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OPENING REMARKS

HABEAS LIBRIS

FOR BOOKS IN NEED OF A REPRIEVE

Ross E. Davies[†]

Habeas Libris is a website (www.habeaslibris.com) dedicated to the salvation of books – old-fashioned, ink-on-paper books. The thinking behind the website is based on four simple observations about law libraries and law librarians: (1) they are reducing their print collections; (2) they are having a hard time finding buyers – or even takers – for the books they cannot keep; (3) they would rather give away than throw away their unwanted and unmarketable books; and (4) they lack a truly cheap and easy way to offer their unmarketable books to anyone who might want them. Habeas Libris aspires to be that cheap and easy way for law libraries to give away those surplus books.

In addition, in this time of much re-ordering of priorities and re-tasking of facilities, and not so much re-shelving of books, Habeas Libris also aspires to provide book-loving librarians some small consolation that they have done everything they reasonably can before they consign any books to the dumpster – including offering their surplus books to the whole web-connected world for free.¹

This article briefly puts the current circumstances of surplus law books in context, and then explains how Habeas Libris works.

[†] Professor of law, George Mason University; editor, *The Green Bag*. A version of this paper was presented in Philadelphia at the 2015 annual meeting of the American Association of Law Libraries. Thanks to Cattleya Concepcion, Melanie Knapp, Holly Riccio, and Debbie Shrager.

¹ *Cf.*, e.g., Ira Brad Matestky, *The Adventure of the New York World*, in 2015 GREEN BAG ALM. 465; NICHOLSON BAKER, DOUBLE FOLD: LIBRARIES AND THE ASSAULT ON PAPER (2001; 1st Vintage Books ed. 2002); *but see*, e.g., RICHARD J. COX, VANDALS IN THE STACKS? A RESPONSE TO NICHOLSON BAKER'S ASSAULT ON LIBRARIES (2002).

BOOKS ON THE WAY OUT

Law librarians have been painted – not by themselves but by circumstance – into a not-entirely-promising but not-entirely-hopeless corner on the matter of the disposition of surplus books.

In short, a combination of forces relating to budgets, physical space, technology, accreditation and other forms of regulation, and consumer demand are driving law librarians to make hard choices about their collections: What to get, what to keep, and what to get rid of.² Reasonable minds differ about causes and effects and long-term consequences, but all agree that for most libraries, one of the most important and unavoidable short-term consequences is significant reductions in the size of ink-on-paper book collections.³ Naturally, that means getting rid of books, lots and lots of books. Pretty much everyone is engaged in this process, making many of the same choices and acting on them at pretty much the same time. Which means that books are not trickling out of a few libraries. They are gushing out of many.

There is, then, a glut of used law books, all looking for homes now. And there will be many more books of that sort in the near future.

This is not to say that the law book is dead. Indeed, a recent exchange between professor Stephen Bainbridge and library director Kevin Gerson (both of the UCLA School of Law) neatly illustrates (in admirably measured terms and tone) important distinctions between collection reduction and collection usage. Law books are obviously, visibly pouring out of law libraries, but many remain, and remain valuable resources for students, practitioners, and scholars.⁴ Our concern here, however, is with those

² See, e.g., Michael Whiteman, *Book Burning in the Twenty-First Century: ABA Standard 606 and the Future of Academic Law Libraries as the Smoke Clears*, 106 LAW LIBRARY J. 11 (2014); Taylor Fitchett, James Hambleton, Penny Hazelton, Anne Klinefelter, and Judith Wright, *Law Library Budgets in Hard Times*, 103 LAW LIBRARY J. 91 (2011).

³ Compare, e.g., James G. Milles, *Legal Education in Crisis, and Why Law Libraries are Doomed*, 106 LAW LIBRARY J. 507 (2014), with Kenneth J. Hirsh, *Like Mark Twain: The Death of Academic Law Libraries Is an Exaggeration*, 106 LAW LIBRARY J. 521 (2014).

⁴ See *Why is W&L increasing its law library budget while cutting everything else?*, PROFESSORBAINBRIDGE.COM, www.professorbainbridge.com/professorbainbridge.com/2015/02/why-is-wl-increasing-its-law-library-budget-while-cutting-everything-else.html (Feb. 19, 2015, vis. July 19, 2015); *My law librarian responds in defense of the book*, PROFESSORBAINBRIDGE.COM, www.professorbainbridge.com/professorbainbridge.com/2015/02/my-law-librarian-responds-in-defense-of-the-book.html (Feb. 26, 2015, vis. July 19, 2015); see also, e.g., Joseph D. Lawson, *What About the Majority? Considering the*

books that do not make the cut in the flux through which law libraries are now moving.

BOOKS WITH NEW PURPOSES

Finding homes for all those surplus books is proving difficult. Supply has so far exceeded demand that some libraries have taken to putting books out with the garbage.⁵ Librarians, however, being the resourceful characters they tend to be, appear to be making the best of the situation wherever they can.

Consider, for example, the project undertaken by Susanna Leers, Pat Roncevich, and Sallie Smith of the Barco Law Library at the University of Pittsburgh. They provided the Pittsburgh Public Theater with enough case reporters – books that were, as they ever so gently put it, “destined for the dumpster” – to create a 20-by-24-foot bookshelf backdrop for a production of “Freud’s Last Session” in 2012. They described the satisfying conclusion to this unusual undertaking in an article in *Spectrum*, an official publication of the American Association of Law Libraries:

As lawyers and law students increasingly turn to online resources, it’s reassuring to know that law books, such as our discarded case reporters, may pursue other career paths besides legal research.⁶

Legal Research Practices of Solo and Small Firm Attorneys, 106 LAW LIBRARY J. 377 (2014).

⁵ See, e.g., David W. Dunlap, *So Little Paper to Chase in a Law Firm’s New Library*, N.Y. TIMES, Oct. 22, 2014, www.nytimes.com/2014/10/23/nyregion/so-little-paper-to-chase-in-a-law-firms-new-library.html?_r=0 (vis. June 6, 2015) (“Nearly 95 percent of a library that numbered tens of thousands of volumes was discarded. Outdated books were recycled. Updated books were donated.”); Emmy Erbes, *Thormodsgard trashes thousands of books: Law library ignites controversy after discarding old books for unclear reasons*, [University of North Dakota] DAKOTA STUDENT, dakotastudent.com/3288/news/thormodsgard-trashes-thousands-of-books/ (n.d., vis. June 6, 2015); Rachel Brown Hackney, *Law Library books in dumpster by Stan*, SARASOTA NEWS LEADER, sarasotanewsleader.com/law-library-computer-investigation-moor...genda-for-the-city-commission/law-library-books-in-dumpster-by-stan/ (May 4, 2012, vis. June 6, 2015); see also, e.g., Jean P. O’Grady, *It Takes More Than a Dumpster to Build A Digital Law Library: 12 Critical Components For Digital Law Library Transformations*, DEWEY B STRATEGIC, deweybstrategic.blogspot.com/2014/12/it-takes-more-than-dumpster-to-build_10.html (Dec. 10, 2015, vis. June 6, 2015).

⁶ See Susanna Leers, Pat Roncevich, and Sallie Smith, *Law Books Take the Stage!*, AALL SPECTRUM ONLINE (vis. June 6, 2015); cf. Dunlap, *So Little Paper to Chase in a Law Firm’s New Library* (“‘[T]hey’re basically decoration,’ Ira H. Goldfarb, the senior partner and trial lawyer, said about the books [in the offices of Kaye Scholer LLP]. ‘They’re an anachronism. We couldn’t give them away if we wanted to.’”).

The Pittsburgh law librarians also provide a good summary of other creative “functional” and “ornament[al]” uses to which artists and other clever people have put surplus law books, including “birdhouses, purses, lamp bases, or even ornamentation for mail-order catalog furniture.”⁷ It is not difficult to imagine that many law librarians have entertaining stories to tell about repurposing of otherwise doomed books.

BOOKS TO NEW HOMES

There are also the book resellers, some of whom seem quite noble. Consider, for example, Better World Books. Here is how they summarize their processes for acquiring and selling books received from libraries:

How It Works

This no-cost program is simple and straightforward. You gather and box your surplus materials, and Better World Books coordinates and pays for items to be shipped to our warehouse in Mishawaka, Indiana for sale. Items are sorted and scanned, and each saleable item is listed on 50+ marketplaces. Better World Books handles all aspects of inventorying, marketing, selling and shipping these materials, and you receive a payment from each sale.

And what happens to the books they do not sell?

We never, ever, ever throw away a book. Ever! Any book we can't find a proper home for is recycled.⁸

Better World Books seems like an all-around excellent organization, easy (and perhaps even profitable) to work with. I think I would like dealing with them, if I were a librarian with books I had to get rid of.

A closer look, however, reveals that even a successful and appealing reseller like Better World is unlikely to be of much use in the circumstances confronted by law libraries. Having had a look at “How It Works” at Better World, now consider some excerpts from the company’s list of the kinds of books that it does not even accept, let alone try to sell:

⁷ *Id.*

⁸ Better World Books, *Library Welcome Kit 5* (undated pdf) (emphasis added), downloaded via a link at www.betterworldbooks.com/go/libraries (July 19, 2015); *id.* at 2.

- Annuals and Yearbooks
- Books Published by Magazines
- Case Law and Procedural Books
- Dated Reference Material (over 5 years old)
- Journals and Periodicals
- Microfilm and Microfiche
- Tax and Government Documents or Forms⁹

This sounds a bit like a summary of the kinds of books the average law library is probably trying to find homes for. It is as if Better World Books saw law libraries coming and sought to warn them off up front. This might be a reasonable position to take from a business standpoint, but it does leave law libraries, and their surplus law books, out in the cold.

And then there is that most conventional and historically useful outlet: other libraries. Law librarians are energetic and resourceful communicators among themselves – via personal and professional networks, supplemented in recent decades by listservs and the like – and over the years any number of books have found new homes via such channels. But current pressures on law libraries and the associated glut of surplus books have filled the listservs with offers of books that are doomed to never be accepted. Even now, though, there is still an occasional “wants” message like this one:

Hello! I hope everyone is enjoying this wonderful weather! I am looking to buy (or take off[f] your hands) a US Code set. We are looking to buy one for our library and thought I would find out if any libraries may be getting rid of a set this summer. If so, can you contact me off the list?¹⁰

This person probably was contacted off the list, and a surplus *United States Code* just as probably is being put to good use.

• • •

But there are, of course and alas, only so many theater stages to be dressed, only so many retailers willing to accept books for resale (and even they are only willing to take on the very books that are easiest to find

⁹ Better World Books, *Material Guidelines*, www.betterworldbooks.com/go/library-donation-guide lines (vis. July 15, 2015).

¹⁰ Email from Melanie Knapp to Ross Davies, June 26, 2015 (forwarding a posting to a DC-area law librarians' listserv).

new homes for), and only so many needy law librarians seeking cast-offs on listservs.

And how must the books themselves feel (treating them for a moment as anthropomorphic creatures)? Listservs and other outlets are where a kind of desperate game of musical shelves plays out. The lucky books attract the attention of a kindly librarian and land safely in a new stack. The unlucky ones left standing are turned over to the Grim Reaper of books, who is waiting at the edge of the circle of shelves to haul them off to one of the twin graveyards of unwanted books – the landfill and the pulper. A law book that is removed from a library shelf and placed in an archive box (or perhaps a 10-ream box¹¹ – surely a bad sign) is on a bibliographical death row, just waiting its turn for that last, hopeless ride in the dumpster. A surplus law book's only hope is to be speedily claimed by an interested librarian or artist or reseller. A sad scene.

Those books should get another chance, if a chance can be found.

HABEAS FOR BOOKS

What law libraries need to find are ways to reach a larger audience than the one accessible via law librarians' listservs and other professional networks. If they could do that, perhaps they could find good homes for more of their surplus books.¹²

¹¹ Cf. Michael Silver, *10 ream box*, URBAN DICTIONARY (Dec. 14, 2005), www.urbandictionary.com/define.php?term=10+ream+box ("top definition": "v. To fire someone. Companies typically buy paper in a 10 ream box (each ream of paper holds 500 sheets). When someone is fired or let go, they are often given a 10 ream box to pack their stuff in. *Larry got 10 ream boxed this morning. We sure are going to miss him around here.*").

¹² So, a reasonable person might ask, why not just put all those hapless surplus law books on eBay or some other auction site and get at least a small return on them? There are good reasons – at least three of them – to make light of the idea.

First, and most obviously and tellingly: Look at the example of Better World Books, which is experienced at selling books. Better World will, quite reasonably, only accept and attempt to sell books it judges to be reasonably saleable. And it seems to have determined that many law books are not saleable. In addition, dealing with eBay is not cost-free. It takes labor simply to offer items, and more to serve customers if items do sell. And if items do not sell, it is all cost and no benefit.

Second: For many institutions, selling surplus books is not an option. Sales by a public institution (for example, a state university) may be forbidden, or at least tightly constrained, by laws governing the disposition of state property. Sometimes a private entity that is in a service-oriented business (for example, a law firm) does not want to wade into a product-oriented business in which it has no expertise. After all, prudent enterprises, like prudent people, focus on doing what they can do well.

Third: Retail sales is a difficult business (so is wholesaling), and doing it right is a full-time job

For starters, law librarians might be able to make good use of a cheap and easy extension of the listserv approach. That is, a tool they can use to:

- (a) let interested parties know about the availability of their surplus law books; and
- (b) do so without having to follow anyone else's rules about the terms on which those books are available (no eBay, no PayPal, no Better World Books, no etc.), so they can stay focused on their main mission – operating law libraries.

Which brings us to the Habeas Libris project.

Here is the plan. The *Green Bag*, a small, not-for-profit publishing enterprise whose products include the journal in which the article you are now reading appears,¹³ recently launched the Habeas Libris website.¹⁴ The site is there to perform the functions described above. Here is a summary of how it works:

How It Works

This no-cost program – it is not quite no-cost, because you must do the work of giving information to the *Green Bag* and then dealing with people who are interested in your books, and the *Green Bag* must do the work of maintaining the Habeas Libris website – is simple and straightforward (it really is). You send the *Green Bag* two things: (1) a list, in pdf or Word, of books you want to dispose of and (2) a pdf or Word document with the terms on which you are willing to dispose of them. The *Green Bag* posts the documents, as soon as it reasonably can, next to your library's name in the list of libraries on the Habeas Libris website. You can send the *Green Bag* updates whenever you like and we will post them. Anyone can visit the website and poke around on it in search of books, and anyone can reach out to you based on what they find in your book list and in your rules. That is all.

for experts in the field. Just ask anyone who has actually tried to earn a living that way. Librarians already have full-time jobs requiring expertise in librarianship, not marketing and sales.

Moreover, for all three of these reasons, the idea that librarians should not only operate their libraries, but also get into the business of systematically marketing their surplus books and then using the proceeds to balance their own budgets, is not realistic.

¹³ See www.greenbag.org; www.journaloflaw.us.

¹⁴ See www.habeaslibris.com. Or go to the *Green Bag*'s website and click on the blue "Habeas Libris" button.

To get a sense of the kind of website we hope Habeas Libris site will eventually be, take a look at the beautifully simple, easy-to-understand, easy-to-use “Finding Aids Online” page operated by the Manuscript Division of the Library of Congress:¹⁵

Finding Aids (Manuscript Reading Room, Library of Congress) 7/19/15, 8:51 PM

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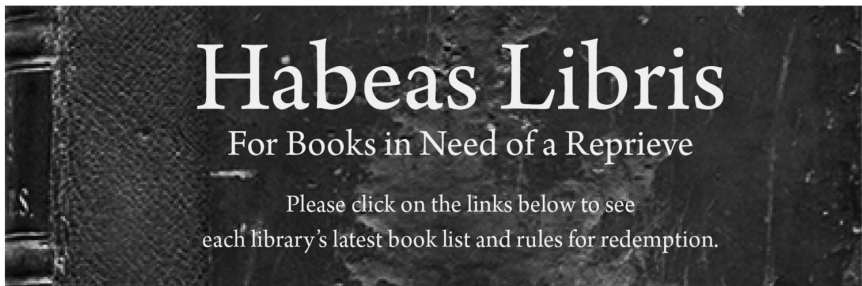
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¹⁵ See *Manuscript Division Finding Aids Online*, www.loc.gov/rr/mss/f-aids/mssfa.html.

HABEAS LIBRIS

The Habeas Libris website, however, is starting out as an even simpler setup. Unlike the Manuscript Division, we do not provide tools for searching our site and the linked-to pdfs as a whole, nor do we provide links for communicating with libraries directly from the site, nor do we provide even a FAQ page (after all, each library is in charge of its own terms of engagement, and so the answers to FAQs will vary from library to library). All of that and other things may well change over time (and we certainly hope so). But for now the idea is to make Habeas Libris cheap and simple and easy to use and maintain, and therefore more likely to be actually used and actually maintained. Here is what it looks like now:



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The screen shot above shows that as we go to press two respectable libraries – the Alameda County Law Library and the Law Library of Louisiana at the Supreme Court of Louisiana – are already using Habeas Libris.¹⁶ If we are

¹⁶ See www.habeaslibris.com; see also Email from Francis X. Norton, Jr., Head of Public Services,

useful and fortunate, there will soon be a longer list of libraries for interested, book-loving people to scroll through.

There is another reason for this simplicity at the start: We at the *Green Bag* are not librarians, so we really do not know what we are doing. We just know that we would like to help law libraries' surplus books find homes. By making the Habeas Libris website simple now, we leave ourselves maximum room for easy maneuvering in the future as we hear from librarians about how to make this idea work better.¹⁷

For now, Habeas Libris will simply give librarians a place to share news about their books that are on a bibliographical death row, and give the world – the interested part of it – one last chance to grant those books a reprieve.¹⁸

At the very least, law librarians who list their last-gasp books on Habeas Libris will be able to sleep a little easier at night, knowing that they gave those books a chance to survive and serve more readers.

Law Library of Louisiana, Supreme Court of Louisiana, to Ross E. Davies, (Aug. 20, 2015); Email from Mark E. Estes, Law Library Director, Bernard E Witkin Alameda County Law Library, to Ross E. Davies, (Sept. 2, 2015).

¹⁷ We are also trying to keep quality control simple by only allowing libraries that are members of the AALL to submit lists and rules for posting, at least for now.

¹⁸ An aside: There are alternatives to triage of the sorts proposed here. Once in a while, for example, people with substantial wealth or good connections to it will – quite admirably – spend money and otherwise exert themselves to preserve rare copies of famous old publications. One prominent case comes to mind, told by prize-winning journalist Nicholson Baker in his book *Double Fold*. See note 1 above. But such episodes of dramatic bibliophilic heroism do not apply to the situations in which many law librarians (and countless mundane titles) exist now. Baker himself acknowledges this reality in a revealing line in the epilogue to his critique of libraries and preservation practices: “Congress should designate and fund some other archive to do the job.” BAKER, *DOUBLE FOLD* at 270. The key word, obviously, is “fund.” Declaring that Congress should allocate tax dollars to solve libraries' problems is not a solution. It is a fantasy.

New Voices

Volume 2 • Number 1 • Spring 2015

[A]t least eight of the authors of the twenty-five most-cited student notes are now teaching at highly ranked law schools. . . .

continued inside . . .

New Voices

Volume 2 • Number 1 • Spring 2015

Editor-in-Chief

Suzanna Sherry

Senior Editors

Daniel J. Hay

Christopher J. Climo

Submission information:

Faculty should submit their students' work, along with their own brief preface, to new.voices@vanderbilt.edu. Please obtain the student's permission before submitting, and include the student's contact information.

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JL

FROM THE EDITOR

Suzanna Sherry[†]

Readers of this journal are likely interested in student-authored scholarship, so I thought it might be enlightening to do a little research on the career paths of those who wrote influential scholarship while still in law school.

With the help of *New Voices*' newest senior editor, Vanderbilt student Chris Climo, I discovered that at least eight of the authors of the twenty-five most-cited student notes are now teaching at highly ranked law schools.

Given that tracking down the authors of unsigned student notes is something of a crapshoot, and that our methods were hardly scientific¹ (this is not the *Journal of Legal Metrics*, after all), we probably missed some student-authors-turned-professors.² That we likely underestimated the number of highly cited student authors who became highly respected law professors makes our findings all the more astonishing.

Perhaps some of the students whose work has been published in earlier issues of *New Voices* will go on to illustrious academic careers. Or perhaps Kristin MacDonnell, a member of the class of 2015 at the University of California, Hastings College of the Law, will do so: In this issue, we present her excellent paper on the obsolescence of the Rule 23 typicality requirement. It is a must-read for anyone interested in class actions, especially since the Rules Committee is perennially considering changes to Rule 23.

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

¹ We identified all student notes available on HeinOnline from the top ten legal journals (as ranked by the Washington & Lee Law Library 2013 combined journal rankings) and sorted them by the number of times each was cited by other scholarly pieces according to HeinOnline data. Among other shortcomings, this method omits notes written by students at my own alma mater, because the *University of Chicago Law Review* does not make the Washington & Lee top ten. Perhaps a law student would like to do a more careful study and submit it to *New Voices* (or even to the *Journal of Legal Metrics*).

² This is especially likely because the single most-cited student work was the *Harvard Law Review*'s 1969 *Developments in the Law* on Equal Protection, which had multiple authors (none of whom we could identify, but several of whom are probably in the academy).

SUZANNA SHERRY

Oh, and because we know that you are dying to know, the table below lists the eight student notes in rank order.

MOST-CITED STUDENT NOTES

Rank	Author and current or most recent academic affiliation	Title of student note	Citation	Citation count
2	Anthony G. Amsterdam (NYU)	<i>The Void-for-Vagueness Doctrine in the Supreme Court</i>	109 U. PA. L. REV. 67 (1960)	850
4	Lewis D. Sargentich (Harvard)	<i>The First Amendment Overbreadth Doctrine</i>	83 HARV. L. REV. 844 (1970)	574
10	William W. Bratton, Jr. (Penn)	<i>The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court</i>	75 COLUM. L. REV. 623 (1975)	363
13	Larry Simon (USC)	<i>Twice in Jeopardy</i>	75 YALE L.J. 262 (1965)	297
18	John Sexton (NYU)	<i>Toward a Constitutional Definition of Religion</i>	91 HARV. L. REV. 1056 (1978)	280
19	William Michael Treanor (Georgetown)	<i>The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment</i>	94 YALE L.J. 694 (1985)	275
21	Dawn E. Johnsen (Indiana – Maurer)	<i>Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection</i>	95 YALE L.J. 599 (1986)	256
22	Carol S. Steiker (Harvard)	<i>The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification</i>	98 HARV. L. REV. 1285 (1985)	244

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IS IT TIME FOR THE END OF TYPICALITY?

Kristin MacDonnell[†]
with a Preface by Scott Dodson^{*}

PREFACE

Kristin MacDonnell's terrific paper argues for the interment of the typicality requirement of Rule 23(a)(3). Her argument proceeds by developing two propositions. First, the typicality requirement has lost independent significance in light of the recent tightening of other class-certification requirements, especially by *Wal-Mart Stores, Inc. v. Dukes*, which has given real teeth to the commonality requirement of Rule 23(a)(2), and *Amchem Products, Inc. v. Windsor*, which bolstered Rule 23(a)(4)'s adequacy requirement. Second, the typicality requirement, because it floats between commonality and adequacy, has tended to cause substantial confusion in cases and commentary, even prompting courts to merge typicality with either commonality or adequacy. To alleviate the confusion, Ms. MacDonnell argues that typicality should be removed from Rule 23(a), and she offers language for doing so. Her article is particularly timely in light of the renewed focus on class actions by both the Supreme Court and the Rules Committee.

• • •

INTRODUCTION

Changes to Rule 23, the Federal Rule governing class actions, have generally tracked new developments in multi-party litigation. For example, the perception of class actions as a lucrative tool for

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plaintiffs' attorneys – unexpected in 1966, when the first major changes to Rule 23 were made – led the Rules Committee to adopt a number of amendments in 2003 that increased judicial oversight of class action litigation.¹ The Rules Committee continues to refine how Rule 23 governs the complex creature that is the class action. It is currently considering two proposed changes to Rule 23: the first would amend Rule 23(e)(2) to eliminate releases for future conduct in the settlement of class actions;² the second involves a number of changes to the standards governing “no injury” cases, certification standards for issue classes, and notice requirements.³

Despite the Committee's willingness to adapt Rule 23 to new practical realities, the four “threshold requirements” to class certification, set forth in Rule 23(a), have remained inviolate since 1966. Granted, courts have taken a renewed interest in the Rule 23(a) requirements following the Supreme Court's prescription in *Wal-Mart Stores, Inc. v. Dukes* that a class may be certified only when “the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”⁴ But so far, that judicial attention has not translated into a rule change. As courts attempt to sort out the proper criteria for each of the threshold requirements, a puzzling question persists: what is the unique role of Rule 23(a)(3)'s typicality requirement? How is it different from commonality or adequacy of representation? Courts and scholars have been confused by this question since 1966.⁵

¹ See, e.g., FED. R. CIV. P. 23(c) (giving courts managerial authority over class actions with respect to timing of certification, notice to class members in mandatory actions, and the ability to create subclasses); FED. R. CIV. P. 23(e) (giving courts authority over settlement and voluntary dismissal of certified class actions); FED. R. CIV. P. 23(g) (requiring courts to appoint class counsel after certification).

² See COMM. ON RULES OF PRACTICE AND PROCEDURE, ADMIN. OFFICE OF THE U.S. COURTS, CIVIL RULES SUGGESTIONS DOCKET NO. 14-CV-A, available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/cv-suggestions-2014/14-CV-A-suggestion.pdf, archived at perma.cc/9VLJ-GFUL.

³ See COMM. ON RULES OF PRACTICE AND PROCEDURE, ADMIN. OFFICE OF THE UNITED STATES COURTS, CIVIL RULES SUGGESTIONS DOCKET NO. 14-CV-F, available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/cv-suggestions-2014/14-CV-F-suggestion.pdf, archived at perma.cc/Y939-BRKC.

⁴ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)) (internal quotation marks omitted).

⁵ See, e.g., *White v. Gates Rubber Co.*, 53 F.R.D. 412, 414-15 (D. Colo. 1971) (discussing different judicial approaches to typicality and finding each insufficient); ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL § 3.6A (4th ed. 2012) (“Courts have thus struggled to interpret the typicality requirement, resulting in confusion and a lack of consensus.”); see also Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH.

IS IT TIME FOR THE END OF TYPICALITY?

The lack of consensus among the courts as to the meaning of typicality, and the concomitant lack of effectiveness of the requirement, suggests that typicality is unnecessary in modern procedural practice. This is so for several reasons.

First, the history of the rule suggests that the 1966 Rules Committee did not carefully examine the justification for the requirement before including it in Rule 23(a). Without a clear rationale, typicality operates at a superficial level, ensuring that the class “looks” cohesive by insisting that the legal claims of the representative resemble those of the class.

Second, typicality does not appear to do much to ensure effective class representation, especially compared to commonality, adequacy of representation, and the requirement of a definable class. These other Rule 23(a) requirements more practically address the due process concerns underlying the threshold requirements and have received more attention – and therefore have been better developed – by courts in recent years.

Third, typicality is obsolete in light of a reality already addressed by the Rules Committee: that it is class counsel who spur and direct class action litigation and, as such, require more judicial oversight.⁶ The formal requirement that class representatives’ claims be typical is less important when one acknowledges that class counsel – not the class members themselves – are in need of judicial supervision.

Finally, typicality leads to confusion: confusion as to why the Rules Committee adopted it, confusion as to what independent territory it occupies in Rule 23(a), and confusion as to how its satisfaction should be determined. Confusion is not inherently bad. But when confusion is provoked by a superfluous appendage to the rule, it becomes harmful.

This paper proceeds in four parts. Part I explores the 1966 introduction of typicality and the other Rule 23(a) requirements, and outlines the subsequent attempts by courts and scholars to divine a purpose for typicality. Part II illustrates the superfluity of typicality in light of the other

J.L. REFORM 1097, 1103 (2013) (describing the typicality requirement as “mystifying”).

⁶ See FED. R. CIV. P. 23(g) (requiring district courts to appoint class counsel and providing a framework for assessing the appropriateness of class counsel applicants); see also Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3-4 (1991) (“The absence of client monitoring raises the specter that the entrepreneurial attorney will serve her own interest at the expense of the client.”).

threshold requirements and recent trends in class action litigation. Part III discusses the harmful effects of the confusion caused by typicality, using a recent case as an example. Part IV is a call to action that encourages the Rules Committee to excise the requirement and adopt a new, functional test that combines the values of typicality with the requirement that representation be adequate.

I. ORIGINAL PURPOSE OF TYPICALITY

The Rules Committee introduced typicality, along with the other Rule 23(a) threshold requirements, to the class action rule in 1966, as part of the most comprehensive reform to Rule 23 since its 1938 inception. Although the objectives behind the new 23(a) threshold requirements were certain enough – courts needed a way to achieve efficiency while protecting the due process rights of absent class members⁷ – the Committee offered little explanation as to the values that supported the four requirements. Nowhere was judicial uncertainty about the 23(a) requirements stronger than with typicality, decried as “a thorn in the side of courts and attorneys who deal with class actions.”⁸ One of the first Supreme Court decisions to discuss the newly amended Rule 23 failed to discuss the element at all.⁹ Perhaps the Rules Committee added typicality with the intention of reinforcing the other Rule 23(a) requirements. Perhaps it envisioned an independent purpose for the requirement; if so, the Committee left it up to the courts to divine that purpose. Perhaps, though, as I argue in this paper, its addition was an attempt to legitimize the entire concept of representative litigation as a preclusive device at a time when that idea was new and on uncertain ground. Assuming that is true, typicality is no longer needed in modern practice, in which the preclusive effect of class actions is widely accepted.¹⁰

⁷ See Bone, *supra* note 5, at 1103 (noting that the 1966 Committee “had to face squarely the due process and fairness-to-absentee issues that the 1938 Committee had dodged”).

⁸ *Wilson v. Anderson Greenwood & Co.*, No. 76-H-2086, 1979 WL 247, at *2 (S.D. Tex. June 7, 1979).

⁹ See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

¹⁰ See, e.g., *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (“There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.”).

Recent courts have sought to carve out a distinct role for typicality, but with little practical effect. Without a clear original purpose or subsequent utility, the persistence of the typicality requirement is merely a source of confusion and wasted effort for litigants and the courts.

A. The 1966 Amendments

Confusion surrounding the typicality requirement likely originates from the uncertain reasons for its inclusion in Rule 23. When the 1966 Rules Committee introduced the provision, it offered no context or instruction apart from the text of the rule itself: “the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.”¹¹ The Rule provides a formal limitation as to *what* must be typical: the claims or defenses of the class. But the Committee gave no guidance as to how typicality was to be assessed, what function it served, or what values supported it. While the general purpose of the 1966 amendments was clear – make the Rule more practically useful – determining how the typicality requirement advanced that purpose has proved elusive.

Typicality was introduced as part of the overhaul of Rule 23 from a highly formal, rights-based classification system¹² to a pragmatic, functional tool that corresponded to the real-world circumstances that called for representative mass litigation in the first place.¹³ The old Rule 23 did not envision the class action as a preclusive device whose primary purpose was to achieve judicial efficiency.¹⁴ Instead, the class action was an equitable

¹¹ FED. R. CIV. P. 23(a)(3).

¹² The original Rule 23(a) provided only a classification system. It authorized a class action when “the character of the right” was (1) “joint, or common, or secondary;” (2) “several, and the object of the action [was] the adjudication of claims which do or may affect specific property;” or (3) “several, and there [was] a common question of law or fact affecting the several rights and a common relief [was] sought.” FED. R. CIV. P. 23(a) (1938) (repealed 1966), *reprinted in* 5 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 23App.01 (Daniel R. Coquillette et al. eds., 3d ed. 2014).

¹³ *See, e.g.*, Benjamin Kaplan, *A Prefatory Note*, 10 BOS. C. INDUS. & COM. L. REV. 497, 497 (1968):

The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from such bloodless words as “joint,” “common,” and “several,” and to rebuild that law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties.

¹⁴ Although preclusion and efficiency concerns were not at the forefront of the 1938 rule, class actions still had some binding effect. That effect depended on which rights-based category the action fit into. Actions involving joint or common rights bound everyone in the class. Actions involving several rights and specific property bound class members only with respect to the property at issue.

invention of necessity, designed “so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights.”¹⁵ This old conception of the class action had a narrow purpose: to allow a lawsuit to continue without joining necessary parties.¹⁶ This limited view of the device allowed the 1938 drafters to mostly avoid the due process and fairness-to-absentee concerns that would become the focus of the 1966 amendments.

Concrete policy concerns, rather than the abstract rights described in the 1938 version of the rule, undergirded the 1966 revisions.¹⁷ Efficiency and decisional consistency were at the forefront of the values underlying the Rule 23 changes. These policy goals were illustrated by, for example, the addition of Rules 23(b)(2) and 23(b)(3), which respectively authorized class actions for cases in which injunctive relief would be impossible or far more difficult for courts to grant in individual litigation, or in which common questions of law or fact united the class members.¹⁸ These amendments evinced a new conception of the class action device, one that acknowledged the class action as not simply an alternative to joinder, but a device that improved efficiency by both allowing aggregation of related claims and giving broad preclusive effect to aggregated judgments.

It was in light of these efficiency considerations that the idea of threshold requirements for class certification arose.¹⁹ If judgments in class actions were to be given preclusive effect, courts needed a way to accurately define the class and identify its members, who would be bound by the judgment. The Rules Committee recognized that under this new regime, district courts would have to supervise class litigation in order to protect the interests of absent class members.²⁰ Rule 23(a) provided part of the framework for that supervision.

Finally, actions involving several rights and common questions bound only those who chose to intervene. See James Wm. Moore & Marcus Cohn, *Federal Class Actions – Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 555-63 (1938).

¹⁵ *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

¹⁶ See Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 242-45 (1990).

¹⁷ Bone, *supra* note 5, at 1102.

¹⁸ FED. R. CIV. P. 23(b)(2)-(3); see also Bone *supra* note 5, at 1102 (describing how each of the new 23(b) subdivisions served specific policy goals).

¹⁹ See Bone, *supra* note 5, at 1103.

²⁰ See *id.* (“[The Committee] also responded [to due process concerns] by assigning responsibility to the district judge to look out for the interests of absent class members.”).

IS IT TIME FOR THE END OF TYPICALITY?

Rule 23(a) sets forth four threshold requirements that a party moving for class certification must satisfy in order to maintain a class action. First, the class must be “so numerous that joinder of all members is impracticable.”²¹ Second, there must be “questions of law or fact common to the class.”²² Third, “the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.”²³ Fourth and finally, the court must determine that “the representative parties will fairly and adequately protect the interests of the class.”²⁴ These requirements are colloquially referred to as numerosity, commonality, typicality, and adequacy of representation.²⁵ Rule 23(a)’s four requirements direct the court to consider efficiency and due process concerns at an early stage by determining whether a class action is an expedient and fair way to adjudicate a mass dispute.

From the outset, some of these new requirements made more sense than others. Out of the four, Rule 23(a)(4)’s adequacy of representation requirement appears to have been the most intentional. The rule was a direct response to the Supreme Court’s decision in *Hansberry v. Lee*, in which the Court held that due process of law is satisfied only if the interests of absentee class members are adequately represented.²⁶ Rule 23(a)(1)’s numerosity requirement served a practical purpose and merely made explicit an implicit requirement of class action practice: that a class must be comprised of a sufficient number of individuals such that the more simple joinder device is impracticable.

But the other Rule 23(a) additions did not have such clear functions. Those other additions – Rule 23(a)(2)’s commonality requirement and Rule 23(a)(3)’s typicality requirement – appear to have been added without much thought as to what they meant or how their presence was to be determined. These elements also appear redundant. As Professor Bone notes, the requirements of each 23(b) subdivision already guarantee a common question – and 23(b)(3) explicitly requires one – so the addition

²¹ FED. R. CIV. P. 23(a)(1).

²² FED. R. CIV. P. 23(a)(2).

²³ FED. R. CIV. P. 23(a)(3).

²⁴ FED. R. CIV. P. 23(a)(4).

²⁵ See WILLIAM RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:1 (5th ed. 2014).

²⁶ 311 U.S. 32, 42-43 (1940) (“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . .”).

of a common question as a threshold requirement seems unnecessary.²⁷ The typicality requirement also seems unnecessary given the more intentional inclusion of 23(a)(4)'s adequacy of representation.²⁸

Surely, the addition of the typicality requirement was part of the Committee's concern for the due process rights of absent class members. But there is no evidence that the Committee thought rigorously about how the requirement would address that concern. Professor Bone hypothesizes that the typicality requirement was rooted in the Committee's assumption that a class had to exhibit internal "homogeneity," "solidarity," or "cohesion," in addition to adequate representation, in order to fairly bind absent class members.²⁹ As typicality is a proxy for cohesion, perhaps the Committee added Rule 23(a)(3) to ensure that a class explicitly satisfied the previously assumed cohesion requirement. But this explanation does little to increase the utility of the requirement because neither the language of 23(a)(3) nor the Committee's understanding of "cohesion" was set forth in functional terms.³⁰ Rather, by restricting typicality to the similarity of legal claims, the Committee couched the requirement in the old formalism that characterized the pre-1966 Rule 23. Perhaps the Committee recognized the redundancy of the typicality requirement and so restricted the element to legal claims or defenses. If typicality could be established by some other standard – such as class members having suffered a similar injury – it would be so obviously duplicative of the commonality requirement as to be meaningless.

The Committee's reasons for adding typicality were more likely about appearance than substance. A typicality requirement lent legitimacy to the unsettling concept of mass litigation that could potentially preclude the related legal claims of thousands of people.³¹ The preclusive nature of class

²⁷ Bone, *supra* note 5, at 1103 n.28.

²⁸ *Id.*

²⁹ *Id.* at 1104 (quoting FED. R. CIV. P. 23 advisory committee's note, subdivision (b)(3) (1966) (internal quotation marks omitted); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 380 (1967)).

³⁰ Indeed, Professor Bone notes that although the Committee may have considered "cohesion" a requirement for a class action, that principle is at odds with Rule 23(b)(1) limited fund actions, which "inherently pit[] one class member against the others" as they compete for shares of a limited fund. Bone, *supra* note 5, at 1104 n.34.

³¹ See RUBENSTEIN, *supra* note 25, § 3:28 (describing how typicality "mirrors the requirement that a political representative be a member of the polity she is elected to represent," and noting that this "may add a degree of legitimacy to the representation").

actions was at odds with “the usual rule that litigation is conducted by and on behalf of the individual named parties only.”³² By requiring that the class representative possess claims similar to those of the class, typicality ensured that a class appeared cohesive and well suited to have its claims adjudicated en masse. Despite the salutary effect of this appearance, the resulting confusion surrounding typicality underscored its lack of independent substantive relevance. Whatever typicality’s meaning, the 1966 Rules Committee left it to the courts to divine.

B. Judicial and Scholarly Developments

Early courts concluded that the typicality requirement was intended to reinforce the other Rule 23(a) requirements³³ – the implication being that it had no independent meaning. In an early treatise, Professor Moore even went so far as to conclude that “there appears to be little or no need for this [typicality] clause, since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23.”³⁴ But more recently, and guided by the canon of interpretation that portions of a statute should not be rendered meaningless,³⁵ scholars and courts have sought to carve out a distinct role for typicality.

In a leading modern treatise, Professor Rubenstein maintains that typicality “harnesses selfishness as a means to accomplish altruistic ends.”³⁶ A plaintiff is bound to pursue her own self-interest in litigation, even if she purports to represent others. By insisting that her claims align with those of the class, typicality ensures that the plaintiff’s pursuit of her self-interest also advances the interests of absent class members. This is not precisely the same as adequacy of representation. Though both typicality and adequacy of representation are rooted in the due process rights of unnamed

³² *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

³³ *See, e.g., Rosado v. Wyman*, 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970) (“[T]he typical representative element in Rule 23(a)(3) is designed to buttress the fair representation requirement in Rule 23(a)(4).”).

³⁴ *Wilcox v. Petit*, 117 F.R.D. 314, 317-18 (D. Maine 1987) (quoting 3B JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE*, ¶ 23.06-2 (2d ed. 1987)).

³⁵ *See, e.g., Rake v. Wade*, 508 U.S. 464, 471 (1993) (“We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid denying effect to a part of a statute, we accord significance and effect to every word.” (internal quotation marks and citations omitted)).

³⁶ RUBENSTEIN, *supra* note 25, § 3:28.

class members, they tackle the issue differently. Rule 23(a)(4)'s adequacy requirement addresses due process concerns directly by inquiring whether the representative has conflicts of interest with class members and is able to pursue the litigation with enthusiasm and knowledge.³⁷ The typicality requirement, on the other hand, addresses due process concerns indirectly by relying on the "inherent logic" that a class will necessarily benefit from the representative's pursuit of her own claims if her claims are sufficiently similar to those of the class.³⁸

These theoretical differences are of limited utility to the courts, who must devise functional tests to determine whether typicality is satisfied. The tests that have emerged tend to be functionally similar to either commonality or adequacy of representation, or both. For example, the Ninth Circuit says that "[t]he test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct."³⁹ Other circuit courts employ similar tests.⁴⁰ It is hard to see how tests such as the Ninth Circuit's address problems that the commonality requirement – especially in the more exacting form demanded after *Dukes*⁴¹ – or the adequacy requirement do not already cover. Indeed, where typicality has been invoked as a bar to class certification, the same outcome would have been the likely result under a commonality, adequacy of representation, or Rule 23(b)(3) predominance analysis.⁴²

³⁷ See *id.*; *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 314 (5th Cir. 2007) (stating that the inquiry into adequacy of the proposed class representative examines both "the class representatives' willingness and ability to serve" and "conflicts of interest between the named plaintiffs and the class they seek to represent" (citation omitted)). It also bears mentioning that 23(a)(4) is a basis for assessing adequacy of class counsel; now that inquiry is also encompassed in Rule 23(g).

³⁸ See RUBENSTEIN, *supra* note 25, § 3:28.

³⁹ *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 2008)) (internal quotation marks omitted).

⁴⁰ *Beck v. Maximus, Inc.*, 457 F.3d 291, 295-96 (3d Cir. 2006); *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001); *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001); *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977).

⁴¹ *Dukes*'s stringent commonality standard requires the plaintiff to demonstrate that class members have "suffered the same injury," that class claims "depend upon a common contention," and that the common contention be of a nature that is "capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, at 2551 (2011).

⁴² See, e.g., *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 596-99 (7th Cir. 1993) (affirming the lower court's holding that a class action was barred on the basis of both the typicality and

In sum, the 1966 amendments did little to explain the reasons behind the typicality requirement or the goals that it was meant to serve. Subsequent scholarly and judicial attempts to divine a meaning for typicality have been fruitful only to the extent that conceptual distinctions have emerged. These distinctions are of little practical import because other, better-developed aspects of Rule 23 practice address the due process concerns that underlie the requirement of typicality. It seems time, then, to examine the superfluity of typicality and consider its abolition.

II. THE CURRENT SUPERFLUITY OF TYPICALITY

The persistence of typicality in modern practice is unnecessary for three primary reasons. First, it is unclear whether the typicality requirement actually promotes effective litigation. Second, other threshold requirements of Rule 23(a) more effectively address the concerns that underlie typicality. Third and finally, typicality is obsolete in light of two modern trends in class action practice that have received recent attention from the Rules Committee: (1) the fact that most class actions, as with individual litigation, settle; and (2) that it is class counsel, not class members themselves, who spur and direct class litigation and therefore require more judicial oversight. This section addresses each of these problems in turn.

A. The Dubious Effectiveness of Typicality

By requiring that the class representative possess claims that are typical of the class, the typicality requirement assumes that the individual best suited to represent the class is the one who is most similar to the rest of the class members. But it is not necessarily true – in either history or in litigation – that the best advocate for a group is one of its own members. As Professor Rubenstein aptly notes in illustrating this point, wealthy individuals have championed the rights of the poor; men the rights of women; whites the rights of blacks.⁴³ This is true not only of social movements.

adequacy requirements); see generally RUBENSTEIN, *supra* note 25, §§ 3:31-32 (discussing overlap of typicality with commonality and adequacy of representation).

⁴³ RUBENSTEIN, *supra* note 25, § 3:28 (“Senator Edward Kennedy, for instance, was a well-known advocate for the poor although hailing from a wealthy family; John Stuart Mill, a famous male feminist; a white man, William Lloyd Garrison, a leading American proponent of the abolition of African slavery in the United States.”).

Effective, enthusiastic proponents for any cause – especially in the relatively impersonal context of litigation – need not be the ones who are most “typical” of group members. For example, in litigation involving trusts, the actions of the trustee as to the trust will bind beneficiaries. But courts do not preliminarily inquire as to whether the trustee and the beneficiaries share the same legal interests.⁴⁴ Indeed, the very concept of legal representation assumes that the best advocate for an injured person is not necessarily someone who has experienced the injury firsthand. It therefore seems an arbitrary and untrue assumption that the best measure of effectiveness of a group representative is her “typicality.”

Moreover, the concerns that likely undergirded the Rules Committee’s addition of typicality are no longer at issue in modern practice. As discussed above, typicality lent legitimacy to the general idea of representative litigation, but appeared to have little practical purpose. Numerosity and commonality, by ensuring that the class contained a sufficient number of connected individuals, advanced judicial economy. Adequacy of representation, especially with its connection to the *Hansberry* case, explicitly ensured that class members were accorded due process. Only typicality appeared to be without a functional home, tacked on as an extension of adequacy to assure class members that their leader was “one of them,” despite the fact that their claims were being aggregated and adjudicated together in the name of efficiency.

Now, however, the idea of the class action as an efficiency device is well established in American jurisprudence⁴⁵ and no longer needs symbolic reinforcement of its legitimacy. Furthermore, the modern reality is that most potential class members have only an attenuated interest in the outcome of the litigation – indeed, potential members may not even realize that the harm giving rise to the claims has occurred.⁴⁶ The idea that such a disjointed group requires a leader to champion its interests manifests a rather romanticized notion of representative litigation that is at odds with

⁴⁴ Geoffrey C. Hazard et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1856 (1998) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 311 (1950)).

⁴⁵ *E.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 402 (2010) (stating that Rule 23 is “designed to further procedural fairness and efficiency”).

⁴⁶ See Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 413 (2014) (summarizing critiques of the class action device and noting that “in many cases class members may not even know that they have been harmed, may not care about minor injuries, and may be entirely disinterested in pursuing litigation”).

reality.⁴⁷ Instead, the class representative should be the individual (from among those who have suffered the same harm as the rest of the class members, criteria addressed in Rule 23(a)(2)'s commonality requirement) who is most knowledgeable, capable, and available – criteria addressed in Rule 23(a)(4)'s adequacy of representation requirement.

A final illustration of the doubtful effectiveness of typicality lies in the method by which the most typical representative is selected. If typicality truly were an important indicator of the effectiveness of a putative representative, one would think that the representative would be elected by the class members or appointed by the court. But this is not how it works. Instead, the class representative is simply the person – almost always selected by the plaintiffs' attorney – who files a complaint and moves for class certification. The court only assesses this selection after the fact, on the motion for class certification. In practice, then, the typicality requirement works not as a way of ensuring the most effective representative, but as a “check [on] counsel's zeal by forcing them to find a class member to represent the class prior to bringing suit to redress an alleged wrong.”⁴⁸ It is true that class counsel, and not class members themselves, usually initiate class litigation.⁴⁹ The selection of counsel, therefore, requires more judicial oversight than the selection of a class representative. But typicality is not the way to accomplish this oversight. Other, more effective checks built into Rule 23 directly address that problem. For example, courts have long used Rule 23(a)(4)'s adequacy requirement to ensure not only the adequacy of class representatives, but also the adequacy of class counsel.⁵⁰ And Rule 23(g), added in 2003, more explicitly directs the trial court to ensure that class counsel will “fairly and adequately represent the interests of the class.”⁵¹

⁴⁷ See RUBENSTEIN, *supra* note 25, § 3:28 (noting that, in practice, “it is class counsel, not class representatives, who generally direct class actions, and they typically select the class's representatives rather than the class's representatives seeking them out.”).

⁴⁸ *Id.*

⁴⁹ See, e.g., *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (quoting *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (internal quotation marks omitted) (“Experience teaches that it is counsel for the class representative, and not the named parties, who direct and manage these actions.”); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998) (“[C]lass representatives often are recruited by class counsel, play no client role whatsoever, and – when deposed to test the adequacy of representation – commonly show no understanding of their litigation.”).

⁵⁰ RUBENSTEIN, *supra* note 25, § 3:52.

⁵¹ FED. R. CIV. P. 23(g).

It is unclear, therefore, what role typicality plays in ensuring effective class litigation. The only unique role that might have existed for the requirement in 1966 – legitimizing class litigation by requiring the representative to be a “leader” of the group – has become obsolete in the current legal landscape. As discussed further below, there is no longer any need to subscribe to the fiction that the best representative is the one most typical of the class. Other, more developed aspects of Rule 23 ensure that the class representative – the named class member acting through counsel – zealously pursues the class’s interests such that a binding, preclusive judgment comports with due process.

B. Other Threshold Requirements

Early courts struggled with the typicality requirement. Some treated it as synonymous with the commonality requirement.⁵² Others saw it as synonymous with the adequacy of representation requirement.⁵³ Still others attempted to give it an independent meaning by finding that it required an absence of any conflict between the interests of the plaintiff and others in the class⁵⁴ – but of course, as noted by one court,⁵⁵ this interpretation is essentially the same as the adequacy of representation requirement. In more recent years, courts have assessed typicality by inquiring whether the named representative suffered the same type of injury or was subjected to the same type of conduct by the defendant.⁵⁶ These formulations, howev-

⁵² See, e.g., *Hyatt v. United Aircraft Corp.*, 50 F.R.D. 242, 247 (D. Conn. 1970) (finding typicality not satisfied because of the unique factual and legal nature of plaintiff’s claims).

⁵³ See, e.g., *Brown v. Weinberger*, 417 F. Supp. 1215, 1218 (D.D.C. 1976) (granting class certification because, among other things, “there [were] no apparent substantial conflicts of interest or legal positions to be advanced within the class,” and not discussing typicality at all); *Moss v. Lane Co.*, 50 F.R.D. 122, 126 (W.D. Va. 1970) (finding there was “no doubt” that typicality was satisfied, but discussing only adequacy of representation).

⁵⁴ See, e.g., *Mersay v. First Republic Corp. of Am.*, 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968) (finding the class representative’s claims to be typical because “his interests [were] not antagonistic to those of the class”); *Cannon v. Tex. Gulf Sulphur Co.*, 47 F.R.D. 60, 63 (S.D.N.Y. 1969) (citing *Mersay* for the idea that “representatives must not have interests antagonistic to or in conflict with those they seek to represent.”).

⁵⁵ *White v. Gates Rubber Co.*, 53 F.R.D. 412, 414-15 (1971).

⁵⁶ See, e.g., *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (“The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.”) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 2010)).

er, essentially boil down to the same inquiry as commonality, especially as that requirement was formulated in *Dukes*.⁵⁷ Thus, with adequacy of representation, commonality, and the requirement of a definable class covering much of the same ground as typicality, typicality appears to have little independent meaning.

1. *Falcon* and the Early Erosion of Typicality

An early hint of typicality's lack of independent utility came in the Supreme Court's 1982 decision in *General Telephone Co. of the Southwest v. Falcon*, in which the Court reversed a certification order concerning a class of Mexican-Americans claiming employment discrimination.⁵⁸ The class representative in *Falcon* was a Mexican-American who was allegedly denied a promotion on the basis of race.⁵⁹ He sought to represent a class of other Mexican-Americans who had been or might be denied either employment or promotion because of the employer's discriminatory practices.⁶⁰ The Court held that the named representative's claims were atypical because his claims only involved the denial of promotion, and that the district court erred in "fail[ing] to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)."⁶¹ In making this determination, the Court acknowledged that "the commonality and typicality requirements of Rule 23(a) tend to merge," and that, "[t]hose requirements [] also tend to merge with the adequacy-of-representation requirement."⁶²

Falcon was hardly a direct blow to typicality. Although the Court blended the typicality and commonality analyses, it focused more heavily on typicality, even appearing to treat commonality as if it were an initial

⁵⁷ See *supra* note 41.

⁵⁸ 457 U.S. 147, 150-51, 161 (1982).

⁵⁹ *Id.* at 149.

⁶⁰ *Id.* at 150-1.

⁶¹ *Id.* at 160.

⁶² *Id.* at 157 n.13:

[B]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement

step in assessing typicality.⁶³ And lower courts treated *Falcon* as a directive regarding typicality.⁶⁴ Still, the long-term effect of *Falcon* on the decline of typicality's importance was substantial. As Professor Spencer maintains, "the shadow of the typicality concern [in *Falcon*] permitted the freestanding commonality requirement to be subsumed and enlarged simultaneously."⁶⁵ *Falcon* provided the language of commonality that Justice Scalia would eventually seize on in *Dukes* to strengthen the commonality requirement in such a way that it overshadowed the typicality requirement.⁶⁶ The Court's acknowledgment in *Falcon* – and, later, *Amchem Products, Inc. v. Windsor*⁶⁷ – that the Rule 23(a) requirements merge paved the way for the gradual erosion of typicality through the enlargement of other Rule 23(a) threshold requirements. In the modern procedural landscape, the development of adequacy of representation, commonality, and even the "unspoken" requirement of a definable class far outpace typicality. These trends suggest that typicality lacks independent meaning.

2. Overlap with Adequacy of Representation

The adequacy of representation requirement contained in Rule 23(a)(4) insists that representative parties "fairly and adequately protect the inter-

⁶³ See *id.* at 158-59 ("Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner . . ."); see also A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 468-9 (2013) (stating that *Falcon* "treated commonality as if it were merely instrumental to determining typicality").

⁶⁴ See, e.g., *Wakefield v. Monsanto Co.*, 120 F.R.D. 112, 116 (E.D. Mo. 1988) ("[C]onsistent with the Supreme Court's opinion in *Falcon*, the typicality requirement is not always satisfied by suits alleging broad-based racial discrimination.").

⁶⁵ Spencer, *supra* note 63, at 468.

⁶⁶ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (quoting *Falcon*, 457 U.S. at 157-58) (internal quotation marks omitted):

Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.

For a more thorough history of how the commonality requirement came to be infused with the "same injury" requirement, see Spencer, *supra* note 63, at 464-68.

⁶⁷ 521 U.S. 591, 626 n.20 (1997).

ests of the class.”⁶⁸ The touchstone of the adequacy inquiry is whether the representative has an irreconcilable conflict of interest or is otherwise incompetent to represent the class.⁶⁹ Typicality overlaps with adequacy in that both inquiries require the court to consider the due process implications of allowing a class representative to press claims that are not the same as – or in conflict with – the claims of class members. Many courts address the typicality and adequacy of representation together because of their related nature.⁷⁰ But even when courts address the two inquiries separately and invoke typicality as a bar to class certification, the same outcome would occur under an adequacy of representation analysis.

A Seventh Circuit case, *Retired Chicago Police Association v. City of Chicago*, illustrates this overlap.⁷¹ In the case, an association of retired Chicago police officers (“RCPA”) and other municipal pension-fund groups sued the city alleging due process and equal protection violations when the city entered settlement agreements that altered the terms of the groups’ health care coverage.⁷² The plaintiffs also alleged breach of contract and estoppel claims based on the City’s promise that they would have lifetime health coverage at unchanged rates.⁷³ The district court determined that the class – composed of the RCPA and three other pension-fund groups – satisfied numerosity and commonality, but not typicality or adequacy of representation.⁷⁴ On appeal, the Seventh Circuit agreed, stating with regard to the breach of contract and reliance claims that “[i]t is not known whether the communications allegedly made by the City and the Funds to *each group of city employees* regarding the health care plan were identical.”⁷⁵ Accordingly, RCPA’s claims were not typical “[b]ecause the RCPA [did] not include

⁶⁸ FED. R. CIV. P. 23(a)(4).

⁶⁹ RUBENSTEIN, *supra* note 25, § 3:58.

⁷⁰ *See, e.g., In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 22-23 (D. Mass. 2008) (stating that the “primary focus of the typicality analysis is the functional question of whether the putative class representative can fairly and adequately pursue the interests of the absent class members without being sidetracked by her own particular concerns” and that, as a result, typicality and adequacy can be “addressed jointly” (internal citations and quotations omitted)); *In re BP, PLC Sec. Litig.*, 758 F. Supp. 2d 428, 437-39 (S.D. Tex. 2010) (considering typicality and adequacy together given the relatedness of the inquiries).

⁷¹ 7 F.3d 584 (7th Cir. 1993).

⁷² *Id.* at 589-90.

⁷³ *Id.*

⁷⁴ *Id.* at 596.

⁷⁵ *Id.* at 597 (emphasis in original).

individuals from all of the fund groups and there [was] no indication that each of the groups was treated identically.”⁷⁶

But the court then went on to assess the adequacy of representation, and for largely the same reasons determined that it had not been met. Supporting its conclusion, the court noted that individuals who had actually benefitted from the City’s settlement were included in the putative class, and that RCPA’s executive secretary had a conflict of interest because of his participation in and approval of the disputed settlements.⁷⁷ Though the court discussed typicality and adequacy of representation separately, the substance of its analysis belied the distinction between the two. For instance, the court’s finding that “the scope of the proposed RCPA class was not restricted to those members whose premiums had increased under the City’s health care plan”⁷⁸ applied to its assessment of inadequacy of representation, but just as easily could have been the basis for a denial of certification due to lack of typicality.⁷⁹

It could be that the overlap between typicality and adequacy of representation evinces only what Professor Rubenstein calls a “stylistic [preference] regarding the structure of the opinion or order.”⁸⁰ But the substance of the courts’ reasoning – as illustrated by the RCPA case, in which the inquiries were stylistically separate – suggests a more serious underlying problem: the two inquiries are the same.

In a more recent case, *Schlaud v. Snyder*, the Sixth Circuit made this substantive overlap apparent by analyzing only the adequacy of representation requirement but stating that its analysis “could also be expressed in terms of commonality or typicality.”⁸¹ In *Schlaud*, a class of home childcare providers sued their union for violation of their First Amendment rights to free association by compelling the collection of dues in support of the union.⁸²

⁷⁶ *Id.*

⁷⁷ *Id.* at 598.

⁷⁸ *Id.*

⁷⁹ See *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (finding typicality lacking in another ERISA case because “the named plaintiffs could not advance the interests of the entire early retiree class”).

⁸⁰ RUBENSTEIN, *supra* note 25, § 3:32.

⁸¹ 717 F.3d 451, 457 n.4 (6th Cir. 2013), *vacated & remanded on other grounds*, 134 S. Ct. 2899 (2014) (mem.). In support of this statement, the Court cited *Amchem* and *Falcon* and their statement that the adequacy, commonality, and typicality requirements “tend to merge.” *Id.*

⁸² *Id.* at 455.

The district court denied certification of the class, which the plaintiffs' complaint defined as all individuals who were home childcare providers in the state of Michigan and had any union dues or fees deducted from the subsidy paid to them by the state.⁸³ The Sixth Circuit agreed with the lower court that there was a conflict of interest between the named representatives – who opposed union representation – and over 4,000 individuals in the proposed class who had voted in favor of the collective bargaining agreement and the dues deduction.⁸⁴ The lower court also found the class representatives inadequate when the plaintiffs tried to refine the class definition to include only childcare providers who had union dues collected *and* who had neither voted for the union nor signed authorization cards.⁸⁵ The Sixth Circuit agreed with the district court that it could not “simply assume that non-voting providers are hostile to [u]nion representation.”⁸⁶ Adequacy of representation was the only Rule 23(a) requirement addressed by the Sixth Circuit's opinion, but the court noted that its adequacy analysis “could also be expressed in terms of [either] commonality or typicality.”⁸⁷ It is unclear whether the Sixth Circuit meant that the tests for typicality, commonality, and adequacy are identical, although that is what the footnote seems to suggest. Earlier decisions from the circuit envisioned a unique role for typicality.⁸⁸ But, as with other formulations, the practical effect of any distinction is limited and attempts to devise a unique role for typicality tend to collapse into other, better-defined requirements like commonality and adequacy. The *Schlaud* decision's seemingly innocuous footnote could very well portend the end of typicality.

3. Overlap with Commonality

Typicality also overlaps with Rule 23(a)(2)'s commonality requirement, which mandates that there exist “questions of law or fact common to the

⁸³ *Id.*

⁸⁴ *Id.* at 458.

⁸⁵ *Id.* at 456.

⁸⁶ *Id.* at 456, 459.

⁸⁷ *Id.* at 457 n.4.

⁸⁸ See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) (issuing a writ of mandamus directing the district court to decertify a class for, among other reasons, failing to engage in a sufficiently rigorous inquiry into the existence of typicality even though each of the named plaintiffs had used a different model of the product at issue and complained of different injuries).

class.”⁸⁹ Both inquiries require a court to determine whether the class representative’s case shares meaningful similarities with that of the class members. As with adequacy, some courts jointly discuss the typicality and commonality requirements because they are so similar.⁹⁰ A prisoners’ rights case, *Hassine v. Jeffes*, exemplifies this approach.⁹¹ In that case, the Third Circuit discussed commonality and typicality under a single heading, concluding that the class representatives’ allegations of double-bunking, water leaking, and food poisoning meant that the prisoners “demonstrated the commonality of their claims with the claims of the class that they sought to represent.”⁹² Having determined that their claims were united by a common question of law or fact, the court deemed the typicality requirement also satisfied.⁹³ Other courts have done the same.⁹⁴

As with adequacy, scholars and courts can devise theoretical distinctions between typicality and commonality. For one, the commonality standard is broad and looks to the interrelatedness of the class as a whole. Its requirements, at least historically, were minimally stringent and easily met in that only a single common question of law or fact was needed to unite class members’ claims.⁹⁵ The typicality standard, on the other hand, is narrow, concerning itself only with the relatedness of the class representative to the class as a whole. Perhaps, then, because typicality is a “slightly more exacting screen than [commonality],”⁹⁶ there is a unique role for the typicality requirement. Surely there are situations in which commonality is satisfied but typicality is not. The *RCPA* case discussed above is one such example. There, the groups shared common questions of law or fact, but the representative’s claims were not typical of the class’s. But considering commonality and adequacy together, it is hard to see what ground typicality covers that those two do not. If commonality

⁸⁹ FED. R. CIV. P. 23(a)(2).

⁹⁰ RUBENSTEIN, *supra* note 25, § 3:31.

⁹¹ 846 F.2d 169 (3d Cir. 1988).

⁹² *Id.* at 177-78.

⁹³ *See id.*

⁹⁴ *E.g.*, *Ginardi v. Frontier Gas Servs., LLC*, No. 4:11-cv-00420-BRW, 2012 WL 1377052, at *2-3 (E.D. Ark. Apr. 19, 2012); *Holman v. Macon Cnty.*, No. 2:10-00036, 2011 WL 252969, at *4-5 (M.D. Tenn. Jan. 26, 2011); *Susan J. v. Riley*, 254 F.R.D. 439, 459-61 (M.D. Ala. 2008).

⁹⁵ *See, e.g.*, *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1299 (10th Cir. 1999) (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)) (“Because the [commonality] requirement may be satisfied by a single common issue, it is easily met.”).

⁹⁶ RUBENSTEIN, *supra* note 25, § 3:31.

ensures that there are meaningful common questions among all class members, then it is necessarily true that any class representative chosen from that class will share at least some of the concerns of the class – and likely possess similar claims and defenses as class members. And if, in the absence of the typicality requirement, there were any doubt that a class representative would press for claims not shared by the rest of the class, then as in *RCPA* or *Schlaud*, the adequacy of representation requirement and its concerns regarding conflicts of interest would bar that individual from continuing as the representative. Taking commonality and adequacy together, then, it appears that the typicality occupies no independent territory and exists as merely a superfluous appendage to Rule 23.

This is especially true in light of the Supreme Court’s tightening of the commonality standard in *Wal-Mart Stores, Inc. v. Dukes*.⁹⁷ Prior to *Dukes*, federal courts characterized the necessary showing for commonality as “minimal.”⁹⁸ The common questions needed to be germane and to advance the litigation and little more.⁹⁹ With this permissive, broad standard governing commonality, typicality – a more exacting standard – made much more sense as an independent requirement. Now, however, *Dukes* mandates a far more stringent commonality showing. *Dukes*’ new commonality standard is threefold. First, the plaintiff class members must “have suffered the same injury.”¹⁰⁰ Second, the common question must be “central to the validity of each one of the claims.”¹⁰¹ Third, the determination of the common question must resolve a central issue “in one stroke” by “generat[ing] common answers apt to drive the resolution of the litigation.”¹⁰²

⁹⁷ 131 S. Ct. 2541, 2550-52 (2011).

⁹⁸ See *Lewis Tree Serv., Inc. v. Lucent Techs., Inc.*, 211 F.R.D. 228, 231-32 (S.D.N.Y. 2002) (“[T]he commonality requirement of Rule 23(a)(2) is usually a minimal burden for a party to shoulder”); see also *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (“The test for commonality is not demanding”).

⁹⁹ *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc) (“It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.”).

¹⁰⁰ *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)) (internal quotation marks omitted).

¹⁰¹ *Id.*

¹⁰² *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Regardless of how one views the validity of these new requirements,¹⁰³ it is clear that they go much farther than the earlier conception of commonality in demanding a common question. Far from the minimal, permissive standard of yesterday, the new *Dukes* standard, by requiring a central common question that will drive the resolution of the litigation, provides the “exacting screen” that was previously the domain of typicality. After *Dukes*, not just any common question of fact will do. For example, in *M.D. ex rel. Stukenberg v. Perry*, the Fifth Circuit vacated the district court’s certification of a class of children in long-term foster care who sued three Texas officials for systemic deficiencies in the administration of conservatorships.¹⁰⁴ The district court found that the common question of fact was “whether Defendants failed to maintain a caseworker staff of sufficient size and capacity to perform properly.”¹⁰⁵ But the Fifth Circuit reversed this determination because it “contained no reference to any of the three causes of action advanced on behalf of the proposed class.”¹⁰⁶

After *Dukes*, then, the commonality requirement is far more substantial than before. There must be a nexus between the common question and the causes of action alleged by the class members, and that nexus must further “drive the resolution of the litigation.” With such an exacting screen for commonality, it is now far more likely that the 23(a)(2) requirement alone will ensure that a class representative advances the claims of the class. After *Dukes*, plaintiff classes are also likely to be smaller to ensure that they meet the more stringent requirement. This trend further guarantees that a class representative does not impermissibly purport to represent sprawling, disparate claims.

4. The Requirement of a Definable Class

Although not an explicit Rule 23(a) threshold requirement, the implicit requirement of a definable class further serves the same values as typicality. Courts have justified this judicially created requirement as inherent in the

¹⁰³ See, e.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 776 (2013) (“The majority decision in *Dukes* cannot be squared with the text, structure, or history of Rule 23(a)(2). Nothing in the text of Rule 23(a)(2), or in the Advisory Committee Notes thereto, requires that the common question be central to the outcome.”).

¹⁰⁴ 675 F.3d 832, 835, 849 (5th Cir. 2012).

¹⁰⁵ *Id.* at 841 (quoting *M.D. v. Perry*, no. c-11-84, 2011 WL 2173673, at *5 (S.D. Tex. June 2, 2011) (internal quotation marks omitted)).

¹⁰⁶ *Id.*

structure of Rule 23 and therefore an “axiomatic” part of class certification.¹⁰⁷ Although relatively few cases turned on the adequacy of the class definition prior to 2000,¹⁰⁸ since then, a significant number of courts have invoked it as part of the reason for denying class certification.¹⁰⁹ These courts tend to reject broad, sweeping class definitions, such as the one proposed in *Brazil v. Dell, Inc.*: “California persons or entities who purchased Dell computer products that [defendant] falsely advertised.”¹¹⁰

Though not all circuits follow this trend,¹¹¹ those that do often meld the analysis of a definable class with the requirements of Rule 23(a), including typicality. For example, in *Romberio v. Unumprovident Corp.*, the Sixth Circuit reversed the district court’s grant of class certification of a Rule 23(b)(2) ERISA class defined as “those plan participants and beneficiaries whose long-term disability benefits were denied or terminated after being subjected to any of the practices alleged in the [c]omplaint.”¹¹² The court rejected the class definition as indefinite and requiring “individualized fact-finding.”¹¹³ These same concerns meant that “the typicality premise [was] lacking” because “it [could not] be said that a class member who prove[d] his own claim would necessarily [have] prove[n] the claims of other class members.”¹¹⁴

The additional standard of definability, then, works in tandem with commonality to ensure that the class is tightly defined and closely related.

¹⁰⁷ See, e.g., *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) (“[I]t is axiomatic that for a class action to be certified a ‘class’ must exist.”); see also *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (“It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.”).

¹⁰⁸ See, e.g., 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1760 (3d ed. 2011) (noting the “liberal judicial attitude toward defining the class” and that “it normally is not essential to delimit its membership with a high degree of precision at the class-certification stage”).

¹⁰⁹ See, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-94 (3d Cir. 2012); *Williams v. Oberon Media, Inc.*, 468 F. App’x 768, 770 (9th Cir. 2012); *Romberio v. Unumprovident Corp.*, 385 F. App’x 423, 430-31 (6th Cir. 2009).

¹¹⁰ 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008). The court rejected the class definition as an impermissible fail-safe class – that is, a class defined in terms of the defendant’s liability. *Id.*

¹¹¹ See, e.g., *Rodriguez v. Countrywide Home Loans, Inc.*, 695 F.3d 360, 370 (5th Cir. 2012) (rejecting the fail-safe class prohibition and holding that a class is appropriately defined where the class members “are linked by [a] common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership”).

¹¹² 385 F. App’x 423, 430-31 (6th Cir. 2009) (internal quotation marks omitted).

¹¹³ See *id.* (finding that the only way to determine whether a given class member’s claims were improperly denied was “to engage in individualized fact-finding,” and that “the need for such individualized fact-finding [made] the district court’s class definition unsatisfactory”).

¹¹⁴ *Id.* at 431-32.

Often, and as in *Romberio*, definability underscores the typicality requirement and addresses many of the same concerns. The recent tendency of district courts to bolster definability – and not typicality – further illustrates the waning significance of the latter.

C. Recent Trends

Two major trends have emerged in class action practice since the Rule 23 amendments in 1966. These trends illustrate the most pressing concerns regarding class action litigation, and the responses to them further illustrate the obsolescence of typicality as a way of ensuring that the due process rights of unnamed class members are protected.

The first trend is the tendency of most class actions to settle. Often, as in *Amchem Products, Inc. v. Windsor*, plaintiffs and defendants will approach the court jointly with a settlement plan prior to class certification.¹¹⁵ While such settlements may be beneficial in that they reduce overall costs, they risk compromising the claims of absent class members, who do not participate in settlement negotiations. Class action settlements present unique issues of collusion and conflicts of interest. As Professor Klonoff points out, “it is not uncommon for class counsel and defense counsel to join forces in support of a settlement in the face of strong objections by intervening class members.”¹¹⁶

Before *Amchem*, there was a question as to whether the Rule 23(a) requirements needed to be met for a settlement-only class. *Amchem* answered that question in the affirmative, holding that the requirements of Rule 23 – including 23(a) – “demand undiluted, even heightened, attention in the settlement context.”¹¹⁷ The Rules Committee corroborated this ruling a few years later in 2003 by amending Rule 23(e) to strengthen the process by which trial judges review and accept settlement plans. The amendments set forth a complex scheme for effecting notice to class members, and, among other things, authorize the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion in 23(b)(3) classes.¹¹⁸

¹¹⁵ 521 U.S. 591, 601-02 (1997).

¹¹⁶ KLONOFF, *supra* note 5, § 9:1.

¹¹⁷ *Amchem*, 521 U.S. at 620.

¹¹⁸ FED. R. CIV. P. 23(e).

Notably, courts and the Rules Committee could have looked to typicality to address some of the class action settlement concerns. They could have required deeper scrutiny of the class representative to ensure that her claims were sufficiently typical to warrant her presence at the negotiating table on behalf of the rest of the class. But courts and the Rules Committee overlooked this possibility, instead choosing to address class action settlement concerns independently. While there may be disagreement about the wisdom of this result, the outcome illustrates the declining relevance of typicality in addressing modern class action concerns.

The second major trend in class litigation is district courts' tendency to require a heightened showing of the Rule 23(a) requirements at the certification stage – a trend that became law with *Dukes*¹¹⁹ and, later, *Comcast Corp. v. Behrend*.¹²⁰ This trend is related to the first one in that the requirement of a heightened showing at the certification stage is, in major part, intended to alleviate the pressure on defendants to settle that comes with the specter of class certification.¹²¹

Undergirding both of these trends is a distrust of plaintiffs' attorneys, who have been widely criticized as “entrepreneurial”¹²² and as abusing the class action device for their own gain.¹²³ But to the extent that courts have tightened up Rule 23(a) requirements in order to alleviate this pressure on defendants to settle, the typicality requirement does very little work. The requirement is premised on the antiquated notion that it is the named plaintiffs – not their attorneys – who initiate class action lawsuits and who therefore require judicial oversight. As discussed earlier, that notion is almost entirely fictitious.¹²⁴ Typicality, then, seeks to control a nonexistent problem.

¹¹⁹ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

¹²⁰ 133 S. Ct. 1426, 1432 (2013).

¹²¹ *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n.8 (3d Cir. 2001)) (internal quotation marks omitted) (“[T]he potential for unwarranted settlement pressure is a factor we weigh in our certification calculus.”).

¹²² *Macey & Miller, supra* note 6, at 3-4.

¹²³ *See, e.g., S. REP.* 109-14, at 14 (“The first such abuse involves settlements in which the attorneys receive excessive attorneys’ fees with little or no recovery for the class members themselves.”). The report goes on to outline numerous abuses of the class action device in which most of the settlement proceeds went to class counsel. *Id.* at 15-20.

¹²⁴ *See supra* Part II.A.

While courts responded to this mistrust of plaintiffs' attorneys by gradually increasing the plaintiffs' burden at the certification stage, the Rules Committee responded in 2003 by adding a new subdivision, 23(g), which requires the trial judge to appoint class counsel following certification.¹²⁵ The Advisory Committee notes to Rule 23(g) recognized that prior to 2003, Rule 23(a)(4) required an inquiry into the appropriateness of class counsel alongside the inquiry as to the adequacy of the class representative.¹²⁶ But the new Rule 23(g) set up a framework dedicated solely to evaluating class counsel – leaving Rule 23(a)(4) to govern only the appropriateness of the class representative.¹²⁷ With Rule 23(g) now providing a framework for evaluating class counsel, there is more conceptual room for 23(a)(4) to address all aspects of the class representative – including whether her claims are “typical.” This makes historic and practical sense. As courts have bolstered commonality and honored adequacy's historic mooring in *Hansberry*, typicality has shrunk in importance. To the extent that the typicality of the class representative's claims is even an important metric, it should be added as a secondary concern under the 23(a)(4) analysis.

III. THE HARMFUL EFFECTS OF THE PERSISTENCE OF TYPICALITY

If typicality still served the same purpose that it did shortly after the 1966 amendments – as a mere reinforcement of commonality and adequacy – its continued presence in Rule 23 might not be problematic. After all, reinforcement is justifiable and desirable in the law. But after *Dukes*, *Amchem*, and the 2003 amendments to Rule 23, the rest of Rule 23(a) no longer needs reinforcing. Typicality, then, persists as a superfluous element that requires unnecessary attention and briefing.

Moreover, retaining typicality only leads to confusion. A recent case from the Northern District of California – a rare instance of a court invoking

¹²⁵ FED. R. CIV. P. 23(g).

¹²⁶ FED. R. CIV. P. 23 advisory committee's note (2003) (“Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4).”).

¹²⁷ *See id.* (“Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision.”).

ing typicality as the sole reason for denying class certification – illustrates the unnecessary confusion that the typicality requirement can cause.

In *Major v. Ocean Spray Cranberries, Inc.*, the named plaintiff, Noelle Major, filed a putative class action against defendant Ocean Spray, claiming that Ocean Spray had sold drink products that “[were] improperly labeled so as to amount to misbranding and deception.”¹²⁸ The class to be certified was defined as all individuals in the state of California who had purchased any of four categories of Ocean Spray products within the last four years.¹²⁹ The district court denied the motion for certification because the class included purchasers of Ocean Spray products that Major herself had never purchased, thereby rendering Major’s claims atypical of those of the class.¹³⁰

After this decision, Major filed a second motion for class certification, seeking to cure the typicality defect by restricting the allegations regarding defective labels to Ocean Spray’s 100% Juice blends.¹³¹ Ocean Spray’s brief in opposition to the second motion dedicated nearly ten pages to discrediting Major’s claims that she relied on statements in Ocean Spray’s claims on its labels.

Ocean Spray maintained that Major did not meet the typicality burden because she could not show that she was misled by the allegedly defective labels, nor could she show that the Ocean Spray products indeed had added sugar.¹³² Ocean Spray also discussed ascertainability alongside the typicality requirement, describing the implicit requirement as “an integral part of typicality, predominance and manageability.”¹³³ It cited as proof of lack of ascertainability that Major had “no documentary evidence that she ever purchased any Ocean Spray 100% Juice product.”¹³⁴ This statement would easily fit into a commonality or adequacy analysis. And because those elements have clearer, better-defined standards, they are better grounds than typicality to defeat class certification in this case.

¹²⁸ No. 5:12-CV-03067 EJD, 2013 WL 2558125, at *1 (N.D. Cal. June 10, 2013).

¹²⁹ *Id.* at *2.

¹³⁰ *Id.* at *4.

¹³¹ Plaintiff’s Second Motion for Class Certification, for Appointment of Class Representative, and for Appointment of Class Counsel at 1, *Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067 EJD (N.D. Cal. Nov. 1, 2014).

¹³² See Defendant Ocean Spray’s Opposition to Plaintiff’s Second Motion to Certify Class at 2-9, *Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067 EJD (N.D. Cal. Jan. 3, 2014).

¹³³ *Id.* at 9.

¹³⁴ *Id.*

The briefing from both sides evinces confusion surrounding the distinctions among commonality, typicality, and the requirement of a definable class. Major’s brief, for example, repeats much of the same analysis in its typicality section as in its commonality and adequacy sections. It states, for instance, that typicality is satisfied because the determination of whether the single label at issue was lawful or unlawful “unquestionably” makes plaintiff typical of all class members.¹³⁵ In her brief’s commonality section, Major similarly maintains that “the question of unlawfulness is a common question.”¹³⁶ She uses this same conclusion to argue that “the claims of the class members and the class representatives are reasonably co-extensive,” and that, as a result, “there is no conflict” that would defeat adequacy of representation.¹³⁷

Ultimately, the court did not reach the issue of typicality on Major’s second motion because it granted Ocean Spray’s motion to dismiss on the issues that Major sought to be certified for class treatment.¹³⁸ Major’s motion for class certification was therefore rendered moot.¹³⁹

Without assessing the merits of either position, the parties’ briefing illustrates the confusion that occurs because of the overlap between typicality the other Rule 23 threshold requirements. The briefing shows that the concerns typicality is supposed to address are already covered by the more exacting post-*Dukes* commonality screen and by the lack of conflicts of interest required under the adequacy analysis. The requirement of an ascertainable class provides additional protection. Of course, *Major* is an isolated example, but it is indicative of the current state of the typicality requirement.

If typicality is duplicative of other Rule 23 requirements, why should it be the one to be jettisoned, rather than commonality, adequacy, or definability? As shown in this paper, those other requirements – with the exception of definability – have been more consistently defined across the circuits and have a firmer historical basis in the Rule. Typicality differs

¹³⁵ Plaintiff’s Second Motion For Class Certification, For Appointment of Class Representative, and For Appointment of Class Counsel, *supra* note 126, at 9.

¹³⁶ *Id.* at 7 (internal quotation marks omitted).

¹³⁷ *Id.* at 11 (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)).

¹³⁸ See *Major v. Ocean Spray Cranberries, Inc.*, No. 5:12-CV-03067 EJD, 2015 WL 859491, at *6 (N.D. Cal. Feb. 26, 2015).

¹³⁹ *Id.*

from commonality. The former contemplates the interrelatedness and relevance of the representative's claims compared to those of the class, while the latter considers the class as a whole and requires just one common question that will advance the litigation. Typicality also differs from adequacy of representation. The former takes a mechanical approach to ensuring due process by requiring that the legal claims or defenses are sufficiently similar; the latter take a more nuanced approach by examining the capacity, knowledge, enthusiasm, and potential conflicts of the class representative. But typicality does not differ from what happens when a court puts commonality and adequacy together. If the underlying value of typicality is to ensure that "the interests of the named representative[s] align[] with [those] of the class,"¹⁴⁰ the better-established requirements of commonality and adequacy fully address that concern. At this point in the development of Rule 23, it would be preferable for the Rules Committee to relieve courts and parties of the necessity of contorting and repeating facts to satisfy the now-obsolete typicality requirement. While reinforcement is justifiable, duplication and confusion are not.

IV. PROPOSALS FOR CHANGE

For the foregoing reasons, a Rule change is in order. The Rules Committee first needs to recognize the superfluity of typicality. Looking to cases such as *Falcon*, *Dukes*, and *Amchem*, the Committee should acknowledge that the Supreme Court has determined that the Rule 23(a)(2)–(4) requirements "merge," and that they therefore do not necessarily warrant discrete, individualized attention in every case. Lower court decisions have followed this prescription and do not always consider each of the Rule 23(a) requirements separately.¹⁴¹ Those that do tend to display repetition and confusion,¹⁴² suggesting that there is a duplicative element in Rule 23(a). Unlike commonality, which enforces the basic requirement that the class members are united by some shared question, and unlike

¹⁴⁰ *E.g.*, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

¹⁴¹ *See, e.g.*, *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 134 (S.D.N.Y. 2008) (addressing the typicality and adequacy inquiries together, and noting that defendants contested both requirements on the same grounds).

¹⁴² *See, e.g.*, *In re Sanofi-Aventis Sec. Litig.*, 293 F.R.D. 449, 454-55 (S.D.N.Y. 2013) (discussing typicality and adequacy together and acknowledging that the two inquiries overlap).

adequacy, which protects the due process rights of unnamed class members, typicality does not have a firm historic or practical basis. Some courts tack it on to the commonality inquiry, others to adequacy of representation. Few discuss it separately or invoke it as the sole reason for denying class certification. These judicial trends suggest the waning significance of typicality and militate in favor of the Committee excising it as a stand-alone Rule 23(a) requirement.

Because Rule 23(g) is now entirely dedicated to the assessment of class counsel, the Committee should also clarify that Rule 23(a)(4) applies only to the appropriateness of the class representative.¹⁴³ The Committee should direct the courts, in line with its stated intentions in the 2003 amendments, to assess adequacy of counsel only under Rule 23(g).¹⁴⁴ This shift would provide the Committee with a prime opportunity to clarify the requirements of Rule 23(a). Given the superfluity of Rule 23(a)(3)'s typicality requirement, the Committee should blend Rule 23(a)(3) and Rule 23(a)(4) into one requirement that addresses all issues regarding the appropriateness of the named plaintiff to represent the class. This includes the inquiry as to whether the named plaintiff suffered the same injury or was subject to the same course of conduct as the unnamed class members (previously a typicality concern that overlapped significantly with commonality). It also includes inquiries as to conflicts of interest between the named plaintiff and the class members (traditionally an adequacy inquiry). It may include an inquiry as to whether the named plaintiff possesses the same legal claims or defenses as those of the class (previously a typicality inquiry). But the new rule should jettison the formal requirement that the named plaintiff's claims or defenses typify those of class members. Instead, the rule should align itself with the rest of Rule 23 and seek to adopt a

¹⁴³ Many courts still assess the adequacy of class counsel under Rule 23(a)(4). *See, e.g., id.* at 454. But this is arguably not aligned with the Rules Committee's intentions as stated in the Advisory Committee's notes: "Rule 23(a)(4) will continue to call for scrutiny of the class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision." FED. R. CIV. P. 23(g) advisory committee's note (2003). The only circuit court to directly address this issue has said that continuing to analyze class counsel under Rule 23(a)(4) is incorrect. *See* *Sheinberg v. Sorensen*, 606 F.3d 130, 132-33 (3d Cir. 2010) (stating that although class counsel adequacy was "traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4)," it is now "governed by Rule 23(g)," and admonishing the district court for failing to apply that section).

¹⁴⁴ *Contra Sanofi-Aventis*, 293 F.R.D. at 454.

practical test that embodies the functional due process purposes behind the threshold requirements. The amended Rule 23 could look something like this:

- (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
 - 1. the class is so numerous that joinder of all members is impracticable;
 - 2. there are questions of law or fact common to the class; and
 - 3. the named parties' interests are sufficiently representative of those of the class that the interests of unnamed class members will be fairly and adequately protected.

In using the broader term “interests,” a term already found in Rule 23(a)(4), this revision establishes a more functional standard that recognizes that the similarity of the representative’s claims is not necessarily the best measure of her effectiveness. The revision would also sanction the trend of many courts to collapse the adequacy and typicality inquiries into one¹⁴⁵ and eliminate the confusion that can result from courts trying to separate the two.

This revision will not solve all the problems outlined in this paper. Most likely, even the revised rule would overlap with commonality and the implicit requirement of a definable class. But it would be a step in the right direction and a move toward increasing the clarity and functionality of Rule 23(a). If the Rules Committee is to continue to meaningfully respond to the shifting realities of legal practice, this revision is necessary.

CONCLUSION

With the Rules Committee already considering changes to Rule 23, it is time to revisit the four threshold requirements to ensure that each of them is serving a clear purpose. Upon close scrutiny, which this paper sought to provide, the Rule 23(a)(3) requirement of typicality appears to do little to advance the major goals of class action litigation: efficiency and fairness. With a bolstered commonality requirement, a historic and comprehensive adequacy of representation requirement, and the im-

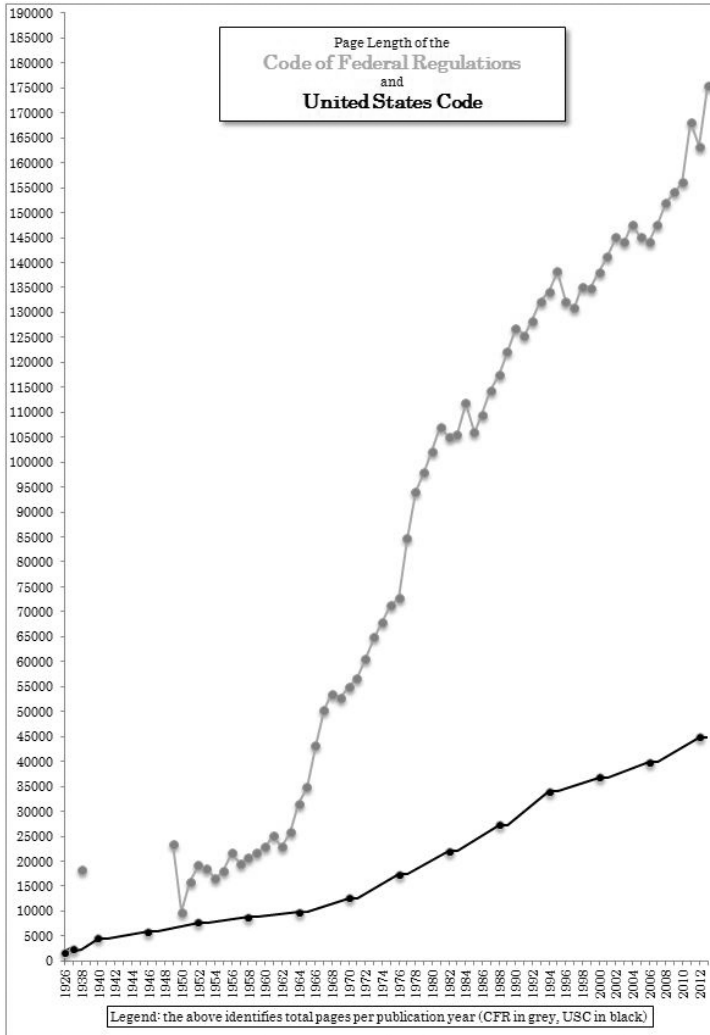
¹⁴⁵ *Id.* at 454; *In re BP, SLC Sec. Litig.*, 758 F. Supp. 2d 428, 437-39 (S.D. Tex. 2010); *Monster Worldwide, Inc.*, 251 F.R.D. at 134.

plied requirement of a definable class, there is little room for typicality to meaningfully contribute to the class certification decision. Its superfluity is underscored by recent cases that either combine the requirement with others or manifest confusion when attempting to define an independent role for it. Typicality, then, means little in modern practice and only leads to confusion. The Rules Committee should recognize its superfluity and ultimately excise the requirement. Such action would greatly improve the clarity of Rule 23.

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LEARNING FROM AND ABOUT THE NUMBERS

Carole Silver & Louis Rocconi[†]

INTRODUCTION

One of the few characteristics of U.S. legal education not now under attack is its effectiveness in teaching students to ‘think like lawyers.’¹ This is its signature success, and in its most basic form it involves (although does not stop at) learning to apply the law to the facts. Learning to “think like a lawyer” goes well beyond this but our focus

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¹ See generally ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007) (discussing the ways in which law school teaches students to recognize certain issues as relevant and others as irrelevant (to law)); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH W. WEGNER, LLOYD BOND AND LEE S. SCHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 28 (2007) (describing case-based Socratic dialogue as central to learning to think like a lawyer); Geoffrey R. Stone, *The Importance of Law School*, NY TIMES, July 25, 2011, www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/the-importance-of-law-school (“The practice of law demands a rigorous, self-critical (and critical), creative and empathic (how will my opponent and the judge see this issue?) mind-set. In general, legal education does this brilliantly. This is at the very core of a legal education.”); Nancy B. Rapoport, *Is ‘Thinking Like a Lawyer’ Really What We Want to Teach?*, J. OF THE ASSOCIATION OF LEGAL WRITING DIRECTORS CONFERENCE PROCEEDINGS 91, 93 (2001), papers.ssrn.com/sol3/papers.cfm?abstract_id=936248 (“shorthand for analyzing cases and statutes (applying both inductive and deductive reasoning and criticizing faulty reasoning), and communicating the analysis coherently? Is it shorthand for extrapolating principles of law from bits and pieces of authority (cases that are on-point or nearly so; analogous areas of law; law review articles)?”); Bridgette Dunlap, *Anyone Can ‘Think Like a Lawyer’: How the Lawyers’ Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 FORDHAM L. REV. 2817, 2823(2014) (“Thinking like a lawyer entails the ability to separate one’s assumptions, and moral intuitions from the legal question at hand; attention to detail; an acceptance of counsel’s role in the adversarial system; and a sense that even seemingly plain legal language is filled with terms of art.” (footnote omitted)).

here does not lie with the debate about the meaning of this term. Rather, we take aim at the other end of the equation of legal analysis: the facts to which the law, once identified, must be applied. The question addressed in this article is how law schools help students learn to understand the facts that contextualize legal issues.

In the past, the implicit assumption was that students admitted to law school were smart enough to learn the facts on their own in their first years of practice. Law school admission has been sufficiently selective so that there was some confidence that those admitted had the capacity to learn these facts. Law schools did not necessarily defer entirely to practice as the laboratory for this learning, and certain upper-level courses aimed at particular industries, for example, also provided an important foundation. But generally, new graduates joining practice settings that involved particularly thorny factual contexts were assumed to have a learning period as they began their careers, during which they were exposed to the clients and industries that would comprise the bulk of their attention.

Today, that grace period has vanished, replaced by demands for “practice ready” students who can “hit the ground running” upon graduation. This means it is more important for law students to learn how to understand the facts surrounding their clients’ problems. At the same time, however, learning the facts is more difficult for law students than ever before. The difficulty relates to increasing reliance on numbers, tables, graphs and data as a means of conveying information, as well as to the complexity of business and finance. As Michael Blastland and Andrew Dilnot explain, *The Numbers Game*, “For good or ill, [numbers] are today’s preeminent public language – and those who speak it rule.”²

Law students are not necessarily well-prepared to take on the task of understanding the language of commerce and interpreting and explaining

² MICHAEL BLASTLAND AND ANDREW DILNOT, *THE NUMBERS GAME* (2008), (introduction). See Barry Gewen, *What are the Odds a Handy, Quotable Statistic is Lying? Better Than Even*, NY TIMES (February 2, 2009), www.nytimes.com/2009/02/03/books/03gewen.html?pagewanted=all&_r=0 (last vis. May 14, 2014) (describing the book’s “aim [a]s to render its readers a little smarter about statistics, to make better citizens of them”). See generally S. W. Dingman and B. L. Madison, *Twenty-first-century quantitative education: Beyond content*, 13 PEER REVIEW 15 (2011), www.aacu.org/peerreview/pr-SU11/DingmanMadison.cfm (quantitative demands imposed by today’s society and the modern workforce are great and continue to grow; consequently, quantitative skills are need in today’s workplace, regardless of career); B. L. MADISON AND L. A. STEEN, EDs., *QUANTITATIVE LITERACY: WHY NUMERACY MATTERS FOR SCHOOLS AND COLLEGES* (2003).

numerical information, however.³ Unlike most other professional schools and despite the growing importance of quantitative literacy, U.S. law schools generally do not require particular course work or substantive knowledge as a condition of admission.⁴ And the vast majority of law school applicants have not majored in a subject that requires quantitative literacy.⁵ Nevertheless, in light of the recent and continuing decline in applicants to law school, it is unrealistic to imagine that law schools will move to impose new admission conditions at this time. Rather, as the law schools compete for applicants, adding conditions to admission is likely to be viewed as a move in the wrong direction, and one that may even further deplete the pool of potential applicants.

Moreover, it is not unusual for law students to explain their decision to attend law school as related to an aversion to numbers, which is consistent with the absence of admission criteria related to numeracy skills. According to Professor Jessica Gabel, a number of her law students “revealed that they chose law school because math and science presented subjects that were ‘too hard,’ ‘too boring,’ or ‘useless.’”⁶ Michelle Obama provided her

³ In this article, we use the terms “numeracy,” “quantitative analysis,” “quantitative information” and “numerical, graphical or statistical information” interchangeably, unless otherwise noted. For examples of others who use these terms interchangeably see, N.D. Grawe, *Beyond Math Skills: Measuring Quantitative Reasoning in Context*, 149 NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH 41 (2011); H.L. Vacher, *Looking at the Multiple Meanings of Numeracy, Quantitative Literacy, and Quantitative Reasoning*, 7 NUMERACY 1 (2014).

⁴ Certain law schools favor applicants with work experience, which may relate to gaining some understanding of business, for example. See *infra* n. 68.

⁵ According to data collected by Professor Derek Muller on applicants to law school in 2013, fewer than 13% of all law school applicants majored in a field that suggests facility with numbers: only 3.35% had majored in chemistry, biology, or electrical or mechanical engineering; 0.38% were math majors; and 8.76% majored in accounting, finance, or economics. Derek Muller, *Best Prospective Law Students Read Homer*, EXCESS OF DEMOCRACY (April 7, 2014), excessofdemocracy.com/blog/2014/4/the-best-prospective-law-students-read-homer (explaining that the data were obtained from LSAC). Note that the reported numbers reflect only majors with more than 150 applicants.

⁶ Jessica D. Gabel, *Forensiphilia: Is Public Fascination with Forensic Science a Love Affair or Fatal Attraction?*, 36 N.E. J. ON CRIM. & CIV. CON. 233, 256 (2010); see also Paula J. Williams, Kris Anne Tobin, Eric Franklin, Robert J. Rhee, *Tackling ‘Arithmophobia’: Teaching How to Read, Understand, and Analyze Financial Statements*, scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1487&context=facultypub (“Arithmophobia, . . . is a word that . . . Eric Franklin has coined to describe a common phenomenon I see among my students: fear of working with numbers, fear of spreadsheets. I have heard some students say, ‘I went to law school so that I wouldn’t have to deal with numbers.’”) (statement of Paula Williams); Gillian Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010) (“Lawyers don’t like numbers – as I often joke with my students, that’s why they choose to go to law school. Kidding

own take on this issue in comments delivered at the National Science Foundation: “And it starts with lighting the spark for science and math in elementary school and grade school. We talk about this all the time. I know for me, I’m a lawyer because I was bad at these subjects. (Laughter.) All lawyers in the room, you know it’s true. We can’t add and subtract, so we argue.”⁷ Nor is this a uniquely American characteristic; in interviews with international law students enrolled in U.S. law schools, the same explanation commonly is offered as the basis for their decision to study law outside of the U.S., too. A Belgian lawyer explained “I didn’t like math, I didn’t like science and the law appeared to be the most logical thing for me to do. I have no better explanation than that.”⁸

Others have written about the need for law graduates to have the same ability to think critically about numbers, business and financial matters as they do about legal issues.⁹ We build on this by offering insight into what

aside, however, the relative discomfort with numbers among lawyers individually adds up professionally to a slim empirical base on which to assess how well American lawyers are doing what they promise the public they will do: deliver legal services with competence and in the public interest.”); Elliott J. Weiss, *Accounting and Taxation: Teaching Accounting and Valuation in the Basic Corporation Law Course*, 19 CARDOZO L. REV. 679 (1997) (“Professors’ misgivings derive from the widely-held belief that most law students are math-averse - that they chose to attend law school, rather than business school, in large part because they wanted to avoid courses in which they would be required to deal with mathematical concepts.”); Robert Ambrogi, *What Lawyers Don’t Get About Finance*, BULLSEYE (March 26, 2008), practice.findlaw.com/financing-a-law-firm/what-lawyers-don-t-get-about-finance.html (“There are two kinds of people in the world, says finance expert Tom E. Greene: word people and number people. Most lawyers fall into the first group, which explains why they either panic or gloss over when faced with financial concepts in litigation.”).

⁷ Remarks at the National Science Foundation Family-Friendly Policy Rollout (9.26.2011), avail. at www.whitehouse.gov/the-press-office/2011/09/26/remarks-first-lady-national-science-foundation-family-friendly-policy-ro (visited 6.5.2014). See Arden Rowell and Jessica Bergant, *Numeracy and Legal Decision Making*, 46 ARIZ. ST. L. J. at p. 2 (forthcoming 2014), papers.ssrn.com/sol3/papers.cfm?abstract_id=2163645 (additional statements about lawyers’ challenges with math).

⁸ This and other interviews were conducted with lawyers whose first law degree was earned outside of the United States; for more information on the research for which the interviews were conducted, see Carole Silver, *The Variable Value of US Legal Education in the Global Legal Services Market*, 24 GEORGETOWN J. OF LEGAL ETHICS 1 (2010); Carole Silver, *States Side Story: ‘I like to be in America:’ Career Paths of International LLM Students*, 80 FORDHAM L. REV. 2383 (2012).

⁹ Edward K. Cheng, *Fighting Legal Innumeracy*, 17 GREEN BAG 2D 271 (2014) (“Numeracy is a fundamental skill for any intelligent, engaged participant in society, and we lawyers ignore it at our peril.”); Howell E. Jackson, *Analytical Methods for Lawyers*, 53 J. LEGAL EDUC. 321, 322 (2003) (“Quantitative skills are essential for lawyers in the twenty-first century.”); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 116 (2001) (suggesting that law schools teach empirical methods to certain students). See Bryant G. Garth and Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 470 (1993) (competence itself is not static, and

actually is happening in law schools in this regard, using data from law students about what they think they are learning in law school related to business and financial matters, and the extent to which they perceive their law school classes require them to use numerical and statistical information generally. The importance of these data goes beyond what they show about the perceptions of a sample of law students' experiences in law school. Rather, they fit into a larger framework for explaining the value of legal education to prospective students and to the hiring market for law graduates.

Section I of this article reviews the need for quantitative literacy generally and specifically in law, as well as the importance of understanding business and financial concepts. Section II describes the data mentioned above, which were gathered in 2013 through a set of survey questions completed by more than 8,000 law students enrolled in 34 U.S. law schools. Section III sets out the survey analyses and findings. In Section IV, we draw on the data and the survey itself to suggest a number of paths going forward that will allow law schools to address students' learning gaps. Approaching these gaps so that improvement can be measured and monitored may lend credibility to law school efforts in the current, challenging environment of U.S. legal education.

I. THE NEED FOR QUANTITATIVE, BUSINESS AND FINANCIAL LITERACY

The importance of numbers in society stands apart from the specific context of law. As Professor Robert Orrill explained, "Increasingly, numbers do our thinking for us. They tell us which medication to take, what policy to support, and why one course of action is better than another. These days any proposal put forward without numbers is a nonstarter. Theodore Porter d[id] not exaggerate when he wr[ote]: 'By now numbers surround us. No important aspect of life is beyond their reach'."¹⁰ The National Council on Education and the Disciplines, which focuses on "core

. . . law schools are important partly because they help change norms about competence.").

¹⁰ Robert Orrill, Forward, *National Council on Education and the Disciplines, Why Numeracy Matters for Schools and Colleges* at p. vii (2003), www.maa.org/sites/default/files/pdf/QL/WhyNumeracyMatters.pdf (referring to Theodore M. Porter, *The Triumph of Numbers: Civic Implications of Quantitative Literacy*, in LYNN STEEN, ED., *WHY NUMBERS COUNT: QUANTITATIVE LITERACY FOR TOMORROW'S AMERICA* (1997)).

literacies” for students from elementary school through college, described the need for quantitative literacy as involving the ability to “understand and correctly interpret disease or unemployment rates, the comparative costs of car or apartment rental agreements, and trends in the composition of the country’s population[.]”¹¹

For lawyers, information must be interrogated, analyzed and explained or translated, whether or not presented in textual form.¹² Ed Cheng, the latest to add to this argument, labels as “legal numeracy” the ability to “treat statistical studies critically.”¹³ Cheng continues: “As the statistician George Box once warned, ‘[r]emember that all models are wrong; the practical question is how wrong do they have to be to not be useful.’”¹⁴ Cheng asserts that “For lawyers, numeracy should be less about numbers per se and more about statistical inference or how to interpret and understand scientific or social scientific studies.”¹⁵ His point is that lawyers should have the ability to “critique . . . what statistical studies mean, and . . . explain the relevant ideas to factfinders.”¹⁶ Indeed, data analytics is gaining attention and investment within the legal industry, including from traditional law firms.¹⁷

¹¹ Richard L. Scheaffer, *Statistics and Quantitative Literacy*, NAT’L COUNCIL ON EDUCATION AND THE DISCIPLINES, WHY NUMERACY MATTERS FOR SCHOOLS AND COLLEGES 145 (2003), www.maa.org/sites/default/files/pdf/QL/WhyNumeracyMatters.pdf.

¹² See generally Gabel, *supra* n. 6 at 255-256 (“[W]e in the legal field glimpse the shortcomings of science through the lens of wrongful convictions. As it stands now, the legal system heavily relies upon the post-conviction process to fix the bad science. In doing so, we treat the effect rather than the cause. In failing to treat the cause, we also discount one of the accessories to the crime of a wrongful conviction - bad lawyering. Bad lawyering includes not only defense lawyers, but also prosecutors and judges. It is my opinion that if legal education began to incorporate more math and science, attorneys would not cover their ears and shield their eyes at the invocation of these words. A broader openness and greater understanding of math and science in the legal field would perhaps lead to fewer wrongful convictions. As a legal profession, unless we appreciate our own role in the process, real reform will remain an illusion.”) (footnote omitted).

¹³ Edward K. Cheng, *Fighting Legal Innumeracy*, 17 GREEN BAG 2D 271, 275 (2014); see also LEILA SCHNEPS AND CORALIE COLMEZ, MATH ON TRIAL (2013), 221 (After outlining ten cases where math played a significant role in developing the wrong conclusions, the authors question the role of math in the courtroom “The obvious disadvantage . . . is that it is only too easy for non-mathematicians, or for mathematicians who are not used to applying math in real life situation, to misunderstand and misuse mathematics.”).

¹⁴ Cheng, *supra* n. 13 (emphasis in original) (quoting from BOX & DRAPER, EMPIRICAL MODEL BUILDING AND RESPONSE SURFACES (1987) at 74).

¹⁵ *Id.* at 272.

¹⁶ *Id.* at 273.

¹⁷ Rebekah Mintzer, *Legal Industry Investing in Data Analytics*, CORPORATE COUNSEL (3.9.2015), avail. at www.corpcounsel.com/id=1202720031578/Legal-Industry-Investing-in-Data-Analytics?

In addition to numeracy skills, lawyers must be familiar with business and financial concepts, as well. These are relevant to lawyers' work because of the role of businesses as clients and employers, the significance of financial matters in public and private enterprise, and the importance of both to the work of managing a law practice.

Research on the legal profession indicates that business clients have assumed an increasingly significant role in the work of a substantial portion of the legal profession.¹⁸ In order to understand the problems and legal issues that cause these clients to seek legal advice, lawyers must understand the language and concepts of business generally, including having at least a rudimentary understanding of how to read simple financial statements. This is certainly relevant for law graduates who plan to work in corporate-focused law firms.¹⁹ But the importance of business and financial literacy is not limited to graduates who join "BigLaw." Lawyers working in other settings also need this foundation in order to understand the problems of their clients. Whether practicing in a government agency or in a solo or small firm setting, lawyers must understand the financial implications of their clients' actions and the contexts in which those decisions arise.

Businesses also employ law graduates to work outside of practicing roles. Data from the National Association of Law Placement reveal that more than 18% of 2013 graduates began their careers with employment in business; this is the high point in a trend of increasing proportions of graduates finding first jobs in business since 2010.²⁰ The American Bar Association's Law Graduate Employment Data indicate that 15.2% of 2013 law

kw=Legal%20Industry%20Investing%20in%20Data%20Analytics&et=editorial&bu=Corporate%20Counsel&cn=20150314&src=EMC-Email&pt=Weekend%20Round-Up.

¹⁸ John P. Heinz, et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOCIETY REV. 751 (1998).

¹⁹ At Columbia Law, approximately 90% of all graduates work as corporate lawyers or litigators with corporate clients within five years of graduation. Victor Fleisher, *Deal: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 480 (2002), available at heinonline.org/HOL/Page?handle=hein.journals/colb2002&div=15&g_sent=1&collection=journals#483. See also Garth and Martin, *supra* n. 9 at 498 (discussing variation in the complex sources for new law graduates' learning of skills and knowledge necessary for practice).

²⁰ NALP CLASS OF 2013 EMPLOYMENT STATISTICS (2014), www.nalp.org/uploads/Classof2013SelectedFindings.pdf ("Employment in business reach a historic high of 18.4% in 2013, and has exceeded 15% since 2010. The percentage of jobs in business has been in the 10-14% range for most of the two decades prior to 2010, except in the late 1980s and early 1990s, when it dipped below 10%. About 28% of these jobs were reported as requiring bar passage, and about 42% were reported as jobs for which a JD was an advantage.")

school graduates took jobs classified as “Business or Industry,” which represented the second highest category of employment after “Law Firm Positions,” and was nearly equal to the 15.4% of 2013 graduates who reported plans to enter either “Government” or “Public Interest.”²¹ Furthermore, a substantial number of law graduates who begin their careers practicing in law firms end up working in business settings according to data from the *After the JD* project (AJD), which has tracked a nationally representative sample of lawyers who were admitted to practice in the U.S. in the year 2000. While only 8% of AJD lawyers worked in business settings within the first couple of years after passing the bar, at the 13-year mark in their careers that proportion rose to 20%.²² Not all of these lawyers are practicing law: slightly more than one-third of the AJD lawyers working in business at the 13-year mark were not practicing law.²³

Finally, lawyers must manage their practices and this also calls for some business acumen.²⁴ The American Bar Association estimates that “of the total number of practicing lawyers in the United States, more than 48 percent are in solo practice.”²⁵ Several law schools, including City University of New York and Seattle University, have set up incubator programs to prepare students for solo practice.²⁶ A few more have partnered with or-

²¹ ABA LAW GRADUATE EMPLOYMENT DATA (2013), www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_graduate_employment_data.authcheckdam.pdf.

²² AFTER THE JD III: THIRD RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 27 (2014) (“The path to business appears well travelled among this cohort of lawyers, as this sector continues to represent a substantial segment of AJD respondents. While only 8% of AJD respondents began their careers in business, by Wave 2, those working in this sector grew to 19% and, in Wave 3, to 20%.”).

²³ *Id.* See generally ASSOCIATION OF CORPORATE COUNSEL, ACC’S CHIEF LEGAL OFFICERS 2013 SURVEY 4 (2014) www.acc.com/legalresources/loader.cfm?csModule=security/getfile&pageid=1327206 (“Over the past 12 months, the majority (77 percent) of respondents spent most of their time advising executives and participating in strategic corporate issues. The top three non-legal skills many survey respondents are seeking to develop within their department include business management (63 percent), communication (53 percent) and project management (52 percent).”)

²⁴ The concern that the work of lawyers and the legal profession generally are becoming more of a business than a profession is not new. For an insightful analysis, see Garth and Martin, *supra* n. 9 at 502 (finding “support for this story of an increasingly commercialized profession”).

²⁵ American Bar Association, *Solo and Small Firm Lawyers: A Renewed Priority for Bar Associations* (Spring 2011), www.americanbar.org/publications/bar_leader/2010_11/3503/solosmall.html.

²⁶ Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, NY TIMES, March 7, 2013, www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html?pagewanted=all; Randy Trick, *Legal Incubators, Helping to Hatch Solo Practices*, NW LAWYER, (September 2013), nwlawyer.wsba.org/nwlawyer/sept_2013#pg20 (“In the last several years, as hiring rates have

ganizations that offer guidance on helping students or new graduates develop their own practices and provide training in managing a law firm.²⁷ Further, as the legal market continues to develop post-2008, particularly with new sorts of firms offering variations on services and fee strategies, among other things, learning to manage the business side of law practice will be important as lawyers build careers in managing legal practice organizations as well as provide legal advice from these organizations.²⁸

Criticism of law schools' failure to ensure that their graduates have basic quantitative skills and an understanding of core business and financial concepts has come from within and outside of the academy. Internal criticism generally is in the context of curricular recommendations; external criticism is part of the debate that centers on the value of legal education and new law graduates.²⁹ For example, a recent article in *The Economist* reported that "[m]any lawyers end up working in business, but their legal education leaves them ill-prepared for this. Apart from a bit of accounting, law school courses typically contain little that is of help in running an enterprise."³⁰ The external and internal are linked in the comments of

weakened and schools have placed more focus on preparing students to practice, the academic community has experimented with ways to address these concerns of students by blending small-business entrepreneurship with low-bono legal access. Programs to help new solos launch their own law firms with the guidance of the schools that used to teach them are cropping up across the nation.").

²⁷ Victoria Pynchon, *Occupy Law School at Solo Practice University*, FORBES, November 20, 2013, www.forbes.com/sites/shenegotiates/2011/11/20/occupy-law-school-at-solo-practice-university/2/; see generally SOLO PRACTICE UNIVERSITY, solopracticeuniversity.com/bridges/schools/ (describing services, partners, and more).

²⁸ Irene Plagianos, *And Now for Something Completely Different: The Future of Legal Education*, THE AM-LAW DAILY (April 11, 2010) (among other things, according to Chester Paul Beach, then Associate GC of United Technologies Corporation, "law school doesn't teach lawyers such practical business management skills as financial literacy and effective executive communication").

²⁹ See, e.g., Ashby Jones and Joseph Palazzolo, *What's A First-Year Lawyer Worth?*, WALL ST. J. (October 17, 2011), www.wsj.com/articles/SB10001424052970204774604576631360989675324 ("Law firms often treat the first two years of an attorney's career as a sort of apprenticeship, albeit a well-paid one Traditionally, law firms have recouped costs of young attorneys by giving them simple jobs – research, proofreading or culling important documents from boxes of paperwork – and passing the costs along to clients in the form of hours billed at \$200 or \$300 a pop. But many companies are now refusing to pay those kinds of bills. According to a September survey for The Wall Street Journal by the Association of Corporate Counsel, a bar association for in-house lawyers, more than 20% of the 366 in-house legal departments that responded are refusing to pay for the work of first- or second-year attorneys, in at least some matters. Almost half of the companies, which have annual revenues ranging from \$25 million or less to more than \$4 billion, said they put those policies in place during the past two years, and the trend appears to be growing.").

³⁰ *Commercial law: Business education for lawyers*, THE ECONOMIST (October 19, 2013) www.economist.com.

Brooklyn Law School Dean Nicholas W. Allard, who is described as “arriv[ing] at Brooklyn . . . from the Washington law firm Patton Boggs.” Allard commented that “‘Law firms were telling us that associates had no business literacy’ ‘The need for business literacy has existed for a long time and graduates had to learn the business basics on the wing,’ Mr. Allard said, ‘but the legal recession has forced law schools to address flaws like this that had been papered over, or not addressed, in flush times.’”³¹

The largest law firms responded to their clients’ concerns by developing new educational programs for recent graduates that address business and basic financial and accounting concepts, which are offered on top of training in legal issues that firms have offered for years. Debevoise & Plimpton and Skadden, Arps, Slate, Meager & Flom are two firms that have instituted training programs in business and finance for new associates to complete prior to beginning practice.³² “Some firms are using business training to give their attorneys a better understanding of clients. At Wilmer Cutler Pickering Hale and Dorr LLP in Boston, Jane Eiselein, director of professional development, says the firm last September piloted an executive education business program for second-year associates taught by Northeastern University. ‘We realized our associates don’t have an inside view of how our clients work’”³³

For lawyers who practice in settings other than BigLaw, third party providers have organized similar training programs. One, offered by the Practising Law Institute, is titled a “Pocket MBA” and includes topics on financial reporting, finance and accounting terminology, understanding financial statements, and the basics of corporate finance, among other subjects.³⁴ Another is provided by a partnership of the Indiana Bar Association and Butler University’s College of Business and aimed at teaching man-

com/news/business/21588086-effort-turn-lawyers-creators-not-suffocators-business-commercial-law.

³¹ Elizabeth Olson, *Law Students Leave Torts Behind (for a Bit) and Tackle Accounting*, NY TIMES (February 12, 2015), dealbook.nytimes.com/2015/02/12/law-students-leave-torts-behind-for-a-bit-and-tackle-accounting/.

³² Vanessa O’Connell, *Trendy New Perk (or Punishment?) for Law Firm Junior Lawyers: Business Education*, WALL ST. J., Aug. 22, 2011, blogs.wsj.com/law/2011/08/22/trendy-new-perk-or-punishment-for-law-firm-junior-lawyers-business-education/.

³³ Alina Dizik, *Law Firms Embrace Business School 101*, WALL ST. J., May 20, 2009, online.wsj.com/news/articles/SB124277243918636539.

³⁴ See PLI, *Pocket MBA Summer 2015: Finance for Lawyers and Other Professionals*, described at www.pli.edu/Content/Seminar/Pocket_MBA_Summer_2015_Finance_for_Lawyers/_/N-4kZ1z129ld?Ns=sort_date%7c0&ID=225539.

agement and financial skills training to mid-level associates.³⁵

Certain law firms also have developed opportunities for mid-level and partner-track lawyers to learn about business matters. For example, Baker & McKenzie, Quarles & Brady, Nixon Peabody, WilmerHale, and Addleshaw Goddard.³⁶ Milbank Tweed, took a slightly different approach by establishing a “collaboration with Harvard Law School . . . meant to give its [mid-level] associates training in business issues, in addition to legal issues, [including] accounting, economics, finance, and negotiation – areas clients themselves tend to care deeply about.”³⁷

But these programs will not reach all law graduates. Only a small segment of new lawyers practice with firms in the “BigLaw” category and third-party programs often are quite costly.³⁸ Perhaps in response to this gap, as well as to address the concerns of prospective employers of their students, law schools have moved to fill this void.³⁹ A survey of law school curricula published in 2012 reported an increase in business and corporate law offerings over the period from 2002 to 2010, as well as in related skills courses and transactional and business-focused clinics.⁴⁰ Certain schools have gone further. NYU added a mandatory first-year course on financial literacy.⁴¹ Cornell offers a one-credit intensive weekend class that “explains business concepts and gives students a fundamental business vocabulary.”⁴² Others have integrated similar topics into their transactional

³⁵ Marilyn Odendahl, *Bar introduces business school for lawyers*, THE INDIANA LAWYER (Aug. 15, 2012), www.theindianalawyer.com/bar-introduces-business-school-for-lawyers/PARAMS/article/29441 (describing the program as “a five-seminar Business School for Lawyers.”).

³⁶ Alina Dizik, *Law Firms Embrace Business School 101*, WALL ST. J., May 20, 2009, online.wsj.com/news/articles/SB124277243918636539.

³⁷ Vanessa O’Connell, *New Solution to Associate Woes: A Harvard Accounting Class*, WALL ST. J., Feb 9, 2011, blogs.wsj.com/law/2011/02/09/new-solution-to-associate-woes-a-harvard-accounting-class/?blog_id=14&post_id=39056.

³⁸ See *supra* n. 34 (noting fees of \$1,695 for PLI’s two-day seminar during the summer of 2015).

³⁹ See generally *Commercial law: Business education for lawyers*, THE ECONOMIST (October 19, 2013), www.economist.com/news/business/21588086-effort-turn-lawyers-creators-not-suffocators-business-commercial-law.

⁴⁰ Catherine Carpenter, *SURVEY OF LAW SCHOOL CURRICULA 2002-2010 74-75* (2012).

⁴¹ Alexandra Tilsley, *Law Schools Get a New Look*, INSIDE HIGHER ED, Oct. 18, 2012, www.insidehighered.com/news/2012/10/18/nyu-announces-changes-its-law-school-curriculum#sthash.0zIQOD2q.dpbs.

⁴² Andrew Clark, *Stout Teaches New Business ‘Boot Camp’ for Law Students*, CORNELL LAW SCHOOL NEWS (October 29, 2013), www.lawschool.cornell.edu/spotlights/Stout-Teaches-New-Business-Boot-Camp-for-Law-Students.cfm (quoting Professor Lynn Stout).

offerings,⁴³ which in turn have increased in recent years. The 2012 curriculum survey mentioned above reports that approximately 50% of schools offer a specialization or certificate in business law, although the survey did not gather information on whether these specializations teach quantitative skills or delve into business and financial matters along with the law regulating businesses.⁴⁴ Relatedly, many law schools have expanded the number of business law courses they offer, including adding business and finance-related seminars.⁴⁵

These law school responses are important indications of an effort to address students' shortcomings. But if law schools do no more than approach the problem by offering another course, they will have missed an opportunity to develop a strategy that satisfies concerns for efficiency and effectiveness. The resource-constrained environment that characterizes legal education today argues for focusing on efficiency in developing new course offerings,⁴⁶ and it is possible that at least certain segments of the law student population enter law school with numeracy and business liter-

⁴³ Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUMBIA BUS. L. REV. 475, 495 (2002) (describing Columbia University Law School's business basics segment of its transactional curriculum, which they call "B-School Lite" and is described as "provid[ing] students with a more user-friendly, accessible, somewhat simplified version of some of the financial concepts taught in business school. The Deals courses do not purport to make students into finance wizards or to substitute for business school, but rather to familiarize students with fundamental economic concepts and goals and the common terminology that their corporate clients will use.").

⁴⁴ Catherine Carpenter, SURVEY OF LAW SCHOOL CURRICULA 2002-2010 70-71 (2012) (47 schools in the 2010 survey of law school upper division curriculum noted that they had either a specialization or certification in business law, with an additional four schools offering transactional skills).

⁴⁵ *Id.* at 74-75 (55 school reported in 2010 that they had a significant increase in Business/Corporate Law curricular offerings. Additionally, 125 schools reported that they offered Transactional Skills as a professional skills course offering).

⁴⁶ See, e.g., *Washington and Lee School of Law, School of Law Strategic Transition Plan* (Feb. 9, 2015), www.wlu.edu/presidents-office/messages-to-the-community/message-to-the-law-school-community/strategic-transition-plan (describing senior faculty salary reductions, elimination of certain administrative and staff positions, and cuts in budget for visiting and adjunct faculty); Peter Schworm, *Waning Ranks at Law Schools*, BOSTON GLOBE (July 6, 2014), www.bostonglobe.com/metro/2014/07/05/law-school-enrollment-fails-rebound-after-recession-local-colleges-make-cuts/rR7dYqWbSrOeXPbS9ibqtN/story.html ("At New England Law School in Boston, first-year enrollment has dropped 40 percent since fall 2010, while Western New England saw a 28 percent decline. In response, New England Law School last year froze wages, offered buyouts to some faculty members, and reduced its administrative staff. The dean, John O'Brien, took a voluntary pay cut of 25 percent."); Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools are Cutting Staff*, WALL ST. J., July 15, 2013, online.wsj.com/news/articles/SB10001424127887323664204578607810292433272 ("Having trimmed staff, some schools are offering buyouts and early retirement packages to senior, tenured professors . . .").

acy – making it unnecessary for law schools to offer additional foundation-level education. But law schools have no simple mechanism for understanding a student’s quantitative or business literacy. There are no criteria on the LSAT⁴⁷ and applications generally do not require a discussion of relevant experience or background. This leaves schools without a baseline for developing and monitoring new educational initiatives. Perhaps most important, without a strategic approach to this education gap, law schools will fail to respond to the metric-oriented mindset that is at least in part the basis for the need for numeracy skills and business acumen in the first place, and which also is reflected in the focus on assessment in higher education generally.

II. DATA ON LAW STUDENTS’ EDUCATIONAL EXPERIENCES: LEARNING ABOUT NUMBERS, BUSINESS, AND FINANCIAL CONCEPTS

In this article we draw on data gathered in 2013 by the Law School Survey of Student Engagement (LSSSE). LSSSE is an annual survey used to assess the extent to which law school students are exposed to and participate in a variety of educational practices identified as effective by research on higher education generally.⁴⁸ The survey presents law students with questions about a wide variety of aspects of their law school experience,

⁴⁷ *About the LSAT*, www.lsac.org/jd/lsat/about-the-lsat (noting that the LSAT “provides a standard measure of acquired reading and verbal reasoning skills that law schools can use . . . in assessing applicants.” The test is intended to measure reading comprehension, analytical reasoning, and logical reasoning.). In comparison, the GMAT and MCAT exams also assess quantitative reasoning. See *The GMAT Exam: Quantitative Section*, www.mba.com/us/the-gmat-exam/gmat-exam-format-timing/ (the GMAT exam contains a 75 minute section of quantitative reasoning which “measures your ability to analyze data and draw conclusions using reasoning skills.” Additionally the thirty minute Integrated Reasoning section, “measures your ability to evaluate information presented in multiple formats from multiple sources – skills you need to succeed in our technology advanced, data driven world.”); *Preparing for the MCAT*, ASS’N OF AMERICAN MEDICAL COLLEGES, www.aamc.org/students/applying/mcat/prepare/ (describing quantitative applied sections regarding the hard sciences and a section on reasoning using quantitative data).

⁴⁸ Carole Silver, Louis Rocconi, Heather Haeger, Lindsay Watkins, *Gaining From the System: Lessons From the LawSchool Survey of Student Engagement about Student Development in Law School*, 10 UNIV. OF ST. THOMAS L. J. 286 (2012); Cassandra M.S. Florio & Steven J. Hoffman, *Student Perspectives on Legal Education: A Longitudinal Empirical Evaluation*, 62 J. LEGAL EDUC. 162 (2012); George Kuh & Patrick O’Day, *Assessing What Matters in Law School: The Law School Survey of Student Engagement*, 81 IND. L.J. 401 (2006).

such as the time and effort they invest in preparing for and participating in class; their discussions, interactions and relationships with students, faculty and staff; and their participation in certain law school activities and groups.⁴⁹ In each LSSSE administration, several sets of experimental questions are posted to a subset of respondents; experimental questions might examine new content or information, test potential new questions, or test the validity of existing questions. In 2013, one set of experimental questions focused on students' exposure to and use of financial, business, and quantitative activities in law school.

Responses to the experimental question set were received from 8,302 law students enrolled in 34 U.S. law schools.⁵⁰ Approximately half of the respondents were male and half were female. Over 90% of respondents were enrolled in law school full-time. Roughly one-third were each of 1Ls, 2Ls and 3Ls.⁵¹ About three-quarters of respondents identified as White, 6% as Asian/Asian-American, 6% as Hispanic, 6% as Black/African-American, and 6% identified as another race/ethnicity (e.g., Native American) or multiracial. Table 1 sets out a comparison of the demographic makeup of students responding to LSSSE in 2013 and their law schools to the national profile of American Bar Association approved law schools. Generally, the respondent group reflects the national profile of law students and law schools except that the respondent group has more White students, and law schools with enrollments less than 500 students tend to be over-represented.

⁴⁹ The survey is available on the LSSSE website, lsse.indiana.edu/pdf/LSSSE_main_US_Q.pdf.

⁵⁰ LSSSE also routinely includes Canadian law schools, but these were excluded from this experimental question set. For information on law schools that have participated in LSSSE, see lsse.indiana.edu/schools.cfm.

⁵¹ Approximately 1% of respondents were 4Ls, indicating enrollment in an evening or part-time program.

TABLE 1: REPRESENTATIVENESS OF LAW STUDENTS AND SCHOOLS IN ANALYTIC SAMPLE

	Analytic sample	ABA schools not in sample	All ABA schools ⁵²
Male students	49.5%	53.1%	53.0%
African-American/Black students	6.1%	8.2%	8.1%
Asian/Asian-American/Pacific Islander students	6.0%	7.6%	7.5%
Hispanic/Latino students	6.1%	11.0%	10.6%
White students	76.1%	69.6%	70.2%
Other race-ethnicity/multiracial	5.6%	3.5%	3.5%
Enrollment size: Less than 500	47.1%	28.6%	31.8%
Enrollment size: 500 – 900	41.2%	51.8%	49.8%
Enrollment size: Greater than 900	11.8%	19.6%	18.4%
Median Undergraduate GPA	3.38	3.37	3.37
Median LSAT score	156.1	155.7	155.9

The experimental question set relating to quantitative and business-related literacy was comprised of five questions that addressed various aspects of students’ exposure to and use of quantitative, business and financial information. Three questions asked students about learning business or financial concepts and skills. One of these asked students how much their law school helped them acquire or develop financial or business skills (response options: very much, some, very little, none)(Q2). Another asked students when they learned to read and understand a financial statement (balance sheet and/or income statement)(response options: before coming to law school/through activities unrelated to law school, in a law school class or other law school sponsored activities, not applicable/never)(Q3). A third asked students how often, during the current school year, they read a national business or finance journal, newspaper or web-based publication (such as the *Wall Street Journal*, *Forbes* or *Yahoo Finance*) (response

⁵² The national profile of all American Bar Association (ABA) approved law schools is based on data from the ABA for the 2012-2013 academic year. See *Employment Statistics*, AMERICAN BAR ASS’N, www.americanbar.org/groups/legal_education/resources/statistics.html; *ABA Required Disclosures*, AMERICAN BAR ASS’N, www.abarequireddisclosures.org/.

options: very often, often, sometimes, never) (Q4).

A second topic covered was students' use of quantitative information (Q1). This was a four-part inquiry, adapted from the National Survey of Student Engagement,⁵³ that asked students how often, during the current school year, they (i) discussed the meaning of numerical, graphical, or statistical information, (ii) evaluated conclusions others have reached that were based on numerical, graphical or statistical information, (iii) explained in writing the meaning of numerical, graphical or statistical information or (iv) used numerical graphical or statistical information to help analyze an issue (such as damages). Response options for these items were very often, often, sometimes and never.

The fifth question focused on students' perceptions about the emphasis of their coursework in law school. Students were asked how much their coursework involved learning to understand (i) numerical, graphical or statistical information, (ii) business concepts or (iii) financial concepts (response options: very much, some, very little, not at all)(Q5). Questions and response options are set out in the Appendix.

III. ANALYSIS AND FINDINGS

In this section, we review the results of the experimental survey questions. We took an exploratory approach to analyze these data; we investigated overall trends reported by respondents and examined differences among sub-populations of students, including, for example, differences by year in law school, gender and race/ethnicity. We also explored the relationship of responses to these experimental questions with other reported experiences in law school as reflected in data captured through the LSSSE core survey.

We begin our discussion of the data by focusing on law students' use of numerical, graphical or statistical (NGS) information (identified above as Q1). Generally, respondents reported that they do not use NGS information much at all. The average scores on these items ranged from 1.63 to 1.90; possible scores range from 1 to 4 with a 1 indicating an average response of 'never,' 2 indicating an average response of 'sometimes,' 3 indicating an average response of 'often' and 4 indicating an average response of 'very often.' As reported in Table 2, approximately one-third of respondents

⁵³ Amber D. Dumford and Louis M. Rocconi, *Development of the quantitative reasoning items on the National Survey of Student Engagement*, 8 *NUMERACY* (2015), dx.doi.org/10.5038/1936-4660.8.1.5.

reported *never* discussing, evaluating or using NGS information, and half of all respondents reported that they never explained in writing the meaning of NGS information – an activity that involves thinking through how to explain numbers with words. Only between 10% and 14% of students reported doing any these activities often or very often.⁵⁴

TABLE 2: FREQUENCIES FOR STUDENTS’ USE OF NGS INFORMATION

	Discussed the meaning of NGS information	Evaluated conclusions others have reached based on NGS information	Explained in writing the meaning of NGS information	Used NGS information to analyze an issue
1 Never	30%	34%	50%	34%
2 Sometimes	55%	52%	40%	52%
3 Often	11%	11%	8%	11%
4 Very often	3%	3%	2%	3%

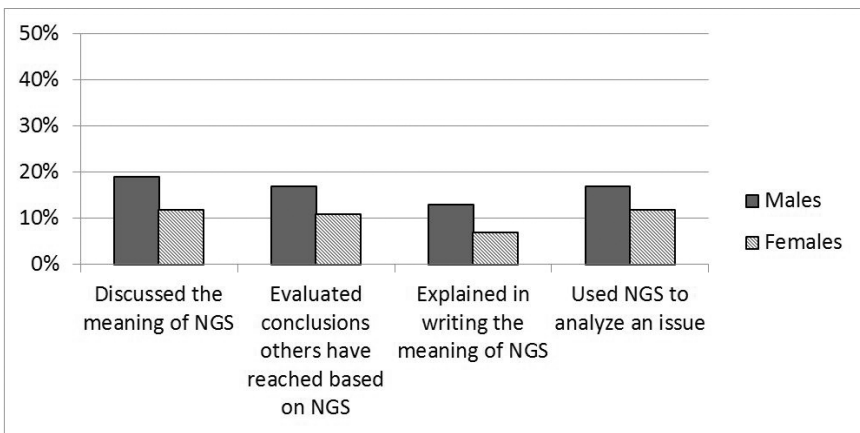
We examined differences in students’ reported use of NGS information by year in law school, gender and race/ethnicity. First-year students reported statistically significant less use of NGS information than second-year students on three of the four NGS items: discussing the meaning of NGS information, evaluating conclusions of others based on NGS information, and explaining the meaning of NGS information in writing. This is not particularly surprising in light of the nearly universal focus of first-year classes on learning legal analysis.⁵⁵ On the other hand, first-year students reported using NGS information to help analyze an issue *more often* than their second- and third-year counterparts. Additional research is necessary to clarify whether this difference relates to a substantive difference or to the parenthetical example in the phrasing of the sub-question that mentioned damages as one context in which such use of information

⁵⁴ These results are consistent with research on undergraduate students about their use of quantitative information, where students’ academic majors correlate with significant differences in quantitatively-focused activities. Not surprisingly, students in science, technology, engineering and mathematics disciplines report the most frequent use while students in the arts and humanities report the least. Louis M. Rocconi, Amber D. Lambert, Alexander C. McCormick, Shimon A. Sarraf, *Making College Count: An Examination of Quantitative Reasoning Activities in Higher Education*, 6 NUMERACY (2013), dx.doi.org/10.5038/1936-4660.6.2.10; Dumford and Rocconi, *supra* n. 53.

⁵⁵ See Sullivan, et al., *supra* n. 1.

might occur, or to another factor. Differences also were found with regard to gender and race-ethnicity. As indicated in Figure 1, males reported using NGS information more than females, which parallels findings from research on undergraduate students.⁵⁶ Additionally, Asian students reported using NGS information more often than their African-American/Black and Hispanic counterparts (see Figure 2).⁵⁷

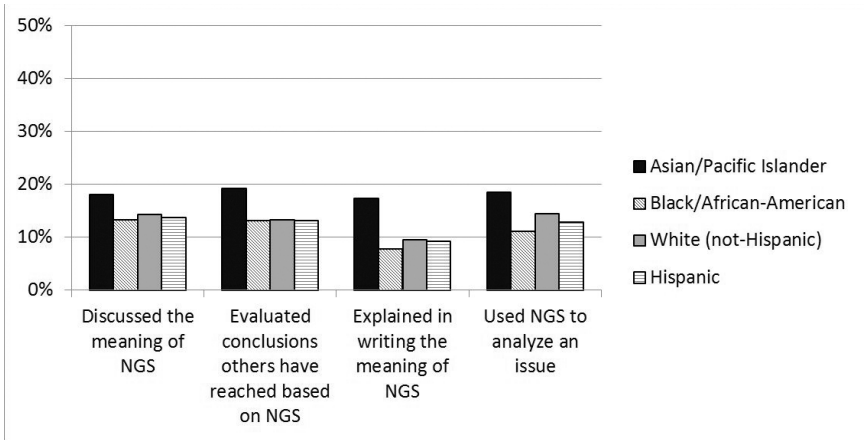
FIGURE 1: PERCENT USING NGS INFORMATION OFTEN OR VERY OFTEN, BY GENDER



⁵⁶ Differences between males and females were statistically significant for all four quantitative items (all p-values < .001; Cohen’s d effect sizes ranged from d=.20 for “used NGS to analyze an issue” to d=.26 for “explained in writing the meaning of NGS”). When examining undergraduate students’ use of quantitative information in college, both Rocconi et al., *supra* n. 54, and Dumford & Rocconi, *supra* n. 53, have noted males reported more-frequent use of quantitative information than females. In addition, national assessments of adult numeracy have found significant gaps in quantitative literacy between males and females. See M. Kutner, E. Greenburg, Y. Jin, B. Boyle, Y. Hsu, and E. Dunleavy, *Literacy in everyday life: Results from the 2003 National Assessment of Adult Literacy*, U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, nces.ed.gov/Pubs2007/2007480_1.pdf.

⁵⁷ A Oneway ANOVA with Tukey post-hoc tests was used to test for differences in students use of NGS information by race-ethnicity. Results indicated statistically significant (p<.05) pair-wise differences between Asian students and Black-African American and Hispanic students on all four NGS items. Cohen’s d effect size differences between Asian and Black/African-American students ranged from d=.23 for “used NGS to analyze an issue” to d=.35 for “explained in writing the meaning of NGS.” Effect size ranges for differences between Asian and Hispanic students ranged from d=.16 for “used NGS to analyze an issue” and d=.28 for “explained in writing the meaning of NGS.” National assessments of adult numeracy have also demonstrated differences between race-ethnic groups in their quantitative literacy abilities; see Kutner et al., *supra* n. 56.

FIGURE 2: PERCENT USING NGS INFORMATION OFTEN OR VERY OFTEN, BY RACE---ETHNICITY



Students who identified a substantive area of specialization related to business – that is, corporate and securities, tax or bankruptcy law – also reported more frequent use of NGS information in each of the aspects explored in this question, although their use still was limited (average response was “sometimes” – or 2 on a 4-point scale). This suggests either that students focused on these business law fields are more attuned to the use of NGS information in their classes, or that classes on these topics actually involve greater use of NGS information than other courses. In either case, it reflects a rather limited view of the use of NGS information in law school, in which the importance of such information for policy analyses or in assessing potential liability, for example, remains largely unrecognized.

Finally, a modest, positive correlation was found between students’ use of NGS information and LSSSE’s aggregate measures of law school environment, student-faculty interaction, and learning to think like a lawyer.⁵⁸ This suggests that students’ use of NGS information does not discourage them in their more traditional law school activities.

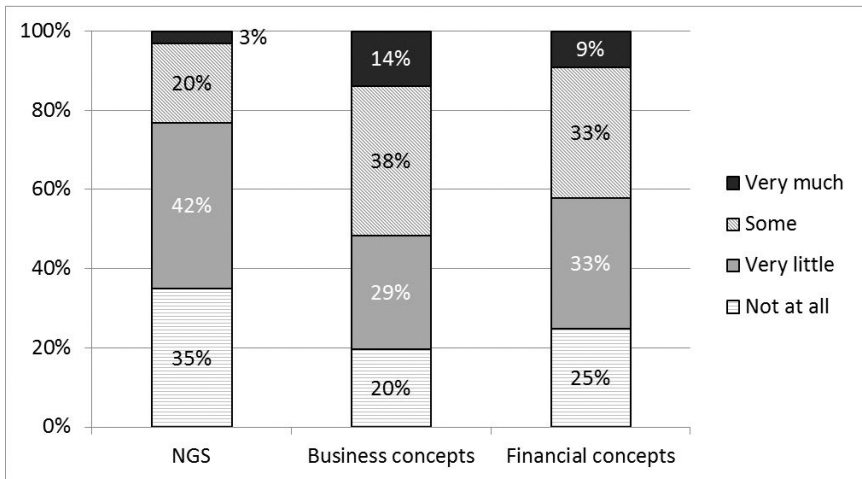
A related question asked students how much their coursework involved learning to understand numerical, graphical or statistical information, or business or financial concepts (Q 5). Overall results are reported in Figure

⁵⁸ Polychoric correlations of .31, .26, and .22 respectively.

3, with differences by year in law school explored in Figures 4-6. Slightly more than 40% of all respondents indicated that their courses substantially involved⁵⁹ learning to understand financial concepts and over half (52%) indicated that their coursework substantially involved learning business concepts.

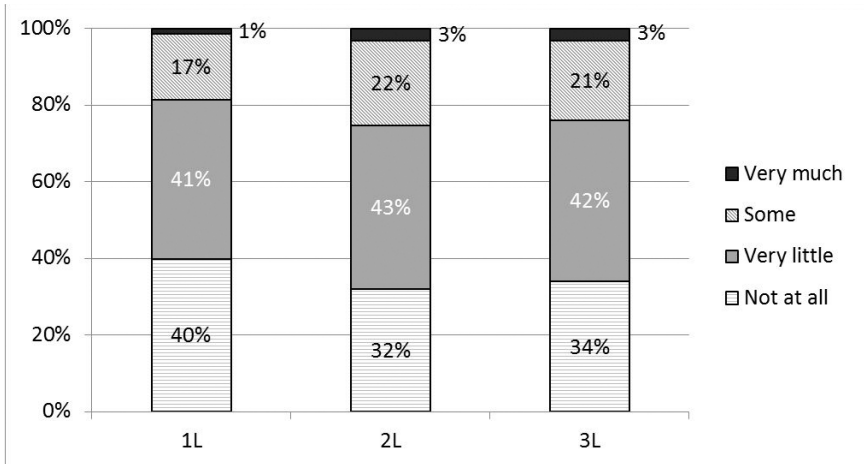
In contrast, however, only 23% of respondents indicated substantial emphasis in learning to understand NGS information. Put another way, over three-fourths (77%) of students reported their coursework involved learning to understand NGS information only very little or not at all (Figure 3) and, as Figure 4 reveals, only slight differences based on year in law school are noticeable with regard to coursework involving NGS information.

FIGURE 3: COURSEWORK EMPHASIS ON LEARNING TO UNDERSTAND NGS INFORMATION, BUSINESS CONCEPTS OR FINANCIAL CONCEPTS



⁵⁹ “Substantial” results from combining the top two response categories, “very much” and “some.”

FIGURE 4: COURSEWORK EMPHASIS ON NGS INFORMATION, BY YEAR IN LAW SCHOOL



Students consider their coursework to emphasize learning business and financial concepts much more than NGS information. There were significant differences between first year and upper-level students with regard to course emphasis on both business and financial concepts (Fig. 5-6), which likely reflects the mandatory first year curriculum’s emphasis on case and textual analysis.⁶⁰ The greater percentage of second year students reporting substantial emphasis on business and financial concepts compared to third year students may reflect their course choices – for example, the prevalence of basic corporations and tax courses – or perhaps this simply is the reaction of second year students who largely are free to pursue their own interests rather than be constrained by a prescribed curriculum.

⁶⁰ Note that certain variations between participating law schools may suggest a relationship to differences in 1L curricula, although additional research is necessary to confirm this.

FIGURE 5: COURSEWORK EMPHASIS ON BUSINESS CONCEPTS, BY YEAR IN LAW SCHOOL

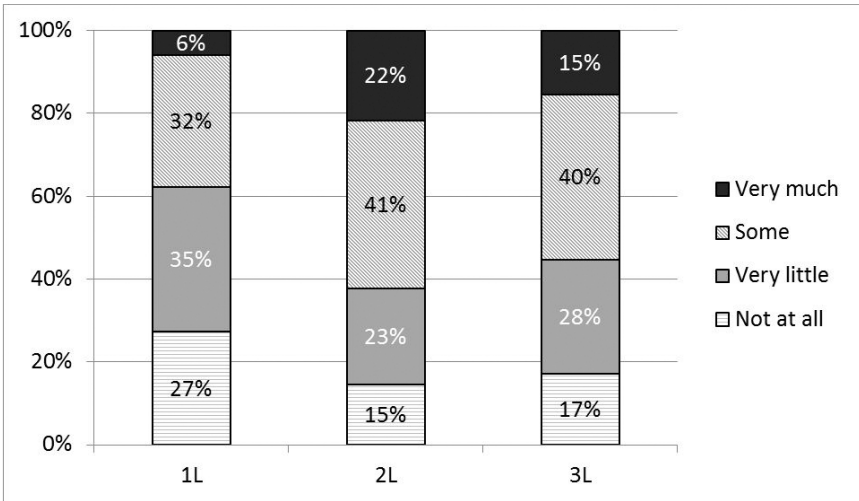
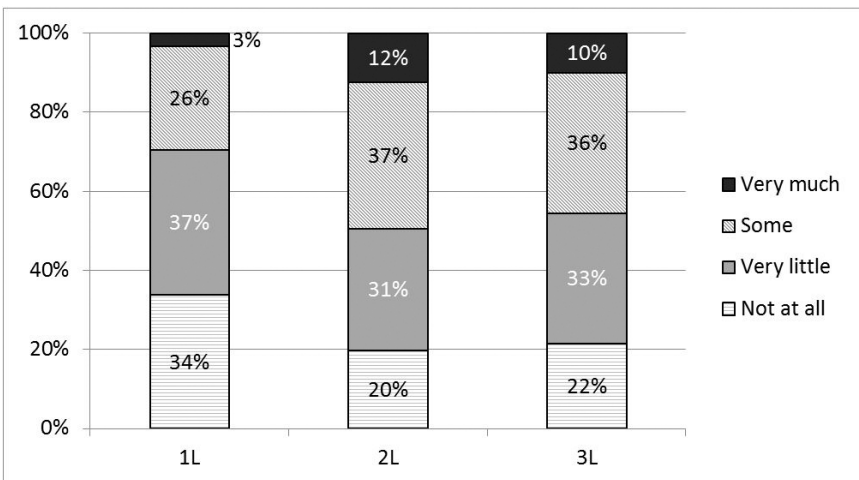


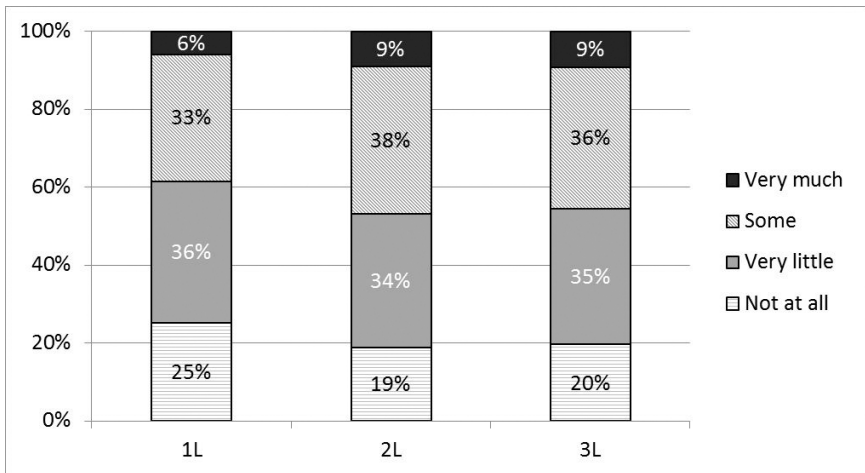
FIGURE 6: COURSEWORK EMPHASIS ON FINANCIAL CONCEPTS, BY YEAR IN LAW SCHOOL



Students also were asked how much their law school helped them to acquire or develop financial or business skills. Overall, 21% of students said not at all while only 8% reported that their law school was very helpful in this regard. Figure 7, which displays these results by year in law

school, shows that there is little variation over the three years. But interest in a particular area of law separates students with regard to their perception of law school’s usefulness in helping them to acquire these skills: when examined by the substantive specialty students expect to focus on in their careers, students who indicated an intention to practice in the field of tax, corporate and securities, or trusts and estates law also reported higher responses regarding law school helping them in acquiring or developing financial or business skills.⁶¹

FIGURE 7: PERCENT REPORTING THAT LAW SCHOOL HELPED TO ACQUIRE OR DEVELOP BUSINESS OR FINANCIAL SKILLS, BY YEAR IN LAW SCHOOL



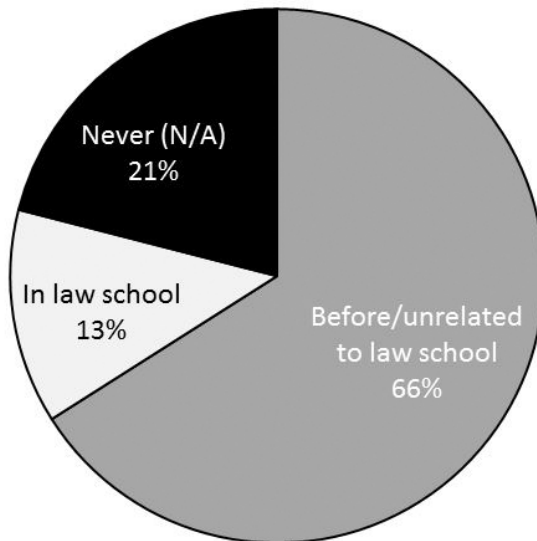
To supplement the questions focused on course emphasis, we also asked students when they learned to read and understand a financial statement. As Figure 8 reports, two-thirds of respondents reported that they had learned to read and understand a financial statement either before coming to law or through activities unrelated to law school.⁶² This high

⁶¹ Between 53% and 60% of respondents who indicated their primary specialty as tax, corporate and securities, or trusts and estates reported their law school substantially (combination of “very much” and “some”) helped them acquire or develop business or finance skills.

⁶² At only two of the 34 schools in the experimental sample set did fewer than 50% of students report that they learned to read and understand a financial statement prior to or outside of law school. Approximately 48% of respondents at each of those two schools indicated they learned this prior to or outside of law school.

percentage reflects students' perceptions of their own abilities as they answered the survey and is not an objective assessment of proficiency. In fact, law school faculty who teach transactional courses that involve understanding financial statements were skeptical of these responses and suggested that students may have overstated their abilities.⁶³ However, the results are generally consistent with another study of numeracy skills of law students. There, the focus was on University of Illinois law students, and researchers found that approximately 57% of students both self-reported high confidence in math and correctly answered a three-question numeracy test that served as an objective assessment of their numeracy skills. Other studies, too, have found a significant correlation between self-evaluation tests regarding numerical understanding and objective problem test scores.⁶⁴

FIGURE 8: PERCENT REPORTING WHEN THEY FIRST LEARNED TO READ AND UNDERSTAND A FINANCIAL STATEMENT



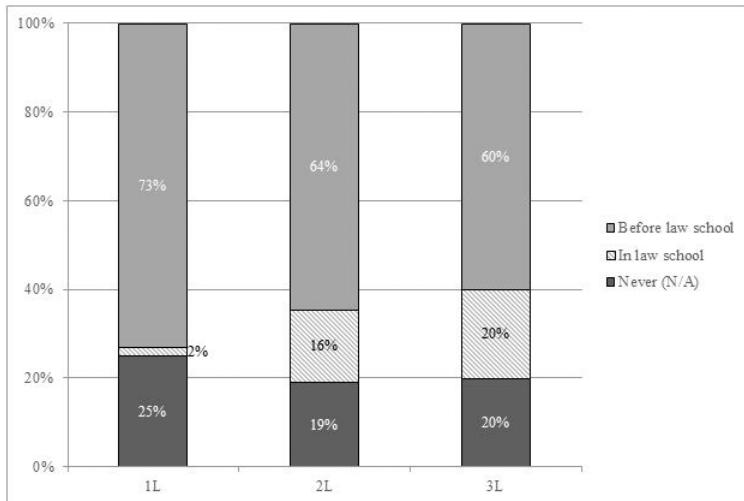
⁶³ Discussion at “Educating the Transactional Lawyer of Tomorrow,” Emory University Law School (June 2014), information at law.emory.edu/academics/academic-programs/center-for-transactional-law-and-practice/conferences.html.

⁶⁴ See Arden Rowell and Jessica Bregant, *Numeracy and Legal Decision Making*, 46 ARIZONA ST. L.J. at 9-10 (forthcoming 2014), [papers.ssrn.com/sol3/papers.cfm?abstract_id=2163645###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163645) (“Math confidence is sometimes used as a subjective numeracy-related measure.”).

LEARNING FROM AND ABOUT THE NUMBERS

Very few first year students (2%) reported learning to read a financial statement in law school or through law school sponsored activities, compared to approximately 16% of second year students and 20% of third years (Figure 9). By far the largest group of respondents in all three years reported learning about financial statements prior to or outside of law school (73% of 1Ls, 64% of 2Ls and 60% of 3Ls). But of those who indicated learning to read financial statements during law school, substantially more were upper level law students than first year students. In addition, this group also was more likely to indicate that they spent more time during law school discussing the meaning of NGS information. This could be because they were in different classes that were more focused on financial literacy or – perhaps more likely – that this baseline of knowledge sensitized them to and enabled them to feel confident in engaging with NGS information in other courses.

FIGURE 9: PERCENT REPORTING LEARNING TO READ AND UNDERSTAND A FINANCIAL STATEMENT, BY YEAR IN LAW SCHOOL

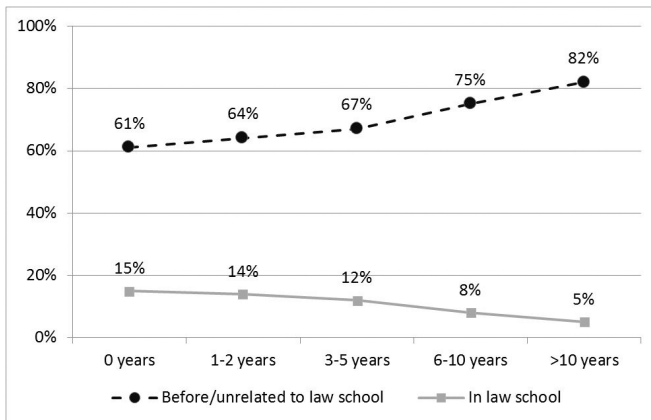


Additional differences also were evident among various segments of the respondent population. For example, more male students indicated having learned to read a financial statement before or outside of law school (69%) compared to female students (63%). On the other hand, female students reported a slightly higher rate of never having learned these skills (25%)

compared to their male counterparts (20%).⁶⁵ It is unclear whether a self-reporting bias or another factor, such as differences in students' backgrounds or undergraduate majors, for example, explain these variations.⁶⁶

Older students also reported a higher level of financial literacy with regard to reading and understanding financial statements. The proportion of students indicating learning to read a financial statement before or unrelated to law school increased as the number of years between earning an undergraduate degree and attending law school increased; relatedly, the inverse relationship existed for those who reported learning to read a financial statement in law school (Figure 10). This difference may reflect the post-college work experience of older respondents, and suggests the practical relevance of NGS information in the context in which such students worked, but more research is necessary to confirm the underlying explanations for these differences.

FIGURE 10: PERCENT REPORTING WHEN LEARNING TO READ A FINANCIAL STATEMENT, BY YEARS BETWEEN UNDERGRADUATE DEGREE AND LAW SCHOOL



⁶⁵ $\chi^2 = 50$, $p < .001$; standardized residual for learning to read a financial statement before coming to law school equals |5.9| and standardized residual for never (n/a) learning to read a financial statement is |7.0|.

⁶⁶ See, e.g., Women also only make up 44% of undergraduate business majors, and incoming undergraduate freshman class of 2012 that number had fallen to 39% female. Additionally, men outnumber women 2:1 in finance, entrepreneurship and information management majors. *Why so Few? Women in Science, Technology, Engineering, and Mathematics*, AMERICAN ASS'N OF UNIVERSITY WOMEN (Feb. 2010), www.aauw.org/files/2013/02/Why-So-Few-Women-in-Science-Technology-Engineering-and-Mathematics.pdf.

Finally, the survey asked students about their reading habits relating to a “national business or financial journal, newspaper or web-based publication.” The question was aimed at uncovering any educationally-relevant activities outside of law school that would support learning about business and financial matters, and expose students at least occasionally to numerical, graphical and statistical information. Reading such material is perhaps the traditional method for law students and lawyers to learn about the world of business and finance generally.

Overall, slightly more than one-quarter (28%) of all respondents reported frequently⁶⁷ reading a business or finance focused publication, and over one-third of respondents (35%) reported never reading such a publication. But there were significant variations among groups of respondents. For example, the percentage of students frequently reading business journals increased as students progressed through law school (25% of 1Ls, 29% of 2Ls, 30% of 3Ls, and 38% of 4Ls), and correspondingly the percentage never reading decreased (40% of 1Ls, 30% of each of 2Ls, 3Ls, and 4Ls). This suggests students’ transition into habits that are related to a professional identity.

A larger proportion of women reported never reading a business or finance journal (45% of women compared with 25% of men). Moreover, 39% of men report frequently reading a business or finance journal, newspaper or web-based publication compared with only 18% of women. Additionally, Asian Pacific students reported a significantly higher engagement with business publications than any other ethnic/racial group.

Not surprisingly, a positive relationship existed between how often students read a business or financial journal and the time they spent reading on their own generally in law school. Those who reported reading a business or finance journal very often spent on average 5.2 hours per week reading own their own (i.e., not assigned reading) compared with 2.8 hours for those who reported never reading a business or finance journal. We also noticed a relationship between how often students read a financial or business journal and their reported area of legal specialization. Students who reported their primary specialty as tax, corporate and securities, non-legal or bankruptcy indicated that they read a financial or business journal the most frequently while those specializing in family and juvenile, public

⁶⁷ “Frequently” results from combining the top two response categories, “very often” and “often.”

interest or criminal law reported the lowest.

There is good news and bad news from the findings reported here with regard to the task of helping students learn how to understand the facts involved in their future work as lawyers. On the positive side, the data indicate that a substantial proportion of responding students recognize the importance of business concepts in law school, and nearly as many also appreciate the relevance of financial concepts. Business and financial concepts are important for multiple purposes, including understanding clients' problems and the organizational context of employers ranging from business corporations to non-profits, law firms and governmental entities. But this good news may be limited to the superficial because law schools appear not to be teaching students the tools to understand business and financial matters – that is, they are not helping students understand the language and structure of financial statements, and many students do not learn this elsewhere. Perhaps even more troubling is that law students are not learning the connection between their legal education and the importance of learning to navigate and understand numerical, statistical and graphical information. To prepare students to be effective in society, whether in practice, in business or in shaping public policy, learning to understand and use information, regardless of the form in which it is presented, is a crucial element of legal education. These data reveal that there is much more that must be done in this regard.

IV. LESSONS AND DIRECTIONS

Several general trends emerge from these data. Overall, students do not report learning to use NGS information in law school, and to the extent they do, this tends to occur after the first year. But the focus of the first year curriculum also is highly relevant to information typically described in NGS terms. This includes material related to presenting a case as well as information about the systems that law students study, such as crime and policing, prison and punishment generally, and rates of settlement and plea bargaining, to name just a few. Whether or not a casebook includes such information, the policy implications of first year topics are laden with NGS information. The question for law schools is whether it is important for faculty to encourage students to explore this information. Is learning to understand and critically assess NGS information legitimately

part of the first year curriculum? Our analysis indicates that students are not taking these lessons from law school, if in fact they are offered there. Consequently, law schools have an opportunity to embrace this void while simultaneously broadening their appeal along and the potential impact of a legal education. Indeed, taking on this approach will help to keep legal education current and ensure that law graduates are able to obtain and maintain positions of influence, which likely will require facility with numbers as numbers increasingly become central to policy and decision-making.

Compared to NGS, much more learning is recognized by students with regard to business and financial concepts. Nevertheless, for most respondents, law school failed to help them understand the basic language of business – the terms of a financial statement. Such an understanding is an important factor for a number of aspects of professional activity, from representing clients to managing a practice and understanding a corporate employer, for example.

There also is a troubling pattern of gender difference in the data. Significantly more women reported never reading material related to business and financial matters compared to men. At the same time, more female students also reported never learning to understand a financial statement compared to males, while fewer women learned to read a financial statement before or outside of law school. Finally, women also were less likely to report using NGS information in law school compared to their male classmates. Together, these differences suggest that women are at a disadvantage with regard to learning about the worlds of business and finance in law school, and also are not keeping up with regard to developing comfort in using NGS information. Combined, these differences risk putting women at a disadvantage in their early careers, whether because they must play catch-up to acquire relevant knowledge and skills or because they feel less confident in this regard, or both.

Other patterns are slightly less distinct, but still suggest the opportunity for law schools to serve as an equalizing force among students with regard to age and experience, race/ethnicity and their interest in particular substantive areas of law. By stressing the importance of NGS, business and financial expertise as basic components of legal education, law schools can communicate that learning the language of these quantitative-focused matters is similarly central to becoming a lawyer as is mastering the language

and basic tenets of contracts, torts and civil procedure. Broadening the focus to include these areas will strengthen the relevance of legal education, too, in light of the widespread use of NGS, business and financial information in describing and analyzing the problems of society.⁶⁸

It remains to determine how best to address the lapses in legal education identified here. In the past, law schools often have implemented curricular changes without also developing strategies to assess their results. Typically there has been no review to determine whether changes in emphasis, coursework or characteristics of faculty contributed to the results the schools intended. Perhaps when law schools were flush with resources such an analysis was considered unnecessary. Today, however, the severe budget constraints in legal education and higher education generally means that it makes little sense to devise solutions that cannot be monitored for progress. And indeed, the topic of NGS information and business and financial concepts themselves suggest a more rigorous and measurable approach.⁶⁹

The results described in Section III confirm the criticism of law schools as not focused on helping students learn to understand the factual contexts that will surround much of their work. More importantly, however, they point to opportunities to improve, to target gaps and build on existing capabilities while also broadening the relevancy of legal education. But this study provides only one approach to learning about law students' experiences; law schools would do well to consider multiple methods of investi-

⁶⁸ Certain findings of the research described in this article require additional investigation. For example, a relationship between law school curricular differences and learning regarding NGS, business and financial matters was suggested in the data and requires more research to understand. Additionally, students who were more satisfied with their overall educational experience in law school were both more engaged generally in law school and reported greater use of NGS compared to students who were less satisfied. Students who rated their entire educational experience as "excellent" or "good" reported statistically greater use of NGS than those who rated their experience as "fair" or "poor" ($p < .001$ for all four NSG items; Cohen's d effect sizes ranged from $d = .34$ for "explained in writing the meaning of NGS" to $d = .45$ for "evaluated others' conclusions based on NGS"). Positive correlations were found between students' use of NGS information and LSSSE's aggregate measures of student-faculty interaction, and learning to think like a lawyer. Again, more research is necessary to understand these correlations and their implications.

⁶⁹ See generally Patrick Johnson, *What Metrics Should You Be Tracking?*, THE METROPOLITAN CORPORATE COUNSEL, (June 26, 2014), www.metrocorp.counsel.com/articles/29293/what-metrics-should-you-be-tracking ("It's difficult to improve what you don't measure. Metrics to optimize operational performance have traditionally been commonplace in most parts of a business, but less so in legal departments – although that trend has been changing as legal departments seek greater efficiency and budgetary restraints.").

gating student learning in order to explore the influence of particular curricular and pedagogical approaches in addition to the characteristics and skills that students bring into law school.⁷⁰

CONCLUSION

The influence and trendiness of assessment and measurable outcomes raises risks and opportunities generally, including for legal education. Measurement may well be an inappropriate goal with regard to certain elements of legal education. But recognizing and embracing its relevance in particular circumstances is a way for law schools to engage with important movements in higher education, the hiring market for law graduates and more generally in society.

The call for law schools to teach students about business and financial matters and to work with quantitative information is not new. This article offers the insight of data on what students perceive they are learning in law school. These data indicate significant opportunities to expand the scope and depth of what law schools teach by increasing the emphasis on the contexts in which law graduates will work. Inevitably, these contexts will involve the issues raised here.

In this article, we have urged law schools to take a more quantitative, measurable approach to their own work as well as to incorporate that in their teaching. By doing both, they will support the relevance of their graduates as well as themselves, and offer more transparency to the issue of value for both students and the institution of legal education.

⁷⁰ The American Bar Association Section of Legal Education and Admissions to the Bar recently amended its Standards and Rules of Procedure for Approval of Law Schools to include requirements for assessment. Especially relevant to the issues discussed here is new Standard 315, "Evaluation of Program of Legal Education, Learning Outcomes, and Assessment Methods," available at www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf. See also *Association of American Law Schools Workshop on Measuring Learning Gains: Institutional Effectiveness for the New Era*, memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=TrkDetails&trk_key=081c2aad-25dd-46c0-a20e-adaa2f63d8e9 (conference for law school faculty and administrators about assessment and learning outcomes standards).

APPENDIX

EXPERIMENTAL QUESTIONS

1. During the current school year, about how often have you done each of the following as part of a course, in class discussion, or for a course-related assignment or project? (response options: very often, often, sometimes, never)
 - a. Discussed the meaning of numerical, graphical or statistical information
 - b. Evaluated conclusions others have reached that were based on numerical, graphical or statistical information
 - c. Explained in writing the meaning of numerical, graphical or statistical information
 - d. Used numerical, graphical or statistical information to help analyze an issue (such as damages)
2. In your opinion, how much has your law school helped you acquire or develop financial or business skills? (response options: very much, some, very little, not at all)
3. When did you first learn to read and understand a financial statement (balance sheet and/or income statement)? Response options:
 - Before coming to law school/through activities unrelated to law school
 - In a law school class or other law-school sponsored activities
 - Not applicable/Never)
4. During the current school year, about how often have you read a national business or financial journal, newspaper or web-based publication (such as the Wall Street Journal, Forbes or Yahoo Finance)? (response options: very often, often, sometimes, never)
5. During the current school year, about how much has your coursework involved learning to understand the following? (response options: very much, some, very little, not at all)
 - a. Numerical, graphical or statistical information
 - b. Business concepts
 - c. Financial concepts

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PUBLIC OPINION AND THE SECOND AMENDMENT

Nelson Lund[†]

Eds. Note: A blog post by Professor Bryan Caplan¹ brought our attention to an interesting polling result from Gallup.² Since 1959, Gallup has asked a question, in one of two forms, regarding a law banning handguns for everyone except police or authorized persons. For the first decade of the survey, the yes responses outweighed the nos (starting at a gap of 20 percentage points and decreasing from there). But since 1967, those responding no, there should not be a ban on handguns, have outweighed – by a notable 20 percent – those that respond yes, there should. We thought the intersection of public polling and Constitutional law was an interesting area to explore. We acknowledge that polling is a “light” metric, but it plays a significant role in shaping policy and legal outcomes. Professor Nelson Lund was kind enough to provide his thoughts, which we publish below.

The striking change in public polling results on the issue of handgun bans during recent decades undoubtedly reflects a significant cultural phenomenon. One can think of many possible contributing factors to the declining support for handgun bans, but it is extremely difficult to determine which of them actually contributed to the phenomenon or to determine how big each of their contributions has been.

Public polling has many notorious limitations. For example, it is well known that slight changes in the wording of a question can lead to dramatically different results. For that reason, the results can be extremely misleading. In this case, for example, the term “authorized person” might mean something very different to different respondents, and it is quite possible that a large fraction interpreted the term to mean something dif-

[†] Nelson Lund is University Professor, George Mason University School of Law. © Nelson Lund 2015.

¹ econlog.econlib.org/archives/2013/11/gun_grabbing_a.html#.

² www.gallup.com/poll/1645/guns.aspx.

ferent from what the pollster had in mind. In addition, many respondents may have interpreted the term in one way during one time period and in a different way during other time periods.

Polling of this type is also unable to measure the intensity of the respondents' opinions or the stability of their convictions. If gun control and/or gun crime has recently been much in the news, many respondents might express different opinions than they would at other times. Similarly, some respondents will undoubtedly be more resistant than others to having their opinions changed by hearing evidence or arguments to which they have not been previously exposed.

Accordingly, I do not believe that we can learn a lot directly from polling data like these. The magnitude of the change measured by these data, however, strongly suggests some kind of important cultural shift, and that shift is confirmed by other data, especially dramatic legal changes that have occurred during this period.

I suspect that the two most important events were the adoption of a liberalized concealed carry statute in Florida in 1987 and the adoption of a major federal gun control statute in 1994.

During the first half of the period covered by the Gallup poll, almost all states with large urbanized population centers effectively prohibited most law-abiding citizens from carrying handguns in public. In 1987, Florida changed its statutes to make it very easy to get a permit for concealed carry. This caused a major public furor, consisting primarily of dire predictions that the streets would soon be running with blood. The predictions proved false, for permit holders almost never used their weapons to commit a crime. As the years went by, many other states changed their laws to resemble Florida's, and nobody has been able to show that this liberalization had any measurable bad effects. Today, only eight states make it almost impossible for an ordinary citizen to have the legal right to carry a concealed handgun.

It is hard to know whether changing public opinion was the main contributor to these legal changes, or whether the results of the legal changes contributed significantly to changes in public opinion. But we can be pretty sure that if the liberalization of concealed carry laws had produced disastrous effects, we would have different laws and different public attitudes today.

The 1994 federal gun control law reflects the other side of the coin. Public discussions of gun control typically flare up after heavy news coverage of gun crimes. The first major federal law, in 1934, was enacted in the

wake of the gangster wars during Prohibition. The next major federal law, in 1968, came shortly after the assassinations of President Kennedy, Robert Kennedy and Martin Luther King, and the urban riots of that period. By the late 1980s, when states began liberalizing their concealed carry laws, gun control had become a more partisan issue than it had once been. A number of well publicized crimes took place, such as the Stockton schoolyard shooting in 1989, which predictably triggered loud calls for a new federal law. Nothing happened, however, until 1994 when the Democrats controlled both houses of Congress and the presidency. After enacting a new statute, the Democrats suffered devastating losses in the mid-term elections that year, and gun control was a major factor in their defeats. Neither House of Congress has taken any significant actions since that time. Even the nominal support for such measures by Al Gore in 2000 and John Kerry in 2004 appears to have hurt them, and it may have been a decisive factor in one or both of their defeats at the ballot box.

After the horrible massacre at Sandy Hook Elementary School in 2012, a few states passed relatively minor new restrictions on firearms, but others responded by *liberalizing* their gun laws. At the federal level President Obama has occasionally offered vague endorsements of more gun control, but he has not dared to impose any significant new restrictions through executive action. Nor has he pushed Congress to enact new legislation.

I regard these political results as more reliable indicators of a cultural shift than polling results. But they point in the same direction. The cultural shift may also help to explain the U.S. Supreme Court's sudden discovery of the Second Amendment in 2008, when it invalidated Washington D.C.'s handgun ban. The Second Amendment had been in the Constitution since 1791, but this was the first time the federal courts had used it to invalidate any gun control measure. Future cases may well confirm a right to carry handguns in public, especially now that so many states have shown that there is little or no danger in doing so. If that happens, it will become ever more unlikely that we will observe public attitudes shifting back toward what they seem to have been at the beginning of the period covered by the polling data. And it will certainly make the law more resistant to advocacy in favor of more gun control.

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CODE WORDS

Tom Cummins[†]

When we study law we are studying text, to one extent or another.¹ The graph on the cover of this issue of the *Journal of Legal Metrics* illustrates one approach to that study. It charts the extent to which two bodies of law – federal statutory and regulatory law – have increased over time. It does so by counting the pages in the *United States Code* and *Code of Federal Regulations* from first through the most recent editions.²

The general idea is not new: trace the growth of federal law over time.³ Never before, however, has a side-by-side measurement of federal statutory and regulatory text been compiled from first through current edition. This short essay provides a little background on those two federal codes, a note on the method used to compile the data, and a few observations, as well as the data itself in an appendix.

[†] Tom Cummins is a senior editor of the *Journal of Legal Metrics*.

¹ Cf. Antonin Scalia and Bryan Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxvii (2012) (“Both your authors are textualists We hope to persuade our readers that this interpretive method is the soundest, most principled one that exists. But even those who are unpersuaded will remain, to a large degree, textualists themselves – whether or not they accept the title. While they may use legislative history, purposivism, or consequentialism at the margins, they will always begin with the text. Most will often end there.”); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) (“In a significant sense, we are all textualists now.”); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 *passim* (1897).

² More precisely, it does so from the first editions through the most recent editions for which apples-to-apples comparisons are possible. Because the most recent full edition of the United States Code is the 2012 edition, this essay’s data and comparison runs through at that year, but no further. In passing, however, it bears noting that the 2013 edition of the *Code of Federal Regulations* had 175,496 pages (a 0.54% increase over the 2012 edition); the 2014 edition had 175,268 pages (a 0.13% decrease over the 2013 edition); and the 2015 edition has not yet been completed. Office of Federal Register, *Federal Register & CFR Publication Statistics – Aggregated Charts* (May 2015), available at <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.pdf> (last visited July 7, 2015).

³ See, e.g., Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 105 (2000).

I. A LITTLE BACKGROUND

A. *United States Code*

The *United States Code* is a collection of “the laws of the United States, general and permanent in their nature.”⁴ That is, the code is a consolidation of federal statutes, organized based on broad subject matter into 54 titles.⁵ The titles, in turn, are subdivided into smaller units including subtitles, chapters, subchapters, parts, subparts, sections, subsections, paragraphs, subparagraphs, clauses, subclauses, and items, although not necessarily in that order.⁶

Twenty-seven titles are “positive law,” meaning the titles’ contents are the law itself.⁷ Surprisingly, the remaining titles are not. Their contents are merely rebuttable evidence of what the law is.⁸ The law itself with respect to these titles is to be found in the volumes of the *United States Statutes at Large*, which is the permanent collection of all laws and resolutions enacted during each session of Congress, organized in chronological order.⁹

Similarly startling is the relative youth of the *United States Code*. Although the Constitution was ratified in 1788 and the first Congress convened and began passing bills the following year, the first publication of the *United States Code* was not until in 1926. The graph adorning the cover of this issue of the *Journal of Legal Metrics*, as noted, illustrates the growth of that body of law from 1926 onwards. The story of what came before, however, is also one worth briefly retelling.¹⁰

⁴ 1 U.S.C. § 204(a) (2012). Temporary laws, such as appropriations acts, and special laws, such as those naming a highway, are not included in the Code.

⁵ One of these titles (Title 34) has been repealed; another (Title 53) has been reserved. See generally U.S. House of Representatives, Office of the Law Revision Counsel, *Detailed Guide to the United States Code Content and Features* (“House Guide”), uscode.house.gov/detailed_guide.xhtml (last visited July 9, 2015).

⁶ *House Guide*, *supra* note 5.

⁷ 1 U.S.C. § 204(a). Currently, the U.S. Code currently has 54 titles, of which the following 27 titles have been enacted into positive law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 41, 44, 46, 49, 51, and 54. As noted, Title 34 has been repealed, Title 53 reserved. *House Guide*, *supra* note 5.

⁸ 1 U.S.C. § 204(a). See *Stephan v. United States*, 319 U.S. 423, 426 (1943); see generally Will Tress, *Lost Laws: What We Can’t Find in the United States Code*, 40 GOLDEN GATE U.L. REV. 129, 131-33 (2010). Among the rebuttable evidence titles are some of the most significant: Title 12 (Banks and Banking), Title 26 (Internal Revenue Code), and Title 42 (Public Health and Welfare).

⁹ 1 U.S.C. § 112; see generally Government Printing Office, *About United States Statutes at Large*, www.gpo.gov/help/index.html#about_united_states_statutes_at_large.htm (last visited July 9, 2015).

¹⁰ For a far more complete retelling, see Ralph H. Dwan and Ernest R. Feidler, *The Federal Statutes*

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The first law regarding the publishing of the laws of the United States was enacted in 1789.¹¹ During the first session of the first Congress, a law was enacted providing that when an act of Congress became law, the secretary of state was to preserve the original, deliver a copy to each congressperson, send two copies to each state's executive authority, and publish the law in at least three newspapers printed in the United States "as soon as conveniently may be."¹²

The first law regarding the official collection of the laws of the United States was enacted six years later. It ordered the printing of a complete edition of all public laws and treaties of the United States up to that date (i.e., 1795), with an index.¹³ The law also ordered that after each session of Congress, the laws enacted during that session were to be printed and distributed among the states and territories.¹⁴

The United States Statutes at Large came into being four decades later when in March 1845 a law was enacted directing the attorney general to contract with Messrs. Little and Brown to publish a thousand copies of the compiled laws and treaties of the United States in chronological order.¹⁵ The gentlemen completed the first edition the following year, an eight-volume work.¹⁶

In doing so, they "discovered errors in the original text of many laws. They copied such text, however, verbatim, and where something had to be added in order that the text might make sense, it was enclosed in brackets."¹⁷ And so it went for the next two decades. Little and Brown continued to compile, but not consolidate, federal laws in chronological order.¹⁸

As the compilation continued to expand, previously enacted laws con-

— *Their History and Use*, 22 Minn. L. Rev. 1008 (1938). For a slightly more recent retelling, see Tress, *supra* note 8, at 133-36.

¹¹ 1 Stat. 68, ch. 14, *cited in* Dwan and Feidler, *supra* note 10, at 1008.

¹² *Id.*

¹³ 1 Stat. 443, ch. 50, *cited in* Tress, *supra* note 8, at 133.

¹⁴ *Id.*

¹⁵ 5 Stat. 798, *cited in* Dwan and Feidler, *supra* note 10, at 1010.

¹⁶ Dwan and Feidler, *supra* note 10, at 1010.

¹⁷ Dwan and Feidler, *supra* note 10, at 1011 n.17. Errors in statutory text, of course, are not confined to the nineteenth century. *See, e.g., King v. Burwell*, 576 U.S. ___ (2015) (slip op. at 14) ("The Affordable Care Act contains more than a few examples of inartful drafting. To cite just one, the Act creates three separate Section 1563s." (Parenthesis omitted)).

¹⁸ Dwan and Feidler, *supra* note 10, at 1011-12.

tinued to be repealed, superseded, or modified, with the result that it became “almost a practical impossibility to make a thorough search of the statutes on many subjects.”¹⁹ Eventually, in 1866 a commission was formed to consolidate the Statutes at Large into a unified whole.²⁰ But the commission quickly found their task would require rewriting numerous laws, reporting to Congress: “Where several statutes relating to the same subject modify each other, it has been impossible to state their united effect without writing a new statute.”²¹ Faced with the choice of writing a new statute or abandoning the task, the commission pressed on with its work.

The final product was presented to Congress in 1873, enacted in 1874, and published in 1875.²² In doing so, the federal government made a clean break with what had come before. When the Revised Statutes of 1873, as they came to be known, took effect, all preceding federal laws “embraced in any section were repealed.”²³ This was the first time (and to date the only time) that a complete revision of all general and permanent statutes was enacted.²⁴ They were not well received.²⁵

While still on the printing presses, 69 mistakes and omissions were identified.²⁶ Congress hastily passed a law correcting these errors, which was printed as a four-page appendix to the Revised Statutes of 1873.²⁷ But these weren’t the only errors and omissions in the text. Acts to fix other errors followed each successive year until 1878, when an amended and updated edition was published.²⁸

The updated edition of 1878, unlike its predecessor, was not enacted as positive law; rather, it was merely rebuttable evidence of what the law was. The reason was simple; “Congress, after its experience with the Revised Statutes of 1873, was reluctant to enact as law even a consolidation and revision of the statutes in a restricted field passed during only a four year period.”²⁹

¹⁹ Dwan and Feidler, *supra* note 10, at 1011-12.

²⁰ Tress, *supra* note 8, at 134.

²¹ William Johnston and Charles James, *Report of the Commissioners Appointed Under Act of June 27, 1866*, S. Misc. Doc. 101 (1868), *quoted in* Tress, *supra* note 8, at 134.

²² Tress, *supra* note 8, at 134.

²³ 1 Rev. Stat. 1091, § 559 (1873), *quoted in* Tress, *supra* note 8, at 135.

²⁴ Dwan and Feidler, *supra* note 10, at 1012.

²⁵ Tress, *supra* note 8, at 135.

²⁶ Dwan and Feidler, *supra* note 10, at 1014.

²⁷ Dwan and Feidler, *supra* note 10, at 1014; Tress, *supra* note 8, at 135.

²⁸ Tress, *supra* note 8, at 135 and nn.35-36 (collecting laws).

²⁹ Dwan and Feidler, *supra* note 10, at 1015.

Four decades passed before serious work on consolidating the laws of the United States resumed. That work began in 1919, when the chairman of the House of Representatives' law revision committee, Colonel Little, undertook the task.³⁰ The Senate's law revision committee was overwhelmed with the results, however, identifying 600 errors.³¹ The two chambers then came up with a new plan: outsource the work to West Publishing Company and Edward Thompson Company.³²

The two publishing companies promptly set to work consolidating an authoritative code, which drew upon Colonel Little's work, was checked by various expert committees and departments, and was also checked by an outside expert.³³ Nevertheless, "glaring errors were discovered when the bill to enact the codification was before the Senate and House of Representatives."³⁴ (Unsurprisingly, the process of enacting the *United States Code* as positive law would not begin until 1947).³⁵

The 1926 edition was replaced by a new edition in 1934, with successive full editions following at six-year intervals.³⁶ The handsome graph on the cover of this issue and appendix concluding this essay detail the growth of that body of law, as well as the growth of federal regulatory law, discussed next.

B. Code of Federal Regulations

The *Code of Federal Regulations* is "the codification of the general and permanent rules published in the *Federal Register* by the departments and agencies of the Federal Government."³⁷ The purpose is straightforward: "to present the official and complete text of agency regulations in one or-

³⁰ Dwan and Feidler, *supra* note 10, at 1018-19.

³¹ Dwan and Feidler, *supra* note 10, at 1019.

³² Dwan and Feidler, *supra* note 10, at 1020. At the time, both companies were producing private compilations. For an entertaining discussion of the competition between these two companies, see generally Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its Promotions*, 6 Charleston L. Rev. 231, 241 (2012).

³³ Dwan and Feidler, *supra* note 10, at 1020.

³⁴ Dwan and Feidler, *supra* note 10, at 1020.

³⁵ See Preface to United States Code (1926) ("This Code is the official restatement in convenient form of the general and permanent laws of the United States. No new law is enacted and no law repealed. It is prima facie the law. The presumption is rebuttable."), quoted in Tress, *supra* note 8, at 136.

³⁶ More fully, editions were published in 1940, 1946, 1952, 1958, 1964, 1970, 1976, 1982, 1988, 1994, 2000, 2006, and 2012.

³⁷ U.S. Gov't Printing Office, *About Code of Federal Regulations*, www.gpo.gov/help/index.html#about_code_of_federal_regulations.htm (last visited July 9, 2015).

ganized publication.”³⁸

Like the *United States Code*, the *Code of Federal Regulations* is organized into titles. Titles, in turn, are organized into volumes. The 2014 edition of the *Code of Federal Regulations*, for instance, has 212 volumes. Volumes are organized into chapters, parts, subparts, sections, and subsections.

The *Code of Federal Regulations* is also a relatively recent development in the nation’s history. Before 1936, the various federal agencies published their own regulations in their own publications, “be they gazettes, bulletins, rulings, digests, pamphlets, notices, codes, certificates, orders, and the like.”³⁹ These regulations were not compiled in a single source, much less codified in a unified whole.

And the New Deal came. With the rapid expansion of agency regulations in the early 1930s, the public and the government itself found it increasingly difficult to keep track of what regulations had been issued, altered, and revoked. This difficulty was vividly on display on December 10, 1934, when at oral argument before the Supreme Court the assistant attorney general had to acknowledge that the executive order that the administration was defending “had been inadvertently revoked.”⁴⁰

The next day, the president appointed a committee to study publishing a gazette containing executive branch orders.⁴¹ That same day, the *Harvard Law Review* published an article by Ervin Griswold entitled “Government in Ignorance of the Law – A Plea for Better Publication of Executive Legislation.”⁴² Griswold’s solution to this problem was “amazingly simple”: “an official publication . . . in which all rules and regulations shall be systematically and uniformly published.”⁴³

Within a year, Congress had passed the Federal Register Act, which Pres-

³⁸ National Archives, *About the CFR*, www.archives.gov/federal-register/cfr/about.html (last visited July 9, 2015).

³⁹ Rich McKinney, *A Research Guide to the Federal Register and the Code of Federal Regulations*, 46 *Law Library Lights* 10, 10 (2002), available at www.llsdc.org/assets/sourcebook/fall02.pdf (last visited July 9, 2015); see also Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register 2* (June 19, 2006) (“*A Brief History of the Federal Register*”), available at www.archives.gov/federal-register/the-federal-register/history.pdf (last visited July 9, 2015).

⁴⁰ McKinney, *supra* note 112, at 39.

⁴¹ McKinney, *supra* note 112, at 39.

⁴² 48 *HARV. L. REV.* 198 (1934).

⁴³ *Id.* at 205.

ident Roosevelt signed into law in July 1935.⁴⁴ The law directed agencies “to compile and file a complete set of all their documents that were in force as of January 26, 1936.”⁴⁵ The documents, moreover, would be available for immediate public inspection and “could not be valid against any person until filed at the [newly-created] *Federal Register*.”⁴⁶ The first edition of the *Federal Register* was published on March 14, 1936; it was 16 pages.⁴⁷

In 1938, the Federal Register Act was amended to require a “codification,” not simple compilation, of federal agency regulations.⁴⁸ The first edition of the *Code of Federal Regulations* was published the same year. It had 15 volumes and “included all finalized regulations that were published in the *Federal Register* from March 14, 1936 to June 1, 1938, as well as those agency regulations deposited with the Archivist [of the United States], and still in effect, that may have been published by the agencies before March 14, 1936.”⁴⁹

Supplements in separate volumes were published over the next several years (except for in 1942, because of the war effort), until the second full edition of the *Code of Federal Regulations* was published in 1949.⁵⁰ The growth from there, as noted, is illustrated on the cover of this issue and chronicled in the appendix following this essay.

II. A LITTLE DISCUSSION

A. *The Method*

The unit of measure used in this study is rough. On the subject, most are.⁵¹ About 15 years ago, for example, one writer took a tape measure to the *United States Code*.⁵² This study took a slightly more fine-grained

⁴⁴ Pub. L. 74-220 (July 26, 1935), cited in *A Brief History of the Federal Register*, *supra* note 39, at 2.

⁴⁵ *A Brief History of the Federal Register*, *supra* note 39, at 2. The full text of the Federal Register Act is available online at www.llsdc.org/assets/sourcebook/pl74-220-lh.pdf (last visited July 9, 2015).

⁴⁶ *A Brief History of the Federal Register*, *supra* note 39, at 2.

⁴⁷ *A Brief History of the Federal Register*, *supra* note 39, at 3.

⁴⁸ *A Brief History of the Federal Register*, *supra* note 39, at 4.

⁴⁹ McKinney, *supra* note 39, at 10.

⁵⁰ McKinney, *supra* note 39, at 10.

⁵¹ For a particularly fine treatment of this subject, however, see William P. Li et al., *Law is Code: A Software Engineering Approach to Analyzing the United States Code* (Sept. 21, 2014), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2511947 (last visited July 9, 2015).

⁵² Ellickson, *supra* note 3, at 105 (“In 1928, the unannotated version of the *United States Code* appeared in two tall volumes that totaled six inches in width. The 1988 version of the unannotated Code included twenty-nine volumes that spanned six feet, a twelve-fold increase.” (footnote omitted)).

approach, counting pages instead.⁵³

Specifically, to complete the study the pages in the *United States Code* were manually counted. Because the purpose was to measure the growth of the law, pages of statutory text were included in the count, but title pages, prefaces, tables of contents, tables of titles and chapters, tables of acts cited by popular names, and indexes were excluded. Partial pages of statutory text were included, blank pages excluded.

The process for gathering the *Code of Federal Regulations* data was far simpler; the data has been compiled by the Office of the Federal Register and is available on its website.⁵⁴ This data also has certain nuances, it should be noted, which are listed on that website and may be of some interest the punctilious scholar.⁵⁵

B. *The Observations*

The principal contribution of this essay is the raw data. Offered as a resource, the data is generally left to speak for itself. But two facets that may not be immediately obvious from the graph on the cover of this issue or the appendix following this essay also merit mention: (1) the specific rate of growth of the two bodies of law over time; and (2) the comparative size of the two bodies of law over time.

Regarding the first item, the overall percentage increase in page length of the *United States Code* from the 1926 edition to the 2012 edition was 2538%. The average rate of growth during this period was about 30% per year.

Additionally, although each successive edition of the *United States Code* increased in length over its predecessors, the specific rate of growth was not uniform. The largest increase, as one might expect, occurred during the New Deal era. The smallest occurred between 1994 and 2006. The following chart identifies the specific percentage increase for each edition over its predecessor (aside from the first edition, of course).

⁵³ Mitigating, albeit not entirely eliminating, the risk of typographical variations affecting the intra- and inter-code comparison is that the print versions of the *United States Code* and *Code of Federal Regulations* are both published by the U.S. Government Printing Office.

⁵⁴ Office of Federal Register, *Federal Register & CFR Publication Statistics – Aggregated Charts* (May 2015), available at <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.pdf> (last visited July 7, 2015).

⁵⁵ For example, total page counts for 1950 through 1969 include revisions and pocket part supplements. See *id.*

CODE WORDS

Increase in length of <i>United States Code</i> over prior edition	
edition	% increase
1926	n/a
1934	33%
1940	98%
1946	32%
1952	31%
1958	13%
1964	11%
1970	28%
1976	38%
1982	27%
1988	24%
1994	24%
2000	8%
2006	8%
2012	11%

Of passing interest, this growth has also not been uniformly distributed across the various titles of the *United States Code*. The most dramatic growth has been in Title 42, “Public Health and Welfare.” In the 1926 edition, the title spanned 11 pages.⁵⁶ In the 2012 edition, it spans 8,269 pages, an approximately 75,000% increase over this 86-year period. Assuming a steady rate of growth over the next 86-year period (a silly assumption, surely), around the turn of the next century, Title 42 will span about 6.2 million pages.

The *Code of Federal Regulations*, unlike the *United States Code*, has not increased in length with each successive edition. Rather, in the 63-year period from 1949, when the annual publication of new editions of the *Code of Federal Regulations* began, through 2012, the new editions were longer than their immediate predecessor 50 times, but shorter than their immediate predecessor 13 times. The overall increase in length during this period was 596%, for an average rate of growth of about 10% per year. The specific

⁵⁶ In 1926, this title was merely “Public Health.”

year-to-year percentage change is available on the Office of the Federal Register's website.⁵⁷

Turning to the second facet, the comparative size of the two texts over time, the relative ratio has not varied as much as a cursory visual inspection of the graph might suggest. The first time full editions of both the *United States Code* and *Code of Federal Regulations* were published in the same year was 1952, which then recurred each six years through 2012.

The first half of that period (i.e., 1952–1982) saw a fairly steady increase in the relative ratio, with the *Code of Federal Regulations* increasing from about 250% longer than the *United States Code* to about 475% longer. The second half, however, saw a fairly steady decline in that ratio, as identified in the chart below.

Percent by which the page length of the <i>Code of Federal Regulations</i> exceeds the <i>United States Code</i>	
edition	% longer
1952	248%
1958	234%
1964	322%
1970	436%
1976	420%
1982	477%
1988	430%
1994	396%
2000	375%
2006	362%
2012	364%

These two facets, of course, are not the only aspects of the data that might merit attention. Additionally, other variables – national population, gross domestic product, political party control, to name just three – might be added to enrich the analysis.

⁵⁷ Office of Federal Register, *Federal Register & CFR Publication Statistics – Aggregated Charts* (May 2015), available at <https://www.federalregister.gov/uploads/2015/05/OFR-STATISTICS-CHARTS-ALL1-1-1-2014.pdf> (last visited July 7, 2015).

CODE WORDS

The aim of this study, however, was simpler. Compile a side-by-side comparison of the text of federal statutory and regulatory law from the first edition through the current edition. The goal was not to answer the question “What does the data say?” but “Where is the data in the first place?”⁵⁸ For the subject of this study, the answer is on the journal’s cover and in the following appendix.

APPENDIX

Year	CFR Pages	USC Pages
1926		1,705
1927		
1928		
1929		
1930		
1931		
1932		
1933		
1934		2,275
1938	18,193	
1939		
1940		4,499
1941		
1942		
1943		
1944		
1945		
1946		5,918
1947		
1948		
1949	23,454	
1950	9,745*	

⁵⁸ See generally Journal of Legal Metrics, Introduction (Jan. 4, 2012), available at www.journaloflegalmetrics.org/2012/01/04/introduction/ (last visited July 10, 2015).

* Total Pages for 1950 through 1969 includes revisions and pocket part supplements.

TOM CUMMINS

Year	CFR Pages	USC Pages
1951	15,932	
1952	19,232	7,768
1953	18,464	
1954	16,502	
1955	17,989	
1956	21,651	
1957	19,589	
1958	20,643	8,807
1959	21,760	
1960	22,877	
1961	25,242	
1962	22,863	
1963	25,828	
1964	31,584	9,797
1965	34,783	
1966	43,118	
1967	50,375	
1968	53,513	
1969	52,863	
1970	54,834	12,582
1971	56,720	
1972	60,632*	
1973	64,872	
1974	67,860	
1975	71,224	
1976	72,740	17,326
1977	84,729	
1978	94,151	
1979	98,032	
1980	102,195	
1981	107,109	

* Total Pages for 1972 does not include the second revisions of titles 42 through 50, which were completed in October 1972.

CODE WORDS

Year	CFR Pages	USC Pages
1982	104,938	21,990
1983	105,654	
1984	111,830	
1985	105,935	
1986	109,509	
1987	114,337	
1988	117,480	27,308
1989	122,090	
1990	126,893	
1991	125,331	
1992	128,344	
1993	132,228	
1994	134,196	33,930
1995	138,186	
1996	132,112	
1997	131,060	
1998	135,127	
1999	134,932	
2000	138,049	36,786
2001	141,281	
2002	145,099	
2003	144,187	
2004	147,639	
2005	145,099	
2006	144,177	39,878
2007	147,639	
2008	151,973	
2009	154,107	
2010	156,010	
2011	168,159	
2012	163,333	44,905

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THE CASE FOR ALLOWING FEE SHIFTING BYLAWS AS A PRIVATELY ORDERED SOLUTION TO THE SHAREHOLDER LITIGATION EPIDEMIC

Stephen M. Bainbridge[†]

I had been planning on writing a law review article on fee shifting bylaws, but I suspect that events will overtake the inevitably lengthy publishing process. This seems to be one of those times when blog publishing is the most effective way of getting the ideas out there.

In 2006, the board of directors of ATP Tour, Inc. (ATP), a Delaware nonstock membership corporation¹ that operates a professional men's tennis tour, amended ATP's bylaws to provide in pertinent part that:

In the event that (i) any [current or prior member or Owner or anyone on their behalf ("Claiming Party")] initiates or asserts any [claim or counterclaim ("Claim")] or joins, offers substantial assistance

[†] Stephen Bainbridge is the William D. Warren Distinguished Professor of Law at UCLA School of Law. Originals at www.professorbainbridge.com/professorbainbridgecom/2014/11/the-case-for-allowing-fee-shifting-bylaws-as-a-privately-ordered-solution-to-the-shareholder-litigat.html (Nov. 17, 2014) (vis. Sept. 4, 2015). © 2014 Stephen M. Bainbridge. Republished with permission.

¹ The Delaware General Corporation Law (DGCL) defines a nonstock corporation as "any corporation organized under [the DGCL] that is not authorized to issue stock." Del. Code Ann., tit. 8, § 114(d)(4). A nonstock corporation can be either for-profit or nonprofit. *See id.* § 114(c)(3) (defining a "nonprofit nonstock corporation" as "a nonstock corporation that does not have membership interests"). Members of a for-profit nonstock corporation have a "membership interest," which is defined as "a member's share of the profits and losses of [the] corporation, or a member's right to receive distributions of [the] corporation's assets, or both." *Id.* § 114(d)(3). ATP is a nonprofit nonstock corporation. *See Deutscher Tennis Bund v. ATP Tour Inc.*, 480 F. App'x 124, 125 (3d Cir. 2012) (explaining that "ATP is a not-for-profit Delaware membership corporation").

to or has a direct financial interest in any Claim against the League or any member or Owner (including any Claim purportedly filed on behalf of the League or any member), and (ii) the Claiming Party (or the third party that received substantial assistance from the Claiming Party or in whose Claim the Claiming Party had a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the League and any such member or Owners for all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses) (collectively, "Litigation Costs") that the parties may incur in connection with such Claim.²

The Delaware Supreme Court upheld the bylaw as valid.

These fee shifting "bylaws impose a 'loser pays' rule that transfers a company's costs and expenses in shareholder litigation to the plaintiff shareholder if the plaintiff is unsuccessful."³ At least 24 for profit Delaware business corporations have now adopted them. It is widely assumed that the legal basis for upholding such a bylaw in the context of a membership corporation will carry over to a stock corporation.

As a WSJ opinion column recently reminded us, however, the Delaware legislature may yet intervene:

Weeks after the [Delaware Supreme Court's *ATP*] ruling, the Delaware legislature, cheered on and supported by the powerful state plaintiffs bar, attempted to pass a law "fixing" the Delaware Supreme Court's decision. Far from a fix, the bill would have outlawed a company's ability to use the fee-shifting tool to protect itself against frivolous litigation.

Loud protests from national, state and local business groups, as well as individual companies caused the legislature to rethink its approach. But the legislature hit only the pause button, asking the Delaware Bar's leadership to "study" the matter this fall before recommending to the legislature a revised provision to be considered early next year.⁴

² *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 556 (Del. 2014) (quoting ATP Bylaw Article 23.2(a)).

³ DavisPolk Briefing: Governance, [The Latest on Fee-Shifting Bylaws](http://www.davispolk.com/briefing/corporategovernance/latest-fee-shifting-bylaws/) (Oct. 23, 2014) [www.davispolk.com/briefing/corporategovernance/latest-fee-shifting-bylaws/].

⁴ Lisa A. Richard, [Delaware Flirts With Encouraging Shareholder Lawsuits](http://www.wsj.com/articles/lisa-rickard-delaware-flirts-with-encouraging-shareholder-lawsuits-1416005328?tesla=y&mg=reno64-wsj), Wall St. J., Nov. 14, 2014 [www.wsj.com/articles/lisa-rickard-delaware-flirts-with-encouraging-shareholder-lawsuits-1416005328?tesla=y&mg=reno64-wsj].

The purpose of this essay is to explain the case for fee shifting bylaws and, accordingly, to argue that the Delaware legislature should not ban them legislatively.

WHY ARE FEE SHIFTING BY LAWS NEEDED?

In 2006-2007, there were three major reports studying the declining competitiveness of U.S. capital markets: the Bloomberg-Schumer Report,⁵ the Paulson Committee Interim Report,⁶ and the Chamber Report.⁷ Taken together, and evaluated in light of subsequent developments, the evidence they gathered confirmed that the U.S. capital markets became less competitive vis-à-vis other markets in the last decade. By why?

In 2008, the Supreme Court handed down one of the most consequential securities cases to come before it in many years, *Stoneridge Investment Partners v. Scientific-Atlanta*.⁸ What makes *Stoneridge* instructive for our purposes is not the specific legal issues or the holding, but rather the Supreme Court majority's explicit reliance on policy considerations and the content of those considerations:

The practical consequences of an expansion [of Rule 10b-5 liability] . . . provide a further reason to reject petitioner's approach. In *Blue Chip*, the Court noted that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies. Adoption of petitioner's approach would expose a new class of defendants to these risks. As noted in *Central Bank*, contracting parties might find it necessary to protect against these threats, raising the costs of doing business. Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities

⁵ Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the U.S.' Global Financial Services Leadership* (2007) [hereinafter the Bloomberg-Schumer Report].

⁶ Comm. on Capital Mkts. Reg., *Interim Report of the Committee on Capital Markets Regulation* (2006). The Committee on Capital markets regulation – or, as it is better known – the Paulson Committee subsequently issued a follow up report identifying thirteen competitive measures that the Committee tracks on a quarterly basis. Comm. on Capital Mkts. Regulation, *The Competitive Position of the U.S. Public Equity Market* (2007) [hereinafter the Paulson Committee Report].

⁷ U.S. Chamber of Comm., *Capital Markets, Corporate Governance, and the Future of the U.S. Economy* (2006) [hereinafter the Chamber Report].

⁸ *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

offerings away from domestic capital markets.⁹

Like all three of the capital market competitiveness reports, the Supreme Court majority thus explicitly recognized the risk that our expansive securities anti-fraud legal regime poses to the competitiveness of our markets.

The point is not that we should live in a world of *caveat emptor*. An effective anti-fraud regime has obvious benefits. It serves to compensate defrauded investors. It deters fraud. It provides a bond making issuer disclosures more credible and thereby lowers the cost of capital. The question remains, however, whether the current U.S. anti-fraud regime imposes costs that may outweigh or, at least, reduce these benefits.

An affirmative answer to that question is suggested by a survey of global financial services executives, which found that the litigious nature of U.S. society and capital markets has a negative impact on the competitiveness of those markets.¹⁰ The key problem appears to be the prevalence of private party securities fraud class actions, which do not exist in most other major capital market jurisdictions.

Between 1997 and 2005 there was a steady increase in both the number of securities class action filings and the average settlement value of those suits.¹¹ The total amount paid in securities class actions peaked in 2006 at over \$10 billion, even excluding the massive \$7 billion Enron settlement.¹² The vast majority of such settlement payments historically have been made either by issuers or their insurers, rather than by individual defendants.¹³ As a result, the vast bulk of securities settlement payments come out of the corporate treasury, either directly or indirectly in the form of higher insurance premia. In either case, settlement payments reduce the value of the residual claim on the corporation's assets and earnings. In effect, the company's current shareholders pay the settlement, not the directors or officers who actually committed the alleged wrongdoing.

⁹ *Id.* at 163-64 (citations omitted).

¹⁰ Bloomberg Schumer Report, *supra* note 1, at 73.

¹¹ See Paulson Committee Report, *supra* note 2, at 75. A mid-decade dip in filings was probably caused by the lack of volatility in U.S. stock markets during the period and the fading of the substantial litigation generated by the bursting of the dot-com bubble. Bloomberg-Schumer Report, *supra* note 1, at 74.

¹² Statement of the Financial Economists Roundtable on the International Competitiveness of U.S. Capital Markets, 19 *J. Applied Corp. Fin.* 54, 55 (2007) [hereinafter FER].

¹³ *Id.*

THE CASE FOR ALLOWING FEE SHIFTING BYLAWS

The effect of securities class actions thus is a wealth transfer from the company's current shareholders to those who held the shares at the time of the alleged wrongdoing. In the case of a diversified investor, such transfers are likely to be a net wash, as the investor is unlikely to be systematically on one side of the transfer rather than the other. Because there are substantial transaction costs associated with such transfers, moreover, the diversified investor is likely to experience an overall loss of wealth as a result of the private securities class actions. Legal fees to plaintiff counsel typically take 25-35% of any monetary class action settlement, for example, and the corporation's defense costs are likely comparable in magnitude.¹⁴

The circularity inherent in the securities class action process reduces the effectiveness of private anti-fraud litigation as both a deterrent and means of compensation. As to deterrence, because it is the company and not the individual wrongdoers that pays in the vast majority of cases, the system fails to directly punish those individuals. As to compensation, the transaction costs associated with securities litigation ensure that investors are unlikely to recover the full amount of their claims. Indeed, there is evidence that investors recover only two to three percent of their economic losses through class actions.

The analysis to this point has implicitly assumed that all securities fraud class actions are meritorious. When one considers the potential for frivolous or nuisance litigation, the potential impact of litigation on the capital markets is compounded. To be sure, the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998 heightened the pleading standards for securities fraud claims, allowed an automatic stay of discovery while a motion to dismiss is pending, created a uniform federal cause of action, and otherwise tried to reduce frivolous securities class action. While there is some empirical evidence that the PSLRA and SLUSA have reduced – but not eliminated – the number of frivolous suits, there is also evidence that they have had the unintended effect of reducing meritorious suits in which pre-filing indicia of fraud are more difficult to identify and plead with particularity as required by the new pleading standard.¹⁵

¹⁴ *Id.*

¹⁵ Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 *Vand. L. Rev.* 1465 (2004).

The accurate perception that exposure to the U.S. capital markets significantly increases an issuer's litigation risk has a measurable impact on the attractiveness of those markets. A study of domestic issuers found, for example, that issuers with prior experience with securities fraud class actions and those in standard industry classifications having a high incidence of such litigation tended to resort to offshore financing more often than other issuers.¹⁶ As for foreign issuers, they are "deeply" concerned by the "cost of litigation" associated with securities class actions and "risk of huge enforcement actions."¹⁷

When asked which aspect of the legal system most significantly affected the business environment, senior executives surveyed indicated that propensity toward legal action was the predominant problem. Worryingly for New York, the city fares far worse than London in this regard: 63 percent of respondents thought the UK (and by extension London) had a less litigious culture than the United States, while only 17 percent felt the US (and by extension New York) was a less litigious place than the United Kingdom (Exhibit 20). This is a dramatic result, and it is echoed even more strongly by the CEOs surveyed: 85 percent indicated that London was preferable, and not a single one chose New York. . . .

. . . Only about 15 percent [of surveyed senior executives] felt that the US system was better than the UK's in terms of predictability and fairness, while over 40 percent favored the UK in both these regards. The CEOs interviewed also shared this sentiment, although they felt that London's advantage was particularly strong in terms of the predictability. Legal experts indicated that this is a major reason why many corporations now choose English law to govern their international commercial contracts.¹⁸

Because "the only way foreign companies can protect themselves" from litigation risk "is to move out of the United States altogether," "a lot of companies are doing" precisely that.¹⁹

¹⁶ Stephen J. Choi, *Assessing the Cost of Regulatory Protections: Evidence on the Decision to Sell Securities Outside the United States* (Yale Law & Economics Research Paper No. 253, March 21, 2001), available at SSRN: ssrn.com/abstract=267506.

¹⁷ Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application Of Federal Securities Law*, 1743 *PLI/Corp* 1243, 1253 (May 20, 2009).

¹⁸ Bloomberg-Schumer Report, *supra* note 1, at 75, 77.

¹⁹ Jackson, *supra* note 13, at 1254.

The litigation risk problem is not limited to securities class actions. We see essentially identical concerns in areas such as state corporate law derivative litigation. In a seminal empirical study of derivative litigation, Professor Roberta Romano found that derivative litigation is relatively rare.²⁰ Of those cases that go to trial, shareholder-plaintiffs almost always lose. As is generally true of all litigation, however, most derivative suits settle. Only half of the settled derivative suits resulted in monetary recoveries, with an average recovery of about \$6 million. In almost all cases, the legal fees collected by plaintiff counsel exceeded the monetary payments to shareholders. Romano further concluded that nonmonetary relief typically was inconsequential in nature.

Like securities class actions, derivative litigation mainly serves as a means of transferring wealth from investors to lawyers. At best, derivative suits take money out of the corporate treasury and return it to shareholders minus substantial legal fees. In many cases, moreover, little if any money is returned to the shareholders, but legal fees are almost always paid.

As for deterrence, there is no compelling evidence that derivative litigation deters a substantial amount of managerial shirking and self-dealing. To the contrary, there is evidence that derivative suits do not have significant effects on the stock price of the subject corporations, which suggests that investors do not believe derivative suits deter misconduct.²¹ There is also substantial evidence that adoption of a charter amendment limiting director liability has no significant effect on the price of the adopting corporation's stock, which suggests that investors do not believe that duty of care liability has beneficial deterrent effects.²²

CONCLUSION

There is a serious litigation crisis in American corporate law. As Lisa Rickard recently noted, "where shareholder litigation is reaching epidemic levels. Nowhere is this truer than in mergers and acquisitions.

²⁰ Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 *J. L. Econ. & Org.* 55 (1991).

²¹ See Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 *Cornell L. Rev.* 261 (1986).

²² See, e.g., Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 *Iowa L. Rev.* 1 (1989); Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 *Emory L.J.* 1155 (1990).

According to research^{*} conducted by the U.S. Chamber Institute for Legal Reform, lawsuits were filed in more than 90% of all corporate mergers and acquisitions valued at \$100 million since 2010.” There simply is no possibility that fraud or breaches of fiduciary duty are present in 90% of M&A deals. Instead, we are faced with a world in which runaway frivolous litigation is having a major deleterious effect on U.S. capital markets.²³

Fee shifting bylaws are an appropriate means of addressing the problem through private ordering. On the one hand, they likely will prove an effective deterrent to frivolous litigation:

Fee-shifting bylaws, if widely adopted, would raise the risk associated with filing these lawsuits and could weed out the weakest ones, said Sean Griffith, a professor at Fordham University’s law school.

“This could be a gut check for plaintiffs’ lawyers,” Mr. Griffith said. “They would have to ask – for the first time, really – how good is my case?”²⁴

It is, of course, a question that plaintiff lawyers should have been asking all along. The problem, of course, is that they never do.

On the other hand, bylaws are subject to shareholder amendment, so the most likely result will be a process of give and take between directors and shareholders that results in bylaws whose terms are broadly acceptable to the key constituencies (other than lawyers, of course).

Delaware should uphold these bylaws. But will it? That will be the subject of my next essay.

//

^{*} www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf.

²³ The evidence seems clear that “that the system is broken, that shareholder suits are being filed regardless of the merits, and that shareholder plaintiffs are imposing a dead weight on society and an unwarranted burden on corporate America and the courts.” Marc Wolinsky & Ben Schireson, *Deal Litigation Run Amok*, 47 *Rev. Sec. & Comm. Reg.* 1 (Jan. 8, 2014). The authors offer a number of solutions, including an endorsement of fee shifting bylaws.

²⁴ Liz Hoffman, *Shareholder Suits May Prove Costly*, *Wall St. J.*, May 18, 2014 [www.wsj.com/articles/SB10001424052702304908304579565850165670972].

FROM: PROFESSORBAINBRIDGE.COM

DELAWARE'S DECISION

VIEWING FEE SHIFTING BYLAWS THROUGH A PUBLIC CHOICE LENS

Stephen M. Bainbridge[†]

In a recent WSJ [column](#),* Lisa Rickard did a great job analyzing the decision Delaware's legislature will soon face with respect to fee shifting bylaws:

Specifically, the controversy hinges on whether a company can adopt bylaws allowing it to claw back some of its legal costs if plaintiffs lawyers bring an abusive shareholder lawsuit and lose in court. . . .

The debate over fee shifting was ignited in May, after ATP Tour Inc., the Delaware-incorporated company that oversees men's professional tennis, tried to enforce a fee-shifting provision in its bylaws after it won a lawsuit brought by members challenging changes to the tour schedule and format. The Delaware Supreme Court ultimately determined that ATP was within its rights to adopt the provision under state law.

Weeks after the court's ruling, the Delaware legislature, cheered on and supported by the powerful state plaintiffs bar, attempted to pass a law "fixing" the Delaware Supreme Court's decision. Far from a fix, the bill would have outlawed a company's ability to use the fee-shifting tool to protect itself against frivolous litigation.

Loud protests from national, state and local business groups, as well as individual companies caused the legislature to rethink its approach.

[†] Stephen Bainbridge is the William D. Warren Distinguished Professor of Law at UCLA School of Law. Originals at www.professorbainbridge.com/professorbainbridgecom/2014/11/delawares-decision-viewing-fee-shifting-bylaws-through-a-public-choice-lens.html (Nov. 18, 2014) (vis. Sept. 4, 2015). © 2014 Stephen M. Bainbridge. Republished with permission.

* www.wsj.com/articles/lisa-rickard-delaware-flirts-with-encouraging-shareholder-lawsuits-1416005328?tesla=y&mg=reno64-wsj.

But the legislature hit only the pause button, asking the Delaware Bar's leadership to "study" the matter this fall before recommending to the legislature a revised provision to be considered early next year.

In an earlier post, I made the case that the Delaware legislature ought to authorize and validate fee shifting bylaws. But will it?

In this post, I view the problem through a public choice lens. As I see it, there are two questions: (1) What's in the state of Delaware's best interest? (2) What's in the best interest of the key interest group that would be affected by fee shifting bylaws? As we'll see, I think those questions have different answers. Predicting what Delaware will decide is thus quite difficult.

THE LEGISLATURE'S INCENTIVES TO PRESERVING DELAWARE'S DOMINANCE

Back in the nineteenth century state corporation laws gradually moved in the direction of increased liberality, making the incorporation process simpler on the one hand, while at the same time abandoning any effort to regulate the substantive conduct of corporations through the chartering process. In later years, this process became known as the "race to the bottom."¹ Corporate and social reformers believed that the states competed in granting corporate charters. After all, the more charters (certificates of incorporation) the state grants, the more franchise and other taxes it collects. According to this view, because it is corporate managers who decide on the state of incorporation, states compete by adopting statutes allowing corporate managers to exploit shareholders.

Many legal scholars reject the race to the bottom hypothesis.² According to a standard account, investors will not purchase, or at least not pay as

¹ See generally William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *Yale L.J.* 663 (1974) (classic statement of race to the bottom hypothesis); see also Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 *Harv. L. Rev.* 1437 (1992).

² See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. Legal Stud.* 251 (1977) (the seminal response to Cary); see also William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 *J. Legal Stud.* 303 (1997); Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 *Del. J. Corp. L.* 540, 654-71 (1984); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 *Nw. U. L. Rev.* 913 (1982); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 *Cardozo L. Rev.* 709 (1987); cf. Jonathan R. Macey and Geoffrey P. Miller, *Toward an Interest Group Theory of Delaware Corporate Law*, 65 *Tex. L. Rev.* 469 (1987) (public choice-based theory of state competition).

much for, securities of firms incorporated in states that cater too excessively to management. Lenders will not make loans to such firms without compensation for the risks posed by management's lack of accountability. As a result, those firms' cost of capital will rise, while their earnings will fall. Among other things, such firms thereby become more vulnerable to a hostile takeover and subsequent management purges. Corporate managers therefore have strong incentives to incorporate the business in a state offering rules preferred by investors. Competition for corporate charters thus should deter states from adopting excessively pro-management statutes. The empirical research appears to bear out this view of state competition, suggesting that efficient solutions to corporate law problems win out over time.³

Whether state competition is a race to the bottom or the top,⁴ there is no question that Delaware is the runaway winner in this competition. More than half of the corporations listed for trading on the New York Stock Exchange and nearly 60% of the Fortune 500 corporations are in-

³ See Roberta Romano, *The Genius of American Corporate Law* (1993) (setting forth both an empirical analysis and theoretical arguments challenging race to the bottom hypothesis). As even many advocates of the race to the top hypothesis concede, however, state regulation of corporate takeovers appears to be an exception to the rule that efficient solutions tend to win out. See, e.g., Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 *Fordham L. Rev.* 843 (1993); Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 *Colum. L. Rev.* 1526 (1989); see also Lucian Ayre Bebchuk and Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 *Colum. L. Rev.* 1168 (1999) (contending that the race to the bottom in takeover regulation may be a general phenomenon).

⁴ The empirical data, however, imply a much less vigorous competition than either story claims. At most, it seems that states compete with Delaware to retain local incorporations. With few exceptions (perhaps Pennsylvania and Nevada), states generally are not competing with Delaware for out-of-state incorporations.

The empirical data only comes as a surprise, however, to those bemused by the popular caricature of the debate. Race to the top theorists like Ralph Winter or Roberta Romano never claimed that a Los Angeles-based lawyer sits down and thumbs through all 50 state statutes before deciding where to incorporate a client.

We all know that lawyers play a big role in the decision of where to incorporate. Lawyers are subject to the same bounded rationality constraints everybody else is, as well as the familiar incentives of agency cost economics. Under such conditions, lawyers naturally will adopt a decision-making heuristic; and, home state versus Delaware is far and away the most sensible heuristic.

So the market for corporate charters is better described as a leisurely walk than a race. But so what? Even though Delaware doesn't face as much competition as the caricature of the debate claims, there is still competition: When a firm is incorporated, the lawyer and client often decide between Delaware and the home state. And, of course, many firms periodically consider whether to change their domicile to Delaware via reincorporation.

incorporated in Delaware. Proponents of the race to the bottom hypothesis argue that Delaware is dominant because its corporate law is more pro-management than that of other states. Those who reject the race to the bottom theory ascribe Delaware's dominance to a number of other factors: There is a considerable body of case law interpreting the Delaware corporate statute (DGCL), which allows legal questions to be answered with confidence. Delaware has a separate court, the Court of Chancery, devoted largely to corporate law cases. The Chancellors have great expertise in corporate law matters, making their court a highly sophisticated forum for resolving disputes. They also tend to render decisions quite quickly, facilitating transactions that are often time sensitive.⁵

Whether one thinks Delaware's dominance is because the state is winning the race to the top or the race to the bottom, there is no doubt that Delaware benefits significantly from its dominance. Delaware does get an astonishing percentage of state revenues from incorporation fees and franchise taxes. In some years, Delaware's annual revenues from these sources constitute up to 30% of the state's budget – an estimated equivalent of \$3,000 for each household of four in the state. Given the importance of franchise taxes and other corporate fees to Delaware's budget it would be surprising if such competition did not suffice to keep Delaware on its toes. If Delaware isn't racing, it is at least fast walking.

The question thus becomes: How would banning fee shifting bylaws affect Delaware's competitive position. In my view, Delaware's competitive position would be adversely affected by doing so.

As I observed in an earlier [post](#),^{*} quoting Kevin LaCroix:

. . . while the Delaware legislative initiative is on hold, at least one legislature has gone forward to provide for the awarding of fees against unsuccessful derivative lawsuit claimants. . . .

. . . the "loser pays" model that the Oklahoma legislation adopts is extraordinary – It represents a significant departure from what is general known as the American Rule, under which each party typically bears its own cost. And unlike the fee-shifting bylaws being debated in Delaware –which would in any

⁵ See generally Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061 (2000).

^{*} www.professorbainbridge.com/professorbainbridgecom/2014/10/oklahoma-leads-on-fee-shifting-bylaws-will-delaware-and-mbca-follow.html.

event require each company to decide whether it was going to adopt the bylaw (and might therefore be subject to shareholder scrutiny) – the Oklahoma legislation applies to any derivative action in the state, even if the company involved is not an Oklahoma corporation.

If more states follow Oklahoma's lead, Delaware's need to remain at the forefront of corporate law may be enough to overcome the self-interested lobbying by lawyers (both defense and plaintiff) who hate loser pays.

John Coffee has similarly observed* that a ban by “Delaware might fuel an interjurisdictional competition, as other, more conservative states (think, Texas) might seek to lure companies to reincorporate there to exploit their tolerance for such provisions.”

The effect of banning fee shifting bylaws on Delaware's dominance might only be marginal, but Delaware has kept its position at the top of the corporate law heap by responding to even marginal threats.

So what's in Delaware's best interest? If you're a Delaware taxpayer, the answer is clear: Endorse and validate fee shifting bylaws.

THE INTEREST GROUP THAT MATTERS

My late friend Larry Ribstein once observed that:

Professors Jonathan Macey and Geoffrey Miller argue that lawyers may be the group that most influences Delaware corporate law. Delaware lawyers have all of the attributes of a politically powerful interest group: they are already organized into bar associations and maintain an advantage over other groups because they continually learn about the law as a consequence of their profession; they are centered in a single city (Wilmington), in a small state and, therefore, can communicate with each other at minimal costs; and they provide an important service for legislators in drafting legislation on complex commercial and corporate matters.

Delaware lawyers, in essence, are the Delaware legislature, at least insofar as corporate law is concerned. Delaware has one of the three smallest legislatures in the country. Its legislative committees are virtually inactive. Most striking, however, is that few of Delaware's legislators are lawyers. Such legislators are likely to rely on lawyers to

* clsbluesky.law.columbia.edu/2014/10/14/fee-shifting-and-the-sec-does-it-still-believe-in-private-enforcement/.

supply sophisticated commercial and business legislation. As a result, virtually all of Delaware corporate law is proposed by the Delaware bar, and the bar's proposals invariably pass through the legislature.⁶

The Macey and Miller article to which Ribstein refers exhaustively reviews the various interest groups that might influence the production of Delaware law and conclude that “the bar is the most important interest group within this equilibrium. Thus, the rules that Delaware supplies often can be viewed as attempts to maximize revenues to the bar, and more particularly to an elite cadre of Wilmington lawyers who practice corporate law in the state.”⁷ They further explain that:

The Delaware bar is interested in maximizing one specific portion of the indirect costs of Delaware incorporation – fees to Delaware lawyers paid for work on behalf of Delaware corporations. These legal fees are functionally related to the number of charters in Delaware in the sense that the expected legal revenues will increase as the number of corporations chartered in the state increases. Accordingly, the bar would tend to favor low franchise fees, because keeping the fees low will tend to increase the number of Delaware corporations. But the bar could also benefit from legal rules that increase the amount of expected legal fees per corporation, even if such rules, by imposing additional costs on Delaware corporations, reduced the absolute number of firms chartered in the state. If the legal fees gained exceed the fees lost by deterring Delaware incorporation, the bar would prefer to adopt rules that did not serve the interests of the other interest groups within the state. In this respect, the bar's interests are opposed to the interests of all other groups.⁸

How then would fee shifting bylaws affect the income of Delaware lawyers? It seems fair to assume that there will be a net reduction in shareholder litigation as a result of fee shifting bylaws becoming widespread. As Kevin LaCroix observed,^{*} quoting the Delaware Supreme Court's ATP Tour decision:

⁶ Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 Del. J. Corp. L. 999, 1009-10 (1994).

⁷ Jonathan R. Macey, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469, 472 (1987).

⁸ *Id.* at 503-04.

^{*} www.dandodiary.com/2014/07/articles/corporate-governance/though-delaware-legislature-has-tabled-action-upcoming-judicial-review-of-fee-shifting-bylaws-seems-likely/.

DELAWARE'S DECISION

Fee shifting provisions “by their nature, deter litigation.”

This would adversely affect not just plaintiff lawyers, but also defense lawyers. After all, fewer lawsuits mean less work for defense litigators too:

The bar . . . does benefit from increasing the amount of litigation and accordingly would tend to favor litigation-increasing rules Delaware could stimulate litigation [by making] litigation cheaper by reducing the costs to the parties, especially plaintiffs who make the initial choice of forum.⁹

Both sides of the litigation bar thus have a strong interest in banning fee shifting bylaws. Such bylaws would raise plaintiff costs, deterring lawsuits, reducing fees for all litigators.

Widespread adoption of fee shifting bylaws could also adversely affect transactional lawyers. Litigation risk is a major driver in the level of advisory work. As Jonathan Macey observed, for example, Delaware case law has given corporate directors “significant incentives to cloak their decisions in a dense shroud of process and to take other steps that will generate high fees for lawyers, investment bankers, and other advisors (who, incidentally, are precisely the same people who advise companies to incorporate in Delaware in the first place).”¹⁰ Fee shifting bylaws would reduce those incentives and thus decrease the demand for advisory work by lawyers.

All corporate lawyers – litigators and transactional – have a strong incentive to oppose fee shifting bylaws. Hence, it was no surprise that the Delaware legislature – dominated in this area by the Delaware bar – leaped to ban such bylaws. The business groups that favor fee shifting bylaws were able to delay that action. But the final decision remains pending.

Update: You should check out Brett McDonnell’s comment below. Also consider the point being made by Usha Rodrigues*:

Certainly litigators want litigation. But deal lawyers don’t want it – at least, not this particular kind of litigation. Indeterminacy over doctrinal areas like good faith is good for transactional types as well as litigators, because it gives them more nuances and risks to have to explain at length to boards as they advise on various types of action. The type of

⁹ Id. at 504.

¹⁰ Jonathan Macey, Delaware: Home of the World’s Most Expensive Raincoat, 33 Hofstra L. Rev. 1131, 1137 (2005).

* www.theconglomerate.org/2014/11/bainbridge-on-fee-shifting-bylaws.html.

fee-shifting bylaw we're discussing, in contrast, is bad for deal lawyers – at least, if you think, as Steve does, that

There is a serious litigation crisis in American corporate law. As Lisa Rickard recently noted, “where shareholder litigation is reaching epidemic levels. Nowhere is this truer than in mergers and acquisitions. According to research* conducted by the U.S. Chamber Institute for Legal Reform, lawsuits were filed in more than 90% of all corporate mergers and acquisitions valued at \$100 million since 2010.” There simply is no possibility that fraud or breaches of fiduciary duty are present in 90% of M&A deals. Instead, we are faced with a world in which runaway frivolous litigation is having a major deleterious effect on U.S. capital markets.

If these suits amount to nothing more than a litigation tax on deals, then they discourage deals. And that's bad for deal lawyers.

CONCLUSION

The debate over fee shifting bylaws will come to a head in the Delaware legislature early in 2015. It is shaping up to be a fascinating test of whether the Delaware bar's grip on Delaware corporate law will be strong enough to overcome the incentives Delaware legislators have to remain the most attractive state of incorporation. Because endorsing fee shifting bylaws is the right answer from a policy perspective, those of us who do not have a dog in that specific fight can only hope that the latter position prevails. To end with a classic cliché, however, only time will tell.

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* www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf.

FROM: THE FACULTY LOUNGE

ABOVE THE (PUBLIC HEALTH) LAW

HEALTHCARE WORKER DECEPTION &
DISOBEDIENCE IN A TIME OF DISTRUST

Michelle N. Meyer[†]

A physician shall . . . be honest in all professional interactions, and strive to report physicians . . . engaging in fraud or deception, to appropriate entities.

– AMA Principles of Medical Ethics¹

This is a troubling series of news reports about deception and defiance on the part of some healthcare workers (HCWs) in response to what they believe to be unscientific, unfair, and unconstitutional public health measures:

(1) Ebola Aide Doc: I'm Not Telling My Team To Tell The Truth²

Gavin Macgregor-Skinner, an epidemiologist and Global Projects Manager for the Elizabeth R. Griffin Foundation, who has led teams of doctors to treat Ebola in West Africa, reported that he “can’t tell them [his doctors] to tell the truth [to U.S. officials]” on Monday’s “CNN Newsroom.”

[†] Michelle Meyer is Assistant Professor of Bioethics and Director of Bioethics Policy in the Union Graduate College-Icahn School of Medicine at Mount Sinai Bioethics Program. Originals at www.thefacultylounge.org/2014/10/healthcare-worker-deception-defiance-in-a-time-of-distrust.html (Oct. 29, 2014; Addendum and updates (latest: 4 pm, 10/31) added below) (vis. June 1, 2015). © 2014 Michelle N. Meyer. Republished with permission.

¹ www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?

² www.breitbart.com/video/2014/10/27/ebola-aide-doc-im-not-telling-my-team-to-tell-the-truth/.

“At the moment these people are so valuable . . . I have to ensure they come back here, they get the rest needed. I can’t tell them to tell the truth at the moment because we’re seeing so much irrational behavior,” he stated. “I’ve come back numerous times between the U.S. and West Africa. If I come back now and say ‘I’ve been in contact with Ebola patients,’ I’m going to be locked in my house for 21 days,” Macgregor-Skinner said as his reason for not being truthful with officials, he added, “when I’m back here in the US, I am visiting US hospitals everyday helping them get prepared for Ebola. You take me out for three weeks, who’s going to replace me and help now US hospitals get ready? Those gaps can’t be filled.”

He argued that teams of doctors and nurses could be trusted with the responsibility of monitoring themselves, stating, “When I bring my team back we are talking each day on video conferencing, FaceTime, Skype, text messaging, supporting each other. As soon as I feel sick I’m going to stay at home and call for help, but I’m not going to go to a Redskins game here in Washington D.C. That’s irresponsible, but I need to get back to these hospitals and help them be prepared.

UPDATE: [Here](#)³ is the CNN video of his remarks.

(2) [Ebola Doctor ‘Lied’ About NYC Travels](#)⁴

The city’s [first Ebola patient](#)⁵ initially lied to authorities about his travels around the city following his return from treating disease victims in Africa, law-enforcement sources said. [Dr. Craig Spencer](#)⁶ at first told officials that he isolated himself in his Harlem apartment – and didn’t admit he [rode the subways, dined out and went bowling](#)⁷ until cops looked at his MetroCard the sources said. “He told the authorities that he self-quarantined. Detectives then reviewed his credit-card statement and MetroCard and found that he went over here, over there, up and down and all around,” a source said. Spencer finally ‘fessed up when a cop “got on the phone and had to relay questions to him through the Health Department,” a source said. Officials then re-

³ www.cnn.com/videos/bestoftv/2014/10/27/exp-macgregor-skinner-intv.cnn.

⁴ nypost.com/2014/10/29/ebola-doctor-lied-about-his-nyc-travels-police/.

⁵ nypost.com/2014/10/23/nyc-doctor-tests-positive-for-deadly-ebola-virus/.

⁶ nypost.com/tag/craig-spencer/.

⁷ nypost.com/2014/10/25/biohazard-scrubbing-begins-at-places-visited-by-ebola-doctor/.

traced Spencer's steps, which included dining at The Meatball Shop in Greenwich Village and bowling at The Gutter in Brooklyn.

UPDATE 11PM, 10/30: A spokesperson for the NYC health department has now disputed⁸ the above story, which cites anonymous police officer sources, in a statement provided to CNBC. The spokesperson said: "Dr. Spencer cooperated fully with the Health Department to establish a timeline of his movements in the days following his return to New York from Guinea, providing his MetroCard, credit cards and cellphone." . . . When CNBC asked again if Spencer had at first lied to authorities or otherwise mislead them about his movements in the city, Lewin replied: "Please refer to the statement I just sent. As this states, Dr. Spencer cooperated fully with the Health Department."

(3) Ebola nurse in Maine rejects home quarantine rules⁹ [the WaPo headline better captures the gist: After fight with Chris Christie, nurse Kaci Hickox will defy Ebola quarantine in Maine¹⁰]

Kaci Hickox, the Ebola nurse who was forcibly held in an isolation tent in New Jersey for three days, says she will not obey instructions to remain at home in Maine for 21 days. "I don't plan on sticking to the guidelines," Hickox tells TODAY's Matt Lauer.¹¹ "I am not going to sit around and be bullied by politicians and forced to stay in my home when I am not a risk to the American public."

Maine health officials have said they expect her to agree to be quarantined at her home for a 21-day period. *The Bangor Daily News* reports.¹² But Hickox, who agreed to stay home for two days, tells TODAY she will pursue legal action if Maine forces her into continued isolation. "If the restrictions placed on me by the state of Maine are not lifted by Thursday morning, I will go to court to fight for my freedom," she says.

⁸ www.cnn.com/2014/10/29/heres-why-states-dont-trust-voluntary-ebola-quarantines.html.

⁹ www.usatoday.com/story/news/nation/2014/10/29/ebola-nurse-maine/18105327/.

¹⁰ www.washingtonpost.com/news/morning-mix/wp/2014/10/29/after-fight-with-chris-christie-nurse-kaci-hickox-defies-ebola-quarantine-in-maine/.

¹¹ www.today.com/health/nurse-kaci-hickox-says-she-wont-obey-maines-ebola-quarantine-1D80251330.

¹² bangordailynews.com/2014/10/28/health/lawyer-for-fort-kent-nurse-says-she-wont-abide-by-quarantine/.

On the evolving Hickox situation, it's unclear whether – as Hickox herself has suggested – she is already under a mandatory home quarantine order, which she is threatening to defy by leaving her house on Thursday morning and (unless it's been lifted) suing, or whether – as her attorneys say – she is currently under no such quarantine order and is free to leave her house at any time (but is choosing to rest for a couple of days). In any case, Maine has clearly said that it is prepared to get a court order to enforce (or impose) a quarantine order.

More after the jump . . .

It isn't clear whether Hickox will wait for judicial resolution of her legal claim, which surely could be expedited, that home quarantine is unconstitutional before disobeying it. (If anything, statements both she and her lawyers have made suggest that she in fact does not intend to wait, and that she will leave quarantine on Thursday morning regardless of whether things have been resolved in her favor or not.) Even if you disagree with the merits of Maine's policy, it takes more to justify a refusal to let a fairly quick legal process play out, and to defiantly flaunt your Typhoid Mary¹³ intentions through multiple media outlets to a country already struggling to keep its fear in check.

Nor is it clear what measures Hickox *is* willing to take to protect the public and her friends and family. Hickox has said that she will continue to take her temperature daily. But I've seen nothing from either her or her lawyers reassuring the public that she plans on adhering even to the relatively more relaxed precautions advised by the CDC.

UPDATE: Maine Governor LePage offered to allow¹⁴ Hickox (and all others in the "some risk" category) to comply with a version of the more relaxed CDC guidelines, rather than home quarantine, but Hickox apparently declined that offer.

UPDATE 2: On 10/30, Maine filed a petition for a court order compelling Hickox to comply with CDC guidelines for asymptomatic people with her exposure level. The court granted¹⁵ that petition, compelling Hickox to comply until such time as the court can consider a permanent order. A hearing on that question is reportedly¹⁶ occurring now (the morning of Oct. 31).

¹³ en.wikipedia.org/wiki/Typhoid_Mary.

¹⁴ www.maine.gov/tools/whatsnew/index.php?topic=Gov+News&id=630562&v=article2011.

¹⁵ www.scribd.com/doc/245106293/Hickox-Temporary-Court-Order-10-30-14.

¹⁶ www.wmtw.com/health/maines-ebola-protocols-mean-quarantine-for-nurse/29379150.

UPDATE 3 (4pm, 10/31): The court issued a new temporary order,¹⁷ superseding the prior one discussed in the above update, finding that the state had met its burden, prior to a full hearing, of clear and convincing evidence that compelling Hickox to do three things – (a) comply with Direct Active Monitoring (public health authorities observe her once/day; a second check-in may be by phone); (b) coordinate her travel to ensure Direct Active Monitoring; and (c) immediately notify authorities if any symptom appears – are all “necessary” (Maine’s statutory standard) to protect others from infection. However, the court also found, based on the current record before it, that the state had not met this burden as to the other measures it wanted Hickox to take. The court will issue a final order following a full hearing, to be held Nov. 4 and 5,¹⁸ at which additional evidence and/or legal arguments may be heard.

The newly released CDC guidance¹⁹ defines four tiers of risk, depending on an individual’s exposure to Ebola: high, some, low, and no risk. CDC describes those returning to the U.S. from countries with widespread Ebola virus transmission who have had direct contact with a symptomatic Ebola patient while using appropriate personal protective equipment (PPE) – a category I assume includes Hickox – as “some risk.” For “some risk” individuals who are asymptomatic, like Hickox, the CDC advises as follows:

- Direct active monitoring
- The public health authority, based on a specific assessment of the individual's situation, will determine whether additional restrictions are appropriate, including:
 - Controlled movement: exclusion from long-distance commercial conveyances (aircraft, ship, train, bus) or local public conveyances (e.g., bus, subway)
 - Exclusion from public places (e.g., shopping centers, movie theaters), and congregate gatherings
 - Exclusion from workplaces for the duration of a public health order, unless approved by the state or local health department (telework is permitted)
- Non-congregate public activities while maintaining a 3-foot distance from others may be permitted (e.g., jogging in a park)
- Other activities should be assessed as needs and circumstances change to determine whether these activities may be undertaken
- Any travel will be coordinated with public health authorities to ensure uninterrupted direct active monitoring
- Federal public health travel restrictions (**Do Not Board**) may be implemented based on an assessment of the particular circumstance
 - For travelers arriving in the United States, implementation of federal public health travel restrictions would occur after the traveler reaches the final destination of the itinerary

¹⁷ www.scribd.com/doc/245121348/Hickox-New-Court-Order.

¹⁸ courts.maine.gov/news_reference/high_profile/hickox/scheduling_order.pdf.

¹⁹ www.cdc.gov/vhf/ebola/pdf/monitoring-and-movement.pdf.

It's unclear whether Hickox is having intimate contact with her boyfriend (a nursing student), but his Maine school reportedly precluded him from coming to campus for 21 days and he has said he will do the quarantine with Hickox (does this mean that he, too, will disobey it after a few days?).

FACTS AND VALUES, NOT "FACTS VERSUS FEAR"

I'm not here to defend governors who impose quarantines on relatively low-risk (or "some-risk," in CDC parlance) people without so much as consulting their own public health officials. But it's also increasingly hard to defend the argument, made by Macgregor-Skinner and others, that we can trust HCWs who have already risked their lives to "do the responsible thing," when some of them so defiantly, publicly, and blanketly insist that they, as individuals – rather than either the judicial or political process – get to decide what responsible public health conduct entails, because they know better. And it's hard to imagine that this very public defiance and deception won't irresponsibly undermine trust in HCWs and contribute to public fear and suspicion.

There has been entirely too much confident bumper sticker assertion of late that public health policy comes down to "fear versus facts." Yes, sound public policy (on just about anything, not just public health policy) depends on accurate facts, including scientific facts. We should not base policy on mere intuitions and good intentions when those intentions can be rigorously tested, much less on what is already known to be factually false. I trot out that reminder every²⁰ chance I get.²¹ And yes, fear has played a troubling role in the history of public health²² (and many other) policies, and that fear can have devastating costs, to both individuals and society.

But (a) the relevant science is not as clear-cut and certain as many officials have suggested (suggestions perhaps designed to quell fear which, when they prove false, probably end up causing more distrust and fear), and (b) to claim that the IL/NY/NJ and similar quarantines are necessarily

²⁰ articles.latimes.com/2013/sep/29/opinion/la-oe-chabris-nudge-20130929.

²¹ papers.ssrn.com/sol3/papers.cfm?abstract_id=2215799.

²² www.washingtonpost.com/national/health-science/ebola-a-growing-epidemic-of-fear-eerily-like-the-early-years-of-the-age-of-aids/2014/10/15/5781f1fe-5479-11e4-809b-8cc0a295c773_story.html.

“not grounded in science,” as even one White House official has done²³ – sometimes in ways that seem designed to further politicize the debate about how we ought to respond to Ebola within our borders by tapping into stereotypes that only one side of the political spectrum ignores science²⁴ – is to ignore what one would have thought to be an obvious feature of law and public policy: they cannot be grounded in science (or other fact) *alone*, but inescapably involve value judgments, such as how to make trade-offs between costs and benefits and among groups of people.

Consider the common refrain that it’s “impossible” (not just unlikely) to contract and therefore transmit Ebola after 21 days from exposure, that 21 days is “the virus’s maximum incubation period.”²⁵ This isn’t so (one might even say that this isn’t “grounded in science”). Here’s²⁶ a recent article with background on where this number comes from (pretty good, but not perfect, data), which suggests that the tail of the distribution of onset of symptoms includes somewhere between 0.1-12% of Ebola patients who exhibit initial symptoms after 21 days. And here’s a recent WHO report²⁷ concluding that the mean incubation period (which did not differ across countries or between HCWs and other patients) was 11.4 days (see Figure 3), with 5% of patients becoming symptomatic after 21 days from exposure. So, policies that focus on 21 days are rough justice: they are grounded in science but also reflect a decision to balance the costs of quarantine, controlled movement, and even self-monitoring with the low risk of transmission by not requiring these public health measures after 21 days. Much the same is true of claims that someone has to have a fever before he or she can infect others with Ebola.²⁸

Our knowledge of this strain of Ebola, as it operates in our urban environment, is good, but imperfect. Based on that imperfect knowledge, the risk of returning HCWs transmitting Ebola to others is low, but not zero. As long as the risk is not zero, it requires a value judgment to decide what degree of individual liberty is reasonable to require returning HCWs tem-

²³ washington.cbslocal.com/2014/10/27/white-house-we-have-concerns-with-unintended-consequences-of-policies-not-grounded-in-science/.

²⁴ www.washingtonpost.com/news/wonkblog/wp/2014/10/28/liberals-deny-science-too/.

²⁵ www.washingtonpost.com/news/morning-mix/wp/2014/10/24/how-difficult-is-it-to-catch-ebola-on-the-subway/.

²⁶ currents.plos.org/outbreaks/article/on-the-quarantine-period-for-ebola-virus/.

²⁷ www.nejm.org/doi/full/10.1056/NEJMoa1411100.

²⁸ www.latimes.com/nation/la-na-1012-ebola-fever-20141012-story.html#page=1.

porarily to sacrifice in order to protect the public from that risk. Support for quarantines and other public health measures can certainly be rooted in scientific error or ignorance. But they can also be rooted in scientific disagreement around the edges and/or value-laden trade-offs with which others disagree. These kinds of value judgments are ones we entrust to our elected officials (God help us), to expert agencies, and sometimes to courts.

I don't personally happen to think that mandatory quarantine for returning HCWs in the "some risk" category is the optimal way to strike the balance between competing aims and values. And there have been some public health decisions in the past several weeks that can credibly be described as "not grounded in science" (such as when a teacher from Maine who had visited Dallas – but did not go to Texas Health Presbyterian Hospital, where Thomas Eric Duncan was treated and later died, and did not take either of the flights that his nurse, Amber Vinson, took before becoming symptomatic with Ebola – was placed on leave by her school district²⁹). Some who support quarantines seem to want to reduce the risk of Ebola transmission to zero, and we generally – and, in my view, rightly – don't regulate with that idealistic aim in mind, even when the magnitude of the harm is very great; such aims usually reflect a failure to appreciate the costs of regulation.

I prefer the CDC guidelines which, notably, allow for an individualized assessment of the risk that an asymptomatic "some risk" individual poses to others and, presumably, of the burden to her of complying with the various options the CDC lists (such as abstaining from public transportation and public places, which not everyone can do as easily as others, at least not without state assistance). Some people have families to support and rent to pay; others are stay-at-home parents or have jobs that can be done via telecommuting. Some people depend on public transportation; others can drive themselves to work (where they would not come within three feet of others, etc.). Some activities that pose risks to others are optional (low-risk bowling and dining out; high-risk sex); others are not (work; child care). These policies necessarily involve cost-benefit tradeoffs, and where we can engage in individualized CBA, we should. I would be more sympathetic to Hickox, for example, if she explained why a home quarantine

²⁹ www.pressherald.com/2014/10/17/fearing-ebola-strong-elementary-teacher-on-leave-after-traveling-to-dallas/.

posed a substantial burden to her rather than flatly stating that it per se violates her “human rights” and if she at least acknowledged a responsibility and intention to abstain from optional and higher-risk activities that pose risk to others while rejecting more draconian quarantine conditions that prohibit necessary and/or extremely low risk activities.

But these are judgment calls, not (only) scientific claims, and neither I – nor Macgregor-Skinner, Craig Spencer, or Kaci Hickox – have the were appointed the “decider.” Spencer and Hickox’s actions (and NBC reporter Nancy Snyderman’s³⁰ before them) appear self-serving, driven by something somewhere between a dislike of the personal inconvenience involved in home quarantines and a principled belief in individual liberty. Macgregor-Skinner’s plans, at least, are designed to help west Africans (and, hence, the rest of the world) by making it easier for U.S. HCWs to volunteer their time and talents. There is certainly a long, if controversial, history of “beneficent deception”³¹ in medicine, though usually the risks and expected benefits of such rare deception are imposed on a single patient, not traded off among different populations of people. And whether quarantines and other aggressive public health measures will reduce the supply of willing volunteers is an empirical question, as is the extent to which any such reduction would hamper the effort to defeat Ebola in west Africa, and knowledgeable people can and do disagree about the answers (here³² are the provocative pro-quarantine thoughts about that from a medical school dean and former New York City Health Commissioner). Predicting such effects, and trading off some short-term risk to the U.S. public health against some short-term risk to west African public health and some longer-term risk to the U.S. public health, are policy calls, and complex ones at that.

There are ways of protesting laws and policies with which we disagree, and it is especially troubling to see members of a profession that so critically depends on trust so willing to undermine it by choosing methods of protest that involve deception and disobedience. Indeed, aside from differing values, I think the resistance to more “liberal” public health responses to Ebola is primarily rooted not in a disbelief or ignorance of science, but in a distrust of those who speak authoritatively about that science. Early,

³⁰ theweek.com/speedreads/444439/nbcs-dr-nancy-snyderman-apologizes-breaking-ebola-quarantine.

³¹ en.wikipedia.org/wiki/Therapeutic_privilege.

³² www.forbes.com/sites/matthewherper/2014/10/25/a-defense-of-the-ebola-quarantine/.

overconfident and absolutist pronouncements by CDC and other officials helped create that crippling distrust, politicians faced with reelection challenges responded to it, and now HCW deception and disobedience threaten to stoke it. We are caught in a distrust death spiral of our own collective making.

Healthcare workers who risk their lives by traveling to west Africa to fight Ebola at its source are heroes, and when they return, they deserve better than being stowed away in a tent and given little information about what officials have in mind for them. But neither this heroism nor HCWs' knowledge of Ebola facts license them to ignore or undermine public policies that are based on much more.

ADDENDUM: ON UNINTENDED CONSEQUENCES

To be clear, I fully support Hickox's right to go to court and challenge the quarantine order. On the one hand, I firmly believe that quarantine, in the right circumstances, is a legally legitimate and sometimes even morally obligatory public health tool. (It has been painful to watch CNN's Anderson Cooper as he repeatedly tries to process that quarantine could *ever* be a thing. He keeps characterizing quarantine as criminal, and asking his guests whether there are any other laws that convict and punish someone before they've done anything wrong. But quarantines are not (intentionally) punitive, and they do not necessarily rely at any stage on *mens rea* (if someone gives officials reasons to believe that they cannot be trusted to obey more relaxed public health measures, then they may be subject to heightened measures). Quarantine and other public health measures do, however, share with criminal law a reliance on something like probable cause: public health officials must have some reason to believe that an individual (or fairly well-defined group) has been exposed to an infectious agent (*quarantine* is, by definition, the isolation of asymptomatic but exposed, and thus potentially infectious, individuals; *isolation* refers to, erm, isolation of already-symptomatic and/or demonstrably infectious individuals). Once police have probable cause, there are all manner of things they can do to infringe the liberties of individuals despite the absence of proof of guilt – detain them, search them, and so on. So, too, here. Moving further afield, people who are reasonably believed to be a danger to themselves or others can be involuntarily confined. And of course we have laws – like

the FDA premarket approval process and the IRB system – that don't even make individualized assessments but assume that whole categories of products or action are per se risky and restrain people's liberty to market those products or engage in those activities until various processes designed to ensure public safety are complete.)

On the other hand, the devil is in the details, and there are lots of those devilish details to be worked out in our various federal and state quarantine policies, both in the immediate and the short term, with respect to Ebola, and in the longer-term, with respect to any number of infectious diseases that might visit our shores. Here's³³ a good overview of the law and politics of quarantine in recent years that highlights some of these open questions and how the task of answering them has become mired in politics (and here's³⁴ an earlier post by the same author). Would that politicians would find a way to overcome their security/civil libertarian deadlock and answer some of those questions. But if they won't, then the courts will have to start defining the outer edges of quarantine law as applied to a succession of cases. One lawsuit³⁵ challenges the absurd decision of a Connecticut public school to refuse to allow a healthy third-grader to attend school for 21 days following an October trip she and her family took to Nigeria – a country that was officially declared Ebola-free this summer – where she therefore interacted with precisely zero people with Ebola. A legal challenge to Hickox's quarantine could likewise usefully help define the contours of quarantine law.

What I *do* worry about is the possibility of lawlessness that Hickox and Macgregor-Skinner invited with their nationally televised comments on major media outlets. There are more and less responsible ways of challenging policies and more and less responsible ways of communicating one's plans to do so. Especially given the extent of public fear and distrust, there's no reason why Hickox, for instance, shouldn't avail herself of quick judicial resolution of her legal claim, and no reason why she couldn't have reassured the public that, in the meantime, she would adhere to the more relaxed CDC guidance and not, for instance, seek out close contact

³³ www.forbes.com/sites/scottgottlieb/2014/10/30/why-ebola-quarantines-will-grow-larger-and-more-troubling/.

³⁴ www.forbes.com/sites/scottgottlieb/2014/08/12/if-ebola-arrives-in-america-some-controversial-tools-could-be-used-to-stop-it/.

³⁵ abc7ny.com/371318/.

with others (she and her boyfriend broke quarantine this morning, which so far has been limited to a harmless bike ride along apparently rural back roads).

But shouldn't people sometimes disobey unjust and/or irrational laws? Sure; obviously, there's a whole history of civil disobedience that I don't address and I'm not arguing for an absolute rule against such tactics or even deception. I'm a consequentialist, not a deontologist. But I think it's fair to say that these should be last resorts and not engaged in casually or flippantly. Why?

For one thing, people have vastly different ideas about *which* laws and policies are irrational, unscientific, and/or unjust, so it's simply unworkable, as anything other than a rare exception, for each individual to make up her own mind about when she must obey the law. Although the governors who have imposed quarantines on returning HCWs (themselves a mixed political bag) have been mocked as part of a right-leaning "anti-science" "you can't be too safe" mindset, a moment's reflection reveals that right-wingers don't have the market cornered on pursuing "you can't be too safe" policies. Everyone loves the precautionary principle *sometimes*; they just differ on when. (On the left, consider fracking, GMOs, genetic engineering in general, nuclear power, and second-hand smoke, for instance.) To reiterate a central point of my post: regulations are based on both facts and values. The reason why different political parties exhibit risk-aversion in different contexts is because there's something other than "facts" doing the work. So there will always be someone whose conscience tells them that a law is unjust or unwise, and, rare exceptions aside, it's overall unworkable for each of us – or each political party – to relitigate these policy decisions. Elections have consequences, and so on.

Second, there will often be unintended or even perverse consequences, both of the short- and long-term variety, when people start flouting rules with which they disagree, and individuals making these decisions, who may be doing so with incomplete information and under psychological and time pressures, won't often be in a position to appreciate said consequences.

The White House invoked the specter of unintended consequences in arguing (apparently somewhat successfully) with Christie and Cuomo that draconian quarantine policies would affect the willingness and ability of much-needed medical volunteers to travel to west Africa. Let's stipulate this is true. It makes sense, then, for Dr. Macgregor-Skinner to advise his

team of doctors to lie to U.S. officials, right? Those who answer in the affirmative fail to sufficiently appreciate the extent to which many, many Americans (not just some right-wing fringe) distrust those, including some-risk HCWs, in charge of responding to the risk of Ebola in the U.S. (Check out the [#KaciHickox](#)³⁶ Twitter hashtag for a sampling.) Citizens who were already coming from a place of distrust and anger, given the CDC's slow start out of the gate, officials' overly confident and absolutist statement about Ebola knowledge and risk, and the Dallas experience, are only made even more distrustful and angry when HCWs publicly announce that they will flout the rules because they know better. Such citizens are likely to demand that their elected officials implement stricter, compulsory public health measures, since HCWs who flaunt their willingness to lie to officials and disobey laws have shown that they cannot be trusted to the honor system. The political process being what it is, especially right before an election, many of those elected officials will predictably respond by making a show of imposing those more aggressive public health measures. And that, by hypothesis, will undermine the effort to get volunteers to west Africa . . . which is exactly what Macgregor-Skinner says he's trying to avoid. Transparent, law-abiding methods of trying to change quarantine policies are unlikely to have

Longer term, I think it's harmful for the public to see doctors and nurses willing to lie about matters concerning health. A regular citizen who defies a quarantine order or lies to officials about his travel or exposure history doesn't have the same impact as a doctor or nurse doing the same thing. As Mark Hall has [highlighted](#),³⁷ trust is a foundational principle of health care policy, so it's startling to see several HCWs so casually endorse behaviors, like deception and disobedience, that would undermine that trust.

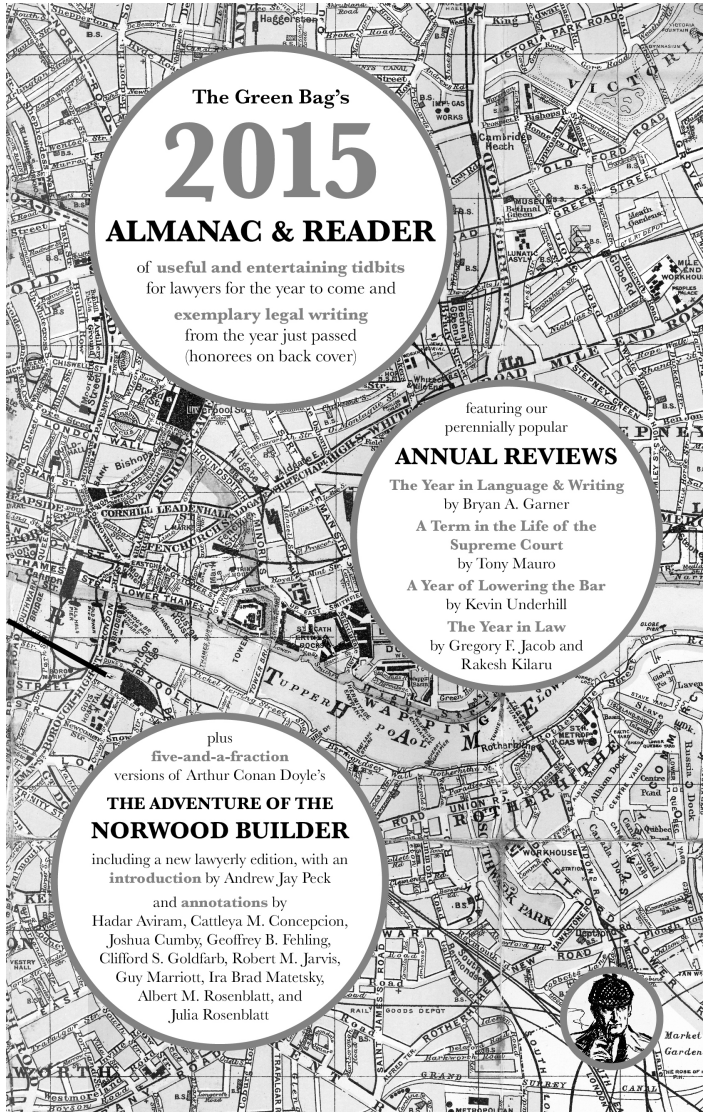
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³⁶ twitter.com/search?q=%23KaciHickox&src=tyah.

³⁷ papers.ssrn.com/sol3/papers.cfm?abstract_id=306986.

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ALMANAC EXCERPTS



Selected original works from the latest edition of the *Green Bag Almanac of Useful and Entertaining Tidbits for Lawyers and Reader of Exemplary Legal Writing from the Year Just Passed*

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Editor's note: Unbracketed page number references in the text of the articles
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PREFACE

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This is the tenth *Green Bag Almanac & Reader*. For a reminder of the reasons why the world is a better place with it than without it, read the “Preface” to the 2006 edition. It is available on our website (www.greenbag.org).

OUR DILIGENT BOARD

Our selection process for “Exemplary Legal Writing of 2014” was, like past years’, not your typical invitation to competitive self-promotion by authors and their publishers and friends. We did not solicit (or accept) entries from contestants, charge them entry fees, or hand out blue, red, and white ribbons. Rather, we merely sought to:

- (a) organize a moderately vigilant watch for good legal writing, conducted by people (our Board of Advisers) who know it when they see it and bring it to our attention;
- (b) coordinate the winnowing of advisers’ favorites over the course of the selection season, with an eye to harvesting a crop of good legal writing consisting of those works for which there was the most substantial support (our “Recommended Reading” list);
- (c) poll our advisers to identify the cream of that already creamy crop; and then
- (d) present the results to you in a useful and entertaining format — this book.

The nitty-gritty of our process for selecting exemplars was a simple but burdensome series of exercises:

Step 1: Our advisers read legal writing as they always have, keeping an eye out for short works and excerpts of longer works that belonged in a collection of good legal writing. When they found worthy morsels, they sent them to the *Green Bag*. “Good legal writing” was read broadly for our purposes. “Good” meant whatever the advisers and the lead editor thought it did. As one experienced scholar and public servant on our

board put it, “there is good writing in the sense of what is being said and also in the sense of how it is being said.” Our advisers were looking for works that had something of each. “Legal” meant anything written about law — opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. “Writing” meant ink-on-paper or characters-on-screen.

Step 2: The *Green Bag* organized the advisers’ favorites into categories, and sent a complete set to every adviser, along with a ballot. Advisers’ names were not attached to the works they nominated. In other words, everything was anonymized. Advisers voted without knowing who nominated a piece.

Advisers’ votes were secret too. No one but the lead editor ever saw individual advisers’ completed ballots or knew who voted in which categories. And the editor will destroy all individualized records once this *Almanac* is in print.

Advisers were free to vote in as many categories — or as few — as they desired. Most advisers voted in all categories.

Step 3: The lead editor tallied the votes and compiled the “Reader” portion of the *Almanac* based on those tallies, without adding to or subtracting from the list of works in each category that received the most adviser votes. All nominated works are listed in the “Recommended Reading” section.

Despite the substantial work involved in this project, most of our advisers seemed to enjoy it. The rest seemed to view it as a professional duty. Either way, we’re glad to have had them. But these are people with jobs, other commitments, and sleep requirements. So not everyone has pitched in every year — and quite reasonably and understandably so. Being listed as an adviser on an *Almanac* implies that a body has done some advising, however, and it doesn’t seem right to burden people with a slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate this time around. So, the list of board members in this *Almanac* is different from last year’s. The fact that people have moved on and off the list does not necessarily indicate anything about their commitment to the *Almanac*, nor does it affect our gratitude for the efforts of every one. And we are indeed very grateful for what is, with the completion of this *Almanac*, a decade of work.

TURNING THE PAGE:
A NEW SELECTION SYSTEM FOR 2015 AND BEYOND

It has been a good run, these past ten years, but now we are done with our original system for selecting exemplary legal writing. Starting with the eleventh *Almanac* (that's the next one, to be published in 2016, recognizing works published in 2015 and 1965), we are using a new system. But before we get to that, permit me, on behalf of everyone at the *Green Bag*, to once again thank all of our advisers for their generous contributions of their time, thought, good taste, and reputation-by-association. It has been, I would like to think, worth the trouble. Thank you very much, advisers.

Now, about the present and the future.

A. The New System

It is like the old system, with four exceptions:

- there is some division of labor at the nominations stage;
- only nominators get to vote — and all of them get to vote in all categories;
- the categories have changed a bit — we are starting small and hoping to manage things fairly well on a small scale early on, work out any kinks, and expand in the future; and
- the nominations cycle was Halloween-to-Halloween (cute but confusing); now it is the calendar year (dull but not so confusing).

B. Categories and Nominators

We're starting out in 2015 with four categories, each with its own nominators, and all with the same deadline: January 1, 2016.

- Category #1: Judicial Opinions •

Who can nominate? Any judge who issued a signed opinion in 2014 that is available in WestlawNext's "Cases" database.

What can they nominate? One or two signed judicial opinions issued in 2015 that are available in WestlawNext's "Cases" database. (If someone nominates more than two it won't be a problem — we will simply ask them at the end of the year to pick their two favorites from all their nominees.)

• Category #2: U.S. Supreme Court Briefs •

Who can nominate? Any member of the Supreme Court bar whose name is on the cover of a merits-stage brief — filed on behalf of a party or an amicus curiae — in a case decided by the Court on the merits in 2014. Also, any member of the Court's press corps.

What can they nominate? One or two briefs in cases decided by the Court on the merits in 2015. (Once we have a handle on this we will probably add other practice-related categories.)

• Category #3: Law Review Articles •

Who can nominate? Anyone who (a) authored a work with a 2014 publication date that is available in WestlawNext's "Law Reviews & Journals" database, and (b) was not a law student at the time.

What can they nominate? One work with a 1965 publication date in any law review at a U.S. law school. This is a test of durability and timeliness: What legal scholarship published 50 years ago is the most readable and worth reading today? (We will probably add other times in the future — 10, 25, and 100 years seem like good candidates — but for now we're starting simple.)

• Category #4: Books •

Who can nominate? Each year, starting this year, we will enlist a few respectable authorities to give us lists of their five favorite new law books (with short explanations, which we will publish with the listers' bylines in the *Almanac*). Those will be our nominees in the "Books" category. (We will probably treat other types of writing this way in the future — news reporting, scripts, and poetry seem like good candidates — but, again, for now we're starting simple.)

What can they nominate? This time around, any books about law with 2015 publication dates.

C. *Winnowing and Voting*

Voting will be conducted in January 2016.

PREFACE

Who can vote? Anyone who (a) sends a valid nomination in any category to rdavies@greenbag.org, and (b) provides their snailmail address with the nomination (so we can send them a ballot) gets to vote in all categories.

What will they actually vote on? A ballot of finalists winnowed from the pools of nominees. The winnowing will be mostly a popularity-and-persuasion contest — opinions, briefs, and articles receiving the most nominations will make the ballot, as will those whose nominations are accompanied by the most persuasive explanations of their sterling qualities. The “Books” category will be an exception: it will be a merged list of the “five favorites” lists described above. We will probably divide the “Judicial Opinions” nominees into two categories — “Opinions for the Court” and “Dissents, Concurrences, Etc.” — when it comes time to vote.

D. Confidentiality

This is one area where there will be no change: Confidentiality of nominator-nominee and voter-nominee connections will be complete, as it always has been. The names of all nominators and voters will appear only in a long, plain, simple list with no indication of what anyone nominated or voted for. No titles or other honorifics, no precedence, no categories — just alphabetical order by last name as it has been on our website and in the *Almanac* since day one back in 2006.

I suppose the people making the “five favorites” lists of books are exceptions of a sort — everyone will know what their five favorites are because we are going to publish their short explanations with bylines. But that is all. Even for the book people, no one will know what they vote for in any category.

E. Publication

The old routine holds here as well. Every year we will publish as many of the top vote-getters as we can (or, for books, excerpts) in the *Almanac*.

F. Why Are We Doing This?

There are many reasons, big and small. Here are short versions of a few of the biggest:

First, we are trying to expand and diversify the pool of nominated works — by expanding and diversifying the community of participants in the selection process.

Second, we are trying, at the same time, to maintain (or perhaps even improve) the credibility of our results. (We think they have always been credible, due to the quality of our board of advisers.) To that end, we've created for each category a pool of nominators consisting of obviously qualified and interested experts (people who are sufficiently competent and committed to publish in the relevant category, and sufficiently active to have done so quite recently), and an overall pool of voters that is sufficiently large and diverse to offset any parochial tendencies among specialists in any one category.

Third, we are also trying to structure the whole process so that it is less burdensome and more enjoyable for all participants.

So, for example, focusing on judges to make the initial nominations of opinions and then inviting a wider range of people to vote — that “wider range” being all nominators in all categories, all of whom are experts on legal writing of some sort and have demonstrated their interest in the subject of writing excellence generally by nominating in their own categories — seems like a good thing to try. Nobody else has, to the best of our knowledge. Dealing with practitioners' writing and scholarship in pretty much the same way seems equally worthwhile: focusing on practitioners to make the initial selection of briefs and then letting a wider range of experts vote, and focusing on scholarly writers to make the initial selection of law-review writing and then letting a wider range of experts vote.

I expect that in the next few years we will enlarge (and perhaps also refine) our nominating pools for current categories, add new categories (legal journalism? student writing?), add new vintages for scholarly writing, and so on.

Suggestions are most welcome. Please send them to editors@greenbag.org. And please spread the word.

G. And Yes, We Are Paying a Steep Price

While we are optimistic about this new system, we are also unhappy with one feature of it. We will lose, temporarily, several superb (as in superbly knowledgeable, collegial, and sage) *Almanac* advisers who do not fit in any of the new categories of nominator-voters. But we hope to be able to invite them back soon, as this new system grows and evolves.

PREFACE

SHERLOCKIANA IN GENERAL
AND THE EXTRAORDINARY JULIAN WOLFF, M.D.
IN PARTICULAR

The theme of this year's *Almanac* is, as should be obvious from the cover, the world of Sherlock Holmes and, in particular, "The Adventure of the Norwood Builder," a Holmes story set in London in 1894 and first published in 1903. You will find here, among many other interesting and entertaining items, several versions of the "Norwood Builder" story, including a lawyerly annotated edition with contributions by several leading Holmes scholars (and an introduction by Andrew Jay Peck), a rare 1911 pamphlet edition from the David M. Rubenstein Rare Book & Manuscript Library at Duke University, and a couple of pages of the original manuscript from the Berg Collection at the New York Public Library (with an introduction by Jon Lellenberg).

In addition, as should be obvious from pages 1 and 2 of this *Almanac*, the *Green Bag* believes that full appreciation of a Sherlock Holmes story involves knowing the lay of the land. For that sort of thing there is no substitute for a map. We've done our best (*see* pages 1 and 2 above). But we probably have not lived up to the standard set by the late Julian Wolff, M.D., the Ptolemy of Sherlockian cartographers.¹ As a salute to his work — and for the benefit of our readers — we are reprinting (with the kind permission of his family) all 13 maps from his famous but hard-to-find *Sherlockian Atlas*.² Plate I ("London") is reproduced on pages 12 and 13 below. Plates II through XIII appear (sometimes accompanied by details) in sequence as the opening images of each month in this *Almanac*. But first, here are Wolff's foreword to his atlas, and the table of contents with its charming illustration:

¹ See, e.g., Jon Lellenberg, *Cartographer Royal of the BSI*, FRIENDS OF THE SHERLOCK HOLMES COLLECTIONS, Dec. 2002, at 1; Peter B. Flint, *Dr. Julian Wolff*, 85; *Led a Club for Fans Of Sherlock Holmes*, N.Y. TIMES, Feb. 16, 1990.

² JULIAN WOLFF, *THE SHERLOCKIAN ATLAS* (1952) (privately printed limited edition; "Approximately ~~one~~ 3 hundred copies of this small brochure have been printed for friends of Sherlock Holmes & Dr. Watson [signed] Julian Wolff").

FOREWORD

Flattering requests which have been from many quarters received indicate that some demand for these maps still exists and it seems appropriate to make the entire collection available for the one hundredth birthday of Dr. Watson, that old soldier who will never fade away. Therefore this parvum opus is now offered to a world which may not yet be prepared and to experts who will probably agree that it is not the last word on the subject.

Included in this irregular atlas are the five maps which originally appeared in Edgar Smith's Baker Street and Beyond: THE WORLD, EUROPE, ENGLAND, LONDON and UNITED STATES. IT IS FULL OF OLD HOUSES, HIS LAST BOW WINDOW, OPERATION REICHENBACH and DARTMOOR were previously published in the old Baker Street Journal, notorious for its missing three quarters. The sketch on the contents page is by the old master, Frederic Dorr Steele, and this is its first appearance in print.

J.W.

33 Riverside Drive
New York 23, N.Y.

Foreword, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952)

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"Here you have the particular district which concerns us."
(The Hound of the Baskervilles.)

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Contents, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952)



Plate I: England, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952) (left side)

PREFACE

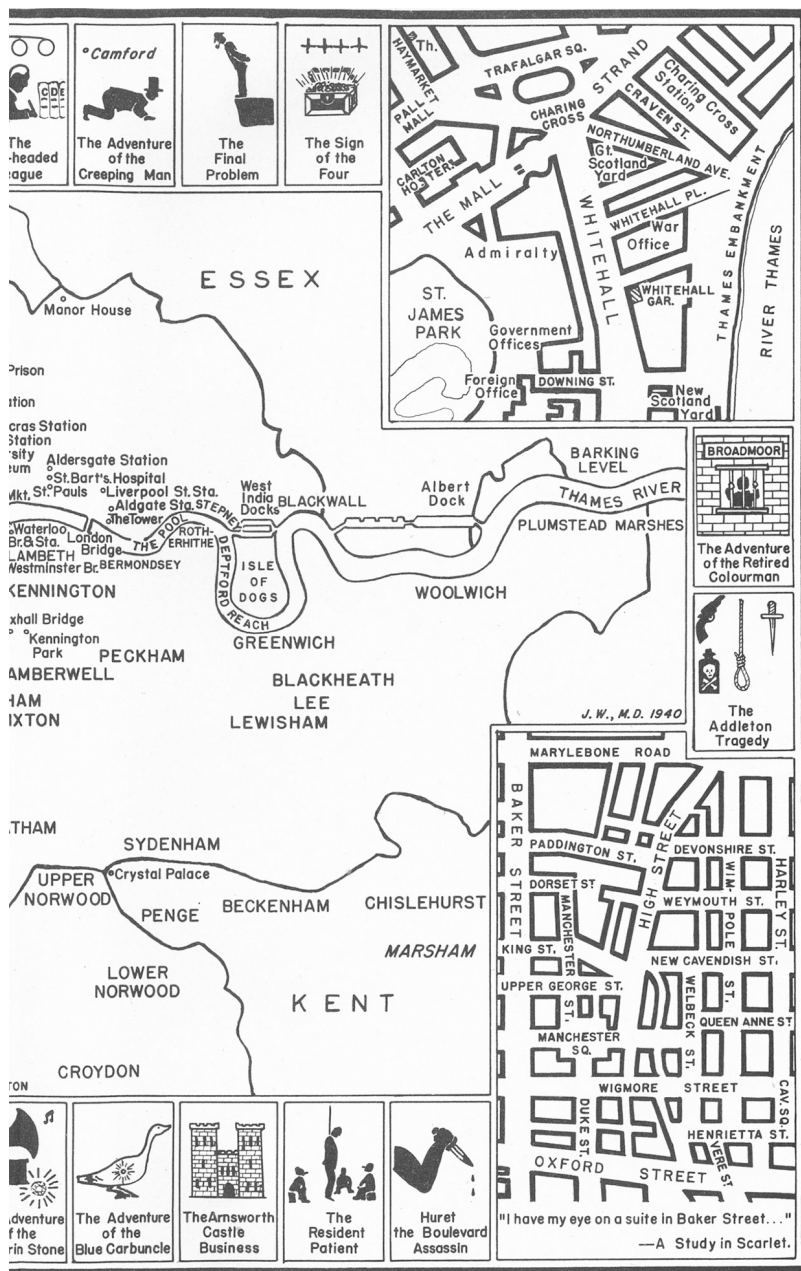


Plate I: England, in JULIAN WOLFF, THE SHERLOCKIAN ATLAS (1952) (right side)

HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Here is the only error we are sure we made — there are others, no doubt — in the 2014 *Almanac*:

Page 137: There should be a closed parenthesis after “1986” at the bottom of the page.

Blessed as we are with intelligent and attentive readers, we are confident that all our errors will eventually be brought to our attention. Consider, for example, this useful catch by Christopher G. Bradley of Austin, Texas:

Almanac & Reader 2012, pages 285 & 294: As I made my way (belatedly) through your varied and engaging *Almanac & Reader 2012*, I noticed an error. In Rex Stout’s “The Last Drive,” you include a “Synopsis of Preceding Chapters” on page 285, just before Chapter IV. But the Synopsis in fact includes events from Chapter IV itself and not just the preceding chapters, and therefore I believe it should have been placed instead at the beginning of Chapter V, which begins on page 294. (While the Synopsis acted as a “spoiler” of Chapter IV, I will add I found the story to be a great read nonetheless.) You may well have corrected this error already. On the off-chance you have not, I knew you would be zealous to do so.

“The Last Drive” is included (with the above-noted error corrected) in a new book — *The Last Drive and Other Stories* (Mysterious Press/Open Road, May 2015) (Ira Brad Matetsky, editor). The volume also includes ten other early Rex Stout stories that have never been reprinted since their magazine publications a century ago.

IN OTHER BUSINESS

Our goals remain the same: to present a fine, even inspiring, year’s worth of exemplary legal writing — and to accompany that fine work with a useful and entertaining potpourri of distracting oddments. Like the law itself, the 2014 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we’ll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

PREFACE



Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. The *Green Bag* also thanks our Board of Advisers for nominating and selecting the works recognized here; O'Melveny & Myers LLP (especially Nadine Bynum, Marjorie Inparaj, and Greg Jacob) and the George Mason University School of Law for generous support; and the many members of the Sherlockian community generally and the Baker Street Irregulars particularly who pitched in to make this *Almanac* much better than it might have been. And thanks especially to Peter Blau, whose byline appears nowhere in this book, but whose generous, humorous, literate, and encyclopedic influence pervades it, and whom we salute, elliptically, on the cover.

Ross E. Davies
January 29, 2015



Medical life is full of dangers and pitfalls, and luck must always play its part in a man's career. . . .

I made £154 the first year [1882], and £250 the second, rising slowly to £300, which in eight years I never passed, so far as the medical practice went. In the first year the Income Tax paper arrived and I filled it up to show that I was not liable. They returned the paper with "Most unsatisfactory" scrawled across it. I wrote "I entirely agree" under the words, and returned it once more. For this little bit of cheek I was had up before the assessors, and duly appeared with my ledger under my arm. They could make nothing, however, out of me or my ledger, and we parted with mutual laughter and compliments.

Sir Arthur Conan Doyle,
MEMORIES AND ADVENTURES 70 (1924);
cf., e.g., Preface, in 2013 GREEN BAG ALM. 1, 3;
Preface, in 2014 GREEN BAG ALM. 1, 3

JL

RECOMMENDED READING

[parallel citation: 2015 Green Bag Alm. 16]

We have tallied the ballots and printed the top vote-getters in this book. They are the ones listed in the Table of Contents above and marked in the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

• • • •

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Fortunato P. Benavides, *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014)

★ Frank H. Easterbrook, *National Organization for Women, Inc. v. Scheidler*, 750 F.3d 696 (7th Cir. 2014)

★ Neil M. Gorsuch, *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014)

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Richard A. Posner, *Medlock v. Trustees of Indiana University*, 738 F.3d 867 (7th Cir. 2013)

★ John G. Roberts, Jr., *Riley v. California*, 134 S.Ct. 2473 (2014)

Robin S. Rosenbaum, *Berry v. Leslie*, 767 F.3d 1144 (11th Cir. 2014)

Kevin G. Ross, *State v. Schmid*, 840 N.W.2d 843 (Minn. Ct. App. 2013)

David S. Tatel, *Amer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014)

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- Sidney R. Thomas, *Hawkins v. Franchise Tax Board of California*, 769 F.3d 662 (9th Cir. 2014)
- ★ Diane P. Wood, *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723 (7th Cir. 2014)

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- Harry T. Edwards, *Gilardi v. U.S. Dept. of Health and Human Services*, 733 F.3d 1208 (D.C. Cir. 2013)
- ★ Emilio M. Garza, *Fisher v. University of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014)
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- ★ Richard C. Tallman, *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014)
- ★ Don R. Willett, *El-Ali v. State*, 428 S.W.3d 824 (Tex. 2014)

BOOKS

- Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Harvard University Press 2014)
- ★ Joan Biskupic, *Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice* (Sarah Crichton Books/Farrar, Straus and Giroux 2014)
- Ward Farnsworth, *Restitution: Civil Liability for Unjust Enrichment* (University of Chicago Press 2014)
- Damian Fowler, *Falling Through Clouds: A Story of Survival, Love, and Liability* (St. Martin's Press 2014)
- ★ Bryan A. Garner, *Black's Law Dictionary* (Thomson Reuters 2014) (10th edition)
- Morris B. Hoffman, *The Punisher's Brain: The Evolution of Judge and Jury* (Cambridge University Press 2014)
- David Lat, *Supreme Ambitions: A Novel* (American Bar Association 2014)
- Richard A. Posner, *Reflections on Judging* (Harvard University Press 2013)
- Leslie H. Southwick, *The Nominee: A Political and Spiritual Journey* (University Press of Mississippi 2013)
- ★ Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (Henry Holt and Co. 2014)
- Lea VanderVelde, *Redemption Songs: Suing for Freedom Before Dred Scott* (Oxford University Press 2014)

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LONG ARTICLES

- Nicholas S. Brod, *Rethinking a Reinvigorated Right to Assemble*, 63 Duke Law Journal 155 (2013)
- H.L.A. Hart, *Discretion*, 127 Harvard Law Review 652 (2013)
- ★ Toby J. Heytens, *Reassignment*, 66 Stanford Law Review 1 (2014)
- Alfred S. Konefsky and Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 Buffalo Law Review 659 (2014)
- ★ Andrew Norris, *A Maelstrom of International Law and Intrigue: The Remarkable Voyage of the S.S. City of Flint*, 54 American Journal of Legal History 73 (2014)
- Ilya Shapiro, *Fear and Loathing at One First Street*, 18 Texas Review of Law & Politics 358 (2014)
- Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 Harvard Law Review 666 (2013)
- J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 Vanderbilt Law Review 1099 (2014)

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- ★ David Cole, *Can Privacy Be Saved?*, New York Review of Books (March 6, 2014)
- John Elwood and Conor McEvily, *Relist Watch*, SCOTUSblog, www.scotusblog.com (October 9, 2014)
- Jennifer Gonnerman, *Before the Law*, The New Yorker (October 6, 2014)
- Scott H. Greenfield, *Horse-Trading Constitutional Rights*, Simple Justice, blog.simplejustice.us (October 25, 2014)
- ★ Linda Greenhouse, *With All Due Deference*, New York Times (July 23, 2014)
- Jeff Hadden, *The limits of judicial immunity*, Detroit News (August 22, 2014)
- ★ Adam Liptak, *The Polarized Court*, New York Times (May 10, 2014)
- Tony Mauro, *On Second Thought . . .*, National Law Journal (November 4, 2013)
- Jeffrey Toobin, *The Solace of Oblivion*, The New Yorker (September 29, 2014)

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- John D. Bates, *Letter to Honorable Patrick J. Leahy* (August 5, 2014)
- Stephen B. Burbank, *Re: Jimmy Graham Franchise Player Tender, NFLPA v. NFL* (July 2, 2014)

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Tristan L. Duncan et al., *Appellant's Brief, Petrella v. Brownback*, Nos. 13-3334 & 14-3023 (10th Cir. March 31, 2014)

★ Drew Justice, *Response to Government's Motion in Limine Two, State v. Powell* (Cir. Ct. Williamson County, Tenn. [2013]) (No. I-CR-086639-B)

★ Jon R. Muth and Patrick M. Jaicomo, *Amicus Curiae Brief of the Students of Father Gabriel Richard High School, Ann Arbor, Michigan, People v. Carp*, 852 N.W.2d 801 (Mich. 2014), 2014 WL 814722

Barbara B. Rollins, *The Lawyers, in Lawyer Poets and That World We Call Law* 190 (Pleasure Boat Studio 2013)

★ Ilya Shapiro, *Brief of Amici Curiae Cato Institute and P.J. O'Rourke in Support of Petitioners, Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014), 2014 WL 880942

Donald B. Verrilli, Jr., *Memorandum for Respondents in Opposition, Little Sisters of the Poor v. Sebelius* (U.S. January 2014)



I went to Holmes' grave yesterday and I laid a big wreath on it — not as from myself, but from "The Authors Society." In one beautiful graveyard lie Holmes, Lowell, Longfellow, Channing, Brooks, Agassiz, Parkman & ever so many more.

A. Conan Doyle,

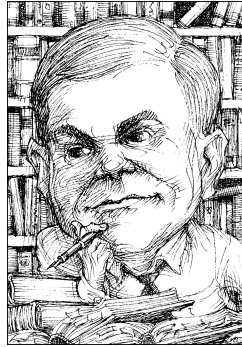
Letter to Mary Doyle, Nov. 2, 1894, in

JON LELLENBERG ET AL., ARTHUR CONAN DOYLE:

A LIFE IN LETTERS 340 (2007)

THE YEAR 2014 IN LANGUAGE & WRITING

[parallel citation: 2015 Green Bag Alm. 21]



Bryan A. Garner[†]

JANUARY

TES News and the *Guardian* (U.K.) reported that a frequently updated software glossary of electronic-slang words and phrases has been developed to help U.K. teachers recognize problems such as bullying, self-harm, eating disorders, sexting, grooming, suicide, and racist and homophobic language. Among the terms defined are initialisms and acronyms such as *dirl* (“die in real life”) and *gnoc* (“get naked on camera”), and the product name Bio-Oil, which people who harm themselves use to reduce the appearance of scars. The software sends an alert to teachers when a student types a term in the glossary. The *Christian Science Monitor* noted

[†] Bryan A. Garner is the author of more than a dozen books about words and their uses, including *Garner’s Dictionary of Legal Usage* (Oxford, 3d ed. 2011) and *Garner’s Modern American Usage* (Oxford, 3d ed. 2009). He is editor in chief of *Black’s Law Dictionary* (West, 10th ed. 2014) and the author of the chapter on grammar and usage in the *Chicago Manual of Style* (Chicago, 16th ed. 2010). He has coauthored two books with Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012). Copyright © 2015 Bryan A. Garner.

that a similar type of glossary is used in the U.S. to detect gang activity. • *The Irish Times* reported that the third edition of the venerable *Oxford English Dictionary* is expected to be complete in 2037. Michael Proffitt, the new chief editor, is optimistic about the *Dictionary's* future and ability to adjust to people's increasing reliance on the Internet: "My idea about dictionaries is that, in a way, their time has come," he says. "People need filters much more than they did in the past. As much as I adhere to the *OED's* public reputation, I want proof that it is of value to people in terms of practical use." Recognizing that students increasingly rely on web searches, Proffitt advocates linking terms in digitized literature to *OED* entries. Oxford University Press plans to license *OED* data to other companies so as to reach more users. • *Slate* magazine discussed whether commas are still important in English as more and more people omit them in casual writings such as texts and e-mails. Professor John McWhorter of Columbia University commented that one "could take [the commas out of] a great deal of modern American texts and you would probably suffer so little loss of clarity that there could even be a case made for not using commas at all." Of Oxford commas in particular, he added, "Nobody has any reason for [using a comma after the penultimate item in a series] that is scientifically sensible and logical in the sense that we know how hydrogen and oxygen combine to form water. So these things are just fashions and conventions. They change over time." Despite that, McWhorter doesn't expect commas to disappear from formal writing because people seem to be comfortable with shifting between informal and formal writing styles, and that's "exactly the way it's going to stay." • At its annual meeting in Minneapolis, the American Dialect Society crowned its 2013 Word of the Year: *because*. Not the conjunction *because*. Instead, a new incarnation of the word that is usually followed by one word (noun, verb, adjective, or something else): Because science. Because protest. Because waffles. "We may be talking about a new class of words," said Ben Zimmer, the linguist who presided over the voting. He called this usage of *because* "Internet-inspired grammar." Because computers.

FEBRUARY

The *Oxford English Dictionary* appealed to the public for help identifying modern British English terms that originated in World War I slang. The *OED's* lexicographers believe that soldiers may have used battlefield

slang when writing letters home and that home-front slang may have been similarly recorded, so they're encouraging people to read old letters and other personal papers and report any war-related terms they find. The popular verb *skive* (to avoid work) has been traced to 1919 and is believed to be even older. Some of the terms identified so far are common in both British and American English, such as *camouflage* (1916) and *tank* (1916). The findings so far have been interesting and surprisingly relevant to modern times. In a burst of patriotism, German-style sauerkraut was called "freedom cabbage" (similar to the more recent "freedom fries").

- Researchers at Texas Tech University found that people who use the same kinds of function words, such as personal pronouns, articles, and conjunctions, are more likely to be immediately attracted to one another. Dialogues between heterosexual couples in 40 speed dates were analyzed. The researchers tracked whether couples went on second dates and how many were still together after several months. The study determined that a positive correlation of function-word similarity indicated a higher probability a couple would continue dating. Surprisingly, it also showed that language similarity was a better predictor of relationship stability than any other factor, including how much the couple spoke during the speed date and their perceived personal similarities. One researcher commented, "People . . . aren't very good at predicting ahead of time what they'll find attractive on a date. So in a way, language predicts what people want in a partner better than they do themselves."
- *Cambridge News* reported that the Cambridge city council has lifted its punctuation ban for street signs. Two years ago, the council caused something of an uproar among grammatically minded Britons when it banned the use of apostrophes on street signs. In typical response, local grammar guerrillas took to vigilante editing, using permanent markers to add absent apostrophes to the offending signs. A public debate ensued, campaigners arguing that Cambridge, as a center of learning, should uphold the standards of good English. For its part, the council claimed that it was only following national guidelines warning that punctuation could confuse emergency-services drivers. But now it has reversed the decision. As one councilor explained, "We rue the day we allowed ourselves to be influenced by a bureaucratic guideline which nobody has been able to defend to us now that it has come under the spotlight."
- During the opening ceremony for the winter Olympics in

Sochi, Russia, the announcer boasted of 180 Russian nations — each with its own culture and language. In the North Caucasus region near Sochi, more than 40 languages are spoken. According to John Colarusso, a McMaster University linguist, all the Caucasian languages are highly complex in grammar and syntax, with up to 81 consonants, sounds articulated in different parts of the mouth, and widely varied case systems. But as reported by the *Boston Globe*, many of those languages are endangered. UNESCO's 2010 Atlas of the World's Languages in Danger lists a high number (over 130) of Russia's minority languages in the "vulnerable" category. In fact, Ubykh — the language that gave Sochi its name (Sochi derives from an Ubykh word for "seaside") — is now extinct.

MARCH

The *Daily Telegraph* (U.K.) reported a costly typo. A man who attempted to transfer £25,000 from his account to his daughter's accidentally transposed two numbers of her account. Even though he'd entered her name as well, the bank did not complete the transfer, lost the money, and couldn't fix the error. A bank representative explained that it's up to the customer to ensure that the data is entered correctly to begin with and advised double-checking the input before submitting it. • CNN reported that an American teenager suggested a simple way for the U.S. government to save \$136 million per year: use Garamond typeface exclusively. As part of a school science project, 14-year-old Suvir Mirchandani learned that ink is twice as expensive as the same volume of perfume and explored how to reduce ink usage without changing the words on a printed page. Using five sample pages from documents published by the Government Printing Office and the General Services Administration's estimated annual cost for ink (\$467 million), Mirchandani calculated that a 30% saving could be achieved by using the thinner typeface. The GPO acknowledged the suggestion but was noncommittal about adopting it. Meanwhile, the General Services Administration is focused on teaching government offices how to minimize printing waste by keeping computer settings on default to Times New Roman, Garamond, or Century Gothic. It hopes to save the federal government up to \$30 million per year — only \$100 million less than it might. • Noted typographer Mike Parker, who was instrumental in popularizing Helvetica font, died at the age of 84. In the late 1950s, Parker oversaw Helvetica's development into

a font for Linotype machines, which were widely used for printing. Under Parker's direction, Mergenthaler Linotype Co. built a library of over 1,000 typefaces, which became the standard for printing and publishing. In 1981 Parker cofounded Bitstream, the first company dedicated to producing digital fonts. • Fox News was raked over the social-media coals when it misspelled *spelling bee* while covering — what else? — a spelling bee. During the show *Fox & Friends*, an on-screen caption read “Longest spelling be ever?” Of course, a screenshot appeared on Facebook within seconds, and Twitter erupted with tweets lampooning the gaffe. • A Southern California middle-school teacher, Heather Shotke, created the gramMARCH Challenge after abbreviations and symbols typically used on social media (LOL, OMG, emoticons) started showing up in her students' schoolwork. “I am disappointed and appalled,” Shotke said. “Kids are using ‘text language’ in their academic work, and they think it is acceptable because that is how they are communicating with their friends on social media. It worries me that they cannot differentiate between a formal school assignment and a text to a friend.” Because it takes about 30 days for something to become a habit, Shotke said, “if we can get people to accept the gramMARCH Challenge and write with proper grammar in all communications — including texts, tweets, Kiks, Instagram captions, and Facebook status updates — for the month of March, we may be able to make the shift back to intelligent communication.” • According to the *Daily Mail*, a 15-year-old English schoolboy pointed out a grammatical error — a double comparative — on Tesco's “most tastiest” orange-juice label. Though the 15-year-old said he doesn't hold supermarkets “wholly responsible for teaching young people English grammar,” he opposes their recklessness.

APRIL

Nextions, a leadership-training and business-coaching company in Chicago, published a paper titled *Written in Black and White*, in which it concluded that supervising lawyers are more critical of nonwhite juniors' writing skills than of whites'. It designed a study to test the hypothesis that legal editors implicitly expect a nonwhite writer's work to contain more errors. With the help of partners from five different law firms, Nextions prepared one research memo containing 22 errors and made two sets of copies. In one set, it identified the writer as African American, in

the other as Caucasian. Both were third-year associates and graduates of the same law school. Sixty partners (23 women, 37 men, 21 racial/ethnic minorities, 39 white) from 22 firms agreed to participate in a “writing-analysis study.” Each received a copy of the memo to edit. They were also asked to assess the quality on a 5-point scale, a score of 5 meaning “extremely well written.” The results were dismaying. Partners who received the “Caucasian” writer’s memo corrected on average only 7 of the 22 errors and gave the memo a score of 4.1/5.0. Partners who received the “African American” writer’s memo found an average of 14 errors and gave the memo a 3.2/5.0. The study found no significant correlation between a partner’s race/ethnicity or gender and the number of errors found or the scores assigned. It concluded that the hypothesis was correct: editors see more errors when they expect to see errors. • A Turkish reporter was sentenced to ten months in jail for an inadvertently insulting tweet caused by a typo, according to the *International Business Times*. Önder Aytaç referred to Turkey’s prime minister as “Ustam” (meaning “my chief” or “my master”). But he mistakenly added a “k” at the end, which changed the word to “eff off.” The court ultimately suspended the sentence. • Mispronouncing the name of the legendary Greek hero Achilles cost a college freshman \$1 million, reported the *Indianapolis Star*. The student appeared on the game show *Wheel of Fortune* and had only to read aloud “Mythological hero Achilles” to win the prize. Unfortunately, he said /ay-chill-iss/ not /uh-kill-eez/. Because the game’s rules require correct pronunciation, he lost the million-dollar prize. Similar pronunciation blunders cost him his other two chances to win prizes as well. In an interview, the student said that he knew who Achilles was before the program and how to pronounce all the words but that nerves and adrenaline had overwhelmed him. • Two booksellers in New York City claimed to have found Shakespeare’s annotated personal dictionary. In 2008 George Koppelman and Daniel Wechsler found a 1580 copy of *An Alvearie, or Quadruple Dictionarie*, which scholars have long believed to be the lexicon the poet and playwright consulted. Where did they uncover this treasure? eBay, of course. Believing the copy to be the Bard’s own book, they bought it for \$4,300 — a steal, if the purported provenance is true. In April the pair published *Shakespeare’s Beehive: An Annotated Elizabethan Dictionary Comes to Light* — half reproduction, half discussion — making the case for their theory. Scholars at the Folger Shakespeare Library, however, expressed preliminary skepticism.

MAY

The BBC reported that U.S. armed forces in World War I employed Native Americans as code-talkers. During the Meuse-Argonne Offensive on the Western Front, the Germans successfully tapped the American forces' field-telephone lines and deciphered the military codes. Two American soldiers at the Front were Choctaw. An officer overheard them speaking in their native tongue. They knew of Choctaw soldiers at the troops' headquarters and were immediately employed to contact their colleagues over the tapped phone lines. Even if the calls were intercepted, the Germans had no means of translating them. And since many military terms had no equivalent in Choctaw, substitutes were created: a machine gun was a "little shoot fast" and a battalion was a number of grains of corn. In total, 19 men participated in the Choctaw Telephone Squad, the precursors of the Navajo and Comanche code-talkers of World War II. The BBC noted that on the American home front — strangely enough — Native American children were discouraged from learning or speaking their native languages. • After a dozen rounds in the finals of the 87th Scripps National Spelling Bee — despite such challenging words as *feuilleton* and *stichomythia* — neither of the two finalists had misspelled a word. The judges had no more words to give them. So for only the fourth time in the Bee's history, the finalists were declared co-champions and each was awarded the grand prize. The last time the Spelling Bee ended in a tie was 1962. • The Associated Press reported about how a lawyer in Indiana learned that Facebook is not the best way to communicate with an opposing party. The post to the client's ex-husband read: "You pissed off the wrong attorney. You want to beat up women and then play games with the legal system . . . well then you will get exactly what you deserve. After I get [my client] out of jail I'm going to gather all the relevant evidence and then I'm going to anal rape you so hard your teeth come loose. I tried working with you with respect. Now I'm going to treat you like the pond scum you are. Watch your ass you little [expletive deleted]. I've got you in my sights now." The lawyer admitted writing the post but claimed poetic license: he said that the language was the same as that used by the ex-husband and meant only that the lawyer intended to gather all relevant evidence to defend his client. The lawyer was arrested and charged with felony intimidation. • A study published in the journal *PLoS ONE* found that people consider

others less credible if their names are hard to pronounce. Researchers from Victoria University of Wellington, New Zealand, and Kwantlen Polytechnic University in Canada first asked volunteers to rate real names from 18 countries on their pronounceability. They then used those ratings to create a set of hard-to-pronounce names, such as Yevgeni Dherzhinsky, as well as a set of easier names. The scientists then presented subjects with factual statements attributed to those names. Apparently, the subjects were more likely to believe a statement if the associated name was easy for them to pronounce. Kwantlen Polytechnic seems not to have been among the names tested.

JUNE

John Simpson, who retired as chief editor of the *Oxford English Dictionary* in 2013, was named an Officer of the Order of the British Empire (OBE) for his outstanding services to English Literature. The honor recognizes distinguished service to the arts and sciences, public services outside the Civil Service, and work with charitable and welfare organizations of all kinds. Simpson joined the editorial staff of the *OED* in 1976, was coeditor of the second edition (1989), and served as chief editor of the *OED* from 1993 to 2013. During his tenure as chief editor, the *OED* added at least 60,000 new words, successfully produced a digital edition (available on the Internet), and began releasing quarterly updates to the dictionary online. • *The Times* (London) reported that researchers at the University of the West of Scotland have completed a study showing that job applicants' language skills in casual communication affect their employment opportunities. Employers are increasingly likely to check social-networking sites to help to determine a candidate's suitability. Misspellings, poor grammar, and excessive use of "text speak" create bad impressions that lead to applicants' being weeded out long before the interview stage. One researcher commented, "The main finding from the paper is that the language you use online doesn't really influence what your peers think of you, but it can affect how you are judged by potential employers. So if you make spelling mistakes or use textspeak online, you'll be viewed as less intelligent and employable than if you use correct language." • In response to a Freedom of Information Act request, the FBI released a glossary it's been compiling of "Twitter shorthand," or Internet slang. The document is 83 pages long and contains nearly 3,000

words. It contains the commonplace acronyms we all know — LOL, BTW, and the like — but it also catalogues hundreds of rare and, frankly, improbable coinages. Among those are BTDTGTTSA-WIO (been there, done that, got the T-shirt, and wore it out), PEBKAC (problem exists between keyboard and chair — apparently a favorite among IT professionals), BTWITAILWY (by the way, I think I am in love with you), and IAWTCSM (I agree with this comment so much), which appears in a whopping 20 tweets. The glossary's introduction suggests that in addition to its professional applications, agents might find it useful for keeping up with their children and grandchildren. ITHO. • As reported in *The Courier-Mail* (Australia), the Australian Government allocated \$1.8 million to add Classical Latin, Classical Greek, Hindi, Turkish, and Auslan (Australian Sign Language) to the list of second-language choices for students. A spokesman for Education Minister Christopher Pyne said: "The Government is working towards 40% of Year 12 students studying a second language in a decade. The more language options available for schools, the more likely students will be attracted to language study." Not everyone agreed with the decision to include Latin. Cynthia Dodd, president of Modern Language Teachers' Association of Queensland, said she preferred that the students first learn a "living language." But Latin advocates pointed to a finding that studying Latin correlates with higher academic performance in English, math, and science.

JULY

According to the *New York Times*, a scholar argued that the official transcript of the Declaration of Independence produced by the National Archives and Records Administration contains a significant error. A period that appears right after the phrase "life, liberty and the pursuit of happiness" in the transcript shouldn't be there. Danielle Allen, a professor at the Institute for Advanced Study in Princeton, N.J., maintains there is no period on the badly faded parchment original, just an errant spot of ink. "The logic of the sentence moves from the value of individual rights to the importance of government as a tool for protecting those rights," Ms. Allen said. "You lose that connection when the period gets added." Her argument is supported by other scholars, and some manuscript experts say there are existing high-resolution images of the document that show little evidence of a period. • If at first you don't succeed, don't try harder

to learn a language, say scientists at MIT. As reported in *Science Daily*, the researchers discovered that the harder adults tried to learn a new language, the worse they were at deciphering the language's morphology — the structure and deployment of linguistic units such as root words, suffixes, and prefixes. Part of the reason may be that adults simply have too much brainpower: they have a much more highly developed prefrontal cortex than children, and they tend to throw all of that brainpower at learning a second language. This high-powered processing may actually interfere with certain elements of learning language. Researchers plan to study whether "turning off" the adult prefrontal cortex could help adults overcome this obstacle.

- Actor Kelsey Grammer, best known for playing the inveterately pretentious Dr. Frasier Crane on *Cheers* and *Frasier*, lived up to his name when he joined Twitter — and the ranks of language snoots. His sole purpose: to root out ungrammatical tweets. Using the hashtag #KelseyGrammerGrammar, he tweeted, "It has come to my attention that the fine people of @Twitter have an egregious grammar problem. I'm here to help." He rendered this public service by correcting wayward spelling, punctuation, and grammar in tweets — mostly ones about him. Frasier would be (insufferably) proud.
- *The Guardian* (U.K.) reported that English Grammar Day was held on July 4, 2014, in association with University College (London), Oxford University, and the British Library. Many eminent linguists, including David Crystal and Dick Hudson, came together to discuss the history, prevalence, and importance of grammar. But the symposium's main focus was on how grammar is taught in schools today and the common problems that arise. Lindsey Thomas, a consultant at Buckinghamshire Learning Trust, suggested that teachers replace the word *grammar* with *understanding language*. She posited that *grammar* may conjure off-putting, old-fashioned classroom images because of its associations of "right" or "wrong." She suggested that *understanding* or *knowledge about language* makes the subject sound more positive.

AUGUST

The New Jersey Supreme Court ordered a new trial for a man convicted of attempted murder because the prosecution used as evidence 13 pages of violent rap lyrics that the defendant had composed five years earlier. The lyrics often mentioned a character who shared the defendant's nick-

name. Prosecutors argued that the lyrics reflected the code of the streets that the defendant lived by. In its unanimous opinion, the Court wrote: "One would not presume that Bob Marley, who wrote the well-known song 'I Shot the Sheriff,' actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story 'The Tell-Tale Heart,' simply because of their respective artistic endeavors on those subjects. Defendant's lyrics should receive no different treatment."

• Musician "Weird Al" Yankovic released a song and video titled "Word Crimes," a parody of the widespread neglect of proper grammar, usage, pronunciation, and spelling. The lampooned gaffes included using *literally* to describe nonliteral situations, using *less* for *fewer*, using "to who" instead of "to whom," mispronouncing *espresso* (with an *x*), confusing *it's* and *its*, and omitting the serial comma. Yankovic deliberately added a split infinitive in the lyrics to see whether listeners would notice. • A bank robber in Colorado earned himself an unusually laudatory sobriquet. The suspect, believed to be responsible for several robberies in the state, set himself apart from the typical bank robber with the carefully typed and letter-perfect demand letters he presented to tellers. This earned him the title "Good-Grammar Bandit." An FBI spokesman explained that the letters were "well-spelled, -punctuated, and -laid-out. Normally we get poor scribble-scratch on the back of a deposit slip." • The *New York Times* posted Emmanuel Vaughan-Lee's short documentary (an Op-Doc) about the last fluent speaker of the Wukchumni language, Marie Wilcox, and her dictionary written to preserve the language. The Wukchumni tribe is not recognized by the U.S. government — it's part of the broader Yokuts tribe native to central California. Only about 200 members of the Wukchumni tribe remain today. With the support of Advocates for Indigenous California Language Survival, Ms. Wilcox has spent seven years writing the dictionary — the longest work of its kind — and has also recorded a spoken version. The dictionary is intended to preserve for posterity the pronunciations and intricate accents of the language.

SEPTEMBER

The *Proceedings of the National Academy of Sciences* published a report by scientists at Northwestern University about the relationship between children's ability to follow rhythms and their language- and reading-

related skills. The scientists found that children who could match a drumbeat could more easily name objects and colors, had superior short-term auditory memory, and were better at discriminating among rhythms and melodies than children who could not follow a beat. The scientists noted that rhythm is a key factor in communication because it helps to identify syllables and words, and provides cues for meaning. They concluded that an inability to process rhythm properly, as well as speech and sound, may be associated with reading problems.

- Can you copyright words used for a game? Hasbro Corp. is trying to copyright the list of words approved for playing *Scrabble*, says *Slate* magazine. Player-compiled lists, drawn from general dictionaries and the *Official Scrabble Players Dictionary (OPSD)*, have circulated in hard-copy and digital form for decades. Hasbro now claims it has a copyrightable interest in those lists. But that claim is arguable. Hasbro's rules for terms permitted in Scrabble are straightforward: words must be between 2 and 15 letters long; no proper names; no hyphens, apostrophes, or abbreviations; no words considered foreign. "You can have a million interns working at a million typewriters to derive all these words and go through every page of every dictionary," said an intellectual-property lawyer. "If all they've done is say this one meets the Scrabble rules and this one doesn't, they probably haven't done enough to deserve a copyright."
- The Canadian media lambasted the Winnipeg Regional Health Authority after a local mother posted on Facebook a letter from the Authority riddled with spelling errors. The ten errors were all to basic words, including "studint" (student), "shets" (sheets), and "chiled" (child). (The complex medical terms were all correct.) The mother, Belinda Bigold, told reporters, "This was authorization to put drugs in my child's body; that's where it struck a nerve. Are you going to trust your child's health to someone who sends out a half-illiterate letter?"
- In an interview with David Berreby of BigThink, the philosopher Evan Selinger said he was "horrified" by Apple's predictive-text feature in the upcoming iOS 8. As Apple's website explained: "As you type, you'll see choices of words or phrases you'd probably type next, based on your past conversations and writing style. The feature takes into account the casual style you might use in Messages and the more formal language you probably use in Mail. It also adjusts based on the person you're communicating with, because your choice of words is likely more laid back with your spouse than with your boss." Mr. Selinger lamented:

"The more we don't autonomously struggle with language, grapple to find the right word, muscle through to bend language poetically, the less we're able to really treat conversation as an intentional act." • *The New Republic* reported that humans may become less self-centered with age. Older Facebook users' posts are less about "me, me, me," and more about "we, we, we." The University of Pennsylvania's World Well-Being Project analyzed 75,000 Facebook users' language and noted that the older the user, the fewer the first-person singular pronouns (*I, me, my, mine*). • The *National Journal* reported that while the referendum on Scottish secession posed lots of complicated questions, the ballot language did not. At 13 words (including the voting instructions), it was a model of simplicity, asking "Should Scotland be an independent country?" Marina Koren, reporting on the election, compared that to Crimea's secession ballot in March, a complicated page in two parts and three languages. It was also ambiguous, asking whether to reinstate the Crimean constitution but not specifying which of two constitutions would apply. Still, the Crimean proposal won almost 97% of the vote, while Scotland's garnered less than 45%.

OCTOBER

Researchers at Coventry University published in the journal *Reading and Writing* a study titled "do i know its wrong: children's and adults' use of unconventional grammar in text messaging." Many educators have expressed concern that the grammatical errors made by students in their text messages are related to poorer performance on tests of grammatical knowledge, including translating grammatically unconventional text messages into standard English. The study concluded that elementary-school children and college students who make grammar and spelling errors when texting are more likely to make similar errors in formal writing. But secondary-school children do not show the same consistency: many who make numerous errors when texting do not make errors in other writings. • After 13 years of updating, the Royal Spanish Academy unveiled the 23rd edition of its dictionary, the nation's oldest and most authoritative. Unfortunately, not all the changes were for the better. Though the Academy removed a previous definition glossing the adjective *gitano* (gypsy) as "defrauding or operating with deception," it replaced it with a new sense equating the word with *trapacero*, meaning

“dishonest or swindling.” Spain’s Roma population, which has lobbied for years to remove the original offending definition, celebrated last year when the Academy promised to revise it. But they were outraged with the result. The Association of Feminist Gypsies for Diversity called for Spaniards to take to social media to protest the definition. The Academy’s director responded that in lexicography, accuracy and linguistic reality trump political correctness. • In an interview with the *Boston Globe*, Dan Jurafsky — a Stanford University linguistics and computer-science professor — discussed his book *The Language of Food: A Linguist Reads the Menu*. The author conducted a study with Carnegie Mellon researchers, looking at the language in fast-food menus, ancient recipes from Sumer, and even potato-chip packaging. What did he find? “There are certain positive adjectives — *fresh, rich, mild, crisp, tender, golden brown* — that we found only on the menus of middle-priced and cheaper restaurants. Expensive restaurants want you to assume it’s crisp. Cheaper restaurants have to convince you it’s crisp.” Not surprisingly, he also found that expensive restaurants use longer words on average on its their menus: “They’re using these long, complicated, and rare words as a sign that they’re a fancy restaurant and have an educated staff and educated customers.”

NOVEMBER

The BBC is apparently no longer a bastion of correct English. Thousands of viewers and listeners have complained that the BBC’s once-high standards of grammar and pronunciation have slipped. The newsroom’s style editor conceded that presenters and reporters repeatedly make basic errors, such as confusing the word *historic* with *historical*. The Queen’s English Society in particular criticized the network for allowing presenters to say “haitch” instead of “aitch” when referring to the letter *H*. The BBC responded that it was proud of the diversity of voices across its programs. • Boston’s Massachusetts Bay Transportation Authority (MBTA) found itself in a Twitter war over a point of usage, reported the *Boston Daily*. When an accident made it necessary to close a station, the MBTA tweeted: “Orange Line Svc is suspended at DTX Due To medical emergency.” It then directed riders to an alternate route. One person responded: “BECAUSE OF a medical emergency NOT due to one! The use of ‘due to’ requires a fiduciary (that means \$\$) responsibility.” This ignited an escalating debate on the proper English usage of *due to*, includ-

ing citations to *Garner's Modern American Usage*. No reportage on how much tardiness in reopening the station was due to linguistic paralysis. • The *ABA Journal* reported that an escapee remained free for 33 years because of a spelling error. The escapee's surname, Marcheterre, was misspelled "Maschererre" on the arrest warrant. Although Marcheterre was arrested repeatedly and even sent to jail several times after his escape, the misspelling on the outstanding arrest warrant prevented it from being associated with Marcheterre's FBI number and criminal records. • Scientists at Carnegie Mellon University used Harry Potter to identify the brain regions people use when processing language. The researchers used an fMRI machine to scan the brains of people reading a chapter of the first Harry Potter book. By analyzing those scans, they were able to pinpoint the specific parts of the brain responsible for various tasks involved in reading, such as parsing sentences, determining word meanings, and understanding the relationships between characters. The computational model the scientists then built from this data was able to determine which of two passages a person was reading with 74% accuracy. The scientists believe that future improvements on this model will provide valuable insight into disorders such as dyslexia, aphasia, and the special difficulties that students encounter when learning a foreign language. • *The Guardian* (U.K.) reported that China's print and broadcast administration banned wordplay because the misuse of idioms risked "cultural and linguistic chaos." Issued by the State Administration for Press, Publication, Radio, Film, and Television, the order stated: "Radio and television authorities at all levels must tighten up their regulations and crack down on the irregular and inaccurate use of the Chinese language, especially the misuse of idioms." David Moser, academic director for CET Chinese studies at Beijing Capital Normal University, responded that the ban was ridiculous because wordplay "is so much a part and parcel of Chinese heritage." He noted that when couples marry, some people will give them dates and peanuts, which refers to the wish *Zao-sheng guizi*, or "May you soon give birth to a son." The word for *dates* is also *zao*, and for *peanuts* it's *huasheng*.

DECEMBER

Lexicographic departments at publishing houses announced their words of the year: at Oxford, it was *vape* (= to inhale vapor from an e-cigarette);

at Merriam-Webster, it was *culture*. • In the *Boston Globe*, columnist Britt Peterson commemorated the centennial of several words and phrases that entered the language in 1914: *blurb*, *legalese*, *multiple-choice*, *backpack*, *big screen*, *crossword*, *posh*, *stash*, and *sociopath*. • Several egregious errors in a sign posted in front of a Paterson, N.J. elementary school apparently cost the principal her job, according to CBS News. *December* was spelled “Dicember,” *reports* was spelled “reepor,” and the numeral *1* was backwards. The sign was up for a week before a parent posted a photo of it on Facebook, where it was seen by a member of the city’s school board. The school district didn’t confirm that the misspellings were the reason for the principal’s removal. • The online-edition *Telegraph* reported that mass-marketer Amazon had cold-heartedly pulled an e-book from its Kindle Store for overhyphenation. Graemen Rey-nold’s *High Moor 2: Moonstruck* had been on sale for almost two years and had received more than 100 favorable reader reviews. Reynolds, who had paid a professional copyeditor to work on the book before it was published, objected. But Amazon replied that the book would be removed permanently if he did not remove the hyphens. Reynolds reported the incident on his blog. After that post got 180,000 hits, Amazon relented. No definitive word on whether the hyphens were ill-considered or well-founded.



THE MOST MORTIFYING SOLECISMS IN 2014 LAW REVIEWS

1. “We then use this framework to diagram the flow of information and requests for information through the legal procedures under study, dropping in the substance of an issue (such as climate change) and mapping out the *apparati* [read *apparatuses* or, if you’re a Latinist, *apparatus* (the Latin plural)] for interdisciplinary communication as it is.” Deborah M. Hussey Freeland, *Law & Science: Toward a Unified Field*, 47 Conn. L. Rev. 529, 570 (2014). (Extra points for pervasive abstractitis and bafflegab, and further extra points for dropping in the substance of an issue.)
2. “The Capatos, however, conceived naturally and had a son *whom* [read *who*] they hoped would one day have a sibling.” Jessica Knouse,

- Liberty, Equality, and Parentage in the Era of Posthumous Conception*, 27 J.L. & Health 9, 12–13 (2014). (*Who* should be the subject of *would have*; the phrase *they hoped*, could be omitted from the sentence altogether.)
3. “Ms. Jones had standing to argue that visitation between *she* [read *her*] and the child would be in the child’s best interests in a second hearing.” Kendra Huard Fershee, *The Prima Facie Parent*, 48 Fam. L.Q. 435, 459 (2014). (Extra points for the misplaced modifier: would it also have been in the child’s best interests in a third hearing?)
 4. “It is implied that the allocation of tax responsibility should, therefore, come with an isolation of liability to *whomever* [read *whoever*] was allocated the task.” Stephanie Hunter McMahon, *What Innocent Spouse Relief Says About Wives and the Rest of Us*, 37 Harv. J.L. Gender 141, 166 (2014). (Extra points for not hyphenating *innocent-spouse relief* in the countless times the phrase appears — and further extra points for the superfluous commas around *therefore* because they impart the wrong emphasis.)
 5. “It appears that neither Singson nor Tjan *were* [read *was*] seeking compensation for the sex in question.” Anna K. Christensen, *Equality with Exceptions?*, 102 Cal. L. Rev. 1337, 1353 n.122 (2014).
 6. “Nonetheless, the duty still appears in case law, although *seldomly* [read *seldom*].” Salar Ghahramani, *Fiduciary Duty and the Ex Officio Conundrum in Corporate Governance*, 10 Hastings Bus. L.J. 1, 17 (2014).
 7. “The enumeration of constitutional rights *are* [read *is*] intended to guide state policy and/or express ideals.” Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 Am. J. Comp. L. 1043, 1049 (2014). (Extra points for the *and/or*, which not only is inherently poor but also suggests that state policy and aspirational ideals might otherwise be mutually exclusively exclusive.)
 8. “Each of these amendments *were* [read *was*] assigned codes [read *a code?*] for the various permutations that were common” Ranjini Govender Dowley & Noah Kaplan, *Evaluating Evaluation*, 43 J.L. & Educ. 485, 487 (2014). [Another possible revision: *These amendments were assigned codes for the various permutations*]
 9. “Professor Sepinuck suggests one reason is *because* [read *that*] ‘careful transactional lawyers seek comfort in the safety blanket of redundancy.’” Michael Korybut, *The Uncertain Scope of Revised Article 9’s*

Statutory Prohibition of Exculpatory Breach of Peace Clauses, 10 Hastings Bus. L.J. 271, 307 n.147 (2014). (Extra points for irony and further extra points for not hyphenating *breach-of-peace clause*.)

10. "The probability of being caught for file sharing may, for better or for worse, be perceived as so low by many people that they will continue to *flaunt* [read *flout*] the law." Irina D. Manta, *The High Cost of Low Sanctions*, 66 Fla. L. Rev. 157, 188 (2014). (Extra points for not hyphenating *file-sharing*.)
11. "[W]hile in recent years champerty and maintenance have *laid* [read *lain*] dormant that does not mean that they are no longer valid defenses to a breach of contract claim." James M. Fischer, *Litigation Financing*, 27 Geo. J. Legal Ethics 191, 195 n.23 (2014). (Extra points for the lack of a comma after *dormant* and further extra points for not hyphenating *breach-of-contract claim*.)
12. "But after *Katzenbach's* succinct dismissal, the equal footing doctrine *laid* [read *lay*] dormant in the realm of preclearance litigation." Austin Graham, *Unstable Footing*, 23 Wm. & Mary Bill Rts. J. 301, 325 (2014). (Extra points for not hyphenating *equal-footing doctrine*.)



A wish for these solecisms in 2015:

May they lie dormant.
Would that they had lain dormant for years.

THE YEAR IN LAW 2013-2014

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Gregory F. Jacob & Rakesh Kilaru[†]

A review of some highlights of law in America (with a few overseas detours) during the past twelve months or so.

NOVEMBER 2013

Nov. 1: The Virginia Supreme Court overturns a jury verdict in a wrongful-death suit filed by the parents of two students killed in a 2007 massacre by a student-gunman, finding that the university had no duty to warn students about the potential for criminal acts by the gunman. • The U.S. Court of Appeals for the D.C. Circuit holds that the provision of the Affordable Care Act requiring employers to provide their employees health insurance that includes birth control violates the First Amendment.

Nov. 4: Attorney General Eric Holder states that Khalid Sheikh Mohammed and four alleged co-conspirators “would be on death row as we speak” if he had been allowed to try them in federal court, as he initially planned. Due to political opposition to Holder’s decision, the Justice Department instead tried the defendants in a military court, resulting in

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lengthy delays tied to the defendants' challenges to the legitimacy of that mode of adjudication. • The Justice Department announces a \$1.2 billion settlement of a criminal insider-trading indictment filed against SAC Capital Advisors LP. The company had already agreed to pay \$616 million to the SEC.

Nov. 6: At oral argument in the Supreme Court in *Bond v. U.S.*, the Justices pepper Solicitor General Don Verilli with hypotheticals about the proper use of a federal statute enforcing the Chemical Weapons Convention. Carol Bond had been convicted under the statute after she tried to poison her husband's paramour by spreading a toxic chemical on her doorknob handle. Bond challenged her conviction, contending that the statute exceeded Congress's power under the Treaty Clause. Justice Samuel Alito asks if he and his wife could be prosecuted for distributing chocolate to children on Halloween, because chocolate is poisonous to dogs, making it a toxic chemical under the Convention.

Nov. 7: The Supreme Court hears oral argument in *Town of Greece v. Galloway*, a case addressing the constitutionality of prayers at town hall meetings. Justice Antonin Scalia asks if nonsectarian prayers proposed by the counsel for the plaintiffs would be acceptable to "devil worshippers" and "atheists." • The Senate passes legislation banning workplace discrimination against gay, lesbian, bisexual, and trans-gender workers. The vote on the legislation is 64-32. • President Barack Obama gives an interview apologizing for the fact that thousands of Americans were losing their health insurance as part of the rollout of the Affordable Care Act. The President had previously indicated that people who liked their insurance plans could keep them.

Nov. 8: The U.S. Court of Appeals for the D.C. Circuit issues a decision in *U.S. v. Glover*, holding that a federal judge in the District of Columbia lacked jurisdiction to authorize the FBI to place an electronic bug on the defendant's truck in Maryland.

Nov. 12: The Louisiana Supreme Court declines to grant review of an intermediate court opinion holding that an amended version of New Orleans's "anti-begging" statute is unconstitutional. A federal judge had previously invalidated a prior iteration of the ordinance as overbroad. • Senate Republicans block the President's nomination of Cornelia Pillard to the U.S. Court of Appeals for the D.C. Circuit. Pillard is the second judicial candidate blocked in the past month. • The Justice Department

reaches a settlement with American Airlines and U.S. Airways that allows the two companies to merge, dropping its claims that the merger would result in higher airfares, higher fees, and fewer choices for consumers.

Nov. 13: The U.S. Court of Appeals for the Second Circuit issues an opinion clarifying that it had not meant to suggest that U.S. District Judge Shira Scheindlin had misbehaved when it removed her from a case involving New York City's stop-and-frisk policies based on alleged violations of the judicial code of conduct. The Court instead holds that disqualification was required because Scheindlin's conduct on the bench, and her conduct in the media, would cause a reasonable observer to question her impartiality.

Nov. 14: Judge Denny Chin, of the U.S. Court of Appeals for the Second Circuit, dismisses a lawsuit against Google brought by authors claiming that Google did not obtain their permission before scanning their works. Chin concludes that Google's efforts represent "fair use" of the authors' material.

Nov. 15: The South Carolina Advisory Committee on Standards of Judicial Conduct issues an opinion stating that a full-time magistrate judge may participate as a dancer in a fund-raiser at his church styled after the TV show "Dancing with the Stars." The Committee relies on the fact that the judge is not "personally solicit[ing] donations or allow[ing] the organization to use the prestige of the judge's office in fund-raising efforts."

Nov. 18: The U.S. Court of Appeals for the Federal Circuit allows Apple a second chance to raise claims that Samsung infringed on its patents in creating phones and tablets, and should be enjoined from selling those devices. A district court judge had previously denied Apple's request for an injunction. • In a speech to bank compliance officers, lawyers, and investigators, Deputy Attorney General James Cole suggests that banks are not doing enough to ensure compliance with applicable laws and regulations, citing ongoing and persistent government investigations into bank fraud. • Senate Republicans block the President's nomination of Robert Wilkins, a district judge on the U.S. District Court for the District of Columbia, to the U.S. Court of Appeals for the D.C. Circuit. Wilkins is the third nominee to be blocked in the last month.

Nov. 21: The U.S. Senate votes to exercise the "nuclear option" and allow filibusters to be broken by majority vote (rather than the usual 60 votes

required to invoke cloture) for most executive branch and judicial nominations. The vote, spearheaded by Majority Leader Harry Reid, is viewed as a response to Senate Republicans' blocking of three of the President's nominees to the U.S. Court of Appeals for the D.C. Circuit (see Nov. 12 and 18 entries). • A jury awards Apple \$290 million in the retrial of the damages award in its patent infringement suit against Samsung. Combined with \$600 million previously awarded, Apple's total is approximately \$903 million — less than the \$1.05 billion initially awarded (see Nov. 8 entry).

Nov. 24: Judge J. Harvie Wilkinson III, of the U.S. Court of Appeals for the Fourth Circuit, pens an editorial in the *Washington Post* decrying the end of the filibuster, contending that it may result in more judges being appointed to the federal bench “without a scintilla of bipartisan support” (see Nov. 21 entry).

Nov. 25: An Ohio grand jury indicts several school officials, including the superintendent of schools, in Steubenville, Ohio, for their possible role in covering up a rape committed by several football players.

Nov. 26: The Supreme Court grants review in two cases presenting the question whether the provision of the Affordable Care Act requiring employers to provide birth control coverage in employee insurance violates the Constitution or the Religious Freedom Restoration Act (see Nov. 1 entry). • A group of large creditors in the Detroit municipal bankruptcy files a motion asking for an independent valuation of the city's art collection — the first step in an effort to force the city to sell its art as part of the bankruptcy.

DECEMBER 2013

Dec. 3: The U.S. Court of Appeals for the Ninth Circuit announces that it will begin providing live video streaming of en banc oral arguments, making it the first federal appellate court to offer such a service. • U.S. Bankruptcy Judge Steven Rhodes rules that Detroit is eligible for municipal bankruptcy. Detroit is the largest city ever to seek reorganization under the bankruptcy laws.

Dec. 4: Auction house Christie's values Detroit's art collection, housed at the Detroit Institute of Arts, at up to \$866 million. The collection includes paintings from Vincent Van Gogh and Pieter Breugel (see Nov. 26 entry). • The ABA's accreditation committee censures Rutgers University at

Camden's law school for allowing applicants to take a standardized graduate-admissions test, rather than the LSAT, to obtain admission to the school.

Dec. 6: At a congressional policy briefing at George Mason University's law school, former Deputy Attorney General David Ogden states that the government is paying too much under whistleblower laws and is failing to give companies adequate incentives to self-police for legal compliance. The government's own reports indicate that it recovered more than \$16.7 billion through False Claims Act cases, but incurred more than \$72 billion in losses due to fraud and improper payments. • A federal judge halts customers' last-ditch attempt to halt the merger of U.S. Airways and American Airlines, finding there is no evidence supporting a finding of irreparable harm (see Nov. 12 entry).

Dec. 9: A French court rules that tobacconists have the exclusive right to sell electronic cigarettes, which should be subject to advertising bans like those on tobacco-based products. • The Senate votes to extend a ban on the manufacture of plastic firearms designed to evade metal detection, but declines to extend the law to cover plastic guns made with 3-D printers.

Dec. 10: The Senate confirms Patricia Millett to the U.S. Court of Appeals for the D.C. Circuit by a 56-38 vote. She had been filibustered by Senate Republicans prior to Senate Democrats' decision to exercise the nuclear option. • The SEC, CFTC, Office of the Comptroller of the Currency, FDIC, and Federal Reserve approve the so-called "Volcker Rule," which restricts banks from making risky investments with their own money. The controversial rule was part of the 2010 Dodd-Frank law.

Dec. 12: The Senate confirms Cornelia Pillard to the U.S. Court of Appeals for the D.C. Circuit by a straight party-line vote. Pillard is the second judge confirmed to the D.C. Circuit in the aftermath of Democrats' decision to eliminate the filibuster for judicial nominees (see Nov. 21 entry). • U.S. District Judge Lewis A. Kaplan orders a joint trial for three alleged Al-Qaeda operatives accused of planning two U.S. Embassy bombings in Kenya and Tanzania in 1998. He also announces that he may empanel two juries to avoid prejudicing a single jury with evidence pertaining to only one of the defendants.

Dec. 13: U.S. District Judge Larry Burns orders removal of the 29-foot cross at the Mt. Soledad Veteran's Memorial in San Diego, because a series

of changes designed to secularize the memorial could not overcome its long sectarian history. He had previously held that the cross could remain in place, but the Ninth Circuit reversed, finding that the cross violated the First Amendment but permitting supporters of the cross an opportunity to alter the monument to minimize Establishment Clause problems.

Dec. 16: The Boston Police Department indefinitely suspends its use of automatic license plate readers in the wake of a *Boston Globe* report indicating that the Department had inadvertently released the license plate numbers of 68,000 vehicles scanned by the readers over a six-month period.

- U.S. District Judge Richard J. Leon rules that the NSA's phone surveillance program likely violates the Fourth Amendment, concluding that access to records of who a person calls and where they are calling from gives the government "a vibrant and constantly updating picture of the person's life," and calling the program "almost Orwellian."

Dec. 17: At a breakfast gathering in Virginia hosted by the Northern Virginia Technology Council, Justice Ruth Bader Ginsburg calls it an "exhilarating change" that the three female Justices on the Court are no longer confused for each other at oral argument. • Preet Bharara, U.S. Attorney for the Southern District of New York, directs prosecutors to seek forfeiture judgments that would encompass retirement payments in cases involving politicians convicted of corruption.

Dec. 18: U.S. District Judge Richard Story grants a temporary injunction against Georgia's decision to charge \$5/month to individuals who receive subsidized cell phone service as part of a plan designed to ensure that low-income households have access to basic communications services. • Wisconsin Governor Scott Walker signs a bill making it more difficult for the state to force schools to drop Native American theme names and voiding state directives that two schools change their names. The bill amends a 2010 law that made it harder for teams to keep such names. • The New Mexico Supreme Court issues an opinion declaring the state's opposite-sex-only marriage laws unconstitutional. New Mexico is the 16th state to allow same-sex marriage.

Dec. 23: Queen Elizabeth II grants a royal pardon to Alan Turing, a famous code-breaker, for a 1952 conviction for homosexual activity. Turing died 59 years earlier. • The American Bankers Association files a lawsuit seeking to suspend one part of the Volcker Rule, claiming that small banks will incur hundreds of millions of dollars in capital losses and curtail

lending activities (see Dec. 10 entry). • The en banc U.S. Court of Appeals for the Ninth Circuit strikes down a Los Angeles ordinance requiring hotel operators to produce information about hotel guests to police officers, upon request, without a warrant. The court rules that guests lack a privacy interest in the hotel's records, but that the hotel has the right to exclude others from prying into its records.

Dec. 27: U.S. District Judge Ruben Castillo rules that four novels and 46 short stories about Sherlock Holmes are in the public domain and can be freely reinterpreted by new authors, although 10 later short stories written by Sir Arthur Conan Doyle are not yet part of the public domain. • U.S. District Judge William H. Pauley III upholds the NSA's collection of U.S. phone consumer data, creating a division of authority over the program. He notes that there is no evidence that NSA used the data collected for any purpose other than attempting to stop terrorist attacks (see Dec. 16 entry).

Dec. 31: Chief Justice John G. Roberts issues his 2013 Year-End Report on the Federal Judiciary, lauding the judiciary's fiscal restraint, and noting that it consumes "just two-tenths of one percent of the federal government's total outlays." • U.S. District Judge William M. Skretny upholds most of New York's 2013 gun-control law, known as the SAFE Act, against a Second Amendment challenge. Among other things, the court upholds an expanded ban on semi-automatic weapons and ammunition magazines holding more than 10 rounds.

JANUARY 2014

Jan. 1: Justice Sonia Sotomayor issues a temporary injunction barring the U.S. Government from enforcing the ACA's birth-control mandate against the Little Sisters of the Poor (an order of nuns in Colorado). A case assessing the propriety of the mandate as applied to non-religious for-profit corporations is already on the Court's docket (see Nov. 26 entry).

Jan. 2: The California Supreme Court grants a motion for admission to the state bar filed by a Mexican immigrant who graduated from law school and passed the California bar, but who is living in the United States illegally.

Jan. 6: The Supreme Court issues an order halting same-sex marriages in Utah pending the state's appeal of a district court ruling invalidating Utah's opposite-sex-only marriage laws. The Tenth Circuit had declined to

issue a similar order, and hundreds of same-sex couples married between the time of the district court's ruling and the Supreme Court's stay order.

Jan. 7: J.P. Morgan Chase agrees to pay \$1.7 billion to victims of the massive fraud scheme perpetrated by Bernard Madoff, as part of a deferred prosecution agreement signed by U.S. Attorney Preet Bharara. • Los Angeles County sheriff Leroy D. Baca retires in response to a three-year investigation into civil rights abuses in L.A. jails.

Jan. 9: A federal grand jury indicts Devyani Khobragade, an Indian consular worker, for visa fraud and making false statements in an effort to obtain a work visa for a babysitter and housekeeper. Khobragade was strip-searched after being arrested earlier in the month, prompting demonstrations in India and protests by the Indian government. • The federal government opens an investigation into whether New Jersey Governor Chris Christie orchestrated a traffic jam in retaliation against a political opponent.

Jan. 13: The Supreme Court hears oral argument in *Noel Canning v. NLRB*, a case involving the scope of the President's power to make "recess appointments." Press coverage almost overwhelmingly suggests the Court will limit — perhaps drastically — Presidential power in this area. • The Court denies review of a case from Arizona striking down a state law banning most abortions after a woman reaches the 20th week of pregnancy.

Jan. 14: The U.S. Court of Appeals for the D.C. Circuit strikes down FCC regulations requiring "net neutrality" — *viz.*, regulations mandating that internet service providers treat similar content equally over broadband internet. The court finds that the FCC lacked the authority to issue anti-discrimination rules because broadband internet is not a common carrier service. • U.S. District Judge Anita B. Brody denies preliminary approval to a \$760 million settlement between the National Football League and players suffering from complications due to concussions. Brody expresses concern "that not all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis or their related claimants will be paid."

Jan. 15: The Justice Department announces that it will expand its restrictions on racial profiling to cover profiling based on religion, national origin, gender, and sexual orientation discrimination. • U.S. District Judge Paul Friedman rejects a challenge to Obama administration regulations

providing subsidized insurance coverage to individuals living in states that have not set up their own health insurance exchanges. Challengers to the law asserted that the relevant statutory text precludes subsidies for individuals who do not purchase insurance on an exchange established by a state.

Jan. 16: A group of snowboarders sue the Alta Ski Lifts Company, claiming that the ban on snowboards at its ski facility in Alta violates the equal protection clause of the U.S. Constitution by discriminating against snowboarders without any rational basis. The lawsuit is dismissed in September 2014.

Jan. 21: Harvard Law professor Lawrence Lessig posts a rap song to the website Rap Genius that he has been singing throughout his 185-mile long trek across New Hampshire. • The U.S. Court of Appeals for the Ninth Circuit holds that the Constitution prohibits excluding an individual from a jury based on her sexual orientation. The panel's opinion is authored by Judge Stephen Reinhardt, who previously authored an opinion invalidating California's gay-marriage ban.

Jan. 23: Virginia Attorney General Mark Herring announces that he will not defend the state's gay marriage ban in upcoming litigation. The state's constitutional amendment banning same-sex marriage was passed in 2006. • Federal prosecutors charge Vincent Asaro, a 78-year-old man, for his role in the 1978 "Lufthansa heist," in which masked gunmen seized \$6 million in cash and jewels from a cargo bay at John F. Kennedy International Airport. The heist was featured in Martin Scorsese's 1990 hit movie "Goodfellas." • A new study on independent political spending, to be published in the *Indiana Law Journal*, shows that the Supreme Court's ruling in *Citizens United* has not been attended by a spike in large expenditures (i.e., over \$55,000), but by a spike in expenditures ranging between \$1,000 and \$40,000.

Jan. 27: Stephen Glass, a former *New Republic* writer who fabricated dozens of stories, is deemed unfit to practice law by the California Supreme Court. • An appellate court in Florida removes a trial judge from presiding over a divorce proceeding because the judge had sent a Facebook "friend" request to the wife. The request was not accepted, and the judge subsequently issued several rulings favoring the husband.

Jan. 28: President Obama announces that he will raise the minimum

wage for employees of federal contractors to \$10.10 per hour — almost \$3 greater than the existing federal minimum wage of \$7.25. • The Obama administration allows reporters and human-rights advocates to view part of a hearing on whether certain detainees at Guantanamo should be released from the detention facility. • The family of late NFL player Junior Seau files an objection to the NFL's proposed concussion settlement, asserting that he suffered from degenerative brain disease caused by multiple concussions and blows to the head during his playing career (see Jan. 14 entry).

Jan. 30: Attorney General Eric Holder announces that the federal government will seek the death penalty against Dzhokhar Tsarnaev, the man accused of the Boston Marathon bombings. Holder asserts that the “nature of the conduct at issue and the resultant harm compel this decision.” • Attorneys for New York City file paperwork indicating that they will abandon their appeal of Judge Shira Scheindlin's ruling that the city's stop-and-frisk policies violate the Constitution. Soon after, attorneys for unions representing NYPD officers file papers seeking to appeal or oppose the dismissal of the suit (see Nov. 13 entry). • Deputy Attorney General James Cole announces that the government will be commuting more sentences for nonviolent drug offenders in the coming years. President Obama had granted clemency to eight such individuals in December.

Jan. 31: U.S. Magistrate Judge Paul Grewal imposes relatively moderate sanctions on Quinn Emanuel Urquhart & Sullivan LLP for allowing its client, Samsung Electronics Co., to obtain a copy of a confidential license agreement between Apple and Nokia. Judge Grewal criticizes Quinn Emmanuel's handling of the matter and orders the firm to reimburse Apple and Nokia for legal costs created by the leak. The error apparently occurred when a junior associate working late at night forgot to redact the agreement in a document production to Samsung.

FEBRUARY 2014

Feb. 2: Jamie Casino, a personal-injury lawyer from Savannah, Georgia, produces, stars in, and airs a two-minute Super Bowl ad that becomes an internet sensation. The ad depicts the story of a lawyer who seeks to avenge his brother's death, and features a scene where Casino smashes a flaming sledgehammer into a tombstone. Casino claims the ad is based on the true story of his brother's 2012 shooting death.

Feb. 4: Missouri files a lawsuit against California, seeking to enjoin a California law requiring all producers who sell eggs in the state to avoid tethering or confining animals in a way that would prevent them from lying down, standing up, extending their limbs, or turning around freely. • A study by University of Michigan law professor Samuel Gross reveals that the number of falsely convicted individuals exonerated in 2013 (87) was the highest in decades, though there were fewer cases in which DNA evidence played a role. • Former Attorney General Alberto Gonzales publishes an article in the *George Washington Law Review* urging the Obama administration to limit drone strikes against U.S. citizens overseas by requiring prior approval by a military panel or a federal judge.

Feb. 5: Google reaches a settlement with the European Commission in a case involving antitrust scrutiny into Google's search results. The search engine company agrees to ensure that its search results give prominence to the same results offered by three major rivals.

Feb. 6: Twitter states that it is pressing the Justice Department for more information about government data requests pertaining to its customers. The company threatens to sue if the Department does not accede to the request. • Statistics from the Transactional Records Access Clearinghouse reveal that the number of criminal tax prosecutions has spiked during the Obama administration — to the tune of a 38.4% increase over the George W. Bush administration. • Preet Bharara, U.S. Attorney for the Southern District of New York, oversees the conviction of a former portfolio manager at SAC Capital Advisors LP — his 79th consecutive conviction or settlement in an insider trading case.

Feb. 10: The *Wall Street Journal Law Blog* publishes a story about a unique lawsuit filed by a woman seeking to establish that she is not, in fact, dead. The case involves a woman who filled out a credit application at a local branch bank, which then reported her as “deceased” on her credit report, prohibiting the woman from refinancing her mortgage. Her suit asserts that the bank and the credit reporting agency failed to adequately investigate her complaints. • Attorney General Eric Holder announces that same-sex spouses will now receive the same legal rights in federal matters as other married couples regarding issues of bankruptcy, prison visits, and testimonial privilege. • The Justice Department announces the end of a three-year hiring freeze.

Feb. 11: The corruption trial of former New Orleans Mayor Ray Nagin is delayed for a day after one of the jurors fails to show up for the second day of deliberations on the evidence. • Speaking at Georgetown's law school, Attorney General Eric Holder criticizes laws denying felons the right to vote as outdated, racially unfair, and counterproductive. Senators Mike Lee and Rand Paul, also in attendance, voice agreement with Holder's remarks. • Nevada's Attorney General announces that she will no longer defend the state's same-sex marriage law in an appeal to the U.S. Court of Appeals for the Ninth Circuit. The announcement is the third in the past six months in which a state law enforcement official has publicly disavowed laws restricting same-sex marriage. • The U.S. Attorney's Office for the Southern District of New York announces that it obtained \$4 billion in forfeitures over the past year, including the skeleton of a Tyrannosaurus dinosaur illegally smuggled into the United States.

Feb. 12: The Obama administration releases voluntary cybersecurity guidelines for utilities, banks, and other critical industries. • Former New Orleans Mayor Ray Nagin is convicted of bribery and other corruption charges based on conduct occurring in the aftermath of Hurricane Katrina (see Feb. 11 entry).

Feb. 13: The U.S. Court of Appeals for the Ninth Circuit issues a 2-1 ruling recognizing a right to carry a gun in public. The court declines to rule on whether the Second Amendment requires states to permit carrying concealed firearms. • U.S. District Judge Arenda L. Wright rules that Virginia's same-sex marriage ban is unconstitutional.

Feb. 14: The Treasury Department announces that it will allow banks to provide financial services to marijuana businesses, so long as the businesses are legal under state law and the institutions regularly report to the Department and keep an eye out for any suspicious activity. • The Indiana Court of Appeals invalidates the portion of its public intoxication law banning "annoy[ing]" conduct, finding that the term is too vague. The court notes that the term "annoy" "may encompass a vast array of human behavior, and the statute provides no guidance for distinguishing between acceptable and annoying conduct."

Feb. 18: As part of a settlement, the National Security Agency and Department of Homeland Security acknowledge that they erred in threatening legal action against retailer Zazzle.com for using their official logos in merchandise mocking the agencies.

Feb. 20: Emmett Burke, owner of a Chicago-style pizza restaurant in downtown Manhattan, challenges Justice Scalia to bring his favorite New York pizza to the restaurant for a taste test conducted by *Daily Show* host Jon Stewart. The challenge is in response to Scalia's comment that deep-dish pizza is "very tasty, but i[s] not pizza."

Feb. 21: The city of Detroit submits its financial restructuring plan, which covers an estimated \$18 billion in long-term obligations. The plan involves full payment to secured creditors, a discounted amount to pensioners, and 20 cents on the dollar to unsecured creditors (see Dec. 3 entry). • The U.S. Court of Appeals for the Seventh Circuit concludes that a grocery store ad featuring Michael Jordan's jersey number is commercial speech, buttressing Jordan's \$5 million dollar suit for misappropriating his identity.

Feb. 26: Apple files its opening brief in the U.S. Court of Appeals for the Second Circuit in a case challenging a ruling that it violated federal anti-trust law by participating in a conspiracy with publishers to increase e-book prices.

Feb. 27: A spectator sneaks a video camera into the U.S. Supreme Court, and captures video of a protestor who disturbs oral argument by urging the Court to overturn its *Citizens United* decision. • The U.S. Court of Appeals for the Seventh Circuit rules that an Indiana school board discriminated against a male teenager who was kicked off the basketball team for refusing to cut his hair. The teenager's attorney had asserted that the case is "about a kid who was forced to choose between the game he loves and not feeling like himself if he cut his hair."

Feb. 28: The U.S. Court of Appeals for the Ninth Circuit rules that a California high school did not violate its students' First Amendment rights when it told them they could not wear American flag t-shirts. The court accepts the school's argument that it was engaged in a good-faith effort to prevent a fight between the putative t-shirt wearing students and Mexican students.

MARCH 2014

Mar. 3: An appeals court in Florida invalidates an \$80,000 settlement between a Miami high school and a former headmaster after the headmaster's daughter posted about it on Facebook. The settlement contained confidentiality terms that the daughter breached with her post. • The

Justice Department sues Sprint, claiming the company overcharged law enforcement agencies by more than \$21 million to facilitate eavesdropping on phone calls.

Mar. 4: U.S. District Judge Lewis A. Kaplan issues an opinion holding that a \$9.5 billion Ecuadorian verdict against Chevron was obtained by fraud. Kaplan concludes that the environmental litigation, instituted by lawyer Steven Donziger, involved widespread corruption, including a ghostwritten final judgment written by a bribed judge.

Mar. 5: The Obama Administration announces that it will allow individuals with health insurance plans that do not conform to the ACA's requirements to keep those plans through October 2017. • The Supreme Court hears oral argument in *Erica P. John Fund v. Halliburton*, a case addressing the ongoing validity of the "fraud on the market" presumption that permits many securities fraud class actions to go forward. • Florida's Senate judiciary committee votes out of committee a bill that would legalize firing a warning shot at a would-be attacker.

Mar. 6: The U.S. Attorney's Office for the Southern District of New York indict three former executives from Dewey & LeBoeuf LLP, claiming that they engaged in a years-long fraud to hide the now-defunct firm's financial problems from banks and other creditors.

Mar. 7: The Kansas Supreme Court rules that the state violated its constitution by underfunding poor school districts, in violation of the constitutionally protected educational rights of the students.

Mar. 11: General Keith Alexander, outgoing head of the NSA, sends a letter to the American Bar Association stating that the United States has policies and safeguards in place to prevent the mishandling of attorney-client privileged information collected during routine surveillance missions. • The Senate Banking Committee reaches agreement on a bill to overhaul Fannie Mae and Freddie Mac.

Mar. 12: A former CreditSuisse Group banker pleads guilty to helping Americans hide money in Switzerland. The indictment alleged the banker set up offshore accounts totaling \$3 billion. • Attorney General Eric Holder announces his support for a proposal to reduce the average recommended sentence for drug-trafficking offenses from 62 months to 51. • President Obama issues an executive order directing the Labor Department to increase the number of workers eligible for overtime pay by in-

creasing the salary ceiling for receiving overtime benefits. • U.S. District Judge Shira Scheindlin dismisses the indictment against Devyani Khobragade, an Indian consular official accused of committing fraud in connection with visa paperwork for her housekeeper. The dismissal is based on the fact that Khobragade was protected by diplomatic immunity when the indictment was filed (see Jan. 9 entry).

Mar. 13: The Florida Supreme Court declares unconstitutional limitations imposed on the amounts recoverable in medical malpractice lawsuits. The caps had limited the amount of pain and suffering damages to \$500,000 for injuries and \$1 million in cases where an individual died or was left in a permanent vegetative state.

Mar. 14: Homeowner assistance groups sue California Governor Jerry Brown, claiming he diverted to the State's general fund money that was earmarked for borrower assistance as part of national mortgage settlement with five major banks. • Manhattan prosecutors issue a second indictment against Devyani Khobragade, relying on her decision to leave the U.S., which eliminated her diplomatic immunity (see Jan. 9 and Mar. 12 entries). • Indiana legislators approve a bill that would allow gun owners to store firearms in cars parked in front of schools. A previous law made such conduct a felony.

Mar. 16: Brigadier General Jeffrey Sinclair agrees to plead guilty to some sexual assault charges in exchange for dismissal of more serious charges that could have required him to register as a sex offender. Army prosecutors had accused Sinclair of forcing a female captain under his command to perform certain sex acts, but their case had become plagued with credibility problems. Sinclair had previously pleaded guilty to having improper relationships with several subordinate officers.

Mar. 17: Jurors begin deliberating in the criminal prosecution of five former employees of Bernard L. Madoff. The jurors were initially called six months earlier and heard testimony from more than 40 witnesses. • The Law School Admissions Council issues new figures showing that the number of LSAT takers is up 1.1% from the previous year — the first time since June 2010 that there was an increase in the number of people taking the exam.

Mar. 19: Sulaiman Abu Ghaith (Al-Qaeda spokesman and Osama bin Laden's son-in-law) takes the stand in his own defense in his criminal

trial for providing material support to the terrorist organization and conspiring to kill Americans. • Federal prosecutors enter a deferred prosecution agreement with Toyota in which the company admits to misleading consumers about safety issues with its vehicles and agrees to pay \$1.2 billion to the United States. • Chevron requests an award of \$32.3 million in attorney fees from Steven Donziger — allegedly a fraction of the costs the company incurred in establishing that an environmental judgment obtained against Chevron was procured through fraud (see Mar. 4 entry).

Mar. 20: Toothpaste company Hello Product LLC announces that it will dispense 100,000 bottles of its toothpaste on the streets of Manhattan, in order to comply with an injunction against the sale of the toothpaste obtained by Procter & Gamble on the ground that the toothpaste's label is false and misleading. • U.S. District Judge William H. Pauley approves Toyota's deferred prosecution agreement (see previous entry) and urges prosecutors to continue their probe to find the individuals responsible for Toyota's misconduct. • A group of consumers sues Fitbit, makers of a fitness-tracking bracelet, claiming that the device causes blisters and rashes.

Mar. 21: The Illinois Supreme Court strikes down the state's 50-year-old eavesdropping law, which prohibits citizens from making audio recordings without first obtaining permission from all parties and imposes enhanced penalties for recording a conversation with a police officer. • Credit Suisse Group AG agrees to pay \$885 million to settle a lawsuit brought by the U.S. Federal Housing Finance Agency. The agency claimed that the bank mischaracterized mortgage-backed securities sold between 2005 and 2007.

Mar. 24: Jurors convict five of Bernard Madoff's former employees, concluding they helped him perpetrate the biggest financial fraud in history (see Mar. 17 entry). • Jurors also convict Sulaiman Abu Ghaith of providing material support to terrorists, after deliberating for just six hours (see Mar. 19 entry).

Mar. 25: The U.S. Court of Appeals for the Second Circuit affirms the insider trading conviction of Rajat Gupta, a former Goldman Sachs Group Inc. director. Gupta had challenged prosecutors' use of certain wiretap recordings at trial; the court approved not only the use of wiretaps on Gupta's phone, but also recordings of two conversations in which Gupta did not participate. • The Supreme Court hears oral argument in two cas-

es involving challenges to the contraception mandate in the Affordable Care Act (see Nov. 1 and 26 entries). • At almost the same time, the U.S. Court of Appeals for the D.C. Circuit hears oral argument in a case featuring a challenge to the IRS regulation providing insurance subsidies to low-income individuals purchasing exchange insurance plans in states that do not have their own health insurance exchanges (see Jan. 15 entry). • Smokers sue the city of New York, challenging a law banning individuals from “vaping,” or smoking e-cigarettes, in public places. • The U.S. Court of Appeals for the Ninth Circuit upholds a San Francisco ordinance requiring handgun owners to keep their firearms locked up or on their person when at home, and prohibiting the sale of hollow-point bullets.

Mar. 26: NLRB regional director Peter Sung Ohr issues a decision declaring that Northwestern University football players receiving athletic scholarships can unionize because they are employees of the university.

Mar. 27: U.S. District Judge Nelva Gonzales Ramos agrees to hear argument on a motion that would force General Motors to inform customers that they cannot drive their cars until their ignition switches are fixed.

Mar. 28: Maryland lawmakers include in an amended budget bill a threat to use the power of eminent domain to seize the property of the production company that creates the Netflix series “House of Cards” in an effort to force the continued recording of the show in the state. The show’s producers had previously sent a letter to the governor threatening to move production of the show to another state unless they received more tax credits.

APRIL 2014

Apr. 1: A trial begins in Colorado federal district court over the validity of gun restrictions passed by the state legislature. The restrictions require background checks for all gun purchasers and ban the sale of ammunition magazines containing more than 15 rounds. • The Supreme Court holds, in *Burwell v. Hobby Lobby Stores*, that the ACA’s contraceptive mandate violates the First Amendment’s Petition Clause, and also finds that the mandate cannot be severed from the remainder of the Act, requiring its outright invalidation.¹

Apr. 2: The Supreme Court issues its 5-4 opinion in *McCutchen v. FEC*,

¹ April Fools!

invalidating federal election law imposing aggregate limits on political contributions. Justice Stephen Breyer dissents, joined by Justices Ginsburg, Sotomayor, and Elena Kagan, arguing that the majority's decision, combined with the Court's earlier decision in *Citizens United*, "eviscerates our Nation's campaign finance laws." • The U.S. Court of Appeals for the Fifth Circuit overturns a district court decision requiring Texas to disclose information about the source of its lethal injection drugs. The district court had stayed two executions, holding that the state had improperly withheld information about the source of drugs it planned to use.

Apr. 3: Federal prosecutors notify Reaz Qadir Khan, who is suspected of aiding a terror group in Syria, that some of the evidence against him was collected through the NSA's bulk surveillance program (see Dec. 16 and 27 entries). • The U.S. Court of Appeals for the Fourth Circuit overturns a \$920 million dollar verdict for DuPont and against Kolon Industries, holding that the trial judge had improperly excluded some of the defendant's evidence. The verdict was one of the largest-ever intellectual property damage awards. • Former U.S. Attorney General Alberto Gonzales is hired to be dean of Belmont University's law school.

Apr. 4: Dallas Mavericks owner Mark Cuban co-authors an op-ed in the *Wall Street Journal* arguing that the SEC would not have indicted him for insider trading if it had been forced to comply with the *Brady* rule during the litigation. • *Politico* reports that President Obama has had more judicial nominees confirmed than George W. Bush at the same point in their respective presidencies — 237 to Bush's 234.

Apr. 7: U.S. District Judge Esther Salas permits the FTC to move forward with a suit claiming that Wyndham Worldwide Corp. failed to make reasonable efforts to protect its customers' information. The suit is widely viewed as a major test of the FTC's authority to regulate corporate data security practices.

Apr. 9: The ABA releases its latest set of law school graduate employment figures, which reveal that 57% of graduates from the class of 2013 landed full-time jobs — a 0.8% increase from the previous year. The number of graduates reporting unemployment, however, is up to 11.2% from 10.6% the year before.

Apr. 10: The Justice Department releases a report indicating that the Albuquerque Police Department engaged in pervasive overuse of excessive

and deadly force during encounters with civilians who posed little to no threat. The report finds that the majority of fatal shootings by officers between 2009 and 2012 were unjustified. • The House Oversight and Government Reform Committee votes to hold former IRS official Lois Lerner in contempt of Congress for failing to answer the panel's questions regarding potential IRS targeting of politically conservative groups. Lerner asserted her Fifth Amendment privilege against self-incrimination; Republicans on the panel responded by claiming that she had waived the privilege by making an opening statement proclaiming her innocence at a hearing the previous year. • U.S. District Judge Laura Taylor Swain approves SAC Capital Advisors LP's criminal settlement with the Justice Department, ending a decade-long investigation into the hedge fund. As part of the settlement, the company agreed to pay \$1.8 billion — including a \$900 million criminal penalty (see Nov. 4 entry).

Apr. 11: The U.S. Court of Appeals for the Third Circuit vacates hacker Andrew Auernheimer's computer crime conviction, concluding that there was no basis for prosecuting him in New Jersey. The ruling leaves open the possibility of a re-prosecution elsewhere.

Apr. 15: President Obama commutes 3.5 years of Cesar Huerta Canta's sentence, concluding that the extra time was based on a typographical error in his sentencing documents (see Jan. 30 entry).

Apr. 16: The U.S. Court of Appeals for the Fourth Circuit rules that a company should not have been allowed to anonymously litigate its dispute with the federal Consumer Product Safety Commission. A district judge had allowed "Company Doe" to pursue its claim under a pseudonym, ultimately concluding that the Commission had issued a materially inaccurate safety complaint.

Apr. 17: U.S. District Judge Nelva Gonzales Ramos declines to require General Motors to tell owners of cars affected by an ignition-switch recall to park their cars until the ignition issue is fixed. The court concludes that the National Highway Traffic Safety Administration is better suited to oversee the recall process (see Mar. 27 entry). • The trial of Abu Hamza al-Masri, the second major terrorist trial to take place in federal court, begins in New York.

Apr. 18: The Virginia Supreme Court rejects the Energy & Environmental Legal Institute's efforts to force the University of Virginia to turn over

emails from a climate scientist who used to work at the school. The scientist had been accused of working to stifle the views of those who do not believe in global warming.

Apr. 21: The Supreme Court grants certiorari for the second time in a case now known as *Zivotovsky v. Clinton*, which addresses the constitutionality of a federal statute that allows American citizens born in Jerusalem to list “Israel” as their birthplace on U.S. passports. The case involves separation-of-powers issues, because no President since Harry Truman has officially recognized any country’s sovereignty over Jerusalem. The Court had previously ruled that the question presented in the latest iteration of the case was not a political question outside the jurisdiction of the judicial branch.

Apr. 22: The Supreme Court holds, in a 6-2 decision, that Michigan did not violate the Constitution by passing a constitutional amendment banning affirmative action programs. Justice Anthony Kennedy authors the plurality opinion, joined by the Chief Justice and Justice Alito, holding that the Sixth Circuit improperly extended one of the Court’s prior precedents on the political process doctrine, which (generally speaking) bars states from burdening minorities’ access to the channels of political change. Justices Scalia and Clarence Thomas concur, saying that the political process doctrine should be invalidated. Justice Breyer concurs on narrow grounds. Justice Sotomayor, joined by Justice Ginsburg, writes a strongly-worded dissent. Justice Kagan was recused. • The Court hears argument in *ABC, Inc. v. Aereo, Inc.*, on the propriety, under the copyright laws, of a service that allows individuals to watch copyrighted television programs over the internet as they are being broadcast over the air.

Apr. 23: The Obama Administration announces the details of a new clemency program, which will allow low-level offenders who are without a significant criminal history, have served at least 10 years in prison, and have no history of violence to seek clemency if they would have received a substantially lower prison term under today’s laws (see Jan. 30 and Apr. 16 entries).

Apr. 24: In an interview with the *American Spectator*, Justice Alito opines that law schools put too much emphasis on the LSAT, asking, “What in life is a multiple choice test?”

Apr. 25: Northwestern University football players conduct a vote on

whether to unionize, in response to an earlier NLRB decision granting them the right to unionize (see Mar. 26 entry).

Apr. 28: The Supreme Court grants review in *Yates v. U.S.*, which presents the question whether a provision of the Sarbanes-Oxley Act that makes it a crime to knowingly destroy “any record, document or tangible object” with the intent to impede an investigation covers throwing undersize fish overboard to avoid a charge for illegally harvesting fish. • A report issued by the Center for Public Integrity asserts that since 2010, federal appellate judges considered more than two dozen cases in which they had a financial conflict. • U.S. Congressman Michael Grimm (R) is indicted on 20 counts, including payroll tax evasion and hiring undocumented workers, for his conduct in running a Manhattan restaurant before being elected to Congress in 2010. Grimm would win reelection in November, and then plead guilty to a single count of tax fraud in December, while vowing that he would not resign his office.

Apr. 29: NBA Commissioner Adam Silver announces that Donald Sterling, the owner of the Los Angeles Clippers, will be banned from the NBA for life and fined \$2.5 million for making racist comments.

Apr. 30: The Supreme Court issues a revised version of Justice Scalia’s dissent in *EPA v. EME Homer City Generation*, a case concerning the validity of an EPA regulation limiting power-plant emissions crossing state lines. He had accused the EPA of attempting “to convert the Clean Air Act into a mandate for cost-effective regulation,” citing his prior opinion in *Whitman v. American Trucking Associations, Inc.* — only to discover that the trucking associations, and not the EPA, had sought consideration of cost in *Whitman*.

MAY 2014

May 1: Law Day, U.S.A. is celebrated by adoring fans of law throughout the United States. Law Day was first proclaimed by President Dwight Eisenhower in 1958, and was enacted into law in 1961. • The U.S. Court of Appeals for the Federal Circuit denies a motion by plaintiff Two-Way Media LLC to dismiss AT&T’s appeal of the \$40 million patent verdict as untimely. AT&T argued that its lawyers at Sidley Austin LLP missed the appeal deadline because “affirmatively misleading docket notices” led them to believe that some of the post-trial motions in the case had not yet been resolved. At oral argument in December, the Federal Circuit panel

expressed skepticism that attorneys do not have a duty to read the contents of all judicial communications, no matter how they are labeled.

May 5: In *Town of Greece v. Galloway*, the Supreme Court holds that the Town of Greece did not violate the Establishment Clause by opening board meetings with prayers from citizens. Justice Kagan, joined by three other Justices, dissents, contending that the prayers at issue were predominantly sectarian, and that the town did not do enough to accommodate minority religions (see Nov. 7 entry).

May 6: UBS AG agrees to pay \$358 million to Assured Guarantee Ltd. to settle a lawsuit claiming that UBS falsely overstated the quality of mortgage loans underlying mortgage-backed securities, which began to go bad in 2009. The settlement mirrored one between Assured Guarantee and Bank of America in April 2011, for \$1.1 billion.

May 9: President Woodrow Wilson's Mother's Day proclamation — backed by a May 8, 1914 congressional joint resolution requiring that the second Sunday in May be set aside for the purpose — turns 100. • Arkansas Circuit Court Judge Chris Piazza strikes down Arkansas's 2004 constitutional amendment banning same-sex marriages.

May 15: The FCC votes 3-2 to re-propose net neutrality rules, following the U.S. Court of Appeals for the D.C. Circuit's decision striking down a previous version of the rules (see Jan. 14 entry).

May 19: British cleric Abu Hamza al-Masri is convicted in the U.S. District Court for the Southern District of New York on 11 terrorism-related charges. Al-Masri was accused of orchestrating the kidnappings of 16 American, British, and Australian tourists in Yemen in 1998; attempting to establish a terrorist training camp in Oregon; and supporting terrorism by sending one of his followers to train with Al-Qaeda in Afghanistan (see Apr. 17 entry). • The U.S. District Court for the District of Oregon strikes down Oregon's 2004 ban on same-sex marriage.

May 20: The U.S. District Court for the Middle District of Pennsylvania strikes down Pennsylvania's 1996 ban on same-sex marriage.

May 21: A court in Geneva, Switzerland awards Elena Rybolovleva, ex-wife of Russian billionaire and "fertilizer king" Dmitry Rybolovlev, \$4.8 billion in the largest divorce award ever recorded. She had previously initiated related court proceedings against him in New York, Florida, and Hawaii to prevent him from transferring assets while the divorce

was pending.

May 23: U.S. Rep. John Conyers (D) is restored to the ballot in Michigan to run for his 26th term after Judge Matthew Leitman of the U.S. District Court for the Eastern District of Michigan strikes down Michigan's law requiring that individuals who gather petition signatures be registered to vote, stating that it violates the First Amendment. • The South Dakota Supreme Court denies a motion by ABC and journalist Diane Sawyer to dismiss Beef Products Inc.'s \$1.2 billion suit alleging they defamed its lean finely textured beef product by referring to it as "pink slime" and making other false and disparaging statements about it. The complaint alleges that the negative news coverage caused sales to fall from 5 million pounds of the product per week to just 2 million pounds per week; ABC and Sawyer claim that the lawsuit is preempted by the Agricultural Food Products Disparagement Act.

May 28: *Law360* and BPI Consulting Group publish the "Billing Rate Reference 2014," which shows that firms with 400 or more lawyers charge rates that are on average 30% higher than firms with 150 to 399 lawyers, and 54% higher than firms with fewer than 150 lawyers. The average hourly rates at the biggest firms: \$400 for associates, \$581 for partners, and \$724 for senior partners.

May 30: Judge Randall Rader steps down as Chief Judge of the U.S. Court of Appeals for the Federal Circuit, after sending a laudatory email to his friend — patent attorney and president of the Federal Circuit Advisory Council Edward Reines — concerning his advocacy before the court, and further encouraging Reines to share the email with others. Rader explains in a letter to his colleagues that his conduct constituted a breach of his ethical obligation not to lend the prestige of his judicial office to advance the private interests of others. In November, the Federal Circuit would reprimand Reines for distributing the email to no fewer than 35 existing and prospective clients. It also referred to California bar authorities allegations that things of value were exchanged between Rader and Reines.

May 31: President Obama swaps five detainees held at Guantánamo Bay — including top Taliban officials — for Sgt. Bowe Bergdahl, who had been captured by the Taliban in 2009. The released Guantánamo detainees are required by the terms of the agreement to live in Qatar, which helped facilitate the deal. The transfer of prisoners out of Guantánamo Bay

without 30 days' prior notice to Congress violates a provision of the 2014 Defense Appropriations Act; defenders of the Administration's action consider the notice requirement an unconstitutional infringement on the President's power as Commander-in-Chief (see Aug. 22 entry).

JUNE 2014

June 2: In *Bond v. U.S.*, the Supreme Court holds that Section 229 of the Chemical Weapons Convention Implementation Act of 1998 does not cover a simple assault conviction resulting from a woman's attempt to poison her husband's mistress by spreading chemicals on her doorknob. The Court thus avoids the question of whether the Act is constitutional under the Treaty Clause (see Nov. 6 entry).

June 4: In *Burton v. Infinity Capital Management*, the Ninth Circuit holds that attorneys who prepare orders at a judge's direction are not entitled to absolute quasi-judicial immunity, because although drafting such orders "does require the preparer to make important decisions about language and tone," the "ultimate discretion in determining whether an order will be integral to resolving a dispute lies with the judge, not the preparer." If you happen across an attorney who responds to a judge's direction to draft an order by stating: "I've read *Burton*. You have immunity, I don't. Why don't you draft it yourself, Your Honor?", please forward the example to the authors; a *Baggish* award awaits you.

June 10: In *Vergara v. California*, L.A. County Superior Court Judge Rolf M. Treu rules that the state's existing teacher tenure system is unconstitutional under the state constitution. He writes, "Evidence has been elicited in this trial of the specific effect of grossly ineffective teachers on students. The evidence is compelling. Indeed, it shocks the conscience."

June 12: The U.S. District Court for the Southern District of New York approves an \$18 million class-action settlement in *In re Literary Works in Electronic Databases Copyright Litigation*, a copyright lawsuit brought against Google by The Authors Guild, the American Society of Journalists and Authors, and others in 2000.

June 18: In a 2-1 decision, the Trademark Trial and Appeal Board of the U.S. Patent Office revokes six federal trademark registrations owned by the Washington Redskins on the grounds that the term is derogatory. The trademark rights remain in force pending appeal.

June 19: The Supreme Court issues its decision in *Alice Corporation Pty. Ltd. v. CLS Bank International*, holding that a computer-implemented scheme for mitigating the risks involved in certain financial transactions is not patentable because it is a patent-ineligible abstract idea.

June 23: The Supreme Court decides *Halliburton v. Erica P. John Fund, Inc.* in a unanimous judgment, with a majority opinion by Justice Breyer. The Court declines to overrule the “fraud on the market” presumption relied on by many securities class action plaintiffs, but holds that defendants may attempt to rebut the presumption prior to class certification (see Mar. 5 entry). • A report commissioned by Pennsylvania Attorney General Kathleen G. Kane (D) finds that prosecutors showed a lack of urgency in charging former Penn State assistant coach Jerry Sandusky with sexually abusing children, but that no evidence shows that the prosecution’s pace was affected by then-Attorney-General Tom Corbett’s (R) gubernatorial campaign. Prosecutors respond that their methodical construction of the case against Sandusky is fully justified by his eventual conviction on 45 counts for the abuse. • Egyptian Judge Mohamed Nagy Shehata sentences *Al Jazeera English* reporters Peter Greste (Australian), Mohamed Fahmy (dual Canadian-Egyptian), and Baher Mohamed (Egyptian) to between seven and ten months in jail for endangering Egypt’s national security, falsifying news, and helping terrorists. In July, the judge would explain that “the devil encouraged them to use journalism and direct it toward actions against this nation” by “showing the country — contrary to the truth — in a situation of chaos and upheaval”

June 25: The Supreme Court issues its 6-3 opinion in *ABC Inc. v. Aereo, Inc.*, holding that Aereo infringed on broadcasters’ copyrights by streaming broadcast programs over the internet at the same time they were airing on television. The opinion is essentially the death knell for Aereo (see Apr. 22 entry). • The Court issues a unanimous opinion in *Riley v. California*, holding that officers generally must secure a warrant before searching cell phone data incident to arrest.

June 26: In *NLRB v. Noel Canning*, the Supreme Court invalidates the President’s appointment of three NLRB members during a three-day adjournment between two *pro forma* Senate sessions. The Court holds that the President has the constitutional authority to fill any vacancy during any recess of sufficient length, but that the Senate gets to decide when it is in recess, and was not in recess when the challenged appoint-

ments were made (see Jan. 13 entry). • The Court also issues a unanimous judgment in *McCullen v. Coakley*, invalidating a Massachusetts statute making it a crime to stand on a public sidewalk within 35 feet of the entrance to any facility where abortions are performed.

June 27: In a Minneapolis speech, President Obama announces that he intends to expand his use of executive powers to enact his policy agenda in the face of congressional intransigence. Acknowledging that some in Congress would object, he states: “So sue me.”

June 30: The Supreme Court issues its ruling in *Burwell v. Hobby Lobby Stores, Inc.* In a 5-4 opinion by Justice Alito, the Court holds that the ACA’s so-called “contraceptive mandate” violates the federal Religious Freedom Restoration Act, which generally prohibits the government from substantially burdening a person’s exercise of religion even if the burden results from a generally-applicable rule (see Nov. 1 and 26 entries). • In *Harris v. Quinn*, another 5-4 opinion by Justice Alito, the Court holds that a state may not compel personal care providers to pay the costs that their union incurs in engaging in collective bargaining for better terms of employment. The Court does not overrule *Abood v. Detroit Board of Education* — a precedent on the First Amendment implications of union dues that the petitioners had asked the Court to overrule.

JULY 2014

July 2: The U.S. Court of appeals for the Ninth Circuit rules that the San Francisco Sheriff’s Department may have impermissibly discriminated against male deputies on the basis of sex by barring them from supervising female inmates, holding that the County failed to show that background checks and psychological testing were insufficient means of weeding out male deputies who might engage in sexual misconduct with the inmates.

July 3: The Illinois Supreme Court strikes down the State Employee Group Insurance Act of 2012, which required Illinois retirees to pay a portion of their health care premiums, finding that it violated the pension protection clause of the state constitution, which describes membership in a public retirement system as “an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”

July 4: Answering questions on “Mumsnet,” a website advertising itself

as “by parents for parents,” Hillary Rodham Clinton explains that in 1975, while she was working as a lawyer at the University of Arkansas legal aid clinic, she asked to be removed from a case defending a man who was accused of sexually assaulting a 12-year-old-girl, but was nevertheless left on the case. Facing the possibility of 30 years to life in prison, the 41-year-old defendant was ultimately sentenced to a year in county jail and four years of probation. “I had a professional duty to represent my client to the best of my ability, which I did,” Clinton stated.

July 10: The Ninth Circuit upholds a \$500 million price-fixing fine against AU Optronics Corp., as well as the conviction of two executives, rejecting arguments that U.S. antitrust law did not extend to AUO’s overseas conduct in fixing the prices of liquid crystal display panels.

July 14: Citigroup agrees to a \$7 billion settlement with the U.S. Department of Justice (\$4 billion in penalties, \$2.5 billion in mortgage modifications, and \$500 million for five states and the FDIC) for its conduct in securitizing and selling residential mortgage-backed securities prior to Jan. 1, 2009. The \$4 billion penalty is the largest to date under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).

July 16: Reversing a position it took in 2013, the Department of Health and Human Services determines that U.S. territories do not qualify as “states” within the meaning of Title I of the Affordable Care Act, thus exempting them from some of the Act’s requirements. • Judge Cormac J. Carney of the U.S. District Court for the Central District of California rules the California death penalty system is unconstitutional under the Eighth Amendment because it is arbitrary and plagued with delay.

July 17: Eric Garner dies in Staten Island, New York, after a police officer puts him in a grappling hold around his neck while making an arrest for illegally selling loose cigarettes. Medical examiners later conclude that the cause of death was “homicide,” meaning that it was caused by a person (specifically, the police officer), but not implying legal culpability. On December 3, 2014, a grand jury chooses not to indict the police officer responsible for the death, sparking widespread protests. • Australia repeals its carbon tax, originally enacted in 2012. The tax was alleged to have caused a 9% increase in power prices in Australia. According to the United Nations Statistics Division, among developed countries Australia has the second-highest per capita carbon emissions in the world, after

Luxembourg, but less than 1/16 the total carbon emissions of China.

July 21: President Obama issues an executive order prohibiting the federal government and its contractors from discriminating on the basis of sexual orientation or gender identity. The order does not provide any exemption for religious organizations that object to homosexual conduct. Federal contractors employ approximately 28 million workers in aggregate, making up one fifth of the total American workforce. • U.S. District Judge William Griesbach of the District of Wisconsin dismisses a lawsuit filed by U.S. Senator Ron Johnson challenging the Obama Administration's decision (issued by the Office of Personnel Management (OPM) in September 2013) to subsidize insurance purchased by Members of Congress and their staff in insurance exchanges, despite the absence of any authorization in the Affordable Care Act for such a subsidy. In a *Marbury*-esque ruling, Griesbach says that "If proven, this would be a violation of Article I of the Constitution, which reposes the lawmaking power in the legislative branch," but goes on to hold that Johnson lacks standing to sue: "There is nothing in the Constitution stipulating that all wrongs must have remedies, much less that the remedy must lie in federal court." • Azamat Tazhayakov, a college friend of Boston Marathon bombing suspect Dzhokhat Tsarnaev, is convicted of conspiracy and obstruction of justice, for working with other friends of Tsarnaev to remove a backpack containing altered fireworks from his dorm room shortly after the bombing. Tsarnaev's trial is scheduled for November 2014, with trials of other friends and alleged conspirators scheduled in between.

July 22: In *Halbig v. Burwell*, the U.S. Court of Appeals for the D.C. Circuit rules 2-1 that the Obama Administration violated the Affordable Care Act when it provided tax credits for insurance purchased in exchanges established by the federal government. The Act authorizes tax credits only for insurance purchased "through an exchange established by the state"; the Court holds that federally established exchanges do not qualify. • Hours later, the U.S. Court of Appeals for the Fourth Circuit issues a unanimous opinion reaching the opposite conclusion in *King v. Burwell*: "the defendants have the stronger position, although only slightly." • Hajn sues television network A&E for marketing a variety of *Duck Dynasty* merchandise that bears the logo "My Favorite Color Is Camo," based on a statement that Uncle Si Robertson made on the popular show. Hajn alleges the logo violates a trademark it registered in 2011, prior to the

airing of the *Duck Dynasty* series, and that it has been marketing merchandise bearing the logo since that time. • The FAA issues a “Notice to Airmen” (NOTAM) prohibiting U.S. airlines from flying into or out of Israel’s Ben-Gurion International Airport for 24 hours, after a rocket strike lands one mile from the airport.

July 24: President Obama announces he is imposing a new round of “major” sanctions on Russia and Russian President Vladimir Putin for Russia’s continued involvement in the destabilization of eastern Ukraine, prohibiting, among other things, U.S. citizens or companies from providing financing to any of several Russian financial institutions, or exporting certain energy-related goods and technologies to Russia.

July 30: The U.S. House of Representatives votes 225 to 201, with no Democrats supporting, to sue President Obama for failing to properly enforce the employer mandate in the Affordable Care Act.

July 31: The U.S. Senate fails to pass a \$2.7 billion bill to address the surge of unaccompanied minors crossing United States borders. It adjourns the next morning.

AUGUST 2014

Aug. 1: By a vote of 223-189, the U.S. House of Representatives passes a \$694 million emergency border security spending bill to address — via extra border security, immigration judges, National Guard troops, and housing and care — the surge of unaccompanied minors crossing United States borders. President Obama, who had requested \$3.7 billion in immigration-related spending, declares the bill “extreme and unworkable,” and “I’m going to have to act alone.”

Aug. 8: In *O’Bannon v. NCAA*, Judge Claudia Wilken of the U.S. District Court for the Northern District of California rules in favor of UCLA basketball player Ed O’Bannon and 19 other plaintiffs, holding that the NCAA’s ban on college athletes’ benefiting from the use of their own image violates antitrust laws, and the NCAA must allow its member schools and conferences to offer football and basketball players at least \$5,000 per year as compensation for the use of their names, images, or likenesses.

Aug. 9: Michael Brown is shot and killed by police officer Darren Wilson in Ferguson, Missouri. Some witnesses state that Brown was shot in the

back while attempting to flee; others state that he was shot while attempting to passively surrender with his hands up; and others state that Brown was shot while aggressively charging Wilson, after assaulting Wilson and attempting to take his gun. On November 24, 2014, a grand jury declines to indict Wilson.

Aug. 10: During protests arising from Michael Brown's death, more than two dozen businesses in Ferguson, Missouri are damaged, one is set on fire, and 32 people are arrested (see Aug. 9 entry).

Aug. 15: Texas Governor Rick Perry is indicted by a Travis County grand jury on two felony counts for allegedly abusing his official power by pressuring Travis County District Attorney Rosemary Lehmborg to resign her office with a threat to veto (and then an actual veto of) state money earmarked for Lehmborg's public integrity unit. Perry allegedly thought it was inappropriate for Lehmborg to continue as the head of the public integrity unit after she served jail time for drunk driving following an unseemly 2013 arrest. • In a lawsuit filed by Judicial Watch, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia orders the IRS to file a sworn declaration by August 22 explaining its efforts to recover lost Lois Lerner emails and its policies for tracking and degaussing hard drives, after finding that previous explanations were insufficient. The Treasury Inspector General for Tax Administration announces in November that it has located as many as 30,000 missing Lerner emails on backup disaster recovery tapes that the IRS never searched (see Apr. 14 entry).

Aug. 16: Missouri Governor Jay Nixon declares a state of emergency in Ferguson and sets a midnight-to-5:00 a.m. curfew. Two days later, he sends in the National Guard (see Aug. 9 and 10 entries).

Aug. 22: The Government Accountability Office (GAO) concludes that President Obama's transfer of five Taliban detainees out of Guantánamo Bay in exchange for Sgt. Bowe Bergdahl in May 2014 clearly and unambiguously violated Section 8111 of the Department of Defense Appropriations Act of 2014, as well as the Antideficiency Act (see May 31 entry).

Aug. 25: The House of Representatives announces that it has hired David Rivkin of Baker Hostetler to represent it in its lawsuit against President Obama, at a rate of \$500 per hour. Rivkin and Baker Hostetler withdraw from the representation less than a month later, amid rumors of pressure

from clients to drop the case, and shortly after comedian Jimmy Fallon ran a parody ad on the Tonight Show that declared: "At Baker Hostetler, we specialize in one thing: suing the President." After a brief interlude during which William Burck of Quinn Emanuel is retained for the representation, but also drops it, the House ultimately hires GWU law professor Jonathan Turley; the lawsuit is finally filed on November 21, 2014.

SEPTEMBER 2014

Sept. 1: According to an ABA report, only 37,924 people begin their first year of law school in the fall of 2014, down 4% from 2013, and down from a peak first-year enrollment of 52,488 in 2010.

Sept. 4: The U.S. Department of Justice announces it has opened a civil investigation of the Ferguson, Missouri police (see Aug. 9, 10, and 16 entries). • The full United States Court of Appeals for the D.C. Circuit accepts the government's request to vacate the earlier panel ruling in *Halbig v. Burwell*, and sets the case for en banc review (see July 22 entry). • Just nine days after oral arguments, the U.S. Court of Appeals for the Seventh Circuit affirms lower court rulings invalidating same-sex marriage bans in Wisconsin and Indiana.

Sept. 5: Judge Mark Fuller of the U.S. District Court for the Middle District of Alabama agrees to enter substance abuse and domestic violence counseling, after being charged with beating his wife. • The U.S. Department of Labor issues a report indicating that there are 1,139,000 legal-sector jobs in the United States. Legal-sector employment has grown each year since 2009, when total employment stood at 1,103,700 at year's end.

Sept. 8: The Baltimore Ravens release Ray Rice, and NFL Commissioner Roger Goodell extends Rice's July 2014 two-game suspension indefinitely, following a furor after a video of Rice striking his wife (then-fiancée) Janay in an elevator in February 2014 goes public. In November the indefinite extension is overturned as arbitrary by a former federal district judge serving as an arbitrator.

Sept. 11: President Obama announces a fourth round of sanctions on Russia for its conduct in destabilizing eastern Ukraine, tightening restrictions on debt financing for Russia's financial institutions and exports to Russia's energy and defense sectors.

Sept. 18: The Kansas Supreme Court grants Democrat Chad Taylor's re-

quest to be removed from the ballot as a candidate for U.S. Senate, over the Secretary of State's objection that he had not given a sufficient reason for his withdrawal. The decision leaves Independent Greg Orman as the main challenger to Republican incumbent Pat Roberts.

Sept. 23: In an interview in *Elle* magazine, Justice Ginsburg is asked whether she will resign from the Supreme Court while President Obama is in office. She replies: "If I resign any time this year, he could not successfully appoint anyone I would like to see in the Court. . . . So anybody who thinks that if I step down, Obama could appoint someone like me, they're misguided. As long as I can do the job full steam —. I think I'll recognize when the time comes that I can't any longer. But now I can."

Sept. 24: The U.S. Court of Appeals for the Seventh Circuit overturns an injunction entered by the U.S. District Court for the District of Wisconsin in May 2014 that blocked Wisconsin state prosecutors from continuing a "John Doe" criminal investigation into suspected violations of Wisconsin campaign finance laws, on the grounds that the injunction violated the Anti-Injunction Act. "John Doe" criminal proceedings can be initiated without naming a target, but news reports suggest the investigation seeks to establish illegal coordination between political advocacy group Wisconsin Club for Growth and the election campaign of Wisconsin Governor Scott Walker. • Chelsea (formerly Bradley) Manning, famed Wikileaker serving a 35-year sentence in Fort Leavenworth, sues the Department of Defense for access to hormone therapy for gender dysphoria, stating in court filings "I do not believe I will be able to survive" without it.

Sept. 25: Eric Holder announces that he will step down as Attorney General. • Sohiel Omar Kabir and Ralph Deleon are convicted in the U.S. District Court for the Central District of California of providing material support to terrorists and conspiring to kill officers and employees of the U.S. government, after plotting in 2012 to fly overseas for the purpose of committing violent jihad.

Sept. 30: California Governor Jerry Brown signs into law the first statewide ban on plastic bags in grocery stores.

OCTOBER 2014

Oct. 3: Dallas County Judge Clay Jenkins, personally and without protec-

tive equipment, escorts the girlfriend of Ebola victim Thomas Duncan and three others from the cramped apartment in which they had been quarantined — amidst Duncan's sweat-soaked sheets — to a donated four-bedroom home.

Oct. 6: The Supreme Court kicks off October Term 2014 with argument in *Heien v. North Carolina*, which presents the question whether a police officer's mistake of law can give rise to reasonable suspicion justifying a seizure (in particular, a traffic stop) under the Fourth Amendment. The Court denies review of seven decisions invalidating same-sex marriage bans in Indiana, Wisconsin, Utah, Oklahoma, and Virginia.

Oct. 7: The U.S. Court of Appeals for the Ninth Circuit affirms a district court ruling invalidating Idaho's 1995 legislative ban and 2006 constitutional ban on same-sex marriage, and reverses a 2012 district court ruling upholding Nevada's 2000 constitutional ban on same-sex marriage.

Oct. 8: Minnesota Vikings running back Adrian Peterson appears in a Montgomery County, Texas courtroom to face a charge of felony child abuse for using a wooden switch to discipline his four-year-old son, a charge that carries up to two years in prison if he is convicted. In November, Peterson pleads no contest to one count of misdemeanor reckless assault. He is required to pay a \$4000 fine and perform 80 hours of community service, and is placed on probation.

Oct. 12: The United States District Court for the District of Alaska strikes down Alaska's 1998 ban on same-sex marriage.

Oct. 14: Deputy Attorney General James M. Cole announces in a memorandum to all federal prosecutors that they should no longer ask criminal defendants who plead guilty to waive their right to claim on appeal that their attorney was ineffective.

Oct. 16: Over the coming months, more than 20 will publicly accuse Bill Cosby of having raped them, frequently using sedating drugs, with the earliest incidents alleged to have occurred in the 1960s.

Oct. 17: The U.S. District Court for the District of Wyoming strikes down Wyoming's ban on same-sex marriage. • The U.S. District Court for the District of Arizona strikes down Arizona's ban on same-sex marriage. Arizona Attorney General Tom Horne states that he will not appeal the ruling, because "It would be unethical for me to file an appeal that would have no chance of success."

Oct. 20: President Obama tells *The New Yorker* that his favorite Supreme Court decision of his tenure was its denial of certiorari just weeks earlier of several decisions striking down bans on same-sex marriage (see Oct. 6 entry). Eschewing any desire to walk in the footsteps of President William Howard Taft, he also declares that the life of a Supreme Court Justice would be “too monastic” for his taste.

Oct. 23: Judge Reggie Walton of the U.S. District Court for the District of Columbia dismisses a lawsuit brought by True the Vote against the IRS, finding that there is no ongoing controversy because the IRS has pledged that it is no longer selecting tax exemption applications for greater scrutiny based on applicants’ political leanings. The ruling left open the possibility that two plaintiffs whose applications still had not been ruled on after 270 days (Patriots Educating Concerned Americans Now and the Liberty Township Tea Party) might have standing to sue.

Oct. 26: Nurse Kaci Hickox, quarantined by New Jersey after returning from treating Ebola patients in West Africa, threatens to file a federal lawsuit challenging her confinement as a violation of her civil rights. Shortly thereafter, Hickox is permitted to travel to her boyfriend’s home in Maine, where she openly flouts Maine’s quarantine restrictions.

Oct. 27: Pennsylvania Supreme Court Justice Seamus McCaffery, the former “Eagles Court” judge who served out speedy justice in the basement of Veterans Stadium on Philadelphia Eagles’ game days, resigns from the Pennsylvania Supreme Court amid accusations that he sent or received 234 pornographic emails using an official account, and attempted to blackmail fellow Justice Michael Eakin. McCaffery had been relieved of his duties by the other Justices of the court on October 20.

Oct. 28: Robel Phillipos, a friend of Boston Marathon bombing suspect Dzhokhar Tsarnaev, is convicted on two counts of lying to investigators about a terrorism investigation. Phillipos is not alleged to have participated in the bombing, but is accused of lying to the FBI when he told them that he could not remember being in Tsarnaev’s dorm room immediately after the bombing occurred. His defense team unsuccessfully argued that he had used too much marijuana that day to remember what had happened.

Oct. 30: Leon County Judge Judith Hawkins calls a five-minute recess and leaves the courthouse after receiving word that the Florida Supreme

Court has removed her from office; she is replaced on the bench within minutes by County Judge Ronald Flury, who asks the waiting courtroom litigants: “Y’all want to tell me what’s going on?” The Florida Judicial Qualifications Commission had sought to have Hawkins fined and suspended for using her position as a judge to sell religious products at the courthouse and through a website that featured Hawkins wearing her robes; the Florida Supreme Court deemed the conduct dishonest and deceitful and removed her from office instead.

Oct. 31: Judge Charles LaVerdiere declines to quarantine Kaci Hickox in her home, ruling she does not pose a sufficient health risk to justify such confinement, but requires that she coordinate all travel with state public health officials and submit to daily monitoring for symptoms. In his order, the judge criticizes “misconceptions, misinformation, bad science, and bad information being spread from shore to shore in our country with respect to Ebola” (see Oct. 26 entry).

NOVEMBER 2014

Nov. 3: Former third-ranking UBS executive Raoul Weil is acquitted on charges of tax evasion by a jury in the U.S. District Court for the Southern District of Florida. The IRS accused Weil of establishing sham structures to help 17,000 U.S. clients conceal \$20 billion in assets from the IRS. UBS had paid \$780 million in fines and provided the names of numerous clients to the IRS in 2009 as part of a settlement relating to the same underlying conduct.

Nov. 4: On election day, Republicans pick up eight seats in the U.S. Senate (a ninth is added in December when Mary Landrieu loses a runoff in Louisiana), giving them a majority for the first time since 2006, and 13 seats in the House of Representatives, bringing them to 247 (the largest GOP majority since 1929); two governorships (bringing their total to 31); and 11 state legislative chambers (bringing their total to 68, the highest ever). • Voters consider 158 statewide ballot questions (146 are actually decided on November 4), the lowest number since 1988. They approve 102 and reject 56. Among them: Colorado and Oregon reject required labeling of genetically modified foods; Alaska, Oregon, and DC legalize recreational marijuana use, while Florida rejects medical marijuana for debilitating diseases; Alaska, Arkansas, Nebraska, and South Dakota

raise the minimum wage (Alaska raises it the most, to \$8.75 in 2015 and \$9.75 in 2016), and Illinois approves it in concept; California rejects raising the cap on pain-and-suffering awards in medical malpractice cases; Oregon rejects drivers licenses for undocumented residents; Washington requires universal background checks on gun purchases; and Tennessee bans personal income taxes, while Massachusetts rejects automatic increases in gas taxes. • Orleans Parish Criminal Court Judge Frank Marullo, Louisiana's longest-serving judge, is elected to another term in office. But because voters defeat a ballot measure that would have eliminated a constitutional requirement that judges retire by age 70, he is too old to serve. • The U.S. District Court for the District of Kansas invalidates Kansas's 1996 legislative and 2005 constitutional bans on same-sex marriage.

Nov. 5: The St. Louis City Circuit Court invalidates Missouri's 2004 constitutional ban on same-sex marriage. • At a post-election press conference, President Obama proclaims that "I feel obliged to do everything I can lawfully with my executive authority to make sure that we don't keep on making the [immigration] system worse," but promises that any executive action he implements will expire upon Congress's passage of a comprehensive immigration reform bill.

Nov. 6: A divided panel of the U.S. Court of Appeals for the Sixth Circuit reverses lower court rulings in cases from Kentucky, Michigan, Ohio, and Tennessee, and upholds those states' bans on same-sex marriage. Writing for the majority, Judge Jeffrey Sutton says, "When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better, in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way." The decision creates a split with the Fourth, Seventh, Ninth, and Tenth Circuits, and sets the stage for potential Supreme Court review.

Nov. 7: The Supreme Court grants certiorari in *King v. Burwell*, returning the Affordable Care Act to its docket. Commentators express some surprise, since the D.C. Circuit's decision to vacate the panel ruling in *Halbig v. Burwell* and take it en banc left no circuit split on the issue (see July 22 and Sept. 4 entries).

THE YEAR IN LAW 2013-2014

Nov. 8: President Obama nominates Loretta Lynch, the United States Attorney for the Eastern District of New York, to serve as Attorney General.

Nov. 10: The District Court for Oklahoma County, Oklahoma orders Harold Hamm, CEO and majority shareholder of Continental Resources, to pay nearly \$1 billion to his ex-wife, Sue Ann Hamm. When they married in 1988, Harold Hamm was only worth several million dollars, rather than the \$18 billion he is worth today; no prenuptial agreement was in place.

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A TERM IN THE LIFE OF THE SUPREME COURT

[parallel citation: 2015 Green Bag Alm. 79]



Tony Mauro[†]

A summary of developments involving the Supreme Court of the United States in 2014 that are not likely to be memorialized in the United States Reports.

Jan. 1: *Times Square.* Justice Sonia Sotomayor rang in the New Year by pressing the button that started the descent of the crystal ball for the final 60-second countdown to 2014 in New York's Times Square. The justice's recent predecessors in the role included Lady Gaga and the Rockettes. Sotomayor's assignment is a first for a Supreme Court justice, though other justices have played prominent parts in similar events. In 2005, Justice Antonin Scalia, another New York native, served as grand marshal for the city's Columbus Day Parade. Justice Sandra Day O'Connor, since retired, was the grand marshal of the Rose Bowl Parade in Pasadena in January 2006, a year after Mickey Mouse served in that role.

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Jan. 14: *Awkward Moment.* During oral argument in *Marvin Brandt Revocable Trust v. U.S.*, a property rights case, a nervous first-time advocate appeared to be reading from a prepared text when Justice Antonin Scalia interrupted and asked: “Counsel, you are not reading this, are you?” The lawyer, Steven Lechner, froze and did not answer, staying silent until Justice Stephen Breyer broke the tension by saying “It’s all right.” The Court’s Rule 28 states, “Oral argument read from a prepared text is not favored.” And the court clerk’s guide to oral argument warns advocates, “Under no circumstances should you read your argument from a prepared script.” But Scalia’s comment drew criticism, with Supreme Court blogger, law prof and author Josh Blackman calling it “a dick move,” adding that “just because [Scalia] wears a robe does not entitle him to be a jerk, and embarrass the lawyer for something like this.”

Feb. 26: *Argument Interrupted.* A protester loudly interrupted an oral argument to criticize the court’s *Citizens United* decision and proclaim that “Money is not speech.” Court police quickly removed the man, Kai Newkirk, and he was charged with violating a law that prohibits “loud, threatening, or abusive language” in the Supreme Court building. Compounding the uniqueness of the event, a video clip of the episode soon surfaced online — evidently taken with a pen camera or other device brought into the court secretly by an ally of Newkirk. It was the first time in decades that a live court session had been photographed. The court was later criticized for deleting the audio of Newkirk’s statement from the recording of the oral argument. In April, Newkirk pleaded guilty to a D.C. Superior Court judge and was given a light sentence. A Supreme Court police officer also handed Newkirk a “barring notice” prohibiting him from setting foot on Supreme Court property for the next 12 months.

All year: *Script Change.* Chief Justice John Roberts Jr. subtly changed the “script” he uses during court bar admissions in the court chamber — a change that may anticipate the inevitable day when a lawyer will ask the court to admit a same-sex spouse. For years, members of the Supreme Court bar who move the admission of close relatives have been allowed to mention that relationship, as in, “I move the admission of my wife, Jane Doe.” Then, Roberts — like his predecessors — would typically say, “Your wife will be admitted.” In recent months however, the chief justice’s response has omitted the relationship, instead stating that, for example, “Ms. Doe will be admitted.” Roberts would not comment on the

reason for the change. But it may serve to “neutralize” the ceremony before the day comes that a man explicitly moves the admission of his husband, or a woman moves the admission of her wife. By taking the relationship out of the reply, Roberts could turn the ritual into a routine matter that would incorporate same-sex couples into the bar admission process, without calling attention to it.

May 27: *New Terminology.* In its death penalty decision *Hall v. Florida*, the court for the first time used the phrase “intellectual disability” to describe the condition formerly known by the now disfavored term “mental retardation.” As recently as 2013, the court used the term “mental retardation” in a Medicaid case, *Wos v. E.M.A.*, but the court appeared to respond to advocates for the intellectually disabled who have tried to banish the old term from the legal lexicon. The ruling rejected Florida’s standard for determining whether a death-row inmate who claims to have intellectual disability could be executed. Early in the majority opinion, Justice Anthony Kennedy wrote, “Previous opinions of this court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.” In 2010, Congress passed “Rosa’s Law,” named after a Maryland girl whose family campaigned against the term. It replaced mental retardation with “intellectual disability” in specific federal laws.

June 30: *Vasil Retires.* On the final day of the court’s term, Chief Justice Roberts announced several retirements from the court staff, including that of Chris Vasil, the chief deputy clerk, after 32 years at the court. “Mr. Vasil has performed the vital role of assisting both the bench and bar in the management of our docket, and in navigating the nuances of our rules, practice and customs,” Roberts said from the bench. “He has done so with grace, good judgment, and distinction.” Since then, court clerk Scott Harris has abolished the position as such, though Jordan “Danny” Bickell in the position of deputy clerk for practice and procedure will take on many of the duties of the position.

Aug. 11: *Faint Praise.* Chief Justice Roberts made a rare appearance before the American Bar Association’s House of Delegates, hailing the importance of the Magna Carta as a foundation of “our fundamental freedoms” on the eve of its 800th birthday. The chief justice’s appearance kicked off a commemoration of the British charter’s birthday that will include a meeting in London in 2015 and re-dedication of a monument to

the Magna Carta in Runnymede, first placed there by the ABA in 1957. The document was sealed by King John of England in 1215. It was not a perfect document, however, Roberts told the audience. It was aimed at resolving a quarrel between “a venal king and selfish barons,” and it includes distasteful provisions, including one that disparages Jews. But it is worth celebrating, Roberts said, because it planted seeds of modern-day concepts of due process, separation of powers, trial by jury, and the rule of law. It helped lead the United States and other nations “down the path to constitutional democracy.”

Sept. 19: *Keep it Brief.* Chief Justice Roberts made a plea for brevity by appellate advocates, complaining about the unnecessary length of briefs filed with the court. Speaking at the University of Nebraska College of Law, Roberts was asked for tips on writing persuasive briefs. He answered without hesitation: “I know that every judge in this room will agree with me: Be brief! Be concise.” For most Supreme Court briefs, Roberts said, lawyers are limited to roughly 50 pages. As a result, Roberts said with a long-suffering tone, “every brief you pick up is 50 pages — every one of them, the next one, and the next one, and the next one.” But then, he said, “all of a sudden, you pick up a brief that’s 35 pages long. The first thing you do is look at the cover, because you like that lawyer.” Briefs should be balanced as well, he said. “So many briefs say the case is so clear, that the statute can have no other meaning and . . . your client should clearly win. You pick up the next brief, and it’s the same on both sides.” When both sides tell the court that their position is the only possible way to rule, Roberts continued, “They’re telling you basically that you are going to be an idiot whichever way you rule.”

Sept. 22: *Kneedler’s Work.* Deputy Solicitor General Edwin Kneedler won a career achievement award for his nearly 40 years of public service in the U.S. Department of Justice. Attorney General Eric Holder presented Kneedler with a “Sammie” award — the Samuel J. Heyman Service for America Medal — from the Partnership for Public Service, which sponsors the awards for distinguished service by federal employees. Holder praised Kneedler as the “institutional memory and the institutional conscience” of the solicitor general’s office. “He has worked long hours in the service of our country,” Holder said, joking that Kneedler had started his federal career in the Abraham Lincoln administration. It was actually the Gerald Ford administration, he hastened to note. At the Justice De-

partment, the 68-year-old Kneedler has argued 125 cases before the Supreme Court, more than any other person currently in practice. He has no plans to retire.

Sept. 23: *Not Yet.* Justice Ruth Bader Ginsburg explained, in the most explicit terms yet, why those who are calling for her to retire are “misguided.” In an interview with *Elle* magazine, Ginsburg said, “Who do you think President Obama could appoint at this very day, given the boundaries that we have?” She added, “If I resign any time this year, he could not successfully appoint anyone I would like to see in the court.” She went on to explain that while new Senate rules bar filibusters for the confirmation of lower court judges and other nominees, “it remains for this court. So anybody who thinks that if I step down, Obama could appoint someone like me, they’re misguided. As long as I can do the job full steam . . . I think I’ll recognize when the time comes that I can’t any longer. But now I can.” It is rare for Supreme Court justices to publicly handicap the moves of other public officials in such explicit terms.

Oct. 6: *Web Makeover.* The Supreme Court’s 14-year-old web site took on a new appearance as the 2014-2015 term began. The site has “a new look and improved functionality,” according to a press release from the court. The new home page presents frequently requested information, including transcripts and audio from the most recent oral arguments. The update also features “enhanced images and graphics, improved search features and updated access on mobile devices,” the court stated. Launched in April 2000, the site has gotten mixed reviews from the beginning. Critics have said it is difficult for those unfamiliar with how the court works to find docket and other information. An earlier redesign came in 2010, when the court began hosting the website in-house, taking it over from the Government Printing Office.

Oct. 10: *Roberts and Clinton.* Documents released by the Clinton Presidential Library led to a startling revelation: Chief Justice Roberts, then in private practice, considered representing President Bill Clinton before the U.S. Supreme Court in 1997 in the legal battle over Paula Jones’ allegations of sexual harassment. The then-acting solicitor general, Walter Dellinger, approached Roberts about the possible representation in 1996 and Roberts did not say no. Clinton ultimately stuck with Robert Bennett, a veteran litigator who had represented him in earlier stages of the Paula Jones case but had not previously argued before the Supreme Court. An ambig-

uous four-page handwritten note from Elena Kagan, then associate White House counsel, led to the intriguing possibility that the conservative Roberts could have joined Clinton's legal team. Titled "John Roberts / Hogan," the note mentions "counsel change?" Roberts, former deputy solicitor general under President George H.W. Bush, was a partner at Hogan & Hartson at the time. Bennett said he was unaware Roberts ever had been contacted to argue the case. "There was no finer Supreme Court advocate at the time than John Roberts," Bennett said. "If the decision had been 5-4, he might have made a difference. But not when it was 9-0."

Oct. 22: *Errata*. In a rare announcement, the court said that an error in a recent order written by Justice Ginsburg had been discovered and corrected. Ginsburg's mistake came in her dissent to an order in the Texas voter ID case, *Veasey v. Perry*, released at 5 a.m. on Oct. 18. In describing provisions of the law that tightens identification requirements, Ginsburg wrote: "Nor will Texas accept photo ID cards issued by the U.S. Department of Veterans' Affairs." The *Election Law Blog* soon reported that such cards are an acceptable form of identification for voters. By Oct. 22, the sentence was deleted, and, apparently at Ginsburg's request, the error was announced. The misstep followed other high court mistakes in recent months. In *EPA v. EME Homer City Generation*, Justice Scalia on April 29 incorrectly summarized a precedent — a 2001 decision he had written. Justice Kagan's turn came on May 5 in her dissent in *Town of Greece v. Galloway*, when she incorrectly stated that Newport, R.I., was the home of the first community of American Jews. In an investigative law review article, Harvard Law School professor Richard Lazarus also focused on the court's secretive process for fixing postpublication errors. That prompted David Zvenyach, a lawyer for D.C.'s city council, to launch @SCOTUS_servo, a Twitter feed that reports on regular, automated sweeps that search the court's online opinions for changes. The feed picked up the changes in Ginsburg's dissent.

Nov. 3: *Time Flies*. The Supreme Court is often accused of "turning the clock back" on one doctrine or another. But on the Monday after the end of Daylight Saving Time, when it came to turning the clock back — literally — at the court building, it seemed not to be up to the task. Before the court session began at 10 a.m., clocks in several parts of the building were inaccurate by several hours. At 9 a.m. the clocks read 6 a.m. Upon entering the court from behind the velvet curtains, Chief Justice Roberts

turned around and looked up at the wayward timepiece. Before calling the first argument, Roberts offered words of caution to the advocates about to stand before the court. The clock, he said, is “not accurate.” Court spokeswoman Kathy Arberg confirmed that the end of Daylight Saving Time triggered a problem with the signaling system that governs the clocks. Electricians from the Architect of the Capitol’s office, which has jurisdiction over the court building, were working to make repairs.

Nov. 12: *Lift the Veil.* A new organization targeting the Supreme Court over transparency began airing television ads that describe the court as the “most powerful, least accountable” government institution. The group is called Fix the Court and will campaign not only for cameras in the Supreme Court, a perennial issue, but other measures that would shed more light on the justices in areas of financial disclosures, recusals, ethics and media access. “Most Americans now view the Supreme Court unfavorably. Is it any wonder? The Supreme Court’s outsized power is only matched by its disdain for transparency,” said Gabe Roth, executive director of Fix the Court. Roth was formerly manager of the Coalition for Court Transparency, also a pro-openness group that will continue in existence.

Nov. 26: *Heart Trouble.* Justice Ginsburg underwent a heart catheterization procedure to clear blockage in her right coronary artery. The procedure took place at MedStar Heart & Vascular Institute at MedStar Washington Hospital Center in Washington and resulted in placement of a stent too. Ginsburg, 81, experienced “discomfort” during routine exercise the previous night, and was taken to the hospital. She was sent home after the procedure and attended the next oral argument at the court, just days after her surgery. Since joining the court in 1993, Ginsburg has survived two bouts with cancer and has impressed colleagues with her resilience and exercise regimen, supervised by a trainer.

Dec. 8: *Flawed Petition.* The Supreme Court issued an extraordinary order telling a Washington practitioner to show cause why he should not be sanctioned for “his conduct as a member of the bar of this court” in connection with a pending petition in a patent case. Howard Shipley, a Foley & Lardner intellectual property partner, was the target of the order, and his petition was in the case *Sigram Schindler Beteiligungsgesellschaft MBH v. Lee*. Under the order, Shipley was given 40 days to show why he should not be sanctioned. No documents on file with the court shed any light on the reasons for the order. It was possible that the court’s dis-

pleasure was triggered by a footnote on the final page of Shipley's petition. It states, "Prof. Sigram Schindler, the primary inventor of the '453 patent, should be recognized for significant contributions to this petition." In other cases involving the German high-tech firm, Schindler is described as a computer sciences professor at the Technical University of Berlin. The clerk's published guide for lawyers states, "Names of non-lawyers such as research assistants, law students, and advisors may not appear on the cover [of the petition] under any circumstances; nor are they to be credited with having contributed to the preparation of the petition either in the text, in a footnote, or at the conclusion of the petition."

Dec. 15: *Quacks Like a Duck.* It was a coup for the University of Mississippi School of Law that Justices Kagan and Scalia agreed to appear together at the school for a public conversation. But the justices may have had ulterior motives in saying yes. After the talk, the two went duck hunting together on an expedition hosted by former federal judge Charles Pickering. Kagan previewed the adventure at an appearance in November at Princeton University, her alma mater. As she has before, Kagan recounted how she asked Scalia about hunting soon after she joined the court in 2010. They began with skeet shooting, Kagan said. "Then we went on to the real thing." She told the audience that she and Scalia go on hunting trips a couple of times of year for quail and pheasant, adding that in December they would go to Mississippi for duck hunting. "I do like it," Kagan said. "I'm a competitive person. You know, you put a gun in my hand and say the object is to shoot something, I'm like, 'All right! Let's do it!'"

Dec. 31: *Annual Report.* The Supreme Court is developing an electronic filing system that will make all case filings available to the public online, Roberts announced in his annual year-end report. Roberts said the new system "may be operational as soon as 2016," even as a "next generation" case management and electronic case filing system is under development for lower federal courts. But the chief justice, responding to increasing calls for greater transparency of the judicial branch, in effect asked the public to be patient with an institution that is — and, in his view, should be — slow to embrace technological change. "The courts will often choose to be late to the harvest of American ingenuity," Roberts said, in his most detailed explanation of the judiciary's thinking on transparency issues. He made no mention of the long-running debate over camera access to the federal courts.

A YEAR OF LOWERING THE BAR 2013-2014

[parallel citation: 2015 Green Bag Alm. 88]



M. Kevin Underhill[†]

OCTOBER 2013

Oct. 28: *Vice.com* interviews Angeles Duran, the woman who owns the Sun. Duran says she has owned the G2-class stellar object since 2010, when she realized the Outer Space Treaty of 1967 applied only to nations, not individuals, and promptly filed the necessary paperwork with a local notary public. Duran says she does not charge individuals for using her Sun, but does plan to charge corporations one euro per solar panel. It is not clear whether she will be so generous with the intellectual property she also claims to own, such as the rights to the Tarzan shout.

[†] Kevin Underhill is a partner with the law firm of Shook, Hardy & Bacon LLP, depending on who you ask. Millions of people who apparently have nothing better to do read his legal-humor blog *Lowering the Bar* (www.loweringthebar.net), from which this is adapted. Kevin's writing has also previously appeared in the *Green Bag*, *Forbes*, the *Washington Post*, a couple of ransom notes and a draft screenplay in which Harry Potter and his friends are eaten by talking dinosaurs.

NOVEMBER

Nov. 4: According to KOB News, records it has reviewed support David Eckert's lawsuit alleging that police in New Mexico violated his Fourth Amendment rights after a traffic stop. This is because the records appear to confirm that, with the help of two doctors, police did indeed subject Eckert to two digital cavity searches, three enemas, a chest X-ray and a colonoscopy in an unsuccessful 12-hour hunt for drugs. The officers argue that they had probable cause for the search because Eckert "appeared to be clenching his buttocks" after being ordered out of his car.

Nov. 14: Saying it "regrets the error," the *Harrisburg Patriot-News* retracts its criticism of a presidential speech it called "silly" and forgettable. It was retracting a one-paragraph editorial printed on November 24, 1863, in which it had totally panned the Gettysburg Address.

Nov. 20: A mistrial is declared in *Calcagno v. Springfield*, in which the plaintiff accuses pop star Rick Springfield of knocking her down with his rear end during a concert. She called no supporting witnesses, but did show the jury a photo she claimed to have taken just before impact. Springfield said he did not recall the incident, but he did tentatively identify the pictured buttocks as his own.

Nov. 21: Senate Democrats push through a rule change making it impossible to filibuster most judicial nominations. This is not something they will regret, because there is no chance they will ever again be in the minority.

Nov. 26: Number of arguments made by O.J. Simpson in an effort to secure a new trial on robbery charges: 22. Number that work: zero. Among them: the argument that Simpson received ineffective assistance of counsel partly because his lawyer failed to present an intoxication defense. Simpson's lawyer testified that he did not present the intoxication defense because "Mr. Simpson wasn't intoxicated."

Nov. 28: "Firstly, I'd like to stress that it isn't against the law to dress up as a clown," says a police spokesman in Norfolk, England. This follows reports that clowns, or people dressed as clowns, have been alarming people in the area. The spokesman notes that the purported clowns have not actually assaulted anyone, but says that police are patrolling the area and, if they locate any clowns, will "offer them strong words of advice."

DECEMBER

Dec. 7: Canadian sources report that a judge in Quebec has deemed Bruno Leduc to be a “quarrelsome litigant” (*plaideur quérulent*). Leduc’s 70 lawsuits have included claims that a Staples employee treated him “in a cavalier manner,” that Costco employees took too long to bring him a lawnmower, and that Air Canada wouldn’t let him sit in business class (which he hadn’t paid for). Leduc also sued the Dominican Republic because it rained during his vacation there.

Dec. 18: California lawyer Nathan Dooley responds to a cease-and-desist letter that his client, Yohannes “Hanes” Petros, received from Hanesbrands Inc. Noting that his client’s product, Hanes Hummus, is food and that Hanes underpants are underpants, Dooley opines that “there appears to be no danger of confusion” between the two companies’ trademarks.

Dec. 24-25: Arguments triggered by the following things result in people trying but thankfully failing to kill each other during the Christmas holiday season: a wedding color scheme (stabbed), apple fritters (stabbed), the location of the Big Dipper (stabbed), turning off a Crock-Pot (choked and stabbed), and returning from the store without beer (stabbed with sharp ears of ceramic squirrel).

Dec. 25: Citing details obtained via the Freedom of Information Act, *The Guardian* reports that the number of alarming clown sightings in the UK has risen to 57. Clown representatives emphasize that the incidents are the work of “a small group of people with stupid views” who “have nothing to do with clowning.” Bluebottle, secretary of Clowns International, says those involved are “doing clowning no favors.” “People’s reaction to us has changed,” says Crazy Bananas. “This is my business and I don’t like frightening people.”

Dec. 30: The California Court of Appeal affirms a verdict awarding \$161,721.44 to a man who accused the defendant of yanking his pants down during marching-band rehearsals. The plaintiff claimed that the two pantsings caused him emotional distress, noting that he was unable to rectify the situation immediately because he was wearing a drum harness. Both parties were students at Pasadena City College, in which the plaintiff enrolled after spending four years in the Marine Corps.

JANUARY 2014

Jan. 2: A judge rules in favor of William Berroyer and his wife in their lawsuit against the U.S. government, awarding them a total of \$862,000. Berroyer alleged that he was injured when he tripped over a phone cord at a local IRS office, which he had visited in order to discuss how he planned to pay \$60,000 in back taxes. The visit did answer that question, eventually.

Jan. 9: New York Assemblyman Jim Tedisco sponsors a bill that would make it illegal to hit someone in the head. He is concerned about a fad called “the Knockout Game” in which young hoodlums allegedly pick out victims at random and try to knock them out with one punch. The New York ACLU notes, however, that the “game” may only be an urban legend, and also that hitting someone in the head is already illegal. “You don’t need to have an assault provision for every part of the body,” it points out. Although it would be pretty funny if you did.

Jan. 27: The California Supreme Court rejects Stephen Glass’s application for bar membership. Glass was a reporter for *The New Republic* in the 1990s but was fired after it came to light that he had fabricated dozens of stories. (He later wrote a novel in which a fictional “Stephen Glass” fabricates dozens of stories.) Glass then got a law degree and a job as a paralegal. Numerous witnesses testified on his behalf, including lawyers at his firm and a doctor who “saw no evidence that [he] was a sociopath.” But the court finds this outweighed by evidence of continuing dishonesty, including what it called “evasive” testimony at the State Bar hearing itself.

Jan. 28: Following the State of the Union address, Rep. Michael Grimm (R-NY) responds to questions about alleged campaign-finance violations by threatening to throw the reporter off the balcony. “I’ll break you in half,” Grimm also threatens. “Like a boy.” Grimm later apologizes for the outburst. Luckily for the reporter, probably, he had not asked about the tax-evasion charges (of which Grimm would later be convicted).

Jan. 30: The FAA contacts Lakemaid Beer in Minnesota to say that its plan to use drones to deliver beer to local ice fishermen violates at least four current regulations.

FEBRUARY

Feb. 6: The Law Society of Saskatchewan rules that an attorney was guilty of “conduct unbecoming” when he wrote a fee-retainer agreement

on a piece of toilet paper. The attorney was upset at an adjudicator who insisted on seeing a written retainer agreement for each case, something the attorney said had never previously been required. The Society finds that the toilet-paper contract was an effort to humiliate the adjudicator, an effort that cost the attorney about \$10,500 in fines and costs.

Feb. 11: The BBC reports that a French court has awarded five Michael Jackson fans one euro each for “emotional damage” they claimed to have suffered as a result of the pop star’s death. The five claimants, all members of a Jackson fan club, had sued the star’s former doctor, who was implicated in his death. The plaintiffs’ lawyer said his clients would not try to collect, but rather were hoping the ruling would help them gain access to Jackson’s grave, which is closed to the public. He did not explain how it might help them do that.

Feb. 13: In Pickens County, South Carolina, Kayla Finley is arrested for violating section 16-13-420 of the state code, which makes it a crime to fail to return leased or rented property. Police ran a routine check on Finley when she visited the police station to report another, probably more serious crime, which is how they learned she was wanted on a nine-year-old warrant for failing to return the movie *Monster-in-Law*.

Feb. 14: Saying that the conditions of his detention in a Norwegian jail amount to torture, Andres Breivik threatens to go on a hunger strike if his jailers do not meet his demands for better treatment. Breivik, who murdered 77 people in 2011, is demanding a Play-Station 3 on the grounds that his PS2 is now well out of date. Breivik has previously complained that his cell is “poorly decorated” and has no view, and that he is not allowed to properly moisturize.

Feb. 18: The Wisconsin Legislature passes Assembly Bill 422, which legalizes and regulates rubber-duck racing in the state. The legislation was prompted by the executive branch’s decision to crack down on the annual rubber-duck race in Mishicot (pop. 1,400), which it said amounted to illegal gambling.

Feb. 18: A federal judge sentences three activists to prison after they are convicted of “sabotaging” the Y-12 National Security Complex in Oak Ridge, Tennessee, where the U.S. stores its weapons-grade uranium. The activists, one of whom is an 84-year-old nun, simply cut a hole in some fences and walked into the complex, where they put up banners and sang songs during the two hours it took for any guards to show up.

Feb. 20: Prosecutors drop the charges against Kayla Finley for failing to return *Monster-in-Law* nine years before. Although South Carolina does not have a generally applicable statute of limitations, the passage of time is relevant because the video store where she rented the VHS tape no longer exists. Presumably, prosecutors also reasoned that if Finley did watch *Monster-in-Law*, she has already been punished enough.

Feb. 21: A class-action lawsuit is filed in New Orleans accusing various hotels of price-gouging in connection with Mardi Gras and the Super Bowl. The lawsuit claims that defendants' actions "caused plaintiff emotional hardship, anxiety and depression, and led to a broken tooth."

Feb. 26: A Florida court rules that Patrick Snay violated the non-disclosure clause of a settlement agreement with Gulliver Schools by speaking to his daughter about the outcome of the case. The disclosure came to light after the daughter mentioned the outcome in a Facebook post, telling followers that "Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The post cost Snay about \$80,000.

MARCH

Mar. 8: TSA agents in Phoenix shut down a checkpoint and call in a bomb expert to examine something that they think may be a grenade but is actually a clear glass bottle of Jimmy Choo perfume. The expert confirms that it is not a grenade but confiscates it anyway, telling the owner that other passengers might confuse the perfume bottle with a grenade as the TSA agents did, if she were to "wave this around" on the airplane.

Mar. 10: The *New York Times* reports that the Florida Legislature may abolish Hampton, a one-square-mile "town" of 477 people known as one of the nation's worst speed traps. Hampton is located east of Highway 301, except for a half-mile-long tentacle that reaches out and touches the highway. The town's 17 police officers have been lying in wait there for drivers who fail to notice the brief reduction in speed limits, writing almost 13,000 tickets in two years. The *Times* also notes, however, that it is not clear how many of the 17 were actually police officers.

Mar. 11: CIA Director John Brennan denies that his agency spied on Senate staff while they were investigating it: "As far as the allegation of, you know, CIA hacking into Senate computers, nothing could be further from the truth. We wouldn't do that. That's just beyond the scope of rea-

son . . . [L]et me assure you the CIA was in no way spying on SSCI or the Senate." Just FYI, there may be a followup to this item coming up below. Please do not speculate as to its contents.

Mar. 14: The executive director of Miami-Dade Crime Stoppers, which collects thousands of anonymous tips every year, is held in contempt for refusing to turn over a document. Richard Masten said he was concerned that turning over the document might reveal the source's identity. "[I]t's not going to happen on my watch," he told reporters, explaining why he ate the document instead.

Mar. 22: One day after being released from prison in southern New Jersey, Christopher Miller is arrested after allegedly robbing a shoe store about 100 miles away. Miller had just finished serving a 15-year sentence for robbing the same shoe store in 1999.

Mar. 26: In San Francisco, state senator Leland Yee is indicted by federal prosecutors. Yee was previously known for sponsoring AB 1179, a law that banned the sale of violent video games to minors on the theory that the games contribute to violence in society. "This is all about [gamers'] lust for violence and the industry's lust for money," said Yee, who has now been charged with arms trafficking and bribery.

APRIL

Apr. 3: The *New York Post* reports that a "rogue" court reporter in Manhattan has deliberately botched the transcripts of six trials and 24 other matters since 2010. Instead of recording the proceedings, the reporter "hit random keys or wrote, 'I hate my job. I hate my job. I hate my job,' over and over," a source claims. Judges were reportedly holding "reconstruction hearings" in which those involved in the affected cases were trying to remember what had happened.

Apr. 3: Sources in Holland Township, Michigan, report that two insurers are suing to recover \$2 million for fire damage to an apartment complex. The defendants are a couple who formerly lived at the complex. The insurers argue that she is required by her lease to be responsible for damages caused by "any occupant," and that he started the fire while using a hand-held torch to burn the fur off a squirrel.

Apr. 5: The BBC reports that a nine-month-old baby has been arrested in Pakistan and charged with attempted murder. The alleged infant was

caught up in an arrest of 35 people who police claimed had pelted them with stones during a protest, and was apparently charged along with all the others. Pakistani law provides that children under seven cannot be found guilty of any crime, but the first judge to review the matter ruled he did not have jurisdiction to dismiss. He did grant bail, however.

Apr. 8: The TSA fines John Brennan \$500 for “interfering with” screening personnel at the Portland airport. He did this, according to the TSA, by responding to a false-positive test for explosive residue by taking off all his clothes to prove he did not have a bomb. Though he did nothing except remove his clothes and stand quietly, a TSA administrator rules that this constituted “interference” because agents had to stop what they were doing and surround him with things so other travelers could not see him naked.

Apr. 19: In Kansas, the defense lawyer for murder defendant Jeffrey Chapman files a motion requesting the services of a tattoo artist before his client’s trial begins. This is because his client has the word “MURDER” tattooed in large capital letters on the front of his neck. The lawyer argues that the tattoo should be removed or obscured so the tattoo does not unfairly prejudice the jury.

Apr. 22: KATU News in Washington reports that a woman has sued for \$275,000 alleging she was attacked by a duck at a trailer park. The plaintiff’s lawyer claims neighbors will testify that “this duck was a crazy duck” that had attacked people before, which is the basis for the lawsuit’s allegation that the duck’s owner knew it had “abnormally dangerous propensities.”

Apr. 25: Reuters reports that Jeffrey Chapman’s motion for a tattoo artist has been denied, and that a deal has instead been reached in which Chapman will wear a turtleneck to trial every day. Coincidentally, the trial has also been postponed until August, when the average high temperature in Kansas is 92 degrees.

Apr. 25: “The ‘dog feces incident,’ as counsel for the Plaintiffs calls it, is a *high* point of this claim.” *Morland-Jones v. Taerk*, CV-12-463877, 2014 ONSC 3061 (Ont. Super. Ct. Justice Apr. 25, 2014) (emphasis added).

MAY

May 10: Former New York Giant Tyler Sash is arrested after (briefly)

trying to elude police by fleeing on a small motorized scooter. (They saw him riding it on a busy street at night with the lights off, and accurately suspected him of being intoxicated.) NFL records show that Sash weighs 215 pounds and can run 40 yards in 4.62 seconds, which leads this writer to calculate that Sash would have been able to run away faster than the overloaded scooter could carry him.

May 13: A Portland woman calls 911 to report that her car is being attacked by a “pirate.” The man informs police that he is not a pirate, but rather “a high elf engaged in battle with the evil Morgoth,” for whom he had apparently mistaken the woman’s BMW. The man also mentions that he has recently taken LSD. He has been arrested before, he later admits, most recently for climbing a downtown lamppost while dressed as a ninja.

May 22: The *Syracuse Post-Standard* reports that *Calcagno v. Springfield*, which previously ended in a mistrial, will be retried in January 2015.

May 28: The *Telegraph* reports that the family of His Holiness Shri Ashutosh Maharaj Ji has asked a court to investigate the guru’s alleged death in January, and to order his body to be released to them for cremation. To date the guru’s aides have refused to hand over the body, claiming that His Holiness is not dead, just “in deep meditation.” The deepness of the meditation is said to explain why there is “nothing unusual” in the fact that he is currently being kept in a freezer. His Holiness has “spent many years meditating in sub-zero temperatures in the Himalayas,” one points out.

JUNE

June 2: The Florida Bar says it is looking into an incident in which a judge and a public defender got into a fight after a courtroom confrontation. “If you want to fight,” said the judge, “let’s go out back and I’ll just beat your ass.” “Let’s go,” the attorney responded, and they went. Both scufflers took a leave of absence while the matter was sorted out.

June 3: Police in Ontario say that they are still looking for the owner of a fingertip found at the local fairgrounds. They say they have not ruled out foul play but have no reason to suspect it, either. “The priority,” said a spokesperson, “is to identify who lost a fingertip and who it belongs to.” Probably those will end up being the same person, but either way police ask anyone with information to come forward.

June 16: Eighteen-year-old Francisco Canseco pleads not guilty to five charges of vandalism after allegedly writing on a number of chairs in a San Diego courtroom. According to authorities, Canseco is a well-known graffiti artist or “tagger” whose signature is highly recognizable. He allegedly tagged the courtroom chairs with a paint pen while waiting for a hearing on 31 prior tagging charges.

June 18: New York’s legislature passes Bill No. S06903C, which makes it unlawful for any licensed exhibitor or dealer to “knowingly allow the public to have direct contact with a big cat,” defined to include lions, tigers, jaguars, mountain lions, most leopards, and any hybrids thereof. The bill’s sponsor was motivated in part by an apparent trend in which male users of online-dating services are posting pictures of themselves posing with tigers. “They can still pose with bears or monkeys,” Assemblywoman Linda Rosenthal says. “They just have to take big cats off their list.”

June 18: Calling the matter “a case study in how not to respond to a motion for attorney fees and costs,” a federal judge orders the State of Texas to pay almost \$1.1 million. While Texas had a fair argument that it was the prevailing party, it felt so strongly about this that it did not bother to respond to the other side’s motion. Instead, it filed a three-page “advisory” that (in the court’s words) “expresses indignation at having to respond at all, and presumes that the motion . . . is so frivolous that Texas need not provide further briefing . . . unless requested.” The judge instead awards the full amount claimed.

June 30: A federal judge dismisses Insane Clown Posse’s lawsuit against the FBI for classifying the rap duo’s fans, known as “Juggalos,” as members of a criminal gang. Based in part on reports that some ICP fans had committed crimes, the FBI’s 2011 National Gang Threat Assessment had described Juggalos as a “loosely organized non-traditional hybrid gang subset.” The FBI defines “hybrid gang” as one with “multiple affiliations, ethnicities, [a] migratory nature and nebulous structure,” and a membership that is “transient and continuously evolving,” a definition that would appear broad enough to include the cast of *Saturday Night Live*.

JULY

July 7: *The Smoking Gun* reports that a man who was shown sleeping in the stands during an ESPN broadcast of a game at Yankees Stadium is

suing the network and two announcers for making fun of him. The complaint alleges that ESPN's announcers subjected him to an "unending verbal crusade" that encouraged others to mock him online after the video was posted, causing him emotional distress. The lawsuit also names the Yankees and Major League Baseball as defendants.

July 9: The *Washington Post* reports that officials in Manassas City and Prince William County, Virginia, are considering "a unique approach" to collecting evidence in a "sexting" case involving two minors. The approach they say they are considering is to forcibly inject the boy with a substance that will cause the relevant body part to assume the state in which it allegedly appeared in the video he sent to his girlfriend, so that the two images can be compared more easily.

July 10: Officials in Manassas City and Prince William County announce that they have decided to drop the plan mentioned above. While they refuse to comment on why the decision was made, some speculate that it involved a realization that any thinking member of a civilized society would find that plan revolting, or possibly a dim understanding of the irony involved in demanding that sort of picture from a 17-year-old boy they were planning to charge with "creating child pornography."

July 15: In San Francisco, an intoxicated man manages to infiltrate a TSA security checkpoint, put on a pair of blue gloves, and pat down two women in a private screening booth before anyone notices what he is doing. In other news, the TSA budget request for 2015 is approximately \$4.6 billion.

July 19: The *Chicago Sun-Times* reports that the Chicago Cubs are suing five people who have allegedly been taking turns posing as a Cubs mascot near Wrigley Field, engaging in "mascot-like activities" and asking for money. The team alleges that "Billy Cub" has also embarrassed the team by making various "rude, profane and derogatory remarks and gesticulations," of a sort from which the club's official mascot, Clark, is said to refrain.

July 25: A Canadian tribunal dismisses a discrimination claim by Her Majesty the Queen against a pro bono organization. The group had refused to help the plaintiff bring a civil suit for back wages, pointing out that the plaintiff was not Her Majesty the Queen but rather a guy who had changed his name to "Her Majesty the Queen." At the hearing, the plaintiff had "argued that his claim for wages as the Monarch would succeed because he is Queen Elizabeth II and it is a difficult job," but the

tribunal did not reach the question of whether the underlying employment claim had merit.

July 31: A CIA spokesperson states that some of the agency's employees may indeed have "acted in a manner inconsistent with the common understanding" between the CIA and Senate investigators; specifically, the investigators' understanding that the CIA would not spy on them while they investigated. This entry therefore ends the suspense you have probably been feeling since the March 11 entry above, which I admit was kind of a cliffhanger.

AUGUST

Aug. 6: Bradley Hardison eats eight doughnuts in two minutes, thus winning the adult division of a doughnut-eating contest in Elizabeth City, North Carolina. The contest is sponsored by local law-enforcement agencies as part of the "National Night Out Against Crime."

Aug. 7: Bradley Hardison is arrested by a local law-enforcement agency that had been looking for him in connection with a number of burglaries in the area. According to *Reuters*, Hardison was not recognized at the contest — in which he defeated several police officers, among others — but the report of his victory "caught the eye" of the Camden County Sheriff's Office, which then renewed its efforts to locate him.

Aug. 9: The *Courier* reports that the Social Security Administration has asked Donald Miller's two children to repay almost \$50,000 in benefits they received after Miller was declared legally dead in 1994. The SSA points out that Miller is not actually dead, as he proved by showing up again in 2013. As a judge ruled that same year, however, he is still *legally* dead because Ohio law requires any petition for change of status to be filed within three years of the disappearance. As far as the SSA is concerned, though, Miller is and has always been alive, even though under state law he is currently dead.

Aug. 13: In an effort to sort out the results of a disputed election in Montezuma, Colorado (pop. 65, 12 of whom were candidates), the town and its clerk sue all 61 registered voters.

Aug. 17: A 49-year-old South Carolina man is charged with bigamy after authorities learn he is married to at least four women. The first three became suspicious after noticing that their husband had posted wedding pictures on Facebook in which they did not appear.

Aug. 18: In California, authorities say that the drunken man who posed as a TSA agent in July will not be prosecuted. They have been unable to locate the two women he is believed to have patted down, a spokesperson says, and so “don’t know if anything improper” actually happened. “There is no law against impersonating a TSA agent,” the DA claims, although there are in fact two federal statutes that make it a felony to impersonate a “federal employee.” The fact that the suspect is a wealthy banker whose father-in-law is an important official in Hong Kong is probably irrelevant to the decision.

Aug. 19: The mayor of Ocala, Florida, says he is in favor of repealing the town’s ordinance that makes it illegal to “knowingly or intentionally wear pants below the person’s natural waistline” in a manner that exposes the underwear. Reminded that he signed it into law less than a month before, the mayor says he did so by mistake. “[H]e actually meant to veto it when it came across his desk,” a spokesperson says, but “there were many papers and he mistakenly signed it into law.”

Aug. 19: The U.S. Copyright Office releases a new edition of its “Compendium,” the first in over two decades. Among the changes: the Office clarifies that it will not register a work not created by a human being, such as, for example, “a photograph taken by a monkey.” This follows months of controversy over who if anyone owns the rights to a picture taken in Indonesia by a monkey who hit the button on a photographer’s camera. The monkey has no rights, but many argue that its involvement means that the picture is necessarily in the public domain.

Aug. 25: In Indiana, Judge Dean Young issues an order directing a local attorney “to never again appear for a legal proceeding in the Blackford [County] Circuit Court unless he is entirely clad in ‘appropriate business attire’ which includes socks upon his feet.” Asked about his socklessness, the attorney had responded, “I hate socks,” and said that “unless the Judge . . . could show him applicable ‘orders or other legal authority’ he would continue his habit of appearing sockless in court.” The judge promptly wrote such an order and showed it to him.

SEPTEMBER

Sept. 8: Sen. Lindsey Graham says he hopes the president will not ask Congress to vote in favor of going to war in Syria, because he is concerned

a majority might not vote for war. "What if [a presidential request] comes here and we can't pass it?" Graham worries. "That would be a disaster." Sen. John McCain agrees that the president doesn't need Congress's approval to go to war, but opines that "it certainly is helpful to have Congress fully engaged."

Sept. 11: California's State Bar Court recommends suspension for a lawyer who had digitally added herself to dozens of celebrity photos she then posted on her "Publicity" page. The court finds that the altered photos could be misleading because they imply that the lawyer is well connected.

Sept. 18: Facing disbarment, Dennis Hawver appears before the Kansas Supreme Court dressed as Thomas Jefferson. "I wore this outfit," Hawver tells the court, "because today, the issue before you is whether or not the Constitution of the United States . . . has bearing on our rights." The issue is actually whether Hawver failed to provide competent representation in a capital case. Among other things, Hawver argued that his client could not be guilty because there were two eyewitnesses to the crime. "With this man's background and experience," Hawver asked rhetorically, "do you think he would have left an eyewitness alive?" Hawver also sued the Kansas Supreme Court for an injunction preventing it from disbaring him, which it later declined to grant just before disbaring him.

Sept. 22: *Above the Law* reports that it has received a copy of a formal confidentiality agreement that one member of a law-school study group had allegedly proposed to the others. Among other things, the agreement includes a liquidated-damages clause imposing a \$5,000 penalty for any breach.

Sept. 29: Sources report that the trial of Mark Besemann's claim against his neighbor, Roger Weber, has been continued until December. Besemann accuses Weber of trying to resolve a property dispute by cutting Besemann's garage in half with a power saw. Weber had asked for the continuance, which might or might not have had something to do with the fact that he was then running for a seat in the Minnesota House of Representatives.

Sept. 30: U.S. District Judge Amy Berman Jackson rules that former Idaho senator Larry Craig and his campaign committee violated election laws by using campaign funds to pay Craig's legal fees. Craig had been

accused of propositioning an undercover officer in an airport bathroom, and argued that because he was traveling between D.C. and Idaho at the time, the fees pertaining to that incident were “related to official Senate duties.”

OCTOBER

Oct. 2: Surprising no one, the TSA affirms its own order imposing a fine on John Brennan for taking off his clothes at a checkpoint. Brennan says he will appeal.

Oct. 8: “I think I can safely say this is a very unusual claim,” said Shari Moore, the city clerk of St. Paul, Minnesota. She was referring to Megan Campbell’s claim for property damage sustained after a city vehicle hit her car. The claim is unusual because Campbell had been driving the city vehicle at the time.

Oct. 13: A spokesperson in Auckland, New Zealand, says that police are still looking for a woman who left a courtroom after being sentenced to jail time. “[S]he simply walked out of the sentencing box and out the front door,” a witness reports. “The judge said ‘someone stop that woman’ and she just kept on going. It’s quite embarrassing for them really.” The spokesperson describes the woman as a “low risk” offender, which is good because they have no idea where she is.

Oct. 22: The *Madison County Record* reports that Aaron Wemple has sued the Illinois State Bar Association and all its members for just over \$250 billion. What they have done is not entirely clear, but it has something to do with a “court process” he says is “defective and unsafe for its intended purpose in that it generates degeneration financially, psychologically and/or physically.” (It also may have something to do with his conviction.) The new demand is actually far more reasonable than the one he made in a 2012 case captioned *Wemple v. Illinois State Bar Association Members and Knowing Accomplices*. There he sought \$4.2 trillion based on claims that the state’s legal system is unconstitutional.

Oct. 22: An election in Hanover, Manitoba, goes forward without a vote on a referendum that would have repealed the town’s ban on alcohol sales. The referendum is removed from the ballot after city officials realize that the town has never had such a ban. The area was once reserved for Mennonite immigrants, and while residents have long assumed alcohol was prohibited — though “turning a blind eye” to the one store in

the jurisdiction that sold alcohol — officials could find no evidence of that. “[The store has] been there since the early ‘70s,” an official said, “and I’ve often asked, ‘How did this come about?’ But nobody seemed to have the history.”

Oct. 25: The *Milwaukee Journal-Sentinel* reports that officials in Marathon County, Wisconsin, sent 24 officers and an armored vehicle to the home of a couple in their 70s to collect a civil judgment. Asked whether police considered the man dangerous, a spokesperson said no, but cautioned that “while [he] was never considered dangerous, he was known to be argumentative.” Police escort the known-to-be-argumentative man to a bank and wait while he withdraws \$80,000 in cash.

Oct. 29: Writing to *Reason* magazine, Sean Malone says that TSA agents confiscated his silver belt buckle, which was shaped to look like a Flash Gordon-style ray gun. Asked why she considered the buckle a threat, one agent postulated, “What if you take this object out of your bag and point it — like a gun — at a police officer? He would have no choice to assume that it was a [ray] gun, and take action against you.” A supervisor ruled in Malone’s favor on that trip, but on his return flight it happened again. TSA agents at LAX confiscated the item, citing a policy against allowing “replica weapons” on board.



THE ADVENTURE OF THE NORWOOD BUILDER

A LAWYERLY ANNOTATED EDITION

[parallel citation: 2015 Green Bag Alm. 116]



A. Conan Doyle[†]

introduction by Andrew Jay Peck^{*}

[†] Arthur Conan Doyle was trained as a physician and practiced medicine for quite a while, but he spent most of his life as a professional writer — an extraordinarily good and successful one. *See, e.g.,* JON LELLENBERG, DANIEL STASHOWER & CHARLES FOLEY, *ARTHUR CONAN DOYLE: A LIFE IN LETTERS* (2007) (hereafter “LELLENBERG ET AL., LIFE IN LETTERS”); ANDREW LYCETT, *THE MAN WHO CREATED SHERLOCK HOLMES: THE LIFE AND TIMES OF SIR ARTHUR CONAN DOYLE* (2007) (hereafter “LYCETT, LIFE AND TIMES”); DANIEL STASHOWER, *TELLER OF TALES: THE LIFE OF ARTHUR CONAN DOYLE* (1999) (hereafter “STASHOWER, TELLER OF TALES”).

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¹ Hadar Aviram holds the Harry and Lillian Hastings Research Chair at University of California, Hastings College of the Law, where she co-directs the Hastings Institute for Criminal Justice, and runs the California Correctional Crisis Blog. Her book *Cheap on Crime* (2015) addresses the impact of the financial crisis on the American correctional landscape. She's a long-time rabid Sherlock Holmes fan and never misses a visit to Baker Street when in London.

² Cattleya M. Concepcion is a Reference and Faculty Services Librarian at George Mason University School of Law. She received her J.D. from George Mason and her M.S. in Library and Information Science from Catholic University.

³ Joshua Cumby is an intellectual property and commercial litigation associate at Venable LLP and a graduate of the University of Texas and the George Mason University School of Law. While in law school, he studied English legal history at the University of Cambridge. He became a devotee of the Holmes Canon in 1991, when he received his copy of *The Complete Sherlock Holmes* from his grandparents.

⁴ Ross Davies is a George Mason University law professor and *Green Bag* editor.

⁵ Geoffrey B. Fehling is an associate at K&L Gates LLP in Washington, DC, and a graduate of Davidson College and the George Mason University School of Law.

⁶ Clifford S. Goldfarb is a lawyer with the Toronto firm of Gardiner Roberts LLP. He specializes in charitable and non-profit organizations. He is co-author, with Hartley R. Nathan, of *Nathan's Company Meetings For Share Capital and Non-Share Capital Corporations* (10th ed.). In the Sherlockian world, he is a former Meyers (President) of the Bootmakers of Toronto, and was investitured in the Baker Street Irregulars as "Fordham, the Horsham Lawyer." His Doylean writing has been published in the *Journal of Olympic History*, *Finest Hour*, and other journals, and includes *Investigating Sherlock Holmes: Solved & Unsolved Mysteries* (with Hartley R. Nathan, Mosaic Press, 2014). Contributions copyright © 2015 by Clifford S. Goldfarb.

⁷ Robert M. Jarvis (jarvisb@nova.edu) is a professor of law at Nova Southeastern University in Fort Lauderdale, Florida. Prior to entering academia, he practiced maritime law with Haight, Gardner, Poor & Havens and Baker & McKenzie in New York. A past editor of the *Journal of Maritime Law and Commerce*, and a past chair of the Admiralty Law Committee of The Florida Bar, he is the author of numerous works on maritime law. His current projects include an article exploring the maritime roots of Sherlock Holmes as revealed in "The Adventure of the Gloria Scott."

⁸ Guy Marriott is a retired English Solicitor, who specialized in intellectual property and entertainment law. He graduated from the University of Cambridge (Churchill College) in 1968 with a degree in Law and Economics. A Holmesian for many years, and a former Chairman of, and currently the President of, The Sherlock Holmes Society of London, he received his investiture in 2008 in the Baker Street Irregulars as "Grand Hotel du Louvre." Contributions copyright © 2015 by Guy Marriott.

⁹ Ira Brad Matetsky (imatetsky@ganfershore.com) is a partner in the firm of Ganfer & Shore, LLP in New York. He is a lifelong student of the Sherlock Holmes Canon.

¹⁰ Albert M. Rosenblatt, a former Judge of the New York Court of Appeals, now teaches law at the NYU Law School. He also does national and international mediations, arbitrations, and consulting. He is with McCabe & Mack in Poughkeepsie, NY. He has been a Baker Street Irregular for many years, with the investiture "Inspector Bradstreet," and his Sherlockian writings have appeared in the *Baker Street Journal* and other publications. He is married to Julia Carlson Rosenblatt, whose annotations also appear here.

¹¹ Julia Carlson Rosenblatt is a former Vassar College professor and a winter-sports newspaper

EDITORS' PREFACE

We hope that the annotations provided here will educate and entertain you, and draw you further into the world of Sherlock Holmes, Dr. John H. Watson, Inspector Lestrade, et al. These notes are, however, only the beginning, only a sampling, of what there is to know about "The Adventure of the Norwood Builder."

For anyone interested in fully appreciating this story — its characters, plot, context, and so on — two books are essential resources. First, there is *The New Annotated Sherlock Holmes* (2005), by Leslie S. Klinger. Volume II of that work includes "Norwood Builder," and Klinger's notes there are flagged here with citations to "LSK, 2 New Ann. p. _ note _." Second, there is *The Sherlock Holmes Reference Library*, also by Klinger. The volume in that series covering *The Return of Sherlock Holmes* (2003) includes "Norwood Builder," and Klinger's notes there are flagged here with citations to "LSK, Ref.: RETUR, p. _ note _." If you want to know what his notes say (and you should), you will need to get his books (which you should).

The text of the "Norwood Builder" presented here is from the McClure, Phillips & Co. edition of *The Return of Sherlock Holmes* (1905), which has its quirks, as does every version. The picture of Jonas Oldacre on page 116 above is the frontispiece of that volume.¹²

INTRODUCTION: THE DATING OF "THE ADVENTURE OF THE NORWOOD BUILDER"

Andrew Jay Peck

In "The Adventure of the Creeping Man," Watson says to Holmes: "As to your dates, that is the biggest mystification of all." What is the mystery here, you may ask? There is no doubt that "The Adventure of the Norwood Builder" ("NORW") was first published in the November 1903

columnist. She has been a member of the Baker Street Irregulars since 1991 with the investiture "Mrs. Turner" and is "Maude Bellamy" in the Adventuresses of Sherlock Holmes. Among other works, she has written *Dining with Sherlock Holmes* with Chef Fritz Sonnenschmidt.

¹² "Norwood Builder" being a subject of interest to Sherlockians, other interesting, and entertaining scholarly works about it, or at least touching on it, abound. They are too numerous to list and too various to summarize. Conveniently and not surprisingly, a good starting point for exploration of other scholarship is Klinger. See Leslie S. Klinger, *Sifting the Writings upon the Writings*, 52 BAKER STREET J. 47 (Summer 2002).

issue of the *Strand Magazine* (U.K.) and the October 31, 1903 issue of *Collier's Weekly* (U.S.) under the byline of Arthur Conan Doyle. But to the members of The Baker Street Irregulars¹³ and other Sherlockians (or Holmesians, in the parlance of our more formal British colleagues), there is another reality. We play the Grand Game — with tongue in cheek, we believe (or at least pretend) that Holmes and Watson are real people, Watson's accounts of Holmes's adventures are historical fact, and Doyle merely was Watson's literary agent. Sherlockians' answer to "Sherlock Holmes, fact or fiction?" is "yes." Or in the words of the Museum of London's current special exhibition: "Sherlock Holmes: The Man Who Never Lived and Will Never Die."

Thus, Sherlockians deduce from the stories, and argue about, such topics as Holmes's university — Oxford or Cambridge? Was Watson wounded in Afghanistan in the arm, or the leg (or possibly in his posterior)? Was John H. Watson's middle name Hamish? How many times was Watson married? Where was 221B Baker Street? What type of snake drinks milk and climbs a bell pull?

A major area of study, and controversy, deals with the chronology of each of the sixty Sherlock Holmes stories (the "Canon" to Sherlockians). As Vincent Starrett has noted, "Nearly all [of the chronologists] are at variance with one another; indeed, when two Sherlockian chronologists agree, it is an event . . . None of them, although Mr. Brend comes nearest, agree with Dr. Watson."¹⁴

What is the reason for the chronological difficulties? In some stories, Watson is very vague as to the case's date. For example, no information is given for "The Adventure of the Red Circle"; in "The Adventure of the Blue Carbuncle," we know it is December 27, but no year is given; in "The Adventure of Charles Augustus Milverton," it is the winter but the year is "concealed"; and in "The Adventure of the Second Stain," it is a Tuesday in autumn in "a year that shall be nameless."

¹³ The Baker Street Irregulars ("BSI"), named after the street urchins who assisted Holmes, was founded in 1934 by Christopher Morley.

¹⁴ Vincent Starrett, *Preface* at iii, in ERNEST BLOOMFIELD ZEISLER, *BAKER STREET CHRONOLOGY: COMMENTARIES ON THE SACRED WRITINGS OF DR. JOHN H. WATSON* (Chicago: Alexander J. Isaacs 1953; reprinted, New York: Magico Magazine 1983). Starrett never engaged in the chronological game himself — perhaps because of the line in his famous poem, "it is always 1895."

In other stories, it is not a lack of information but rather conflicting internal statements or disparity between Canonical facts and historical facts, such as the weather. For example, in “The Red-Headed League,” the story starts in June and mysteriously jumps ahead to October. As Prof. Christ has said, “With one shining exception (‘The Adventure of the Devil’s Foot’), whenever a reminiscence gives us (whether specifically or deducibly) the year of action, together with the month, the day of the month, and the day of the week, we are led into confusion, frustration and high glee.”¹⁵

Finally, and importantly, the dating of one story often is dependent on the dating of several others, so a change in dating one case will affect the dating of other cases. This issue particularly arises with the stories that are dependent on Watson’s marital status. Putting aside Watson’s marriage circa 1903, we clearly have Watson’s marriage to Mary Morstan after *The Sign of Four*, but some chronologists also have posited another marriage, shortly before or after the Watson-Morstan nuptials. This “second” marriage — unsupported by any Canonical evidence — was proposed because it solves certain chronological problems (for cases dated as occurring “soon after” Watson’s marriage), but in my opinion it creates as many chronological problems as it solves. I therefore join Rev. Folsom¹⁶ in rejecting the second marriage theory and conclude that Watson was married once, and only once, to Mary Morstan.¹⁷

With that background, I turn to “The Adventure of the Norwood Builder.” What chronological data does Watson give us? As Holmes said in “The Adventure of the Creeping Man,” “Well, now, let us take the dates first.” Holmes refers to the “late lamented Professor Moriarty,” so NORW must occur after Moriarty’s death (in “The Final Problem”) and

¹⁵ Quoted in ANDREW J. PECK AND LESLIE S. KLINGER, “THE DATE BEING — ?”: A COMPENDIUM OF CHRONOLOGICAL DATA at iii n.2 (New York, Magico Magazine 1996 Expanded & Revised Ed.) (hereafter, Peck & Klinger, *The Date Being* — ?). Prof. Christ has exaggerated somewhat — in the same category as “The Adventure of the Devil’s Foot” (Tuesday, March 16, 1887) of cases on which there is unanimity are “His Last Bow” (Sunday, August 2, 1914), “The Adventure of the Bruce-Partington Plans” (Thursday, November 21, 1895), and “The Adventure of the Creeping Man” (Sunday, September 6, 1903).

¹⁶ HENRY T. FOLSOM, THROUGH THE YEARS AT BAKER STREET: A CHRONOLOGY OF SHERLOCK HOLMES (Revised Edition. Washington, New Jersey: Privately printed 1964).

¹⁷ Again, I am not considering Watson’s possible 1903 marriage, because whatever views one has about it, it does not create any chronological problems.

thus also after Holmes's return from the dead in "The Empty House." "The Empty House" occurred "in the Spring of the year 1894," according to Watson.¹⁸ Indeed, in NORW Watson states that "Holmes had been back for some months." More specifically as to the month, in describing his investigation, Holmes said that he "crawled about the lawn with an August sun at my back."

The date of NORW thus would appear clear: August 1894, and that is the date chosen by Blakeney,¹⁹ Christ,²⁰ Brend,²¹ Zeisler,²² Folsom²³ and Dakin,²⁴ among others.²⁵

Two of the major chronologists, however — Bell²⁶ and Baring-Gould²⁷ — date NORW a year later, in August 1895. Baring-Gould based this on meteorological data. He explains that in NORW, Holmes describes the weather as "very warm these past few days," with a drought that made the ground hard. But according to meteorological data, "there was no period in August of that year [1894] in which the weather was both dry and hot. In August, 1895, on the other hand, there was no rain from Wednesday, August 14 . . . to Tuesday, August 22," and the temperature

¹⁸ Most of the major chronologists date "The Empty House" as occurring in April 1894. See Peck & Klinger, *The Date Being — ?*, at 13.

¹⁹ T.S. BLAKENEY, *SHERLOCK HOLMES: FACT OR FICTION?* (London: John Murray 1932; Reissued, The Baker Street Irregulars, Inc. 1954; Reprinted, New York: Otto Penzler Books 1993).

²⁰ JAY FINLEY CHRIST, *AN IRREGULAR CHRONOLOGY OF SHERLOCK HOLMES OF BAKER STREET* (Ann Arbor, Michigan: The Fanlight House 1947; Reprinted, New York: Magico Magazine 1985).

²¹ GAVIN BREND, *MY DEAR HOLMES* (London: George Allen & Unwin, Ltd. 1951; Reprinted, New York: Otto Penzler Books 1994).

²² ERNEST BLOOMFIELD ZEISLER, *BAKER STREET CHRONOLOGY: COMMENTARIES ON THE SACRED WRITINGS OF DR. JOHN H. WATSON* (Chicago: Alexander J. Isaacs 1953; Reprinted, New York: Magico Magazine 1983). Zeisler, however, dates NORW as July 2, 1894, and says that the "August sun" reference was an expression for a hot summer sun.

²³ HENRY T. FOLSOM, *THROUGH THE YEARS AT BAKER STREET: A CHRONOLOGY OF SHERLOCK HOLMES* (Revised Edition; Washington, New Jersey: Privately printed 1964).

²⁴ D. MARTIN DAKIN, *SHERLOCK HOLMES COMMENTARY* (Newton Abbott: David & Charles, Ltd. 1972, and New York: Drake Publishers, Inc. 1972).

²⁵ See Peck & Klinger, *The Date Being — ?*, at 14.

²⁶ H.W. BELL, *SHERLOCK HOLMES AND DR. WATSON: THE CHRONOLOGY OF THEIR ADVENTURES* (London: Constable & Co. 1932; Reissued, The Baker Street Irregulars, Inc. 1953; Reprinted, New York: Magico Magazine 1984).

²⁷ WILLIAM S. BARING-GOULD, *THE CHRONOLOGICAL HOLMES* (New York: Privately Printed 1955). Also, WILLIAM S. BARING-GOULD, ED., *THE ANNOTATED SHERLOCK HOLMES* (New York: Clarkson N. Potter 1967).

rose from 64.8 degrees on August 13 to 82 degrees on August 19. Baring-Gould adds that the “selection of 1895 over 1894 is strengthened by the fact that Watson did not include ‘The Adventure of the Norwood Builder’ in his list of important cases of 1894 (‘The Adventure of the Golden Pince-Nez’).” Bell also based his 1895 date on the omission of NORW from the list of 1894 cases in “The Adventure of the Golden Pince-Nez.”

Brend and Dakin respond that the reference in NORW to Holmes being back for “some months” would hardly be appropriate if Holmes had been back for sixteen months, *i.e.*, from the April 1894 date of “The Empty House” to August 1895.²⁸ Dakin and Zeisler note that the list of 1894 cases in “The Adventure of the Golden Pince-Nez” are non-exclusive and are of unpublished cases (which tantalize Sherlockians), and since NORW was published only a few months before “The Adventure of the Golden Pince-Nez,” there was no reason to list NORW. Moreover, Watson referred to “three massive manuscript volumes” of 1894 cases, further indicating that the list was examples and was not exclusive.

My opinion: The weather was not significant to the plot of NORW. The list of (unpublished) cases in “The Adventure of the Golden Pince-Nez” clearly was not exclusive — it also did not mention “The Empty House,” which is unanimously dated by the major chronologists as occurring in 1894. The references in NORW to August (by Holmes) and to Holmes being back for “some months” since “The Empty House,” convince me that NORW occurred in August 1894. Readers are invited to come to their own conclusion.

To learn more about the chronological game, read Peck & Klinger, “*The Date Being — ?*”



²⁸ To make his March 1894 date for “The Adventure of Wisteria Lodge” (because the reference in NORW to “the case of the papers of ex-President Murillo” appears to be a reference to that case) fit between “The Empty House” and the August 1894 date of NORW, Brend dates “The Empty House” as February 1894 instead of April 1894.

THE ADVENTURE OF THE NORWOOD BUILDER

Arthur Conan Doyle

“From the point of view of the criminal expert,” said Mr. Sherlock Holmes, “London has become a singularly uninteresting city since the death of the late lamented²⁹ Professor Moriarty.”³⁰

“I can hardly think that you would find many decent citizens to agree with you,” I answered.

“Well, well, I must not be selfish,” said he, with a smile, as he pushed back his chair from the breakfast-table. “The community is certainly the gainer, and no one the loser, save the poor out-of-work specialist, whose occupation has gone. With that man in the field, one’s morning paper presented infinite possibilities. Often it was only the smallest trace, Watson, the faintest indication, and yet it was enough to tell me that the great malignant brain was there, as the gentlest tremors of the edges of the web remind one of the foul spider which lurks in the centre. Petty thefts, wanton assaults, purposeless outrage — to the man who held the clue all could be worked into one connected whole. To the scientific student of the higher criminal world, no capital in Europe offered the advantages which London then possessed. But now —” He shrugged his shoulders in humorous deprecation of the state of things which he had himself done so much to produce.

At the time of which I speak, Holmes had been back for some months, and I at his request had sold my practice and returned to share the old quarters in Baker Street.³¹ A young doctor, named Verner,³² had purchased my small Kensington practice, and given with astonishingly little demur the highest price that I ventured to ask — an incident which only explained itself some years later, when I found that Verner was a distant relation of Holmes, and that it was my friend who had really found the money.³³

Our months of partnership³⁴ had not been so uneventful as he had

²⁹ LSK, REF.: RETUR, p. 47, note 1; LSK, 2 NEW ANN. p. 829, note 2.

³⁰ LSK, REF.: RETUR, p. 47, note 2; LSK, 2 NEW ANN. p. 829, note 3.

³¹ LSK, REF.: RETUR, p. 47, note 3; LSK, 2 NEW ANN. p. 830, note 4.

³² LSK, REF.: RETUR, p. 47, note 4; LSK, 2 NEW ANN. p. 830, note 5.

³³ LSK, REF.: RETUR, p. 47, note 5; LSK, 2 NEW ANN. p. 830, note 6.

³⁴ CLIFFORD S. GOLDFARB: Watson and Holmes describe their relationship as a partnership on multiple occasions. See “The Adventure of Charles Augustus Milverton” (published

stated, for I find, on looking over my notes, that this period includes the

1904) (“Dr. Watson is my friend and partner.”); “The Adventure of the Three Garridebs” (published 1924) (“... in my position of partner and confidant I am obliged to be particularly careful to avoid any indiscretion.”); and “The Red-Headed League” (published 1891) (“This gentleman... has been my partner and helper in many of my most successful cases...”). It is to be noted that “Norwood Builder” and two of the other three cited cases were published after Holmes’s 1894 return. “Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.” *Partnership Act*, 1890, 53 & 54 Vict, c.39 (henceforth the “PA”). There is no doubt that an active detective agency constitutes a business. Watson’s contributions as an assistant in investigations, revolver-toting bodyguard, recording secretary and publicist are well-documented. As to a view of profit, while Holmes could be cavalier about his fees, he certainly approached the subject in a business-like manner: “My professional charges are upon a fixed scale... I do not vary them, save when I remit them altogether.” See “The Problem of Thor Bridge” (published 1922). While it is likely that the relationship between Holmes and Watson was a partnership prior to the events of 1891, when Holmes faked his death at the Reichenbach Falls, we will concern ourselves here only with their business arrangements from 1894. At that point, the original partnership, which had not been dissolved by the supposed death of Holmes (PA, s.33), was either revived, or a new partnership was formed. The fact that both Holmes and Watson hold each other out as partners is convincing evidence of the existence of a partnership (PA, s.14(1)), although not conclusive. *Re Stanton Iron Co.* (1855) 21 Beav 164. Since Watson had given up his medical practice and was enjoined from publishing accounts of Holmes’s cases in the *Strand Magazine* until 1903, clearly he had to be looking to Holmes for financial support. Suggestions that he might be living off his capital or a share of royalties from earlier stories are purely speculative. MARTIN DAKIN, A SHERLOCK HOLMES COMMENTARY 166 (The Battered Silicon Dispatch Box, Shelburne, Ontario, 2002; originally published 1972). It is clear that his participation in the new cases coming in after Holmes’s return entitled him to an equal share in the profits of the partnership, unless otherwise agreed. PA, s.24(1). Likely Watson agreed to accept a less than equal share in the circumstances. Even if Holmes, as senior partner, chose not to share the profits, but only to give Watson an allowance, that does not preclude a partnership. The receipt of profits is not conclusive and the court will look at the entirety of the arrangements between the parties. *Davis v. Davis* [1894] 1 Ch 393. Only Holmes is mentioned in the firm name of “Sherlock Holmes, Consulting Detective.” Again, that does not belie the existence of a partnership. Leslie Klinger, in his very useful annotations to “The Norwood Builder” (LSK, Ref.: RETUR, p. 47, note 3), advises that the words “as a Junior and insignificant member of the firm” have been deleted from the manuscript, no doubt removed on the advice of Watson’s solicitor. A junior partner would not expect his name to be part of the firm name. Another issue is the revenues of the firm. These would include fees paid by clients, royalties from publishing the stories and royalties from sales of Holmes’s monographs on tobacco, secret writings and many other topics. The partnership would have terminated when Holmes retired to keep bees on the Sussex Downs. See “The Adventure of the Second Stain” (published 1904). A fuller analysis of this partnership relationship is beyond the scope of this note.

case of the papers of ex-President Murillo,³⁵ and also the shocking affair of the Dutch steamship *Friesland*, which so nearly cost us both our lives.³⁶

³⁵ LSK, REF.: RETUR, p. 48, note 7; LSK, 2 NEW ANN. p. 830, note 7.

³⁶ ROBERT M. JARVIS: As has been pointed out elsewhere, the real-life *Friesland* was a Belgian carrier built for the Red Star Line in 1889 and later chartered to her sister company (the American Line). See LSK, 2 NEW ANN. p. 831, note 8. Doyle's description of the vessel as Dutch normally is treated as a minor mistake not worth mentioning. See, e.g., James Donahue, *Red Star Liner Friesland Singled Out by Famed British Author*, at perdurabo10.tripod.com/ships/id294.html.

It seems doubtful, however, that Doyle would have made such an obvious error, given that the *Friesland* was still trading at the time "The Norwood Builder" was published (1903) and Doyle was well-acquainted with maritime matters. See, e.g., "The Adventure of the Gloria Scott" (1893) (learned discussion of the penal transport trade). Moreover, the *Friesland* was a run-of-the-mill freighter that had an unremarkable career, which came to an end in 1912 when, as the *La Plata*, she was scrapped by her Italian owners. See *S/S Friesland, American Line*, at www.norwayheritage.com/p_ship.asp?sh=frie5. It therefore strains the imagination to think of her as being part of a "shocking affair . . . which so nearly cost us both our lives."

Perhaps then Doyle meant to draw attention to the ship's nationality rather than her name. Given that "The Norwood Builder" is set in 1894, this raises an obvious question: was there a recent Dutch voyage significant enough to require Holmes and Watson's attention, dangerous enough to threaten their existence, and familiar enough to both English and U.S. readers that they would have understood that Doyle was sending them a clue?

One candidate that springs to mind is the *Spaarndam* (ex-*Arabic*), a ship built in 1881 for the White Star Line that was purchased by the Holland America Line in February 1890. See *Spaarndam*, at www.halpostcards.com/unofficial/ships/spaar.html (explaining that the ship's name was changed following the sale). Within just a few months of joining the Holland America fleet, the *Spaarndam* found herself in a trans-Atlantic race upon which numerous fortunes were riding:

In 1890 a most peculiar situation occurred which turned into a financial windfall. The USA government had decided that on 1 Oct[.] of [that] year higher tariffs (import taxes) would be levied against the import of prepared [t]obacco. This was a major export from the Netherlands and this protectionist measure caused great concern among the Dutch businessmen involved. Thus with great haste as much tobacco as possible was shipped to the States to avoid these higher import taxes. The *Spaarndam* was on a schedule . . . that would see [her] arriv[e in New York] just inside the deadline. The Dutch business community offered Captain Bonjer a bonus of \$ 5000 [] if he would make it on time with the ship. He did and to the amazement of most, the bonus was indeed paid.

Albert J. Schoonderbeek, *Bonjer, Frederik Hendrik*, at www.hollandamericablog.com/captains-from-the-past/bonjer/. The 1890 tariff act, commonly known as the McKinley Tariff, increased the duty on numerous foreign agricultural products, with the levy on imported tobacco rising from 35 cents a pound to \$2 a pound. See S. REP. 456, REPLIES TO TARIFF INQUIRES: S. COMM. ON FINANCE, 53D CONG. (1894). Blamed by many for helping to bring about the Panic of 1893, the statute was repealed in 1894. See PAUL STUDENSKI & HERMAN EDWARD KROOSS, FINANCIAL HISTORY OF THE UNITED STATES 213-14 (1952) (Beard Books reprint 2003).

His cold and proud nature was always averse, however, from anything in the shape of public applause, and he bound me in the most stringent terms to say no further word of himself, his methods, or his successes — a prohibition which, as I have explained, has only now been removed.³⁷

The *Spaarndam* arrived in New York on September 30, 1890, with 6,500 bales of Sumatra tobacco valued at \$1.5 million. See *Brought by the Spaarndam*, N.Y. TIMES, Sept. 30, 1890, at 5 (reporting that there was “cheering in the various tobacco merchants’ offices [when they were told] over the telephone of the Spaarndam’s arrival.”).

In present-day terms, the *Spaarndam*’s cargo was worth \$38 million. See S. Morgan Friedman, *The Inflation Calculator*, at www.westegg.com/inflation/infl.cgi. By beating the government’s October 1 deadline, the shippers were able to corner the American market. See *A Prize for a Cargo*, PHIL. TIMES, Oct. 3, 1890, at 4 (“It is said that the eight firms that now practically control the leaf tobacco here will combine, keep the supply from the market and force buyers to pay extravagant prices. This is sustained by the fact that little fine leaf is offered for sale.”). For a further discussion, see PETER HOCHSTEIN, *CIGARS AND OTHER PASSIONS: THE BIOGRAPHY OF EDGAR M. CULLMAN* 30-32 (2010).

With so much at stake, it is easy to believe that there were many parties who would have gone to great lengths to keep Captain Bonjer from making his deadline — and even greater lengths to cover up their involvement when their plot failed. Needless to say, bringing these perpetrators to justice would have required Holmes’s unique abilities while placing him and Watson in mortal danger.

Of course, whether Doyle was referencing the *Spaarndam* is unknown due to the fact that he never wrote *The Shocking Affair of the Dutch Steamship Friesland*. Others, however, have done so. See, e.g., Peter Calamai, *The Strange Affair of the Steamship Friesland*, in *GASLIGHT GRIMOIRE: FANTASTIC TALES OF SHERLOCK HOLMES* (Jeff Campbell & Charles Prepolec eds. 2008) (ghost story); Mary Robinette Kowal, *The Shocking Affair of the Dutch Steamship Friesland*, in *THE IMPROBABLE ADVENTURES OF SHERLOCK HOLMES* (John Joseph Adams ed. 2009) (assassination plot); “Jaelijn,” *The Shocking Affair of the Dutch Steamship Friesland*, at www.fanfiction.net/s/10029274/1/The-Shocking-Affair-of-the-Dutch-Steamship-Friesland (political thriller); “Cthulhu,” *The Shocking Affair of the Dutch Airship Friesland RP*, at wayfinderexperience.com/forums/index.php?topic=748.0 (steampunk tale). In addition, the 1945 Basil Rathbone film *Pursuit to Algiers*, which finds Holmes guarding a foreign prince, takes place on a Swedish ship called the *Friesland*. See RON BACKER, *MYSTERY MOVIE SERIES OF 1940S HOLLYWOOD* 81 (2010) (concluding that Leonard Lee, the screenwriter, “was trying to provide his version of [the] adventure . . . which Dr. Watson never had the time to immortalize in print.”). See also LSK, REF.: RETUR, pp. 48-49, note 8.

³⁷ IRA BRAD MATETSKY: According to the Canon, Holmes disappeared (Watson believed him to have been killed at Reichenbach Falls) in 1891 (“The Final Problem”) and reappeared in 1894 (“The Adventure of the Empty House”), but Watson did not begin publishing his accounts of Holmes’s 1894 cases until 1903. Watson explains in “The Empty House” that “[o]nly now, at the end of nearly ten years, [was he] allowed to” publish his account of Holmes’s role in that case. “The Norwood Builder” was the first story that Watson published after “The Empty House” (i.e., for modern readers, it is the second story in *The Return of Sherlock Holmes*). See also Cattleya M. Concepcion, *The Adventure of the Elusive Post-*

Mr. Sherlock Holmes was leaning back in his chair after his whimsical protest, and was unfolding his morning paper in a leisurely fashion, when our attention was arrested by a tremendous ring at the bell, followed immediately by a hollow drumming sound, as if someone were beating on the outer door with his fist. As it opened there came a tumultuous rush into the hall, rapid feet clattered up the stair, and an instant later a wild-eyed and frantic young man, pale, dishevelled, and palpitating, burst into the room. He looked from one to the other of us, and under our gaze of inquiry he became conscious that some apology was needed for this unceremonious entry.

"I'm sorry, Mr. Holmes," he cried. "You musn't³⁸ blame me. I am nearly mad. Mr. Holmes, I am the unhappy John Hector McFarlane."

He made the announcement as if the name alone would explain both his visit and its manner, but I could see, by my companion's unresponsive face, that it meant no more to him than to me.

"Have a cigarette, Mr. McFarlane," said he, pushing his case across. "I am sure that, with your symptoms, my friend Dr. Watson here would prescribe a sedative. The weather has been so very warm these last few days. Now, if you feel a little more composed, I should be glad if you would sit down in that chair, and tell us very slowly and quietly who you are, and what it is that you want. You mentioned your name, as if I should recognise it, but I assure you that, beyond the obvious facts that you are a bachelor, a solicitor, a Freemason, and an asthmatic, I know nothing whatever about you."³⁹

card, in 2015 GREEN BAG ALM. 442; LSK, Ref.: RETUR, p. 49, note 9.

³⁸ THE EDITORS: A spelling rare now but common at the time.

³⁹ GUY MARRIOTT AND JOSHUA CUMBY (authors of two excellent annotations merged by the Editors): Holmes identifies Mr. McFarlane as a lawyer who practices as a solicitor in England and Wales. The professional body regulating solicitors both in Mr. McFarlane's time and today is The Law Society, which was founded in 1825 and incorporated shortly thereafter. See generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 164 (4th ed. 2007); THOMAS LUND, A GUIDE TO THE PROFESSIONAL CONDUCT AND ETIQUETTE OF SOLICITORS (1960). The organization became known colloquially as The Law Society although its first formal title was "The Society of Attorneys, Solicitors, Proctors and others not being Barristers, practising in the Courts of Law and Equity of the United Kingdom." The Law Society, *Our history*, available at www.lawsociety.org.uk/about-us/our-history/ ("Law Society Website"); but see BAKER at 164 (noting that a "Society of Gentleman Practisers in the Courts of Law and Equity" was formed in the eighteenth century and that the Law Society is its "descendant"); EDMUND B.V. CHRISTIAN, A SHORT HISTORY OF SOLICITORS 120 (1896) (stating that "there was in existence an association of London attorneys and solicitors . . . in

which lay the germ of the present Law Society, bearing the title of ‘The Society of Gentleman practisers [sic] in the Courts of Law and Equity.’). In 1903 the Society changed its official name to ‘The Law Society,’ and women were first admitted as solicitors in 1922. *Id.*

Distinguishable from barristers (and the older branches of the legal profession in England, serjeants and attorneys), solicitors first appeared in the fifteenth century, became a separate branch of the legal profession in the seventeenth, and became ‘not only tolerable but even respectable’ by the early eighteenth and ‘as respectable as . . . barrister[s]’ in the early nineteenth. BAKER at 162-64; Law Society Website (noting that from the mid-sixteenth century there had developed two branches of the legal profession — ‘barristers’ and ‘attorneys and solicitors’ — and that gradually, ‘attorneys and solicitors’ combined and the name ‘solicitor’ was adopted). From the beginning, solicitors did just what their name suggests, ‘soliciting causes’ by ‘helping clients through the jurisdictional jungle [and] giving general advice.’ BAKER at 163; *see also* Law Society Website (noting that traditionally attorneys advised parties in lawsuits and solicitors dealt with landed estates). Solicitors could, if they chose, practice in partnership with other solicitors, and solicitors’ offices were to be found in London and in every city and every market town throughout the country. Members of the general public with legal issues, such as wills, estates, real property transactions or other civil or criminal legal matters, could only retain a solicitor to give them advice, the solicitor in turn retaining a barrister for advice on the more complicated or important matters, or to appear in court on behalf of the client. *See* BAKER at 163 (noting that ‘specialist’ barristers left ‘preliminary dealings with clients, and the preparation of briefs’ to solicitors); L. RAY PATTERSON & ELLIOTT E. CHEATHAM, *THE PROFESSION OF LAW* 15 (1971) (‘It is the solicitor who deals with and is chosen by the layman . . . who does the office work as client guide and caretaker, and in litigated matters it is he who does most of the preparatory work as gathering the evidence.’). There remains today in the legal profession in England and Wales the distinction between ‘barristers’ and ‘solicitors’ although the distinction is more blurred than it was in Mr. McFarlane’s time. *See* BAKER at 164 (noting that ‘[t]he social and educational differences between the two classes have withered away, and the professional differences are in function and expertise rather than in education or ability.’). Solicitors and not barristers served as the model for the organization of the legal profession in the United States. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 97 (1953); *see also* PATTERSON & CHEATHAM at 15 (‘In the matter of professional organization, The Law Society, rather than the Inns of Court, seem closer to the bar associations in the United States.’). Given the division of labor between solicitors and barristers and the fact that only the first would have come in direct contact with a client like Mr. Oldacre, it is unsurprising that Conan Doyle chose to make the subject of Oldacre’s designs a solicitor rather than a barrister; indeed, the plot depends on it.

Unlike solicitors, until recent years, barristers had to practice independently, and could not practice in partnership, although they would often share ‘chambers’ with other barristers in London or in major cities outside London. In London, these barristers’ chambers would be situated in one of the four Inns of Court — Gray’s Inn, Lincoln’s Inn, Inner Temple, or Middle Temple. To emphasize barristers’ ‘superiority over the purely ministerial practitioners,’ solicitors, attorneys, and other ‘men of law’ were historically excluded from membership in the Inns and the professional training they provided. BAKER at 163; *see also* CHRISTIAN at 120 (reporting that the Law Society was ‘formed, it is said, as the immediate

Familiar as I was with my friend's methods, it was not difficult for me to follow his deductions, and to observe the untidiness of attire, the sheaf of legal papers, the watch-charm, and the breathing which had prompted them. Our client, however, stared in amazement.

"Yes, I am all that, Mr. Holmes; and, in addition, I am the most unfortunate man at this moment in London. For Heaven's sake, don't abandon me, Mr. Holmes! If they come to arrest me before I have finished my story, make them give me time, so that I may tell you the whole truth. I could go to gaol happy if I knew that you were working for me outside."

"Arrest you!" said Holmes. "This is really most grati— most interesting. On what charge do you expect to be arrested?"

"Upon the charge of murdering Mr. Jonas Oldacre, of Lower Norwood."⁴⁰

My companion's expressive face showed a sympathy which was not, I am afraid, entirely unmixed⁴¹ with satisfaction.

result of the exclusion of attorneys from the Inns of Court"). Baker also notes that "most distinguished English lawyers between about 1850 and 1950 were either not university graduates at all or were men who had read subjects other than law." BAKER at 171.

So we know that, as a solicitor, Mr. McFarlane would have been excluded from membership in the Inns. We do not know, however, whether he was a university graduate or — if he was — what he "read" there (or, for that matter, whether he qualifies as a "distinguished English lawyer"). It is reasonable to infer, then, that Mr. McFarlane received his legal training from another source. Whether or not a university graduate, McFarlane would have received his practical training by being articled to a solicitor, and learning on the job under supervision from that solicitor. McFarlane could well have been articled to Graham, but that is speculation. After a period of years as an "articled clerk" McFarlane would have been able to apply for admission as a solicitor. Or perhaps (or in addition), Mr. McFarlane availed himself of the lecture courses the Law Society began providing in the 1830s. See BAKER at 171 n.55. In either case, it may be that by 1894, regulation of the profession included the requirement that a solicitor "take and pass a Preliminary Examination as to his general education and then serve as an articled clerk in the office of a Solicitor for a specified number of years." Hollis R. Bailey, *Admission of Barristers and Solicitors in England*, 14 MASS. L.Q. 60-69 (Nov. 1928) (reprinted in FREDERICK C. HICKS, ORGANIZATION AND ETHICS OF THE BENCH AND BAR 148 (1932)). The period of service "under articles" depended on a prospective solicitor's education: three years "for graduates in Arts, Laws or Science of certain universities and for certain others" and five years for the rest. *Id.* Given that Mr. McFarlane "may have been about twenty-seven," and that by that time he was called a "solicitor" and not a "clerk," his legal education likely began sometime in his early twenties, depending (again) on whether he attended university or not.

⁴⁰ LSK, REF.: RETUR, p. 50, note 10.

⁴¹ LSK, REF.: RETUR, p. 50, note 11.

“Dear me,” said he, “it was only this moment at breakfast that I was saying to my friend, Dr. Watson, that sensational cases had disappeared out of our papers.”

Our visitor stretched forward a quivering hand and picked up the *Daily Telegraph*,⁴² which still lay upon Holmes’ knee.

“If you had looked at it, sir, you would have seen at a glance what the errand is on which I have come to you this morning. I feel as if my name and my misfortune must be in every man’s mouth.” He turned it over to expose the central page. “Here it is, and with your permission I will read it to you. Listen to this, Mr. Holmes. The head-lines are: ‘Mysterious Affair at Lower Norwood. Disappearance of a Well-known Builder. Suspicion of Murder and Arson. A Clue to the Criminal.’ That is the clue which they are already following, Mr. Holmes, and I know that it leads infallibly to me. I have been followed from London Bridge Station,⁴³ and I am sure that they are only waiting for the warrant to arrest me. It will break my mother’s heart — it will break her heart!” He wrung his hands in an agony of apprehension, and swayed backwards and forwards in his chair.

I looked with interest upon this man, who was accused of being the perpetrator of a crime of violence. He was flaxen-haired and handsome, in a washed-out negative fashion, with frightened blue eyes, and a clean-shaven face, with a weak, sensitive mouth. His age may have been about twenty-seven, his dress and bearing that of a gentleman. From the pocket of his light summer overcoat protruded the bundle of indorsed papers which proclaimed his profession.⁴⁴

“We must use what time we have,” said Holmes. “Watson, would you have the kindness to take the paper and to read the paragraph in question?”

⁴² LSK, REF.: RETUR, p. 50, note 12.

⁴³ LSK, REF.: RETUR, p. 50, note 13.

⁴⁴ GUY MARRIOTT: Lawyers’ “indorsed papers” (perhaps more usually “endorsed papers”) refers to the practice of making a note on papers relating to a particular issue, the note perhaps relating to the settlement terms of the matter, or other terms of importance in the case. If the papers are a written brief sent by a solicitor to a barrister, for the purpose of instructing the barrister to appear in court on behalf of the solicitor’s client, then the brief will be endorsed with the name of the court in which the action is to be tried, the title of the action, and the names of counsel and of the solicitor who delivers the brief. The barrister’s agreed fee is also endorsed on the brief. When concluded, the result of the action is endorsed on the brief by counsel, or if the action is compromised, the terms of the compromise are endorsed on each brief and signed by counsel on each side.

Underneath the vigorous head-lines which our client had quoted, I read the following suggestive narrative:

Late last night, or early this morning,⁴⁵ an incident occurred at Lower Norwood which points, it is feared, to a serious crime. Mr. Jonas Oldacre is a well-known resident of that suburb, where he has carried on his business as a builder for many years. Mr. Oldacre is a bachelor, fifty-two years of age, and lives in Deep Dene House,⁴⁶ at the Sydenham end of the road of that name.⁴⁷ He has had the reputation of being a man of eccentric habits, secretive and retiring. For some years he has practically withdrawn from the business, in which he is said to have amassed considerable wealth. A small timber-yard still exists, however, at the back of the house, and last night, about twelve o'clock, an alarm was given that one of the stacks was on fire. The engines were soon upon the spot, but the dry wood burned with great fury, and it was impossible to arrest the conflagration until the stack had been entirely consumed. Up to this point the incident bore the appearance of an ordinary accident, but fresh indications seem to point to serious crime. Surprise was expressed at the absence of the master of the establishment from the scene of the fire, and an inquiry followed, which showed that he had disappeared from the house. An examination of his room revealed that the bed had not been slept in, that a safe which stood in it was open, that a number of important papers were scattered about the room, and, finally, that there were signs of a murderous struggle, slight traces of blood being found within the room, and an oaken walking-stick, which also showed stains of blood upon the handle. It is known that Mr. Jonas Oldacre had received a late visitor in his bedroom upon that night, and the stick found has been identified as the property of this person, who is a young London solicitor⁴⁸ named John Hector McFarlane, junior

⁴⁵ LSK, REF.: RETUR, p. 51, note 14; LSK, 2 NEW ANN. p. 833, note 9.

⁴⁶ LSK, REF.: RETUR, p. 51, note 15.

⁴⁷ LSK, REF.: RETUR, p. 51, note 16.

⁴⁸ JOSHUA CUMBY: In England in 1894, there were only two classes of legal professional: solicitors and barristers. Medieval "attorneys" were abolished together with the Court of Common Pleas (where they practiced) by the Judicature Act of 1873. BAKER, *supra* note 39, at 164 n.30. Baker notes that "[i]n the United States the older title lives on as a generic term for all legal practitioners, although the Supreme Court ordered in 1790 that attorneys should not practice as counsellors." *Id.* Baker is referring to an order of the Supreme Court that "declared and established" certain rules when the justices first convened in New York in 1790. See Appointment of Justices, 2 U.S. (2 Dall.) 399-400 (1790) (ordering "[t]hat counsellors shall not practise as attorney, nor attorney as counsellors in this court" and prescribing the oath for those admitted to practice before the Court: "I do solemnly swear, that I will demean myself as an attorney (or counsellor) of the court, agreeably and according to law; and that I will support the constitution of the United States.").

partner of Graham and McFarlane, of 426, Gresham Buildings, E.C.⁴⁹ The

⁴⁹ GUY MARRIOTT: As already noted, solicitors could, if they chose to do so, practice in partnership, and the article in the *Daily Telegraph* advises the reader that McFarlane is in partnership with a Mr. Graham. Traditionally, partners would each take the same annual sum out of the profits of the partnership, although by noting that McFarlane is a “junior partner” we are to understand that, in this case, Mr. Graham takes a larger share of the partnership profits than does Mr. McFarlane. Partnerships existed at common law in England, and the Partnership Act, 1890, remains largely unchanged today as the statutory basis for partnership law in Great Britain. The Act generally applies in the absence of any express contrary agreement between the partners. See GEOFFREY MORSE, *PARTNERSHIP LAW* (7th ed., 2010, Oxford University Press).

The post code “E.C.” indicates that the solicitors’ office is in the “Eastern Central” area of London, such post codes being introduced during 1857 (see the website of the British Postal Museum and Archive at www.postalheritage.org.uk). Gresham Buildings stood in Basinghall Street in the City of London, and the City of London’s ancient Guildhall is adjacent. The *London Gazette* issue of August 5, 1870, notes a Mr. Chatteris in practice as an accountant at number 1 Gresham Buildings, Basinghall Street, and the issue of February 25, 1908, notes Pothecary & Co. in practice as solicitors, also at number 1 Gresham Buildings, Basinghall Street London E.C. It perhaps seems unlikely that offices in Gresham Buildings were numbered as high as “426.” The building no longer exists. Basinghall Street suffered severe aerial bomb damage during the Second World War, and the whole area has been extensively redeveloped. We must assume that it is only a coincidence that Macfarlanes (note spelling) is today one of London’s largest and respected firm of solicitors — their website at www.macfarlanes.com notes that the firm was founded in the City of London in 1875 by George Watson Neish, who was joined in partnership by John Embleton Macfarlane in 1894, whose sons and grandsons continued the firm which, in 1962, adopted its current name of Macfarlanes. See also LSK, Ref.: RETUR, p. 51, note 17; LSK, 2 New Ann. p. 834, note 10.

CATTLEYA M. CONCEPCION: Guides to Sherlock Holmes’s London have identified Gresham Buildings as Gresham House on Old Broad Street, and Gresham House on Holborn Viaduct. E.g., ARTHUR M. ALEXANDER, *HOT ON THE SCENT* 193 (1999); THOMAS BRUCE WHEELER, *THE NEW FINDING SHERLOCK’S LONDON* 130 (2009). Elsewhere in this *Almanac*, the editors have suggested two additional possibilities: the building of the Gresham Life Assurance Society in the Poultry, and Gresham Buildings on Basinghall Street. See Ross E. Davies & Cattleya M. Concepcion, *Scenes from a Young Lawyer’s Salvation*, in 2015 GREEN BAG ALM. 1, n.5. The buildings on Basinghall Street were most likely the inspiration for the location of John Hector McFarlane’s law practice. Not only did they share the name of McFarlane’s office block — Gresham Buildings, rather than some other variant — they were notable offices during Holmes’s time. According to a contemporary source on London, “several of the great blocks of offices and warehouses, which [had] become so marked a feature of City architecture, [had] been erected in [Basinghall Street], notably Gresham Buildings, which contain[ed] a hundred distinct offices.” 1 HENRY B. WHEATLEY, *LONDON PAST AND PRESENT* 122 (1891). Situated on the east side of Basinghall Street at Nos. 1 and 2, they were near the junction with Gresham Street, on the side opposite of Gresham College and Guildhall. E.g., HENRY A. HARBEN, *A DICTIONARY OF LONDON* 278 (1918) (providing

police believe that they have evidence in their possession which supplies a very convincing motive for the crime, and altogether it cannot be doubted that sensational developments will follow.

Later. — It is rumoured as we go to press that Mr. John Hector McFarlane has actually been arrested on the charge of the murder of Mr. Jonas Oldacre. It is at least certain that a warrant has been issued. There have been further and sinister developments in the investigation at Norwood. Besides the signs of a struggle in the room of the unfortunate builder it is now known that the French windows of his bedroom (which is on the ground floor) were found to be open, that there were marks as if some bulky object had been dragged across to the wood-pile, and, finally, it is asserted that charred remains⁵⁰ have been found among the charcoal ashes of the fire. The police theory is that a most sensational crime has been committed, that the victim was clubbed to death in his own bedroom, his papers rifled, and his dead body dragged across to the wood-stack, which was then ignited so as to hide all traces of the crime. The conduct of the criminal investigation has been left in the experienced hands of Inspector Lestrade, of Scotland Yard, who is following up the clues with his accustomed energy and sagacity.

Sherlock Holmes listened with closed eyes and finger-tips together to this remarkable account.

“The case has certainly some points of interest,” said he, in his languid fashion. “May I ask, in the first place, Mr. McFarlane, how it is that you are still at liberty, since there appears to be enough evidence to justify your arrest?”

“I live at Torrington Lodge, Blackheath,⁵¹ with my parents,⁵² Mr. Holmes, but last night, having to do business very late with Mr. Jonas Oldacre, I stayed at an hotel in Norwood, and came to my business from

P.O. Directory No. 1 for Gresham Buildings); THE POST OFFICE LONDON DIRECTORY 1210 (1891) (listing, for example, solicitors Myers & Co. at 2 Gresham Buildings). Gresham Buildings must have been impressive edifices to call one's office. They “[rose] comparatively high” against the surrounding “‘houses,’ ‘chambers,’ and ‘buildings.’”⁸ WALTER BESANT, SURVEY OF LONDON 68 (1910). “[F]aced with dark-coloured stone,” the “ground-floor walls on the exterior [were] covered with the most elaborate stonework representations of flowers and foliage.” *Id.*

ROSS E. DAVIES: On the other hand, Conan Doyle's profitable association with the Gresham Life Assurance Society early in his career might weigh in favor of its offices. *See, e.g.,* LELLENBERG ET AL., LIFE IN LETTERS at 5, 186-236.

⁵⁰ LSK, REF.: RETUR, p. 52, note 18.

⁵¹ LSK, REF.: RETUR, p. 52, note 19.

⁵² LSK, REF.: RETUR, p. 52, note 20.

there.⁵³ I knew nothing of this affair until I was in the train, when I read what you have just heard. I at once saw the horrible danger of my position, and I hurried to put the case into your hands. I have no doubt that I should have been arrested either at my city office or at my home. A man followed me from London Bridge Station, and I have no doubt — Great Heaven! what is that?"

It was a clang of the bell, followed instantly by heavy steps upon the stair. A moment later, our old friend Lestrade appeared in the doorway. Over his shoulder I caught a glimpse of one or two uniformed policemen outside.

"Mr. John Hector McFarlane?" said Lestrade.

Our unfortunate client rose with a ghastly face.

"I arrest you for the wilful murder of Mr. Jonas Oldacre, of Lower Norwood."

McFarlane turned to us with a gesture of despair, and sank into his chair once more like one who is crushed.

"One moment, Lestrade," said Holmes. "Half an hour more or less can make no difference to you, and the gentleman was about to give us an account of this very interesting affair, which might aid us in clearing it up."

"I think there will be no difficulty in clearing it up," said Lestrade, grimly.

"None the less, with your permission, I should be much interested to hear his account."

"Well, Mr. Holmes, it is difficult for me to refuse you anything, for you have been of use to the force once or twice in the past, and we owe you a good turn at Scotland Yard," said Lestrade. "At the same time I must remain with my prisoner, and I am bound to warn him that anything he may say will appear in evidence against him."⁵⁴

⁵³ LSK, REF.: RETUR, p. 52, note 21.

⁵⁴ GEOFFREY B. FEHLING: Doyle's works referenced *Miranda*-like warnings as early as the late nineteenth century, *see, e.g.*, DOYLE, THE SIGN OF THE FOUR 48 (House of Stratus 2008) (1890) ("Mr. Sholto, it is my duty to inform you that anything which you may say will be used against you. I arrest you in the Queen's name as being concerned in the death of your brother."), but their actual use in England during this time is less than clear. Indeed, despite the Inspector's insistence that he was duty-bound to provide certain warnings to prisoners, no formal rules governing investigations by police existed until the formative Judges' Rules were codified in 1912. *See* T.E. St. Johnston, *Judges' Rules and Police Interrogation in England Today*, 57 J. CRIM. L. & CRIMINOLOGY 85, 85 (1966):

"I wish nothing better," said our client. "All I ask is that you should hear and recognise the absolute truth."

Lestrade looked at his watch. "I'll give you half an hour," said he.

"I must explain first," said McFarlane, "that I knew nothing of Mr. Jonas Oldacre. His name was familiar to me, for many years ago my parents were acquainted with him, but they drifted apart. I was very much surprised, therefore, when yesterday, about three o'clock in the afternoon, he walked into my office in the city. But I was still more astonished when he told me the object of his visit. He had in his hand several sheets of a note-book, covered with scribbled writing — here they are — and he laid them on my table.

"'Here is my will,' said he. 'I want you, Mr. McFarlane, to cast it into proper legal shape. I will sit here while you do so.'

"I set myself to copy it, and you can imagine my astonishment when I found that, with some reservations, he had left all his property to me. He was a strange little ferret-like man, with white eyelashes, and when I looked up at him I found his keen, grey eyes fixed upon me with an amused expression.⁵⁵ I could hardly believe my own senses as I read the terms of the will; but he explained that he was a bachelor with hardly any living relation, that he had known my parents in his youth, and that he had always heard of me as a very deserving young man, and was assured that his money would be in worthy hands. Of course, I could only stammer out my thanks. The will was duly finished, signed, and witnessed by my

Prior to 1912 the problems of investigation and interrogation were not so profound as they are today. No rules governed investigations by the police, and indeed, it was not until 1912 that some form of guidance was given to them when questioning persons suspected or charged with crime. This is not to say that the police in the nineteenth century were allowed unlimited scope when carrying out their investigations. As far back as 1870 Lord Chief Justice Cockburn said at the Central Criminal Court:

"You may ask a man a question with an honest intention to elicit the truth and ascertain whether there are grounds for apprehending him; but with a fore-gone intention of arresting him, to ask him questions for the main purpose of getting anything out of him that may afterwards be used against him, is very improper proceeding."

No doubt it is possible to go back still further. The point is, however, that there has been some form of guidance for many years, although it was not generally known to police officers and not enforced to any great extent.

⁵⁵ LSK, REF.: RETUR, p. 53, note 22; LSK, 2 NEW ANN. p. 837, note 11.

clerk. This is it on the blue paper, and these slips, as I have explained, are the rough draft.⁵⁶ Mr. Jonas Oldacre then informed me that there were a

⁵⁶ GUY MARRIOTT: McFarlane had been retained by Oldacre to take Oldacre's draft notes ("these slips") of the will, which he had written on "several sheets of a note-book" and then to "cast it in to proper legal shape." McFarlane would have written the will in draft on the blue paper then used for drafts, and the engrossment of the will for signature would be written on white paper, and presumably retained by Oldacre after execution of the will. As noted by S.J. Bailey, author of *The Law of Wills* (2d ed., 1940, London, Sir Isaac Pitman & Sons), "there is no rule which compels the body of a will to be written by the testator, or in his presence; for although the testator is free to draft his own will if he so desires, it is usually advisable to instruct a solicitor to prepare it for him."

However, the issues arising from the witnessing of the will, as reported by Dr. Watson apparently quoting McFarlane, have engaged the attention of lawyers for many years. Only one witness — "my clerk" — is noted as witnessing Jonas Oldacre's signature, but the Wills Act, 1837, had created a uniform set of rules whereby all wills (with one exception only, in favour of wills disposing of personalty made by soldiers in actual military service, or by sailors at sea) were required to be in writing, signed and attested by two or more witnesses. The 1837 Act was the relevant act at the time of the Oldacre will, and much of the Act is still the law today. Section 9 of the 1837 Act provides that "no Will shall be valid unless it shall be in Writing and executed in manner hereinafter mentioned (that is to say) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator."

We may assume that the soldiers-and-sailors exception is of no application in this case. So where were the required two witnesses? Some commentators on the matter have assumed that McFarlane himself was the second witness. But, by section 15 of the 1837 Act, "... if any Person shall attest the Execution of any Will to whom ... any beneficial Devise, Legacy, Estate, Interest, Gift, or Appointment, of or affecting any Real or Personal Estate (other than and except Charges and Directions for the Payment of any Debt or Debts) shall be thereby given or made, such Devise, Legacy, Estate, Interest, Gift, or Appointment shall, so far only as concerns such Person attesting the Execution of such Will ... be utterly null and void." So if McFarlane was the second witness to attest Oldacre's signature, he could take no benefit under the will. As we must assume McFarlane (and indeed, his clerk) would be very familiar with the law on the attestation of wills, some commentators have taken the view that Dr. Watson failed to record that McFarlane stated to Holmes that there had been another witness besides McFarlane's clerk — Graham's clerk, for example — and that Oldacre's will was indeed validly executed.

We may perhaps note here that when it was clear that the remains in the fire were not those of Jonas Oldacre, but for some reason Oldacre thereafter failed to re-appear, the presumption in English common law (and enacted into statute law only as recently as 2013) is that persons who have been absent, unheard of, for seven years are dead, and the will (assuming properly executed with two witnesses) could then have been proved in favour of McFarlane's inheritance. On the other hand, note also that at common law at this time, it was not clear whether or not a body was required to secure a murder conviction — and

number of documents — building leases, title-deeds, mortgages, scrip,⁵⁷ and so forth — which it was necessary that I should see and understand. He said that his mind would not be easy until the whole thing was settled, and he begged me to come out to his house at Norwood that night, bringing the will with me, and to arrange matters. ‘Remember, my boy,

without Holmes’s intervention in the case, McFarlane could perhaps have been tried and convicted for murder. The point is uncertain because of the *Campden Wonder* case of 1660 (three persons hanged for the murder of William Harrison of Chipping Campden in Gloucestershire, no body found, and Harrison himself returned from abroad in 1662). To avoid such a miscarriage of justice occurring again, the “no body, no murder” rule is said to have originated. The rule was definitively abolished by Lord Chief Justice Goddard only as late as 1954 in the case of *R v. Onufrejczyk*, Goddard LCJ noting on the appeal, which upheld the murder conviction of Onufrejczyk, that “things have moved on since the days of the *Campden Wonder*” and “. . . it is equally clear that the fact of death, like any other fact, can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that it must lead to one conclusion only.”

If McFarlane had been convicted of murder, it was not clear at the time whether or not he could inherit under the will (assuming properly executed with two witnesses). The Forfeiture Act, 1870, had abolished the previous common law rule that a conviction for felony led to the automatic forfeiture of all of the felon’s possessions (both real and personal) to the Crown, and murder was a felony. But for reasons of public policy, the Courts in England subsequently developed the rule that no person found guilty of the murder or manslaughter of the testator could benefit from the deceased’s will. This was so stated by the Court of Appeal in 1892 in *Cleaver v. Mutual Reserve Fund Life Association* and applied in *Re Crippen* by the High Court in 1911, when the court determined that the notorious murderer Dr. Crippen could take no benefit under the intestacy of his murdered wife Cora. (It will be remembered that much of the notoriety of the Crippen case arose from the use of wireless telegraphy by the Captain of the *SS Montrose* to alert the British authorities that Crippen had fled London for the United States, and was on board this ship, and the ability of Chief Inspector Dew, of Scotland Yard, to then catch a faster ship, *SS Laurentic*, and arrest Crippen when the *SS Montrose* arrived in the St Lawrence River.) The *Cleaver* and *Crippen* cases were murder, and the court reached the same conclusion in the manslaughter case of *Hall v. Knight and Baxter* in 1914. However, in *Re Houghton* in 1915 the court determined that this rule did not apply if the murderer was insane when he killed the deceased. See also LSK, REF.: RETUR, p. 53, note 23; LSK, 2 NEW ANN. p. 837, note 12.

IRA BRAD MATETSKY: Watson had previously displayed ignorance of the requirement that a valid will under British law requires two independent witnesses in at least one earlier case (“The Five Orange Pips”); query whether this increases the likelihood that Watson here simply mis-recalled or misreported what he regarded as a minor detail of the will execution rather than a potentially dispositive one. For further discussion of the issues surrounding Jonas Oldacre’s will, citing additional authorities, see Stephen R. Alton, *The Game Is Afoot!: The Significance of Donative Transfers in the Sherlock Holmes Canon*, 46 REAL PROP., TRUST & EST. J. 125, 144-48 (Spring 2011).

⁵⁷ LSK, REF.: RETUR, p. 54, note 24.

not one word to your parents about the affair until everything is settled. We will keep it as a little surprise for them.' He was very insistent upon this point, and made me promise it faithfully.

"You can imagine, Mr. Holmes, that I was not in a humour to refuse him anything that he might ask. He was my benefactor, and all my desire was to carry out his wishes in every particular. I sent a telegram home, therefore, to say that I had important business on hand, and that it was impossible for me to say how late I might be. Mr. Oldacre had told me that he would like me to have supper with him at nine, as he might not be home before that hour. I had some difficulty in finding his house, however, and it was nearly half-past before I reached it. I found him —"

"One moment!" said Holmes. "Who opened the door?"

"A middle-aged woman, who was, I suppose, his housekeeper."⁵⁸

"And it was she, I presume, who mentioned your name?"

"Exactly," said McFarlane.

"Pray proceed."

McFarlane wiped his damp brow, and then continued his narrative:

"I was shown by this woman into a sitting-room, where a frugal supper was laid out.⁵⁹ Afterwards, Mr. Jonas Oldacre led me into his bedroom, in which there stood a heavy safe. This he opened and took out a mass of documents, which we went over together. It was between eleven and twelve when we finished. He remarked that we must not disturb the housekeeper. He showed me out through his own French window, which had been open all this time."

"Was the blind down?" asked Holmes.

"I will not be sure, but I believe that it was only half down. Yes, I remember how he pulled it up in order to swing open the window. I could not find my stick, and he said, 'Never mind, my boy, I shall see a good deal of you now, I hope, and I will keep your stick until you come back to claim it.' I left him there, the safe open, and the papers made up in

⁵⁸ LSK, REF.: RETUR, p. 54, note 25; LSK, 2 NEW ANN. p. 837-38, note 13.

⁵⁹ JULIA ROSENBLATT: The frugal supper that Oldacre provided should not be confused with a dinner. Dinner would have been consumed earlier in the evening. This post-9:00 p.m. repast provided some nourishment for the two or three hours of intensive work ahead, and its frugal nature should have been a clue as to Oldacre's miserly nature. The evening's business was not the act of generosity that McFarlane perceived. Such a meal would be served cold, all the more so because this was a hot summer's evening. It would have consisted of bread, cheese and, perhaps, some cold leftover meat, and some seasonal fruit.

packets upon the table. It was so late that I could not get back to Blackheath, so I spent the night at the Anerley Arms, and I knew nothing more until I read of this horrible affair in the morning.”⁶⁰

⁶⁰ ROSS E. DAVIES: McFarlane’s decision to spend the night at the Anerley Arms is a puzzler:

Lower Norwood and Blackheath, Christopher Morley estimates, are only four miles from each other. “It has always bothered me,” he comments in “Clinical Notes by a Resident Patient,” “why could not the unhappy John Hector McFarlane get back from Lower Norwood to Blackheath that night?”

LSK, 2 NEW ANN. p. 838, note 14; *see also, e.g.*, ALISTAIR DUNCAN, CLOSE TO HOLMES 176-78 (2009); THE OXFORD SHERLOCK HOLMES: THE RETURN OF SHERLOCK HOLMES 341 (1993) (Richard Lancelyn Green, ed.). Leslie Klinger considers and is quite reasonably skeptical of McFarlane’s own rationale for this odd choice of overnight arrangements:

McFarlane mentions later in his narrative that he and Jonas Oldacre completed their business “between eleven and twelve.” It is possible that McFarlane may have thought this “very late,” but considering the short distance to his parents’ house, spending a night in a hotel seems like an unnecessary exercise and expense.

LSK, 2 NEW ANN. pp. 838-39, note 14; *see also* LSK, REF.: RETUR, p. 55, note 26. As a practical matter, Morley and Klinger are correct. Trains ran at that hour, making the trip from Lower Norwood to Blackheath short in both distance and time. *See, e.g.*, BRADSHAW’S GENERAL RAILWAY AND STEAM NAVIGATION GUIDE, FOR GREAT BRITAIN AND IRELAND 118-19 (Dec. 1895). Besides, the distance is short enough to walk, even for a young man with a bit of asthma, nighttime being a cooler alternative to what Holmes describes as the “very warm . . . past few days.”

Another possibility — one that might account for both McFarlane’s opting for Anerley over Blackheath and his failure to give a plausible reason for that choice — hinges on McFarlane’s age and living arrangements. He is, says Watson, “about twenty-seven,” with the “dress and bearing . . . of a gentleman.” And yet he lives at home with his parents. As a partner in a city law firm, McFarlane surely has the means to live independently. But he is staying under the same roof as his mom and dad, perhaps nobly sharing living expenses and paying rent to his parents in order to preserve their dignity while propping up their feeble finances. (As Holmes soon learns from McFarlane’s mother, she broke her engagement with Oldacre to “marry a better, if poorer, man.”) It is not difficult to imagine someone of McFarlane’s age and situation leaping at (perhaps even contriving) an opportunity to spend a night on the town, and then expecting (or at least hoping) that what happened in Anerley would stay in Anerley.

Indeed, McFarlane may be keeping quiet about his night at the Anerley Arms because whatever he did during that time was not anything he had intended or expected to ever disclose to anyone. Consider, for example, the business model of another 19th-century Anerley Arms — this one in Portsmouth:

In fact, it is likely that beerhouse profits might have hinged upon prostitution, and as the solicitor for the Anerley Arms, Somers Road [in Portsmouth], argued in 1866, “It was almost impossible for beerhouse keepers to live unless they applied their houses for immoral purposes.”

R.C. RILEY & PHILIP ELEY, PUBLIC HOUSES AND BEERHOUSES IN NINETEENTH CENTURY

"Anything more that you would like to ask, Mr. Holmes?" said Lestrade, whose eyebrows had gone up once or twice during this remarkable explanation.

"Not until I have been to Blackheath."

"You mean to Norwood," said Lestrade.

"Oh, yes, no doubt that is what I must have meant," said Holmes, with his enigmatical smile. Lestrade had learned by more experiences than he would care to acknowledge that that razor-like brain could cut through that which was impenetrable to him. I saw him look curiously at my companion.

"I think I should like to have a word with you presently, Mr. Sherlock Holmes," said he. "Now, Mr. McFarlane, two of my constables are at the door, and there is a four-wheeler waiting." The wretched young man arose, and with a last beseeching glance at us walked from the room. The officers conducted him to the cab,⁶¹ but Lestrade remained.

PORTSMOUTH 12 (1983) (citing the *Hampshire Telegraph*, Sept. 8, 1866). Perhaps not coincidentally, Arthur Conan Doyle spent the last years of his bachelorhood — when he, like McFarlane here, was in his mid-20s — in Portsmouth, where he did some carousing of his own, including escapades that he could not recall because he was drunk at the time. See LYCETT, *LIFE AND TIMES* ch. 6; STASHOWER, *TELLER OF TALES* ch. 5. In any event, if the Anerley Arms near Lower Norwood operated on the same business model as did its namesake in Portsmouth, McFarlane could be in a real bind: He might have an alibi for the time of the alleged murder of Oldacre, but an alibi that involves confessing to immoral or perhaps even criminal acts is risky. The recently enacted Criminal Law Amendment Act of 1885 (48 & 49 Vict. c.69) was the culmination of a quarter-century of increasingly broad legislation criminalizing not only prostitution-related abuses, but also sexual (including same-sex) activity itself. Oscar Wilde was famously convicted of violating the 1885 Act. See MICHAEL S. FOLDY, *THE TRIALS OF OSCAR WILDE: DEVIANCE, MORALITY, AND LATE-VICTORIAN SOCIETY* (1997); see also, e.g., JUDITH R. WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE* 211-51 (1980; 1999 prtg.); Laura I. Appleman, *Oscar Wilde's Long Tail: Framing Sexual Identity in the Law*, 70 MD. L. REV. 985 (2011). Conan Doyle was a supporter of regulation of that sort. See LYCETT, *LIFE AND TIMES* at 101. So, disclosing details of his night at the Anerley Arms might expose McFarlane to prosecution (or at least opprobrium), and might not carry much weight with a jury (Holmes would certainly advise McFarlane not to rely on jurors!) or even be allowed into evidence. It would still be a dangerous maneuver in the modern United States. See, e.g., *State v. Via*, 704 P.2d 238, 251-52 (Ariz. 1985); *U.S. v. Williams*, 738 F.2d 172, 177-78 (7th Cir. 1984) (citing *U.S. v. Evans*, 635 F.2d 1124, 1125-26 (4th Cir. 1980)).

⁶¹ GUY MARRIOTT: London's horse-drawn cabs at this time were of two types — the two-wheeler and the four-wheeler. The two-wheeler was the famous "Hansom Cab" which could take two passengers, and where the driver was placed behind the body of the cab. Prime Minister Benjamin Disraeli called these cabs "the gondolas of London." The four-

Holmes had picked up the pages which formed the rough draft of the will, and was looking at them with the keenest interest upon his face.

"There are some points about that document, Lestrade, are there not?" said he, pushing them over.

The official looked at them with a puzzled expression.

"I can read the first few lines, and these in the middle of the second page, and one or two at the end. Those are as clear as print," said he, "but the writing in between is very bad, and there are three places where I cannot read it at all."

"What do you make of that?" said Holmes.

"Well, what do *you* make of it?"

"That it was written in a train. The good writing represents stations, the bad writing movement, and the very bad writing passing over points. A scientific expert would pronounce at once that this was drawn up on a suburban line, since nowhere save in the immediate vicinity of a great city could there be so quick a succession of points. Granting that his whole journey was occupied in drawing up the will, then the train was an express, only stopping once between Norwood and London Bridge."

Lestrade began to laugh.

"You are too many for me when you begin to get on your theories, Mr. Holmes," said he. "How does this bear on the case?"

"Well, it corroborates the young man's story to the extent that the will was drawn up by Jonas Oldacre in his journey yesterday. It is curious — is it not? — that a man should draw up so important a document in so haphazard a fashion. It suggests that he did not think it was going to be of much practical importance. If a man drew up a will which he did not intend ever to be effective, he might do it so."

"Well, he drew up his own death warrant at the same time," said Lestrade.

"Oh, you think so?"

"Don't you?"

wheeler was officially called a "Clarence" but was universally known as a "growler" from the supposed noise of its wheels on the London cobblestones. The four-wheeler could take four passengers, plus luggage on the roof, and so was commonly found at railway stations for passengers with luggage, or used by families, or old ladies who thought a Hansom was too dashing for them — or by Scotland Yard taking prisoners away.

“Well, it is quite possible, but the case is not clear to me yet.”

“Not clear? Well, if that isn’t clear, what *could* be clear? Here is a young man who learns suddenly that, if a certain older man dies, he will succeed to a fortune. What does he do? He says nothing to anyone, but he arranges that he shall go out on some pretext to see his client that night. He waits until the only other person in the house is in bed, and then in the solitude of the man’s room he murders him, burns his body in the wood-pile, and departs to a neighbouring hotel. The blood-stains in the room and also on the stick are very slight. It is probable that he imagined his crime to be a bloodless one, and hoped that if the body were consumed it would hide all traces of the method of his death — traces which, for some reason, must have pointed to him. Is not all this obvious?”

“It strikes me, my good Lestrade, as being just a trifle too obvious,” said Holmes. “You do not add imagination to your other great qualities, but if you could for one moment put yourself in the place of this young man, would you choose the very night after the will had been made to commit your crime? Would it not seem dangerous to you to make so very close a relation between the two incidents? Again, would you choose an occasion when you are known to be in the house, when a servant has let you in? And, finally, would you take the great pains to conceal the body, and yet leave your own stick as a sign that you were the criminal? Confess, Lestrade, that all this is very unlikely.”

“As to the stick, Mr. Holmes, you know as well as I do that a criminal is often flurried, and does such things, which a cool man would avoid. He was very likely afraid to go back to the room. Give me another theory that would fit the facts.”

“I could very easily give you half a dozen,” said Holmes. “Here, for example, is a very possible and even probable one. I make you a free present of it. The older man is showing documents which are of evident value. A passing tramp sees them through the window, the blind of which is only half down. Exit the solicitor. Enter the tramp! He seizes a stick, which he observes there, kills Oldacre, and departs after burning the body.”

“Why should the tramp burn the body?”

“For the matter of that, why should McFarlane?”

“To hide some evidence.”

“Possibly the tramp wanted to hide that any murder at all had been committed.”

“And why did the tramp take nothing?”

“Because they were papers that he could not negotiate.”

Lestrade shook his head, though it seemed to me that his manner was less absolutely assured than before.

“Well, Mr. Sherlock Holmes, you may look for your tramp, and while you are finding him we will hold on to our man. The future will show which is right. Just notice this point, Mr. Holmes: that so far as we know, none of the papers were removed, and that the prisoner is the one man in the world who had no reason for removing them, since he was heir-at-law, and would come into them in any case.”

My friend seemed struck by this remark.

“I don’t mean to deny that the evidence is in some ways very strongly in favour of your theory,” said he. “I only wish to point out that there are other theories possible. As you say, the future will decide. Good morning! I dare say that in the course of the day, I shall drop in at Norwood and see how you are getting on.”

When the detective departed, my friend rose and made his preparations for the day’s work with the alert air of a man who has a congenial task before him.

“My first movement, Watson,” said he, as he bustled into his frock-coat, “must, as I said, be in the direction of Blackheath.”

“And why not Norwood?”

“Because we have in this case one singular incident coming close to the heels of another singular incident. The police are making the mistake of concentrating their attention upon the second, because it happens to be the one which is actually criminal. But it is evident to me that the logical way to approach the case is to begin by trying to throw some light upon the first incident — the curious will, so suddenly made, and to so unexpected an heir. It may do something to simplify what followed. No, my dear fellow, I don’t think you can help me. There is no prospect of danger, or I should not dream of stirring out without you. I trust that when I see you in the evening, I will be able to report that I have been able to do something for this unfortunate youngster, who has thrown himself upon my protection.”

It was late when my friend returned, and I could see, by a glance at his haggard and anxious face, that the high hopes with which he had

started had not been fulfilled. For an hour he droned away upon his violin, endeavouring to soothe his own ruffled spirits. At last he flung down the instrument, and plunged into a detailed account of his misadventures.

"It's all going wrong, Watson — all as wrong as it can go. I kept a bold face before Lestrade, but, upon my soul, I believe that for once the fellow is on the right track and we are on the wrong. All my instincts are one way, and all the facts are the other, and I much fear that British juries have not yet attained that pitch of intelligence when they will give the preference to my theories over Lestrade's facts."

"Did you go to Blackheath?"

"Yes, Watson, I went there, and I found very quickly that the late lamented Oldacre was a pretty considerable blackguard. The father was away in search of his son. The mother was at home — a little, fluffy, blue-eyed person, in a tremor of fear and indignation. Of course, she would not admit even the possibility of his guilt. But she would not express either surprise or regret over the fate of Oldacre. On the contrary, she spoke of him with such bitterness that she was unconsciously considerably strengthening the case of the police for, of course, if her son had heard her speak of the man in this fashion, it would predispose him towards hatred and violence. 'He was more like a malignant and cunning ape than a human being' said she, 'and he always was, ever since he was a young man.'⁶²

⁶² HADAR AVIRAM: It is no coincidence that Doyle chooses the ape simile as part of Mrs. McFarlane's description of her old suitor. "The Adventure of the Norwood Builder" is one of the later stories in the Sherlock Holmes canon, and at the time of its publication in 1903 Darwin's *The Origin of Species* (1855) had already been a popular and familiar scientific work for several decades. The interest in science and in evolution was very central to the emerging field of criminology. In 1865, Cesare Lombroso, an Italian doctor, published *L'Uomo Delinquente* (Criminal Man), establishing the positivist school of criminology. CESARE LOMBROSO, CRIMINAL MAN (2006 [1865]). In this book and other works he analyzed skulls, facial expressions, body types and other physical features of criminals of all kinds, attributing their criminality (and sometimes their particular criminal occupation) to their essential biological makeup. According to Lombroso, who was strongly inspired by Darwinism and some of its then-accepted implications, some of the common physical features he found among criminals were evidence of atavism, and the people exhibiting them were evolutionary "throwbacks" who reverted to a primitive state. Doyle was well aware of Darwinism — biological and social — and many of his Sherlock Holmes stories exhibit, in the physical descriptions of criminals and their actions, a strong adherence to positivist criminology. See generally DAVID HORN, THE CRIMINAL BODY: LOMBROSO AND THE ANATOMY OF DEVIANCE (2003); NICOLE HAHN RAFTER, CREATING BORN CRIMINALS (1998).

“‘You knew him at that time?’ said I.

“‘Yes, I knew him well, in fact, he was an old suitor of mine. Thank Heaven, that I had the sense to turn away from him, and to marry a better, if poorer, man. I was engaged to him, Mr. Holmes, when I heard a shocking story of how he had turned a cat loose in an aviary, and I was so horrified at his brutal cruelty that I would have nothing more to do with him.’ She rummaged in a bureau, and presently she produced a photograph of a woman, shamefully defaced and mutilated with a knife. ‘That is my own photograph,’ she said. ‘He sent it to me in that state, with his curse, upon my wedding morning.’⁶³

“‘Well,’ said I, ‘at least he has forgiven you now, since he has left all his property to your son.’

“‘Neither my son nor I want anything from Jonas Oldacre, dead or alive!’ she cried, with a proper spirit. ‘There is a God in Heaven, Mr. Holmes, and that same God who has punished that wicked man will show, in His own good time, that my son’s hands are guiltless of his blood.’

“Well, I tried one or two leads, but could get at nothing which would help our hypothesis, and several points which would make against it. I gave it up at last, and off I went to Norwood.

⁶³ HADAR AVIRAM: Stalking and domestic violence were not topics of research in the early twentieth century, but they were widespread and well known to readers at the time. In fact, one of the main reasons for the Women’s Christian Temperance Union’s advocacy for alcohol prohibition was the prevalence of domestic violence against women, which they linked, with considerable justification, to excessive drinking. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2011). Indeed, many heroines in Sherlock Holmes stories, criminals and victims alike, are portrayed as victims of physical and emotional abuse by their partners. Hadar Aviram, *Dainty Hands: Perceptions of Women and Crime in Sherlock Holmes Stories*, 22 *HASTINGS WOMEN’S L.J.* 233 (2011). The behavior that Mrs. McFarlane identified as so frightening and off-putting is classic stalking by a former partner. Recent research on stalking identifies several common traits among stalkers of former partners: a history of substance abuse, criminal involvement, violence, mental health problems, difficulty in forming relationships, and reacting with inappropriate emotion and jealousy. K.A. Roberts, *Stalking following the breakup of romantic relationships: characteristics of stalking former partners*, 47(5) *J. FORENSIC SCIENCES* 1070 (2002); K.A. Roberts, *Women’s experience of violence during stalking by former romantic partners: factors predictive of stalking violence*, 11(1) *VIOLENCE AGAINST WOMEN* 89 (2005). Mrs. McFarlane was very lucky (and prescient) to have chosen a different man for a husband; stalking is a common part in the cycle of domestic violence. Frances Coleman, *Stalking Behavior and the Cycle of Domestic Violence*, 12 *J. INTERPERSONAL VIOLENCE* 420 (1997).

“This place, Deep Dene House, is a big modern villa of staring brick, standing back in its own grounds, with a laurel-clumped lawn in front of it. To the right and some distance back from the road was the timber-yard which had been the scene of the fire. Here’s a rough plan on a leaf of my note-book. This window on the left is the one which opens into Oldacre’s room. You can look into it from the road, you see. That is about the only bit of consolation I have had to-day. Lestrade was not there, but his head constable did the honours. They had just found a great treasure-trove. They had spent the morning raking among the ashes of the burned wood-pile, and besides the charred organic remains they had secured several discoloured metal discs. I examined them with care, and there was no doubt that they were trouser buttons. I even distinguished that one of them was marked with the name of ‘Hyams,’ who was Oldacre’s tailor.⁶⁴ I then worked the lawn very carefully for signs and traces, but this drought has made everything as hard as iron. Nothing was to be seen save that some body or bundle had been dragged through a low privet hedge⁶⁵ which is in a line with the wood-pile. All that, of course, fits in with the official theory. I crawled about the lawn with an August sun on my back, but I got up at the end of an hour no wiser than before.

“Well, after this fiasco I went into the bedroom and examined that also. The blood-stains were very slight, mere smears and discolorations, but undoubtedly fresh. The stick had been removed, but there also the marks were slight. There is no doubt about the stick belonging to our client. He admits it. Footmarks of both men could be made out on the carpet, but none of any third person, which again is a trick for the other side. They were piling up their score all the time, and we were at a standstill.⁶⁶

“Only one⁶⁷ little gleam of hope did I get — and yet it amounted to nothing. I examined the contents of the safe, most of which had been taken out and left on the table. The papers had been made up into sealed envelopes, one or two of which had been opened by the police. They were not, so far as I could judge, of any great value, nor did the bank-

⁶⁴ LSK, REF.: RETUR, p. 58, note 27; LSK, 2 NEW ANN. p. 845, note 15.

⁶⁵ LSK, REF.: RETUR, p. 58, note 28.

⁶⁶ LSK, REF.: RETUR, p. 58, note 29.

⁶⁷ THE EDITORS: This word is “on” in the McClure, Phillips & Co. edition (1905) at 47, on which our annotation is based, and surely a typographical error. It is “one” in both the *Strand Magazine* (1903) at 491 and *Collier’s Weekly* (1903) at 18.

book show that Mr. Oldacre was in such very affluent circumstances. But it seemed to me that all the papers were not there. There were allusions to some deeds — possibly the more valuable — which I could not find. This, of course, if we could definitely prove it, would turn Lestrade's argument against himself; for who would steal a thing if he knew that he would shortly inherit it?

"Finally, having drawn every other cover and picked up no scent, I tried my luck with the housekeeper. Mrs. Lexington is her name — a little, dark, silent person, with suspicious and sidelong eyes. She could tell us something if she would — I am convinced of it. But she was as close as wax. Yes, she had let Mr. McFarlane in at half-past nine. She wished her hand had withered before she had done so. She had gone to bed at half-past ten. Her room was at the other end of the house, and she could hear nothing of what passed. Mr. McFarlane had left his hat, and to the best of her belief his stick, in the hall. She had been awakened by the alarm of fire. Her poor, dear master had certainly been murdered. Had he any enemies? Well, every man had enemies, but Mr. Oldacre kept himself very much to himself, and only met people in the way of business. She had seen the buttons, and was sure that they belonged to the clothes which he had worn last night. The wood-pile was very dry, for it had not rained for a month. It burned like tinder, and by the time she reached the spot, nothing could be seen but flames. She and all the firemen smelled the burned flesh from inside it. She knew nothing of the papers, nor of Mr. Oldacre's private affairs.

"So, my dear Watson, there's my report of a failure. And yet — and yet —" — he clenched his thin hands in a paroxysm of conviction — "I *know* it's all wrong. I feel it in my bones. There is something that has not come out, and that housekeeper knows it. There was a sort of sulky defiance in her eyes, which only goes with guilty knowledge. However, there's no good talking any more about it, Watson; but unless some lucky chance comes our way I fear that the Norwood Disappearance Case will not figure in that chronicle of our successes which I foresee that a patient public will sooner or later have to endure."⁶⁸

"Surely," said I, "the man's appearance would go far with any jury?"⁶⁹

⁶⁸ LSK, REF.: RETUR, p. 59, note 30; LSK, 2 NEW ANN. p. 846, note 16.

⁶⁹ IRA BRAD MATETSKY: The jury in a nineteenth-century criminal trial in England would have consisted of 12 male subjects between the ages of 21 and 60, drawn from within the

"That is a dangerous argument, my dear Watson. You remember that terrible murderer, Bert Stevens, who wanted us to get him off in '87?⁷⁰ Was there ever a more mild-mannered, Sunday-school young man?"

"It is true."

"Unless we succeed in establishing an alternative theory, this man is lost. You can hardly find a flaw in the case which can now be presented against him, and all further investigation has served to strengthen it. By the way, there is one curious little point about those papers which may serve us as the starting-point for an inquiry. On looking over the bank-book I found that the low state of the balance was principally due to large cheques which have been made out during the last year to Mr. Cornelius. I confess that I should be interested to know who this Mr. Cornelius may be with whom a retired builder has such very large transactions. Is it possible that he has had a hand in the affair? Cornelius might be a broker, but we have found no scrip to correspond with these large payments. Failing any other indication, my researches must now take the direction of an inquiry at the bank for the gentleman who has cashed these cheques. But I fear, my dear fellow, that our case will end ingloriously by Lestrade hanging our client, which will certainly be a triumph for Scotland Yard."

I do not know how far Sherlock Holmes took any sleep that night, but when I came down to breakfast I found him pale and harassed, his bright eyes the brighter for the dark shadows round them. The carpet round his chair was littered with cigarette-ends and with the early editions of the morning papers. An open telegram lay upon the table.

"What do you think of this, Watson?" he asked, tossing it across.

It was from Norwood, and ran as follows:—

"IMPORTANT FRESH EVIDENCE TO HAND. MCFARLANE'S GUILT DEFINITELY ESTABLISHED. ADVISE YOU TO ABANDON CASE. —LESTRADE"

"This sounds serious," said I.

"It is Lestrade's little cock-a-doodle of victory," Holmes answered, with a bitter smile. "And yet it may be premature to abandon the case."

county or city within which the crime was committed, who satisfied a property qualification (although "working men" started to be included on some juries beginning about 1870). See, e.g., DAVID BENTLEY, *ENGLISH CRIMINAL JUSTICE IN THE NINETEENTH CENTURY* ch. 10 (1998).

⁷⁰ LSK, REF.: RETUR, p. 59, note 31 (citing DONALD A. REDMOND, *SHERLOCK HOLMES: A STUDY IN SOURCES* 120-21 (1982), for an intriguing connection between Stevens and a couple of prominent 19th-century English lawyers).

After all, important fresh evidence is a two-edged thing, and may possibly cut in a very different direction to that which Lestrade imagines. Take your breakfast, Watson, and we will go out together and see what we can do. I feel as if I shall need your company and your moral support to-day.”

My friend had no breakfast himself,⁷¹ for it was one of his peculiarities that in his more intense moments he would permit himself no food, and I have known him presume upon his iron strength until he has fainted from pure inanition. “At present I cannot spare energy and nerve force for digestion,” he would say in answer to my medical remonstrances. I was not surprised, therefore, when this morning he left his untouched meal behind him, and started with me for Norwood.⁷² A crowd of morbid sightseers were still gathered round Deep Dene House, which was just such a suburban villa as I had pictured. Within the gates Lestrade met us, his face flushed with victory, his manner grossly triumphant.

“Well, Mr. Holmes, have you proved us to be wrong yet? Have you found your tramp?” he cried.

“I have formed no conclusion whatever,” my companion answered.

“But we formed ours yesterday, and now it proves to be correct, so you must acknowledge that we have been a little in front of you this time, Mr. Holmes.”

“You certainly have the air of something unusual having occurred,” said Holmes.

Lestrade laughed loudly.

“You don’t like being beaten any more than the rest of us do,” said he. “A man can’t expect always to have it his own way, can he, Dr. Watson?”

⁷¹ LSK, REF.: RETUR, p. 60, note 32.

⁷² JULIA ROSENBLATT: This is the story’s second breakfast. In the opening, we met the “unfortunate Hector McFarlane” as Holmes and Watson finished breakfast. The original Sydney Paget drawing illustrating this scene (*Strand Magazine*, 1903) shows a well-set table. The picture does not indicate the morning’s menu save that it included bread and a hot dish. This second breakfast was, no doubt, similarly ample. That Holmes spurned it while encouraging Watson to enjoy it does not surprise. Holmes often fasted when intent upon a case. Holmes preferred mealtimes to be relaxed, times to enjoy the food fully. Indeed, he would not discuss an ongoing case over dinner, waiting until the table had been cleared before he satisfied the eager curiosity of his listeners. A full English breakfast typically included eggs. That may have prompted the poultry metaphor when Holmes spoke of Lestrade’s “little cock-a-doodle of victory.” See also JULIA CARSON ROSENBLATT AND FREDERIC H. SONNENSCHMIDT, *DINING WITH SHERLOCK HOLMES: A BAKER STREET COOK-BOOK* 186 n.1 (1976).

Step this way, if you please, gentlemen, and I think I can convince you once for all that it was John McFarlane who did this crime."

He led us through the passage and out into a dark hall beyond.

"This is where young McFarlane must have come out to get his hat after the crime was done," said he. "Now look at this." With dramatic suddenness he struck a match, and by its light exposed a stain of blood upon the whitewashed wall. As he held the match nearer, I saw that it was more than a stain. It was the well-marked print of a thumb.

"Look at that with your magnifying glass, Mr. Holmes."

"Yes, I am doing so."

"You are aware that no two thumb-marks are alike?"

"I have heard something of the kind."⁷³

"Well, then, will you please compare that print with this wax impression of young McFarlane's right thumb, taken by my orders this morning?"

As he held the waxen print close to the blood-stain, it did not take a magnifying glass to see that the two were undoubtedly from the same thumb. It was evident to me that our unfortunate client was lost.

"That is final," said Lestrade.

"Yes, that is final," I involuntarily echoed.

"It is final," said Holmes.

Something in his tone caught my ear, and I turned to look at him. An extraordinary change had come over his face. It was writhing with inward merriment. His two eyes were shining like stars. It seemed to me that he was making desperate efforts to restrain a convulsive attack of laughter.

"Dear me! Dear me!" he said at last. "Well, now, who would have thought it? And how deceptive appearances may be, to be sure! Such a nice young man to look at! It is a lesson to us not to trust our own judgment, is it not, Lestrade?"

"Yes, some of us are a little too much inclined to be cocksure, Mr. Holmes," said Lestrade. The man's insolence was maddening, but we could not resent it.

"What a providential thing that this young man should press his right thumb against the wall in taking his hat from the peg! Such a very natural action, too, if you come to think of it." Holmes was outwardly calm, but his whole body gave a wriggle of suppressed excitement as he

⁷³ LSK, REF.: RETUR, p. 61, note 33; LSK, 2 NEW ANN. p. 849, note 17; id. at 860 ("Sherlock Holmes and Fingerprinting").

spoke. "By the way, Lestrade, who made this remarkable discovery?"

"It was the housekeeper, Mrs. Lexington, who drew the night constable's attention to it."

"Where was the night constable?"

"He remained on guard in the bedroom where the crime was committed, so as to see that nothing was touched."

"But why didn't the police see this mark yesterday?"

"Well, we had no particular reason to make a careful examination of the hall. Besides, it's not in a very prominent place, as you see."

"No, no — of course not. I suppose there is no doubt that the mark was there yesterday?"

Lestrade looked at Holmes as if he thought he was going out of his mind. I confess that I was myself surprised both at his hilarious manner and at his rather wild observation.

"I don't know whether you think that McFarlane came out of gaol in the dead of the night in order to strengthen the evidence against himself," said Lestrade. "I leave it to any expert in the world whether that is not the mark of his thumb."

"It is unquestionably the mark of his thumb."

"There, that's enough," said Lestrade. "I am a practical man, Mr. Holmes, and when I have got my evidence I come to my conclusions. If you have anything to say, you will find me writing my report in the sitting-room."

Holmes had recovered his equanimity, though I still seemed to detect gleams of amusement in his expression.

"Dear me, this is a very sad development, Watson, is it not?" said he. "And yet there are singular points about it which hold out some hopes for our client."

"I am delighted to hear it," said I, heartily. "I was afraid it was all up with him."

"I would hardly go so far as to say that, my dear Watson. The fact is that there is one really serious flaw in this evidence to which our friend attaches so much importance."

"Indeed, Holmes! What is it?"

"Only this: that I *know* that that mark was not there when I examined the hall yesterday. And now, Watson, let us have a little stroll round in the sunshine."

With a confused brain, but with a heart into which some warmth of

hope was returning, I accompanied my friend in a walk round the garden. Holmes took each face of the house in turn, and examined it with great interest. He then led the way inside, and went over the whole building from basement to attic. Most of the rooms were unfurnished, but none the less Holmes inspected them all minutely. Finally, on the top corridor, which ran outside three untenanted bedrooms, he again was seized with a spasm of merriment.

"There are really some very unique features about this case, Watson," said he. "I think it is time now that we took our friend Lestrade into our confidence. He has had his little smile at our expense, and perhaps we may do as much by him, if my reading of this problem proves to be correct. Yes, yes, I think I see how we should approach it."

The Scotland Yard inspector was still writing in the parlour when Holmes interrupted him.

"I understood that you were writing a report of this case," said he.

"So I am."

"Don't you think it may be a little premature? I can't help thinking that your evidence is not complete."

Lestrade knew my friend too well to disregard his words. He laid down his pen and looked curiously at him.

"What do you mean, Mr. Holmes?"

"Only that there is an important witness whom you have not seen."

"Can you produce him?"

"I think I can."

"Then do so."

"I will do my best. How many constables have you?"

"There are three within call."

"Excellent!" said Holmes. "May I ask if they are all large, able-bodied men with powerful voices?"

"I have no doubt they are, though I fail to see what their voices have to do with it."

"Perhaps I can help you to see that and one or two other things as well," said Holmes. "Kindly summon your men, and I will try."

Five minutes later, three policemen had assembled in the hall.

"In the outhouse you will find a considerable quantity of straw," said Holmes. "I will ask you to carry in two bundles of it. I think it will be of the greatest assistance in producing the witness whom I require. Thank

you very much. I believe you have some matches in your pocket, Watson. Now, Mr. Lestrade, I will ask you all to accompany me to the top landing.”

As I have said, there was a broad corridor there, which ran outside three empty bedrooms. At one end of the corridor we were all marshalled by Sherlock Holmes, the constables grinning and Lestrade staring at my friend with amazement, expectation, and derision chasing each other across his features. Holmes stood before us with the air of a conjurer who is performing a trick.

“Would you kindly send one of your constables for two buckets of water? Put the straw on the floor here, free from the wall on either side. Now I think that we are all ready.”

Lestrade’s face had begun to grow red and angry.

“I don’t know whether you are playing a game with us, Mr. Sherlock Holmes,” said he. “If you know anything, you can surely say it without all this tomfoolery.”

“I assure you, my good Lestrade, that I have an excellent reason for everything that I do. You may possibly remember that you chaffed me a little, some hours ago, when the sun seemed on your side of the hedge, so you must not grudge me a little pomp and ceremony now. Might I ask you, Watson, to open that window, and then to put a match to the edge of the straw?”

I did so, and driven by the draught, a coil of grey smoke swirled down the corridor, while the dry straw crackled and flamed.⁷⁴

⁷⁴ IRA BRAD MATETSKY: Did Sherlock Holmes and Dr. Watson commit arson here? Arson was defined long before Victorian times as the malicious setting afire of the dwelling-house of another, whether by day or by night. Here, Watson, at Holmes’s direction, set fire not directly to Oldacre’s house, but to a pile of straw within the house, raising a nice question as to whether this would constitute arson. At common law, it would not unless the burning caused actual damage to the dwelling; damage to personal property within the dwelling, or even to coverings such as carpeting or wallpaper, was insufficient.

Separate from the crime of arson, however, Parliament independently criminalized, as a felony, the act of intentionally setting fire to certain specified types of personal property, primarily agricultural products, including “any stack of . . . straw.” Here, “a quantity of straw” was intentionally set afire, and so it might seem that this was a canonical [*sic*] example of this statutory crime. *But see R. v. Satchwell*, [1873] 2 CCR 21 (quashing conviction for setting fire to a stack of straw piled on a lorry):

The prisoner was indicted for setting fire to a stack of straw, under the 24 & 25 Vict. c. 97 s. 17, and the question reserved was whether the facts proved support an indictment for setting fire to a stack of straw. The statute enacts that whosoever shall unlawfully and maliciously set fire to any stack of . . . straw . . . shall be guilty of

"Now we must see if we can find this witness for you, Lestrade. Might I ask you all to join in the cry of 'Fire!?' Now, then; one, two, three —"

"Fire!" we all yelled.

"Thank you. I will trouble you once again."

"Fire!"

"Just once more, gentlemen, and all together."

"Fire!" The shout must have rung over Norwood.

It had hardly died away when an amazing thing happened. A door suddenly flew open out of what appeared to be solid wall at the end of the corridor, and a little, wizened man darted out of it, like a rabbit out of its burrow.

"Capital!" said Holmes, calmly. "Watson, a bucket of water over the straw. That will do! Lestrade, allow me to present you with your principal missing witness, Mr. Jonas Oldacre."

The detective stared at the newcomer with blank amazement. The latter was blinking in the bright light of the corridor, and peering at us and at the smouldering fire. It was an odious face — crafty, vicious, malignant, with shifty, light-grey eyes and white lashes.

"What's this, then?" said Lestrade, at last. "What have you been doing all this time, eh?"

Oldacre gave an uneasy laugh, shrinking back from the furious red face of the angry detective.

"I have done no harm."

felony. . . . Now here, what the petitioner set fire to was not a stack in the ordinary sense of the word, but a quantity of straw. The case does not say whether the straw was brought from a stack or was to be taken to a stack. We think that this was not a stack of straw when it was set fire to, though it may have been once part of one. . . .

Here, Watson describes what was set afire as "a quantity of straw," not as a "stack" of it — perhaps with the holding of *Satchwell* in his mind — and so he and Holmes would not be guilty of this offense. Watson and Holmes still could, at least in theory, have been charged with a misdemeanor for the non-felonious burning of the property of another. But perhaps the most practical evaluation of the lawfulness of Holmes's and Watson's conduct here can be drawn from another of Watson's accounts, "The Adventure of the Illustrious Client." Watson concludes his account of that case, in which Holmes entered another man's house without consent but for what he believed was a very good reason, by reporting that "Sherlock Holmes was threatened with a prosecution for burglary, but when an object is good and a client is sufficiently illustrious, even the rigid British law becomes human and elastic. My friend has not yet stood in the dock."

"No harm? You have done your best to get an innocent man hanged. If it wasn't for this gentleman here, I am not sure that you would not have succeeded."

The wretched creature began to whimper.

"I am sure, sir, it was only my practical joke."

"Oh! a joke, was it? You won't find the laugh on your side, I promise you. Take him down, and keep him in the sitting-room until I come. Mr. Holmes," he continued, when they had gone, "I could not speak before the constables, but I don't mind saying, in the presence of Dr. Watson, that this is the brightest thing that you have done yet, though it is a mystery to me how you did it. You have saved an innocent man's life, and you have prevented a very grave scandal, which would have ruined my reputation in the Force."

Holmes smiled, and clapped Lestrade upon the shoulder.

"Instead of being ruined, my good sir, you will find that your reputation has been enormously enhanced. Just make a few alterations in that report which you were writing, and they will understand how hard it is to throw dust in the eyes of Inspector Lestrade."

"And you don't want your name to appear?"

"Not at all. The work is its own reward.⁷⁵ Perhaps I shall get the credit also at some distant day, when I permit my zealous historian to lay out his foolscap⁷⁶ once more — eh, Watson? Well, now, let us see where this rat has been lurking."

A lath-and-plaster partition had been run across the passage six feet from the end, with a door cunningly concealed in it. It was lit within by slits under the eaves. A few articles of furniture and a supply of food and water were within, together with a number of books and papers.

"There's the advantage of being a builder," said Holmes, as we came out. "He was able to fix up his own little hiding-place without any confederate — save, of course, that precious housekeeper of his, whom I should lose no time in adding to your bag, Lestrade."

"I'll take your advice. But how did you know of this place, Mr. Holmes?"

"I made up my mind that the fellow was in hiding in the house. When I paced one corridor and found it six feet shorter than the corre-

⁷⁵ LSK, REF.: RETUR, p. 65, note 34.

⁷⁶ LSK, REF.: RETUR, p. 65, note 35.

sponding one below, it was pretty clear where he was. I thought he had not the nerve to lie quiet before an alarm of fire.⁷⁷ We could, of course, have gone in and taken him, but it amused me to make him reveal himself, besides, I owed you a little mystification, Lestrade, for your chaff in the morning."

"Well, sir, you certainly got equal with me on that. But how in the world did you know that he was in the house at all?"

"The thumb-mark, Lestrade. You said it was final; and so it was, in a very different sense. I knew it had not been there the day before. I pay a good deal of attention to matters of detail, as you may have observed, and I had examined the hall, and was sure that the wall was clear. Therefore, it had been put on during the night."

"But how?"

"Very simply. When those packets were sealed up, Jonas Oldacre got McFarlane to secure one of the seals by putting his thumb upon the soft wax. It would be done so quickly and so naturally, that I dare say the young man himself has no recollection of it. Very likely it just so happened, and Oldacre had himself no notion of the use he would put it to. Brooding over the case in that den of his, it suddenly struck him what absolutely damning evidence he could make against McFarlane by using that thumb-mark. It was the simplest thing in the world for him to take a wax impression from the seal,⁷⁸ to moisten it in as much blood as he could get from a pin-prick, and to put the mark upon the wall during the night, either with his own hand or with that of his housekeeper. If you examine among those documents which he took with him into his retreat, I will lay you a wager that you find the seal with the thumb-mark upon it."

"Wonderful!" said Lestrade. "Wonderful! It's all as clear as crystal, as you put it. But what is the object of this deep deception, Mr. Holmes?"

It was amusing to me to see how the detective's overbearing manner had changed suddenly to that of a child asking questions of its teacher.

"Well, I don't think that is very hard to explain. A very deep, malicious, vindictive person is the gentleman who is now waiting us down-

⁷⁷ THE EDITORS: There is no period after "fire" (surely a typographical error) in the McClure, Phillips & Co. edition (1905) at 57, on which our annotation is based. There is in both the *Strand Magazine* (1903) at 495 and *Collier's Weekly* (1903) at 30.

⁷⁸ LSK, REF.: RETUR, pp. 65-66, note 36.

stairs. You know that he was once refused by McFarlane's mother? You don't! I told you that you should go to Blackheath first and Norwood afterwards. Well, this injury, as he would consider it, has rankled in his wicked, scheming brain, and all his life he has longed for vengeance, but never seen his chance. During the last year or two, things have gone against him — secret speculation, I think — and he finds himself in a bad way. He determines to swindle his creditors, and for this purpose he pays large cheques to a certain Mr. Cornelius, who is, I imagine, himself under another name. I have not traced these cheques yet, but I have no doubt that they were banked under that name at some provincial town where Oldacre from time to time led a double existence. He intended to change his name altogether, draw this money, and vanish, starting life again elsewhere."

"Well, that's likely enough."

"It would strike him that in disappearing he might throw all pursuit off his track, and at the same time have an ample and crushing revenge upon his old sweetheart, if he could give the impression that he had been murdered by her only child. It was a masterpiece of villainy, and he carried it out like a master. The idea of the will, which would give an obvious motive for the crime, the secret visit unknown to his own parents, the retention of the stick, the blood, and the animal remains and buttons in the wood-pile, all were admirable. It was a net from which it seemed to me, a few hours ago, that there was no possible escape. But he had not that supreme gift of the artist, the knowledge of when to stop. He wished to improve that which was already perfect — to draw the rope tighter yet round the neck⁷⁹ of his unfortunate victim — and so he ruined all. Let us descend, Lestrade. There are just one or two questions that I would ask him."

The malignant creature was seated in his own parlour, with a policeman upon each side of him.

⁷⁹ IRA BRAD MATETSKY: The death sentence, in the form of death by hanging (using the "long drop" method), was the sole authorized punishment on a conviction for murder in nineteenth-century Britain, subject only to the possibility of commutation by The Queen (on recommendation of the Home Secretary; the commutation rate appears to have been about 40 to 50 percent). There were 18 executions (all for murder) in England and Wales in 1894 and 11 in 1895. For very detailed information on the history of capital punishment and executions in the United Kingdom, see www.capitalpunishmentuk.org.

"It was a joke, my good sir — a practical joke, nothing more," he whined incessantly. "I assure you, sir, that I simply concealed myself in order to see the effect of my disappearance, and I am sure that you would not be so unjust as to imagine that I would have allowed any harm to befall poor young Mr. McFarlane."

"That's for a jury to decide," said Lestrade. "Anyhow, we shall have you on a charge of conspiracy, if not for attempted murder."⁸⁰

⁸⁰ ALBERT M. ROSENBLATT: Faking one's death to avoid apprehension or punishment has not been unknown (e.g., *United States v. Leung*, 360 F.3d 62 (2d Cir. 2004); *United States v. Friedland*, 83 F.3d 1531 (3d Cir. 1996)), nor has faking death to gain government benefits (e.g., *Pepper v. Colvin*, 2013 U.S. Dist. Lexis 101628 (W.D. Mo. 2013)). But faking death to throw creditors off the track is less common and seemingly unique when coupled with the odious goal of framing an innocent person for causing the culprit's supposed death. We do not know whether Clarence Roberts had read "Norwood Builder," but the facts of his case are reminiscent, as summarized in *Malone v. ReliaStar*, 558 F.3d 683 (7th Cir. 2009): "[In] *Roberts v. Wabash Life Insurance Co.*, 410 N.E.2d 1377 (Ind. Ct. App. 1980), . . . firefighters discovered a dead body while extinguishing a fire in a barn owned by Clarence Roberts. The charred remains were initially thought to be those of Roberts himself . . . Further investigation, however, suggested that the body was not Roberts. In fact, the evidence indicated that Roberts might have killed a man and then burned the body in the barn in an effort to fake his own death, with the intent of avoiding creditors and potential charges of fraud." Roberts's crime seems demonstrable enough, and would be covered by various statutes defining fraud, larceny, falsely reporting an incident and the like, and possibly murder. Oldacre's crime, as respects McFarlane as victim, is more complex. Inspector Lestrade said to Oldacre, "You have done your best to get an innocent man hanged." And then, "Anyhow, we shall have you on a charge of conspiracy, if not for attempted murder." As for conspiracy we have a criminal collaboration between Oldacre and his housekeeper, Mrs. Lexington. Attempted murder? I should think that a prosecutor would think twice before bringing that charge, given the variables: Is a trial and jury verdict and execution as sure and direct as the path of a bullet (that misses the mark)? In the meantime if you believe Oldacre had an idea worth replicating, read *Gone Girl*, or see the movie.

IRA BRAD MATETSKY: Although it may be questioned whether Oldacre could have been charged with attempted murder, Lestrade's suggestion that Oldacre would be charged with conspiracy was sound, so long as it could be shown that Mrs. Lexington was part of the plot. (If that could not be shown, the conspiracy charge would fail, as the elements of conspiracy include an agreement between two or more persons to do the prohibited act.) British conspiracy law did not require that the act that the parties conspired to bring about must itself be a crime. Indeed, as early as the Ordinance of Conspirators of 1305, 33 Edw. 1, conspiracy was defined by statute as including a "confederation or alliance for the false and malicious promotion of indictments and pleas . . ." — that is, "combinations to indict falsely." PETER GILLIES, *THE LAW OF CRIMINAL CONSPIRACY* 1 n.1 (1990); see also ROBERT WRIGHT, *THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS* 5 (1887). There is little doubt that Oldacre, presumably with Lexington's assistance, sought to cause McFarlane to be falsely charged with a capital crime that he did not commit. What crime, if any, Oldacre could

“And you’ll probably find that your creditors will impound the banking account of Mr. Cornelius,” said Holmes.

The little man started, and turned his malignant eyes upon my friend.

“I have to thank you for a good deal,” said he. “Perhaps I’ll pay my debt some day.”

Holmes smiled indulgently.

“I fancy that, for some few years, you will find your time very fully occupied,” said he. “By the way, what was it you put into the wood-pile besides your old trousers? A dead dog, or rabbits, or what? You won’t tell? Dear me, how very unkind of you! Well, well, I dare say that a couple of rabbits would account both for the blood and for the charred ashes.⁸¹ If ever you write an account, Watson, you can make rabbits serve your turn.”⁸²



have been charged with had he acted alone remains an open question.

⁸¹ LSK, 2 NEW ANN. p. 860, note 18.

⁸² LSK, REF.: RETUR, p. 67, note 37.

THE ADVENTURE OF THE NORWOOD BUILDER

EXCERPTS FROM THE MANUSCRIPT (1903)

[parallel citation: 2015 Green Bag Alm. 192]

[Editors' note: The images associated with this article are only available in the original 2015 *Almanac & Reader*.]

A. Conan Doyle[†]

introduction by Jon Lellenberg^{*}

Arthur Conan Doyle was not the same person in 1903, as he began writing the *Return of Sherlock Holmes* stories, that he had been in 1886 when he invented the character and wrote the first tale, *A Study in Scarlet*. Then he had been a struggling young doctor in a suburb of Portsmouth, writing stories to eke out his slender income from medicine. He was far from established as an author, despite an early success or two, and had to sell the entire copyright to *A Study in Scarlet*, for a mere £25, in order to see it published in a pulp magazine at the end of 1887, to little notice and applause. It was not until he started writing short stories about Sherlock Holmes in 1891 that they suddenly took off, and lit up the firmament, and made him a famous man who could quit medicine in order to be a full-time writer. So popular were the Sherlock Holmes stories, appearing in the then-new *Strand Magazine*, that after two series of them, he sent Holmes and his arch-enemy Professor Moriarty, the Napoleon of Crime, to their deaths, in mortal combat at Switzerland's Reichenbach Falls, so Conan Doyle could get breathing space to write other things he valued more highly.

[†] See page 116, note †. See page 197 for information about the image above.

^{*} Jon Lellenberg is "Rodger Prescott (of evil memory)" in the Baker Street Irregulars, and the BSI's historian. Conan Doyle quotations above are from his Edgar Award-winning 2007 book *Arthur Conan Doyle: A Life in Letters*, co-edited with Daniel Stashower and Charles Foley. He is married to a lawyer who frequently reminds him not to try to practice law. Copyright © 2015 Jon Lellenberg.

By 1903, Conan Doyle had been transformed. He was justly famous for other things besides Sherlock Holmes that he'd written, literary efforts far removed from detective stories. He had become a man of public affairs as well, and been knighted for his volunteer medical service in the Boer War in South Africa, his history of the conflict, and his defense of the British cause. He had pursued his love of sports, especially cricket, and now was well-known as a sportsman, too. He had traveled to North America and Egypt as well as to South Africa.

At the same time, Sherlock Holmes was not entirely behind him. He had collaborated on a play about the great detective with the American playwright-actor William Gillette. It had proven immensely popular on Broadway, and would come to London's West End before long. And he'd turned an idea for a supernatural tale that he'd been given, upon returning to England from South Africa, into a posthumous Sherlock Holmes tale, *The Hound of the Baskervilles*, which became a bestseller in both Britain and America — indeed, around the world, one of the most famous pieces of British fiction ever.

It's often said that Conan Doyle was badgered into bringing Sherlock Holmes back to life in the *Return* stories by the character's incessant burning fans. What actually did the trick was instead what's been described as the largest offer for short stories in the history of literature at the time, coming in March 1903 from Norman Hapgood, editor of *Collier's Weekly* in America, who'd met Conan Doyle ten years before as a reporter when the writer visited Chicago during his U.S. speaking tour. "I have done no short Sherlock Holmes stories for seven or eight years," Conan Doyle told his mother, "and I don't see why I should not have another go at them and earn three times as much money as I can by any other form of work." The *Collier's Weekly* offer was for \$25,000 for six stories, \$30,000 for eight, or \$45,000 for thirteen, irrespective of length — for the U.S. rights — and on top of that, the *Strand Magazine's* burning desire to publish them in Britain. "Very well. A.C.D." Conan Doyle replied in a postcard.

"Good old Sherlock," Conan Doyle's younger brother Innes told him: "I think he has had quite a long enough rest."

"I don't think you need have any fears about Sherlock," Conan Doyle reassured his doting but anxious mother: "I am not conscious of any failing powers, and my work is not less conscientious than of old." He set to work quickly, composing the story "The Empty House" to explain what

really had happened at the Reichenbach Falls in “The Final Problem” — where Holmes had been the three years that Dr. Watson and the world thought him dead — and why he was returning to London now. Conan Doyle also thoughtfully killed off Mrs. Watson (Mary Morstan from the second Holmes novel, *The Sign of the Four*, in 1890), making it possible for Watson to rejoin Holmes in their old rooms at 221B Baker Street.

“The Adventure of the Norwood Builder” was the next *Return of Sherlock Holmes* story, and while the editor of *Collier’s Weekly* in America had no known issues with it, Conan Doyle’s longtime *Strand Magazine* editor H. Greenhough Smith did. He apparently expressed disappointment that the story lacked crime, or at any rate an outright murder. (“We shall have you on a charge of conspiracy, if not for attempted murder,” an incensed Inspector Lestrade tells Jonas Oldacre, for trying to create the impression that he had been killed by Holmes’s client, “the unhappy John Hector McFarlane,” attorney at law.) Compounding the problem for Greenhough Smith was a similar absence of crime (or corpses, anyway) in the third *Return* story Conan Doyle had sent him, “The Adventure of the Solitary Cyclist.”

Conan Doyle had misgivings himself about “Solitary Cyclist,” but stood his auctorial ground on “Norwood Builder,” writing to Greenhough Smith on May 14, 1903: “I think I take a fairly sane view of my own work. I can never remember an instance in which I have been very far wrong. . . . ‘The Norwood Builder’ I would put in the very first rank of the whole series for subtlety and depth. Any feeling of disappointment at the end is due to the fact that no crime has been done & so the reader feels bluffed, but it is well for other reasons to have some of the stories crimeless.”

“Take the series of points,” he continued: “Holmes’ deductions from the will written in the train, the point of the bloody thumb mark, Holmes’ device for frightening the man [Oldacre] out of his hiding place &c. I know no Holmes story which has such a succession of bright points.”

Conan Doyle did not convince Greenhough Smith, and in a subsequent letter had to tell him: “I must say that I cannot agree with your estimate of the ‘Norwood Builder.’ I read it to a roomful of people and I was never more conscious of holding an audience absolutely spellbound.”

Posterity has not agreed with Conan Doyle that much. While other *Return* stories like “Charles Augustus Milverton,” “The Six Napoleons,”

and “The Second Stain” became Sherlock Holmes classics, “The Adventure of the Norwood Builder” has been consigned by its readers to a lower rank. But it was interesting in a legal as well as forensic sense, for making a fingerprint part of the plot. Fingerprints in forensic science were not unprecedented at the time; that went back to the 1860s, with classification becoming systematized in the 1890s, and fingerprint evidence was first accepted as evidence in a criminal trial in 1892 (though in Argentina, not Britain, thanks to its Croatian-born criminologist Juan Vucetich). Scotland Yard (*pace* Inspector Lestrade in “Norwood Builder,” written in 1903 but set in 1894) did not open its Fingerprint Branch until 1901, however, the year following the first use of fingerprints in British detective fiction: “The Clue of the Fingerprint” in Herbert Cadett’s *The Adventures of a Journalist*.¹

But as Ronald R. Thomas notes in *Detective Fiction and the Rise of Forensic Science* (1999, p. 240), Conan Doyle’s “A Study in Scarlet [1887] and *The Sign of the Four* [1890] anticipated the principles underlying fingerprint technology and appropriated in advance its metaphors for treating the body as a text to be read.” Conan Doyle not only saw, but observed — having been trained to do so by his medical school mentor Dr. Joseph Bell, who alongside his colleague Dr. Patrick Heron Watson (no less) served as an expert witness in criminal trials in Edinburgh, as well as suggesting the Sherlock Holmes Method to young A. Conan Doyle.

So there we have it: Sherlock Holmes is back in town, the game is afoot, and this time he has a lawyer for a client, and he solves the mystery and unmasks the villain by use of forensic evidence only then becoming established in the British criminology and law of the day. Not bad for an M.D.; but Sir Arthur Conan Doyle was no ordinary one. He was a master storyteller and a keen observer of scientific developments. The curious should investigate also the ongoing Sherlock Holmes forensic sciences exhibition that opens at the Perot Museum of Nature and Science in Dallas, Texas, on February 12th, at the Discovery Science Center in Santa Ana, California on June 11th, and at the Denver Museum of Nature and Science in Denver, Colorado on October 15th. The game is very much afoot in this exhibition as well.

¹ Christopher Pittard, *Purity and Contamination in Late Victorian Detective Fiction*, 2011, p. 130.

THE ADVENTURE OF THE ELUSIVE POSTCARD

[parallel citation: 2015 Green Bag Alm. 442]

Cattleya M. Concepcion[†]

The story goes like this: After Arthur Conan Doyle killed off Sherlock Holmes in 1893,¹ bereft fans bombarded Conan Doyle with their anger. “I have often been called to task for killing ‘Sherlock Holmes,’ and I was surprised at the number of letters I got from all over the world reproaching me on the subject,” Conan Doyle said. “One, I remember, was from a woman I did not know. It began, ‘You beast!’”²

Conan Doyle offered up a new Sherlock Holmes story in 1901, but as the story was set before Holmes’s death, it was not enough.³ Fans hoped, from the moment Holmes disappeared off a cliff, that he had somehow survived. One reader wrote of “the lamentable and untimely taking off of their old friend Mr. Sherlock Holmes”: “It is grievous news. . . . His many admirers will cling to the last to the hope that he may be found, and found alive”⁴

[†] Reference and Faculty Services Librarian, George Mason University School of Law. Thanks to Ira Brad Matetsky for his help with research.

¹ See Arthur Conan Doyle, *The Adventure of the Final Problem*, STRAND MAGAZINE, Dec. 1893. Conan Doyle explained his decision to kill Sherlock Holmes:

My objections to detective stories are that they only call for the use of a certain portion of one’s imaginative faculty — the invention of a plot without giving any scope to character drawing. The best literary work is that which leaves its reader better for having read it. Now, nobody can possibly be better, in the high sense which I mean it, by reading of Sherlock Holmes, although he may have passed a pleasant hour in doing so.

I therefore determined to stop my Holmes stories, and as my mind was fully made up, I couldn’t see any better way than by bringing Holmes to an end, as well as the stories.

Doyle Writes of His Hero, CHICAGO DAILY TRIBUNE, Dec. 16, 1900, at 9.

² *Death of Sherlock Holmes*, BOSTON DAILY GLOBE, Feb. 17, 1901, at 32. Or the letter may have said, “You Brute.” See ARTHUR CONAN DOYLE, MEMORIES AND ADVENTURES 94 (1924).

³ Arthur Conan Doyle’s *The Hound of the Baskervilles* was serialized in *The Strand Magazine* from August 1901 to May 1902. There is disagreement among Holmes scholars over whether *The Hound of the Baskervilles* took place before Holmes’s death in “The Final Problem” or after Holmes was revealed to be alive in “The Empty House.” See *Chronology*, in ARTHUR CONAN DOYLE, *THE HOUND OF THE BASKERVILLES* 143 (Leslie S. Klinger ed., 2002).

⁴ E.S. Martin, *This Busy World*, HARPER’S WEEKLY, Dec. 16, 1893, at 1191.

In 1903, *Collier's Weekly* made Conan Doyle a huge offer to resurrect Holmes: \$25,000 for six stories, \$30,000 for eight stories, or \$45,000 for thirteen stories. Accepting the offer, Conan Doyle sent a postcard to his literary agent A.P. Watt. He kept it simple, responding, "Very well. A.C.D." What followed were thirteen stories published in *Collier's Weekly*, including the theme of this *Almanac*, "The Adventure of the Norwood Builder."⁵

The story of the American magazine's too-good-to-pass-up offer and Conan Doyle's no-frills acceptance has often been told. The first (to my knowledge) telling was almost twenty years after Conan Doyle's death in a 1949 biography, *The Life of Sir Arthur Conan Doyle* by John Dickson Carr.⁶ Many biographies since then have repeated it.⁷ It also appears in bibliographies of Conan Doyle's writings,⁸ forewords to reprints of Sherlock Holmes stories,⁹ and newspaper articles on the author.¹⁰

After hearing of Conan Doyle's simple two-word acceptance by postcard of such a momentous contract, a Sherlockian lawyer probably could not help but ask inquisitively, "Where is this postcard?" The real question lurking beneath would be a giddier one: "Can we see it?" Despite the numerous accounts of the postcard in published pieces, none provide any clues to track it down.¹¹

⁵ The stories were collected and published in *The Return of Sherlock Holmes* (1905). The London publisher of the book was as happy as readers. See *Sherlock Holmes Unlimited*, FINANCIAL TIMES, July 31, 1903, at 2 ("Incidentally this welcome resurrection [of Sherlock Holmes] should help to make dividends for the shareholders of George Newnes, Limited.").

⁶ See JOHN DICKSON CARR, *THE LIFE OF SIR ARTHUR CONAN DOYLE 199-200* (1949).

⁷ See, e.g., DANIEL STASHOWER, *TELLER OF TALES: THE LIFE OF ARTHUR CONAN DOYLE* 240 (1999); MARTIN BOOTH, *THE DOCTOR AND THE DETECTIVE: A BIOGRAPHY OF SIR ARTHUR CONAN DOYLE* 248 (2000); ARTHUR CONAN DOYLE: *A LIFE IN LETTERS* 510 (Jon Lellenberg et al. eds., 2007); ANDREW LYCETT, *THE MAN WHO CREATED SHERLOCK HOLMES* 297 (2007); RUSSELL MILLER, *THE ADVENTURES OF ARTHUR CONAN DOYLE* 245 (2008).

⁸ See RICHARD LANCELYN GREEN & JOHN MICHAEL GIBSON, *A BIBLIOGRAPHY OF A. CONAN DOYLE* 140 (1983).

⁹ See Anthony Lejeune, *Foreword* to ARTHUR CONAN DOYLE, *THE HOUND OF THE BASKERVILLES* 9 (Capuchin Classics 2008).

¹⁰ See Hugh A. Mulligan, *Sherlock Still Hounded Conan Doyle Despite 'Final Problem'*, N.Y. TIMES, Apr. 26, 1987, at 2.

¹¹ The sources cited *supra*, notes 7-10, point to other second-hand accounts of the postcard. See, e.g., LYCETT, *supra* note 7, at 297 (citing CARR, *supra* note 6). Carr's bibliography includes family papers, see CARR, *supra* note 6, at 340-52, but it is unclear which, if any, he relied on to learn about the postcard.

Here is how I tried:

The logical place to start a search for the postcard was with its intended recipient, Conan Doyle's agent A.P. Watt. A.P. Watt, we can safely assume, took possession of the postcard before Holmes was revived in *Collier's Weekly* in 1903.¹² Despite A.P. Watt's British roots, some records for the agency are within reach in the United States, at the New York Public Library¹³ and the University of North Carolina.¹⁴ Although both collections include correspondence from Conan Doyle to A.P. Watt for the relevant time period, neither includes Conan Doyle's two-word postcard.¹⁵

The other participant in the exchange, the postcard's sender — Conan Doyle — seemed like the next best lead. Special collections relating to Conan Doyle and Sherlock Holmes form a sizeable list. They can be found in academic libraries: Birmingham-Southern College,¹⁶ Harvard University,¹⁷ Indiana University,¹⁸ Kent State University,¹⁹ University of Michigan,²⁰ University of Minnesota,²¹ University of North Carolina at

¹² See *The Adventure of the Empty House*, COLLIER'S WEEKLY, Sept. 26, 1903.

¹³ For a finding aid, see Henry W. and Albert A. Berg Collection of English and American Literature, The New York Public Library, *A.P. Watt and Son Records*, archives.nypl.org/uploads/collection/generated_finding_aids/brg19277.pdf.

¹⁴ For a finding aid, see Rare Book Literary and Historical Papers, The Wilson Library, University of North Carolina at Chapel Hill, *A.P. Watt Records*, www2.lib.unc.edu/mss/inv/a/A.P.Watt.html#d1e51.

¹⁵ I received copies of A.P. Watt's private account files relating to Conan Doyle's Sherlock Holmes stories in box 112, folder 119.02 of the A.P. Watt Records, collection no. 11036, Rare Book Literary and Historical Papers, The Wilson Library, University of North Carolina at Chapel Hill. Email from The Wilson Library (Jan. 5, 2015) (on file with author). The postcard was also not found after searching a small file of correspondence dated between 1896 and 1914, and addressed to A.P. Watt as literary agent for Conan Doyle, in the Henry W. and Albert A. Berg Collection of English and American Literature, The New York Public Library. Email from Ira Brad Matetsky (Dec. 31, 2014) (on file with author).

¹⁶ For more information, see Birmingham-Southern College Library, *Richard and Joshua Green Sherlock Holmes Collection*, library.bsc.edu/bsclibcollections.html#green.

¹⁷ For a finding aid, see Houghton Library, Harvard University, *Baker Street Irregulars (Organization: U.S.) Archive, 1923-2007 (MS Am 2717)*, nrs.harvard.edu/urn-3:FHCL.Hough:h02178.

¹⁸ For an inventory, see Lilly Library Manuscript Collections, Indiana University, *Doyle Mss.*, www.indiana.edu/~liblilly/lilly/mss/index.php?p=doyle#xtocid54943.

¹⁹ For a finding aid, see Department of Special Collections and Archives, Kent State University Libraries and Media Services, *Sherlock Holmes Ephemera Collection*, www.library.kent.edu/sherlock-holmes-ephemera-collection.

²⁰ For information about the Parker Family Sir Arthur Conan Doyle Collection, see, e.g., Dave Askins, *Arthur Conan Doyle Collection Unveiled*, ANN ARBOR CHRONICLE, Apr. 25, 2009, annarborchronicle.com/2009/04/25/arthur-conan-doyle-collection-unveiled/. To search the

Chapel Hill,²² University of Texas at Austin,²³ and University of Tulsa²⁴ in the United States, and Bibliothèque Cantonale et Universitaire in Switzerland.²⁵ Also featuring Conan Doyle- or Holmes-centric collections are public libraries in the United States (New York Public Library²⁶ and San Francisco Public Library²⁷), Canada (Toronto Public Library²⁸), and England (Marylebone Library²⁹ and Portsmouth History Centre at the Portsmouth Central Library³⁰). Independent libraries have collections, too: the Huntington Library³¹ and the Newberry Library³² in the United

University of Michigan's library catalog, see mirlyn.lib.umich.edu. The researcher may limit search results to "Doyle, Arthur Conan" in the subject field, and "Special Collections" or "Hatcher Graduate" in the library location field.

²¹ For finding aids, see Special Collections, Rare Books, & Manuscripts, University of Minnesota, *Sherlock Holmes Collections: Archival Finding Aids*, www.lib.umn.edu/scr/bm/holmes/archival-finding-aids.

²² Christy Edina Richards, *An Assessment of the Mary Shore Cameron Sherlock Holmes Collection at the University of North Carolina at Chapel Hill*, Nov. 2003, ils.unc.edu/MSpapers/2907.pdf.

²³ For a finding aid, see Harry Ransom Humanities Research Center, University of Texas at Austin, *Sir Arthur Conan Doyle*, norman.hrc.utexas.edu/fasearch/pdf/00788.pdf. For a digital collection, see Harry Ransom Humanities Research Center, University of Texas at Austin, *Sherlock Holmes and Sherlockiana Collection*, hrc.contentdm.oclc.org/cdm/landingpage/collection/p15878coll8.

²⁴ For a finding aid, see Department of Special Collections and University Archives, McFarlin Library, University of Tulsa, *Jack Powell Collection of Sherlock Holmes*, www.lib.utulsa.edu/mcfarlin/speccoll/collections/powelljack/index.htm.

²⁵ For more information, see Bibliothèque Cantonale et Universitaire, *Manuscripts – Publications*, www.bcu-lausanne.ch/patrimoine/collections-precieuses/publications/publications-manuscripts/; Bibliothèque Cantonale et Universitaire, *Trésors des Collections*, www.bcu-lausanne.ch/patrimoine/collections-precieuses/tresors-des-collections/.

²⁶ For a finding aid, see Henry W. and Albert A. Berg Collection of English and American Literature, The New York Public Library, *Sir Arthur Conan Doyle Collection of Papers*, archives.nypl.org/uploads/collection/generated_finding_aids/brg19164.pdf.

²⁷ For more information, see San Francisco Public Library, *Sherlock Holmes Collection*, sfpl.org/index.php?pg=2000008201.

²⁸ For more information and to search the library catalog, see Toronto Public Library, *Arthur Conan Doyle Collection*, www.torontopubliclibrary.ca/books-video-music/specialized-collections/literature-genre-doyle.jsp.

²⁹ For more information, see City of Westminster, *About the Sherlock Holmes Collection*, www.westminster.gov.uk/about-sherlock-holmes-collection.

³⁰ For more information, see Portsmouth City Council, *The Arthur Conan Doyle Collection Lancelyn Green Bequest*, www.conandoylecollection.co.uk.

³¹ To search the Huntington Library's online catalog, see catalog.huntington.org. The researcher may refine results by limiting to relevant subjects, such as "Doyle, Arthur Conan, 1859-1930 -- Manuscripts -- Facsimiles," "Doyle, Arthur Conan, 1859-1930 -- Diaries," or "Doyle, Arthur Conan, 1859-1930 -- Correspondence."

States, and the Royal College of Surgeons of Edinburgh in Scotland.³³ Finally, there are national libraries with related collections, including the British Library³⁴ and National Library of Scotland.³⁵

A review of finding aids, library catalogs, and press releases for these Conan Doyle and Sherlock Holmes collections revealed little. None made specific mention of Conan Doyle's postcard to A.P. Watt. The closest call was an undated message from Conan Doyle to an unknown recipient that said, "Thank you for work *very well* done."³⁶ Alas, five words too many. I also did not see a broader description of correspondence in which the postcard seemed likely to be included. But, there was a caveat to this: Since finding aids might not provide detailed inventories, library catalogs might not capture manuscript materials, and press releases might highlight only selected items, it was still possible that the postcard was hidden in one of the collections.

That brought the search to *Collier's Weekly*, which had an interest in the postcard as the offeror in the contract. Did A.P. Watt give the postcard to *Collier's Weekly* after receiving it from Conan Doyle? Unfortunately, no records could be located for publisher P. F. Collier & Son or its founder Peter F. Collier. While a collection of records is available for Crowell-Collier Publishing Company, which took over and published

³² For a finding aid, see The Newberry Library, *C. Frederick Kittle Collection of Doyleana*, mms.newberry.org/xml/xml_files/KittleDoyle.xml.

³³ For finding aids, see The Royal College of Surgeons of Edinburgh Library & Archive, *Arthur Conan Doyle*, www.library.rcsed.ac.uk/docs/GD21_Papers_of_Sir_Arthur_Conan_Doyle.pdf; The Royal College of Surgeons of Edinburgh Library & Archive, *The Stisted Bell Collection*, www.library.rcsed.ac.uk/docs/GD16_Papers_and_memorabilia_of_Joseph_Bell.pdf (includes materials related to Sherlock Holmes).

³⁴ For more information about items in the collection, see, e.g., Press Release, The British Library, *Dangerous Work: Diary of an Arctic Adventure – British Library to Publish Arthur Conan Doyle's Previously Unseen Arctic Diary* (Aug. 6, 2012), www.bl.uk/press-releases/2012/august/dangerous-work-diary-of-an-arctic-adventure--british-library-to-publish-arthur-conan-doyles-previous; Press Release, The British Library, *The Narrative of John Smith, Arthur Conan Doyle's Lost First Novel, to Be Published by the British Library for the First Time* (Sept. 25, 2011), www.bl.uk/press-releases/2011/september/the-narrative-of-john-smith-arthur-conan-doyles-lost-first-novel-to-be-published-by-the-british-libr.

³⁵ For more information, see, e.g., Press Release, National Library of Scotland, *Conan Doyle Papers* (Apr. 30, 2012), www.nls.uk/news/press/2012/04/conan-doyle-papers.

³⁶ Correspondence from Arthur Conan Doyle to Unknown Correspondent, n.d., Box 2, Folder 132, *C. Frederick Kittle Collection of Doyleana*, The Newberry Library, Chicago (emphasis added).

Collier's Weekly in the early twentieth century, it only includes records after 1931.³⁷

What remained to be considered were collections held outside libraries. Many manuscripts related to Holmes are in private collections.³⁸ For example, in 2004, auction house Christie's sold a lot containing over 150 letters and cards from Conan Doyle to A.P. Watt to a private collector.³⁹ The lot description did not discuss the postcard,⁴⁰ but as with finding aids, library catalogs, and press releases, its absence from the description did not necessarily mean it was not in the lot. Since collections like these are privately, and often anonymously, owned, research here could go no further.

Finally, my search included an inquiry to the Conan Doyle Estate. The postcard, however, is not among the correspondence in the family papers held by the estate.⁴¹

As I saw it, this left a list of places where the postcard was not located; places where it was unlikely, but still possible, to be; and places where there were barriers to further searching. To be sure, there were also places where it could be but that I did not think of checking.⁴²

What now is the next step in the search for the postcard? Enticing, I hope, more eyes to join the search. If you have any leads on the whereabouts of this elusive postcard, do follow the clues. The game's afoot!



³⁷ For a finding aid, including a history of the company, see Manuscripts and Archives Division, Humanities and Social Sciences Library, The New York Public Library, *Crowell-Collier Publishing Company*, archives.nypl.org/uploads/collection/pdf_finding_aid/crowell_collier.pdf.

³⁸ *A Tangled Skein: The Papers of Sir Arthur Conan Doyle*, THE ECONOMIST, May 22, 2004, at 97, 98.

³⁹ Christie's, *Auction Results for Lot 37: A.P. Watt & Son, Literary Agents*, May 19, 2004, www.christies.com/lotfinder/lot/ap-watt-son-literary-agents-4290279-details.aspx?intObjectID=4290279; Randall Stock, *A Census of The Conan Doyle Collection: Ownership Records and the Christie's 2004 Sale*, May 28, 2014, www.bestofsherlock.com/ref/200405christies_lots.htm (noting lot 37 is owned by a private collector).

⁴⁰ See Christie's, *supra* note 39.

⁴¹ Email from Jon Lellenberg, U.S. Agent for Conan Doyle Estate Ltd (Dec. 9, 2014) (on file with author). For more information about the Conan Doyle Estate, see www.conandoyleestate.com.

⁴² Museums with Sherlock Holmes exhibitions, for example.

THE ADVENTURE OF THE *NEW YORK WORLD*

[parallel citation: 2015 Green Bag Alm. 465]

Ira Brad Matetsky[†]

This year's *Green Bag Almanac and Reader* gives attention to a Sherlock Holmes short story of particular interest to lawyers, "The Adventure of the Norwood Builder." The editors have obtained and presented copies of this story as it would have appeared to its original readers in various forms between 1903 and 1911 — including in its original magazine publications in the United Kingdom (*The Strand Magazine*, 1903) and the United States (*Collier's Weekly*, 1903), and in its first book version (*The Return of Sherlock Holmes*, 1905), as well as part of the original manuscript (also 1903).

The final format of "The Norwood Builder" included in this *Almanac* is a pamphlet version of the story that appeared in the *New York Sunday World* in 1911. This nicely illustrated edition of "The Norwood Builder," part of a *World* series that year reprinting all 13 stories of *The Return*, seems to have been completely forgotten by modern readers, including even the most devoted of Sherlock Holmes enthusiasts.¹ Also included in this *Almanac* is the 1911 *World* version of another story from *The Return* — "The Six Napoleons." Both were located (along with several others that have been or will be republished by the *Green Bag*) by my editorial colleague Cattleya Concepcion in volumes of the *New York World* housed at the David M. Rubenstein Rare Book and Manuscript Library of Duke University. It is the editors' pleasure to bring these rare, and in some instances seemingly unique, copies to the attention of the *Green Bag's* readership and of Sherlockians. But we would be remiss if in doing so we did not acknowledge that these editions of the stories would not be known, and might not exist today at all, if it were not for an extraordinary act of cultural preservation by the author Nicholson Baker.

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¹ And the most devoted of Sherlock Holmes enthusiasts are very devoted and enthusiastic indeed, and are proud of it, too.

Baker, a novelist,² also writes non-fiction, some of it quite controversial, and is a self-proclaimed “library activist.” He first gained attention in the latter capacity when he published a 1994 *New Yorker* article decrying libraries’ replacement of their traditional card catalogs with electronic equivalents which, at that time, did not work very well.³

In 1999, Baker was conducting research for what became his 2001 book *Double Fold*.⁴ In that book, Baker decried more broadly the conduct of libraries in discarding paper copies of hundreds of thousands of books, newspapers, magazines, and other materials. Many of these the libraries replaced — but, Baker argued, inadequately and damagingly replaced — with microform (or, later, electronic) versions. With respect to the newspapers, Baker found that hard-copy holdings of many widely circulated, historically important, and visually appealing U.S. nineteenth- and twentieth-century newspapers apparently no longer existed in any institution at all. The replacement of hard-copy newspapers by microforms, Baker argued, was unsatisfactory for a host of reasons: the microforms were in black and white even where original pages were in color; they were subject to errors and imperfections in the filming process, such as blurring and cutting-off of margins; they physically deteriorated over time; and they were difficult to search and all-in-all a pain to work with.⁵

² One of Baker’s novels received publicity in connection with a certain dispute involving President Clinton, about which the less said here the better.

³ Nicholson Baker, “Discards”, *The New Yorker*, Apr. 4, 1994, at 64, reprinted in Nicholson Baker, *The Size of Thoughts* 125 (Random House 1996). Electronic library catalogs work much better now, and their availability online is an invaluable aid to researchers, but it still would be nice to have the traditional card catalogs of our youth available as well. (A few institutions — Princeton, for one — did keep them.)

⁴ Nicholson Baker, *Double Fold: Libraries and the Assault on Paper* (Random House 2001). Baker explains that the term “double fold” refers to a test formerly used by librarians to test the brittleness of paper: if folding a corner of a page back and forth breaks the corner off, the item is deemed dangerously brittle and is a candidate for preservation measures or discarding. See *id.* at 155-63. Baker’s thesis throughout *Double Fold* is that libraries’ efforts to preserve the contents of books, newspapers, and other paper media through mechanisms such as chemical treatments and destructive microfilming have been counterproductive and have led to the loss, sometimes irreparable, of valuable content. Some librarians and archivists have expressed disagreement with many of Baker’s assertions and conclusions. See, e.g., Richard Cox, *Vandals in the Stacks: A Response to Nicholson Baker’s Assault upon Libraries* (Praeger 2002).

⁵ *Double Fold*, *passim*, particularly chapters 2 to 7. See also G. Thomas Tanselle, *Literature and Artifacts* (Bibliographical Society of the U. of Virginia 1998).

Worst of all, preparing the microfilms was almost invariably followed by the discarding and destruction of the original newspapers themselves.

Despite these points, a complete run of a daily newspaper over a period of decades takes up plenty of space, so one can understand why a given library might be unable to hold and maintain voluminous files of all the newspapers it would like to make available to its patrons — thus presenting the library with a choice between microforms (or, today, electronic forms) or nothing. And trying to search through a large set of bound volumes of a newspaper presents practical problems of its own, especially if that paper is not yet word-searchable online and no one has prepared an index to it. Nonetheless, one can readily agree that if *no* institution holds a real-life, hard-copy, fully accessible run of a major twentieth-century newspaper, then something has gone badly wrong.

The *New York World* is illustrative. This was a broadsheet newspaper published in Manhattan from 1860 until 1931, appearing as the *Morning World* and *Evening World* on weekdays and the nationally distributed *Sunday World* on Sundays. Owned by Joseph Pulitzer from 1883 until his death in 1911, the paper acquired a reputation for sensationalism and the original “yellow journalism.” In 1896, it became the first newspaper with a four-color press, of which it took robust advantage during the ensuing years.⁶ It published O. Henry and Mark Twain and A.J. Liebling and later Dorothy Parker; it featured the first comic strip (“Hogan’s Alley,” aka “The Yellow Kid”) and the first crossword puzzle. Throughout this period, the *World* sold several hundred thousand copies a day, within and beyond New York City. But the *World* was one of the newspapers of which Baker found that by the 1990s, no library in the United States still held a hard-copy set.⁷

How did this happen? Baker explains:

The Library of Congress and the New York Public Library once owned Pulitzer’s *New York World* complete. . . . [Those copies] don’t exist now. . . . At Columbia University (whose school of journalism Pulitzer founded), at the New York Public Library, and at the Library

⁶ See *Double Fold*, at 3–4. See generally Kenneth Jackson, *The Encyclopedia of New York City* 904–05 (Yale, 2d ed. 2010).

⁷ See Nicholson Baker, *The Way the World Works* 129 (Simon & Schuster 2012); Nicholson Baker & Margaret Brentano, *The World on Sunday*, Introduction by Baker, at viii (Bulfinch Press 2005), reprinted in *The Way the World Works* 149, 152.

of Congress, you can flip through memoirs, biographies, scholarly studies, and original holograph letters of Joseph Pulitzer, works that describe his innovations in graphic design and recount his public squabbles with [William Randolph] Hearst. . . . But the *World* itself, the half-million-page masterpiece in the service of which Pulitzer stormed and swore and finally went blind, was slapdashedly micro-filmed in monochrome and thrown out by the New York Public Library, probably in the early fifties. Columbia said good-bye to its *World* at some point thereafter; the New-York Historical Society did so around 1990. . . . The Library of Congress was quick to clear its shelves of the *World* . . . and replace them with copies of the NYPL's . . . micro-film; and copies of that very same mid-century microfilm — edge-blurred, dark, gappy, with text cut off of some pages, faded to the point of illegibility on others — will now have to serve. . . .⁸

When Baker was doing his research, in the 1990s, one library *did* still have a set of bound volumes of the *New York World*, daily and Sunday, covering the years from 1898 to 1930. That was the British Library in London, which started collecting New York newspapers when they became internationally notorious for their role in instigating the Spanish-American War. Over time, as American libraries disposed of their hard-copy newspapers, the set at the British Library probably became the last hard-copy run of those three decades of the *World* (and quite a number of other papers) in existence anywhere.

In the late 1990s, the British Library decided to deaccession — to get rid of — all its bulky holdings of the *New York World* and dozens of other American newspapers. Fortunately, it did not just throw them away. Unfortunately, it did not donate them to another library that might have wanted them. Instead, it decided to auction the newspapers off. No other repository, in the United States or elsewhere, bid to acquire them. The interested bidder was a dealer, of the sort who advertises that you can pick some date of interest to you and send in a check, and he will send you an authentic original copy of your hometown newspaper for that date. One doesn't think, in sending away for such an offer, that you might be getting the very last copy in existence of that day's newspaper, or that the dealer may be mutilating the last available volume of that month's papers to send it to you.⁹

⁸ *Double Fold*, at 13-14; see also *The Way the World Works* 129.

⁹ See *Double Fold* 3-5, 9-13, 22-24, 263-68; *The World on Sunday*, at viii-ix; *The Way the World*

Baker remonstrated with the librarians at the British Library. He was horrified that valuable works of journalism and art — the last surviving set of them — would be lost forever to “box-cutter bisection and plastic-sheathed, issue-by-issue disposal.”¹⁰ The librarians were not horrified; they were committed to selling the volumes to the highest bidder. Without any institutional support at the time, Baker decided that the highest bidder would have to be himself. He formed a non-profit entity called the American Newspaper Repository and put in bids for the runs of the various newspapers, including £9,200 (about \$15,000) for the *World*.¹¹

Baker was successful in his bids for the *World* and several other newspapers. In total, he paid £19,282 to the British Library for many years of old *New York Worlds*, *New York Herald Tribunes*, and about ninety other titles. He then acquired several other runs, including decades of *The New York Times* and the *Chicago Tribune*, from the dealer who had bought them from the British Library. In total, Baker spent about \$150,000,¹² most of which he raised by cashing in his retirement account.¹³

The British Library shipped the papers to Baker, who rented a facility in which to house them. From 2000 to 2004, thousands of irreplaceable volumes of the *New York World* and 90 other newspapers resided, still at Baker’s expense,¹⁴ in warehouse space in a converted mill building in Rollinsford, New Hampshire, located between a potato chip manufacturer and an importer of French underwear.¹⁵

In 2003, the Duke University Library, under the leadership of David Ferriero,¹⁶ offered to take ownership of the American Newspaper Repository collection. Baker agreed, on condition that Duke promise to keep the collection forever intact, and all the newspapers traveled to North Carolina the following year. Before the volumes of the *World* were shipped from New Hampshire to North Carolina, Baker and his wife, Margaret Brentano,

Works 128, 153-54.

¹⁰ *The World on Sunday*, at ix; *The Way the World Works* 153.

¹¹ *Double Fold*, at 265; Nicholson Baker, “Deadline,” *The New Yorker*, July 24, 2000, at 42.

¹² *The World on Sunday*, at ix-x; *The Way the World Works* 152-53.

¹³ See *Double Fold*, at 265; interview with Nicholson Baker, www.identitytheory.com/nicholson-baker (Mar. 11, 2001).

¹⁴ Some support was later provided by the Knight Foundation and the MacArthur Foundation.

¹⁵ *The World on Sunday*, at x; see also *The Way the World Works* 128-29, 153-54.

¹⁶ Ferriero was later the Director of the New York Public Library from 2004 to 2009. Since 2009, he has served as the Archivist of the United States.

selected more than 100 of the most interesting, most historic, and most colorful pages that appeared in the *Sunday World* over a 14-year period and published them as a coffee-table book, *The World on Sunday: Graphic Art in Joseph Pulitzer's Newspaper (1898-1911)*. The book vividly displays the visual artistry and some of the journalism of a bygone age; it is highly recommended.

The American Newspaper Repository is now prominently publicized as part of Duke's library holdings,¹⁷ and its contents are readily available to researchers — including Sherlock Holmes enthusiasts interested in the *World's* reprintings of "The Norwood Builder" and other stories. In particular, its holding of the 1911 reprinting, like the missing three-quarter of the Cambridge fifteen, has proved indispensable. "The Norwood Builder" of 1911 was a self-contained eight-page pamphlet included with issues of the *Sunday World*. It is omitted from the microfilm version of the *Sunday World* — and hence from all electronic versions based on that microfilm — but it was part of the British Library's physical set and hence is now part of Duke's. The editors are glad that we could locate it and share it with our readers.



¹⁷ See library.duke.edu/rubenstein/findingaids/americannewspaperrepository/.

SMOKING OUT THE “NORWOOD BUILDER”

A BIBLIOGRAPHY AND SEARCH FOR AN EARLY BOOKLET

[parallel citation: 2015 Green Bag Alm. 496]

Cattleya M. Concepcion[†]

Bibliographies of Arthur Conan Doyle’s Sherlock Holmes mystery “The Adventure of the Norwood Builder” and the collection in which it appears, *The Return of Sherlock Holmes*, have been done and done well. Two in particular are excellent: *A Bibliography of A. Conan Doyle* by Richard Lancelyn Green and John Michael Gibson, and *The Universal Sherlock Holmes* by Ronald Burt De Waal.

The bibliography presented here builds on what has been done by using resources that were not yet available or have been much improved since bibliographers first picked up the task. Among these resources are online union catalogs that reach into thousands of library collections around the world, and digital libraries with millions of digitized books, magazines, and newspapers. Because many early printings may be publicly accessed online, digitized copies are noted where available.

This bibliography is intended to cover authoritative publications of “The Adventure of the Norwood Builder” — defined here as those published during Conan Doyle’s lifetime. Publications were included on the list only if an existing copy of the work could be verified. So, some works identified by other bibliographers are not listed,¹ and it is possible — even probable — that there are publications that have yet to be identified by any bibliographer. This is an effort that will, hopefully, keep getting better with time.

[†] Reference and Faculty Services Librarian, George Mason University School of Law.

¹ Not included in this bibliography are editions of *The Return of Sherlock Holmes* published by John Murray (London) from 1918 to 1927, as identified by De Waal. RONALD BURT DE WAAL, *UNIVERSAL SHERLOCK HOLMES*, at nos. C1792-C1794, C1796, C1799 (1994). Also omitted are printings of the *Return* stories in the *Augusta Herald*, *Boston Sunday Post*, *Cleveland Sunday Plain Dealer*, *Portland Daily Advertiser*, and *Wausau Daily Record*, which are noted by Green and Gibson. RICHARD LANCELYN GREEN & JOHN MICHAEL GIBSON, *A BIBLIOGRAPHY OF A. CONAN DOYLE* 140, 716 (first rev. ed. 2000).

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² For a digitized copy, see Google Books, books.google.com/books?id=JvwNAAAAYAAJ&oe=UTF-8; HathiTrust Digital Library, catalog.hathitrust.org/Record/006871797; Internet Archive, archive.org/details/returnofsherlock00doyliala.

³ For a digitized copy, see HathiTrust Digital Library, catalog.hathitrust.org/Record/100293457; Internet Archive, archive.org/details/cihm_73462.

⁴ For a digitized copy, see Google Books, books.google.com/books?id=sO89AQAAMAAJ&source=gbs_navlinks_s; HathiTrust Digital Library, catalog.hathitrust.org/Record/006871798.

⁵ For a digitized copy, see HathiTrust Digital Library, catalog.hathitrust.org/Record/011665294.

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⁷ Grosset and Dunlap bought A. Wessels Company and released copies of *The Return of Sherlock Holmes* with the Wessels title page. GREEN & GIBSON, *supra* note 1, at 137. For a digitized copy, see Google Books, books.google.com/books?id=Le49AQAAMAAJ&source=gbs_navlinks_s; HathiTrust Digital Library, catalog.hathitrust.org/Record/006904254.

SMOKING OUT THE "NORWOOD BUILDER"

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⁸ Green and Gibson provide the publication date of 1913. GREEN & GIBSON, *supra* note 1, at 579.

⁹ Per Green and Gibson, the publication date is 1914. *Id.* at 596. For a digitized copy, see HathiTrust, catalog.hathitrust.org/Record/100032271.

¹⁰ According to De Waal, this set was published in three different bindings. DE WAAL, *supra* note 1, at nos. C2225-C2227.

¹¹ For a digitized copy, see HathiTrust Digital Library, catalog.hathitrust.org/Record/006880283.

¹² Green and Gibson give the publication date of 1918. GREEN & GIBSON, *supra* note 1, at 572.

¹³ Green and Gibson narrow the publication date to sometime during the 1920s. *Id.* at 596. For a digitized copy, see Google Books, books.google.com/books?id=xgnTteuZ694C&source=gb_s_navlinks_s; HathiTrust Digital Library, catalog.hathitrust.org/Record/006880454.

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¹⁴ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn83045462/issues/.

¹⁵ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn83030193/issues/. For a history on the poor quality of this copy, taken from the New York Public Library's microfilm, see Ira Brad Matetsky, *The Adventure of The New York World*, in 2015 GREEN BAG ALM. 465.

¹⁶ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn99021999/issues/.

¹⁷ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn85058130/issues/.

¹⁸ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn85066387/issues/.

¹⁹ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn92053934/issues/.

²⁰ For a digitized copy, see Google News Archive, news.google.com/newspapers?nid=KFIQUvoPKFAC.

²¹ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn86072143/issues/.

SMOKING OUT THE “NORWOOD BUILDER”

The Guthrie Daily Leader, June 23-24, 1905²²

The Paducah Sun, June 23-29, 1905²³

The Evening News (San Jose), June 30-July 6, 1905²⁴

Richmond Planet, July 15, 1905²⁵

The Columbus Journal, July 19-August 16, 1905²⁶

Evening Bulletin (Honolulu), July 26-29, 1905²⁷

The Carroll Herald, February 28-March 14, 1906²⁸

The New York Sunday World, April 16, 1911 [booklet]

The Chicago Sunday Tribune, July 2, 1911 [supplement]

The Salt Lake Tribune, August 11, 1912 [magazine]²⁹

SEARCH FOR THE *NEW YORK SUNDAY WORLD*

From early publications of “The Adventure of the Norwood Builder,” one stood out. The *New York Sunday World*’s printing of the Sherlock Holmes mystery on April 16, 1911 was unlike previous appearances in newspapers. The “Norwood Builder” was not just an item in the paper, or part of an accompanying weekend supplement or magazine. It was, as the newspaper’s own advertisement described it, a separate “pocket edition booklet.”³⁰

²² For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn86063952/issues/.

²³ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn85052116/issues/.

²⁴ For a digitized copy, see Google News Archive, news.google.com/newspapers?nid=0q7iQwrhYWUC.

²⁵ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn84025841/issues/.

²⁶ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn95073194/issues/.

²⁷ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn82016413/issues/.

²⁸ For a digitized copy, see Google News Archive, news.google.com/newspapers?nid=8v7czoltWYsC.

²⁹ For a digitized copy, see Library of Congress, *Chronicling America: Historic American Newspapers*, chroniclingamerica.loc.gov/lccn/sn83045396/issues/.

³⁰ See Advertisement, *The Return of Sherlock Holmes: Story No. 2*, *N.Y. WORLD*, April 9, 1911, at 10. The ad appears in this *Almanac*. See Ross E. Davies, *The Regulatory Adventure of the Two Norwood Builders*, in 2015 *GREEN BAG ALM.* 567, 626.

The challenge in finding the booklet was not in figuring out where or when it was published, but determining who might have a copy over 100 years later. My first step was to verify the newspaper's title. Using the U.S. Newspaper Directory on Chronicling America, the Library of Congress' historic newspapers website, I confirmed that a daily New York newspaper called *The World* was published by Joseph Pulitzer during this time period.

I then turned to WorldCat, an online union catalog, to locate a physical copy. Although many newspapers in the public domain are available online, I had been able to quickly rule out the availability of a digitized copy, as resources like Chronicling America and the Google News Archive did not have it. WorldCat listed 98 libraries — ranging from academic libraries to public libraries to historical societies — that had collected issues of *The World* in print and microform formats.

The microfilm of the April 16, 1911 issue was a dead end. It did not include the "Norwood Builder" booklet. The only trace of the story was the advertisement in the April 9th issue for the booklet, which would be "Free With Every Copy of Next Sunday's World."³¹

Returning to the list of 98 libraries, I eliminated ones that had the April 16th issue on microfilm or did not have the issue at all. In the end, only one library in the world remained on my list: The David M. Rubenstein Rare Book & Manuscript Library at Duke University in Durham, North Carolina.

There was an important question still to be asked: Did the copy in the Rubenstein Library have the booklet of "The Adventure of the Norwood Builder," or had the newspaper issue and booklet been separated long ago? A helpful staff member at the Rubenstein Library retrieved the April 16th issue to check its contents. The booklet was there.

This was, as far as I could tell, an extremely rare copy of *The World* from April 16, 1911, complete with a booklet of Conan Doyle's "The Adventure of the Norwood Builder."³² Even now, I dare not think of what would have been lost if every print copy of this issue had been discarded — without a clue of the treasure inserted within its pages.

³¹ *Id.*

³² Turns out that this booklet is actually a pamphlet, and that both booklet and pamphlet versions were issued. See Davies, *supra* note 30.

THE REGULATORY ADVENTURE OF THE TWO NORWOOD BUILDERS

SHERLOCK HOLMES CROSSES PATHS WITH
CONGRESS, THE PRESIDENT, THE COURTS,
AND THE ADMINISTRATIVE STATE, IN THE PRESS

[parallel citation: 2015 Green Bag Alm. 567]

[Editors' note: The images associated with Appendixes A–E of this article are only available in the original 2015 *Almanac & Reader* and at www.availableat.org.]

Ross E. Davies[†]

It was almost certainly some combination of law on the books and law in the works that inspired the *New York World* to publish its 1911 version of the Sherlock Holmes story, “The Adventure of the Norwood Builder,” in not one, but two, formats. (In its Sunday editions from April 9 to July 2, 1911, the *World* republished all thirteen stories from *The Return of Sherlock Holmes* in their original sequence, with “Norwood Builder” appearing on April 16.)

The law on the books was a series of interpretations of the Mail Classification Act of 1879 by the U.S. Post Office Department¹ (in 1901) and the U.S. Supreme Court (in 1904). The law in the works was the ongoing congressional and presidential interest in tinkering with postal service in general and second-class mail rates in particular — an interest that manifested itself in 1911 in the form of hearings conducted in New York City by a special federal Postal Commission headed by Justice Charles Evans Hughes.

[†] Professor of law at George Mason University and editor of the *Green Bag*. Sharper (and in some cases more colorful) versions of images in this article are available at www.availableat.org. Thanks to Cattleya Concepcion and Ira Brad Matetsky.

¹ Now the U.S. Postal Service. Postal Reorganization Act, 84 Stat. 719 (Aug. 12, 1970).

The results were: (a) a colorful, relatively small, booklet version of “Norwood Builder” (and similar booklets of the other stories in the series) for in-town readers of the *World*, and (b) black-and-white, relatively large, tabloid versions of the same stories for out-of-town subscribers to the newspaper. Unfortunately, decisions by several of America’s great libraries to discard their hard copies of the *World* have left us (at least for now) with the rather plain tabloid version of “Norwood Builder,”² but not the colorful booklet version, to share with readers of the *Green Bag Almanac & Reader*.³

I.

THE LAW ON THE BOOKS

On July 17, 1901, Postmaster General Charles Emory Smith issued regulations reversing longstanding Post Office practice under the Mail Classification Act of 1879.⁴ Reinterpreting the 1879 Act, Smith determined that publications “having the characteristics of books” would no longer qualify as “periodicals” mailable at the very low, heavily subsidized second-class postal rates intended for newspapers and magazines, but would instead go at the much higher third-class rates intended for other kinds of publications.⁵

Many publishers were in the habit of characterizing books and book-like products as periodicals in order to capitalize on the Post Office’s formerly generously broad definition of “periodicals” under the 1879 Act. Thus, the new regulations meant much higher distribution costs for those publishers. For decades, they had been successfully frustrating efforts by Postmasters General to persuade Congress to amend the 1879 Act to achieve what Smith was now doing by (in the eyes of the publishers) overreaching bureaucratic fiat.⁶ Not surprisingly, this sharp reversal

² See Appendix A below.

³ See Cattleya M. Concepcion, *Smoking Out the “Norwood Builder,”* page 496 above; Ira Brad Matetsky, *The Adventure of the New York World*, page 465 above.

⁴ 20 Stat. 355, 358-59 (Mar. 3, 1879).

⁵ See *Payne v. National Railway Publishing Co.*, 20 App. D.C. 581, 585-86 (D.C. Cir. 1902) (describing and quoting the regulation); ANNUAL REPORTS OF THE POST-OFFICE DEPARTMENT FOR THE FISCAL YEAR ENDED June 30, 1901, at 772-83 (1901) (describing the rationale for the regulations and the early and anticipated impacts).

⁶ See Richard B. Kielbowicz, *Mere Merchandise, or Vessels of Culture?: Books in the Mail, 1792-1942*, 82 PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 169, 179-86 (June 1988); see also, e.g., William H. Moody, *The Work of the Postal Commission*, THE INDEPENDENT, Jan. 24,

upset them.

As the new regulations went into effect, several publishers mounted court challenges. They failed. In a series of decisions in 1904, the U.S. Supreme Court sided with the Post Office, engaging in a mix of statutory interpretation and deference to agency judgments that would sound pretty familiar to a modern administrative lawyer.⁷ The Court's admirably forthright descriptions of its own role and of the Postmaster General's authority under the 1879 Act left the publishers with little reason to hope that more resistance would achieve a different result:

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the decision of the Post Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.⁸

So, starting in 1904, it was pretty well settled that publications "having the characteristics of books" in the eyes of the Post Office would be posted at third-class rates, which tended to be seven or eight times higher than the second-class rates at which books had traditionally traveled.⁹ That

1901, at 195, 196 (a Member of the U.S. House of Representatives and future U.S. Attorney General and Supreme Court Justice describing an earlier congressional Postal Commission whose members had agreed "that there should be a curtailment of the amount of matter mailable as second class").

⁷ *Houghton v. Payne*, 194 U.S. 88 (1904); *Smith v. Payne*, 194 U.S. 104 (1904); *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904); see also *Houghton v. Cortelyou*, 208 U.S. 149 (1908).

⁸ *Bates & Guild Co. v. Payne*, 194 U.S. at 109-110.

⁹ See Jane Kennedy, *Development of Postal Rates: 1845-1955*, 33 LAND ECONOMICS 93, 100 (May 1957); Richard B. Kielbowicz, *Postal Subsidies for the Press and the Business of Mass Cul-*

was still the state of the law in 1911.

Of course, the Post Office was free to “exercise . . . a reasonable discretion,” which meant that for a publisher there was no harm in trying for second-class postage on a case-by-case basis. But the *New York World* had no good reason to hope for any discretionary administrative beneficence from the Post Office when it came to publishing Sherlock Holmes stories in book (or book-like) form. In *Smith v. Payne*, one of the cases decided against the publishers by the Supreme Court in 1904, the publishers had argued that their publications merited second-class postage in part because:

Each issue contains high-class fiction of great literary merit, such as “The Sherlock Holmes Detective Stories,” by A. Conan Doyle, “An Accidental Password,” by Nicholas Carter, and “The Clique of Gold,” by Emile Gaboriau . . .¹⁰

Unfortunately for Smith and his co-appellants, Justice Henry Billings Brown’s opinion for the Court had no kind words for their literary taste:

The books of these series are apparently of an inferior class of literature . . .

The considerations moving us to affirm the decree of the Court of Appeals in the case of *Houghton v. Payne* [the lead case on the publishers’ challenge to the regulation], just decided, apply with much greater persuasiveness to this case, and the decree dismissing the bill is, therefore

*Affirmed.*¹¹

Arthur Conan Doyle himself might have concurred. He viewed his Sherlock Holmes stories (which he called “police romances”) as “on a different and humbler plane”¹² than “my more serious literary work.”¹³

ture, 1880-1920, 64 BUSINESS HISTORY REV. 451, 458 (Autumn 1990); Kielbowicz, *Mere Merchandise*, note 6 above, at 179.

¹⁰ Transcript of Record 2 (filed Nov. 14, 1903), *Smith v. Payne*, 194 U.S. 104 (1904).

¹¹ *Id.* at 105.

¹² A. Conan Doyle, *Preface to the Author’s Edition*, THE WHITE COMPANY vi (1891; 1902 D. Appleton edition).

¹³ Arthur Conan Doyle, *Preface*, THE CASE-BOOK OF SHERLOCK HOLMES xix, xx (1927; Leslie S. Klinger ed., 2007); see also SIR ARTHUR CONAN DOYLE, MEMORIES AND ADVENTURES 108 (1924); DANIEL STASHOWER, TELLER OF TALES: THE LIFE OF ARTHUR CONAN DOYLE 151 (1999).

II. THE LAW IN THE WORKS

The controversy over books and book-like things as second-class or third-class mail matter was just one phase in a long conflict over public subsidies for book distribution. It was not settled until President Franklin D. Roosevelt established a special book rate in 1938 and Congress followed up in 1942.¹⁴ The books conflict was, in turn, just one front in a larger, long-running policy-and-politics struggle over the proper role of government in the distribution (and thus also the regulation) of information.¹⁵

In 1911, the hot topic was second-class postage generally. The Post Office was running big deficits and the emergent yellow press was offending politicians and other powerful people, providing plenty of inspiration for Congress and the President to take a close look at the wisdom of subsidies for newspapers and magazines.¹⁶ Generally speaking, debates over the second-class postal rates in 1911 revolved (as they had, off and on, for more than a decade) around the interconnected issues of pricing of the service and the efficiency with which it was provided: Should second-class rates be raised somewhat (thus reducing public subsidies to publishers of newspapers and magazines) or should periodicals pay their own way (thus abolishing subsidies) or should rates be left as-is (thus, in an inflating economy, effectively increasing subsidies) or should the Post Office reform its operations (thus becoming more efficient and obviating subsidy concerns)?¹⁷

¹⁴ 3 F.R. 2588 (Nov. 1, 1938); 3 F.R. 2662 (Nov. 9, 1938); 56 Stat. 462 (June 30, 1942); see also Kielbowicz, *Mere Merchandise*, note 6 above, at 196-99.

¹⁵ See generally, e.g., *Federal Interference With the Freedom of the Press*, 23 YALE L.J. 559 (1914); LINDSAY ROGERS, *THE POSTAL POWER OF CONGRESS: A STUDY IN CONSTITUTIONAL EXPANSION* chs. IV-VII (1916); GERALD CULLINAN, *THE POST OFFICE DEPARTMENT* chs. II-VII (1968); DOROTHY GANFIELD FOWLER, *UNMAILABLE* (1977).

¹⁶ See Kielbowicz, *Postal Subsidies for the Press*, note 9 above, at 464-71.

¹⁷ See generally MESSAGE OF THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE ANNUAL REPORT OF THE POSTMASTER GENERAL FOR THE FISCAL YEAR ENDED JUNE 30, 1911 AND THE REPORT OF THE COMMISSION ON SECOND-CLASS MAIL MATTER, 62d Cong., 2d Sess., H.R. Doc. No. 559 (Feb. 22, 1912) (hereafter "REPORT OF THE COMMISSION"); HEARINGS OF THE COMMISSION ON SECOND-CLASS MAIL MATTER IN NEW YORK CITY BEGINNING AUGUST 1, 1911: STATEMENTS ON BEHALF OF THE POST OFFICE DEPARTMENT (1911) (hereafter "HEARINGS OF THE COMMISSION"); see also Richard B. Kielbowicz, *Cost Accounting in the Service of Policy*

Among those who were interested in both improving the Post Office's financial condition and making trouble for trouble-making periodicals was President William Howard Taft. After a legislative session in which newspaper and magazine publishers continued their long run of successful resistance to increases in second-class rates, Congress — with the support of Taft — passed a joint resolution in March 1911:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President shall appoint three competent and impartial persons, one of whom shall be a judge of the Supreme Court of the United States and the other two of whom shall hold no office, and no one of whom shall be connected with the Postoffice Department or have any interest in any business directly or indirectly affected by the publishing of magazines or newspapers using the mails of the United States, to examine the reports of the Postoffice Department and any of its officers, agents or employees, and the existing evidence taken in respect to the cost to the Government of the transportation and handling of all classes of second class mail matter which may be submitted to them, and such evidence which may be presented to them by persons having an interest in the rates to be fixed for second class mail matter, to make a finding of what the cost of transporting and handling different classes of such second class mail matter is to the Government and what in their judgment should be the rate for the different classes of second class postal matter, in order to meet and reimburse the Government for the expense to which it is put in the transportation and handling of such matter, and on or before December first to make report of their proceedings and findings to the President for transmission to Congress: *Provided*, That the sum of twenty-five thousand dollars is hereby appropriated to pay the expenses of such commission, including compensation to the members thereof, to the necessary secretaries, stenographers, and other incidental expenses, and such compensation may be awarded to the Federal official member of the commission, anything in the existing law to the contrary notwithstanding.¹⁸*

Reform: Postal Rate Making, 1875-1926, 75 SOCIAL SCIENCE Q. 284, 291-93 (June 1994).

¹⁸ S.J. Res. 147, 36 Stat. 1458 (Mar. 4, 1911); see *Our Political Postoffice*, N.Y. SUN, Feb. 14, 1911, at 7 (advertisement); *Taft Averts One Defeat*, N.Y. TIMES, Mar. 5, 1911, at 2; *Justice Hughes to Be Named*, N.Y. SUN, Mar. 7, 1911, at 1; *Justice Hughes Accepts*, N.Y. SUN, Mar. 10, 1911, at 4; *Harvard President to Assist in Postal Rate Investigation*, WASH. TIMES, Mar. 31, 1911, at 1; *President Lowell Will Serve on Postal Commission*, N.Y. SUN, Apr. 1, 1911, at 8; *Lowell on Inquiry*

Charles Evans Hughes — then an Associate Justice of the U.S. Supreme Court (1910-1916), and later a Republican presidential candidate (1916), then Secretary of State (1921-1925), and, finally, Chief Justice (1930-1941)¹⁹ — later recalled in his memoirs the context and consequences of the joint resolution:

I looked forward with eagerness to the long vacation of 1911. But that gave me no relief. For President Taft had a Joint Resolution passed providing for a Commission to determine the cost of second-class mail matter, then a question of much public interest in connection with a proposal to raise the rates. . . . President Taft asked me to serve, saying that he had the Resolution passed with the intention to appoint me and did not wish to name any other Justice. I had not been consulted about this action and strongly resisted. But President Taft was insistent, arguing that it would not be a difficult task, that all of the calculations had been made in the Post Office Department and that I should have able associates — President A. Lawrence Lowell of Harvard and Harry A. Wheeler, a leading businessman of Chicago. So I was persuaded to undertake the task. Of course, it turned out to be a very hard one. We held public hearings during the summer of 1911. The calculations of the Post Office Department were strongly challenged and we had to take a lot of technical evidence and make our own calculations. I caught a severe cold and suffered greatly from lumbago. Through the fall while I was trying to keep up with the work of the Court I was busy over figures until late into the night. It was February 1912, before we got in our report, and it was not until the summer of 1912 that I had any opportunity for rest.²⁰

Basically then, the Postal Commission was a congressionally mandated, presidentially organized, and judicially led investigation into second-class mail service and its adequacy for, or abuse by, publishers. Alas (or fortunately), nothing came of all those inter-branch exertions in 1911-1912.

Board, N.Y. TIMES, Apr. 1, 1911, at 7; *The Postal-Rates Commission Completed*, HARPER'S WEEKLY, Apr. 8, 1911, at 5; see also Kielbowicz, *Postal Subsidies for the Press*, note 9 above, at 469-70.

¹⁹ Burnett Anderson, *Charles Evans Hughes*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1992* at 306-10 (Clare Cushman, ed., 1993).

²⁰ *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 166 (David J. Danelski and Joseph S. Tulchin, eds., 1973) (footnote omitted); see also MERLO J. PUSEY, *1 CHARLES EVANS HUGHES* 296 (1951).



The members of the 1911 Postal Commission (left to right): Charles Evans Hughes, Harry A. Wheeler, and A. Lawrence Lowell.

No legislation adjusting second-class rates was enacted at that time, or for several years thereafter.²¹

But in the spring and summer of 1911, publishers of newspapers and magazines (and things that might be considered book-like) had, obviously, good reason to be nervous. And the *New York World* had two grounds, at least, to be especially nervous.

²¹ Kennedy, *Development of Postal Rates*, note 9 above, at 100.

First, there was the danger that the *World* might serve as an example of abuse of second-class postal rates. Hughes and his colleagues on the Postal Commission had chosen to conduct their hearings in New York, where any misbehavior by the *World* — for example, any attempt to send books through the mail at second-class rates — would make it a convenient target.²²

Second, there was the danger that partisan Republican frustration with the Supreme Court's January 1911 decision in *U.S. v. Press Publishing Co.*²³ might somehow manifest itself via the Postal Commission's proceedings or Congress's use of them. The Court's decision was the culmination of a Justice Department prosecution — under Presidents Theodore Roosevelt and William H. Taft — of the *World's* parent company for libel based on the newspaper's reporting of alleged government complicity in profiteering during development of the Panama Canal. The Court ruled in the *World's* favor on jurisdictional grounds, and so did not reach the constitutionality of seditious libel prosecutions, but it was still an important victory for Press Publishing and the *World*, and for owner Joseph Pulitzer.²⁴ The case has been obscured by a lively century of First Amendment jurisprudence, but it was a big deal at the time.²⁵ In victory, the Pulitzer organization does not seem to have exerted itself to improve relations with the government. Instead, it celebrated publicly and energetically. For example, in April 1911 it put out a pamphlet with a title that some observers might have considered a trifle inflammatory: "*The Roosevelt Panama Libel Case Against the New York World: A Brief History of the Attempt of President Roosevelt by Executive Usurpation to Destroy the Freedom of the Press in the United States.*"²⁶

Under those circumstances it should perhaps be unsurprising that the *World* was not so obstreperous when it came to compliance with the more mundane (and Supreme Court-endorsed) government imposition of restraints on the use of second-class mail to distribute book-like publications. Indeed, the *World* was quite docile — at least in a strictly, technically regulatory sense.

²² See REPORT OF THE COMMISSION, note 17 above, at 53.

²³ 219 U.S. 1 (1911).

²⁴ See DENIS BRIAN, PULITZER: A LIFE chs. 31-34 (2001).

²⁵ See Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 290-93 (1986).

²⁶ THE ROOSEVELT PANAMA LIBEL CASE AGAINST THE NEW YORK WORLD 3 (1911).

III. THE *NEW YORK WORLD* UNDER THE LAW

By 1911, the *World* was an accomplished operator under the Supreme Court's 1904 second-class mail decisions and the Post Office policy the Court upheld. The *World* continued to promote and publish book-like things. But it also complied with the new postal regulatory regime.

For example, while Congress was debating second-class rate reform and passing the Postal Commission joint resolution in early 1911, the *World* was including a "complete novel in book form" in its Sunday edition each week. Those books — *The Red Triangle Stories*, which the *World* promoted as "A Second Sherlock Holmes" — were just the sorts of things that the Post Office and the Supreme Court had said were not mailable at second-class rates.²⁷ But each book was "given in Greater New York" — that is, to the *World's* local customers, who were accessible via non-postal channels, such as newsstands and local delivery. Indeed, advertisements for the book series admonished readers, "You really must order from [a] newsdealer in advance if you expect to have a Sunday World containing one of these booklets saved for you."²⁸ Apparently, out-of-town subscribers were out of luck. Not every advertisement for the book series included a reference to "Greater New York" availability, but plenty did.²⁹ And I have found no evidence that the Post Office objected to the *World's* distribution of the *Red Triangle* books.

The *World* must have been pleased with reader response to the "Second Sherlock Holmes," because it announced on April 2, 1911, that it was bringing back the real thing — republishing the thirteen stories in *The Return of Sherlock Holmes*.³⁰ (The stories had first been serialized in 1903-04

²⁷ *A Second Sherlock Holmes*, N.Y. WORLD, Feb. 18, 1911, at 6 (advertisement); see also ARTHUR MORRISON, *THE RED TRIANGLE: BEING SOME FURTHER CHRONICLES OF MARTIN HEWETT, INVESTIGATOR* (1903).

²⁸ See, e.g., *The Cleverest Idea Yet Offered*, and *FREE*, N.Y. WORLD, Jan. 27, 1911, at 12 & Jan. 26, 1911, at 15 (advertisements).

²⁹ Compare, e.g., *id.*, with *The Great Detective Begins to Unravel the Mystery of the Red Triangle*, N.Y. WORLD, Feb. 13, 1911, at 14 (advertisement).

³⁰ Interest in republication may have been amplified by other Holmes-related developments in 1911. It was the busiest year for new Holmes stories in nearly a decade, including the first printings of "The Adventure of the Red Circle" and "The Disappearance of Lady Frances Carfax" in England and in the U.S. and the first printing of "The Adventure of the Devil's Foot" in the U.S. See RICHARD LANCELYN GREEN & JOHN MICHAEL GIBSON, *A BIBLI-*

and collected in 1905.³¹) Again, the *World's* advertising said, the stories would be published "in book form."³² The *World* did not, however, mention distribution limited to "Greater New York" or orders to be placed with news-dealers, as it had with *The Red Triangle Stories*. But a few days later, on April 8, another advertisement cleared things up: the *World* would honor the letter of the postal law while at the same time honoring the wishes of both its local readers and its out-of-town subscribers for Sherlock Holmes stories: locals and out-of-towners were to receive the same stories, in different formats. It was a vivid — both colorful and black-and-white — example of regulatory line-drawing and regulated line-toeing.

OGRAPHY OF A. CONAN DOYLE 182 (first rev. ed. 2000) (hereafter "GREEN & GIBSON"); N.Y. WORLD, Mar. 21, 1911, at 2 (advertisement). Other interesting Holmes-related activity included: (1) a rather nice, eclectic serial reissue by the *Boston Post*, under the general title *Masterpieces of Sherlock Holmes*, of Holmes stories of various vintages (see, e.g., Appendix E below); (2) performances in New York by William Gillette of his famous "Sherlock Holmes" play (see, e.g., N.Y. WORLD, Mar. 27, 1911, at 10 & Apr. 3, 1911, at 10 & Apr. 10, 1911, at 10 (advertisements)); and (3) the first readings of Ronald Knox's "The Mind and Art of Sherlock Holmes" which would be printed the next year as "Studies in the Literature of Sherlock Holmes." See Nicholas Utechin, *The Case of the First Reading*, 61 BAKER ST. J. 34 (Spring 2011); *Studies in the Literature of Sherlock Holmes*, BAKER ST. J. 2010 CHRISTMAS ANNUAL 28-43 (reprinting the Knox paper, and describing its first publication in *The Blue Book: Conducted by Oxford Undergraduates* in September 1912); 1 BLACKFRIARS 154 (June 1920); Steven Rothman, *Christopher Morley and the Baker Street Irregulars: The Gospel According to Kit*, 40 BAKER ST. J. (n.s.) 9, 10 (Mar. 1990); ANDREW LYCETT, *THE MAN WHO CREATED SHERLOCK HOLMES: THE LIFE AND TIMES OF SIR ARTHUR CONAN DOYLE* 356-57 (2007). Arthur Conan Doyle was very much in the public eye as well, with his public endorsements of Irish Home Rule (see JON LELLENBERG, DANIEL STASHOWER, AND CHARLES FOLEY, ARTHUR CONAN DOYLE: A LIFE IN LETTERS 578-79 (2007)) and liberalized divorce laws (see Albert M. Rosenblatt, *Divorce, Canonical Style: Checkmate*, 35 BAKER ST. J. (n.s.) 15 (Mar. 1985)), as well as the death of Joseph Bell, his teacher in medical school who became the main real-life model for Holmes. See Dr. Douglas Guthrie, *Dr. Bell of Edinburgh*, 13 BAKER ST. J. (n.s.) 202 (Dec. 1963).

³¹ See GREEN & GIBSON, note 30 above, at 135-39.

³² *The Return of Sherlock Holmes*, N.Y. WORLD, Apr. 2, 1911, at 11 (advertisement).



The Return of Sherlock Holmes

In its ever-willingness to respond to the wishes of its readers, The World takes great pleasure in making the following announcement:

The series of detective stories in book form that have been given away from week to week with copies of the Sunday World have struck such a popular chord that The World has received many requests to republish the famous series of stories in which Conan Doyle brought to life again his famous character, Sherlock Holmes.

The World has arranged to comply with these numerous requests and makes announcement that the first of the series of Sherlock Holmes stories, "The Adventure of the Empty House," will be given free with copies of next Sunday's World. It is needless to say that this adventure of the world's most famous detective is highly exciting. It will be presented in book form, trimmed and pasted, with attractive cover printed in colors.

On following Sundays will be given "The Adventure of the Norwood Builder," "The Adventure of the Dancing Men," etc., etc.

Sherlock Holmes needs no introduction to the public. His name stands for all that is wonderful as a detector of crime, a reasoner and conclusionist of almost supernatural powers. Every one of his remarkable adventures is a marvellous lesson in the study of human conduct and in the baffling methods and cunning resources of wrongdoers. The reader is guided, step by step, through a maze of conflicting incidents and emotions until, at length, he bursts out into the broad daylight of perfect understanding. The sensation is delightful and exalting. The morals taught are educational and inspiring. The stories, as a whole, stand unapproached as masterpieces of analytical fiction.

This fascinating series consists of thirteen Sherlock Holmes stories. A different story will be given with copies of the Sunday World every Sunday for twelve consecutive Sundays. The set will make a valuable addition to any library.

Be sure and get story No. 1, "The Adventure of the Empty House," with next Sunday's World. Read it and you will surely want them all.

Advertisement, N.Y. World, Apr. 2, 1911, at 11.

13 Conan Doyle Sherlock Holmes Stories in Book Form Free.

Twenty-five Thousand Dollars was paid not long since by the publishers of a magazine for the "best American serial right" of a new novel. Mind you, this did not permit them to publish the book—only to be the first to print the novel by instalments. Though the price was high the publishers were satisfied with results.

The novel they purchased was by Sir ARTHUR CONAN DOYLE, the most highly paid and by far the most popular author in the English speaking world. He has written more books than any other living writer. His books are read and re-read, more interesting books, than any other living writer. Rudyard Kipling not excepted.

His Best Work

Yet the novel for which this startling high price was paid was far from being his best. "Sir Nigel," entertaining though it was, does not rank with "The White Company," "The Mystery of Chamber," or "A Study in Scarlet," all of which were "best sellers" for years and are yet. Yet even these are not his best work.

If five hundred years from now an American school boy is asked "who was Conan Doyle?" the answer will always be "He wrote Sherlock Holmes." These masterpieces of detective fiction stand on a pinnacle, far higher than the works of Poe, of Galton, or any of the other famous masters of mystery.

A Great Detective

"The Adventures of Sherlock Holmes" as related by Conan Doyle, using the literary creation of "Dr. Watson," incidentally Conan Doyle was a doctor when he began writing—made more than a star when they were first published. They set a new pace for mysteries. So popular were they that even after Sherlock Holmes had been killed by the clever, wicked Professor Moriarty the public was not satisfied.

Sherlock Holmes Returns

No incident was the public demand for "more of Sherlock Holmes," that Conan Doyle, in the entertaining story in this booklet, "The Adventure of the Empty House," miraculously brought the master detective back to life and put him to work again.

For published in England, these new Sherlock Holmes stories, proved even a better than the first ones. They are the most thrilling, the most mysterious, the most interesting of the detective stories ever published anywhere. In response to the requests of many readers, the Sunday World has decided to republish them.

Twelve More Stories

Besides "The Adventure of the Empty House" there are twelve more stories in the "Return of Sherlock Holmes" series. Each of these will be published in a 16-page booklet like this, with a cover in four colors, and fully illustrated. One of these booklets will be given free with The Sunday World each Sunday.

The twelve more Sherlock Holmes stories to be given free with the Sunday World were the best, most thrilling, most mystifying detective stories ever written. The titles are as follows:

The Adventure of The Six Napoleons:

If one by one six clay plaster heads of Napoleon in various parts of London were mysteriously stolen it is the name as Sherlock Holmes?

The Adventure of The Three Students:

Some one stole valuable papers. Three students are suspected. What was the matter? A plot of black clay betrays the guilty man.

The Golden Pince-nez:

This story is about the remarkable death of young Willoughby Smith, mysteriously struck down in the street. A pair of pince-nez and a cigarette butt on the carpet solves the problem.

The Adventure of The Missing Three Quarter:

A famous foot-baller mysteriously disappears just before he had had a walk. On three slender clues Sherlock Holmes finds him.

The Adventure of The Abbey Grange:

The dark, midnight feature of a woman's face is a fair in a terribly fanciful expression. Her hand was horribly injured—mysterious thing, don't you think?

The Adventure of The Second Stain:

This is a thrilling tale of disguise, disguise, disguise—A mysterious murder follows. A hand is hidden in a mysterious place.

You ought not to miss a single one of these twelve stories. Tell your newsdealers to deliver THE SUNDAY WORLD to your house for the next three months.

Each Story in a Separate Booklet Free with the SUNDAY WORLD
Out-of-town Readers Will Be Furnished With These Stories as a Special Supplement in Pamphlet Form.

ONE EACH WEEK WITH THE SUNDAY WORLD

Advertisement, N.Y. World, Apr. 8, 1911, at 12 (above) and detail (below).

You ought not to miss a single one of these twelve stories. Tell your newsdealers to deliver THE SUNDAY WORLD to your house for the next three months.
Each Story in a Separate Booklet Free with the SUNDAY WORLD
Out-of-town Readers Will Be Furnished With These Stories as a Special Supplement in Pamphlet Form.

IV. SHERLOCK HOLMES UNDER THE LAW

In 1904, the Supreme Court had gone on at great length about the difference between books and periodicals, and then concluded that,

While it may be difficult to draw an exact line of demarkation between periodicals and books [for purposes of the Post Office's second-class mail regulations], . . . it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue.³³

In all three of its second-class-mail cases, the Court found it “easy to determine” that the kinds of publications in question — popular novels, pieces of sheet music, volumes of highbrow literature — were not periodicals.³⁴ From then on, law-abiding publishers merely had to correctly guess which side of the difficult-to-draw line a court (or, more likely, an official in the Post Office) would easily place each of their publications on.³⁵ It was just another chapter in the ages-old story of blurry and invisible lines of legality and their chilling effects on those subject to the laws.³⁶

By 1911, with a few years of practice, the *World* seems to have developed an intuition about where at least one segment of the postal line between books and periodicals lay. The *World's* April 8 advertisement of its *Return of Sherlock Holmes* series was headlined “13 Conan Doyle Sherlock Holmes Stories in Book Form Free,” and it said:

³³ *Houghton v. Payne*, 194 U.S. at 97 (distinctive spelling in the original).

³⁴ *Id.*; *Smith v. Payne*, 194 U.S. 104; *Bates & Guild Co. v. Payne*, 194 U.S. 106.

³⁵ *Cf.* Statement of Hon. James J. Britt, Third Assistant Postmaster General at 13, in HEARINGS OF THE COMMISSION, note 17 above.

³⁶ *See, e.g.*, David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1182; Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473 (2013); Francesca M. Pisano, *The Foreign Corrupt Practices Act and Corporate Charity*, 62 EMORY L.J. 607, 633-35 (2013); Kevin Werbach, *The Network Utility*, 60 DUKE L.J. 1761, 1786-87 (2011); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference*, 96 GEO. L.J. 1083, 1156-59 (2008); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685 (1978); *see also, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

THE REGULATORY ADVENTURE OF THE TWO NORWOOD BUILDERS

You ought not to miss a single one of these Tell your newsdealers to deliver THE SUNDAY WORLD to your house for the next three months.

Each Story in a Separate Booklet Free with the SUNDAY WORLD[.]

Out-of-town Readers Will Be Furnished With These Stories as a Special Supplement in Pamphlet Form.³⁷

It would seem that in the publishing-and-distributing world according to the *World*, “books” or “booklets” were not second-class mailable and “pamphlets” were.

And the *World* had a fairly precise sense of what counted as a “book” and what counted as a “pamphlet.” As it said in the April 2 advertisement announcing the Holmes series, “book form” meant “trimmed and pasted, with attractive cover printed in colors.”³⁸ In addition, an April 11 advertisement for “The Adventure of the Norwood Builder” expanded on the distinguishing features of a book (or booklet):

This is not a “cut out” or a part of the regular edition of the Sunday World, but is a pocket edition booklet printed in large readable type within covers illuminated in colors — just like one would buy at the stores at ten cents per copy.³⁹

So, a book, unlike a pamphlet, was to be small, with its own cover and binding, and distinctly separate from the regular newspaper it accompanied. These characteristics — size, binding, covers, separateness — were all important to the Supreme Court (though each characteristic standing alone was “by no means essential”⁴⁰) in its 1904 decisions upholding the Post Office’s regulations excluding “books” from second-class mail.⁴¹

Questions remained, of course: How small was small enough to be a book that was not a mere part of the *World*, and how large was large enough to be a pamphlet that was part of the regular newspaper? How

³⁷ 13 *Conan Doyle Sherlock Holmes Stories in Book Form Free*, N.Y. WORLD, Apr. 8, 1911, at 12 (advertisement).

³⁸ *The Return of Sherlock Holmes*, N.Y. WORLD, Apr. 2, 1911, at 11 (advertisement).

³⁹ *The Return of Sherlock Holmes: Story No. 2*, N.Y. WORLD, Apr. 11, 1911, at 16 (advertisement); but compare, e.g., pamphlet, *n.*, 1.b., OED ONLINE (Sept. 2014; vis. Nov. 29, 2014) (“A short printed work of several pages fastened together without a hard cover; a booklet; a leaflet.”), with booklet, *n.*, OED ONLINE (Sept. 2014; vis. Nov. 29, 2014) (no mention of “pamphlet”).

⁴⁰ *Houghton v. Payne*, 194 U.S. at 97.

⁴¹ *Id.* at 95 (size); *id.* at 97, 98 (binding); *id.* at 95 (covers); *id.* at 95, 97 (separateness); see also *Smith v. Payne*, 194 U.S. 104; *Bates & Guild Co. v. Payne*, 194 U.S. 106.

bound was bound enough to be a book, and how unbound was unbound enough to be a pamphlet? How covered to be a book or uncovered to be a pamphlet? How separate or not?⁴²

The limited available evidence suggests that the *World* did in fact publish distinctively small, bound, covered, and separate booklets of *The Return of Sherlock Holmes* stories for its New York readers and distinctively large, unbound, uncovered, and unseparate pamphlets for its out-of-town subscribers. By “limited” I mean severely limited. As my colleague Ira Brad Matetsky explains elsewhere in this *Almanac*, all the great libraries save one discarded their hard copies of the *New York World* many years ago when microfilm — the great 20th-century solution to limited library shelf space — came into vogue.⁴³ And as my colleague Cattleya M. Concepcion explains elsewhere in this *Almanac*, the great microfilm solution was, unfortunately, not so great.⁴⁴ Microfilmmers did not consistently film complete sets of documents, and what they did film they did not film with sufficient care to ensure that everything they were attempting to film actually got filmed. As a result, microfilms of 1911 issues of the *World* do not include the newspaper’s Holmes stories in book or pamphlet form, and related material — advertisements for the stories, for example — that is included is sometimes fragmentary or unreadable. (Should this be a caution to devotees of the great 21st-century in-vogue solution to limited library shelf space? I think so.)

A. *Surviving Pamphlets*

In a bibliographical cliffhanger, with novelist Nicholson Baker as the truly brave and noble hero, Matetsky reports that only the British Library in London preserved its ink-on-paper *Worlds* during the microfilm revolution. But even it eventually decided to dispose of that massive, shelf-space-hogging collection. Fortunately, it put the newspapers up for sale, rather than simply tossing them. Baker bought the *Worlds*, and then the David M. Rubenstein Rare Book & Manuscript Library at Duke Uni-

⁴² The definition of “book” is a question (though perhaps not a great question) of administrative law with which the courts, including the Supreme Court, have long struggled. Compare, e.g., *Houghton v. Payne*, 194 U.S. at 95-100, and *id.* at 100-04 (Harlan, J., dissenting), with *U.S. v. Mead Corp.*, 533 U.S. 218, 224-25, 235 (2001).

⁴³ Matetsky, *The Adventure of the New York World*, note 3 above.

⁴⁴ Concepcion, *Smoking Out the “Norwood Builder,”* note 3 above.

versity agreed to take them off Baker's hands.⁴⁵

London being outside Greater New York, the British Library was an out-of-town subscriber to the *World*. So, we should expect to find "pamphlet" versions, not "book" versions, of the Holmes stories in the Rubenstein collection. And we do (in fact it was Concepcion who found them there⁴⁶). Not all of the stories are in the collection, but the few that are are quite obviously pamphlets.⁴⁷ They are not small (they are tabloids — roughly 11 inches wide by 18 inches tall), they are not bound (the pages are simply broadsheets, folded once, to tabloid size), they have no covers (at the top of the first page there is a heading with a headline beneath it and the story itself below that, all in black-and-white, like the rest of the pamphlet⁴⁸), and they are not very separate (again, they are broadsheets, folded once, and so for mailing they would have fit neatly as just another section in the *World*, which was itself a broadsheet publication).

B. Surviving Booklet

I know of only one existing copy of a "book" version of one of these stories — "The Adventure of the Six Napoleons," which is in my collection.⁴⁹ (I hope this article will prompt Sherlockians to keep their eyes peeled for others.⁵⁰) It is as obviously a booklet as the ones in the Rubenstein collec-

⁴⁵ Matetsky, *The Adventure of the New York World*, note 3 above.

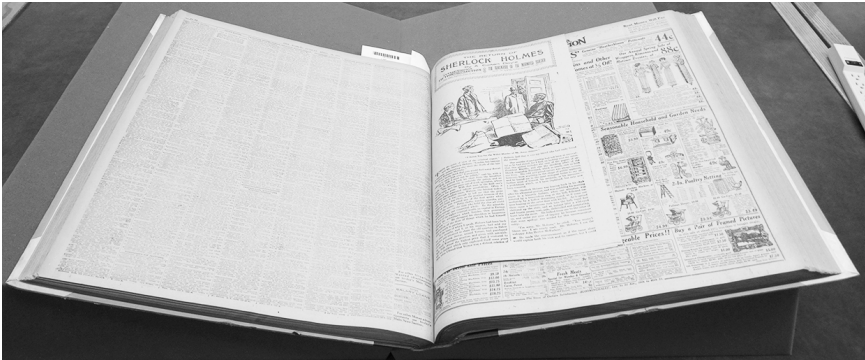
⁴⁶ Concepcion, *Smoking Out the "Norwood Builder,"* note 3 above.

⁴⁷ The Rubenstein collection contains five pamphlets: "The Adventure of the Norwood Builder" (reprinted in Appendix A below), "The Adventure of Black Peter" (reprinted soon in a *Green Bag* book or periodical), "The Adventure of Charles Augustus Milverton" (reprinted in 18 *GREEN BAG* 2D 98 (2014)), "The Adventure of the Six Napoleons" (reprinted in Appendix B below), and "The Adventure of the Golden Pince-Nez" (reprinted in 4 *JOURNAL OF LAW* 259 (2014)).

⁴⁸ All of the pamphlets in the Rubenstein collection are illustrated with black-and-white drawings, but only one pamphlet — "The Adventure of the Norwood Builder" — has a drawing on its first page. See note 47 above; Appendixes A and B below.

⁴⁹ Two stories — "The Adventure of the Priory School" and "The Adventure of Charles Augustus Milverton" — are listed with 1911 *New York World* citations under the heading "'Tabloid' Versions of Sherlockian Stories" in an inventory of the University of Minnesota Library's Sherlock Holmes Collections. See *The "Lumber-Room" Collection/Miscellaneous and Single Issue periodicals from the John Bennett Shaw Collection* box 30 (in process, preliminary inventory, SCRB Collection 150), www.lib.umn.edu/pdf/holmes/150lumberroom.pdf (vis. Dec. 2, 2014). I have been unable to learn whether they are in fact tabloid pamphlets or half-tabloid booklets.

⁵⁰ Intriguingly, another major newspaper, the *Boston Post* — operating at a relatively safe distance from the Postal Commission's hearings in New York City — was publishing versions of Holmes stories in the spring and summer of 1911 in a booklet format very much like the



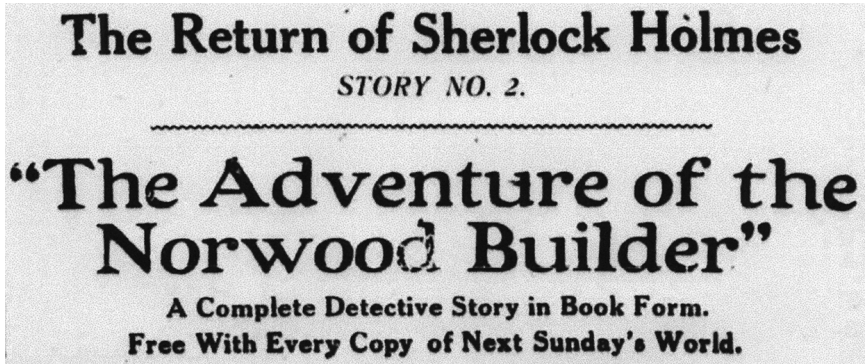
The Adventure of the Norwood Builder — the black-and-white pamphlet version — bound with the New York World, April 16, 1911, in the David M. Rubenstein Rare Book & Manuscript Library at Duke University.



The Adventure of the Six Napoleons — the booklet version, with colorful front and back covers — from the New York World, May 28, 1911.

tion are obviously pamphlets. It is much smaller (roughly 9 inches wide by 11 inches tall — not quite a half-tabloid), it is bound (saddle-stitched), it has covers (colorful ones, front and back), and it is quite separate (its small and odd size, and stapled binding, mean it would not have folded neatly into the *World*, and its distinctive covers mean it would not have blended in visually either).

World's. See, e.g., A. Conan Doyle, *Masterpieces of Sherlock Holmes: The Adventure of the Second Stain*, BOSTON POST, July 2, 1911 (reprinted in Appendix E below). There may be *Boston Post* pamphlet versions of Holmes stories out there somewhere — and perhaps even other pamphlet and book versions produced by other newspapers in 1911 — but I have not yet run across any.



Advertisement, N.Y. World, Apr. 10, 1911, at 6.

Both versions of “The Adventure of the Six Napoleons” — pamphlet and book — are reprinted below, in Appendixes B and C respectively. Direct comparisons of the sizes and colors of the originals are impossible because both versions are printed on pages of the same size as the one you are looking at now, in the low-budget, black-and-white print format of this *Almanac*. But it is possible to get a sense of the very different looks, and the very similar contents, of the two versions. (The color versus black-and-white comparison is possible in the online version of this article, and in the high-resolution images at www.availableat.org.)

• • •

There are, obviously, more pieces of the puzzle missing than present.⁵¹ But there are enough to know the *World* did act on both halves (books and pamphlets) of its advertised plan for publishing and distributing the stories in *The Return of Sherlock Holmes*. Moreover, most of the *World*'s advertisements for the stories — including ads for each of the stories preserved

⁵¹ Perhaps this shortage explains the limited attention paid to the series by bibliographers. One leading work has sketchy entries for most of it. RONALD BURT DE WAAL, *THE WORLD BIBLIOGRAPHY OF SHERLOCK HOLMES AND DR. WATSON* 1, 3-5, 9, 10, 13, 17, 22 (1974) (all except “The Adventure of the Empty House” and “The Adventure of the Missing Three-Quarter”). But several others make no mention of it. *See, e.g.*, GREEN & GIBSON, note 30 above; RONALD B. DE WAAL, *THE UNIVERSAL SHERLOCK HOLMES* (1994), www.lib.umn.edu/scrbm/ush/intro (vis. Nov. 30, 2014); A HOLMES AND DOYLE BIBLIOGRAPHY (AKA HDB): BEING A SUPPLEMENT TO THE UNIVERSAL SHERLOCK HOLMES, www.lib.umn.edu/scrbm/holmes/useful-bibliographies (vis. Nov. 30, 2014).

in pamphlet form in the Rubenstein Collection — highlight their bookish features, suggesting that both the booklets and the pamphlets were produced throughout the series.⁵² And apparently the *World's* plan worked. The dog that did not bark when the *World* put out its *Red Triangle* books in early 1911 — the Post Office — was, as best I can tell, silent again as the *World* followed up with its Holmes books and pamphlets.

So, I am fairly sure that there were two Norwood Builders — that the *World* distributed “The Adventure of the Norwood Builder” to its readers as both a booklet (locally) and a pamphlet (elsewhere) on April 16, 1911. But I can show you only one of them. For now.

Is there a moral to this story? For librarians and collectors, yes: We should hesitate before discarding or destroying our ink-on-paper collections in reliance on high-tech or low-cost substitutes. And while we are hesitating we should check the completeness, the accuracy, and the overall quality of those substitutes. And for lawyers, another yes: When it comes to administrative law, the more things change the more they stay the same — from persistently spasmodic congressional oversight to impatient yet inefficient presidential management to deferential yet intrusive judicial supervision to resourceful and flexible regulated entities.

EXISTING COPIES OF THE NEW YORK WORLD'S
1911 EDITIONS OF THE “RETURN OF SHERLOCK HOLMES” STORIES:
CAN YOU FILL-IN A BLANK?

story title	pub. date	booklet	pamphlet
The Adventure of the Empty House	Apr. 9, 1911		
The Adventure of the Norwood Builder	Apr. 16, 1911		Duke
The Adventure of the Dancing Men	Apr. 23, 1911		
The Adventure of the Solitary Cyclist	Apr. 30, 1911		
The Adventure of the Priory School	May 7, 1911		Minnesota?
The Adventure of Black Peter	May 14, 1911		Duke
The Adventure of Charles Augustus Milverton	May 21, 1911		Duke Minnesota?
The Adventure of the Six Napoleons	May 28, 1911	Davies	Duke
The Adventure of the Three Students	June 4, 1911		
The Adventure of the Golden Pince-Nez	June 11, 1911		Duke
The Adventure of the Missing Three-Quarter	June 18, 1911		
The Adventure of the Abbey Grange	June 25, 1911		
The Adventure of the Second Stain	July 2, 1911		

Please send news of fill-ins to rdavies@greenbag.org.

⁵² For samples of the advertising for each story, see Appendix D below.

APPENDIX A

The Return of Sherlock Holmes: The Adventure of the Norwood Builder,
New York World, April 16, 1911

actual size: approximately 11 inches wide by 18 inches tall
source: David M. Rubenstein Rare Book & Manuscript Library,
Duke University

APPENDIX B

The Return of Sherlock Holmes: The Adventure of the Six Napoleons,
New York World, May 28, 1911

actual size: approximately 11 inches wide by 18 inches tall
source: David M. Rubenstein Rare Book & Manuscript Library,
Duke University

APPENDIX C

The Return of Sherlock Holmes: The Adventure of the Six Napoleons,
New York World, May 28, 1911

actual size: approximately 9 inches wide by 11 inches tall
source: Ross E. Davies

APPENDIX D

Advertisements for The Return of Sherlock Holmes,
New York World, Apr. 3 – July 1, 1911

actual sizes: various
sources: *Chronicling America: Historic American Newspapers*, Library
of Congress, chroniclingamerica.loc.gov; David M. Rubenstein
Rare Book & Manuscript Library, Duke University

APPENDIX E

“Masterpieces of Sherlock Holmes” in the *Boston Post*
May 14 to July 16, 1911

actual size: approximately 9 inches wide by 11 inches tall
source: Louis Round Wilson Special Collections Library,
University of North Carolina at Chapel Hill

This 10-episode series is preserved in its entirety in the Louis Round
Wilson Special Collections Library at the University of North Carolina at

Chapel Hill.⁵³ The series began with three of the earliest Holmes stories, originally published in 1891 and then included in *The Adventures of Sherlock Holmes* in 1892:

- “A Scandal in Bohemia” (May 14, 1911),
- “A Case of Identity” (May 21, 1911), and
- “The Red-Headed League” (May 28, 1911).

Next came two still-new stories that had appeared in *The Strand Magazine* earlier in 1911:

- “The Adventure of the Devil’s Foot” (June 3, 1911) and
- “The Adventure of the Red Circle” (June 11, 1911).

The balance of the series consisted of stories originally published in 1904 and then included in *The Return of Sherlock Holmes* in 1905:

- “The Adventure of the Missing Three-Quarter” (June 18, 1911),
- “The Adventure of the Abbey Grange” (June 25, 1911),
- “The Adventure of the Second Stain” (July 2, 1911),
- “The Adventure of the Golden Pince-Nez” (July 9, 1911), and
- “The Adventure of the Three Students” (July 16, 1911).

The “Masterpieces” were printed as half-tabloids (roughly 9 inches wide by 11 inches tall), with colorful pictorial covers. An example from the UNC–Chapel Hill collection — “The Adventure of the Second Stain” — is reproduced on the next few pages. This half-tabloid format is much like the one in which the *New York World* produced its own complete *Return of Sherlock Holmes* series for local New York consumption (in tandem with full-tabloid pamphlet versions of the same stories for out-of-town subscribers).

⁵³ See Christy Edina Richards, *An Assessment of the Mary Shore Cameron Sherlock Holmes Collection at the University of North Carolina at Chapel Hill* 89, 217 (Nov. 2003), ils.unc.edu/MSpapers/2907.pdf (vis. Dec. 2, 2014). The University of Minnesota Library lists several of the “Masterpieces” in its Sherlock Holmes Collections. See *The “Lumber-Room” Collection/Miscellaneous and Single Issue periodicals from the John Bennett Shaw Collection* box 30 (in process, preliminary inventory, SCRB Collection 150), www.lib.umn.edu/pdf/holmes/150lumberroom.pdf (vis. Dec. 2, 2014); see also GREEN & GIBSON, note 30 above, at 55, 139, 182; CHRISTOPHER REDMOND, *SHERLOCK HOLMES HANDBOOK* 78 (2d ed. 2009).