legitimately imposed as a condition on state recipients of the spending.

seem clear that the federal government can condition the expenditure of its resources, though it should be noted that the Supreme Court has invalidated conditions imposed on the recipients of federal spending unless, among other things, the conditions are unambiguous and reasonably related to the aim of the expenditure.[76] At any rate, only limitations placed on federal funding, not limitations on all state tort actions, would be authorized here.

What about the view that physicians are allegedly "forced" to move to another state, or to retire from practice altogether (thus removing their services from the "stream of interstate commerce"), by hikes in malpractice premiums? At the margin, it is surely true that malpractice abuse has steered some patients across state lines to find better health care and has led potential providers to avoid certain states[77] or to retire early. It surely has affected choice of specialty inside medical schools. [78] But *intrastate* regulation of in-state conduct is not interference with *interstate* commerce – otherwise, as the court pointed out in *Morrison*, there is no area immune from federal jurisdiction. Naturally, there's an effect on commerce when any individual or company ceases economic activity in a state. But if the withdrawal is related to unjust negligence claims, absent discrimination against out-of-state defendants, then the effect is not uniquely related to the *interstate* aspect of commerce.

Fear of malpractice liability leads doctors to order redundant and expensive diagnostic tests and operations, as has been seen. High malpractice insurance premiums may encourage competent senior physicians to retire and discourage promising junior physicians from arriving, leaving geographic areas underserved.[79] This is part of the

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[76] *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987).

[77] *See, e.g.*, Michelle M. Mello *et al.*, *Effects of a Professional Liability Crisis on Residents' Practice Decisions*, 105 OBSTETRICS & GYNECOLOGY 1287 (2005) (finding that one third of residents in their final or next-to-last year of residency planned to leave Pennsylvania because of the lack of availability of affordable malpractice coverage. Although, in general, residents' geographic decisions are influenced by a range of factors, those who are about to leave Pennsylvania named malpractice costs as the primary reason 3 times more often than any other factor.).

[78] *See, e.g.*, Aaron Deutsch *et al.* "*Why Are Fewer Medical Students in Florida Choosing Obstetrics and Gynecology?*" 100(11) SO. MED. J. 1095 (November 2007).

[79] *See* Gary M. Fournier *et al.*, *The Case for Experience Rating in Medical Malpractice Insurance:*

substantive debate over medical malpractice reform, but is not sufficient to justify *federal* reform. For federal intervention is typically neither "necessary" nor "proper" here. The two litigants in a medical malpractice suit are usually a local (in-state) plaintiff and a local (in-state) physician or healthcare provider. As a result, excessive liability will be directly felt in the state, where it will translate into high insurance premiums for doctors and high costs for patients. Doctors who retire or relocate to other states when they find liability too onerous exert pressure on local juries and state legislatures to temper excesses.

State medical malpractice reform is, as has been noted, ubiquitous as a direct result of this. More than three dozen states have passed damage caps. All 50 states have passed or considered some kind of medical malpractice reform. If a state legislature has chosen not to enact reform – and perhaps to suffer an increase in the cost or a decline in the quantity of medical care, or both, from a presumed "optimal" level – that is not a federal crisis. Rather, that is a matter for the state's voters to resolve.

10. Federal Uniformization and Publicity as Medical Malpractice Reform

Nothing prevents the federal government from using its national coordination powers to inform physicians and clients about state medical malpractice law, to encourage them to avail themselves of the opportunities to contract afforded by such law (arbitration,

An Empirical Evaluation, J. OF RISK AND INSURANCE 68, 274 (2001) (physicians, especially rural obstetricians, are choosing to limit practice or self-insure rather than pay soaring premiums unrelated to their own claims experience); *Echo Malpractice Mess*, editorial, CHARLESTON GAZETTE AND DAILY MAIL, January 3, 2002, at 4A (physicians are leaving West Virginia because lawsuits are increasing the cost of insurance coverage); Ovetta Wiggins, *Doctors to Protest Premium Increases*, PHILADELPHIA INQUIRER, April 23, 2001, at B1 (Pennsylvania Medical Society asserts that 11 percent of Pennsylvania physicians "have either moved out of state, retired [prematurely], or scaled back their practices [due to] 'skyrocketing' malpractice insurance rates."); and Patricia Post-Reilly, *Malpractice Maelstrom: Skyrocketing Malpractice Insurance Premiums Have Doctors and Healthcare Professionals Here–and Around the State–Clamoring for Reform*, LANCASTER NEW ERA/INTELLIGENCER JOURNAL/SUNDAY NEWS, December 17, 2001, at 1 (high jury awards pushing up insurance rates and forcing physicians to retire early, move to more rate-friendly states, or limit patient access to medical care).

etc.), and possibly even to standardize contract terms so as to reduce transaction costs, as explained in Part V immediately below.

PART V. PRIVATE CONTRACTS AND THE PHYSICIAN-PATIENT RELATIONSHIP

11. Alternative Dispute Resolution Mechanisms

As indicated in Part I, tort law is an intrinsic part of private ordering. Private ordering need not result in tort adjudication of all disputes – indeed, as argued above, tort should give way to consensual allocation of risks when feasible and when important citizen protections are not at stake. Potential parties to a tort suit are almost always free to provide for other dispute resolution mechanisms after the dispute arises, and they are sometimes free to provide for alternative dispute resolution mechanisms beforehand. Sometimes, of course (as in the case for automobile accidents, for instance), pre-dispute agreements are not practical; the parties do not know each other and cannot conveniently negotiate alternative arrangements. In the medical malpractice field, however, parties are almost always in "privity"; that is, there is almost always already a contract that specifies rights and obligations of both the health care provider and the patient. Presumably this contract could cost-effectively include clauses that determine alternate dispute resolution mechanisms or even alternate liability rules in many cases.

11-1. Arbitration in Consumer Disputes

Arbitration is typically a less expensive and quicker method of resolving disputes than civil litigation. The Federal Arbitration Act[80] and similar (often identical) state statutes encourage the use of arbitration over litigation. Recent studies show that arbitration can be quite fair to consumers. For example, a study by Ernst & Young found that consumers prevail in the majority of credit-card disputes that go to arbitration.[81] A report by Navigant Consulting considered

[80] 9 U.S.C. § 1.

[81] *Credit Card Holders Not Disadvantaged in Arbitration, Study Says*, Dispute Resolution Journal, May-July 2005. E&Y studied 226 cases administered from Jan. 1, 2000-Jan. 1, 2004 by the Minneapolis-based National Arbitration Forum (NAF). It also reviewed NAF's elec-

34,000 arbitration cases involving California consumers from 2003 to 2007, and concluded that consumers prevailed in arbitration proceedings at the same or a higher rate than they did in debt collection lawsuits. It is noteworthy that consumers rarely pay fees for arbitration – unlike court cases, where directly (costs, experts) and indirectly (contingent fees) they pay dearly. In the 33,935 cases where an arbitration fee was paid, the consumer paid no fee in 99.3% of the cases. In the 0.7% cases where the consumer paid an arbitration fee, the median fee paid was $75.

Arbitration protected consumers even when consumers were not present. "Claims against consumers were reduced in 22.6% of cases heard in which the consumer failed to show up for the hearing or respond in any way, suggesting that consumer rights were given consideration even when the consumer was not represented."[82] A 1999 study of individuals participating in securities arbitration found that 93.49% felt that it was fair and handled without bias.[83] This and other data flatly contradict the position of groups such as Public Citizen, which in 2007 released a report entitled "The Arbitration Trap: How Credit Card Companies Ensnare Consumers," based on analysis of results with two minor firms in two states. A scholarly study by Catholic University law professor Peter Rutledge presents decisive empirical evidence that the Public Citizen study is methodologically flawed at best, and perhaps squarely biased at worst.[84]

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tronic files and paper documentation and collected data on the nature of the claim, award dates, claim and award amounts, and who prevailed. The study found that consumers in NAF arbitrations prevailed more often than businesses in cases that went to an arbitration hearing (55% of the cases were resolved in the consumers' favor). Consumers obtained favorable results in close to 80% of the reviewed cases.

[82] *National Arbitration Forum Highlights New Independent Study Demonstrating That Arbitration Offers Benefits for Consumers*, National Arbitration Forum, www.adrforum.com/newsroom.aspx?&itemID=1419&news=3.

[83] Gary Tidwell *et al.*, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations*, Paper presented at Aug. 5, 1999 meeting of Academy of Legal Studies in Business p. 3 (Aug. 5, 1999), *available at* www.finra.org/web/groups/med_arb/documents/mediation_arbitration/p009528.pdf. *See also* Linda J. Demaine *et al.*, *Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 L & CONTEMP. PROBS. 55 (Winter/Spring 2004).

[84] Peter B. Rutledge, *Arbitration – A Good Deal for Consumers: A Response to Public Citizen,* Washington, U.S. Chamber Institute for Legal Reform, 2008.

11-2. Binding Arbitration Agreements in Medical Care Contracts

Should the use of arbitration agreements be extended to situations where physical injury (not just economic loss) occurs, as is the case in the typical medical liability suit? It is reported that a growing number of physicians, nursing homes, and health care facilities are asking patients to sign binding arbitration agreements before offering services. Typically the agreements provide for a binding, alternative dispute resolution; sometimes, however, the agreements sometimes also purport to change the underlying law applicable to the parties. In Florida it is reported that some agreements seek caps on potential damages that are smaller than those allowed by the tort law of the state, for example.[85] In Virginia, one compulsory (if one wishes to obtain service) arbitration agreement used in an Alexandria clinic includes a promise that the patient will limit any future claim for non-economic damages to $250,000 and a promise to pay the attorney's lawyer's fees if an unsuccessful claim is filed.[86]

Such agreements are on the increase, though until recently they were quite rare. The Rand Corporation's Institute for Civil Justice surveyed physicians and hospitals in 1999, and found that 91% did not ask patients to sign arbitration agreements.[87] Of the 9% who did, only about one in five (2% in total) would refuse to provide care without a signature. Fully 71% of the managed care organizations (HMOs, etc.) surveyed by Rand asked new enrollees to sign arbitration agreements, but in the vast majority of cases these agreements only covered contract disputes (*e.g.*, disputes over which benefits were covered by their health plan), as opposed to disputes over the quality of care received. Only 28% of the HMOs asked patients to sign agreements covering alleged medical malpractice. When physicians and hospitals were asked why they did not use arbitration agreements, many noted that they struck "the wrong

[85] Vesna Jaksic, *Patient Arbitration Pacts Are Alarming Attorneys*, LAW.COM, March 28, 2008, www.law.com/jsp/article.jsp?id=1206614812624, last consulted Dec. 12, 2011.
[86] See Appendix B.
[87] Rand Institute for Civil Justice, *Binding Arbitration is Not Frequently Used to Resolve Health Care Disputes*, Research Brief 9030 (1999).

tone" with new patients; on the other hand, most of the few physicians who did ask patients to agree to binding arbitration reported that they were following the recommendation or the instruction of their malpractice insurer. Physicians win approximately 65% of malpractice suits that go to jury verdict but only about 60% of arbitration awards, which might explain why few insurers insisted on the arbitration form. One Kaiser health plan dropped an arbitration clause from its contracts, apparently because it found arbitrators to be lawless, inclined to compromise decisions regardless of whether there had been any physician negligence at all.[88] On the other hand, jury trials are much more expensive, and have a possible "tail" risk of high damage awards in states without non-economic damages caps. Presumably insurers differ about their preference for one forum or the other. Some state medical associations (especially in states with high liability risks and malpractice insurance premiums) now favor arbitration clauses rather explicitly: for example, the Florida Medical Association promotes them at Continuing Medical Education programs and furnishes a sample contract to its members.[89]

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[90] The FAA only covers transactions "involving [interstate] commerce," but even a contract with tenuous interstate connections (*e.g.*, one that implicates disbursal of insurance or Medicare funds) meets this criterion. As implied above, such federal intervention is highly appropriate. It does not interfere with general state contract law ("grounds as exist at law or in equity for the revocation of any contract") and it allows and facilitates, but does not impose, a contractual remedy. In any case, all 50 states, the District of Columbia, and Puerto Rico have some form of general arbitration statute mod-

[88] *See* Physician Insurers' Association of America, *A Comprehensive Review of Alternatives to the Present System of Resolving Medical Liability Claims*, Lawrenceville NJ, 1989, at 49.
[89] Tanya Albert, *Patients in Liability Hot Spots Asked to Arbitrate*, AMERICAN MEDICAL NEWS, Feb. 10, 2003.
[90] 9 U.S.C. § 2 (1999).

eled on the Uniform Arbitration Act, proposed by the National Conference of Commissioners on Uniform State Laws to cover purely local situations.

Despite state and federal arbitration statutes, and despite federal preemption of state laws incompatible with the Federal Arbitration Act,[91] several states have limited the use of medical arbitration agreements when medical care is contracted for. For example, a Georgia statute provides that a patient can agree to arbitration only after the alleged negligence has occurred, and only after consulting with an attorney[92] – this statute may be vulnerable under the preemption clause of the Federal Arbitration Act. A 1999 Utah law that allows medical care professionals to use arbitration agreements was amended in 2004 to provide that a physician cannot deny treatment if a patient refuses to sign such an agreement. This presumably precludes the physician's malpractice insurer from offering a lower premium to reflect lower expected outlays under arbitration, since those patients most likely to sue are also those most likely to decline the physician's invitation to sign the arbitration agreement. Without lower premiums, the physician's incentive to promote the arbitration clause is dulled.

11-3. Enforceability of Binding Arbitration Provisions

Even when no state statute discourages arbitration, there is no guarantee that common law courts will enforce a contractual provision that mandates binding arbitration. This is important, because the Federal Arbitration Act expressly allows for invalidation of arbitration agreements under general provisions of state contract law.

11-3.1. Cases Where a Medical Arbitration Agreement Was Not Enforced

1. *Obstetrics and Gynecologists v. Pepper.*[93] Obstetrics and Gynecologists, a walk-in clinic, required its patients to sign a standard

[91] *See, e.g.*, *Allied-Bruce Terminex Cos. Inc. v. Dobson*, 513 U.S. 265 (1995) (Alabama law invalidating all pre-dispute arbitration agreements held to violate FAA); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

[92] GEO. CODE ANN. § 9-9-61.

[93] *Obstetrics and Gynecologists v. Pepper*, 693 P.2d 1259 (Nev. 1985). *See also Wheeler v. St. Joseph Hospital*, 133 Cal. Rptr. 775 (1976).

agreement before receiving any treatment. The agreement provided that all disputes arising between the parties would be submitted to independent binding arbitration, both parties expressly waiving their right to a jury trial. Evidence suggested that the fees of Obstetrics and Gynecologists were more modest than those charged by comparable groups whose contracts did not contain an arbitration clause. Following the standard procedure of the clinic, a receptionist hands patients the arbitration agreement along with two information sheets, and informs them that any questions concerning the agreement will be answered. Patients must sign the agreement before receiving treatment; the physician signs later. If a patient refuses to sign the arbitration agreement, the clinic declines to administer treatment. Ms. Pepper entered the clinic to obtain a prescription for an oral contraceptive. Her signature appeared on the arbitration agreement, though she disclaimed any recollection of either signing or reading it. Nine months after receiving her prescription Ms. Pepper unfortunately suffered a stroke that left her partially paralyzed. She sued Obstetrics and Gynecologists, claiming that it should have refused to prescribe the contraceptive because of her peculiar medical history. Defendant moved to stay the lawsuit pending binding arbitration. The Nevada Court of Appeals confirmed the lower court decision that the arbitration agreement was an "adhesion contract," that the plaintiff was a "weaker party" who had "no choice as to its terms," and that the agreement was "unduly oppressive." The clinic's motion to force binding arbitration was rejected, and a jury trial granted. This result is not pre-empted by the FAA, because Nevada's unconscionability rules do not single out arbitration agreements for special treatment.[94]

2. In the oft-cited case of *Broemmer v. Abortion Servs. of Phoenix,*

[94] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996) (Patient who was asked to sign one-sided arbitration agreement less than one hour before knee-reconstruction surgery, and while dressed in surgical garb, is not bound by agreement for reasons of unconscionability); *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507 (Miss. 2005) (daughter who was legal guardian of her father admits him to a nursing facility and signs binding arbitration including a cap on damages of $50,000; held, damage provision stricken but arbitrability survives because the clause severed the cap from other provisions);

Ltd.,[95] the Arizona Supreme Court refused to enforce a contract to arbitrate because it was presented to the patient as a condition of treatment, contained no explicit waiver of the right to jury trial, and provided that any arbitrator be an obstetrician–gynecologist.

3. In *Wheeler v. St. Joseph Hospital*,[96] the arbitration clause was to be effective unless the patient initialed the form at a specific spot signifying that he did not agree to arbitration, or unless he sent a written communication to the hospital within 30 days of his discharge stating that he did not consent to arbitration. The patient did not read the hospital admission form, was not given a copy of the form, and neither he nor his wife knew of the existence of the arbitration provision until the wife's attorney informed her that the hospital was attempting to compel arbitration. The court stated that the hospital's standard printed admission form possessed all of the characteristics of a contract of adhesion and was unconscionable, as the patient, who is typically directed by his treating doctor to be admitted to the hospital where the doctor enjoys staff privileges, normally feels that he has no choice but to seek admission to the designated hospital and to accede to all of the terms and conditions for admission.

4. In *Miner v. Walden*,[97] New York's high court refused to enforce an arbitration agreement that it found to be an unconscionable contract of adhesion. Prior to each of the patient's operations, she was called into the doctor's office, and in the presence of the doctor and a nurse, an explanation was made to her as to the meaning and purpose of the arbitration form, an authorization for surgery, and other papers. These forms were enclosed in an envelope and mailed to the plaintiff with a covering letter, which indicated that the form consenting to arbitration "required" her signature. The court held that the average, uneducated person was not disposed to question or doubt a doctor's treatment, nor does the average person leave a

[95] *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (arbitration agreement signed by young woman before undergoing abortion procedure held not enforceable under Arizona contract law).

[96] *Wheeler v. St. Joseph Hospital*, 173 Cal. Rptr. 775 (Cal. App. 1976).

[97] *Miner v. Walden*, 422 N.Y.S.2d 335 (Sup. Ct. 1979).

doctor they rely upon to shop for another who does not require an arbitration agreement to be signed. An agreement to arbitrate must also be mutually binding, said the court. The agreement at issue did not require the doctor to arbitrate claims of money due for services rendered.

5. In *Sosa v. Paulos*,[98] the Utah Supreme Court refused to enforce an arbitration agreement of which the patient was given a copy mere minutes before she was to undergo surgery, while dressed in surgical clothing, and with no explanation of the content of the agreement or of the patient's option not to sign it.

On the other hand, there is no doubt that medical malpractice disputes are in principle arbitrable under state law. Courts have also held, for instance, that statutes governing arbitration of medical malpractice claims are not *per se* violations of state constitutional provisions guaranteeing access to the courts and trial by jury.[99] It is useful here to summarize how courts have dealt with medical arbitration clauses.

11-3.2. Cases where courts have held valid an arbitration clause

1. In *Guadano v. Long Island Plastic Surgical Group, P.C.*,[100] a federal court applying New York law held that a patient failed to make out a case that an arbitration clause was unconscionable and unenforceable. The patient had undergone elective cosmetic surgery and had been sent the arbitration agreement by mail prior to her preoperative office visit. A cover letter accompanying the agreement explained the nature of the arbitration process, that it was a substitute for decision by judge or jury, and that signature on the agreement was required. The nurse also testified that she advised the patient that some of the reasons for the agreement to arbitrate were the increase in malpractice actions, rising insurance premiums, court costs, and large jury awards in medical malpractice cases. There was further information about the process consisting of the nature of the

[98] *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).
[99] *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993).
[100] *Guadano v. Long Island Plastic Surgical Group, P.C*, 607 F. Supp 136 (E.D.N.Y. 1982).

arbitrators, the relinquishment of the right to trial by jury, the finality of the arbitration findings, the right to be represented by counsel at the proceeding, and the availability of booklets provided by the American Arbitration Association, together with the opportunity to speak to the doctor if the patient had any objections or questions concerning the agreement. The court observed that the consequences of the agreement were explained to the patient, that the surgery was elective and necessary for cosmetic reasons only, and that the success of the operation did not require that it be performed within any particular timeframe. Furthermore, said the court, the patient failed to allege any special circumstances, for example, that the parties had a prior relationship that might indicate unequal bargaining power. Note that this decision by a federal trial court has no precedential effect whatsoever.

2. In *Cleveland v. Mann*,[101] an arbitration agreement between a patient and a surgeon was found not to be a procedurally unconscionable adhesion contract by a bare majority of the Mississippi Supreme Court. The patient did not appear to the surgeon to be under any pain or stress at the time he signed the agreement fully 19 days before surgery, and the agreement allowed for subsequent changes if desired by the patient and presented to the clinic for approval. Note that this decision by a closely divided state supreme court has some, if weak, precedential effect.

3. In *Buraczynski v. Eyring*,[102] a unanimous Tennessee Supreme Court found that although an arbitration agreement was a contract of adhesion, it was not unconscionable, oppressive, or outside the reasonable expectations of parties and was enforceable. This case, which has high precedential value, is discussed in more detail below.

In general, none of the cases invalidating arbitration clauses refutes the strongly pro-arbitration case of *Buraczynski*. If a patient is not required to agree to arbitration in order to receive medical treatment, has a lengthy opportunity to discuss the clause, and is not agreeing to an arbitration procedure that gives "unfair advantage" to the medical practitioner (such as, for example, the requirement that

[101] *Cleveland v. Mann*, 942 So. 2d 108 (Miss. 2006).
[102] *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996).

all arbitrators be other physicians in the same field – this is frequently held to be evidence of "unequal bargaining power" favoring the medical practitioner[103]), the arbitration clause is much more likely to be upheld under general state contract law.[104] In *Buraczynski*, the Tennessee Supreme Court listed a number of aspects of an arbitration agreement that make it much more likely to be upheld. Given current case law, these reasons are compelling:

1. The agreement is not contained within a longer clinic or hospital admissions contract, but on a separate, one page document;

2. A short explanation is attached to the document, encouraging the patient to discuss questions;

3. The procedure specified does not favor the practitioner (see above);

4. The agreement contains 10-point block letter red type, just above the signature line, specifying that "BY SIGNING THIS CONTRACT YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL";

5. The agreement contains no buried terms;

6. The agreement is revocable within 30 days;

7. Most importantly, the agreement does not change the doctor's duty of care or limit liability for breach of that duty, but merely shifts disputes to a different forum.[105]

Samples of real, current binding arbitration clauses currently used in the medical liability field are attached in Appendix B. As the reader will note, these samples do not meet the criteria of *Buraczynski*, though each may have been upheld. Each is at more or less risk of being found unconscionable and unenforceable. The Virginia form seems particularly vulnerable, as it implies that consent is necessary for care while diminishing plaintiff's substantive common law rights in addition to the already-low Virginia global medical mal-

[103] *See, e.g.*, *Beynon v. Garden grove Medical Group*, 100 Cal. App. 3d 698 (Cal. App. 1980).

[104] *See, e.g.*, *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996) (upholding the enforceability of an arbitration clause between physicians and patients). Note that collective bargaining agreements are less likely to be seen as oppressive. *See Madden v. Kaiser Foundation Hospitals,* 552 P.2d 1178 (Cal. 1976), upholding a collectively negotiated arbitration clause.

[105] *Buraczynski v. Eyring*, 919 S.W.2d 314, 321 (Tenn. 1996).

practice cap. A possible use of this toolkit would be federal distribution to physicians, with this checklist of factors that make it more likely that an alternative dispute resolution mechanism would be found enforceable highlighted.

In closing this section, it is important to note that federal intervention *preventing* recourse to contract under state law has been proposed but not adopted. The Arbitration Fairness Act of 2007[106], which advanced in the House of Representatives but did not become law, would have invalidated all pre-dispute agreements to arbitrate "consumer" disputes (among others), defined as "a dispute between a person other than an organization who seeks or acquires . . . services, . . . and the seller or provider of such . . . services." The preamble to the Act indicates that "protection" of medical consumers is one of the concerns prompting it, so medical care is clearly one of the "services" that are being contemplated.

PART VI. CREATION OF NEW FORUMS: HEALTH COURTS?

12. Health Courts' Nature and Feasibility

Health Courts, like mandatory arbitration, are devices designed to take the decision-making process in medical liability cases away from juries and leave it to panels of experts. Whereas arbitrators may "split the difference," encouraging claimants to file weak claims, courts presumably must justify their decisions under law. Common Good, a nonpartisan tort reform organization, has sought to implement health courts, notwithstanding the guarantee in both the federal and 49 state[107] constitutions of the right to a jury trial to decide citizens' disputes. Common Good's plan attempts to create a rate-schedule for injury-specific non-economic damages.[108]

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[106] S. 1782, H.R. 3010, 110th Congress.

[107] To my knowledge, only Colorado has not "constitutionalized" the right to a civil jury trial. *See* "*The Fragile Right to a Civil Jury Trial in Colorado*," 27(1) THE COLORADO LAWYER 49 (January 1998).

[108] Common Good, "*An Urgent Call for Special Health Courts: America Needs a Reliable System of Medical Justice*", 2005.

In 2005, the Fair and Reliable Medical Justice Act[109] was introduced in response to pleas by Common Good. The Act would have authorized the Secretary of Health and Human Services to award up to ten demonstration grants to states for the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations.

Had it been adopted (the bill never emerged from the Senate Committee on Health, Education, Labor, and Pensions), the Fair and Reliable Medical Justice Act would have required states pursuing grants to: (1) develop an alternative to current tort litigation; and (2) promote a reduction of health care errors by allowing for patient safety data related to such disputes to be collected and analyzed by organizations that engage in voluntary efforts to improve patient safety and the quality of health care delivery. The bill set forth model alternatives to current tort litigation that applicant states could utilize, including notably a "Special Health Care Court" presided over by judges with health care expertise and authority to make binding rulings on causation, compensation, standards of care, and related issues with reliance on independent expert witnesses commissioned by the court.

To work, health courts require modifications in all states' (save Colorado's) constitutions or, alternatively, voluntary submission of disputes by parties waiving their right to a jury trial. But of course parties can already waive such right, at least post-injury, and submit disputes to binding arbitration. One Michigan statute required hospitals to offer arbitration to prospective plaintiffs (*i.e.*, after the alleged negligence had occurred), but very few such offers were accepted.[110] Only mandatory jurisdiction is likely to have an impact on medical liability, and I detect no groundswell of support in favor of abolishing the right to jury trials.

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[109] S. 1337 (109th Congress).

[110] *See* U.S. General Accounting Office, *Medical Malpractice: Few Claims Resolved Through Michigan's Voluntary Arbitration Program,* Washington 1990.

APPENDIX A

STATE STATUTES APPLICABLE TO MEDICAL LIABILITY AND DEROGATORY OF COMMON LAW, AS OF 12/1/2011

STATE	Previously Enacted Laws	Comments
ALABAMA	**Limits on Damage Awards** No limitations. Limits declared unconstitutional by State Supreme Court.	Current through End of 2011 Regular Session
	Statutes of Limitations 2 years from date of injury, Crosslin v. Health Care Authority of City of Huntsville, 5 So. 3d 1193, 1196-97 (Ala. 2008), or 6 months from discovery. No suit may be brought 4 years after date of injury. Minors under 4 by age 8 if statute would have otherwise expired by that time. Ala. Code §6-5-482.	Current through End of 2011 Regular Session.
	Collateral Source Rule Evidence of payment or reimbursement of plaintiff's medical or hospital expenses is discoverable and admissible into evidence. Ala. Code §§ 6-5-545, 12-21-45.	Upheld as constitutional against a due process and equal protection challenge in *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000) (overruling *American Legion Post No. 57 v. Leahey,* 681 So.2d 1337 (Ala.1996)).
ALASKA	**Limits on Damage Awards** Noneconomic damages limited to $250,000; limited to $400,000 for wrongful death or injury over 70% disabling; limits not applicable to intentional or reckless acts or omissions. Alaska Stat. § 09.55.549.	Current through the 2011 of the First Regular Session and First Special Session of the 27th Legislature.
	Punitive damages limited to $500,000 or 3 times compensatory damages. Alaska Stat. § 09.17.020.	Held to be constitutional in *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).
	Statutes of Limitation Two years. Alaska Stat. § 09.10.070. An attempt to reduce statute of limitations for minors was held unconstitutional.	Current through the 2011 of the First Regular Session and First Special Session of the 27th Legislature.
	Joint & Several Liability Defendants are proportionally liable for damages awarded according to percentage of fault. Alaska Stat. § 09.17.080.	Held to be constitutional in *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).
	Collateral Source Rule Common law collateral source rule is abrogated in most cases. Alaska Stat. § 09.55.548(b).	Held not to violate substantive due process rights in *Reid v. Williams*, 964 P.2d 453 (Alaska 1998).
ARIZONA	**Limits on Damage Awards** No limitations. Limits declared unconstitutional by State Supreme Court.	Current through the First Regular Session and Third Special Session of the Fiftieth Legislature (2011).
	Statutes of Limitation 2 years after cause of action, not afterward for personal injury and wrongful death. AZ St. § 12-542. However, Anson v. American Motors Corp., 747 P.2d 581, 587 (Az. 1987) (holding that the two year statute of limitations is unconstitutional with respect to wrongful death actions).	

STATE	Previously Enacted Laws	Comments
	Joint & Several Liability Defendants are proportionally liable for damages awarded according to percentage of fault, unless defendant acted in concert with another person. AZ St. §12-2506.	Current through the First Regular Session and Third Special Session of the Fiftieth Legislature (2011).
	Limits on Attorney Fees Not limited, but court may review reasonableness of fees upon request of either party. AZ St. §12-568.	Current through the First Regular Session and Third Special Session of the Fiftieth Legislature (2011).
	Expert Witness Qualification Only practitioners may testify as experts in medical malpractice cases AZ St. §12-2604.	Sesinger v. Siebel, 203 P.3d 483, 494 (AZ 2009) (upholding AZ statute § 12-2604(A) as constitutional because it is substantive and does not violate the state's separation of powers doctrine.
	Burden of Proof Medical malpractice against physicians and hospitals providing in certain emergency and disaster situations must be proved by clear and convincing evidence. AZ St. §12-572	Current through the First Regular Session and Third Special Session of the Fiftieth Legislature (2011).
	Collateral Source Rule Defendant may introduce evidence of collateral payments. AZ St. § 12-565.	Held to be constitutional in *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977).
ARKANSAS	**Limits on Damage Awards** Punitive damages limited to $250,000 per plaintiff or 3 times amount of economic damages. Not to exceed $1 million. Limits adjusted for inflation at 3-year intervals beginning in 2006. Requires recklessness or malice. Ark. St. §§ 16-55-205 to 16-55-209.	
	Statutes of limitations 2 years from date of injury. Foreign objects: 1 year from discovery. Minors: before age 9, until age 11. Ark. St. §16-114-203.	Held to be constitutional in *Adams v. Arthur*, 969 S.W.2d 598 (Ark. 1998).
	Joint & Several Liability Defendants are proportionally liable for damages awarded according to percentage of fault. Ark. St. §16-55-201.	Thomas v. Rockwell Automation, Inc. 2009 Ark. LEXIS 274 (holding that the non-party fault provision of the Arkansas code (§16-55-202) was unconstitutional as in violation of the separation of powers, and
	Collateral Source Rule Arkansas St. § 16-55-212(b) limiting recovery to medical expenses actually paid	Thomas v. Rockwell Automation, Inc. 2009 Ark. LEXIS 274, holding that Arkansas St. § 16-55-212(b) limiting the evidence that may be introduced relating to medical expenses as unconstitutional because rules of evidence are in the province of the supreme court).
CALIFORNIA	**Limits on Damage Awards** $250,000 limit for noneconomic damages. Ca. Civil Code §3333.2.	Held constitutional in *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).
	Statutes of Limitations 3 years after injury or 1 year after discovery, whichever is first. No more than 3 years after injury unless caused by fraud, concealment, or foreign object. Minor under age 6: 3 years or before age 8, whichever is	Photias v. Doerfler, 53 Cal. Rptr. 2d 202, 204 (1996) (holding the statute of limitations unconstitutional to the extent that it treats minors more harshly than adults, with respect to tolling the statute of limitations for medmal claims).

STATE	Previously Enacted Laws	Comments
	longer. Ca. Code of Civil Procedure §340.5.	
	Joint & Several Liability Defendants are proportionally liable for noneconomic damages according to percentage of fault, but jointly and severally liable for economic damages. Ca. Civil Code §1431.2.	Cadlo v. Metalclad Insulation Corp., 91 Cal. Rptr. 3d 653 (2009) (holding that prejudgment interest is owed jointly and severally).
	Attorney Fees Sliding scale, not to exceed 40% of first $50,000, 33 1/3% of next $50,000, 25% of next $500,000, and 15% of damages exceeding $600,000. Ca. Code of Business and Professions §6146.	Current with urgency legislation through Ch. 745 of 2011 Reg. Session and all 2011-2012 1st Ex. Session laws.
	Collateral Source Rule Defendant can introduce evidence of collateral source payments. Cal. Civ. Code § 3333.1 (West).	Held not to violate equal protection or due process clause. *Miller v. Sciaroni*, 172 Cal. App. 3d 306 Cal. Rptr. 219 (Ct. App. 1985).
COLORADO	**Limits on Damage Awards** $1 million total limit on all damages; $300,000 noneconomic limitation. C.R.S.A. §13-64-302**.**	Held to be constitutional in *Scholz v. Metro. Pathologists*, 851 P.2d 901 (Colo. 1993).
	Statute of Limitations 2 years from date of injury, no more than 3 years from act. Foreign objects: 2 years from discovery. Minors under age 6: before age 8. C.R.S.A. §13-80-102.5.	Current through the end of the First Regular Session of the 68th General Assembly (2011).
	Joint & Several Liability Defendants are proportionally liable for damages awarded according to percentage of fault, unless act proved deliberate. C.R.S.A. §13-21-111.5.	Current through the end of the First Regular Session of the 68th General Assembly (2011).
	Insurance Repeals existing provisions allowing medical malpractice insurers to use loss experiences from other states and nationwide experiences in certain situations when setting rates; specific information factors not to be included. C.R. S.A. § 10-4-403 (West).	Current through the end of the First Regular Session of the 68th General Assembly (2011).
	Collateral Source Rule Common law collateral source rule is abrogated by C.R.S.A. § 13-21-111.6.	In *Volunteers of Am. Colorado Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010), the Colorado Supreme Court interpreted an exception in the statute broadly to allow the use of the collateral source rule in most cases. Legislation proposed to clarify that the Colorado legislature intended to abrogate the common law collateral source rule. *See* 2011 Colorado House Bill No. 1106.
CONNECTICUT	**Statute of Limitations** 2 years from date of injury, but no later than 3 years of the act or omission. C.G.S.A. §52-584.	Current through 2011 Jan. Reg. Sess. and June Sp. Sess.
	Joint & Several Liability Defendants are proportionally liable accord-	Current through 2011 Jan. Reg. Sess. and June Sp. Sess.

STATE	Previously Enacted Laws	Comments
	ing to percentage of fault for damages awarded. C.G.S.A. §52-572h.	
	Limits on Attorney Fees Sliding scale, not to exceed 1/3 of first $300,000; 25% of next $300,000; 20% of next $300,000; 15% of next $300,000; and 10% of damages exceeding $1.2 million. C.G.S.A. §52-251c.	Current through 2011 Jan. Reg. Sess. and June Sp. Sess.
	Insurance Eliminates requirements that medical professional liability insurance policies issued on a claims-made basis provide prior acts coverage without additional charge to insured; extended reporting coverage liability insurers must provide under certain circumstances. C.G.S.A. §38a-394, (See 2006, P.A. 06-108, § 1.)	Current through 2011 Jan. Reg. Sess. and June Sp. Sess.
	Collateral Source Rule The common law collateral source rule is abrogated except where subrogation can be had. C.G.S.A. § 52-225a.	Current through 2011 Jan. Reg. Sess. and June Sp. Sess.
DELAWARE	**Limits on Damage Awards** Punitive damages may be awarded only on finding of malicious intent to injure or willful or wanton misconduct. No mandated limit. 18 Del.C. § 6855.	Current through 78 Laws 2011, ch. 1-125.
	Statutes of Limitations 2 years from injury; 3 years from discovery if latent injury. Minor: age 6 or same as adult. 18 Del.C. § 6856.	Current through 78 Laws 2011, ch. 1-125.
	Limits on Attorney Fees Sliding scale, not to exceed 35% of first $100,000; 25% of next $100,000; and 10% of all damages exceeding $200,000. 18 Del.C. § 6865.	Current through 78 Laws 2011, ch. 1-125.
	Patient Compensation or Stabilization Fund Stabilization Reserve Fund created. 18 Del.C. § 6833.	Current through 78 Laws 2011, ch. 1-125.
	Arbitration Medical malpractice actions must first be brought in before a medical negligence review panel, whose opinion in favor of the plaintiff may serve a prima facie evidence of negligence in a court action. Del.C. §§ 6803-14	Current through 78 Laws 2011, ch. 1-125.
FLORIDA	**Limits on Damage Awards** Noneconomic damages limited to $500,000 per claimant. Death or permanent vegetative state, noneconomic damages not to exceed $1 million. F.S.A. §766.118. Punitive damages limited to the greater of 3 times amount of economic damages or $500,000. If deliberate intent to harm, no	Current through Chapter 236 (End) of the 2011 Second Regular Session of the Twenty-Second Legislature.

STATE	Previously Enacted Laws	Comments
	limit on punitive damages. F.S.A. §768.73.	
	Statutes of Limitations 2 years from injury or discovery, no more than 4 years from injury. Minors: age 8. If fraud, concealment of injury or intentional misrepresentation prevented discovery within 4-year period, 2 year limit from discovery, not to exceed 7 years after the act. Limitation does not apply to intentional torts resulting in death. F.S.A. §95.11.	Current through Chapter 236 (End) of the 2011 Second Regular Session of the Twenty-Second Legislature.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, monetary limits in liability according to percentage as level of fault increases. F.S.A. §768.81.	Proposed legislation: 2011 Florida House Bill No. 201 to clarify intent of the law after a recent Florida Supreme Court decision.
	Limits on Attorney Fees Limits attorney fees in malpractice lawsuits to 30% of first $250,000; 10% of any award over $250,000. Adopted 2004: Florida Constitution, Article I, Section 26.	No further legislative enactments.
	Patient Compensation or Stabilization Fund Florida Birth-Related Neurological Injury Compensation Plan is the exclusive remedy for children with neurological injuries, except in cases of malicious purpose. F.S.A. § 766.303 (West).	Current through Chapter 236 (End) of the 2011 Second Regular Session of the Twenty-Second Legislature.
	Expert Witnesses An expert witnesses in a medical malpractice case must obtain an expert witness license before he or she can testify. F.S.A. 458.3175; 459.0066; 466.005. An expert witness may not testify on a contingency basis. F.S.A. §766.102.	Current through Chapter 236 (End) of the 2011 Second Regular Session of the Twenty-Second Legislature.
GEORGIA	**Limits on Damage Awards** Previously, noneconomic damages in medical malpractice actions limited to $350,000 against physicians regardless of number of defendants. Noneconomic damages limited to $350,000 against single medical facility; $700,000 against multiple facilities. Aggregate amount of noneconomic damages limited to $1.05 million. Ga. Code Ann., § 51-13-1 (enacted 2005).	Held unconstitutional by *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010).
	Statutes of Limitations 2 years from injury or death; in no event longer than 5 years from act or death. Foreign object: 1 year from discovery. Minors: 2 years from age 5 if action arose before 5th birthday. Ga. Code Ann. §9-3-71, 72, 73.	Current through end of the 2011 Regular Session.
	Joint & Several Liability Multiple defendants liable for apportioned	Current through end of the 2011 Regular Session.

STATE	Previously Enacted Laws	Comments
	damages according to percentage of fault of each person. Damages reduced by court in proportion to percentage of fault if plaintiff is found partially responsible for injury. Plaintiff not entitled to receive any damages if found 50% or more responsible for injury. Ga. Code Ann. §51-12-33. (enacted 2005).	
	Patient Compensation or Stabilization Fund Health care corporation regulations require insurers to establish and maintain reserve funds for unpaid claims and other known liabilities. Ga. Code. Ann. §33-20-13 (c).	Current through end of the 2011 Regular Session.
	Standard of Proof Medical malpractice actions against emergency service providers must be prove gross negligence by clear and convincing evidence. Ga. Code Ann. § 51-1-29.5.	Current through end of the 2011 Regular Session.
	Collateral Source Rule Abrogation of collateral source rule was held unconstitutional in *Amalgamated Transit Union Local 1324 v. Roberts*, 434 S.E.2d 450 (1993).	Current through end of the 2011 Regular Session.
HAWAII	**Limits on Damage Awards** Damages for pain and suffering in medical tort actions limited to a maximum award of $375,000. H.R.S. § 663-8.5, 8.7.	Pending legislation to limit noneconomic damages to $250,000. 2011 Hawaii Senate Bill No. 270.
	Statutes of Limitations 2 years from discovery, not to exceed 6 years from act. Minors: age 10 or within 6 years, whichever is longer. H.R.S. § 657-7.3. Arbitration tolls statute until 60 days after panel's decision is delivered. HRS § 671-18.	Current through the 2011 Regular Session of the Hawai'i Legislature.
	Joint & Several Liability When negligence is less than 25%, noneconomic damages awarded in proportion according to degree of fault. H.R.S. § 663-10.9.	Current through the 2011 Regular Session of the Hawai'i Legislature.
	Limits on Attorney Fees Attorney fees must be approved by court. H.R.S. § 607-15.5.	Current through the 2011 Regular Session of the Hawai'i Legislature.
	Arbitration Medical malpractice claims must be submitted to a medical claim conciliation panel before they can be brought in court. H.R.S. § 671-12.	Current through the 2011 Regular Session of the Hawai'i Legislature.
IDAHO	**Limits on Damage Awards** $250,000 limit on noneconomic damages, adjusted annually according to state's average annual wage. Punitive damages limited to $250,000 or amount 3 times of	Held not to violate separation of powers. *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000).

STATE	Previously Enacted Laws	Comments
	compensatory damages. Idaho § 6.1603; §6.1604.	
	Statutes of Limitations 2 years from injury. Foreign object: 1 year from reasonable discovery or 2 years from injury, whichever is later. Idaho § 5-219.	Current through the 2001 Ch. 1-335 (end).
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, except in cases of intentional act. Idaho § 6-803.	Current through the 2001 Ch. 1-335 (end).
	Collateral Source Rule Common law collateral source rule is abrogated. Idaho § 6-1606.	Current through the 2001 Ch. 1-335 (end).
	Arbitration Before bringing a medical malpractice action in court, a plaintiff must have a non-binding hearing provided by the state board of medicine. Idaho § 6-1001.	Current through the 2001 Ch. 1-335 (end).
ILLINOIS	**Limits on Damage Awards** Noneconomic damages limited to $500,000 against individual physician, $1 million against hospital. 735 ILCS 5/2-1706.5.	Found Unconstitutional in *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010), reh'g denied (May 24, 2010). Legislation pending to remove the cap from the code. 2011 Illinois Senate Bill No. 1888.
	Punitive damages not recoverable in medical malpractice cases. 735 ILCS 5/2-1115.	Current through P.A. 95-982 of the 2008 Reg. Sess.
	Statutes of Limitations 2 years from discovery but not more than 4 years from act. Minors: 8 years after act but not after age 22. 735 ILCS 5/13-212. Wrongful death: 2 years if limitation on personal injury still valid at time of death. 740 ILCS 180/2.	Current through P.A. 95-982 of the 2008 Reg. Sess.
	Joint & Several Liability No separation of joint and several liability. 735 ILCS 5/2-1117.	Proposed legislation to create a system of proportional fault. 2011 Illinois Senate Bill No. 1974.
	Limits on Attorney Fees Sliding scale, not to exceed 1/3 of first $150,000; 25% of $150,000 to $1 million; 20% of damages over $1 million. 735 ILCS 5/2-1114.	Current through P.A. 95-982 of the 2008 Reg. Sess.
	Collateral Source Rule Medical malpractice judgments are reduced post trial by 50% of lost wage or disability programs and 100% of medical collateral benefits received provided that the reduction is not more than 50% of the entire judgment. 735 ILCS § 5/2-1205.	Proposed legislation to reduce judgment by payments made by a collateral source in excess of amount actually paid to a medical provider.2011 Illinois House Bill No. 3153.
INDIANA	**Limits on Damage Awards** $1,250,000 total limit. Liability limited to $250,000 per health care provider. Any award beyond limits covered by Patient Compensation Fund. I.C. §34-18-14-3.	Held not to be unconstitutional under the Indiana constitution. *Indiana Patient's Comp. Fund v. Wolfe*, 735 N.E.2d 1187 (Ind. Ct. App. 2000).

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	Statutes of Limitations 2 years from act, omission, or neglect. Minors: under age 6 until age 8. I.C. §34-18-7-1.	Repealed. This statute had been found unconstitutional as applied in several cases. (See Martin v. Richey, 711 N.E.2d 1273, 1274+ (Ind. Jul 08, 1999); Shah v. Harris, 758 N.E.2d 953, 954+ (Ind.App. Nov 16, 2001); Jacobs v. Manhart, 770 N.E.2d 344, 345+ (Ind.App. Jun 05, 2002); Herron v. Anigbo, 866 N.E.2d 842, 842+ (Ind.App. May 23, 2007)).
	Limits on Attorney Fees Plaintiff's attorney fees may not exceed 15% of any award made from Patient Compensation Fund. I.C. §34-18-18-1.	Current through end of 2011 1st Regular Session.
	Patient Compensation or Stabilization Fund Patient Compensation Fund pays awards over $250,000 up to $1,250,000. I.C. §34-18-6.	I could not find any provision that mentions award amounts. Section IC 34-18-6-3 has been repealed.
	Collateral Source Rule Evidence of collateral benefits may be submitted as evidence. Ind. Code Ann. § 34-44-1-2 (West)	Current through end of 2011 1st Regular Session.
	Arbitration Before an action for medical malpractice can be brought in court, it must first be presented to a medical review panel. I.C. § 34-18-8-4.	Upheld as constitutional in *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 433 (N.D. Ind. 1979) aff'd, 603 F.2d 646 (7th Cir. 1979) and *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980) *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007).
IOWA	**Statutes of Limitations** 2 years from reasonable discovery but not more than 6 years from injury unless foreign object. Minors under age 8: until age 10 or same as adults, whichever is later. Mentally ill: extends to 1 year from removal of disability. I.C.A. § 614.1.	Current through Acts from the 2011 Reg.Sess.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault. Several liability not granted for economic damages when defendant is found more than 50% at fault. I.C.A. § 668.4.	Current through Acts from the 2011 Reg.Sess.
	Limits on Attorney Fees Court to review plaintiff attorney fees in any personal injury or wrongful death action against specified health care providers or hospitals. I.C.A. § 147.138.	Current through Acts from the 2011 Reg.Sess.
	Collateral Source Rule Common law collateral source rule is abrogated for medical malpractice actions. I.C.A. § 147.136.	Pending legislation to exempt payments from family members and Iowa's medical assistance program from the scope of the statute's abrogation. 2011 Iowa Senate File No. 542.
KANSAS	**Limits on Damage Awards** $250,000 limit on noneconomic damages recoverable by each party from all defendants. K.S.A. 60-19a02. Punitive damages	K.S.A. 60-3702 was held to unconstitutionally violate the seventh amendments trial by jury because it allows the judge to determine punitive damages; the court did not analyze

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	limited to lesser of defendant's highest gross income for prior 5 years or $5 million. K.S.A. 60-3702.	severability. *Capital Solutions, LLC v. Konica Minolta Bus. Solutions U.S.A., Inc.,* 695 F. Supp. 2d 1149, (D. Kan. 2010). However, Kansas courts have continued to apply this statute noting that the jury trial requirement can differ between state and federal courts. *Baraban v. Hammonds*, WL 1338083 (Dist. Ct. of Kan. 2011). Pending legislation is 2011 Kansas Senate Bill No. 158.
	Statutes of Limitations 2 years from act or reasonable discovery, but can be up to 10 years after reasonable discovery. K.S.A. §60.513.	Current through End of 2011 Reg. Sess.
	Limits on Attorney Fees Attorney fees must be approved by court. K.S.A. §7.121b.	Current through End of 2011 Reg. Sess.
	Patient Compensation or Stabilization Fund Health Care Stabilization Fund pays claims over $200,000, maximum payout of $300,000 per year on claim. Mandatory participation by medical professionals. K.S.A. §40-3403.	Current through End of 2011 Reg. Sess.
	Collateral Source Rule Attempt to abrogate collateral source rule held unconstitutional in *Thompson v. KFB Ins. Co.*,850 P.2d 773 (Kan. 1993).	Current through End of 2011 Reg. Sess.
KENTUCKY	**Statutes of Limitations** 1 year from act or reasonable discovery, but not more than 5 years after act. KRS § 413.140.	Current through end of 2011 legislation.
	Joint & Several Liability When court apportions percentage of fault, defendant is only liable for comparable share of damages. KRS § 411.182.	Current through end of 2011 legislation.
	Collateral Source Rule Statute abrogating the common-law rule was held unconstitutional in *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995).	
LOUISIANA	**Limits on Damages** $500,000 limit for total recovery. Health care provider liability limited to $100,000. Any award in excess of all liable providers paid from Patient's Compensation Fund. LSA RS 9:5628	Amended in June 2008 to reflect that: "cost for which a health care provider…may be assessed by a trial court shall be limited to the cost incurred prior to the rendering of a final judgment against the health care provider, not as a nominal defendant, after a trial on a malpractice claim, including but not limited to, costs assessed pursuant to Code of Civil Procedure Article 970 in any instance where the board was not the offeror or offeree of the proposed settlement amount. The health care provider shall not be assessed costs in any action in which the fund intervenes or the health care provider is a nominal defendant after there has been a settlement between the health care provider and the claimant."
	Statutes of Limitations	Current through the 2011 1st Extraordinary

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	1 year from act or date of discovery, but no later than 3 years from date of injury. LSA-RS §9.5628. Wrongful death: 1 year from death. LSA-C.C. Art. 2315.2.	Session.
	Joint & Several Liability Defendants are liable only for percentage of fault unless conspiracy of intentional or willful act. LSA-C.C. Art. 2324.	Current through the 2011 1st Extraordinary Session.
	Patient Compensation or Stabilization Fund Patient Compensation Fund pays claims over $100,000. Physicians levied surcharge directly into fund for purpose of paying malpractice claims. RS §40:1299.44. Medical malpractice claims must be submitted first to a panel. La. Rev. Stat. Ann. § 40:1299.47	Current through the 2011 1st Extraordinary Session.
MAINE	**Limits on Damage Awards** Comparative Negligence of plaintiff to reduce award in personal injury or wrongful death cases. Jury to specify amount of damages award to be paid by each defendant in a multiple-defendant medical malpractice complaint; Damage limits granted only in wrongful death cases. Noneconomic damages limited to $500,000, punitive damages limited to $250,000. 18-A M.R.S.A. § 2-804**.**	Current with legislation through the 2011 First Regular Session of the 125th Legislature.
	Statutes of Limitations 3 years from cause of action. Minors: 6 years after accrual or within 3 years of minority, whichever is first. Foreign objects: accrue from reasonable discovery. 24 M.R.S.A. § 2902.	Current with legislation through the 2011 First Regular Session of the 125th Legislature.
	Limits on Attorney Fees Sliding scale, not to exceed 1/3 of first $100,000; 25% of next $100,000; and 20% of damages exceeding $200,000. 24 M.R.S.A. § 2961.	Current with legislation through the 2011 First Regular Session of the 125th Legislature.
	Insurance Statement or conduct acknowledging sympathy, apology or fault made by health care provider to patient or patient's representative relating to injury or death as result of unanticipated medical outcome not admissible as evidence of admission of liability. 24 M.R.S.A. § 2907.	Current with legislation through the 2011 First Regular Session of the 125th Legislature.
	Collateral Source Rule Evidence of collateral payments can be submitted to the court post-verdict to reduce damage award. 24 M.R.S.A. § 2906.	Current with legislation through the 2011 First Regular Session of the 125th Legislature.
	Arbitration Claims must first be submitted to a pretrial panel. 24 M.R.S.A § 2851-8.	Legislation pending.

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MARYLAND	**Limits on Damage Awards** Noneconomic damages limited to $650,000 from 2005 to 2008, thereafter increasing by $15,000 per year beginning on January 1 of applicable year. MD Code, Courts and Judicial Proceedings, § 3-2A-09.	Current through all chapters of the 2011 Regular Session and the 2011 Special Session of the General Assembly.
	Statutes of Limitations 5 years from act or 3 years from discovery. MD Code, Courts and Judicial Proceedings, § 5-109.	This law was held unconstitutional by Piselli v. 75th Street Medical, 808 A.2d 508, 509, 371 Md. 188, 188+ (Md. Oct 08, 2002) (NO. 2 SEPT.TERM 2001).
	Insurance/Stabilization Fund Premium 2% tax exemption repealed, tax assessed on HMOs and MCOs to offset medical liability premium rates. §6-101 - 104; 6-301.	Current through all chapters of the 2011 Regular Session and the 2011 Special Session of the General Assembly.
MASSACHU-SETTS	**Limits on Damage Awards** $500,000 limit for noneconomic damages, some exceptions released from limitations. M.G.L.A. 231 § 60H.	Legislation regarding this statute has been introduced but not finalized. Proposed legislation can be found at: - 2011 Massachusetts House Bill No. 2194.
	Statutes of Limitations 3 years from injury and no more than 7 years, unless foreign object discovered. §260.4. Minors: before age 6 until age 9, no longer than 7 years from injury. §231.60D.	Current through Chapter 141 of the 2011 1st Annual Session.
	Limits on Attorney Fees Sliding scale, not to exceed 40% of first $150,000; 33.33% of next $150,000; 30% of next $200,000 and 25% of award over $500,000. §231.60I.	Current through Chapter 141 of the 2011 1st Annual Session.
	Collateral Source Rule Collateral Source rule is abrogated for medical malpractice actions. § 60G.	Legislation pending: 2011 Massachusetts Senate Bill No. 834.
	Arbitration Before bringing a medical malpractice action in court, a plaintiff must present his or her claim to a tribunal. If the tribunal finds for the defendant, the plaintiff can only proceed in court if he or she posts a $6000 bond to cover defendant's litigation costs in the event that the defendant prevails at trial. § 60B.	Legislation pending: 2011 Massachusetts Senate Bill No. 834.
MICHIGAN	**Limits on Damage Awards** $280,000 limit on noneconomic damages; $500,000 limit on noneconomic damages applies to certain other circumstance. Limit adjusted annually by state treasurer according to consumer price index. M.C.L.A. 600.1483.	Constitutionality was questioned in *Wiley v. Henry Ford Cottage Hosp.*, 668 N.W.2d 402 (Mich. App.2003) but was bound by a previous panel decision. The constitutionality has been resolved. See *Jenkins v. Patel*, 688 N.W.2d 543, 544 n.1 (Mich. App. 2004).
	Collateral Source Rule Collateral source rule is abrogated. M.C.L.A. § 600.6303.	Held constitutional in *Heinz v. Chicago Rd. Inv. Co.,* 549 N.W.2d 47 (Mich. App.1996).
	Arbitration Medical malpractice action must first be	

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	mediated M.C.L.A. § 600.4903.	
	Statutes of Limitations 2 years from injury. M.C.L.A. 600.5805. 6 months from reasonable discovery. No more than 6 years from injury. M.C.L.A. §600.5838a. Minors under age 8: the latter of 6 years or age 10. Reproductive injuries until age 13. M.C.L.A. §600.5851.	Pending Legislation. 2011 Michigan House Bill No. 4318.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, except when uncollectible shares are reallocated among solvent defendants. M.C.L.A. §600.2925a.	Current through the end of the 2011 Regular Session.
MINNESOTA	**Limits on Damage Awards** No limitation for punitive damages but are only allowed if defendant proven to have deliberate disregard to safety. Award subject to judicial review. M.S.A. § 549.20.	Constitutional challenge rejected in *GN Danavox, Inc. v. Starkey Laboratories, Inc.*, 476 N.W.2d 172 (Minn. Ct. App. 1991) (cert. denied).
	Statutes of Limitations 4 years from injury or termination of treatment. M.S.A. § 541.076. Disability extends limitation to 7 years. M.S.A. § 541.15.	Current through the end of the 2011 Regular Session.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, except when defendant is assessed greater than 50% of fault, or proven to have intentional malice. M.S.A. § 604.02.	Current through the end of the 2011 Regular Session.
	Collateral Source Rule Collateral source rule is abrogated. M.S.A. § 548.251.	Held to be constitutional in *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990).
MISSISSIPPI	**Limits on Damage Awards** $500,000 limit on noneconomic damages. Miss. Code Ann. § 11-1-60. Punitive damages only awarded if willful malice or gross negligence proved. Court determines if award granted and amount. Damages limited based on defendant's net worth. M.S.A. §11-1-65.	Current through End of 2011 Regular Session.
	Statutes of Limitations 2 years from act or reasonable discovery, no more than 7 years. M.S.A. § 15.1.36.	Pending Legislation. 2011 Mississippi Senate Bill No. 2008.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, except when defendant is proven to have intentional malice. M.C.A. § 85-5-7.	Current through End of 2011 Regular Session.
	Insurance Provided temporary market of last resort to make medical malpractice insurance available for hospitals, institutions for the aged or	Repealed by Laws 2006, Ch. 567, § 5, eff. July 31, 2008.

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	infirm, or other licensed health care facilities; also for physicians, nurses and any other personnel licensed to practice in any health care facility including hospitals. Miss. Code Ann. § 83-48-3.	
MISSOURI	**Limits on Damage Awards** Noneconomic damages limited to $350,000 regardless of number of defendants. (Inflation index repealed.) V.A.M.S. 538.210. Punitive damages limited to $500,000 or 5 times net amount of judgment. V.A.M.S. 510.265.	V.A.M.S. 538.210 held unconstitutional as applied retroactively to a cause of action already accrued. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752 (Mo. 2010) (En Banc). Pending legislation to remove the damage limit and replace it with a pilot health court program. 2011 Missouri House Bill No. 1014. Pending legislation to reduce punitive damage cap to $250,000 or 2 times the net amount of judgment. 2011 Missouri House Bill No. 606.
	Statutes of Limitations 2 years from act. Foreign object: 2 years from discovery. Amended 2005: Minor under 8: until age 20, or 2 years from 18th birthday. In no event longer than 10 years from injury. V.A.M.S. 516.105.	Current through the end of the 2011 First Extraordinary Session of the 96th General Assembly, pending corrections received from the Missouri Revisor of Statutes.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded; jointly liable if found more than 51% at fault. V.A.M.S. 537.067.	Pending legislation to require proportional liability in all cases. 2011 Missouri House Bill No. 364; 2011 Missouri Senate Bill No. 211.
	Patient Compensation or Stabilization Fund Tort Victim's Compensation Fund does not apply in actions of improper health care. V.A.M.S. 538.300.	Current through the end of the 2011 First Extraordinary Session of the 96th General Assembly, pending corrections received from the Missouri Revisor of Statutes.
MONTANA	**Limits on Damage Awards** $250,000 limit on noneconomic damages. MCA 25-9-411. Liability for punitive damages determined by court, defendant must have been proven guilty of deliberate malice. MCA 27-1-221. Damages for negligence awarded based on "reduced chance of recovery." MCA §27-6-103 (Enacted 2005.)	Current through 2011 laws.
	Statutes of Limitations 3 years from injury or discovery, no more than 5 years from act. Minors under age 4: age 11 or death, whichever occurs first. MCA §27-2-205.	Pending legislation to lower the statue of limitations to 2 years. 2011 Montana House Bill No. 408.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, except when defendant is assessed greater than 50% of fault. MCA §27-1-703.	Pending legislation to change the effect of settlements on the remaining defendant's liability. 2011 Montana House Bill No. 531.
	Patient Compensation or Stabilization Fund Insurance Commissioner to perform study of medical liability insurance market; create market assistance plan, joint underwriting	Current through 2011 laws.

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	association, or stabilization reserve fund based on findings. MCA §33-23-503; §33-23-507-510; (Enacted 2005.)	
	Collateral Source Rule Damages in excess of $50,000 are reduced by collateral sources provided there is no right of subrogation. MCA § 27-1-308.	Current through 2011 laws.
	Arbitration Medical malpractice claims must first be submitted to a panel. MCA §§ 27-6-101-106	Current through 2011 laws.
NEBRASKA	**Limits on Damage Awards** Total damages limited to $1,750,000. Health care provider liability limited to $500,000. Any excess of total liability of all health care providers paid from Excess Liability Fund. Neb.Rev.St. § 44-2825.	Held to be constitutional in *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 663 N.W.2d 43 (2003).
	Statutes of Limitations 2 years from injury or 1 year from reasonable discovery; in no event longer than 10 years from injury. Neb.Rev.St. § 44-2828.	Current through the 102nd Legislature First Regular Session 2011.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for noneconomic damages awarded, and jointly liable for economic damages. Neb Rev St 25-21,185.10.	Current through the 102nd Legislature First Regular Session 2011.
	Limits on Attorney Fees No limitations, but court can review for reasonableness at request of prevailing party. Neb.Rev.St. § 44-2834.	Current through the 102nd Legislature First Regular Session 2011.
	Patient Compensation or Stabilization Fund Excess Liability Fund participation required and surcharge assessed to physicians. Pays claims over $500,000 per defendant up to $1,750,000. Neb.Rev.St. § 44-2829-2831.	Current through the 102nd Legislature First Regular Session 2011.
	Collateral Source Rule Insurance benefits are deducted from damage awards. Neb.Rev.Stat. § 44-2819	Current through the 102nd Legislature First Regular Session 2011.
	Arbitration Medical malpractice claims must first be brought before a medical review panel. Neb.Rev.Stat. § 44-2840.	Current through the 102nd Legislature First Regular Session 2011.
NEVADA	**Limits on Damage Awards** $350,000 limit on noneconomic damages, no exceptions. N.R.S. 41A.035. Punitive damages limited to $300,000 or 3 times compensatory damages; only awarded by court for fraud, oppression, or malice. N.R.S. 42.005.	Punitive damage statute is generally constitutional. *Republic Ins. Co. v. Hires*, 810 P.2d 790, 792 (Nev. 1991).
	Statutes of Limitations	Current through the 2009 75th Regular

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	4 years from injury or 2 years from reasonable discovery if injury or wrongful death prior to Oct. 1, 2002. If after Oct. 1, 2002, 3 years from injury or 1 year from discovery. N.R.S. 41A.097.	Session and the 2010 26th Special Session and technical corrections received from the Legislative Counsel Bureau (2010).
	Joint & Several Liability Defendants proportionally liable according to percentage of fault for economic and noneconomic damages awarded. N.R.S. 41A.045.	Current through the 2009 75th Regular Session and the 2010 26th Special Session and technical corrections received from the Legislative Counsel Bureau (2010).
	Limits on Attorney Fees Sliding scale for attorney fees, not to exceed 40% of first $50,000; 33 1/3% of next $50,000; 25% of next $500,000; 15% of any amount over $600,000. N.R.S. 7.095.	Current through the 2009 75th Regular Session and the 2010 26th Special Session and technical corrections received from the Legislative Counsel Bureau (2010).
	Patient Compensation or Stabilization Fund State insurance commissioner may create insurance coverage through regulation if access to essential insurance in voluntary market is limited. N.R.S. 686B.180.	Current through the 2009 75th Regular Session and the 2010 26th Special Session and technical corrections received from the Legislative Counsel Bureau (2010).
	Collateral Source Rule Statute abrogating collateral source rule has been repealed. N.R.S. § 42.020.	Repealed.
	Arbitration Statute repealed. N.R.S. § 41A.016.	Repealed.
NEW HAMPSHIRE	**Limits on Damage Awards** No limitations. Limits declared unconstitutional by State Supreme Court.	No further legislative enactments.
	Statutes of Limitations 2 years from injury or 2 years from discovery. Minors under age 8: until age 10. N.H. Rev. Stat. § 507-C:4.	This statute was held unconstitutional by Carson v. Maurer, 424 A.2d 825, 826, 120 N.H. 925, 925, 12 A.L.R.4th 1, 1 (N.H. Dec 31, 1980) (NO. 80-017, 80-099, 80-136, 80-191, 80-252, 80-273, 80-291) with regards to 2 year statute of limitations as applied to infants and mentally incompetents.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded. N.H. Rev. Stat. § 507:7-d.	Updated with laws through the end of the 2008 Regular and Special Session, not including changes and corrections made by the State of New Hampshire, Office of Legislative Services.
	Limits on Attorney Fees Sliding scale, not to exceed 50% of first $1000; 40% of next $2000; 1/3 of next $97,000; 20% of excess of $100,000. If settled out of court, fee limited to 25% of up to $50,000. N.H. Rev. Stat. § 507-C:8.	This statute was held unconstitutional by Carson v. Maurer, 424 A.2d 825, 826, 120 N.H. 925, 925, 12 A.L.R.4th 1, 1 (N.H. Dec 31, 1980) (NO. 80-017, 80-099, 80-136, 80-191, 80-252, 80-273, 80-291) inasmuch as the contingent fee scale provisions' "relationship with overall purpose of contending medical injury reparations system cost is questionable and it not only unfairly burdens malpractice plaintiffs and, to a lesser extent, their attorneys, but also unjustly discriminates by interfering with freedom of contract between a single class of plaintiffs and their activities."

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	Collateral Source Rule Statute declared unconstitutional in *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980).	
NEW JERSEY	**Limits on Damage Awards** $350,000 limit on punitive damages, or 5 times compensatory damages, whichever is greater. NJ ST. §2A:15-5.14.	Proposed legislation is pending:2010 New Jersey Senate Bill No. 1919.
	Statutes of Limitations 2 years from accrual of claim or discovery. Minor from birth: until age 13. NJ ST. §2A:14-2.	Pending legislation: 2010 New Jersey Assembly Bill No. 710, 2010 New Jersey Assembly Bill No. 715, 2010 New Jersey Senate Bill No. 760, 2010 New Jersey Assembly Bill No. 1150, 2010 New Jersey Assembly Bill No. 1982, 2010 New Jersey Senate Bill No. 2405, 2010 New Jersey Assembly Bill No. 3622.
	Joint & Several Liability Defendants only responsible for share of fault if less than 60% . Defendants found more than 60% at fault subject to modified rule. NJ ST. § 2A:15-5.2.	Current with laws effective through L.2011, c. 136 and J.R. No. 8.
	Limits on Attorney Fees Sliding scale, not to exceed 1/3 of first $500,000; 30% of next $500,000; 25% of third $500,000; and 20% of fourth $500,000. 25% limit for minor or incompetent plaintiff. N.J. Ct. R. 1:21-7	Current with amendments received through 8/15/11.
	Collateral Source Rule Collateral source rule abrogated.	This statute is preempted by ERISA claims. *Levine v. United Healthcare Corp.*, 402 F.3d 156, 166 (3d Cir. 2005).
NEW MEXICO	**Limits on Damage Awards** $600,000 total limit on all damages. Health care providers not liable for any amount over $200,000; any judgment in excess paid from Patient's Compensation Fund. N. M. S. A. 1978, § 41-5-6.	Current through the First Regular Session of the 50th Legislature (2011).
	Statutes of Limitations §41.5.13. 3 years from injury. N. M. S. A. 1978, § 41-5-13.	This statute was held unconstitutional in Jaramillo v. Heaton, 100 P.3d 204, 205, 136 N.M. 498, 498+, 2004-NMCA-123, 123+ (N.M.App. Aug 17, 2004) (NO. 21,613), as applied to a minor child (due process violation).Proposed legislation: 2011 New Mexico House Bill No. 267, 2011 New Mexico Senate Bill No. 390, 2011 New Mexico Senate Bill No. 333.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, except when defendant is proven to have intentional malice. N. M. S. A. 1978, § 41-3A-1.	Current through the First Regular Session of the 50th Legislature (2011).
	Arbitration Claims must first be submitted to the medical review commission. . N. M. S. A. 1978 § 41-5-15.	Current through the First Regular Session of the 50th Legislature (2011).
	Patient Compensation or Stabiliza-	

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	tion Fund Patient's Compensation Fund only expended for purposes provided in authorizing Act. Superintendent has authority to purchase insurance for fund and its obligations. N. M. S. A. 1978, § 41-5-25 – 41-5-29.	Pending legislation: 2011 New Mexico House Bill No. 267, 2011 New Mexico House Bill No. 333.
NEW YORK	**Statutes of Limitations** 2 1/2 years from injury, 1 year from discovery. McKinney's CPLR § 214-a. Minors: statute tolled until disability ceases, not to exceed 10 years. McKinney's CPLR § 208.	There are at least 5 pieces of proposed legislation pending.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for noneconomic damages awarded, unless found more than 50% at fault. Defendants can be held jointly liable for economic damages. McKinney's CPLR § 1600 – 1601.	Proposed legislation is pending: 2011 New York Senate Bill No. 3187; 2011 New York Assembly Bill No. 4381.
	Limits on Attorney Fees Sliding scale, not to exceed 30% of first $250,000; 25% of second $250,000; 20% of next $500,000; 15% of next $250,000; 10% over $1.25 million. McKinney's Judiciary Law § 474-a.	Pending legislation: 2011 New York Assembly Bill No. 1360.
	Collateral Source Rule Collateral source rule is abrogated by statute. McKinney's C.P.L.R. § 4545.	Current through L.2011.
	Arbitration Defendants can offer to concede liability in exchange for arbitration. Plaintiffs must respond to this offer. N.Y. C.P.L.R. 3045 (McKinney)	Current through L.2011.
NORTH CAROLINA	**Limits on Damage Awards** $250,000 limit on punitive damages, or 3 times economic damages, whichever is greater. N.C.G.S.A. § 1D-25.	Current through Chapter 18.
	Statutes of Limitations 3 years from act or 1 year from reasonable discovery, not more than 4 years after injury. Foreign object: 1 year from discovery but not more than 10 years. Minors: until age 19. N.C.G.S.A. § 1-15.	Current through Chapter 18.
	Joint & Several Liability No separation of joint and several liability. N.C.G.S.A. § 1B-7.	Current through Chapter 18.
NORTH DAKOTA	**Limits on Damage Awards** $500,000 limit on noneconomic damages. NDCC, 32-42-02. Economic damage awards in excess of $250,000 subject to court review. NDCC, 32-03.2-08.	Current through the 2007 Regular Session of the 60th Legislative Assembly
	Statutes of Limitations 2 years from act or reasonable discovery but not more than 6 years after act unless	Current through the 2011 Regular Session.

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	concealed by fraud. NDCC, 28-01-18. Minors: 12 years. NDCC, 28-01-25.	
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, except when defendant is proven to have intentional malice. NDCC, 32-03.2-02.	Current through the 2011 Regular Session.
	Patient Compensation or Stabilization Fund Reserve fund enacted but not implemented unless majority of doctors in state have difficulty securing malpractice insurance. NDCC, 26.1-14-01 through 26.1-14-09.	Current through the 2011 Regular Session.
	Collateral Source Rule Responsible parties can request reduction of damage award by the amount of collateral payments. re NDCC, § 32-03.2-06.	Current through the 2011 Regular Session.
OHIO	**Limits on Damage Awards** $250,000 limit on noneconomic damages or three times plaintiff's economic loss, determined by court. Maximum noneconomic damages $350,000 per plaintiff or $500,000 per occurrence. No limit for permanent injury that prevents victim from independently caring for self. R.C. § 2315.18. Punitive damages limited to twice amount of economic damages or percentage of defendant's net worth. No limit where defendant acted knowingly. R.C. § 2315.21.	A previous version of R.C. § 2315.18. was held to be unconstitutional in *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999). R.C. § 2315.21 has been held to be unconstitutional to the extent that it mandates bifurcated trials. *See Myers v. Brown*, 950 N.E.2d 213 (Ohio App. 2011).
	Statutes of Limitations 1 years after the cause of action accrued. R.C. §2305.11.	A previous version of R.C. § 2315.18. was held to be unconstitutional in *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999). Pending Legislation: 2011 Ohio Senate Bill No. 72; 2011 Ohio House Bill No. 7.
	Joint & Several Liability Defendants are proportionally liable for economic damages according to percentage of fault for damages awarded, unless found more than 50% at fault. Severally liable only for noneconomic damages. R.C. § 2307.22.	Current through 2011 Files 1 to 27, 29 to 47, and 49 of the 129th GA (2011-2012), apv. by 9/26/2011, and filed with the Secretary of State by 9/26/2011.
	Limits on Attorney Fees No limitations but court must approve if fees exceed limits on damage award. R.C. § 2323.43.	Current through 2011 Files 1 to 27, 29 to 47, and 49 of the 129th GA (2011-2012), apv. by 9/26/2011, and filed with the Secretary of State by 9/26/2011.
	Collateral Source Rule Defendant may introduce evidence of collateral sources. R.C. § 2323.41.	Current through 2011 Files 1 to 27, 29 to 47, and 49 of the 129th GA (2011-2012), apv. by 9/26/2011, and filed with the Secretary of State by 9/26/2011.
OKLAHOMA	**Limits on Damage Awards** $300,000 limit on noneconomic damages;	Noneconomic Damage limit has expired. There is pending legislation to reinstate the

STATE	Previously Enacted Laws	Comments
	also specific to obstetric and emergency room care. No limits for negligence or wrongful death. 63 Okl.St.Ann. § 1-1708.1F-1 (expired). Punitive damages based on misconduct. 23 Okl.St.Ann. § 9.1.	limit at $250,000. 2011 Oklahoma House Bill No. 1774.
	Statues of Limitations 2 years from reasonable discovery. 76 Okl.St.Ann. § 18. Minors under 12: 7 years. Minors over 12: 1 year after attaining majority but in no event less than 2 years from injury. 12 Okl.St.Ann. § 96.	There are a number of bills pending to amend Okl.St.Ann. § 18.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded. 23 Okl.St.Ann. § 15.	This statute was recently amended. Causes of action accruing prior to November 1, 2011 are governed by the provisions of the previous law. Under that law, defendants found more than 50% at fault or guilty of willful misconduct or reckless disregard are jointly and severally liable.
	Limits on Attorney Fees Fee may not exceed 50% of net judgment. 5 Okl.St.Ann. § 7.	Current through Chapter 385 (End) of the First Regular Session of the 53rd Legislature (2011).
	Patient Compensation or Stabilization Fund State Insurance Fund authorized to offer malpractice insurance and/or reinsurance based on claims and loss ratio. State Board for Property and Casualty Rates must approve prior to release. 76 Okl.St.Ann. § 22.	Current through Chapter 385 (End) of the First Regular Session of the 53rd Legislature (2011).
OREGON	**Limits on Damage Awards** No limitations. Limits declared unconstitutional by State Supreme Court; 2004 ballot measure to institute noneconomic damage limits rejected by voters. Punitive damages not awarded if physician is found acting in scope of duties without malice. O.R.S. § 31.740.	Current with 2011 Reg. Sess. legislation effective through 9/29/11.
	Statutes of Limitation 2 years from injury or reasonable discovery, not more than 5 years from act. O.R.S. § 12.110.	Current with 2011 Reg. Sess. legislation effective through 9/29/11.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded. O.R.S. § 31.610.	Legislation pending: 2011 Oregon Senate Bill No. 283.
	Limits on Attorney Fees No more than 20% of punitive damages to attorney, no limitation of percentage of economic damages. Joint & Several Liability O.R.S. § 31.735.	Current with 2011 Reg. Sess. legislation effective through 9/29/11.
	Patient Compensation or Stabilization Fund Professional Liability Fund established to	Current with 2011 Reg. Sess. legislation effective through 9/29/11.

STATE	Previously Enacted Laws	Comments
	pay sums as provided that members are legally obligated to as result of malpractice. Maintained by Director of Department of Consumer and Business Services. O.R.S. § 752.035.	
	Collateral Source Rule Damage awards may be reduced by the amount of collateral benefits. O.R.S. § 31.580.	Legislation pending:2011 Oregon Senate Bill No. 876.
PENNSYLVANIA	**Limits on Damage Awards** No limitations. Constitutionally prohibited. Punitive damages granted only if defendant found guilty of willful misconduct or reckless disregard. 40 P.S. § 1301.812-A.	Statute on punitive damages repealed by 2002, March 20, P.L. 154, No. 13, § 5104(a)(2), imd. Effective.
	Statutes of Limitations 2 years from injury or discovery. 42 Pa.C.S.A. § 5524, *declared unconstitutional by Com. v. Neiman*, 2010 PA Super 162 (Pa. Super. Ct. Sept. 8, 2010) (Pa. Aug. 10, 2011). The pending legislation noted addresses this issue. Minor: 2 years after age of majority. 42 Pa.C.S.A. § 5533**.**	Legislation pending: 2011 Pennsylvania Senate Bill No. 196; 2011 Pennsylvania House Bill No. 832; 2011 Pennsylvania House Bill No. 795.
	Joint & Several Liability Defendants are proportionally liable except where their negligence is greater than 60% or where they committed an intentional tort or misrepresentation. 42 Pa.C.S.A. § 7102.	Several bills are pending with respect to this statute.
	Patient Compensation or Stabilization Fund Medical Professional Liability Catastrophe Loss Fund to provide up to $700,000 per occurrence. Participating physicians pay annual surcharge. 40 P.S. § 1301.703.	Repealed. 1980, Oct. 15, P.L. 971, No. 165, § 5, imd. Effective.
	Collateral Source Rule Collateral Source Rule has been abrogated except for life insurance benefits and certain public or government benefits. 40 P.S. § 1303.508.	Current through 2011 Acts 1 to 81.
RHODE ISLAND	**Limits on Damage Awards** Collateral source rule requires jury to reduce award for damages by sum equal to difference between total benefits received and total amount paid to secure benefits by plaintiff. R.I. ST. 1956, § 9-19-34.1.	Held unconstitutional in Maguire v. Licht, 2001 WL 1006060, *1+ (R.I.Super. Aug 16, 2001) (NO. C.A. PC1999-3391, C.A. PC2001-0150, C.A. PC2000-0120, C.A. PC2000-5386).
	Statutes of Limitations 3 years from injury, death or reasonable discovery. R.I. § 9-1-14.1. Minors and incompetents: 3 years from removal of disability. R.I. § 10.7.2.	The statute is current but there is proposed legislation pending: 2007 RI H.B. 5790 (NS), 5790 (NS), 2007 Rhode Island House Bill No. 5790, Rhode Island (Feb 28, 2007), VERSION: Introduced, PROPOSED ACTION: Amended.
SOUTH CAROLINA	**Limits on Damage Awards** Noneconomic damages limited to $350,000 against single health care provider or facility; limit of $1.05 million for multiple	Current through End of 2010 Reg. Sess.

STATE	Previously Enacted Laws	Comments
	defendants. Limits increased or decreased annually based on Consumer Price Index. No limits on noneconomic or punitive damages for cases of willful negligence or misconduct. S.C. ST. § 15-32-220 (Enacted 2005).	
	Statutes of Limitations 3 years from act or omission, or 3 years from discovery, not to exceed 6 years. Foreign object: 2 years from discovery. Minors: tolled for up to 7 years while a minor. S.C. ST. § 15-3-545.	Current through End of 2010 Reg. Sess.
	Joint & Several Liability No separation of joint and several liability. S.C. ST. § 15-38-10.	Current through End of 2010 Reg. Sess.
	Patient Compensation or Stabilization Fund Patients' Compensation Fund to pay portion of malpractice claim, settlement or judgment over $200,000 for each incident or over $600,000 in aggregate for one year. S.C. ST. § 38-79-420.	Amended by 2008 South Carolina Laws Act 348 (S.B. 669). After the amendment, the fund may not grant retroactive coverage to members and the fund is liable only for payment of claims against licensed health care providers and includes reasonable and necessary expenses incurred in payment of claims and the fund's administrative expense.
SOUTH DAKOTA	**Limits on Damage Awards** $500,000 limit on noneconomic damages. S.D. ST. § 21-3-11.	Current through the 2011 Special Session, Executive Order 11-1, and Supreme Court Rule 11-17.
	Statutes of Limitations 2 years from act or omission. S.D. ST. § 15-2-14.1.	Current through the 2011 Special Session, Executive Order 11-1, and Supreme Court Rule 11-17.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault; defendants found less than 50% liable not jointly liable for more than twice percentage of fault allocated. S.D. ST. § 15-8-15.1	Current through the 2011 Special Session, Executive Order 11-1, and Supreme Court Rule 11-17.
	Collateral Source Rule Evidence of collateral compensation is admissible for special damages. S.D. ST. § 21-3-12.	
TENNESSEE	**Statutes of Limitations** 1 year from injury or discovery, no more than 3 years from act unless foreign object. TN ST § 29-26-116.	Current through end of 2008 Second Reg. Sess.
	Joint & Several Liability Joint and several liability provisions in statute, declared unconstitutional by State Supreme Court.	No further legislative enactments.
	Limits on Attorney Fees Fees limited to 1/3 of award to plaintiff. TN ST. § 29-26-120.	Many bills pending to amend this statute.
TEXAS	**Limits on Damage Awards** $250,000 limit per claimant for noneconomic damages. $500,000 limit per claim-	Current through the end of the 2011 Regular Session and First Called Session of the 82nd Legislature.

STATE	Previously Enacted Laws	Comments
	ant for noneconomic damages in judgments against health care institutions. TX Civil Practice & Remedies Code § 74.301.	
	Statutes of Limitations 2 years from occurrence, no more than 10 years. Minors under 12: until age 14. TX Civil Practice & Remedies Code § 74.251.	Held unconstitutional as applied to minors in *Adams v. Gottwald*, 179 S.W.3d 101, 101+ (Tex.App.-San Antonio Aug 17, 2005) (NO. 04-04-00569-CV).
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, unless found more than 50% at fault. TX Civil Practice & Remedies Code § 33.013.	Legislation pending: 2011 Texas House Bill No. 1121; 2011 Texas House Bill No. 1122; 2011 Texas Senate Bill No. 98.
UTAH	**Limits on Damage Awards** $400,000 limit on noneconomic damages adjusted annually for actions arising after July 1, 2002 and before May 15, 2010. $450,00 limit for actions arising after May 15, 2010. . UT ST § 78-14-7.1.	Held to be constitutional in *Judd v. Drezga*,103 P.3d 135 (Utah 2004). Renumbered as § 78B-3-410 by Laws 2008, c. 3, § 716, eff. Feb. 7, 2008.
	Statutes of Limitations 2 years from discovery but not more than 4 years from act; foreign object or fraud: 1 year from discovery, applies to all persons regardless of minority or disability. UT ST § 78-14-4.	Renumbered as § 78B-3-404 by Laws 2008, c. 3, § 710, eff. Feb. 7, 2008.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded. UT ST § 78-27-40.	Renumbered as § 78B-5-820 by Laws 2008, c. 3, § 852, eff. Feb. 7, 2008.
	Limits on Attorney Fees Contingency fee not to exceed 1/3 of award. UT ST § 78-14-7.5.	Renumbered as § 78B-3-411 by Laws 2008, c. 3, § 717, eff. Feb. 7, 2008.
	Collateral Source Rule Evidence of collateral source payments is admissible in medical malpractice actions. UT ST§ 78-14-4.5.	Renumbered as § 78B-3-405 by Laws 2008, c. 3, § 711, eff. Feb. 7, 2008.
	Arbitration Medical malpractice claims are first brought before an informal prelitigation panel. UT ST § 78-14-12.	Renumbered as § 78B-3-416 by Laws 2008, c. 3, § 722, eff. Feb. 7, 2008.
VERMONT	**Statute of Limitations** 3 years from incident or 2 years from discovery, whichever is later. No later than 7 years. Fraud: no statute of limitations. Foreign object: 2 years from discovery. 12 V.S.A. § 521.	Current through the laws of First Session of the 2011-2012 Vermont General Assembly (2011).
VIRGINIA	**Limits on Damage Awards** $2.0 million limit on recovery damages in 2011. Increased by $50,000 a year. VA Code Ann. § 8.01-581.15.	Held to be constitutional. *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989).
	Statutes of Limitations 2 years from occurrence, no more than 10 years unless under disability. Foreign object:	Current through End of 2011 Regular Session.

STATE	Previously Enacted Laws	Comments
	1 year from discovery. VA Code Ann. §8.01-243. Minors have at least until their 10th birthday. VA Code Ann. §8.01-243.1.	
	Patient Compensation or Stabilization Fund Birth-Related Neurological Injury Compensation Fund to provide compensation for infant sustaining brain damage during birth delivery. Physicians pay annual assessment. VA Code Ann. §38.2-5000-5020.	Current through End of 2011 Regular Session.
	Insurance Risk Management plan allowing certain physicians and community hospitals to purchase malpractice insurance extended from 2006-2008. VA Code Ann. § 2.2-1839. Limits circumstances in which insurers are required to provide notice of reduction in coverage or increase in premiums; specified deadlines for medical malpractice policies. VA Code Ann. § 2.2-2818.	Legislation pending.
	Arbitration Either party can request that a claim be submitted to a medical malpractice review panel prior to litigation. Va. Code Ann. § 8.01-581.2 (West)	Current through End of 2011 Regular Session.
WASHINGTON	**Limits on Damage Awards** No specific limits on damage awards. Judgment for noneconomic damages cannot exceed formulation of average annual wage and life expectancy of injured. WA ST § 4.56.250.	Held unconstitutional in Sofie v. Fibreboard Corp., 771 P.2d 711, 712+, 112 Wash.2d 636, 636+, 57 USLW 2655, 2655+, Prod.Liab.Rep. (CCH) P 12,169, 12169+ (Wash. Apr 27, 1989) (NO. 54610-0) Pending Legislation.
	Statutes of Limitations 3 years from injury or 1 year from discovery, whichever is later. No more than 8 years after act. WA ST § 4.16.350.	Held unconstitutional in DeYoung v. Providence Medical Center, 960 P.2d 919, 920+, 136 Wash.2d 136, 136+ (Wash. Aug 27, 1998) (NO. 65373-9). Pending Legislation.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, unless found to be deliberately acting in concert with others. WA ST § 4.22.070.	Many bills pending.
	Limits on Attorney Fees Court to determine reasonableness of each party's attorney fees. WA ST. §7.70.070.	Pending Legislation: 2011 Washington Senate Bill No. 5672; Washington Senate Bill No. 5672; 2011 Washington House Bill No. 1360; 2011 Washington House Bill No. 1360.
	Insurance Medical quality improvement program. Medical liability insurance providers required to report all closed claims to Insurance Commissioner beginning in 2008. WA ST § 18.71.015.	Current with all 2011 Legislation.
	Collateral Source Rule	Current with all 2011 Legislation.

STATE	Previously Enacted Laws	Comments
	Common law collateral source rule has been abrogated. WA ST § 7.70.080.	
WEST VIRGINIA	**Limits on Damage Awards** $250,000 limit for noneconomic damages. $500,000 limit for compensatory damages, limit goes up beginning in 2004 according to inflation index. Physicians must carry at least $1 million malpractice insurance to qualify for limits. WV ST § 55-7B-8.	Held to be constitutional *Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va 2001).
	Statutes of Limitations 2 years from injury or reasonable discovery, no longer than 10 years after injury. Minors under 10: 2 years from injury or age 12, whichever is longer. WV ST § 55-7B-4.	Current through End of the 2011 Second Extraordinary Session.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded. WV ST § 55-7B-9.	Current through End of the 2011 Second Extraordinary Session.
	Patient Compensation or Stabilization Fund Medical Liability Fund to assist in making malpractice insurance more readily available to specific health care providers. WV ST § 29-12B.1-14.	Current through End of the 2011 Second Extraordinary Session.
	Arbitration Mandatory arbitration statute held unconstitutional in. *Waples v. Yi*, 234 P.3d 187 (Wash. 2010) and *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 216 P.3d 374 (Wash. 2009).	
WISCONSIN	**Limits on Damage Awards** Noneconomic damages for medical malpractice limited to 750,000$; Board of Injured Patients and Families Compensation Fund to report to legislature every 2 years any suggested changes to damages limit. Wis. ST § 893.55,	Although prior versions have been held unconstitutional this statute is current through 2007 Act 84, published 03/26/2008. *See Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Services Ins. Corp.*, 717 N.W.2d 216 (WI 2006).
	Statutes of Limitations 3 years from injury or 1 year from discovery, not more than 5 years from act. Foreign object: 1 year from discovery or 3 years from act, whichever is later. Minors: by age 10 or standard provision, whichever is later. Wis. ST § 893.55.	Although prior versions have been held unconstitutional this statute is Current through 2011 Act 31, Acts 33 to 36, and Acts 38 to 44, published 08/23/2011.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded, unless found to be deliberately acting in concert with others or found more than 50% at fault. Wis. ST § 895.045.(2).	The statute is current but there is proposed legislation pending: 2011 Wisconsin Assembly Bill No. 1.
	Limits on Attorney Fees Sliding scale, not to exceed 1/3 of first $1 million, or 25% of first $1 million recovered if liability is stipulated within time limits, 20% of any amount exceeding $1	Current through 2011 Act 31, Acts 33 to 36, and Acts 38 to 44, published 08/23/2011.

STATE	Previously Enacted Laws	Comments
	million. Wis. ST § 655.013.	
	Patient Compensation or Stabilization Fund Injured Patients and Families Compensation Fund pays amounts in excess of statutorily prescribed future damages awards. Health care providers required to pay into fund annually. Wis. ST § 655.27.	Current through 2011 Act 31, Acts 33 to 36, and Acts 38 to 44, published 08/23/2011.
	Collateral Source Rule The collateral source rule has been abrogated.	Previous version held unconstitutional on other grounds. *Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Services Ins. Corp.*, 717 N.W.2d 216 (WI 2006).
WYOMING	**Limits on Damage Awards** Limits prohibited.	Wy. Const. Art. 10, § 4 reads: (a) No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. (Ratified Nov. 2, 2004). Current through amendments approved by the voters on November 4, 2008.
	Statutes of Limitations 2 years from injury or reasonable discovery. Minors: until age 18 or within 2 years, whichever is later. Legal disability: 1 year from removal. WY ST § 1-3-107.	Current through the 2011 General Session.
	Joint & Several Liability Defendants are proportionally liable according to percentage of fault for damages awarded. WY ST § 1.1.109.	Repealed by Laws 1986, ch. 24, § 2.
	Limits on Attorney Fees Recovery $1 million or less: 1/3 if claim settled prior to 60 days after filing; 40% if settled after 60 days or judgment; 30% over $1 million. Wyo. Ct. Rules Ann., Contingent Fee R. 5.	Current with amendments received through 5/15/11.
	Patient Compensation or Stabilization Fund Medical Liability Compensation Fund to provide malpractice insurance coverage in event of cause of action. Participating physicians pay surcharge. WY ST § 26-33-105.	Current through the 2011 General Session.
	Insurance Department of Health program to provide loans to physicians for medical malpractice insurance premiums assistance extended until March 2007. WY ST § 35-1-902.	Current through the 2011 General Session.
	Arbitration Mandatory arbitration requirement held unconstitutional in *Hoem v. State*, 756 P.2d 780 (Wyo. 1988).	

APPENDIX B

SAMPLE ARBITRATION AGREEMENTS IN THE MEDICAL LIABILITY FIELD[111]

I. Duke Arbitration Agreement[112]

AGREEMENT TO ALTERNATIVE DISPUTE RESOLUTION

In accordance with the terms of the United States Arbitration Act, I agree that any dispute arising out of or related to the provision of health care services to me by Duke University, the Private Diagnostic Clinic (PDC), or their employees, physician partners, and agents, shall be subject to final and binding resolution exclusively through the Health Care Claim Settlement Procedures of the American Arbitration Association, a copy of which is available to me upon request. I understand that this agreement includes all health care services which previously have been or will in the future be provided to me and that this agreement is not restricted to those health care services rendered in connection with this admission or visit. I understand that this agreement is voluntary and is not a precondition to receiving health care services.

NOTE: If the individual signing this agreement is doing so on behalf of his or her minor child or any other person for whom he or she is legally responsible, the signature below affirms that he or she has the authority or obligation to contract with Duke University and the PDC for the provision of health care services to that minor child or other person, and that his or her execution of this agreement is in furtherance of that authority or obligation.

12-8-1999 X (signature)

DATE Patient, Parent, Guardian, or Authorized Representative

The arbitration agreement also states under the signature line:

If the signature is not that of the Patient, Parent, or Guardian, indicate below the relationship of person signing for the Patient and the reason Patient is unable to sign.

Relationship: _____

Reason Patient unable to sign: _____

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[111] K. DeVille, "The Jury is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims", 28 J. Leg. Med. 333, 391 (2007).

[112] *Wilkerson v. Nelson*, 395 F. Supp.2d 281 (M.D.N.C. 2005).

II. Arbitration Agreement in Colorado v. Morrison[113]

ARBITRATION OF CLAIMS

A. SCOPE OF ARBITRATION. Any claim arising from alleged violation of a duty incident to this Agreement, irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted to binding arbitration if the claim is asserted:

(1) By a Member, or by a Member's heir or personal representative, or by a person claiming that a duty to him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement ("Claimant/s"),

(2) For any reason, including, but not limited to, death, mental disturbance, bodily injury or economic loss arising from the rendition or failure to render services, or the provision or failure to provide benefits under this Agreement or the consideration or defense of claims descried in this Section,

(3) For monetary damages exceeding the jurisdictional limit of the Small Claims Court, and

(4) Against one or more of the following ("Respondent/s"):

(a) Health Plan,

(b) Hospitals,

(c) Medical Group,

(d) Any Physician, or

(e) Any employee or agent of the foregoing.

B. INITIATING ARBITRATION. Claimant/s shall initiate arbitration by serving a Demand for Arbitration that specifies the nature and legal basis of the claim and the type of loss sustained, including, with specificity, the alleged (1) nature of the injuries suffered, (2) acts or omissions that caused the injuries, and (3) date and place of the acts or omissions. All claims against Respondent/s based upon the same incident, transaction or related circumstance must be arbitrated in one proceeding. Colorado Rules of Civil Procedure and Colorado Revised Statutes pertaining to the prerequisites for the filing and maintenance of a civil action will govern the Demand for Arbitration, except as otherwise provided in this Section 8.

Claimant/s shall serve all Respondent/s reasonably servable, and the arbitrators shall have jurisdiction only over Respondent/s actually served. All Respondent/s served with a Demand for Arbitration must be parties.

[113] *Colorado v. Morrison,* 983 F. Supp. 937 (D. Colo. 1997).

Natural persons must be served as in a Colorado civil action, and any other Respondent/s must be served by registered letter, postage prepaid addressed to Respondent/s in care of Health Plan and the address provided in Section 10-K.

C. FEES AND COSTS. No party shall be entitled to recover pre-award interest separate and apart from the principal amount of any award entered at arbitration, if any. Costs, excluding the fees and expenses of the arbitrators, shall be awarded by the arbitrators at the conclusion of the arbitration pursuant to Colorado Rules of Civil Procedure and Colorado Revised Statutes. Attorney fees may be awarded by the arbitrators at the conclusion of the arbitration pursuant to Colorado Revised Statutes.

D. SELECTION AND POWERS OF ARBITRATOR/S. Unless the parties otherwise agree, within 30 days after service of a Demand for Arbitration, Claimant/s and all Respondent/s served shall each designate an arbitrator and give written notice of such designation to the other. No Claimant or Respondent may act as his or her own arbitrator. Within 30 days after these notices have been given, the two arbitrators so selected shall select a neutral arbitrator and give notice of the section to Claimants and all Respondents served. The parties shall bear the fees and expenses of the neutral arbitrator equally. Each party shall bear the fees and expenses of the arbitrator that it selects. The three arbitrators shall hold a hearing within a reasonable time thereafter. Except where otherwise agreed to by the parties, arbitration shall be held within the Service Area at the time and place designated by the neutral arbitrator.

E. GENERAL PROVISIONS. A claim shall be waived and forever barred if (1) on the date the Demand for Arbitration of the claims is served, the claim, if asserted in a civil action, would be barred by the applicable Colorado statute of limitations, or (2) the Claimants fail to pursue the arbitration claim in accord with the procedures prescribed herein with reasonable diligence. All notices or other papers required to be served or convenient for the conduct of arbitration proceedings following service of the Demand for Arbitration shall be served by mailing the same, postage prepaid, to such address as each party gives for this purpose. After initial service on Respondents has been made pursuant to Section 8-B above, Claimants and Respondents may conduct discovery as in a Colorado civil action. All discovery must be concluded no later than twenty-one (21) days prior to the hearing on the claim set by the arbitrators. Disclosure of witnesses, expert witnesses, exhibits and pre-arbitration legal issues shall be governed by the provisions of Colorado Rules of Civil Procedure 16, or

as otherwise ordered by the arbitrators.

F. SPECIAL PROVISIONS FOR MEDICARE PLUS MEMBERS. For Medicare Plus Members, the provisions of the Section 8 apply only to claims asserted on account of death, mental disturbance or bodily injury arising from rendition or failure to render services under this agreement.

G. WAIVER. The arbitration procedures required by this Section 8 may be waived only upon written agreement of the Claimants and Respondents.

H. UNIFORM ARBITRATION ACT. This arbitration clause is made subject to and incorporates by reference the Colorado Uniform Arbitration Act of 1975, C.R.S. § 13-22-201, et. seq. (1986 Cum. Supp.). The decision of the arbitrators shall be deemed final and binding as to all claims which were made or could have been made against any and all persons or entities who could have been Respondents as described in Section 8-A(4), whether or not a Demand for Arbitration was actually made against such persons or entities.

III. Sample Arbitration Agreement: Association of American Physicians and Surgeons, Inc.

PATIENT'S REQUEST FOR MEDICAL SERVICES

Perhaps you have heard reports of a "malpractice crisis." Lawsuits can be costly, time-consuming and distracting. This form is for patients requesting medical care by the [MEDICAL PRACTICE NAME], and its employees and affiliates, including but not limited to [DOCTORS' NAMES] (jointly and severally, the "Clinic"). Feel free to decline to sign this form, or see a different doctor. You may freely use our phones to call anyone for advice in filling out this form.

Are you having an emergency at this time? (write yes or no) _____ Patient's initials: _____

If the answer is "yes", then stop now and request emergency help immediately. I irrevocably agree (i) to submit any and all claims against the Clinic to arbitration rather than to a judge or jury, (ii) that the Clinic may submit any claim by me to binding arbitration, and (iii) to be bound by the result even if I decline to participate:

Yes: _____ No: _____ Patient's initials: _____

I irrevocably agree to limit any claim relating to any diagnosis, treatment or care by the Clinic to $250,000 for all non-economic damages, including pain and suffering or inconvenience:

Yes: _____ No: _____ Patient's initials: _____

In the event I assert a claim against the Clinic and it is denied, then I agree to pay for the reasonable attorney and expert fees of the Clinic's defense:

Yes: _____ No: _____ Patient's initials: _____

I request services from the Clinic in full agreement with and understanding of the above. I do not rely on any oral representations by anyone on staff in completing this form and am not under any pressure to sign. This form applies to all past and future services rendered by the Clinic and shall bind me and my heirs, legal representatives and assigns. Each provision shall be severable from the remainder and enforceable to the fullest extent of the law.

Patient's signature: _____ Date: _____

Patient's name: _____

A copy of this signed form was received from the patient by:

Staff member's signature: _____ Date: _____

Staff member's name: _____

IV. My Urgent Care, Inc., Walk-In Clinic, Lake Ridge, Virginia

ARBITRATION AGREEMENT

All the doctors working at this clinic feel that there is a "malpractice crisis" that threatens medical care. Lawsuits can be costly and time-consuming, and often interfere with care for sick patients.

All the doctors working at this clinic ask patients to complete this form. You may decline to do so and may see a different doctor. You may also use our phone to call anyone locally for advice in filling out this form.

I am having an emergency at this time: YES ___ NO ___

I agree to submit any and all claims against all the doctors working at this clinic to arbitration by the American Arbitration Association rather than to a judge or jury: YES ___ NO ___

I agree that all the doctors working at this clinic may submit any claim asserted by me to binding arbitration before the American Arbitration Association, and I agree to be bound by that arbitration even if I decline to participate: YES ___ NO ___

I agree to limit any claim in relation to an y diagnosis, treatment or care by all the doctors working at this clinic to $250,000 for all non-economic damages, including pain and suffering or inconvenience: YES ___ NO ___

In the event I assert a claim against any of the doctors working at

this clinic and it is denied, then I agree to pay for the reasonable attorney and expert fees of the defense: YES ___ NO ___

I have been informed and I understand that all the doctors working at this clinic are not employees of this clinic but are independent contractors. I agree to limit any claims whatsoever, only against the doctors and not against this clinic: YES ___ NO ___

Patient's signature: _____ Date: _____

Patient's name: _____

A copy of this signed form was received from the patient by:

Staff member's signature: _____ Date: _____

Staff member's name: _____

V. Sample Arbitration Clause, National Arbitration Forum

PATIENT/ENROLLEE ARBITRATION AGREEMENT

By signing this agreement, the (patient/enrollee) agrees with the (provider/plan) that any dispute between you and us and any dispute relating to (medical/other) services rendered for any condition, including any services rendered prior to the date this agreement was signed, and any dispute arising out of the diagnosis, treatment, or care of the (patient/enrollee), including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this agreement) shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. Information may be obtained and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com, or by mail at P.O. Box 50191, Minneapolis, MN 55405. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the (physician/other), including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term "patient" herein shall mean both the mother and the mother's expected child or children.

This provision for arbitration may be revoked by written notice deliv-

ered to (the physician/other) within _____ days of signature.

The (patient) understands that the result of this arbitration agreement is that claims, including malpractice claims he/she may have against the (physician or hospital/other), cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.

The Post

GOOD SCHOLARSHIP FROM THE INTERNET

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INTRODUCTION

Anna Ivey[†]

Much has transpired since our inaugural edition of *The Post* came out at the end of 2011. Most excitingly, in our Superbowl for lawyers and policy geeks, the Supreme Court has finally ruled on the constitutionality of the Patient Protection and Affordable Care Act (ACA).

In an interesting paradox for *The Post*, so much has been written about the ACA in the run-up to the decision that our panel of expert confessed to "ACA fatigue." As an editorial matter, *The Post* agreed that we didn't want to swamp this entire edition with health-reform-related posts. Among our winners being showcased in this edition, you'll find only one post on the ACA (although we read many fine related pieces), amidst five others on entirely unrelated subjects. No doubt many more worthwhile posts will be written in the wake of the opinion, so while we've restricted ourselves to one post on that topic in this edition, it is perhaps not the last. Incidentally, we selected this ACA post before the ruling was handed down, and we decided *ex ante* that its worthiness did not depend on the ultimate holding.

It is with great interest that we have also observed the (sometimes heated) conversation about the influence of bloggers on the ACA debate, in particular a fair amount of hand-wringing over Randy Barnett's blogging on the subject.[1] For a journal whose founding mission has been to consider the influence of blogging on law (whether in legal practice or on the legal academy), *The Post* now has another important data point confirming that legal bloggers

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[†] Founder and president, Ivey Consulting, Inc.

[1] E.g., Adam Teicholz, "Did Bloggers Kill the Healthcare Mandate?" at www.theatlantic.com/national/archive/2012/03/did-bloggers-kill-the-health-care-mandate/255182 (March 28, 2012).

do in fact influence the debate, either to one's delight or chagrin, depending on the circumstances. Legal bloggers as riffraff or gadflies? The conversation continues, and *The Post* enjoys the front-row seats.

We have also enjoyed watching legal academics use blogs as a forum to test their ideas and elicit feedback. Glenn Cohen, for example, posted this appeal on PrawfsBlog[2]:

> I don't normally post drafts on SSRN until they are in page proofs (this draft is before the editors have had a chance to improve it) but am doing so early in this case because the topic is developing and I want my views to be part of the conversation. Still, it is a work-in-progress, so if you have any feedback you want to give me I always value it; though I think it makes more sense just to email me comments on the paper directly rather than post it on here so as not to clog the blog . . . but happy for more editorial/conversational comments to be added on here.

Blogging as academic crowdsourcing – a fascinating development.

And speaking of popular legal blogs, we wish a very happy 10th birthday to the *How Appealing* blog, one of the longest-running and most widely read legal blogs that just so happens to have been founded by one of our panelists, the prolific Howard Bashman. *The Post* herewith lights a virtual candle on a virtual cake. Congratulations, Howard.

In a more somber spirit, *The Post* also notes the passing of the widely respected law professor and legal blogger Larry Ribstein, a friend to many of *The Post*'s panelists and editorial team. In this edition we reproduce a fine tribute to him by Stephen Bainbridge that originally appeared on the *ProfessorBainbridge.com* blog. We are proud to republish it here. //

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[2] Glenn Cohen, "Circumvention Tourism: Traveling for Abortion, Assisted Suicide, Reproductive Technology, Female Genital Cutting, Stem Cell Treatments, and More . . .," at prawfsblawg.blogs.com/prawfsblawg/2011/12/circumvention-tourism-traveling-for-abortion-assisted-suicide-reproductive-technology-female-genital.html (December 5, 2011).

LARRY RIBSTEIN, RIP

Stephen Bainbridge[†]

I was stunned and deeply saddened to learn that my dear friend Larry Ribstein has passed away. The news came via an email from our mutual friend Henry Manne and has been confirmed on several blogs.

The first time I met Larry, I thought he would make a brilliant Mephistopheles. He was lean in body with sharp and angular facial features, ever so slightly swarthy, and somehow just a little scary. As I got to know him over many years, of course, I learned that he was a brilliant scholar with a wide array of interests, an incisive mind, a vast store of learning, and a talent for getting to the heart of the matter, but also that he was a great person and someone whose company was always a treat.

Larry's scholarship ranged widely. He wrote frequently on securities regulation, with an especial emphasis on the ways securities regulators and legislators tended to err in response to financial crises. See, for example, his brilliant book The Sarbanes Oxley Debacle[1] (co-authored with Henry Butler), which greatly influenced my own thinking in this area. He provided devastating critiques of the tendency to criminalize agency costs. He made contributions to the literature on federalism that ranged from corporate law to marriages.

Larry is probably best known, of course, for his work on "uncorporations," to use his awkward neologism. I.e., agency, partnerships, and, especially, limited liability companies. His book The Rise

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[†] William D. Warren Distinguished Professor of Law, UCLA School of Law. Original at www.professorbainbridge.com/professorbainbridgecom/2011/12/larry-ribstein-rip.html (Dec. 24, 2011; vis. July 5, 2012). © 2012 Stephen M. Bainbridge.

[1] www.amazon.com/gp/product/0844771945/ref=as_li_tf_tl?ie=UTF8&tag=corporatilawa-20&linkCode=as2&camp=1789&creative=9325&creativeASIN=0844771945.

of the Uncorporation[2] remains the single best book I've ever read on the subject.

Yet, I liked best – and I suspect he did too – his work on how lawyers and businessmen are portrayed in movies. Larry loved movies and was one of the few people to successfully turn that love into serious scholarship. His essay, Wall Street and Vine: Hollywood's View of Business[3] (March 8, 2009) has been downloaded over 1100 times at SSRN. As the abstract explains: "American films have long presented a negative view of business. This article is the first comprehensive and in-depth analysis of filmmakers' attitude toward business. It shows that it is not business that filmmakers dislike, but rather the control of firms by profit-maximizing capitalists. The article argues that this dislike stems from filmmakers' resentment of capitalists' constraints on their artistic vision. Filmmakers' portrayal of business is significant because films have persuasive power that tips the political balance toward business regulation."

Sadly, I had never had the opportunity to work with Larry on a joint scholarly project. Next year, however, he was to contribute a paper to a volume of essays on insider trading that I will be editing. I was looking forward to working with him on that project. Now both the book and the experience will be all the lesser for his absence.

In recent years, of course, Larry and I shared an interest in blogging. Larry frequently commented on my posts, not always favorably, but always incisively and in the spirit of intellectual debate. As Ted Frank observed, Larry was "an intellectually honest [friend] who wouldn't hesitate to tell you when he thought you were wrong (which happened several times a year to me)." Me too. So I not only enjoyed our back and forths tremendously, I always came away from them feeling I had learned something useful.

I will miss him. A lot.

My condolences and deepest sympathy go out to his wife Ann and the rest of his family.

Excerpts from tributes elsewhere:

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[2] www.amazon.com/gp/product/0195377095/ref=as_li_tf_tl?ie=UTF8&tag=corporatilawa-20&linkCode=as2&camp=1789&creative=9325&creativeASIN=0195377095.

[3] papers.ssrn.com/sol3/papers.cfm?abstract_id=563181.

Todd Henderson:[4] "I will consider it a life well lived if when I die there is at least one person left behind who feels as I do about Larry." Ditto.

Larry Solum:[5] "My former colleague and dear friend Larry Ribstein passed away this morning. Ribstein had a powerful intellect and iron will. His contributions to legal scholarship are many. In recent years, he has been best know for his work on the "uncorporation" – the move away from the corporate form of business organization, and for his work on jurisdictional competition and choice of law. . . . I have fond memories of many long discussions with Ribstein. He defended his vision of law with a tenacity and rigor that is rare, even among law professors."

Josh Wright:[6] "Larry was – as those who crossed his path in legal academia know – a force to be reckoned with. He pursued his research interests – from corporate law and jurisdictional competition to the reform of legal education – with a passion not rivaled by many in the academy. The legal academy will be worse off for losing Larry's voice as a scholar."

Geoff Manne:[7] "The intellectual life of everyone who knew him, of this blog, and of the legal academy at large is deeply diminished for his passing."

Ilya Somin:[8] "My personal favorite among his many excellent works is his recent book The Law Market[9] (coauthored with Erin O'Hara), which is perhaps the best recent book on the potential benefits of competition between state legal systems in American federalism."

Ted Frank: [10]

> I cannot begin to say how devastated I am at the sudden death of Larry Ribstein this morning,[11] just two days shy of his fortieth

[4] truthonthemarket.com/2011/12/24/goodbye-my-friend/.
[5] lsolum.typepad.com/legaltheory/2011/12/larry-ribstein-rest-in-peace.html.
[6] truthonthemarket.com/2011/12/24/larry-ribstein-rip-2/.
[7] truthonthemarket.com/2011/12/24/larry-ribstein-rip/.
[8] www.volokh.com/2011/12/24/larry-ribstein-rip/.
[9] www.amazon.com/exec/obidos/ASIN/0195312899/thevolocons0d-20/.
[10] www.pointoflaw.com/archives/2011/12/an-irreplaceable-loss-rip-larry-ribstein.php.
[11] lsolum.typepad.com/legaltheory/2011/12/larry-ribstein-rest-in-peace.html.

wedding anniversary. Larry was so creative and innovative in so many fields (this is just how many times we cited to him since February,[12] including just this week[13]), I often found myself wishing that there were several Larrys because everything he wrote had such opportunity cost for other things he didn't have time to write. I was always begging him to write for me when I was at AEI, and the time he said yes, he (with Henry Butler) turned out the important *The Sarbanes-Oxley Debacle*,[14] a devastating and persuasive takedown of the new law. I'd end up plagiarizing Professor Bainbridge's summary[15] of the rest of Ribstein's body of work to discuss the rest of it, so I'll refer you to his thorough post. In area after area – overcriminalization,[16] overregulation, popular-culture portrayal of business, the cartelization of legal practice and education – he was often close to alone in taking important contrarian positions. If I found myself disagreeing with Larry, I knew it meant I'd better put some soul-searching and analysis into my own position; if I hadn't already thought about an issue of corporate law or federalism, I knew I could scan Ribstein's work on the subject to have a good starting point. So not only do we not have the three or five Larry Ribsteins we needed, we now don't even have the one, and we're poorer for it.

But beyond the loss to legal scholarship is the loss of a good person. Larry was also a friend, but an intellectually honest one who wouldn't hesitate to tell you when he thought you were wrong (which happened several times a year to me). But that made it all the more flattering when he demonstrated support, and he was an early supporter of mine[17] when it was far from clear that my hare-brained quixotic scheme would accomplish anything.[18] I'm going to miss him a lot. Condolences to his family and friends. //

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[12] www.pointoflaw.com/cgi-bin/mt/mt-search.cgi?search=ribstein.

[13] www.pointoflaw.com/archives/2011/12/legal-education-debate-shifts-from-content-to-comp.php.

[14] www.amazon.com/exec/obidos/ASIN/0844771945/thf2homepageA.

[15] www.professorbainbridge.com/professorbainbridgecom/2011/12/larry-ribstein-rip.html.

[16] papers.ssrn.com/sol3/papers.cfm?abstract_id=1737915.

[17] busmovie.typepad.com/ideoblog/2009/08/atl-has-a-cool-interview-with-ted-frank-about-his-cool-new-public-interest-law-firm-that-is-planning-to-represent-consumers-u.html.

[18] truthonthemarket.com/2011/10/31/ted-frank-class-action-crusader/.

FROM: PRAWFSBLOG

PERSONHOOD

Glenn Cohen[†]

MISSISSIPPI'S PERSONHOOD AMENDMENT

The NY Times has just run this op-ed[1] I authored (along with Jonathan Wills[2]) on Mississippi's proposed Personhood Amendment 26, which is up for a vote on November 8. Here is the initiative's official description:

Initiative #26 would amend the Mississippi Constitution to define the word 'person' or 'persons', as those terms are used in Article III of the state constitution, to include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."

Jonathan and I argue in the op-ed that whether one is pro-life or pro-choice, the amendment is a bad idea because it is ambiguous in two key ways: (1) that "fertilization" could mean anything from the moment sperm penetrates egg to the moment the fertilize egg implants in the uterus (or does not, in the case of IVF embryos that are not used), thus it is unclear whether it sweeps in some forms of birth control, IVF embryo discard, and stem cell derivation along

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[†] Assistant Professor of Law, Harvard Law School. Originals at prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippis-personhood-amendment.html (Oct. 31, 2011); prawfsblawg.blogs.com/prawfsblawg/2011/11/the-constitutionality-of-mississippis-personhood-amendment-if-it-passes.html (Nov. 1, 2011); prawfsblawg.blogs.com/prawfsblawg/2011/11/stem-cells-ivf-and-abortion-is-there-a-right-and-left-position.html (Nov. 2, 2011); prawfsblawg.blogs.com/prawfsblawg/2011/11/life-humanity-and-personhooda-source-of-some-confusion.html (Nov. 3, 2011) (vis. July 5, 2012). © I. Glenn Cohen.

[1] www.nytimes.com/2011/10/31/opinion/mississippis-ambiguous-personhood-amendment.html?_r=2&ref=opinion.

[2] law.mc.edu/faculty-staff/faculty/will/.

with abortion. (2) It is unclear whether the Amendment is self-executing and thus updates the criminal code among other pieces of law, or whether it instead would require legislative action to do so piece-by-piece. We argue that without a clear amendment, Mississipians can't know what they are voting for. Moreover, if courts are inclined to read the ambiguities in a way to avoid raising federal constitutional questions, even pro-life groups hoping to offer the courts an opportunity to revisit *Roe* may not get what they want with an ambiguous amendment.

I will have more to say about this Amendment during my blogging stint this month, but I just want to make one observation based on my experience in a public debate in Mississippi[3] that I participated in.

Here I should make clear I am speaking only for myself, and not Jonathan:

During the debate, it felt a good deal like the pro-life groups seemed to want to have it both ways on the self-executing question when I pushed them on this during the debate. If it is not self-executing, if it just a statement of "policy" or "principle" without legal effect, it is unclear why they are pushing this amendment so hard politically and financially. They accused me of "fear mongering," and I am too close to this to be objective on the issue, but I do harbor this fear I want to share (if not "monger"): I fear some groups are pushing an ambiguous amendment they hope they can slip by Mississippi voters by protesting against its likely implications as to IVF and abortion, only then to press the courts to rely on the amendment as having altered criminal other laws in the state once it is in effect, impacting a good deal of reproductive practices. I am not trying to cast aspersions on the views of those supporting this amendment. I am sure their motivations are complex, heterogenous, and in some cases overdetermined. I think abortion is actually a hard question from a bioethics perspective, and understand where disagreements on the subject come from. But I found the positions they took on the self-executing question downright peculi-

[3] www.cbsnews.com/8301-201_162-20126236/debating-mississippis-personhood-amendment/.

ar, and I have yet to hear a straight answer from supporters of the law that they do not think it self-executing. Until they publicly take that stand, I will continue pressing (if not "mongering") this fear.

THE CONSTITUTIONALITY OF MISSISSIPPI'S PERSONHOOD AMENDMENT IF IT PASSES

I earlier shared my thoughts on the ambiguity of the Mississippi personhood amendment. In this blog post I focus on the question of its constitutionality.

While I have seen state courts apply the constitutional avoidance canon to state statutes, I have never seen it applied to the meaning of the a ballot initiative, but it is possible the courts will in any event resolve the question I discussed in my last post[4] of whether the Amendment is self-executing in such a way that will allow the courts to avoid having to face a possible conflict with the federal constitution.

If not, and the ambiguity of "fertilization"[5] is resolved to cover everything from the moment that sperm penetrates egg, the amendment (if self-executing[6]) may criminalize some forms of birth control, destruction of excess embryos fertilized as part of IVF, stem cell derivation, and abortion (pre and post-viability).

Let me take those contexts one by one.

As-applied to prohibit pre-viability abortions, the amendment obviously conflicts with *Roe* and *Casey*. Of course, some supporters of this amendment know that and want to offer the Supreme Court an opportunity to reverse these decisions, but I think the fetal pain abortion bans I have written about (with Sad Sayeed) elsewhere[7] in other states are actually a more likely way to get the Court to revisit the issue, although we ultimately think they too are unconstitutional for the reasons we set out in that article.

What about the application of the amendment to criminalize de-

[4] prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippis-personhood-amendment.html.
[5] *Id*.
[6] *Id*.
[7] papers.ssrn.com/sol3/papers.cfm?abstract_id=1805904.

stroying embryos fertilized for IVF but discarded when not needed – that is to force all embryos to be available for embryo adoption? Here the issue will turn on whether there is a federal constitutional right not to procreate (or as I prefer to put it rights not to procreate). I have written about those issues[8] in the context of courts looking for such a right to resolve embryo disposition disputes. In that article I expressed some doubt as to whether there exists a right not to be a genetic parent when unbundled from unwanted gestational and legal parenthood, but I also raised some arguments as to state action and waiver which seem less relevant in this context. There is also a practical question of whether the ban may be evaded by engaging in indefinite freezing rather than either destruction or adoption.

As applied to a ban on stem cell derivation, I am unsure there is a federal constitutional problem, especially if *Abigail Alliance*[9] (full disclosure, I represented DOJ in this matter) is accepted as stating the law in the are. If anything, because stem cells are further away from therapeutics at the moment, if anything the argument seems weaker than that in *Abigail Alliance*.

As applied to certain forms of birth control that terminate pregnancy after the sperm penetrates the egg, I am less sure of my view. Following *Griswold*, *Carey*, and *Eisenstadt* (if read as due process not equal protection), there seems to be an infringement of a fundamental right. However, perhaps the state could argue the availability of pre-fertilization forms of birth control means such a ban could survive strict scrutiny. One can think of this as the birth control equivalent to the most recent *Carhart* decision on the partial birth abortion procedure, that the state may be permissibly rule out some forms of contraception as long as some remain open. That said, so much of the *Carhart* opinion was based on Kennedy's views about women regretting their abortion decisions, which my colleague Jeannie Suk among others has written about,[10] that one might think the opinion

[8] papers.ssrn.com/sol3/papers.cfm?abstract_id=1114806.
[9] en.wikipedia.org/wiki/Abigail_Alliance_v._von_Eschenbach.
[10] www.columbialawreview.org/articles/the-trajectory-of-trauma-bodies-and-minds-of-abortion-discourse.

very much limited to abortion and even then not something to bank on.

Thus on my reading the constitutionality would vary dramatically based on as-applied context. Still, these thoughts are very tentative and I would love to hear what others think.

STEM CELLS, IVF, AND ABORTION: IS THERE A RIGHT AND LEFT POSITION?

This is my third post inspired by the Mississippi Personhood Amendment, and this one turns to the normative issues.

Many people who identify as pro-life as to abortion, oppose stem cell derivation involving the destruction of pre-embryos (or "embryos" simpliciter if you prefer, language is power), and often discard of embryos as part of IVF. Many people who are pro-choice by contrast oppose prohibitions on abortion, stem cell derivation, or IVF embryo discard. What I try to show my students in the classes I teach,[11] and I want to argue here, the three issues do not necessarily go together and the terrain is more complicated than the way it is usually presented.

First, for the left. As Judith Jarvis Thompson most famously tried to show in her (still quite controversial) work, support for an abortion right is not necessarily inconsistent with recognition of fetal personhood. That is, even if one believes fetuses are full persons, one can still support a right not to be a gestational parent (to use my terminology[12]) for women that stems from bodily integrity or perhaps autonomy. As I have argued, as a normative[13] and as a constitutional[14] matter recognition of a right not to be a gestational parent does not necessarily imply recognition of a right not to be a genetic parent, which suggests that the abortion right and the right to engage in IVF discard are quite severable because prohibiting the destruction of excess IVF embryos does not require forcing unwanted gestational duties on anyone. The disconnect is even stronger when

[11] www.law.harvard.edu/academics/curriculum/catalog/.
[12] papers.ssrn.com/sol3/papers.cfm?abstract_id=1116269.
[13] *Id*.
[14] papers.ssrn.com/sol3/papers.cfm?abstract_id=1114806.

it comes to stem cell derivation, where none of the "rights not to procreate" is involved. That means that one can very happily be pro-choice as to abortion, and prohibit embryo discard or destruction via stem cell derivation.

Second, as to the right . . . .

Let us assume the pro-life position on abortion depends on the view that fetuses are persons or close enough to persons that their protection trumps the interests in avoiding gestational parenthood of pregnant mothers. That position does not imply that the destruction of embryos at all stages of development is also equally problematic. A lot depends on one's theory of why fetuses should be given personhood or rights claims against destruction (on this issue I highly recommend Cynthia Cohen's chapter on personhood in her book[15] on stem cells). If your theory of personhood is about the actual possession of criteria X, on some ways to fill in "X" – such as fetal pain, which I have written about here[16] – fetuses late in gestation may possess the criteria but not embryos as the stage they are discarded/destroyed as part of IVF or stem cell derivation. Similarly, many have defended a 14-day or later view of personhood, where personhood begins on the 14th day after fertilization where embryonic twinning – the potential for an embryo to become monozygotic twins – ends. This argument is usually premised on problems with numerical identity. If the embryo was a person before day 14, but twins into two people, which one was it – person A or person B? Many find this argument persuasive, although certainly there are objectors (for example, those who say that if a stick is broken into two that does not mean it wasn't originally one stick, though others doubt the analogy). For present purposes all I want to suggest is someone who opposes abortion can thus fairly easily consistently oppose prohibition on destruction of early embryos.

None of that means that zealots on either side are capable of being nuanced here. The cultural cognition project,[17] if anything, sug-

[15] www.oup.com/us/catalog/general/subject/Medicine/Ethics/?view=usa&ci=9780195305241.

[16] papers.ssrn.com/sol3/papers.cfm?abstract_id=1805904.

[17] www.culturalcognition.net/.

gests the opposite. Still I hope that judges and academics are better poised to see the nuances here.

LIFE, HUMANITY, AND PERSONHOOD . . . A SOURCE OF SOME CONFUSION

In the comments to one of my prior posts[18] one of the commentators (Lifeisbeautiful) makes some statements regarding living and its impact on the abortion debate. I think it more likely than not this was not an attempt to engage in serious debate, but in any event I think the comment helps point out a bit of equivocation or confusion that is common in these debates.

We ought to distinguish (at least) three questions:

> Life: Is X living or not living?
>
> Human: Is X a member of the human species, or not?
>
> Person: Is X a person or not – and by person here we mean the bearer of a set of moral and legal rights, the most important of which is that they are inviolable?

The relation of these three concepts, though, is non-obvious and depends on an argumentation.

One could have a view that if X has LIFE + is HUMAN, then X is a PERSON. This would treat being living humans as sufficient for personhood.

One could have a view that ONLY living humans are persons, this would treat those conditions as necessary.

Neither proposition is self-evidently true . . . .

Defenders of what might be referred to as a "quality X" view of personhood for instance, would disagree. If your quality X is the capacity for rational reasoning, you might treat certain living non-humans (like intelligent apes, or intelligent aliens if they ever show up) as persons. You may also exclude some living humans from personhood, for example ancephalic children or the severely retarded.

Peter Singer, for example, famously argues that views that

[18] prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippis-personhood-amendment.html#comments.

equate being human with being a person, and exclude non-human animals from personhood definitionally are "speciesist" and that this is a kind of discrimination equivalent to racism.

There are still further nuances: what is the right quality or joint set of qualities to fill in "quality X"? Does one have to actually possess quality X at the time in order to be a person, or is it enough to have the potential to possess quality X in the ordinary course of things? What does the "ordinary course of things" mean, for instance is human sperm standing alone the kind of thing that in the ordinary course of things will have the potential for quality X? Is a fetus that is gestating? Can a line be drawn? There are further questions about non-living humans, and their relationship to personhood, which may govern how we treat the dead. Finally, there are questions about the relationship between moral and legal personhood, and within legal personhood between constitutional and non-constitutional conceptions of personhood.

One can only get at these very hard and interesting questions, though, if one is careful to note the possibility that being living, being human, and being a person are three separate concepts whose interactions are complex and not self-evident. //

FROM: ACSBLOG

DEBATE ON ANTITRUST SCRUTINY OF GOOGLE

Benjamin G. Edelman[†] *vs. Joshua D. Wright*[*]

GOOGLE'S DOMINANCE – AND WHAT TO DO ABOUT IT

Benjamin G. Edelman

The Senate Antitrust Subcommittee recently held a hearing[1] to investigate persistent allegations of Google abusing its market power. Witnesses Jeff Katz (CEO of Nextag) and Jeremy Stoppelman (CEO of Yelp) demonstrated Google giving its own services an advantage other sites cannot match. For example, when a user searches for products for possible purchase, Google presents the user with Google Product Search links front-and-center, a premium placement no other product search service can obtain. Furthermore, Google Product Search shows prices and images, where competitors get just text links. Meanwhile, a user

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[*] Professor, George Mason University School of Law and Department of Economics. Originals at www.acslaw.org/acsblog/all/edelman-wright-debate-on-antitrust-scrutiny-of-google (Oct. 3-7, 2011; vis. July 5, 2012). Each of the four main posts (they are presented here in chronological order) begins as follows:

> *Editor's Note: This is the first* [or second or third or final] *post in an ACSblog debate on antitrust scrutiny of Google between Harvard Business School Professor Benjamin G. Edelman and George Mason University School of Law Professor Joshua D. Wright. This online debate follows a recent U.S. Senate hearing* [www.acslaw.org/acsblog/senate-antitrust-hearing-to-examine-google-practices] *on whether Google's business practices "serve consumers" or "threaten competition."*

Comments on a post are reproduced after the end of that post. Professor Edelman's posts are © 2012 Benjamin Edelman. Professor Wright's posts are © 2012 Joshua D. Wright.

[1] www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba64d93cb.

searching for restaurants, hotels, or other local merchants sees Google Places results with similar prominence, pushing other information services to locations users are unlikely to notice. In antitrust parlance, this is tying: A user who wants only Google Search, but not Google's other services, will be disappointed. Instead, any user who wants Google Search is forced to receive Google's other services too. Google's approach also forecloses competition: Other sites cannot compete on their merits for a substantial portion of the market – consumers who use Google to find information – because Google has kept those consumers for itself.

But Google's antitrust problems extend beyond tying Google's ancillary services. Consider advertisers buying placements from Google. Google controls 75% of U.S. PC search traffic and more than 90% in many countries. As a result, advertisers are compelled[2] to accept whatever terms Google chooses to impose. For example, an advertiser seeking placement through Google's premium Search Network partners (like AOL and The New York Times) must also accept placement through the entire Google Search Network which includes all manner of typosquatting sites,[3] adware,[4] and pop-up ads,[5] among other undesirable placements. While these bogus ad placements defraud and overcharge advertisers, Google's U.S. Advertising Program Terms[6] offer remarkable defenses: these terms purport to let Google place ads "on any content or property provided by Google . . . or . . . provided by a third party upon which Google places ads" (clause 2.(y)-(z)) – a circular "definition" that sounds more like a Dr. Seuss tale than an official contract. Even Google's dispute resolution provisions are one-sided: An unsatisfied advertiser must complain to Google by "first class mail or air mail or overnight courier" with a copy by "confirmed facsimile." (Despite my best efforts, I still don't know how a "confirmed" facsimile differs from a regular fax.) Meanwhile, Google may send messages to

[2] www.benedelman.org/news/092011-1.html.
[3] www.benedelman.org/presentations/inta-2009.pdf#page=47.
[4] www.benedelman.org/news/051309-1.html#whenu.
[5] www.benedelman.org/news/011210-1.html.
[6] www.google.com/intl/en_us/adwords/select/TCUSbilling0806.html.

an advertiser merely by "sending an email to the email address specified in [the advertiser's] account" (clause 9). This hardly looks like a contract fairly negotiated among equals. Quite the contrary, Google has all the power and is using it to the utmost.

Google likes to claim[7] that "competition is one click away." I disagree. Google CFO Patrick Pichette recently defended Google's large investments in Chrome by arguing[8] that "everybody that uses Chrome is a guaranteed locked-in user for us." He's right about Chrome's effective lock-in, and the lock-in is bigger than Chrome: Google also buys premium placement in Firefox, and Google's Android platform also offers preferred placement for Google Search. Even on non-Google mobile platforms, Google serves fully 95% of searches thanks to defaults that systematically direct users to Google. (Indeed, when Google then-CEO Schmidt was also on Apple's board, Google sealed a sweetheart deal for iPhone search traffic. Competitors never even had the chance to bid for this traffic.) In addition, Google's web syndication contracts assure exclusive long-term placement on most top web sites. Google has spent billions of dollars to establish these relationships, with the necessary consequence that users systematically and predictably run their searches on Google.

The Google of 2004 promised[9] to help users "leave its website as quickly as possible" while showing, initially, zero ads. But times have changed. Google has modified its site design to encourage users to linger on other Google properties, even when competing services have more or better information. And Google now shows as many fourteen ads on a page;[10] users with mid-sized screens often must scroll to see the second algorithmic result. By adding bias and filling its site with advertising, Google has effectively raised prices to consumers – a price paid not in dollars but in attention, yet with consequences equally real. Meanwhile, prices charged to advertisers – set

[7] blogs.pcworld.com/techlog/archives/004530.html.

[8] www.zdnet.com/blog/btl/why-is-chrome-so-important-to-google-its-a-locked-in-user/47295.

[9] web.archive.org/web/20040603020634/http:/www.google.com/corporate/tenthings.html.

[10] www.benedelman.org/images/google-sep11/acuvue-14ads-091611.png.

through a secretive process with details known only to Google – climbed sharply as Google grew. Finally, as Yelp and Nextag leaders told the Senate last month, Google's current practices make it infeasible to launch businesses like theirs – presaging a world where myriad sectors are off-limits to competition because Google effectively blocks every service but its own.

Search and search advertising are the foundation of online commerce – crucial to users and sites alike. With Google increasingly dominant, exceptionally opaque, and continuously invoking its power in search to expand into ever-more sectors, it's time for antitrust authorities to take a closer look.

RETROGRADE ANTITRUST ANALYSIS IS NO FIT FOR GOOGLE

Joshua D. Wright

The theoretical antitrust case against Google reflects a troubling disconnect between the state of our technology and the state of our antitrust economics. Google's is a 2011 high tech market being condemned by 1960s economics. Of primary concern (although there are a lot of things to be concerned about, and my paper with Geoffrey Manne, "If Search Neutrality Is the Answer, What's the Question?,"[11] canvasses the problems in much more detail) is the treatment of so-called search bias (whereby Google's ownership and alleged preference for its own content relative to rivals' is claimed to be anticompetitive) and the outsized importance given to complaints by competitors and individual web pages rather than consumer welfare in condemning this bias.

The recent political theater in the Senate's hearings on Google[12] displayed these problems prominently, with the first half of the hearing dedicated to Senators questioning Google's Eric Schmidt about search bias and the second half dedicated to testimony from and about competitors and individual websites allegedly harmed by Google. Very little, if any, attention was paid to the underlying

[11] papers.ssrn.com/sol3/papers.cfm?abstract_id=1807951.

[12] www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba64d93cb.

economics of search technology, consumer preferences, and the ultimate impact of differentiation in search rankings upon consumers.

So what is the alleged problem? Well, in the first place, the claim is that *there is* bias. Proving that bias exists – that Google favors its own maps over MapQuest's, for example – would be a necessary precondition for proving that the conduct causes anticompetitive harm, but let us be clear that the existence of bias alone is not sufficient to show competitive harm, nor is it even particularly interesting, at least viewed through the lens of modern antitrust economics.

In fact, economists have known for a very long time that favoring one's own content – a form of "vertical" arrangement whereby the firm produces (and favors) both a product and one of its inputs – is generally procompetitive. Vertically integrated firms may "bias" their own content in ways that increase output, just as other firms may do so by arrangement with others. Economists since Nobel Laureate Ronald Coase[13] have known – and have been reminded by Klein, Crawford & Alchian,[14] as well as Nobel Laureate Oliver Williamson[15] and many others – that firms may achieve by contract anything they could do within the boundaries of the firm. The point is that, in the economics literature, it is well known that self-promotion in a vertical relationship can be either efficient or anticompetitive depending on the circumstances of the situation. It is never presumptively problematic. In fact, the empirical literature[16] suggests that such relationships are almost always procompetitive and that restrictions imposed upon the abilities of firms to enter them generally *reduce* consumer welfare. Procompetitive vertical integration is the rule; the rare exception (and the exception relevant to antitrust analysis) is the use of vertical arrangements to harm not just individual competitors, but competition, thus reducing consumer welfare.

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[13] en.wikipedia.org/wiki/The_Nature_of_the_Firm.

[14] faculty.fuqua.duke.edu/%7Echarlesw/s591/Bocconi-Duke/Papers/new_C09/Vertical%20Integration,%20Appropriable%20Rents%20and%20the%20Competitive%20Contracting%20Process.pdf.

[15] pages.stern.nyu.edu/%7Ewgreene/entertainmentandmedia/Williamsonvertint.pdf.

[16] www.aeaweb.org/articles.php?doi=10.1257/jel.45.3.629.

One has to go back to the antitrust economics of the 1960s to find a literature – and a jurisprudence – espousing the notion that "bias" alone is *inherently* an antitrust problem. This is why it is so disconcerting to find academics, politicians, and policy wags promoting such theories today on the basis that this favoritism harms competitors. *The relevant antitrust question is not whether there is bias but whether that bias is efficient.* Evidence that other search engines with much smaller market shares, and certainly without any market power, exhibit similar bias suggests that the practice certainly has some efficiency justifications. Ignoring that possibility ignores nearly a half century of economic theory and empirical evidence.

It adds insult to injury to point to harm borne by competitors as justification for antitrust enforcement already built upon outdated, discredited economic notions. The standard in antitrust jurisprudence (and antitrust economics) is harm to *consumers*. When a monopolist restricts output and prices go up, harming consumers, it is a harm potentially cognizable by antitrust; but when Safeway brands, sells, and promotes its own products and the only identifiable harm is that Kraft sells less macaroni and cheese, it is not.

Understanding the competitive economics of vertical integration and vertical contractual arrangements is difficult because there are generally both anticompetitive and procompetitive theories of the conduct. One must be very careful with the facts in these cases to avoid conflating harm to rivals arising from competition on the merits with harm to competition arising out of exclusionary conduct. Misapplication of even this nuanced approach can generate significant consumer harm by prohibiting efficient, pro-consumer conduct that is wrongly determined to be the opposite and by reducing incentives for other firms to take risks and innovate for fear that they, too, will be wrongly condemned.

Professor Edelman has been prominent among Google's critics calling for antitrust intervention. Yet, unfortunately, he too has demonstrated a surprising inattention to this complexity and its very real anti-consumer consequences. In an interview in Politico[17] (login

[17] www.politicopro.com/login/.

required), he suggests that we should simply prevent Google from vertically integrating:

> I don't think it's out of the question given the complexity of what Google has built and its persistence in entering adjacent, ancillary markets. A much simpler approach, if you like things that are simple, would be to disallow Google from entering these adjacent markets. OK, you want to be dominant in search? Stay out of the vertical business, stay out of content.

This sort of thinking implies that the harm suffered by competing content providers justifies preventing Google from adopting an entire class of common business relationships on the implicit assumption that competitor harm is relevant to antitrust economics and the ban on vertical integration is essentially costless. Neither is true. U.S. antitrust law requires a demonstration that consumers – not just rivals – will be harmed by a challenged practice. But consumers' interests are absent from this assessment on both sides – on the one hand by adopting harm to competitors rather than harm to consumers as a relevant antitrust standard and on the other by ignoring the hidden harm to consumers from blithely constraining potentially efficient business conduct.

Actual, measurable competitive effects are what matters for modern antitrust analysis, not presumptions about competitive consequences derived from the structure of a firm or harm to its competitors. Unfortunately for its critics, in Google's world, prices to consumers are zero, there is a remarkable amount of investment and innovation (not only from Google but also from competitors like Bing, Blekko, Expedia, and others), consumers are happy, and, significantly, Google is far less dominant than critics and senators suggest. Facebook is now the most visited page on the Internet. Many online marketers no longer view[18] Google as the standard, but are instead increasingly looking to social media (like Facebook) as the key to advertisers' success in attracting eyeballs on the Internet. And at the end of the day, competition really is "just a click away" (OK, a few letters away) as Google has no control over users' ability

[18] www.fantatikole.com/social-media-marketing-more-important-than-seo/.

to employ other search engines, use other sources of information, or simply directly access content, all by typing a different URL into a browser.

Finally, even if there is a concern, there is the problem of what to do about it. Even if Google's critics were to demonstrate that bias is anticompetitive, it is relevant to any analysis that bias is hard to identify, that there is considerable disagreement among users over whether it is problematic in any given instance, that a remedy would be difficult to design and harder to enforce, and that the costs of being wrong are significant.

Tom Barnett[19] – who was formerly in charge of the Antitrust Division at the DOJ and who now represents Expedia and vociferously criticizes Google (including at the Senate hearings in September) – has himself made this point, observing that:[20]

> No institution that enforces the antitrust laws is omniscient or perfect. Among other things, antitrust enforcement agencies and courts lack perfect information about pertinent facts, including the impact of particular conduct on consumer welfare . . . . We face the risk of condemning conduct that is not harmful to competition . . . and the risk of failing to condemn conduct that does harm competition . . .

Condemning Google for developing Google Maps as a better form of search result than its original "ten blue links" reflects retrograde economics and a strange and costly preference for the status quo over innovation. Doing so because it harms a competitor turns conventional antitrust analysis on its head with consumers bearing the cost in terms of reduced innovation and satisfaction.

FINDING AND PREVENTING BIASED RESULTS

Benjamin G. Edelman

Professor Wright questions[21] whether Google biases results towards its own services, and asks whether consumers are harmed even if Google does bias its results. I don't find these questions so

[19] truthonthemarket.com/2011/05/10/barnett-v-barnett-on-antitrust/.
[20] www.justice.gov/atr/public/speeches/226537.htm.
[21] www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.

difficult, and while Professor Wright suggests we'd struggle to identify appropriate remedies, I see some straightforward solutions.

Let's start with the question of whether Google biases its results towards its own services. On a whim, I ran a search[22] for pop superstar Justin Bieber. Google's top-most link promoted Google News (in oversized bold type). Down a few inches came a "Videos" section where three thumbnails and three video titles all linked to YouTube clips. (Less prominent links identified other services showing these same videos – links added only after critics flagged the problem of Google always directing this traffic to its own video site.) Lower, Google presented a block of Google Images results. In the analogous context of extra-prominent links to Google Finance, Google's Marissa Mayer argued[23] that the company should be permitted to put its own links first. "It seems only fair right, we do all the work for the search page and all these other things, so we do put it first." Marissa doesn't dispute that Google favors its own links – and she couldn't, when Google's links widely appear in prominent ways no other service enjoys.

And what of the consequences of Google's bias? Professor Wright posits an "efficient bias" wherein Google usefully offers consumers its full suite of services. Certainly it's handy to have a single Google password providing access to personalized search, finance, videos, and more. But this misses the serious harms of Google's ever-broadening panoply of services.

Consider an advertiser, say a hotel, dissatisfied with high prices for Google's dominant AdWords advertising service. If Google prominently features links to Expedia and Tripadvisor, the hotel can strike deals with those sites to promote its property – a plausible alternative to high prices for ads from Google. But consider Google's recent changes to its search result format. Where Google used to link to Expedia, Google Hotel Finder now appears front-and-center – pushing Expedia links lower and less prominent. And where Google used to link to Tripadvisor, users now see Google Places – which requires hotels and booking services to pay Google

[22] www.google.com/search?q=justin+bieber.
[23] www.youtube.com/watch?v=LT1UFZSbcxE#t=44m50s.

to get direct booking links. (Adding insult to injury, Places also asks a hotel to bid against its competitors for ads on its own Google Place page. If the advertiser bids too low or refuses to participate, Google features competitors instead.) Sending less traffic to alternative advertising venues like Expedia and Tripadvisor, Google can raise prices with greater confidence, and advertisers have little means of escape. There's nothing "efficient" about that; Google raises price above marginal cost, restricts supply, and takes its pound of flesh from advertisers who have little alternative.

Wright suggests we should focus on harm to consumers. In the long run, consumers certainly suffer when innovators can't launch businesses or get financing for fear of Google blocking their opportunities. Who would launch a video sharing site, knowing that Google overwhelmingly sends video-related traffic to YouTube? And if savvy developers envisioned a new mapping site superior to Google Maps, perhaps with better printing or clearer instructions, that team would struggle to reach consumers since Google systematically features its own service whenever a search calls for a map. These foreclosures impede competition, slow innovation, and are a proper subject of antitrust inquiry.

Meanwhile, advertisers continue to suffer a particularly clear-cut harm – and since advertisers' payments fuel Google's $30+ billion annual revenue, antitrust authorities absolutely must consider their plight. As I argued in my opening piece,[24] Google has been thug-like in its imposition of exceptionally harsh terms. Google offers no defense of its take-it-or-leave it terms; Google knows that even the largest advertisers have no viable alternative.

Professor Wright questions what remedy is appropriate for Google's ever-expanding scope. I recently suggested several remedies for search bias,[25] grounded in tried-and-true remedies antitrust authorities have applied in similar circumstances. For example, two decades ago, travel agents used reservation systems that were owned by airlines, and each airline's reservation system favored its own flights – making it hard for travel agents or passengers to find

[24] www.acslaw.org/acsblog/google's-dominance-—-and-what-to-do-about-it.
[25] www.benedelman.org/news/022211-1.html.

the flight that actually best met their needs. Department of Justice litigation put a stop to this practice, disallowing reservation systems from sorting flights based on improper factors like carrier identity. The analogue here is that Google shouldn't favor its own services just because they come from Google; putting Google Finance first because it's most popular might be fine if it actually were most popular (it isn't), but Google ought not put its services first just because they come from Google.

More recently, the European Commission required Microsoft to offer a "browser ballot box" to let users easily choose their preferred web browser, even a browser that competes with Microsoft's own offering. Such a choice can also be provided within search results: When a user seeks information that matches a predefined vertical (like video, pictures, finance, or news), a drop-down box or other listing could let the user choose a preferred vendor. A user might choose Google for ordinary web search, but prefer Hulu's video index, Yahoo's stock quotes, Yelp's local results, and Amazon's product search. A bit of AJAX would let users switch their providers any time. Suddenly Google would be far less able to leverage its dominance in search to achieve dominance in other categories. That would be a major benefit to users, advertisers, and the entire online economy.

COMMENTS

Remedies for Search Bias Good for Consumers? CRS Wasn't

Submitted by Josh Wright on October 6, 2011

You describe the remedies as "tried and true" – but were they successful? There has been ample study of the effects of the travel agent CRS remedy you appeal to. Sure, imposing a remedy is easy. But is it any good at improving consumer welfare? Alexander and Lee examine the CRS remedy and find that "[T]he social value of prohibiting display . . . bias solely to improve the quality of information that consumers receive about travel options appears to be low and may be negative." It gets worse. CRS regulations appear to have caused serious harm to the competitive process and made consumers worse off. Smith (1999) concludes that "When "bias" was

eliminated, United moved up on the American system and vice versa, while all other airlines moved down somewhat . . . The antitrust restriction on competitive use of the CRS, then, actually reduced competition." Further, as with Google search, the CRS was imposed despite evidence that it had improved consumer welfare. One study found that CRS usage increased travel agents' productivity by an average of 41% and that in the early 1990s over 95% of travel agents used a CRS – indicating that travel agents were able to assist consumers far more effectively once CRSs became available (Ellig, 1991). And in your discussion of the CRS model for regulation, you fail to mention that the DOT terminated the regulation in 2004 in light of its failure to improve competitive outcomes and a growing sense that they were making things worse, not better. Seems like an important fact to consider in the debate.

Two More Points to Consider

Submitted by Josh Wright on October 6, 2011

First, the "do they or do they not" bias results discussion is largely a distraction in modern antitrust analysis. The question is whether Google's search practices foreclose rivals sufficiently to raise barriers to entry and generate anticompetitive effects. Anecdotal evidence on these points is insufficient. But it is worth correcting the Mayer quote above; to save space, readers are referred to Danny Sullivan's correction here: http://searchengineland.com/survey-google-favors-itself-only-19-of-the-t….[26]

Second, Professor Edelman gives me far too much credit when he writes "Professor Wright posits an "efficient bias" wherein Google usefully offers consumers its full suite of services." The idea that vertical integration or discrimination in favor of one's own products can be efficient is not my own. Credit may properly be attributed to Coase, Klein, Alchian, Hart, Holmstrom, Williamson, and even back to Cournot. These are old ideas. And distinguishing between foreclosure and efficient bias is at the heart of any modern attempt to diagnosis potentially exclusionary conduct under the antitrust laws.

[26] searchengineland.com/survey-google-favors-itself-only-19-of-the-time-61675.

It is in this light that the point that not only Google has evolved toward universal results and referral to its own content; but also Microsoft's Bing. Professor Edelman's own work demonstrates this; and subsequent analysis confirms it. But Google has market power one might object! In antitrust, the general conventional wisdom (for good economic reason) is that when firms with and without market power, i.e. when the industry, adopts a particular practice it is highly likely to be efficient. Such is the case here.

PUTTING CONSUMER WELFARE FIRST IN ANTITRUST ANALYSIS OF GOOGLE

Joshua D. Wright

Professor Edelman's opening post[27] does little to support his case. Instead, it reflects the same retrograde antitrust[28] I criticized in my first post.

Edelman's understanding of antitrust law and economics appears firmly rooted in the 1960s approach to antitrust in which enforcement agencies, courts, and economists vigorously attacked novel business arrangements without regard to their impact on consumers. Judge Learned Hand's infamous passage in the Alcoa decision comes to mind as an exemplar of antitrust's bad old days when the antitrust laws demanded that successful firms forego opportunities to satisfy consumer demand. Hand wrote:

> we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.

Antitrust has come a long way since then. By way of contrast, today's antitrust analysis of alleged exclusionary conduct begins with (ironically enough) the *U.S. v. Microsoft* decision. *Microsoft* emphasizes the difficulty of distinguishing effective competition from exclusionary conduct; but it also firmly places "consumer welfare" as the

[27] www.acslaw.org/acsblog/google's-dominance-—-and-what-to-do-about-it.
[28] www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.

lodestar of the modern approach to antitrust:

> Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it. From a century of case law on monopolization under § 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.

Nearly all antitrust commentators agree that the shift to consumer-welfare focused analysis has been a boon for consumers. Unfortunately, Edelman's analysis consists largely of complaints that would have satisfied courts and agencies in the 1960s but would not do so now that the focus has turned to consumer welfare rather than indirect complaints about market structure or the fortunes of individual rivals.

From the start, in laying out his basic case against Google, Edelman invokes antitrust concepts that are simply inapt for the facts and then goes on to apply them in a manner inconsistent with the modern consumer-welfare-oriented framework described above:

> In antitrust parlance, this is tying: A user who wants only Google Search, but not Google's other services, will be disappointed. Instead, any user who wants Google Search is forced to receive Google's other services too. Google's approach also forecloses competition: Other sites cannot compete on their merits for a substantial portion of the market – consumers who use Google to find information – because Google has kept those consumers for itself.

There are two significant errors here. First, Edelman claims to be interested in protecting users who want only Google Search but not its other services will be disappointed. I have no doubt such consumers exist. Some proof that they exist is that a service has already

been developed to serve them. Professor Edelman, meet Googleminusgoogle.com.[29] Across the top the page reads: "Search with Google without getting results from Google sites such as Knol, Blogger and YouTube." In antitrust parlance, this is not tying after all. The critical point, however, is that user preferences are being satisfied as one would expect to arise from competition.

The second error, as I noted in my first post,[30] is to condemn vertical integration as inherently anticompetitive. It is here that the retrograde character of Professor Edelman's analysis (and other critics of Google, to be fair) shines brightest. It reflects a true disconnect between the 1960s approach to antitrust which focused exclusively upon market structure and impact upon rival websites; impact upon consumers was nowhere to be found. That Google not only produces search results but also owns some of the results that are searched is not a problem cognizable by modern antitrust. Edelman himself – appropriately – describes Google and its competitors as "information services." Google is not merely a URL finder. Consumers demand more than that and competition forces search engines to deliver. It offers value to users (and thus it can offer users to advertisers) by helping them find information in increasingly useful ways. Most users "want Google Search" to the exclusion of Google's "other services" (and, if they do, all they need do is navigate over to http://googleminusgoogle.com/[31] (even in a Chrome browser) and they can have exactly that). But the critical point is that Google's "other services" are methods of presenting information to consumers, just like search. As the web and its users have evolved, and as Google has innovated to keep up with the evolving demands of consumers, it has devised or employed other means than simply providing links to a set of URLs to provide the most relevant information to its users. The 1960s approach to antitrust condemns this as anticompetitive foreclosure; the modern version recognizes it as innovation, a form of competition that benefits consumers.

Edelman (and other critics, including a number of senators at last

[29] googleminusgoogle.com/.
[30] www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.
[31] googleminusgoogle.com/.

month's hearing) hearken back to the good old days and suggest that any deviation from Google's technology or business model of the past is an indication of anticompetitive conduct:

> The Google of 2004 promised to help users "leave its website as quickly as possible" while showing, initially, zero ads. But times have changed. Google has modified its site design to encourage users to linger on other Google properties, even when competing services have more or better information. And Google now shows as many fourteen ads on a page.

It is hard to take seriously an argument that turns on criticizing a company simply for looking different than it did seven years ago. Does anybody remember what search results looked like 7 years ago? A theory of antitrust liability that would condemn a firm for investing billions of dollars in research and product development, constantly evolving its product to meet consumer demand, taking advantage of new technology, and developing its business model to increase profitability should not be taken seriously. This is particularly true where, as here, every firm in the industry has followed a similar course, adopting the same or similar innovations. I encourage readers to try a few queries on http://www.bing-vs-google.com/[32] – where you can get side by side comparisons – in order to test whether the evolution of search results and innovation to meet consumer preferences is really a Google-specific thing or an industry wide phenomenon consistent with competition. Conventional antitrust analysis holds that when conduct is engaged in not only by allegedly dominant firms, but also by every other firm in an industry, that conduct is presumptively efficient, not anticompetitive.

The main thrust of my critique is that Edelman and other Google critics rely on an outdated antitrust framework in which consumers play little or no role. Rather than a consumer-welfare based economic critique consistent with the modern approach, these critics (as Edelman does in his opening statement) turn to a collection of anecdotes and "gotcha" statements from company executives. It is worth correcting a few of those items here, although when we've

[32] www.bing-vs-google.com.

reached the point where identifying a firm's alleged abuse is a function of defining what a "confirmed" fax is, we've probably reached the point of decreasing marginal returns. Rest assured that a series of (largely inaccurate) anecdotes about Google's treatment of particular websites or insignificant contract terms is wholly insufficient to meet the standard of proof required to make a case against the company under the Sherman Act or even the looser Federal Trade Commission Act.

- It appears to be completely inaccurate to say that "[a]n unsatisfied advertiser must complain to Google by 'first class mail or air mail or overnight courier' with a copy by 'confirmed facsimile.'" A quick search, even on Bing, leads one to this page,[33] indicating that complaints may be submitted via web form.
- It is likewise inaccurate to claim that "advertisers are compelled to accept whatever terms Google chooses to impose. For example, an advertiser seeking placement through Google's premium Search Network partners (like AOL and *The New York Times*) must also accept placement through the entire Google Search Network which includes all manner . . . undesirable placements." In actuality, Google offers a "Site and Category Exclusion Tool"[34] that seems to permit advertisers to tailor their placements to exclude exactly these "undesirable placements."
- "Meanwhile, a user searching for restaurants, hotels, or other local merchants sees Google Places results with similar prominence, pushing other information services to locations users are unlikely to notice." I have strived in vain to enter a search for a restaurant, hotel, or the like into Google that yielded results that effectively hid "other information services" from my notice, but for some of my searches, Google Places did come up first or second (and for others it showed up further down the page).
- Edelman has noted elsewhere[35] that, sometimes, for some of the

[33] support.google.com/adwords/bin/request.py?&contact_type=aw_complaint.

[34] support.google.com/adwords/bin/topic.py?hl=en&topic=1713963&from=15911&rd=1.

[35] www.benedelman.org/searchbias/.

> searches he has tested, the most popular result on Google (as well, I should add, on other, non-"dominant" sites) is not the first, Google-owned result, but instead the second. He cites this as evidence that Google is cooking the books, favoring its own properties when users actually prefer another option. It actually doesn't demonstrate that, but let's accept the claim for the sake of argument. Notice what his example also demonstrates: that users who prefer the second result to the first are perfectly capable of finding it and clicking on it. If this is foreclosure, Google is exceptionally bad at it.

The crux of Edelman's complaint seems to be that Google is competing in ways that respond to consumer preferences. This is precisely what antitrust seeks to encourage, and we would not want a set of standards that chilled competition because of a competitor's success. Having been remarkably successful in serving consumers' search demands in a quickly evolving market, it would be perverse for the antitrust laws to then turn upon Google without serious evidence that it had, in fact, actually harmed consumers.

Untethered from consumer welfare analysis, antitrust threatens to re-orient itself to the days when it was used primarily as a weapon against rivals and thus imposed a costly tax on consumers. It is perhaps telling that Microsoft, Expedia, and a few other Google competitors are the primary movers behind the effort to convict the company. But modern antitrust, shunning its inglorious past, requires actual evidence of anticompetitive effect before condemning conduct, particularly in fast-moving, innovative industries. Neither Edelman nor any of Google's other critics, offer any.

During the heady days of the Microsoft antitrust case, the big question was whether modern antitrust would be able to keep up with quickly evolving markets. The treatment of the proffered case against Google is an important test of the proposition (endorsed by the Antitrust Modernization Commission[36] and others) that today's antitrust is capable of consistent and coherent application in innovative, high-tech markets. An enormous amount is at stake. Faced

[36] govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

with the high stakes and ever-evolving novelty of high-tech markets, antitrust will only meet this expectation if it remains grounded and focused on the core principle of competitive effects and consumer harm. Without it, antitrust will devolve back into the laughable and anti-consumer state of affairs of the 1960s – and we will all pay for it.

COMMENTS

Google's contracts are as I say they are

Submitted by Ben Edelman on October 6, 2011

Lots of interesting discussion here. But to set the record straight on a few key points where Professor Wright's factual errors are exceptionally clear-cut –

Professor Wright links to a Google complaints page where advertisers can send their complaints. Indeed. But for a complaint to be a valid notice within the meaning of advertisers' contracts with Google, Google's non-negotiable contract requires the advertiser to submit the complaint in the remarkable fashion I flagged in my first post. The form Joshua links will not suffice, under the plain language of Google's own contract.

Professor Wright links to a Google Site and Category Exclusion Tool. But that's a tool for the Display Network. (Check the breadcrumbs at the top of the page: "Display Network Placements.") That tool does nothing to address the key bundling problem I flagged, wherein Google requires advertisers to accept the entirety of its Search Network if they want any of its Search Network partners (whose search traffic Google has of course locked up through exclusive contracts such that advertisers can't access these placements any other way).

A few thoughts

Submitted by Josh Wright on October 7, 2011

As I said in the beginning, for the purposes of antitrust analysis I'm quite sure this is already descending into negative marginal product; but nonetheless:

First, Google's AdWords Terms and Conditions only require – according to standard legal practice – that legal papers be served in

writing. As I understand it, North American legal notices are directed to Google's California headquarters, while non-U.S. legal notices are typically directed to the advertising legal support team in Ireland.

Second, and most importantly, Microsoft's AdCenter Terms and Conditions (section 10), as well as Yahoo's advertising Terms and Conditions (section 12), contain the same requirement that legal complaints be submitted in writing:

> o Microsoft: "All notices to Microsoft shall be sent via recognized overnight courier or certified mail, return receipt requested, to the Microsoft adCenter contract notice contacts."
>
> o Yahoo: "You will send all notices to us via recognized overnight courier or certified mail, return receipt requested, to: General Counsel, Yahoo! Inc., 701 First Avenue, Sunnyvale, California 94089."

Again, this is well outside the antitrust domain and Professor Edelman doesn't really make much of an effort to make the connection. But – I'd happily wager the FTC or any private plaintiff would not survive a motion to dismiss.

Third, the search syndication argument can be rejected quite easily. Professor Edelman contends that Google has "locked up through exclusive contracts" the search traffic of its network partners. But its just not the case that Google has locked up a majority of search syndication deals. Compare the Google deals with AOL and Ask.com (say, 5% of search queries) to Microsoft's deal with Yahoo – which runs about 16-20% of search queries! Of course, I've got no problem with vigorous competition between Microsoft and Google for these deals, no matter who wins them. They come up for renewal on a regular basis and Google wins some and loses some – but the idea that Google controls the non-Google and non-Bing search space doesn't square with the facts.

Bottom line: a consumer welfare focused antitrust analysis of Google's conduct just doesn't meet the bar set by the relevant legal precedents nor modern economic analysis. //

FROM: GENDER & SEXUALITY LAW BLOG

COURT OF APPEALS PROP 8 RULING

TREATING MARRIAGE AS A LICENSE, NOT A SACRAMENT

Katherine Franke[†]

Rainbow flags and corsages were waving high in front of the Stonewall Inn in Greenwich Village last night. There's much to celebrate about the 9th Circuit's ruling issued yesterday[1] confirming the lower court finding that Proposition 8 was unconstitutional. As I noted yesterday[2] and Nan Hunter pointed out as well in her reading of the opinion,[3] the reasoning used by the court minimizes the likelihood that the Supreme Court will take it up on appeal.

But what's even more interesting about the opinion, now that I've had overnight to think about it, is the degree to which the 9th Circuit's ruling amounts to a pretty definitive slap down of the Boies and Olson strategy in litigating the case. Recall that one of the main approaches taken at the trial by the so-called "dream team" was to paint a picture of marriage as the most sacred, revered, mature

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[†] Isidor and Seville Sulzbacher Professor of Law, Columbia Law School. Original at blogs.law.columbia.edu/genderandsexualitylawblog/2012/02/08/court-of-appeals-prop-8-ruling-treating-marriage-as-a-license-not-a-sacrament/ (Feb. 8, 2012; vis. July 5, 2012). This is a repost from the Columbia Law School's Gender & Sexuality Law Blog.

[1] blogs.law.columbia.edu/genderandsexualitylawblog/files/2012/02/10-16696_Documents2.pdf.

[2] blogs.law.columbia.edu/genderandsexualitylawblog/2012/02/07/9th-cir-affirms-district-court-in-prop-8-case-narrowly/.

[3] hunterofjustice.com/2012/02/9th-cir-perry-.html.

form of adult coupling, thus denying access to marriage for same-sex couples is a constitutional injury because of the fundamentalness and sacredness of marriage.

Instead, the reasoning used in Judge Stephen R. Reinhardt's opinion marks a triumph for the fabulous and smart Therese Stewart, the lawyer in the San Francisco City Attorney's office who has shined time and again in oral argument[4] and in briefs filed in the marriage equality litigation in California.

Judge Reinhardt chose Stewart's argument, not that of Boies and Olson, as the ground on which to base the affirmance of Judge Walker's lower court opinion. Indeed, he even said so explicitly on page 33 of the opinion. Her argument was that the wrong of Proposition 8 lie in how "it singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason."

The case, in Stewart's and the 9th Circuit's view, turned on the fact that Prop 8 withdrew from same-sex couples a right that California had already granted them. This creates a different constitutional injury than refusing to grant the right in the first place. In the court's words, the problem under this framing is "the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens."

The wisdom of this approach, to my mind, is that the constitutional problem turns on the *withdrawal* of the right, not on the *sanctity* or *fundamental-ness* of the right withdrawn.

Reinhardt is clear about this: "The constitutional injury . . . has little to do with the substance of the right or benefit from which a group is excluded, and much to do with the act of exclusion itself."

What's wonderful about this approach is that it not only minimizes the likelihood of Supreme Court review, but it avoids the

[4] blogs.law.columbia.edu/genderandsexualitylawblog/2010/12/07/whats-marriage-equality-about-law-morality-in-the-prop-8-argument-in-the-9th-cir/.

kind of sermonizing about the sanctity of the marital relation[5] that characterized Olson and Boies' approach as well as that of a number of courts that have addressed the marriage equality issue. The court can find a constitutional problem with Prop 8 while remaining agnostic on the question of marriage and on the question of whether the state should be in the marriage business at all. In this respect, the 9th Circuit and Stewart figure marriage as akin to any other state licensing regime: you may not have a constitutional right to the license in the first place (such as a fishing license), but once you start issuing the licenses you can't then target a particular group, such as catholics, Romanians, or gay people, and take away their right to the license.

I've railed on in other places (here,[6] here,[7] and here[8] for starters) about the difference between the fundamental rights argument and the "marriage as license" approach, clearly preferring the latter. I'm thrilled that the 9th Circuit's opinion in Perry has joined the less moralistic side of the argument, rejecting the tactic taken by Boies and Olson at trial.

Let's hope that if and when the case is appealed, wiser minds let Terry Stewart take the lead in framing the question on appeal. //

[5] *Id*.
[6] www.law.harvard.edu/students/orgs/jlg/vol331/313-320.pdf.
[7] www2.law.columbia.edu/faculty_franke/Franke%20Final.pdf.
[8] www2.law.columbia.edu/faculty_franke/SS%20Marriage%20Essay%20Final.pdf.

FROM: ELECTION LAW BLOG

CLARITY ABOUT SUPER PACS, INDEPENDENT MONEY AND CITIZENS UNITED

Samuel Issacharoff[†]

It is almost two years since the Supreme Court handed down Citizens United. In that time, the opinion has come to serve as a popular shorthand for all that is wrong with the campaign finance system. With the emergence of Super PACs as the latest vehicle for sidestepping contribution limitations, the overwhelming temptation is to attribute this latest money pit to the Supreme Court's contributions to this woeful area of law. For example, just today, the New York Times intones, "A $5 million check from Sheldon Adelson underscores how a Supreme Court ruling has made it possible for a wealthy individual to influence an election."

From the Times, one does not necessarily expect further legal analysis – and one does not get it. The article goes on to claim only the following: "The last-minute injection underscores how last year's landmark Supreme Court ruling on campaign finance has made it possible for a wealthy individual to influence an election. Mr. Adelson's contribution to the super PAC is 1,000 times the $5,000 he could legally give directly to Mr. Gingrich's campaign this year."

The simple concern is that this compressing of campaign finance law misrepresents the problematic holding of Citizens United, a

[†] Bonnie and Richard Reiss Professor of Constitutional Law, New York University School of Law. Original at electionlawblog.org/?p=27675 (Jan. 10, 2012; vis. July 5, 2012). © 2012 Samuel Issacharoff.

case that addressed the use of corporate and union treasury funds for electioneering activity. Nothing in BCRA at issue in Citizens United would have addressed Mr. Adelson's outpouring of money into the latest permutation of third-party control over campaign activities. At best, Citizens United provided indirect legal cover for Mr. Adelson by reaffirming the long-standing (from Buckley v. Valeo) narrow definition of corruption to cordon off all uncoordinated uses of money that cannot be deemed in sufficient proximity to candidates or political parties.

But the more difficult problem is the flip-side of the inquiry. The activities of Mr. Adelson reveal just how thread-bare have become the legal covers for money in politics. To the extent that the concern is that a contribution of $5 million directly from Mr. Adelson to Mr. Gingrich would invite corruption or the appearance of corruption, can anyone believe that this one-step remove alleviates the problem? Will Mr. Gingrich be any less likely to take a phone call from Mr. Adelson, or any less likely to be influenced by the needs of Mr. Adelson's pursuits than if he had received the money directly?

It is more than a decade since Pam Karlan and I wrote about the "hydraulics" of circumvention in the political arena. Among the concerns was the redirection of money into the hands of putatively independent third-party actors, ones who can dominate campaign debate without putting themselves directly before the voters. No better example is necessary than Mr. Romney's claims at one of the New Hampshire debates that he had no responsibility for the independent attacks of his Super PAC on Mr. Gingrich, followed by his use the electoral platform to endorse those same attacks.

The rise of the Super PACs is a real problem for the shaky system of campaign finance as it now exists. But the problem is not Citizens United – there is scant evidence, even anecdotally, of corporate or union treasuries being the source of funding at issue for the new candidate-specific Super PACs. By contrast, there are genuine concerns for transparency of donations, and for accountability of the relation of the donors to the candidates before and after the elections. Super PACs are only the latest of the institutional forms

of circumvention, a list that runs through ordinary PACs, 527s, 501(c)(4)s, and so forth. But they are a particularly virulent form of circumvention because of the proximity they offer between candidates for office and lobbyists, patronage seekers, and contractors for government services. The issue is one that requires a serious regulatory response, not the incantation of Citizens United. //

NONLEGAL ARGUMENTS FOR UPHOLDING THE INDIVIDUAL MANDATE

Ilya Somin[†]

Both sides in the individual mandate litigation have developed a wide range of legal arguments to support their position. Some defenders of the mandate have also emphasized several nonlegal reasons why they believe the Court should uphold the law. These arguments have gotten more emphasis since the Supreme Court oral argument seemed to go badly for the pro-mandate side.[1] The most common are claims that a decision striking down the mandate would damage the Court's "legitimacy," that a 5-4 decision striking down the mandate would be impermissibly "partisan," and that it would be inconsistent with judicial "conservatism."

Even if correct, none of these arguments actually prove that the Court should uphold the mandate as a legal matter. A decision that is perceived as "illegitimate," partisan, and unconservative can still be legally correct. Conversely, one that is widely accepted, enjoys bipartisan support, and is consistent with conservatism can still be wrong. *Plessy v. Ferguson* and *Korematsu*[2] are well-known examples of terrible rulings that fit all three criteria at the time they were decided.

In addition, all three arguments are flawed even on their own terms.

[†] Associate Professor of Law, George Mason University School of Law. Original at www.volokh.com/2012/05/21/nonlegal-arguments-for-upholding-the-individual-mandate/ (May 21, 2012; vis. July 5, 2012). © 2012 Ilya Somin.

[1] www.volokh.com/2012/03/27/thoughts-on-the-individual-mandate-oral-argument/.

[2] www.law.cornell.edu/supct/html/historics/USSC_CR_0323_0214_ZO.html.

I.
A DECISION STRIKING DOWN THE MANDATE IS LIKELY TO ENHANCE THE COURT'S LEGITIMACY MORE THAN IT UNDERMINES IT.

Claims that a decision striking down the mandate will undermine the Court's "legitimacy"[3] founder on the simple reality that an overwhelmingly majority of the public *wants* the law to be invalidated.[4] Even a slight 48-44 plurality of Democrats agree, according to a Washington Post/ABC poll.[5] Decisions that damage the Court's legitimacy tend to be ones that run contrary to majority opinion, such as some of the cases striking down New Deal laws in the 1930s. By contrast, a decision failing to strike down a law that large majorities believe to be unconstitutional can actually damage the Court's reputation and create a political backlash, as the case of *Kelo v. City of New London* dramatically demonstrated.[6]

Striking down the mandate will damage the Court's reputation in the eyes of many liberals and some legal elites. But a decision upholding it will equally anger many conservatives and libertarians, including plenty of constitutional law experts. There is not[7] and never has been[8] an expert consensus on the constitutionality of the mandate. Any decision the Court reaches is likely to anger some people, both experts and members of the general public. But more are likely to be disappointed by a decision upholding the law.

Ultimately, the Court should not base its decision in this case on "legitimacy" considerations. If the justices believe that the mandate is constitutional, they should vote to uphold it despite the possible damage to their reputations. But it would be a terrible signal if key

[3] www.tnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy.

[4] www.volokh.com/2012/03/19/public-opinion-the-individual-mandate-and-the-supreme-court/.

[5] www.washingtonpost.com/blogs/behind-the-numbers/post/toss-individual-health-insurance-mandate-poll-says/2012/03/18/gIQAaZtpLS_blog.html.

[6] papers.ssrn.com/sol3/papers.cfm?abstract_id=976298.

[7] www.volokh.com/2012/03/23/the-individual-mandate-case-is-not-easy/.

[8] www.volokh.com/2009/12/23/the-myth-of-an-expert-consensus-on-the-constitutionality-of-an-individual-mandate/.

swing justices refused to strike down a law merely because their reputations would be damaged in the eyes of a small minority of the public and a vocal faction of the legal elite. It would certainly call into question their willingness to make unpopular decisions that are compelled by their duty to uphold the Constitution, including in cases where they must strike down unconstitutional laws that really do enjoy broad public support.

II.
AN IMPERMISSIBLY "PARTISAN" DECISION?

Any decision striking down the mandate is likely to pit the five conservative Republican justices against the four liberal Democrats. Some commentators, such as Larry Lessig[9] and Jonathan Cohn,[10] claim that such a result would be impermissibly "partisan," creating a perception that the Court is only willing to strike down "liberal" laws.

This sort of argument urges judges to engage in genuinely political decision-making in order to avoid the mere appearance of it. If a Republican-appointed justice votes to uphold a law he believes to be unconstitutional in order to avoid the appearance of "partisanship," he would be allowing political considerations to trump his oath to uphold the Constitution.

Even if there is a judicial duty to avoid the appearance of a partisan split, why doesn't it fall on the liberal justices just as much as the conservatives? If one or more of the liberal justices were to join the five conservatives in striking down the mandate, that would diminish the appearance of partisanship just as much as a conservative "defection" to the liberal side would.

Finally, this line of criticism overlooks an important reason why decisions enforcing limits on congressional power often have an ideological division: the Court's liberals have consistently voted against

[9] www.theatlantic.com/national/archive/12/04/why-scalia-might-uphold-obamacare/255791/.

[10] www.tnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy.

nearly *all* structural limits on congressional power[11] under the Commerce Clause, the Necessary and Proper Clause, and the Tenth Amendment. Thus, the Court enforces such limits only in those cases where the five conservative justices can agree among themselves. The only way for the conservatives to avoid the appearance of partisanship in this area would be complete abdication of judicial enforcement of structural limits on congressional power.

III.
CONSISTENCY WITH JUDICIAL "CONSERVATISM."

Jeffrey Rosen[12] and others have argued that a decision against the mandate would be inconsistent with "conservative" attacks on "judicial activism" and deference to legislative judgment. Judicial conservatism is not a single, unitary entity. All sorts of decisions can potentially be justified on "conservative" grounds.

However, one major strand of conservative legal thought over the last thirty years[13] has been the need to enforce constitutional limits on federal government power. This idea would be completely undercut by a decision upholding the mandate, since all of the government's arguments in favor of the mandate amount to a blank check for unconstrained congressional power.[14] As I explain in detail in this amicus brief[15] for the Washington Legal Foundation and a group of constitutional law scholars, the government's various "health care is special" arguments collapse under close inspection.

Conservative support for judicially enforced limits on federal power is in some tension with loose conservative rhetoric about "judicial activism," which is one reason why I have long been criti-

[11] www.volokh.com/2012/04/15/larry-lessig-on-the-politics-of-the-supreme-courts-federalism-jurisprudence/.

[12] www.tnr.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama.

[13] www.volokh.com/2010/03/25/federalist-society-types-were-committed-to-judicial-enforcement-of-federalism-long-before-obamacare/.

[14] www.scotusblog.com/2011/08/will-the-supreme-court-give-congress-an-unlimited-mandate-for-mandates/.

[15] www.wlf.org/upload/litigation/briefs/11-398bsacWashingtonLegalFoundation.pdf.

cal[16] of such rhetoric. However, for most on the right, "judicial activism" is not coextensive with any judicial overruling of statutes, but rather with departures from the text and original meaning of the Constitution.[17] And the originalist case against the mandate[18] is very strong.

Conservatives and others can disagree among themselves as to how much deference should be given to Congress in any given case. In considering this issue, they should weigh two points that Rosen advanced in his important 2006 book *The Most Democratic Branch: How The Courts Serve America*.[19]

Although generally advocating judicial deference to Congress, Rosen notes two important exceptions to this principle. The first is that "When Congress's own prerogatives are under constitutional assault (in cases involving legislative apportionment or free speech, for example), it may be less appropriate for judges to defer to Congress's self-interested interpretations of the scope of its own power." Obviously, there are few more "self-interested" interpretations of "the scope of its own power" than one that would give Congress virtually unlimited power to impose any mandate it wants.

Second, Rosen suggests that "[f]or the Court to defer to the constitutional views of Congress, Congress must debate issues in constitutional (rather than political) terms" (pg. 10). In order to deserve deference, Congress needs to take the relevant constitutional issues seriously. In the individual mandate case, congressional Democrats notoriously demonstrated utter contempt for the constitutional issues, and plenty of ignorance to boot.[20]

In fairness, their performance was no worse than that of the GOP when they controlled Congress during the Bush years. Far from generating serious constitutional deliberation in the legislative branch, the judiciary's tendency to defer to Congress on federalism

[16] www.volokh.com/archives/archive_2007_10_28-2007_11_03.shtml.
[17] www.volokh.com/posts/1184022611.shtml.
[18] www.davekopel.com/HEW/Incidental-unconstitutionality.pdf.
[19] www.oup.com/us/catalog/general/subject/Law/ConstitutionalLaw/?view=usa&ci=9780195174434.
[20] www.volokh.com/2012/03/28/democratic-congressman-and-senators-on-constitutional-authority-for-the-aca/.

issues has had the opposite effect. Both parties give short shrift to constitutional limits on federal power because judicial deference has created a political culture in which almost anything goes. More careful judicial scrutiny of Congress' handiwork might lead Congress to start taking the Constitution seriously again. That result should be welcomed by conservatives, libertarians, and liberals alike.

A nondeferential posture by the Court wouldn't necessarily lead to the invalidation of the mandate. It merely means that the justices should give little weight to Congress' "self-interested" interpretations of its own power and instead come to their own independent judgment on the constitutional issues at stake.

Ultimately, the Court should not decide the individual mandate case based on these sorts of nonlegal considerations. It is more important that its decision be right than that it be perceived as legitimate, nonpartisan, or conservative. But even on its own terms, the nonlegal case for upholding the mandate is not as impressive as its advocates claim.

UPDATE: Ed Whelan makes some relevant points here.[21] //

[21] www.nationalreview.com/bench-memos/300630/intimidation-today-leaks-tomorrow-ed-whelan#.

FROM: CONCURRING OPINIONS

THE DISCONNECT BETWEEN WHAT PEOPLE SAY AND DO ABOUT PRIVACY

Joseph Turow[†]

In the course of my research I've been fortunate to be able to speak at length with media planning executives and practitioners. They spend much of their time figuring out how to use data to send commercials to targeted segments and individuals online. When the conversation turns to privacy issues, they invariably dispute that the public is genuinely concerned with the topic. "When they respond to your surveys people may claim to worry about privacy issues," the industry practitioners tell me. "But look at what they actually do online. People will give up personal information just to get a discount coupon. And look what they reveal about themselves on Facebook! The disconnect between what people say and do shows that policymakers and academics misjudge the extent to which the public really cares about the use of data about them by marketers."

It's an interesting argument and one that must be taken seriously. One response I give is that people are indeed complex, but their behavior doesn't mean they are two-faced when it comes to privacy. Rather, findings from national telephone surveys (conducted by me and with colleagues) going back to 1999 show that the majority of Americans are deeply unaware about what goes on with their in-

[†] Robert Lewis Shayon Professor of Communication, Annenberg School for Communication, University of Pennsylvania. Original at www.concurringopinions.com/archives/2012/02/the-disconnect-between-what-people-say-and-do-about-privacy.html (Feb. 8, 2012; vis. July 5, 2012). © 2012 Joseph Turow and Concurring Opinions LLC.

formation about them online. They know companies follow them, but they have little understanding of the nature of data mining and targeting. They don't realize companies are connecting and using bits of data about them within and across sites. They think that the government protects them regarding the use of their information and against price discrimination more than it does. And over four surveys, about 75% of adult Americans don't know that the following statement is false: "When a website has a privacy policy, it means that the site won't share information about you with other companies without your permission."

"Why don't Americans know such things?" industry practitioners often ask me after I recite such findings. "And why don't they use anonymizers and other technologies if they are so concerned about leaking data about themselves?" My answer to that typically takes the form of "people have a life." Learning ins and outs about the online world can be complex, and people have so many priorities regarding their families and jobs. Too, when they go online, whether to Facebook, YouTube or a search engine, they want to follow their needs and leave. In moments of rational contemplation they may well indicate web wariness. But online their need to accomplish particular goals and often engage in emotional relationship-building may trump rationale calculation. Chris Hoofnagle, Jennifer King, Su Li, and I inferred this pattern even from young adults – men and women 18-24 who common wisdom suggests wouldn't care a whit about privacy.[1]

There is an additional explanation for people's lack of knowledge about how data about them are treated under the internet's hood. Unfortunately many of the most prominent digital-marketing actors engage in a kind of doubletalk about their use of information. It's a consistent pattern of public faux disclosure that may simultaneously encourage people's confidence in the firms' activities and obfuscate the privacy issues connected with those activities. And some of the

[1] Chris Jay Hoofnagle, Jennifer Kinng, Su Li, and Joseph Turow, "How Different are Young Adults from Older Adults When it Comes to Information Privacy Attitudes and Policies?" August 14, 2010. Report available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589864&download=yes , accessed February 8, 2012.

biggest players engage in this privacy-doublespeak dance.

Consider how Google recently told its users about its decision to link information about their activities across its most popular services and multiple devices beginning March 1. The consolidation was clearly a response to a number of developments. Strategically, Google wanted to use its previously siloed data in ways that would be competitive to its increasing competitor, Facebook.[2] More tactically, Google was motivated by the firm's need to meet a European-Union directive that beginning May 1 all advertisers must obtain consent from their customers to allow websites to set cookies. In the words of the U.K. trade magazine *New Media Age*, "Consolidating its multiple privacy policies, of which it has over 60, for all its accounts will mean consumers only have to give consent once for it to be effective across all Google products."[3]

In the U.S. Google faced a major risk with the data consolidation. The company had to know that some would see the action as violating last year's agreement with Federal Trade Commission not to change its handling of people's data without their explicit permission. In fact, the Electronic Privacy Information Center filed a complaint with the FTC insisting Google's new approach violates the deal.[4] Perhaps to blunt such criticism, the company shouted out its new privacy regime to broad publics. For several days Google emblazoned its search page and the landing pages of its other holdings with statements such as "We're changing our privacy policy" followed by blunt signals of seriousness – for example, "This stuff matters" or "Not the same yada yada." But if you clicked the link to learn more, you found essentially the same yada yada. The urgency evaporated. The language gave no sense that beginning March 1, to quote the *Los Angeles Times*, "the only way to turn off the data sharing

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[2] Byron Acohido, Scott Martin, and Jon Swartz, "Consumers in the Middle of Google-Facebook Battle," *USA Today*, January 26, 2012, http://www.usatoday.com/tech/news/story/2012-01-25/google-facebook-competition/52796502/1, accessed February 8, 2012.

[3] "Google to consolidate privacy data to bolster ad targeting," *New Media Age*, January 25, 2012. Thanks to Jeffrey Chester for pointing out this article to me.

[4] Byron Acohido, Scott Martin, and Jon Swartz, "Consumers in the Middle of Google-Facebook Battle," *USA Today*, January 26, 2012, http://www.usatoday.com/tech/news/story/2012-01-25/google-facebook-competition/52796502/1, accessed February 8, 2012.

is to quite Google."[5] Instead, clickers saw the comforting statement that the change was all good. The privacy policy would be "a lot shorter and easier to read." It would reflect "our desire to create one beautifully simple and intuitive experience across Google."[6]

Google certainly isn't alone in this purposefully confusing, often two-faced approach to the public. Consider how Amazon makes it seem that its data mining is transparent with respect to its visitors. On its landing page the firm is straightforward in letting you know that it is connecting what it previously saw of your site behavior with what others who did similar things bought. But a trudge through the privacy policy will reveal that Amazon's seemingly open approach to visitors' data on the home page actually obscures a far broader and impenetrable use of their data for the company's own and others' marketing purposes. Check out Pandora for a similar pattern of transparency and non-transparency in data-handling. Or visit the Digital Advertising Alliance's op-out area and note the disconnect between the availability of the opt-out choice and the rhetoric around it that makes its selection seem slightly absurd.

This sort of doublespeak may be endemic to the approach data-driven marketers are taking to the public. As Wall Street Journal columnist Al Lewis recently noted, "Mark Zuckerberg says Facebook's IPO is not about the money. But he then says it's about creating a liquid market so his employees and investors can get their money – proving the maxim that it's always about the money."[7] Such corporate "explanations" of their activities add yet another reason for the public's failure to understand the dynamics of big data in their lives. //

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[5] Jessica Guynn, "Google to Expand Its Tracking of Users," *Los Angeles Times*, January 25, 2012, B1.

[6] "Google Policies & Principles," http://www.google.com/policies , accessed February 8, 2012.

[7] Al Lewis, "Facebook, Dead of Alive," *Wall Street Journal*, February 5, 2012, http://online.wsj.com/article/SB10001424052970203889904577199481841403756.html?mod=WSJ_hp_mostpop_read , accessed February 8, 2012.