ARTICLES

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DEFINED BY DICTUM: THE GEOGRAPHY OF REVLO-N-LAND IN CASH AND MIXED CONSIDERATION TRANSACTIONS

MOHSEN MANESH*

I. Introduction

ANYONE familiar with corporate law knows well how much of that law has been shaped by just one state: Delaware. Less obvious, however, is that so much of Delaware corporate law has been defined by the nonbinding dictum of that state’s judges.¹ To illustrate this point, this Article considers the central role of dictum in the evolving doctrine first articulated by the Delaware Supreme Court in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.² And in doing so, this Article refutes the thesis, recently advanced by Professor Stephen Bainbridge, that a judicial concern for di-

* Assistant Professor, University of Oregon School of Law. The author thanks Lyman Johnson, Frank Gevurtz, Eric Franklin, Brian Quinn, Elizabeth Pollman, Abe Cable, Diane Dick, Wendy Couture, Robert Ricca, and Jessica Erickson as well as the participants at the Pacific West Business Law Scholars Colloquium and the Workshop for Corporate and Securities Litigation for their thoughtful comments to earlier drafts of this Article. The author is also grateful to Andrew Rutter (J.D. expected 2015) and Georgina Santos (J.D. expected 2014) for their excellent research assistance on this project. This Article was made possible in part by the generous support of the John L. Luvaas Fellowship Fund. The author takes responsibility for all errors.

¹ See generally Mohsen Manesh, Damning Dictum: The Default Duty Debate in Delaware, 39 J. Corp. L. 35 (2014). Although this Article uses “dictum” generally to refer to judicial statements that have no effect on the outcome of a particular case, some scholars and courts distinguish between two categories of dictum: (i) “judicial dictum,” which is a court’s opinion on a question that was briefed and argued by counsel but that is unnecessary to the court’s ultimate decision; and (ii) “obiter dictum,” which is a court’s opinion on a question that was not briefed and argued by counsel and, therefore, was given without full consideration. See, e.g., David Coale & Wendy Couture, Loud Rules, 34 Pepp. L. Rev. 715, 727–28 (2007); Note, Dictum Revisited, 4 Stan. L. Rev. 513, 513–14 (1952). This distinction does not appear to be recognized in Delaware law, and this Article refers to both categories as simply “dictum.”

² 506 A.2d 173 (Del. 1986).
rector conflicts of interests, and nothing more, motivates the Revlon doctrine.\(^3\)

The Revlon doctrine famously dictates that in certain transactions involving the “sale or change in control” of a corporation,\(^4\) the corporation’s board of directors has a duty to “get[ ] the best price for the stockholders.”\(^5\) What constitutes a “sale or change in control” is thus a crucial legal question. Because when a board of directors enters Revlon-land, as it is colloquially called,\(^6\) the board loses the presumption of the deferential business judgment rule\(^7\) and becomes subject to enhanced judicial scrutiny under an objective standard of reasonableness.\(^8\)

In The Geography of Revlon-Land,\(^9\) Bainbridge attempts to crisply delineate the boundaries and contours of Revlon-land based on a conflict-of-interests theory of the doctrine. On this theory, Revlon is merely the logical extension of the Delaware Supreme Court’s earlier corporate takeover


\(^4\) This articulation of when Revlon applies was developed in subsequent case law interpreting the doctrine. See, e.g., Arnold v. Soc’y for Savs. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (quoting Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42–43, 47 (Del. 1994)).

\(^5\) Revlon, 506 A.2d at 182.

\(^6\) It should be noted that the Delaware Supreme Court has in the past expressed disapproval of such colloquial references to “Revlon-land” and “Revlon duties.” See Arnold, 650 A.2d at 1289 n.40. Although the Delaware Supreme Court has itself made reference to “Revlon duties.” See Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003).

\(^7\) The Delaware Supreme Court has summarized the business judgment rule as the:

\[\text{resumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).}\]

\(^8\) Although the doctrine arising from Revlon is sometimes referred to as “Revlon duties,” the so-called “duty, announced in Revlon, is not an independent duty, but rather a restatement of directors’ [foundational] duties of loyalty and care.” Koehler v. Netspend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *10 (Del. Ch. May 21, 2013) (Glasscock, V.C.). “Rather than changing the duties directors owe to stockholders, Revlon changes the level of [judicial] scrutiny” applied to board decisions. Id. at *11. When in Revlon-land, directors of a corporation “have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders.” QVC, 637 A.2d at 43. As then-Vice Chancellor Strine has explained it:

\[\text{Unlike the bare rationality standard applicable to garden-variety decisions subject to the business judgment rule, the Revlon standard contemplates a judicial examination of the reasonableness of the board’s decision-making process. . . . [T]his reasonableness review is more searching than rationality review . . . . Although the directors have a choice of means, they do not comply with their Revlon duties unless they undertake reasonable steps to get the best deal. In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007).}\]

\(^9\) See generally Bainbridge, supra note 3.
jurisprudence, in which it introduced an intermediate standard of judicial review to police the potential self-interest that may drive the decisions of a target board of directors.\textsuperscript{10} Employing this conflict-of-interests understanding of \textit{Revlon}, Bainbridge decries a string of Delaware Chancery Court decisions applying the \textit{Revlon} doctrine to transactions in which a target corporation is sold for cash or a mix of cash and the stock of a publicly traded, diffusely held acquirer that is without a controlling shareholder.\textsuperscript{11} These chancery court decisions, Bainbridge argues, wrongly focus on the nature of the consideration paid in the transaction, rather than the potential conflicts of interests that may be present between the target’s board of directors and its shareholders. These decisions have thus muddled the boundaries of \textit{Revlon}-land. They are inconsistent with the conflict-of-interests rationale underlying the doctrine as well as subsequent Delaware Supreme Court precedent applying it.

In constructing his critique, however, Bainbridge overstates the chancery court precedent with which he takes issue as well as the supreme court precedent upon which he bases his conflict-of-interests thesis. In reality, the boundaries of \textit{Revlon}-land are murky.\textsuperscript{12} Left uncertain by Delaware Supreme Court precedent, the scope of the \textit{Revlon} doctrine has been purposefully, but cautiously, defined by the Delaware Chancery Court through the use of dictum. By employing dictum, the chancery court has provided useful guidance on a doctrine that is otherwise ill-defined by the supreme court’s jurisprudence; and it has done so strategically—in situations where the court’s statements do not unfairly affect the parties to the dispute before it. For this, the chancery court should be commended.

The remainder of this Article proceeds in three parts. Part II describes the lay of \textit{Revlon}-land under the conflict-of-interests theory that Bainbridge espouses. Part III then explains the considerable ambiguity in the Delaware Supreme Court’s post-\textit{Revlon} precedents and the limited support they provide to Bainbridge’s conflict-of-interests thesis. In the absence of definitive guidance, this part argues, it is unsurprising that the Delaware Chancery Court has resorted to nonbinding dictum to provide some clarity for lawyers and business planners as to the precise boundaries of \textit{Revlon}-land. Finally, Part IV briefly concludes.

II. THE GEOGRAPHY OF \textit{REVLO}N-LAND UNDER A CONFLICT-OF-INTERESTS THEORY

To understand Bainbridge’s conflict-of-interests theory of \textit{Revlon}, one must begin with an earlier and equally famous Delaware Supreme Court decision: \textit{Unocal Corp. v. Mesa Petroleum Co.}\textsuperscript{13} When properly understood, according to Bainbridge, \textit{Revlon}, like \textit{Unocal} before it, is simply a doctrine

\begin{itemize}
  \item \textsuperscript{10} See infra Part II.A.
  \item \textsuperscript{11} See infra Part II.B.
  \item \textsuperscript{12} See infra Part III.
  \item \textsuperscript{13} 493 A.2d 946 (Del. 1985).
\end{itemize}
intended to police the self-interest that may motivate certain board decisions. As such, Bainbridge argues, the boundaries of Revlon-land are defined by the potential for problematic conflicts of interests, and not by the nature of consideration that shareholders are to receive in a sale transaction as the Delaware Chancery Court has erroneously concluded.

A. The Conflict-of-Interests Theory of Revlon

In 1985, the Delaware Supreme Court famously revolutionized the law of corporate takeovers by introducing an intermediate standard of judicial review—more intrusive than the deferential business judgment rule usually accorded to board decisions, but less exacting than the entire fairness review applied to self-dealing transactions. In Unocal, the supreme court recognized that in the context of hostile takeovers, there exists an “omnipresent specter” that a target board of directors may be motivated by self-interest rather than what is best for the corporation and its shareholders. Accordingly, the court applied an “enhanced” level of judicial scrutiny to target board actions taken in response to a hostile takeover bid.

In Bainbridge’s view, the enhanced review articulated under Unocal sensibly balances the irreconcilable tension between accountability and authority in corporate law. On one hand, unfettered director discretion to manage the business free from shareholder oversight or judicial intervention is necessary for the efficient operation of a large firm like the modern corporation. On the other hand, the broad authority that corporate law affords boards of directors creates the potential for director self-dealing at the expense of the corporation and its shareholders. Thus,

14. See supra note 7 and accompanying text.
15. See Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (“The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”).
16. See Unocal, 493 A.2d at 954.
17. See id. at 954–55. Under the Unocal standard, the target board must carry its own initial two part burden: First, a reasonableness test, which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and second, a proportionality test, which is satisfied by a demonstration that the board of directors’ defensive response was reasonable in relation to the threat posed. Unitrin, Inc. v. Am. Gen. Corp. 651 A.2d 1361, 1373 (Del. 1995) (citing Unocal, 493 A.2d at 955). Under the second prong of the Unocal test, the court engages “in a substantive review of the board’s defensive actions” asking whether the board’s actions “fell ‘within a range of reasonable responses to the threat’ posed.” Air Prods. & Chem., Inc. v. Airgas, Inc., 16 A.3d 48, 92–93 (Del. Ch. 2011) (Chandler, C.) (quoting Unitrin, 651 A.2d at 1367).
18. See Bainbridge, supra note 3, at 3313–14.
in circumstances implicating a conflict of interests, the risk of legal sanction—that is, judicial intervention to ensure board accountability to the shareholders—is a necessary check on board authority to deter self-dealing among directors.\textsuperscript{20} Applying this framework to corporate takeovers, \textit{Unocal} recognized that the directors of a target corporation may be motivated by a selfish interest in preserving their own office.\textsuperscript{21} Accordingly, the Delaware Supreme Court forged a middle ground between authority and accountability in the takeover context by requiring that directors’ defensive actions be reasonable—proportionate to the threat that a hostile bid poses.\textsuperscript{22}

For Bainbridge, then, \textit{Revlon} represents the logical evolution of the intermediate \textit{Unocal} standard, a “mere variant of \textit{Unocal}”\textsuperscript{23} designed to address potential self-interest in a slightly different situation: a negotiated sale of a corporation pursuant to which the target board has agreed to “lock-ups” or other deal protections—that is, contract terms used to protect the board’s preferred transaction and deter (or preclude) an unwanted bidder.\textsuperscript{24} In a negotiated transaction, the mere fact that the target board has favored a particular acquirer over other would-be bidders suggests at least the potential that the target directors acted in their own self-interest rather than that of the corporation and its shareholders. To police any potential conflict in this context, the \textit{Revlon} doctrine requires the directors to “act[ ] reasonably to seek the transaction offering the best value reasonably available to the stockholders.”\textsuperscript{25} Thus, like the \textit{Unocal} standard before it, the \textit{Revlon} doctrine seeks to “ferret out board actions motivated by conflicted interests by contrasting the [board’s] decision[s] to some objective standard.”\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{20} See Bainbridge, \textit{supra} note 3, at 3290–93.
\item \textsuperscript{21} See \textit{Unocal}, 493 A.2d at 194.
\item \textsuperscript{22} See \textit{In re Dollar Thrifty S’holder Litig.}, 14 A.3d 573, 597 (Del. Ch. 2010) (Strine, V.C.) (“Avoiding a crude bifurcation of the world into two starkly divergent categories—business judgment rule review reflecting a policy of maximal deference to disinterested board decisionmaking and entire fairness review reflecting a policy of extreme skepticism toward self-dealing decisions—the Delaware Supreme Court’s \textit{Unocal} and \textit{Revlon} decisions adopted a middle ground.”); see also \textit{supra} notes 14–17 and accompanying text.
\item \textsuperscript{23} See Bainbridge, \textit{supra} note 3, at 3314.
\item \textsuperscript{24} See \textit{id.} at 3327.
\item \textsuperscript{25} Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994). As the \textit{QVC} court further elaborated, the key features of an enhanced scrutiny test [under \textit{Revlon}] are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors’ action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably. \textit{Id.} at 45.
\item \textsuperscript{26} Bainbridge, \textit{supra} note 3, at 3313; see also Koehler v. Netspend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013)
\end{itemize}
Bainbridge argues, however, that the potential conflict of interests in a negotiated transaction is not always problematic for shareholders of a target corporation.27 Where the acquirer is a diffusely held, publicly traded corporation, diversified investors are as likely to own shares of the acquiring company as they are to own shares of the target.28 In such cases, a diversified investor would be indifferent to the form of the consideration paid for the target shares (whether it is cash or stock in the acquirer)29 and, more importantly, the allocation of transactional gains as between the shareholders of the acquirer and target.30

The risk of a conflicted motive among target directors is more acute, however, when the preferred acquirer is privately held or, alternatively, publicly held but controlled by a single individual or affiliated group rather than a “fluid aggregation of unaffiliated stockholders.”31 In such cases, even a fully diversified investor is precluded from standing on both sides of the transaction—to benefit from the transactional gains as both an owner of the target and acquirer.32 Accordingly, in such cases even a fully diversified investor would prefer a legal rule requiring that as much of the


28. See id. at 3310.

29. See id. at 3334–35 (“As long as the acquirer is publicly held, shareholders who get cash could simply turn around and buy stock in the postacquisition company. They would then participate in any post-transaction gains, including any future takeover premium.”). This argument—that target shareholders would be indifferent between consideration in the form of cash versus acquirer stock, because each can be easily converted into the other—assumes zero transaction costs, when in fact a shareholder would incur at least some marginal transaction cost to purchase or sell acquirer shares.

30. See id. at 3310–11 (“Because increasing the target’s share of the gains by increasing the premium the acquirer pays to obtain control necessarily reduces the acquirer’s share, the diversified investor will view such a shift as simply robbing Peter to pay Paul.”).

31. See id. (making this assertion). The quoted language derives from Paramount Commc’ns, Inc. v. QVC Network, Inc., in which the Delaware Supreme Court held that Revlon applies when a transaction would transfer corporate control from a “fluid aggregation of unaffiliated stockholders” to a “single person or . . . cohesive group acting together.” See Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42–43 (Del. 1994).

32. See Bainbridge, supra note 3, at 3310.
transactional gains as possible be allocated to the target corporation.33 Unfortunately, Bainbridge observes, it is in these very situations—where the acquirer is privately held or controlled by an individual or affiliated group—that the potential for a conflict of interests is most problematic for investors.34 The acquirer’s ability to reap a disproportionate share of the gains from the transaction give it a “high incentive to . . . offer side payments” and other deal sweeteners to the target directors and managers in order to gain their favor and cooperation.35

Thus, according to Bainbridge’s conflict-of-interests theory, the outer boundaries and inner contours of Revlon-land have been shaped by the Delaware Supreme Court to address the potentially problematic conflict-of-interests that may arise in a negotiated transaction where the acquirer is privately held or otherwise controlled by a single individual or affiliated group.36 It is in these situations, he argues, that Revlon has been applied by the high court in its subsequent case law. Most notably, the supreme court applied Revlon in Paramount Communications Inc. v. QVC Network, Inc.37 (QVC), a case involving the stock-for-stock merger of two publicly held media companies, Paramount and Viacom.38 Unlike its earlier decision in Paramount Communications Inc. v. Time Inc.39 (Time-Warner), where the court ruled that Revlon was inapplicable to a seemingly similar stock-for-stock merger between Time and Warner Communications,40 the supreme court in QVC ruled that the Paramount-Viacom transaction triggered Revlon duties for the Paramount board of directors to get the best value reasonably available for its shareholders because the surviving post-merger business would be controlled by one individual, Viacom’s pre-transaction controlling shareholder.41 Implicit in the high court’s distinction between the Time-Warner and QVC cases, Bainbridge sees the supreme court’s concern for potential conflicted interests in transactions involving a privately held or controlled acquirer, like the Paramount-Viacom merger.42

33. See id. at 3311.
34. See id.
35. See id. If Revlon is aimed at policing the conflicts of interests created by these kinds of side dealings, it is not clear why the doctrine would exist at all given the traditional fiduciary duty of loyalty would already address such concerns. See Gevurtz, supra note 27, at 1564 (“The simple answer . . . is to recognize the conflict-of-interest such side deals can create and invoke the higher scrutiny required of conflict-of-interests transactions.”).
37. 637 A.2d 34 (Del. 1994).
38. Id.
40. Id. at 1142.
41. See QVC, 637 A.2d at 42–46.
42. See Bainbridge, supra note 3, at 3312.
B. The Chancery Court’s Misapplication of Revlon

According to the conflict-of-interests theory of Revlon espoused by Bainbridge, motives matter.\(^{43}\) Whether a target board is adopting takeover defenses or agreeing to sell the corporation in a negotiated transaction, it is the potential that the target directors may be acting in their self-interest that justifies the intrusion on board authority under the heightened judicial scrutiny of Unocal and Revlon.\(^{44}\) In the absence of a potentially problematic conflict of interests, judicial or shareholder intervention into board authority to sell the company in a negotiated transaction would upset the careful balance between authority and accountability that corporate law has constructed.\(^{45}\)

Applying this theory, Bainbridge proceeds to decry a set of three chancery court decisions.\(^ {46}\) Starting with In re Lukens Inc.\(^ {47}\) and culminating with In re Smurfit-Stone Container Corp.,\(^ {48}\) the lower court considered whether Revlon applies to a merger transaction in which the target shareholders were to receive a mix of cash and stock in a publicly traded, diffusely held acquirer:

\(^{43}\) See id. at 3302–05.

\(^{44}\) See id. at 3313.

\(^{45}\) See id. at 3290 (“The efficient separation of ownership and control that makes the modern corporation possible thus is inconsistent with routine shareholder—or judicial—review of board decisions.”).

\(^{46}\) See id. at 3323–29. Bainbridge also criticizes a fourth unpublished chancery court decision—a transcript ruling—Steinhardt v. Howard-Anderson. See Transcript of Ruling of the Court on Plaintiffs’ Motion for a Preliminary Injunction, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL); see also Bainbridge, supra note 3, at 3329–31. The problem that troubles Bainbridge in Steinhardt, however, is different than the three other chancery court decisions discussed herein. Namely, unlike Lukens, NYMEX, and Smurfit-Stone, all of which suggest that Revlon applies based on the nature of the consideration that target shareholders are to receive, in the Steinhardt transcript ruling, Vice Chancellor Laster opined that Revlon applies because of the minority percentage ownership the target shareholders would have in the combined post-merger entity, a widely held, publicly traded company. See Bainbridge, supra note 3, at 3330. The author agrees with Bainbridge that Steinhardt is a legally novel approach to applying Revlon, although it is arguably consistent with the underlying rationale of the doctrine. See Black & Kraakman, supra note 27, at 543–45 (explaining that “whale-minnow” stock-for-stock merger should trigger Revlon under “hidden value” understanding of doctrine).

\(^{47}\) 757 A.2d 720 (Del. Ch. 1999).

Focusing on the substantial cash portion of the total merger consideration to be paid to shareholders of the target, the chancery court first stated in dictum in *Lukens* and then “expressly held” in *Smurfit-Stone*, according to Bainbridge, that *Revlon* applies to such mixed consideration transactions where cash is a substantial component.

In one sense, these mixed consideration cases merely reflect conventional wisdom—that an all-cash transaction categorically triggers *Revlon* duties. Recall, under the Delaware Supreme Court’s well-settled formulation, *Revlon* applies whenever a board embarks on a transaction that will result in a “sale or change of control” of the corporation. Unlike a strategic stock-for-stock merger, where the shareholders of both companies will continue as owners of the combined business, in an all-cash, cash-for-

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49. 757 A.2d 720 (Del. Ch. 1999) (Lamb, V.C.).
52. See Bainbridge, supra note 3, at 3328 (“Unlike *Lukens* and NYMEX . . . in *Smurfit* Vice Chancellor Parsons expressly held that *Revlon* applied even though ‘control of Rock-Tenn after closing will remain in a large, fluid, changing, and changeable market’ and the ‘Smurfit-Stone stockholders will retain the right to obtain a control premium in the future.’” (emphasis added)).
53. See Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock–for–Stock Merger Agreements*, 56 BUS. LAW. 919, 927 n.25 (2001) (“In its simplest formulation, *Revlon* requires directors who wish to sell the company for cash to take affirmative steps to obtain the highest sale price reasonably attainable.”); see also Black & Kraakman, supra note 27, at 539–40 (“The most common port of entry into *Revlon*land is a cash sale . . . . Cash sales . . . are an easy case for limiting the target board’s discretion . . . .”); Brian J.M. Quinn, *Triggering Revlon Duties*, M&A L. PROF BLOG (Oct. 14, 2009), http://lawprofessors.typepad.com/mergers/2009/10/triggering-revlon-duties.html (“We know that an all cash transaction will constitute a change of control and thus require directors attempt [sic] to get the highest price reasonably available for the benefit of target shareholders.”).
55. See, e.g., *QVC*, 637 A.2d at 46–47 (reasoning that *Revlon* was inapplicable in *Time-Warner* to proposed Time-Warner merger because “neither corporation could be said to be acquiring the other. Control of both remained in a large, fluid, changeable and changing market” (quoting Paramount Commc’ns, Inc. v. Time Inc., Civil Action Nos. 10866, 10670, 10935, 1989 WL 79880, 15 Del. J. CORP. L. 700, 705, 739 (Del. Ch. July 17, 1989) (Allen, C.))); *In re Delta & Pine Land Co.*
stock merger, the target shareholders will be cashed out—effectively forced to sell their shares to the acquirer. “[T]here is no tomorrow” for the target shareholders.\textsuperscript{56} For them at least, \textit{this is a “sale” of the corporation.}\textsuperscript{57} Because an all-cash transaction represents the last chance for the target shareholders to maximize the value of their investment, \textit{Revlon} dictates that in such situations directors get the best price reasonably available for their shares.\textsuperscript{58}

This “last chance” reasoning has been used to explain not only the conventional wisdom that \textit{Revlon} categorically applies to any all-cash “sale” transaction. It has also been invoked by the Delaware courts to justify \textit{Revlon}’s applicability to “change of control” transactions—even one structured as a stock-for-stock merger.\textsuperscript{59} Although the target shareholders may continue as minority owners of the combined business following a change of control transaction, the controlling shareholder can, at any time, unilaterally cash out the target shareholders in a future cash-for-stock merger.\textsuperscript{60}

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\textsuperscript{56.} See Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1055 (Del. Ch. 1997) (Allen, C.); see also TW Servs., Inc. v. SWT Acquisition Corp., Civ. A. Nos. 10427, 10298, 1989 WL 20290, 14 Del. J. Corp. L. 1169, 1184 (Del. Ch. Mar. 2, 1989) (Allen, C.) (“In the setting of a sale of a company for cash, the board’s duty to shareholders is inconsistent with acts not designed to maximize present share value, acts which in other circumstances might be . . . justified by reference to the long run interest of shareholders. In such a setting, for the present shareholders, there is no long run.”).

\textsuperscript{57.} See McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) (reasoning that \textit{Revlon} is implicated by proposed all-cash, all-shares transaction, because “the decision constitutes a final-stage transaction”).

\textsuperscript{58.} See Time-Warner, 1989 WL 79880, 15 Del. J. Corp. L. at 751 (Allen, C.) (“\textit{Revlon} was not a radical departure from existing Delaware, or other, law (i.e., it has ‘always’ been the case that when a trustee or other fiduciary sells an asset for cash, his duty is to seek the single goal of getting the best available price) . . . .”); see also Strine, supra note 53, at 927 n.25 (“The \textit{Revlon} principle grows out of the traditional principle that fiduciaries must sell trust assets for their highest value.”).

\textsuperscript{59.} See Equity-Linked Investors, 705 A.2d at 1055 (“The holding of Paramount . . . was that where the stock to be received in the merger was the stock of a corporation under the control of a single individual or a control group, then the transaction should be treated for \textit{Revlon} duty purposes as a cash merger would be treated: there is no tomorrow for the shareholders . . . .”); see also Transcript of Ruling of the Court on Plaintiffs’ Motion for a Preliminary Injunction at 4, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL) (“[T]he change of control test is ultimately a derivative test. . . . [W]hen enhanced scrutiny applies [under \textit{Revlon}] is when you have a final stage transaction.”), available at http://www.alston.com/files/docs/Occam_Ruling.pdf.

\textsuperscript{60.} See QVC Network, Inc. v. Paramount Commc’ns, Inc., 635 A.2d 1245, 1266–67 (Del. Ch. 1993) (Jacobs, V.C.) (“[S]hareholders’ continuing equity interest is far from secure, because once the Viacom transaction is complete Mr. Redstone will have absolute control of the merged entity and will have the power to use his control at any time to eliminate the shareholders’ interest by a ‘cash out’
Regardless of the combined business’s future prospects, the target shareholders can no longer be assured of their continuing equity ownership.\(^{61}\) Accordingly, \textit{Revlon} applies because a change of control represents the target shareholders’ last opportunity to maximize the value of their investment.\(^{62}\)

The chancery court in its \textit{Lukens} and \textit{Smurfit-Stone} decisions simply extended this “last chance” reasoning to mergers involving mixed consideration. In a mixed consideration transaction, by definition, the target shareholders will receive some shares of the acquirer and, therefore, continue as owners of the combined business after the merger. But, where cash is a substantial percentage of the merger consideration, the target shareholders will also be cashed out of a significant portion of their ownership interest. The transaction thus represents the last chance for them to maximize the value of that portion of their investment. Accordingly, for the same reasons conventional wisdom holds that \textit{Revlon} applies to all-cash and change of control transactions, \textit{Lukens} and \textit{Smurfit-Stone} concluded that \textit{Revlon} should also apply to mixed consideration transactions in which cash represents a significant portion of the total merger consideration.\(^{63}\)

Yet, under Bainbridge’s conflict-of-interests theory, this extension of \textit{Revlon}—to apply to cash-heavy mixed consideration transactions—misapprehends the doctrine. Indeed, even the conventional wisdom upon which it is based—that the type of consideration received should matter at all for \textit{Revlon} purposes—runs counter to the conflict-of-interests thesis. Recall, under a conflict-of-interests theory of \textit{Revlon}, the doctrine aims to check board authority only where a problematic conflict of interests potentially

\(^{61}\) See QVC, 635 A.2d at 1267 (observing that Paramount shareholders “have no assurance that they will receive the long-run benefits claimed to justify the [Paramount] board’s decision to prefer Viacom over QVC”) \textit{aff’d} QVC, 637 A.2d at 43 (“Following [the merger], there will be a controlling stockholder who will have the voting power to . . . cash-out the public stockholders . . . . Irrespective of the present Paramount Board’s vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision.”).

\(^{62}\) See QVC, 635 A.2d at 1267 (reasoning that \textit{Revlon} applies because “[t]his is the only opportunity that Paramount’s shareholders will ever have to receive the highest available premium-conferring transaction” (emphasis added)) \textit{aff’d} QVC, 637 A.2d at 45 (reasoning that \textit{Revlon} applies because “an asset belonging to public stockholders (a control premium) is being sold and \textit{may never be available again}” (emphasis added)).

\(^{63}\) See \textit{In re Lukens Inc. S’holders Litig.}, 757 A.2d 720, 732 n.25 (Del. Ch. 1999) (Lamb, V.C.) (“For a substantial majority of the then-current shareholders, ‘there is no long run.’”); see also \textit{In re Smurfit-Stone Container Corp. S’holder Litig.}, C.A. No. 6164-VCP, 2011 WL 2028076, at *14 (Del. Ch. May 20, 2011) (Parsons, V.C.) (“[T]he concern here is that there is no ‘tomorrow’ for approximately 50% of each stockholder’s investment in Smurfit–Stone.”).
arises between the directors and shareholders of a target corporation.\(^64\) The type of consideration received by the target shareholder—whether it is cash, stock in the acquirer, or some mix of the two—is simply irrelevant to the conflict-of-interests question.\(^65\) What matters is the identity of the acquirer and whether it creates the potential for conflicted interests on the part of the target directors. Thus, a “sale” should not trigger \textit{Revlon} simply because a target corporation is to be sold in an all-cash (or even mostly cash) transaction. Properly understood, a “sale” should trigger \textit{Revlon only if} the transaction will also result in a “change of control” of the target from a “fluid aggregation of unaffiliated stockholders”\(^66\) (i.e., the market) to the hands of a private entity or individual owner.\(^67\) As noted above,\(^68\) it is in these transactions—involving a “change of control” from public investors into the hands of a private entity or individual owner—that the potential conflict of interests among the board is most problematic for the shareholders of a target corporation. A “sale or change of control” does not occur for \textit{Revlon} purposes where a target corporation is sold for cash to a publicly traded, diffusely held acquirer with no controlling shareholder.\(^69\) Because, in such cases, control remains vested in a “fluid aggregation of unaffiliated stockholders” both before and after the transaction. To trigger \textit{Revlon}, according to the conflict-of-interests thesis, there must be a “change of control,” by sale or otherwise, raising the specter of conflicted board interest. Absent a “change of control,” the courts should instead defer to the target board’s unconflicted business judgment, as they would in any other transactional context.

By losing sight of this central principle, Bainbridge argues, the chancery court has become “lost in \textit{Revlon}-land.”\(^70\) The lower court has mistakenly asserted that the doctrine applies to all “sales,” focusing on the consideration paid rather than the potential conflict of interests created by a sale transaction. “The borders of \textit{Revlon}-land thus have suffered a significant distortion,” he laments wistfully.\(^71\)

\(^{64}\) See Bainbridge, \textit{supra} note 3, at 3310–11, 3333–35.

\(^{65}\) See \textit{id.} at 3332–35.

\(^{66}\) See \textit{QVC}, 637 A.2d at 46 (distinguishing Time-Warner merger from Paramount-Viacom merger on grounds that in former transaction \textit{Revlon} was inapplicable because “Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger”); \textit{see also} Paramount Commc’ns, Inc. v. Time Inc., C.A. Nos. 10866, 10670, 10935, 1989 WL 79880, 15 Del. J. Corp. L. 700, 739 (Del. Ch. July 17, 1989) (Allen, C.) (reasoning that \textit{Revlon} is inapplicable to Time-Warner merger because “[c]ontrol of both [companies] remained in a large, fluid, changeable and changing market”).

\(^{67}\) See Bainbridge, \textit{supra} note 3, at 3331–33.

\(^{68}\) See \textit{supra} notes 31–35 and accompanying text.

\(^{69}\) See Bainbridge, \textit{supra} note 3, at 3332.

\(^{70}\) \textit{Id.} at 3281.

\(^{71}\) \textit{Id.} at 3329.
III. DICTUM IN THE WAKE OF AMBIGUOUS PRECEDENT

The problem with Bainbridge’s critique of the Delaware Chancery Court in its application of Revlon is twofold. First, in constructing his conflict-of-interests thesis, Bainbridge overstates the relevant chancery court precedent when he characterizes the analysis in Smurfit-Stone regarding Revlon as a “holding” binding future decisions. The Revlon analysis in Smurfit-Stone with respect to mixed consideration transactions, like the decisions that came before it (and that have more recently come since72), is actually nonbinding dictum. But it is dictum built upon an edifice of precedent applying Revlon to all-cash transactions categorically, regardless of the identity of the acquirer.73

Second, Bainbridge overstates the support found in Delaware Supreme Court precedent for his theory that Revlon turns on the potentially problematic conflicts of interests, rather than the nature of the consideration received by the shareholders of the target corporation. In reality, the Delaware Supreme Court precedent, like the rationale for the Revlon doctrine itself, is at best ambiguous.74

Indeed, it is the absence of definitive guidance from supreme court precedent—embracing a conflict-of-interests theory or any other definitive explanation of the Revlon doctrine—that has moved the Delaware Chancery Court to embark on a seemingly deliberate path of defining, ever cautiously, the boundaries of Revlon-land with respect to mixed consideration transactions through the use of dictum. Some may disagree with the boundaries the lower court has drawn in its dictum. But by doing so, the chancery court has provided useful guidance, enhancing the predictability and certainty of corporate law on this key, yet illusive doctrine.75

A. The Dictum of the Chancery Court

Setting aside for the moment the merits of Bainbridge’s conflict-of-interests theory of the Revlon doctrine, it is important to note at the outset that the chancery court has never actually held, as Bainbridge claims, that a mixed consideration merger triggers Revlon duties. Although the lower court has stated this principle on multiple occasions, each time it has been nonbinding dictum, unnecessary to the court’s ultimate decision.

Recall that the chancery court’s application of Revlon to mixed consideration transactions is built upon the conventional wisdom that any all-cash sale is a “sale or change of control” for Revlon purposes.76 Bainbridge concedes that there is recurring language in the lower court’s precedent

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72. See infra notes 188–95 and accompanying text (describing dictum in In re Synthes).
73. See infra Part III.A.
74. See infra Part III.B.
75. See infra Part III.C.
76. See supra Part II.B
affirming this conventional wisdom. For example, he notes, in *In re Topps Company*, then-Vice Chancellor Strine articulated the “familiar” *Revlon* test as follows: “When directors propose to *sell a company for cash* or engage in a change of control transaction, they must take reasonable measures to ensure that the stockholders receive the highest value reasonably attainable.” Likewise, in *TW Services, Inc.*, the esteemed Chancellor Allen summarized the *Revlon* doctrine to mean that “[i]n the setting of a *sale of a company for cash*, the board’s duty to shareholders is . . . to maximize present share value” rather than pursue some long-term corporate interests, because “[i]n such a setting, for the present shareholders, there is no long run.”

Yet, as Bainbridge observes in dismissing the import of these decisions, both *Topps* and *TW Services* involved an all-cash sale to a *privately* held acquirer, raising a potential conflict of interests for the target board of directors. And so, the otherwise unqualified judicial statements of law in these two decisions, *when read in context*, provide scant guidance—let alone binding precedent—on whether *Revlon* categorically applies to any all-cash sale, and, in particular, a cash sale of a target to a publicly traded, diffusely held acquirer, which the conflict-of-interests thesis would hold is outside *Revlon*-land.

But *Topps* and *TW Services* are not the only two chancery court decisions to suggest that *Revlon* categorically applies to any all-cash transaction. One need not delve deeply into Delaware case law to find a number of opinions reaffirming the principle that any all-cash transaction is a “sale or change of control” triggering *Revlon* duties. Moreover, one could read-

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77. See Bainbridge, supra note 3, at 3328 (discussing chancery court’s opinions in *Topps* and *TW Services*).

78. 926 A.2d 58 (Del. Ch. 2007).

79. Id. at 64 (emphasis added).


81. Id. at 1184 (emphasis added).

82. See Bainbridge, supra note 3, at 3324, 3328.

83. Cf. id. at 3328 (“[L]ike *TW Services, Topps* does not stand for the proposition that a cash transaction by a publicly held acquirer triggers *Revlon*.”).

84. See Koehler v. Netspend Holdings Inc., C.A. No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (Glasscock, V.C.) (“Here, the NetSpend Board has agreed to sell the Company in an all-cash [transaction]. If the transaction closes, [the publicly-traded acquirer] will own 100% of NetSpend. This is a change-in-control transaction, and *Revlon* duties apply.”); see also *In re Delphi Fin. Grp. S’holders Litig.*, C.A. No. 7144-VCG, 2012 WL 729232, at *13 (Del. Ch. Mar. 6, 2012) (Glasscock, V.C.) (“Once the Director Defendants decided to sell the Company for cash, they assumed a duty under the *Revlon* doctrine to undertake reasonable efforts to obtain the highest price reasonably available in the sale of the Company.”); Globis Partners, L.P. v. Plumtree Software, Inc., C.A. No. 1577-VCP, 2007 WL 4292024, at *4 (Del. Ch. Nov. 30, 2007) (Parsons, V.C.) (“Under *Revlon*, when a board has decided to sell the company for cash or engage in a change of control transaction, it must act reasonably in order to secure the highest price reasonably available.”); *In re Lear Corp. S’holder Litig.*, 926 A.2d 94, 115 (Del. Ch.
ily cite decisions actually applying this conventional wisdom to transactions involving a publicly traded, diffusely held acquirer.\textsuperscript{85} For example, in \textit{In re Pennaco Energy, Inc.},\textsuperscript{86} then-Vice Chancellor Strine applied \textit{Revlon} to the all-cash sale of a target to Marathon Oil, then a wholly owned subsidiary of the publicly traded, diffusely held USX Corporation.\textsuperscript{87} Likewise, in \textit{In re Cogent, Inc.},\textsuperscript{88} Vice Chancellor Parsons applied \textit{Revlon} to the all-cash sale of a target to the global conglomerate 3M Company.\textsuperscript{89} Together, these precedents go far to suggest the conventional wisdom is conventional for a reason. That an all-cash sale per se triggers \textit{Revlon}—irrespective of the acquirer’s identity—is practically unquestioned by myriad chancery court decisions.

Bainbridge, however, never acknowledges this fact in constructing his conflict-of-interests thesis. Despite the substantial body of precedent applying \textit{Revlon} to all-cash transactions, he instead attacks the conventional wisdom by focusing his attention on the chancery court’s more recent extension of \textit{Revlon} to mixed consideration transactions. Bainbridge argues

\textsuperscript{85} In addition to the decisions noted below, more recently, in \textit{Koehler}, Vice Chancellor Glasscock applied \textit{Revlon} to the all-cash sale of NetSpend to publicly traded, diffusely held Total System Services pursuant to a negotiated tender offer. \textit{See Koehler}, 2013 WL 2181518, at *24 (denying motion for preliminary injunction).

\textsuperscript{86} See \textit{id.} at 703 (denying motion for preliminary injunction); \textit{see also} SEC. EXCH. COMM’N, \textit{Schedule 14A Information: USX Corporation} 19–20 (Mar. 12, 2001), http://www.sec.gov/Archives/edgar/data/101778/000091205701503227/a2040659zdef14a.txt (confirming that USX did not have controlling shareholder around time of acquisition).

\textsuperscript{87} \textit{See id.} at 517 (denying motion for preliminary injunction); \textit{see also} SEC. EXCH. COMM’N, \textit{Schedule 14A Information: 3M Inc.} 31–32 (Mar. 23, 2011), http://www.sec.gov/Archives/edgar/data/66740/000104746911002539/a2920430zdef14a.htm (confirming that 3M did not have controlling shareholder around time of acquisition).
the chancery court began to stray from Revlon-land’s purportedly singular concern for director self-interest in 1999 with its decision in Lukens. In Lukens, and again in a subsequent case, NYMEX, the chancery court suggested that a merger transaction in which the target shareholders receive all cash or mostly cash would trigger Revlon duties even though the acquirer was a publicly traded, diffusely held company with no controlling shareholder. But, as Bainbridge notes, the statements concerning Revlon in these two decisions were mere dicta, unnecessary for the court’s ultimate ruling. In both decisions, the court ruled that even if Revlon were triggered, the corporate charter at issue excused the defendant-directors of any liability for damages sought by the plaintiff-shareholders. Resolution of the Revlon question was therefore irrelevant to the dispute. As dicta, neither decision created legally binding precedent.

According to Bainbridge, however, the dicta of Lukens and NYMEX became binding precedent in 2011 with the chancery court’s Smurfit-Stone

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90. But see supra notes 82–89 (citing cases reaffirming conventional wisdom that Revlon applies to any all-cash transaction and identifying cases applying that conventional wisdom to all-cash transactions involving publicly traded acquirer without controlling shareholder).

91. In Lukens, Vice Chancellor Lamb stated:

The defendants argue that because over 30% of the merger consideration was shares of [the acquirer’s] common stock, a widely held company without any controlling shareholder, Revlon and QVC do not apply. I disagree. Whether 62% or 100% of the consideration was to be in cash, the directors were obliged to take reasonable steps to ensure that the shareholders received the best price available because, in any event, for a substantial majority of the then-current shareholders, “there is no long run.” In re Lukens Inc. S’holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999) aff’d sub nom. Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (unpublished table decision).

92. Citing Lukens, Vice Chancellor Noble in NYMEX observed that:

[In a transaction where cash is the exclusive consideration paid to the acquired corporation’s shareholders, a fundamental change of corporate control occurs—thereby triggering Revlon—because control of the corporation does not continue in a large, fluid market. In transactions, such as the present one, that involve merger consideration that is a mix of cash and stock—the stock portion being stock of an acquirer whose shares are held in a large, fluid market—“[t]he [Delaware] Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering Revlon.” In re NYMEX S’holders Litig., C.A. Nos. 3621-VCN, 3835-VCN, 2009 WL 3206051, at *5 (Del. Ch. Sept. 30, 2009).

93. See Bainbridge, supra note 3, at 3323 n.275, 3326.

94. See Lukens, 757 A.2d at 732 n.25 (holding that, even “assuming that Revlon is implicated, the Complaint must still be dismissed” because allegations pled amounted only to breach of duty of care, which was excused under target corporation’s certificate of incorporation); NYMEX, 2009 WL 3206051, at *5 (observing that court “need not decide whether Revlon scrutiny applies to the present transaction,” because, “even if Revlon applied to this case, application of the exculpatory clause [in the target corporation’s charter] would lead to dismissal” of plaintiff’s duty of care claims).
decision. In that case, Bainbridge asserts, Vice Chancellor Parsons relied on those two earlier opinions “to hold—for the first time—that all- or partial-cash transactions trigger Revlon.”

It is true that in Smurfit-Stone, the vice chancellor opined that, as a general matter, “Revlon will govern a board’s decision to sell a corporation where stockholders will receive cash for their shares”—although, as noted above, this simply reiterates a long-established principle in chancery court jurisprudence.

And it is true that with respect to the challenged transaction before him, which involved mixed consideration, the vice chancellor stated after some deliberation: “I conclude that Plaintiffs are likely to succeed on their argument that the approximately 50% cash and 50% stock consideration here triggers Revlon.” And it is likewise true that others, like Bainbridge, have characterized this facet of the Smurfit-Stone decision as its holding.

But the analysis regarding Revlon’s applicability in Smurfit-Stone is “through and through” dictum. To start with, the opinion addressed a shareholder-plaintiff’s motion for preliminary injunction. Accordingly, the vice chancellor was not asked to definitively determine whether Revlon applied to the challenged transaction. Rather, the question before him was simply whether the shareholder-plaintiff’s Revlon claim had “a reasonable probability of success on the merits.”

95. See Bainbridge, supra note 3, at 3327.
96. Id. (emphasis added).
98. See supra note 84.
103. See In re MFW S’holders Litig., 67 A.3d 496, 521 (Del. Ch. 2013) (Strine, C.) (“[T]he [Delaware] Supreme Court treats as dictum language on an issue if the record before the court was ‘not sufficient to permit the question to be passed on.’ If an issue is not presented to a court with the benefit of full argument and record, any statement on that issue by that court is not a holding with binding force.” (footnote omitted)).
probability of success at the preliminary injunction stage is not a final judgment of the court on the merits or binding on future decisions.

More importantly, however, at the outset of his opinion, Vice Chancellor Parsons also noted that the applicability of Revlon was unnecessary to the ultimate ruling on the motion before him. “[E]ven if I assume without deciding that the Revlon standard applies, the result would be the same” as it would under the default standard, the business judgment rule. Because under either standard of review, the vice chancellor held, the plaintiffs had not shown that they were reasonably likely to succeed on the merits of their claim that the defendant-directors had breached their fiduciary duties in approving the challenged mixed consideration transaction.

As was recently observed in a much discussed decision, Delaware courts “follow[ ] the traditional definition of ‘dictum,’” defining it as “judicial statements on issues that ‘would have no effect on the outcome of [the] case.’ . . . Thus, broad judicial statements, when taken out of context, do not constitute binding holdings.” Under this definition, the analysis


108. Id. (“I conclude that Plaintiffs have not shown a reasonable probability of success on their claim that the Board breached its fiduciary duties by approving the [proposed] merger.”).


110. See In re MFW S’holders Litig., 67 A.3d 496, 521 (Del. Ch. 2013) (emphasis added) (quoting Brown v. United Water Del., Inc., 3 A.3d 272, 276–77 (Del. 2010)) (describing as dictum statements that “would have no effect on the outcome of the case”); id. (citing Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 398 (Del. 2010)) (noting that chancery court ruling was “unnecessary . . . to decide [the] issue,” and therefore “obiter dictum and without precedential effect”); see
in Smurfit-Stone of whether Revlon applied to the challenged mixed consideration transaction is mere dictum. Because it was “unnecessary to the resolution of the case before [him],”\textsuperscript{111} the vice chancellor’s answer to that question does not bind future cases.\textsuperscript{112}

\textbf{B. The Ambiguity of Supreme Court Precedents}

Legal niceties aside, one might ask what does it matter whether the Revlon analysis in Smurfit-Stone was a holding or mere dictum? After all, irrespective of the distinction, \textit{Lukens, NYMEX, Smurfit-Stone}, and other precedents make clear that at least some—and perhaps all—members of the chancery court believe (wrongly, in Bainbridge’s view) that any all-cash or cash-heavy mixed consideration transaction triggers \textit{Revlon} duties regardless of the acquirer’s identity. Moreover, even nonbinding dictum may provide persuasive authority for future decisions.\textsuperscript{113} But recognizing the chancery court analysis in Smurfit-Stone and its predecessors as mere dicta sheds light on a second problem with Bainbridge’s conflict-of-interests account of the \textit{Revlon} doctrine: it lacks support in relevant Delaware Supreme Court precedent.

To begin with, the \textit{Revlon} decision itself—the very genesis of the doctrine—seemed less focused on the “omnipresent specter” of director self-interest\textsuperscript{114} and more focused on a different kind of conflict of interests: namely, the fact that the target board in that case had placed other stakeholders’ interests above the interests of the shareholders.\textsuperscript{115} Thus, the sem-
inal case seems to be more about shareholder primacy over other stakeholders than about selfish directors. If director self-interest was germane to the *Revlon* decision, it was only indirectly implicated.\textsuperscript{116}

*Revlon* itself notwithstanding, one could plausibly find support for a conflict-of-interests theory of *Revlon* by contrasting two post-*Revlon* cases: *Time-Warner* and its seemingly inseparable companion, the *QVC* decision.\textsuperscript{117} As noted above,\textsuperscript{118} both cases involved stock-for-stock mergers, but the Delaware Supreme Court held that *Revlon* applied only in the latter decision, because the Paramount-Viacom merger contemplated a transfer of control over Paramount to Viacom’s controlling shareholder.

Certainly, the differing results of these two well-known cases could be interpreted to be consistent with a conflict-of-interests interpretation of the *Revlon* doctrine.\textsuperscript{119} Importantly, however, the *QVC* court never explicitly cited the potential self-interest of the Paramount directors as a factor for applying *Revlon* to the Paramount-Viacom merger.\textsuperscript{120} The supreme court did, however, expressly articulate a number of other factors to justify *Revlon* scrutiny, including: (i) the diminution in the voting power of the Paramount shareholders in the combined post-merger business;\textsuperscript{121} (ii) the fundamental and irrevocable change in the corporate enterprise that

\textsuperscript{116} Even though the *Revlon* court’s concern focused primarily on the fact that the target board had sacrificed the shareholders’ interest in obtaining the highest price in order to protect certain of the target’s creditors, the court at one point also noted that “[t]he principal benefit” of favoring the creditors over the shareholders “went to the directors, who avoided [the possibility of] personal liability” stemming from litigation that the creditors had threatened. *Id.* at 184.

\textsuperscript{117} *See* Bainbridge, *supra* note 3, at 3299–13.
\textsuperscript{118} *See supra* notes 37–40 and accompanying text.
\textsuperscript{119} *See supra* notes 23–42 and accompanying text.
\textsuperscript{120} Bainbridge all but concedes this point, yet argues that “properly understood” the *QVC* court’s reference to other factors justifying *Revlon* duties “presumably reflect the possibility that conflicted interests” improperly motivated the Paramount board of directors. *See* Bainbridge, *supra* note 3, at 3299–313.
\textsuperscript{121} *See* Paramount Commc’ns, Inc. v. *QVC* Network, Inc., 637 A.2d 34, 43 (Del. 1994) (“In the event the Paramount-Viacom transaction is consummated, the public stockholders will . . . [hold] a minority equity voting position in the surviving corporation. [T]here will be a controlling stockholder who will have the voting power to . . . alter materially the nature of the corporation and the public stockholders’ interests.”).
would result from a transfer of control to Viacom’s controlling share-
holder;\(^{122}\) (iii) the fact that the transaction represented the Paramount
shareholders’ last chance to maximize the value of their ownership inter-
est;\(^{123}\) as well as (iv) the Paramount board’s interference with shareholder
franchise when it agreed to deal protection devices to “lock up” the
board’s preferred transaction.\(^{124}\) Curiously, the risk of director self-inter-
est did not make the list.

Nevertheless, one could also plausibly find support for a conflict-of-
interests theory of the Revlon doctrine in two post-QVC Delaware Supreme
Court decisions: In re Santa Fe Pacific Corp.\(^{125}\) and Lyondell Chemical Corp. v. Ryan.\(^{126}\) And it is true that these cases can be read to be “consistent” with
a conflict-of-interests thesis.\(^{127}\) But neither expressly embraces a conflict-
of-interests understanding of the Revlon doctrine; and each can be read to
be “consistent” with the principle articulated in Lukens, NYMEX, and
Smurfit-Stone that Revlon applies to all all-cash and cash-heavy mixed consid-
eration transactions.

For example, in Santa Fe, the supreme court ruled that Revlon was
inapplicable to a transaction in which the target shareholders were to re-
ceive a 33–67 mix of cash and acquirer stock for their shares in the target
corporation.\(^{128}\) The court’s only explanation for this conclusion was that
there were no facts suggesting that there would be a controlling share-
holder of the publicly traded, combined business following the transac-
tion.\(^{129}\) Seizing on the court’s terse reasoning, Bainbridge argues that
“[t]he clear implication [of Santa Fe] is that the form of consideration was

\(^{122}\) See id. at 47–48 (“There are few events that have a more significant im-
 pact on the stockholders than a sale of control . . . . [It] represents a fundamental
(and perhaps irrevocable) change in the nature of the corporate enterprise from a
practical standpoint. It is the significance of [this event] that justifies [Revlon
scrutiny].”).

\(^{123}\) See id. at 45 (reasoning that Revlon scrutiny applies because “an asset be-
 longing to public stockholders (a control premium) is being sold and may never be
 available again” (emphasis added)).

\(^{124}\) See id. at 42 (“Because of the overriding importance of voting rights,
[Delaware courts] have consistently acted to protect stockholders from unwar-
ranted interference with such rights.”).

\(^{125}\) 669 A.2d 59 (Del. 1995).

\(^{126}\) 970 A.2d 235 (Del. 2009).

\(^{127}\) See Bainbridge, supra note 3, at 3320 (“Although motive did not figure
explicitly in that analysis, the Delaware Supreme Court’s Lyondell decision in fact is
fully consistent with the argument in the preceding part that motive is what mat-
ters.” (emphasis added)); cf. id. at 3331 (“The clear implication [of Santa Fe] is that
the form of consideration was not the relevant issue.” (emphasis added)).

\(^{128}\) See Santa Fe, 669 A.2d at 64–65, 71.

\(^{129}\) See id. at 71 (“Conspicuously absent from the complaint is a description of
the stock ownership structure of Burlington. Absent this factual averment,
plaintiffs have failed to allege that control of Burlington and Santa Fe after the
merger would not remain ‘in a large, fluid, changeable and changing market.’”
(citation omitted)).
not the relevant issue.”

But this reads too much into the high court’s cryptic opinion. After all, Santa Fe concerned a stock-heavy mixed consideration transaction. Thus, the challenged transaction more closely resembled a strategic stock-for-stock merger between two widely held corporations, an area where Revlon clearly does not govern. The Santa Fe court was never asked to consider whether Revlon would apply to an all-cash merger or even a cash-heavy mixed consideration transaction. So, it is unclear what (if anything) Santa Fe portends on that question.

Likewise, in Lyondell Chemical, the supreme court accepted that Revlon applied to an all-cash, cash-for-stock merger, where the acquirer was a privately held business controlled by a single individual. Yet, the court said nothing about whether Revlon would apply to the challenged transaction in the absence of the transfer of control to a privately held acquirer. Indeed, much like the chancery court decisions in Topps and TW Services,

130. Bainbridge, supra note 3, at 3331 (emphasis added).

131. See supra note 128 and accompanying text.


133. As Vice Chancellor Lamb observed in Lukens, I do not agree . . . that Santa Fe, in which shareholders tendered 33% of their shares for cash and exchanged the remainder for common stock, controls a situation in which over 60% of the consideration is cash. The Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering Revlon. I take for granted, however, that a cash offer for 95% of a company’s shares, for example, even if the other 5% will be exchanged for the shares of a widely held corporation, will constitute a change of corporate control. Until instructed otherwise, I believe that purchasing more than 60% achieves the same result.


134. See Gevirtz, supra note 27, at 1527 (“What, if anything, [Santa Fe] tells us about an entirely (or even predominately) cash-out deal . . . is in the eye of the beholder.”); Lyman Johnson & Robert Ricca, The Dwindling of Revlon, 71 WASH & LEE L. REV. (forthcoming 2014) (manuscript at 22) (observing that with respect to question of whether form of consideration matters for Revlon purposes “courts and commentators have extended the Santa Fe decision beyond its actual holding”).


136. Indeed, the only new guidance that Lyondell Chemical provided on the question of what triggers Revlon was that “[t]he duty to seek the best available price applies only when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that will result in a change of control.” Id. at 242. Applying this test, the court concluded that “[t]he time for action under Revlon did not begin until . . . the directors began negotiating the sale of Lyondell,” leaving it uncertain whether any all-cash “sale” or specifically a “sale” to a privately held acquirer (like the one involved under the specific facts of the case) would trigger the enhanced judicial scrutiny. Id. (emphasis added); see also Gevirtz, supra note 27, at 1526–27 (“[W]as this a change in control because cashing out all the existing Lyondell shareholders removed their role in the corporation? Or was it a change in control because the buyer was a privately held company . . . ? The Delaware Supreme Court never actually says.”).
which Bainbridge dismisses on the grounds that each case involved a sale to a privately held acquirer.\footnote{See supra note 82.} \textit{Lyondell Chemical} seems inapposite to the question of whether \textit{Revlon} would apply in an all-cash or cash-heavy sale to a publicly traded, diffusely held acquirer.

Thus, the problem the case law presents for Bainbridge’s conflict-of-interests thesis can be visually depicted as follows (with the applicable Delaware Supreme Court precedent indicated in bold text):

\textbf{FIGURE 2: MATRIX OF CASES DEFINING REVLO\-LAND}

<table>
<thead>
<tr>
<th>Acquirer Identity</th>
<th>Publicly Traded and Diffusely Held</th>
<th>Privately Held or Controlled</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All Stock</strong> (or Mostly Stock)</td>
<td>\textit{Time-Warner Santa Fe}</td>
<td>\textit{QVC}</td>
</tr>
<tr>
<td><strong>All Cash</strong> (or Cash-Heavy Mix)</td>
<td>\textit{Lukens} \textit{NYMEX} \textit{Smurfit-Stone Pennaco Cogent}</td>
<td>\textit{TW Services Topps Lyondell Chemical}</td>
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<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In short, Bainbridge’s conflict-of-interests thesis asserts that \textit{Revlon} is generally inapplicable to transactions that fall into box 4 of the above matrix. But the thesis relies on support from cases in boxes 1, 2, and 3 which are factually distinct from the box 4 situation—namely, an all-cash or cash-heavy sale transaction involving a publicly traded, diffusely held acquirer with no controlling shareholder. While \textit{Revlon}-land certainly covers box 2 and box 3 transactions under supreme court precedent, the high court’s decisions simply leave box 4 unexplored.

To further complicate matters, the ambiguity of supreme court precedent is actually worse than the above matrix suggests. While Bainbridge criticizes \textit{Lukens} and its chancery court progeny in box 4 as inconsistent with his conflict-of-interests understanding of Delaware Supreme Court precedent,\footnote{See Bainbridge, supra note 3, at 3331–33.} he neglects to mention that \textit{Lukens} was summarily affirmed by the high court “on the basis of and for the reasons assigned by the
Court of Chancery in its well-reasoned opinion.” Of course, because the Revlon analysis in Lukens was nonbinding dictum, and not a holding, it is hard to know whether the Delaware Supreme Court intended its rather terse endorsement to cover the chancery court’s dictum or just its holding.

Likewise, a conflict-of-interests theory cannot account for McMullin v. Beran, a case in which a controlling shareholder sought the sale of its partially owned subsidiary in an all-cash, all-shares transaction to an unrelated third-party acquirer. There, the Delaware Supreme Court specifically held that although the challenged transaction did not involve a “change of control” of the target for Revlon purposes, the transaction nonetheless “implicated the [target] directors’ ultimate fiduciary duty that was described in Revlon and its progeny—to focus on whether the shareholder value has been maximized.” Thus, McMullin seems to run expressly counter to Bainbridge’s conflict-of-interests thesis, which after all asserts that a cash “sale” alone does not trigger Revlon unless the transaction will also result in a “change of control” of the target from a “fluid aggregation of unaffiliated stockholders” to the hands of a private entity or individual owner. Instead, McMullin seems to confirm the conventional wisdom that an all-cash transaction per se is a “sale or change of control” categorically triggering Revlon scrutiny.

140. See supra notes 93–95 and accompanying text.
141. 765 A.2d 910 (Del. 2000). Bainbridge’s only mention of McMullin is in a footnote, citing the case for an unrelated point. See Bainbridge, supra note 3, at 3319 n.251.
142. See McMullin, 765 A.2d at 915–16.
143. Id. at 920. Although the target’s controlling and minority shareholders would receive identical cash consideration in the transaction, the Delaware Supreme Court reasoned that because “the decision constitutes a final-stage transaction . . . . [T]he time frame for the board’s analysis is immediate value maximization for all shareholders.” Id. at 918.
144. See supra note 66.
145. To be fair, McMullin may be distinguished from the usual Revlon case, because it involves a controlling shareholder. Thus, although the court expressly stated that Revlon was implicated, what the court seems to articulate in McMullin is really a modified Revlon standard:

When the entire sale to a third-party is proposed, negotiated and timed by a majority shareholder, . . . the board cannot realistically seek any alternative because the majority shareholder has the right to vote its shares in favor of [its proposed] transaction . . . . Nevertheless, in such situations, the directors are obliged to make an informed and deliberate judgment, in good faith, about whether the sale to a third party that is being proposed by the majority shareholder will result in a maximization of value for the minority shareholders.

McMullin, 765 A.2d at 919. But even so, this modified Revlon version was applied to an all-cash sale on the grounds that it was a “final-stage transaction,” even though the court posited it did not involve a “change of control.”
But perhaps most problematic for a conflict-of-interests theory of Revlon is that it fails to explain other facets of the Revlon doctrine. There are, after all, three distinct checkpoints for entering Revlon-land. To quote the Delaware Supreme Court’s definitive statement on the matter, Revlon applies in at least the following three scenarios:

(1) [W]hen a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company; (2) where, in response to a bidder’s offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control.

While Bainbridge sensibly focuses on the third checkpoint, as it is the one that is most often crossed and, therefore, litigated, he says nothing about how his conflicts-of-interests theory explains the first or second

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147. Id. Bainbridge points to the sentence immediately following this excerpted text, in which the Delaware Supreme Court added: “In the latter situation, there is no ‘sale or change in control’ when ‘[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.’” Id. at 1290 (citation omitted). Bainbridge argues this qualification to the third Revlon checkpoint makes clear that an all-cash or mixed consideration acquisition by a publicly held corporation with no controlling shareholder is not a “sale or change of control.” See Bainbridge, supra note 3, at 3332. But the awkwardly edited language of this qualification originated from Chancellor Allen’s description of the stock-for-stock Time-Warner merger. See Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1994). And considering Chancellor Allen’s repeated assertions in other decisions that an all-cash, cash-for-stock merger triggers Revlon, it seems unlikely he intended the above language to exclude such transactions from Revlon’s enhanced scrutiny. See supra note 84 (citing decision of Chancellor Allen among others). The awkwardness of the language becomes clear when one tries to apply it to an all-cash deal. Following an all-cash transaction, it seems inaccurate to say control of “both companies” remains in the market where the target’s shareholders are eliminated and the target becomes a controlled subsidiary of the acquirer. And even if the supreme court’s qualification—that “sole or change in control” does not occur where “control of both companies remains in a large, fluid, changeable and changing market”—supports Bainbridge’s position, an all cash sale may nonetheless fall under Revlon’s first trigger. Arguably, even if the target corporation engages in negotiations contemplating an all-cash sale, the target has begun “an active bidding process seeking to sell itself,” even if those negotiations involve just one bidder.
checkpoints of Revlon-land.\textsuperscript{148} If Revlon is, in fact, all about policing director self-interest, why does the doctrine cover these other two situations?\textsuperscript{149} 

Arguably, this is not a problem with Bainbridge’s conflict-of-interests theory. It is a problem intrinsic in the doctrine it seeks to explain. Ever elusive, there seems to be no one single policy or principle that animates Revlon and its progeny.\textsuperscript{150} The Delaware Supreme Court has never provided a grand unifying theory explaining why Revlon duties exist\textsuperscript{151} or what those duties specifically require of directors.\textsuperscript{152} And it has never explained why only certain categories of transactions trigger this heightened form of judicial scrutiny.\textsuperscript{153} To be sure, the conflict-of-interests concern is part of the Revlon story. But fiduciary self-dealing concerns do not tell the whole tale of Revlon.

As the Delaware Supreme Court has explained, “Revlon [duties] . . . do not admit of easy categorization as duties of care or loyalty.”\textsuperscript{154} Instead, Revlon implicates both of these fiduciary duties.\textsuperscript{155} It is not just about potential conflicts of interests between boards and shareholders. It is also about ensuring that directors act in an “informed and deliberate man-

\textsuperscript{148} By contrast, in the above-quoted excerpt from Arnold, the Delaware Supreme Court gave some guidance as to the theory undergirding the three checkpoints of Revlon-land, by citing the work of Professor Marcel Kahan. See Arnold, 650 A.2d at 1290 (citing Marcel Kahan, Paramount or Paradox: The Delaware Supreme Court’s Takeover Jurisprudence, 19 J. Corp. L. 583 (1994)). Under Kahan’s theory, Revlon is a doctrine that imposes substantive judicial scrutiny as a substitute for shareholder voting in situations where board decisions are irreversible by the shareholders through the election of new directors. Id. at 589–602.

\textsuperscript{149} Moreover, if the concern is simply director self-interest, why does the Delaware Supreme Court not simply say so, instead of explicitly reserving for itself the room to apply Revlon to “scenarios” other than the three it has “at least” articulated? See Arnold, 650 A.2d at 1289–90.

\textsuperscript{150} See Gevurtz, supra note 27, at 1528, 1545 (“Not only has it been uncertain what triggers Revlon, it is also been uncertain what Revlon actually does. . . . [T]he failure of the Delaware courts to resolve [issues as to Revlon’s scope and impact] is symptomatic of the fact that there really is no sensible underlying rational for the doctrine.”).

\textsuperscript{151} See Kahan, supra note 148, at 585 (noting Delaware Supreme Court’s “failure to articulate a unified theory [of Revlon and its other takeover jurisprudence] in a single case”).

\textsuperscript{152} Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) (“There is only one Revlon duty—to ‘[get] the best price for the stockholders at a sale of the company.’ No court can tell directors exactly how to accomplish that goal . . . .”).

\textsuperscript{153} Cf. Gevurtz, supra note 27, at 1545–70 (explaining that common rationales for Revlon do not match category of transactions covered by doctrine).

\textsuperscript{154} In re Santa Fe Pac. Corp. S’holder Litig., 669 A.2d 59, 67 (Del. 1995).

ner”\textsuperscript{156} with respect to significant and irreversible end-of-the-line transactions.\textsuperscript{157} Moreover, beyond fiduciary considerations, the doctrine “rests on ‘the overriding importance of [shareholder] voting rights,’”\textsuperscript{158} a facet of board accountability under corporate law that Bainbridge too readily dismisses.\textsuperscript{159}

The reality, thus, appears to be an untidy one: \textit{Revlon} is animated by a mishmash of policy concerns that go well beyond the simple potential for conflicts of interests.\textsuperscript{160} These concerns span the fiduciary duties of care and loyalty and even the fundamental structure of corporate law—that boards (and not courts) manage the business affairs of the corporation

\begin{itemize}
  \item \textit{Ivanhoe Partners}, 535 A.2d at 1345 (“[\textit{Revlon}] involves duties of loyalty and care. . . . [T]he duty of care requires a director, when making a business decision, to proceed with a ‘critical eye’ by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board.” (citation omitted)); \textit{see also} \textit{Paramount Comm’cs, Inc. v. QVC Network, Inc.}, 637 A.2d 34, 44 (Del. 1993) (noting that in executing \textit{Revlon} duties “this Court has stressed the importance of the board being adequately informed in negotiating a sale of control”);
  \textit{Barkan v. Amsted Indus., Inc.}, 567 A.2d 1279, 1287 (Del. 1989) (observing that “[t]he need for adequate information is central to the enlightened evaluation of a transaction that a board must make” to fulfill its fiduciary duty under \textit{Revlon}); \textit{William J. Carney, Mergers & Acquisitions: The Essentials} 169 (2009) (“\textit{Revlon} duties are a subset of the more general duty to make an informed decision in order to obtain the protection of the business judgment rule . . . .”).
  \item \textit{Santa Fe}, 669 A.2d at 68 (quoting \textit{QVC}, 637 A.2d at 42); \textit{see also} \textit{QVC}, 637 A.2d at 45 (“[\textit{Revlon}] scrutiny is mandated by[\ldots among other factors,] the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again . . . .”); \textit{id.} at 47–48 (“There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental (and perhaps irrevocable) change . . . . It is the significance of each of these events that justifies \textit{Revlon} scrutiny.”); \textit{see also} \textit{McMullin v. Beran}, 765 A.2d 910, 918 (Del. 2000) (holding that \textit{Revlon} applies to target board’s consideration of all-cash, all-shares acquisition because “the decision constitutes a final-stage transaction”); \textit{see also} Transcript of Ruling of the Court on Plaintiffs’ Motion for a Preliminary Injunction at 4, \textit{Steinhardt v. Howard-Anderson}, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL) (“[T]he change of control test is ultimately a derivative test . . . . [W]hen enhanced scrutiny applies [under \textit{Revlon}] is when you have a final stage transaction.”); \textit{see also} \textit{Kahan, supra} note 148, at 592–601 (arguing that \textit{Revlon} is triggered by fundamental corporate transactions that are irreversibly by shareholder through election of new directors).
  \item \textit{Santa Fe}, 669 A.2d at 68 (quoting \textit{QVC}, 637 A.2d at 42); \textit{see also} \textit{QVC}, 637 A.2d at 45 (“[\textit{Revlon}] scrutiny is mandated by[\ldots among other factors,] the threatened diminution of the current stockholders’ voting power . . . . and the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights.”); \textit{see also} \textit{Kahan, supra} note 148, at 592–601 (arguing that \textit{Revlon} is triggered by fundamental corporate transactions that are irreversibly by shareholder through election of new directors).
  \item \textit{Bainbridge, supra} note 3, at 3283.
  \item \textit{Cf. Gevurtz, supra} note 27, at 1488, 1509 (noting that potential for problematic director self-interest is generally less acute in transactional contexts implicating \textit{Revlon} than it is in context of self-entrenching defensive measures scrutinized under \textit{Unocal}).
\end{itemize}
subject to the shareholders’ right to elect the directors. Revlon addresses not only the “omnipresent specter” of director self-interest, it addresses the potential for “slothful indifference” by sometimes “torpid, if not supine” fiduciaries vested with control over the assets of shareholders. Thus, as a doctrinal matter, Revlon is as much the evolutionary descendant of Unocal as it is of Unocal’s more infamous sibling, Smith v. Van Gorkom. In sum, director motives matter, but Revlon cannot be neatly defined solely by the concern for potential conflicts of interests.

C. Dictum’s Guidance in a Vacuum of Binding Precedent

Given the myriad policy concerns that animate Revlon, it is unsurprising that the geography of Revlon-land is unclearly defined in Delaware Supreme Court precedent. And given this uncertainty, it is further

161. See Kahan, supra note 148, at 606; cf. Black & Kraakman, supra note 27, at 538–43 (observing that under applicable case law Revlon seems to be triggered only in transactional contexts where there is reason to second-guess target board’s business judgment as to value of target corporation).

162. See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)); see also In re Dollar Thrifty S’holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010) (Strine, V.C.) (“The heightened scrutiny that applies in the Revlon (and Unocal) contexts are, in large measure, rooted in a concern that the board might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders.”); Barkan v. Amsted Indus. Inc., 567 A.2d 1279, 1286 (Del. 1989) (“Revlon is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders.”).


164. Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1988) (finding that defendant-directors failed in their Revlon duty by being “torpid, if not supine, in [their] efforts to establish a truly independent auction,” free of manipulation by interested directors).

165. See In re Lukens Inc. S’holders Litig., 757 A.2d 720, 731 (Del. Ch. 1999) (“A corporate board’s failure to obtain the best value for its stockholders may be the result of illicit motivation (bad faith), personal interest divergent from shareholder interest (disloyalty) or a lack of due care.” (emphasis added)) aff’d sub nom. Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (unpublished table decision).

166. In re Dollar Thrifty, 14 A.3d at 602 (Strine, V.C.) (“Van Gorkom . . . was really a Revlon case.”); see also Gagliardi v. TriFoods Int’l, Inc., 683 A.2d 1049, 1051 n.4 (Del. Ch. 1996) (Allen, C.) (“I count Smith v. Van Gorkom . . . not as a ‘negligence’ or due care case involving no loyalty issues, but as an early . . . ‘Revlon’ or ‘change in control’ case.”); Black & Kraakman, supra note 27, at 522 (“Van Gorkom should be seen not as a business judgment rule case but as a takeover case that was the harbinger of the then newly emerging Delaware jurisprudence on friendly and hostile takeovers, which included the almost contemporaneous Unocal and Revlon decisions.”); Kahan, supra note 148, at 593 (“Revlon could be seen more like a ‘sale of the company’ case such as Van Gorkom.”)

167. See Gevurtz, supra note 27, at 1488; see also In re Lukens, 757 A.2d at 732 n.25 (Lamb, V.C.) (“The Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering Revlon.”); In re Smurfit-Stone Container Corp. S’holder Litig., C.A. No. 6164-VCP, 2011 WL 2028076, at *13 (Del. Ch. May 20, 2011) (Parsons, V.C.) (“The Supreme Court has
unsurprising that the Delaware Chancery Court has taken on the difficult, but crucial, project of defining the outer boundaries and inner contours of Revlon-land through dictum.

In a contemporaneous article, I explore the Delaware courts’ penchant for the strategic use of dictum. This established judicial practice, I explain, serves valuable guidance, regulatory, and responsiveness functions, which have been vital to Delaware’s success in attracting corporate and alternative entity charters. The chancery court decisions involving mixed consideration mergers—Lukens and Smurfit-Stone in particular—exemplify the court’s strategic use of dictum as well as the guidance function served by the practice.

As reflected in the figure below, mixed consideration mergers have in recent years represented nearly a quarter of all strategic acquisitions involving public corporations:

not yet clarified the precise bounds of when Revlon applies in the situation where merger consideration consists of an equal or almost equal split of cash and stock.”); Bainbridge, supra note 3, at 3320 (observing that, under applicable Delaware precedent, Revlon is triggered whenever “the target corporation . . . initiate[s] ‘an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company,’ with it being unclear whether the reference to a ‘breakup’ modifies both halves of this checkpoint or only the latter”).

168. See Manesh, supra note 1.
169. See id. at Part III.B.1.
170. See id. at Part III.B.2.
Yet, surprisingly only one Delaware Supreme Court opinion, Santa Fe, has addressed the applicability of Revlon to such transactions.\textsuperscript{172} And the meaning of that decision is, as noted above, at best indeterminate.\textsuperscript{173} In the absence of a definitive answer or predictable framework in supreme court precedent regarding the applicability of Revlon to transactions involving mixed consideration,\textsuperscript{174} the chancery court in its Lukens, NYMEX, and Smurfit-Stone decisions has cautiously, but purposefully, used dictum to fill a gap left by the supreme court’s Revlon jurisprudence.\textsuperscript{175}

Such dicta provide crucial guidance for attorneys and business planners on how to structure transactions to comply with applicable fiduciary obligations.\textsuperscript{176} While dictum is not binding on the courts in future decisions, it affords important insight on how a court would rule if the matter was squarely presented to it.\textsuperscript{177} Moreover, by using dictum to clarify uncertain law, the chancery court is able to provide this guidance without unfairly applying a newly announced principle retroactively on the parties who brought the litigation.\textsuperscript{178}

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
\textbf{Year} & \textbf{\textit{n}} & \textbf{All Cash} & \textbf{All Stock} & \textbf{Mixed} \\
\hline
2005–2006 & 212 & 49\% & 20\% & 31\% \\
2007 & 152 & 74\% & 10\% & 16\% \\
2008 & 103 & 66\% & 15\% & 19\% \\
2009 & 75 & 51\% & 24\% & 25\% \\
2010 & 126 & 63\% & 14\% & 23\% \\
2011 & 101 & 61\% & 15\% & 24\% \\
\hline
\textbf{Weighted Average} & & 60\% & 16\% & 24\% \\
\hline
\end{tabular}
\caption{Consideration Paid to Target Shareholders}
\end{table}

\textsuperscript{172} In re Santa Fe Pac. Corp. S’holder Litig., 669 A.2d 59, 64–65, 71 (Del. 1995) (ruling that Revlon is inapplicable to merger in which target shareholders received 33–67 mix of cash and acquirer stock for their shares in target corporation). The original Paramount-Viacom merger at issue in QVC was also a mixed consideration transaction, although the cash amount was relatively small and, in any case, the presence of a controlling shareholder made the case unlike the transaction in Santa Fe, which involved a diffusely held, publicly traded acquirer. See Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 39 (Del. 1994).

\textsuperscript{173} See supra notes 128–34 and accompanying text.

\textsuperscript{174} See Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1055 (Allen, C.) (Del. Ch. 1997) (noting that in wake of supreme court’s QVC decision, \textbf{“[i]n any case, the presence of a controlling shareholder made the case unlike the transaction in \textit{Santa Fe}, which involved a diffusely held, publicly traded acquirer.”}).

\textsuperscript{175} See Manesh, supra note 1, at Part III.B.2.

\textsuperscript{176} See id.

\textsuperscript{177} See In re MFW S’holders Litig., C.A. No. 6566-CS, 2013 WL 2436341, at *19 (Del. Ch. May 29, 2013) (Strine, C) (noting persuasive authority of dictum).

\textsuperscript{178} See Manesh, supra note 1, at Part III.B.2.
noted, the strategic use of dictum is part of the “genius” of the chancery court’s jurisprudence.\textsuperscript{179}

Of course, despite such praise, there is naturally a danger in dictum, because it can sometimes be the product of unconsidered judgment.\textsuperscript{180} Thus, courts have cautioned that “like the proverbial chickens of destiny, [dictum can] come home to roost sooner or later in a very uncomfortable way . . . [becoming] a great source of embarrassment in future cases.”\textsuperscript{181} But Delaware’s judges are uniquely situated to avoid these pitfalls, given their expertise in business law matters and their intensive engagement with the corporate bar and scholars.\textsuperscript{182} Indeed, the restrained manner in which the chancery court has used dictum to only incrementally refine the understanding of \textit{Revlon}’s reach within the mixed consideration context shows just how mindful its judges are of dictum’s potential danger to create bad doctrine as well as its power to influence future behavior.

One can see dictum’s guidance function palpably in the actions of parties in subsequent litigation. For example, following \textit{Smurfit-Stone}, in \textit{In re Plains Exploration},\textsuperscript{183} the shareholder-plaintiffs familiarly claimed the director-defendants had breached their \textit{Revlon} duties in negotiating a merger in which the shareholders would receive a 50–50 mix of cash and stock in the acquiring corporation.\textsuperscript{184} Rather than contesting the applicability of \textit{Revlon}, the director-defendants conceded the point in light of the \textit{Smurfit-Stone} decision\textsuperscript{185} and instead demonstrated that the process they had undertaken was, in fact, reasonable and in compliance with their \textit{Revlon} duties.\textsuperscript{186}

This interaction between dictum and practice, courts and directors, typifies Delaware’s unique and dynamic lawmaking process.\textsuperscript{187} And it has continued, most recently in \textit{In re Synthes, Inc.},\textsuperscript{188} issued apparently after \textit{The Geography of Revlon–Land} was first drafted. \textit{Synthes} continues the gap-filling guidance function that \textit{Lukens} and \textit{Smurfit-Stone} started. But it mer-

\begin{itemize}
\item \textsuperscript{179.} See Savitt, \textit{supra} note 101, at 587–91.
\item \textsuperscript{182.} See Manesh, \textit{supra} note 1, at Part II.B.2.d.
\item \textsuperscript{183.} C.A. No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013).
\item \textsuperscript{184.} See id. at *1.
\item \textsuperscript{185.} See id. at *4 n.32.
\item \textsuperscript{186.} See id. at *4–7 (denying plaintiffs’ motion for preliminary injunction).
\item \textsuperscript{188.} 50 A.3d 1022 (Del. Ch. 2012).
\end{itemize}
its particular attention because, although Bainbridge gives it only scant footnoted treatment, *Synthes* is yet another precedent in which he finds support for his conflict-of-interests thesis. Bainbridge asserts that the “holding” in *Synthes* was that *Revlon* is inapplicable to a transaction in which the target shareholders would receive for their shares a 35–65 mix of cash and stock in a publicly traded, widely held acquirer.

Even if that were the holding of *Synthes*, it would say nothing about the applicability of *Revlon* to an all-cash merger or cash-heavy mixed consideration transaction. Referring back to the matrix above, *Synthes* (much like *Santa Fe*) would be a box 1 case that sheds little light on box 4 transactions.

But more importantly, like *Lukens* and *Smurfit-Stone* before it, the analysis in *Synthes* as to the applicability of *Revlon* to the challenged mixed consideration transaction is unambiguously dictum and not a holding that binds future cases. Reminiscent of Vice Chancellor Parsons’s *Smurfit Stone* opinion, Chancellor Strine at the outset of his analysis in *Synthes* was careful to mention that the question of whether *Revlon* applies is irrelevant to his decision on the motion before him: “[E]ven if *Revlon* applied, for the reasons discussed at length above, there are no pled facts from which I could infer that [the defendants breached their *Revlon* duties]. Thus, even if *Revlon* applied, the complaint fails to state a viable claim.”

Nevertheless, by indulging in dictum, *Synthes* adds incremental clarity to the question of when *Revlon* applies to mixed consideration transactions. Before *Synthes*, two Delaware decisions delineated the outer boundaries of *Revlon*-land for transactions involving mixed consideration. *Santa Fe* implied, but did not clearly hold, that *Revlon* is inapplicable to a merger in which the target shareholders would receive a 33–67 mix of cash and acquirer stock for their shares of the target corporation. And *Smurfit-Stone*, building on *Lukens* before it, stated in dicta that a merger in which target shareholders receive an even 50–50 split of cash and acquirer stock

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189. See Bainbridge, supra note 3, at 3323 n.273 (“Chancellor Strine’s holding [in *Synthes*] is fully consistent with the understanding of *Revlon* and its progeny advanced herein.”).

190. Id.

191. Cf. supra notes 128–34 and accompanying text (questioning relevance of *Santa Fe* to all-cash or cash-heavy transactions).

192. See supra Part III.B.

193. See supra notes 128–40 and accompanying text.

194. See supra notes 107–08 and accompanying text.

195. In re *Synthes*, Inc. S’holder Litig, 50 A.3d 1022, 1047 (Del. Ch. 2012). Notably, in coming to this conclusion, Chancellor Strine cited to NYMEX, an opinion whose articulation of the *Revlon* doctrine Bainbridge finds troublesome. See id. at 1047 n.115.

196. See supra notes 128–34 and accompanying text (noting court’s cryptically terse reasoning in *Santa Fe*); see also Johnson & Ricca, supra note 134, at 22–23 (observing that *Santa Fe* does not provide guidance as to question of whether form of consideration matters for *Revlon* purposes).
would trigger *Revlon* duties.\(^\text{197}\) Although neither decision can be said to be binding on the question, each provided useful guidance as to when *Revlon* may be triggered in the context of mixed consideration transactions. The dictum of *Synthes* now marginally refines the landscape. To borrow from Professor Brian Quinn,\(^\text{198}\) after *Synthes*, the map of *Revlon*-land for mixed consideration transactions can be depicted as follows:

**Figure 4: Boundaries of *Revlon*-Land for Mixed Consideration Transactions**

![Diagram of Revlon-Land boundaries](image)

- **Business Judgment Rule**
  - 0% Cash [100% Acquirer Stock]
  - Santa Fe [33% Cash]
  - Time-Warner [0% Cash]
  - Smurfit-Stone [50% Cash]
- **Revlon-Land**
  - Lukens [62% Cash]
  - Synthes [35% Cash]
  - 100% Cash [0% Acquirer Stock]

**IV. Conclusion**

The boundaries of *Revlon*-land have never been clearly defined precisely because the principles animating the doctrine are multi-faceted and perhaps even confounded. While Bainbridge’s conflict-of-interests explanation of *Revlon* should be lauded for rationalizing specific features of *Revlon*-land, it does not explain the whole breadth of the doctrine.\(^\text{199}\) Recognizing this reality, the Delaware Chancery Court has through the strategic use of dictum sought to provide incremental clarity into the precise borders of this murky doctrinal province.

Certainly, one may disagree with the content and conclusions of such dictum. And certainly, the Delaware Supreme Court may in the future revisit *Revlon* and revise the doctrine to provide clarity on the questions left open by its existing precedents. Indeed, the seemingly arbitrary line-drawing required in cases involving mixed consideration—distinguishing, for example, between a transaction involving an even 50–50 split of cash

\(^\text{197}\) See supra notes 101–08 and accompanying text (noting dictum of *Smurfit-Stone*).

\(^\text{198}\) The diagram that follows updates the diagram that Professor Brian Quinn published on his blog. See Brian J.M. Quinn, *More on Revlon Triggers*, M&A L. PROF BLOG (May 31, 2011), http://lawprofessors.typepad.com/mergers/2011/05/more-on-revlon-triggers.html.

\(^\text{199}\) See supra notes 146–66 and accompanying text.
and acquirer stock versus one involving a 35–65 mix—would suggest it is time for the high court to reconsider the Revlon doctrine.

The high court could choose to explicitly shrink the realm of Revlon-land to focus solely on potentially problematic conflicts of interests, as Bainbridge advocates. Or it could choose, consistent with the rationale of its previous decisions, to expand its doctrinal boundaries of Revlon to cover other categories of final-stage transactions. Less likely yet, the supreme court may, as others have argued, scrap Revlon altogether. Although that would be a dramatic doctrinal shift, it would be consistent with the steady judicial erosion of Revlon’s remedial potency in recent years.

But in the meantime, in the wake of the Delaware Supreme Court’s indeterminate Revlon precedents, the chancery court has through the use of dictum provided some stability and predictability as to the boundaries of Revlon-land, where the law is otherwise uncertain. For this, the chancery court should be commended.


201. See, e.g., Gevurtz, supra note 27, at 1571; see also Johnson & Ricca, supra note 134, at 58.

202. See generally Johnson & Ricca, supra note 134. The Delaware Supreme Court’s most recent significant decision applying the Revlon doctrine made clear that it is exceptionally difficult to obtain damages as a remedy on a Revlon claim. See Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) (stating that where corporate charter includes exculpation provision eliminating director liability for breaches of fiduciary duty of care, “an extreme set of facts”—something more than “inadequate or flawed effort” on part of directors—is required to obtain damages on Revlon claim premised on breach of fiduciary duty of good faith). Likewise, more recent Delaware Chancery Court decisions have made clear that the equitable remedy of a preliminary injunction may be unavailable even if the court believes the directors breached their Revlon duties in approving a particular transaction. See, e.g., Koehler v. NetSpend Holdings Inc., Civil Action No. 8573-VCG, 2013 WL 2181518, at *22 (Del. Ch. May 21, 2013) (Glasscock, V.C.); In re El Paso Corp. S’holder Litig., 41 A.3d 432, 447 (Del. Ch. 2012) (Strine, C.).
HOURS EQUITY IS THE NEW PAY EQUITY

NANTIYA RUAN* & NANCY REICHMAN**

“[S]he’s part time, where is she going to go?”
—Manager of female low-wage worker, in Capruso v. Hartford Financial Service Group, Inc.1

“Scheduling is a form of compensation. It is a very tangible benefit to employees, but the costs are hidden and don’t appear as a line item on any budget.”

—Lisa Disselkamp, Workforce Management Technology Consultant, Athena Enterprises2

I. INTRODUCTION

At the dawning of the fifty-year anniversary of the Equal Pay Act of 1963 (EPA),3 as well as Title VII of the Civil Rights Act of 1964 (Title VII), it is time to change the way we think about pay equity. Workplace fairness between women and men should no longer be framed merely by total disparities in pay, but also by disparities in hours given to women seeking as much work as their male counterparts. Doing so recognizes the realities of many female workers in today’s workplace and addresses the shortfalls thus far absent from the civil rights conversation about pay equity.

Today’s workforce is filled with part-time, female contingent workers who are at the mercy of their supervisors as to the number and scheduling of hours they work. The number of part-time workers has steadily increased over the last decade, with involuntary part-time workers (those forced to downgrade from full-time to part-time because of economic con-

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ditions or the employer’s needs) numbering 8.2 million⁴ and the total number of part-time workers exceeding 27 million. Two-thirds of part-time workers are women, and as the Congressional Joint Economic Committee has recognized, the gender pay gap is partly driven by the earning penalty for part-time work, which pays less per hour than the same or equivalent work done by full-timers.⁵

One under-examined factor in this pay inequity is the power of scheduling that employer supervisors have over their part-time work force. From the outside, supervisors seemingly make capricious decisions on whom to schedule, when, and for how many hours. When individual supervisors make these unilateral decisions without regard to employment standards or criteria, they appear to do so with little oversight and guidance, which can lead to discriminatory bias based on gender. This gender bias can be motivated (consciously or unconsciously) by societal stereotypes casting women as less than “ideal workers”⁶ with weak commitment to the workplace because of outside caregiving responsibilities. Such bias (both conscious and unconscious) can lead to women being scheduled both fewer hours and in less desirable timeslots.

From a doctrinal standpoint, however, the current statutory regimes seem ill suited to address these disparities. The Fair Labor Standards Act (FLSA) of 1938 merely mandates minimum and overtime wages without addressing minimum or required hours;⁷ the EPA does not cover hours equity but only addresses pay rate; and Title VII’s anti-discrimination mandate rarely reaches the issue of scheduling and is therefore sorely underdeveloped. Moreover, due to recent Supreme Court decisions dramatically restricting employment discrimination class actions, bringing aggregate litigation for low-wage workers will be an uphill battle, and attorneys are unlikely to take on cases for relatively low damages.⁸

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7. See U.S. DEP’T OF LABOR, WAGE & HOUR DIV., Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues (2009), http://www.dol.gov/whd/regs/compliance/whdfs70.pdf. “The Act does not preclude an employer from lowering an employee’s hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.” Id.

This Article makes the case for changing the way we think about pay equity. Because our workforce is filled with part-time workers, advocates for low-wage workers should focus not only on pay inequities and living wages, but also on hours equity. Hours equity would provide much-needed stability to scheduling that would allow female part-time workers to have a reliable schedule with guaranteed hours so that they make an expected amount of pay.

Part II describes the experience of many female low-wage workers in retail America. Based on a composite from the authors’ interviews with non-profit agencies dedicated to fair employment practices, as well as low-wage workers themselves, the story of Anna represents the plight of part-time work and the difficulties women faced in an unstable scheduling environment.

Part III explores the modern workplace and the part-time worker’s place in it. Because of employers’ strict adherence to minimizing labor costs and the contingent nature of part-time, low-wage work, today’s workplace is a precarious place without assurances of guaranteed compensation.

Part IV outlines and analyzes the different statutory frameworks meant to regulate workplace fairness: the FLSA, the EPA, and Title VII’s disparate treatment and disparate impact provisions. While each holds potential to address scheduling shortfalls, without amendment, the only current statutory framework that allows for address of the harms stemming from hours inequity is Title VII.

Finally, Part V provides potential solutions to address the scheduling shortfalls: lobbying for statutory gap-filling; community organizing and collective action; and renewed public regulation and enforcement.

II. Hours Equity: The Experience of Female Part-Time Workers

Anna was thrilled to land a full-time job as an associate at a big box retailer after months of searching for employment. Her pay, $8.50 per hour, hardly covered her expenses. Still, she was happy to have a job in this competitive job market with high unemployment. Sharing wage information was strongly discouraged by her employer, but John, another asso-

9. This fact scenario is a realistic representation of the female low-wage retail workers employed by large private chain stores, as described by workers and community organizers. See Confidential Fieldnotes and Interviews with Community Organizers and Retail Associates, in Denver, Colorado (Spring 2013) (on file with authors). For a similar account of how scheduling can negatively affect women and their responsibilities, see Lawrence S. Root & Alford A. Young Jr., Workplace Flexibility and Worker Agency: Finding Short-Term Flexibility Within a Highly Structured Workplace, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 91 (2011) (“At the time Jan was interviewed, her shift at Sylvania had been changed to afternoons, which disrupted her already-tenuous work-family balance. ‘I’ve been playing charades ever since and now I’m not doing too well. Child care is a nightmare now.’”).
ciate hired at the same time, had inadvertently disclosed that he was making the same. With no family to support, John’s paycheck would surely go much further. Even so, she was grateful for her schedule that allowed her to get her two small children off to school before she started work. Working these hours, she could demonstrate her work ethic to the daytime supervisors who were reported to be the pipeline for advancement. After-school care would take a substantial chunk out of her paycheck, but for the first time in years, Anna had a stable job. She was looking forward to promotions and pay raises that might make it possible to afford the insurance benefits her employer offered.

Several times in her first two months she was scheduled for significantly less than the forty hours she was promised, but she was not overly concerned as she was back on track the following week and she was not scheduled for hours that would greatly interfere with her family obligations. Three months later, however, things changed. Anna was scheduled to start work at 5 AM, instead of 9 AM, as she had requested. Anna reached out to her mother and sister to help her with morning child care. While they could help out that first week, they could not commit for additional weeks. They, too, were low-wage workers and their schedules changed constantly. When she mentioned this to John, the associate hired at the same time as Anna, he bragged that he always got the schedule he asked for.

Anna approached her supervisor to see when she could get back to the schedule she requested. Her supervisor reminded her that when she was hired, she had agreed to “open availability,” meaning that she was available for any shifts offered between 5 AM and 10 PM, seven days a week. If this were no longer the case, her supervisor said, her status needed to change to part-time. Fearful of losing full-time work, she agreed to her original availability, calling on neighbors, family, and friends for help with child care, all the while hoping that she would soon have a more stable and desirable schedule. This was not the case. Anna’s request for a schedule that might accommodate her child care needs appeared to have serious consequences. Soon after the discussion with her supervisor, her schedule became more erratic and each week her hours were reduced by five to ten hours less than the expected forty. Finding it impossible to arrange child care for her children in the face of this fluctuating work schedule, Anna was forced to become a part-time worker with no guarantee about how much money she would earn in a given week and far fewer opportunities for advancement. John, with less variability in his schedule and better able to accommodate changes, received pay raises and promotions.

Anna’s story is surprisingly common and not just in big box retail stores. Low-wage workers across a range of work settings rarely have the luxury to “choose” a work schedule that suits their needs and, instead, find themselves hostage to the specific hours assigned by their employer super-


visor.\(^{10}\) The scheduling challenges these workers confront include rigid schedules that offer workers no control over the number of hours they work or their starting or stopping times; hours assigned with no advance notice; and fluctuations in hours from week to week.\(^{11}\) Rigid schedules do not allow workers to handle the unexpected, including sick children, babysitters who are late or fail to show up, or transportation malfunctions, without fear of losing their job. Variable schedules undermine even the best efforts at managing caregiving, looking for additional work to supplement one’s income, or pursuing educational opportunities.\(^{12}\) Across a range of her empirical studies, Professor Lisa Dodson finds that low-wage working women make “crisis decisions” in the face of irregular schedules, mandatory overtime, a lack of sick or personal leave, required evening and weekend hours, and little or no flexibility.\(^{13}\) When they attempt to negotiate a schedule change to accommodate parental obligations, these women are not only “met with a particular stigma . . . that of unworthy reproducers,”\(^{14}\) they are often assumed to be lying about their obligations to others.\(^{15}\) Although some companies, like Anna’s, allow employees to make scheduling requests, research suggests that they face “repercussions in the form of reduced hours or being assigned undesirable shifts when they took advantage of policies allowing them to request scheduling preferences. Thus without minimum hour guarantees or normative pressures to provide them, workers may in effect pay for the opportunity to control their nonwork schedule.”\(^{16}\) Too often, female low-wage workers are met with reduced work just when they need it most.

“Scheduling shortfalls” is the term we use for the scheduling problems low-wage workers face and for female, part-time workers who face shortfalls because of the gender bias at play, scheduling discrimina-


\(^{13}\) See Lisa Dodson, Stereotyping Low-Wage Mothers Who Have Work and Family Conflicts, 69 J. Soc. Issues 257, 264 (2013) (citing numerous examples of women workers needing to make sacrifices in personal lives due to low-wage working situations).

\(^{14}\) Id. at 274.

\(^{15}\) See id. at 267 (discussing negative consequences of attempting to negotiate schedules for low-wage women workers).

tion ought to be recognized as providing redress. Anna’s story demonstrates the number of ways that schedules fall short. Workers may be hired with the promise of a certain number of hours, only to find that they are never scheduled for those hours. Or, like Anna, they may start with a certain number of hours per week and gradually see that number reduced. Scheduling shortfalls also occur when workers consistently receive less desirable shifts that they do not request. Not only did Anna receive a schedule that was unworkable given her family obligations, but her complaints led her managers to see her as less than the “ideal worker,” which led to fewer promotions and pay increases.

Receiving fewer than expected hours to work and less pay as a result can wreak havoc when rents are due and food needs to be on the table. It is difficult enough for low-wage workers to earn a living that would allow them to make ends meet, even when they are lucky enough to get full-time hours. Scheduling shortfalls take a particularly troubling toll on female head of households as they attempt to pay for and manage child care. As an example of such inequities, a survey of 200 mothers working in the restaurant industry found half had unpredictable and erratic schedules, two out of five had a last minute schedule shift which impacted child care, and a third said that child care impaired their ability to work desirable shifts.17 Strikingly, nearly a third of the forty percent of single income mothers who pay for child care use up half their income to do so.18 Even when they can find and afford child care, mothers who work unpredictable hours cannot hold spaces for their children when their own work and income varies from week to week.19 Getting to work, particularly when work is scheduled during non-standard hours, is challenging for low-wage workers who rely on “off peak” public transportation schedules that increase already long commute times.20

Rarely discussed by scholars concerned about the impact of hours variability is the connection between scheduling and pay equity. Anna’s story raises a number of troubling questions. While Anna and John initially received the same pay for the same work, the emerging differences in the hours they were scheduled to work lead to significant differences in weekly earnings, a key measure of pay inequity. Thus, a key empirical question is whether hours are allocated in a way that has a disparate im-


19. See WATSON & SWANBERG, supra note 11, at 8 (discussing impact of constantly changing schedules on feasibility and financing of child care).

20. See id. (examining impact of variable work schedules on transportation).
pact on the lives of women and people of color, or are distributed in a way that is consistent with or undermines pay equity principles.21

III. THE STRUCTURE OF WORK TODAY

Scheduling shortfalls are part of a paradigmatic change in the employment relationship from one that is stable and long-term to one that is both more short-term and precarious.22 Because workers are less likely to have long-term tenure at any particular place of employment, employers feel a reduced obligation to provide such “benefits” as a promised minimum number of hours or a consistent schedule. This is true especially where there is a premium to reducing labor costs in increasingly tight corporate budgets. So while some workers benefit from “employee flexibility” to accommodate family needs, many part-time, contingent workers suffer from increasing employer-driven “flexibility” that results in fewer and less stable hours.

A. Changing Employment Relationships23

Prior to 1970, workers were employed in firms modeled around internal labor market structures (ILMS) that were “closed, inwardly focused and hierarchically governed.”24 ILMS tended to favor internal hiring practices that rewarded seniority and offered non-wage benefits to insure loyalty and tenure. William Whyte’s “organization man,” the over-conforming, loyal employee who spent his career at one firm and worked his way up the ladder toward a secure retirement, has become a symbolic representation of this form of employment. The internalization of labor that his story represents was possible because of sustained economic growth and general stability.25 Strong unions and collective bargaining agree-

21. The authors are currently engaged in just such an empirical project, interviewing female, part-time, low-wage workers about their schedules and scheduling practices of their employers.


23. Many different terms are used to characterize this type of work, including: precarious, casual, flexible, nonstandard, or contingent. See Dennis Arnold & Joseph R. Bongiovi, Precarious, Informalizing, and Flexible Work Transforming Concepts and Understandings, 57 AM. BEHAV. SCIENTIST 289, 289 (2013) (identifying specific aspects of changing employment relationships).


ments were important to establish the reciprocal relationships between employer and employee that defined this era of employment.\textsuperscript{26}

Since the 1980s, ILMS have been replaced by systems of employment that allow employers to adapt to changing economic and institutional pressures, most significantly the increased competition that pressures organizations to manage costs.\textsuperscript{27} Cost containment often rests on the backs of workers as employers view payment for labor that exceeds narrow definitions of demand as an unnecessary expense.\textsuperscript{28} Rather than imposing significant layoffs, employers reduce the hours of the workforce as a whole and then subsidize the resulting reduction in earnings with public programs.\textsuperscript{29} Referred to as “internal labor flexibility,” “just in time scheduling,” or “employer driven flexibility,” workplaces that embrace this model “hire or fire workers, or increase or lower their wages according to business needs and worker performance.”\textsuperscript{30} Professors Lambert, Haley-Lock, and Henly demonstrate that:

The goal of minimizing outlays for labor by holding managers accountable for making sure labor allocations do not exceed ongoing business demand—by week, day, and for some firms, hour—creates a situation ripe for workers experiencing too few rather than too many hours and fluctuating work times rather than rigid ones.\textsuperscript{31}

These changing employment relationships have emerged within the spatial restructuring of work on a global scale. Advances in technology have made it possible for goods, capital, and people to circulate with unprecedented speed across borders, no longer tied to time and space. Free from the spatial and temporal constraints and with the entry of new, densely populated countries into the global economy, employers are better able to seek out cheap labor wherever they can. Gone is a sense of loyalty or commitment. Employment is a transaction rather than a relationship, an arrangement that can be altered or broken on a moment’s notice.\textsuperscript{32}

The profound restructuring of employment also includes major companies shedding off the functions of workforce management to other net-

\begin{itemize}
  \item 26. See Bidwell et al., \textit{supra} note 24, at 66 (noting study’s findings that seniority based practices were initially adopted in unionized industries).
  \item 27. See \textit{id.} at 62 (examining evolution of structural and economic concerns for employers).
  \item 28. See \textit{Schedule Flexibility, supra} note 16, at 295 (discussing employer concerns about costs and expenses in relation to pay).
  \item 29. See Arnold & Bongiovi, \textit{supra} note 23, at 295 (discussing goal of employers to avoid layoffs and indicating that consequences of this strategy fall upon hours for workers).
  \item 30. \textit{Id.}
  \item 31. \textit{Schedule Flexibility, supra} note 16, at 296.
  \item 32. See Dau-Schmidt & Haley, \textit{supra} note 22 (conceiving of employment as transaction and discussing implications).
\end{itemize}
works of organizations. Professor Weil describes this as “fissured employment,” in which employers contract out, outsource, or subcontract their business functions to shift labor costs and liabilities to smaller businesses or third-party labor intermediaries. 33 Introducing an intermediary into the mix of employment relationships transforms it from a hierarchical firm-employee relationship into a market-based triadic exchange, 34 not only affecting where and how regulators must look to enforce workplace fairness, but also where, when, and how workers can challenge policies they feel are unfair 35 and how regulatory agencies can intervene. 36 Within these market-driven employment practices, the conditions of work are evaluated as part of the “business case” rather than normative compliance with government regulation. 37

Changing metrics for assessing corporate success, in particular the increasing significance of shareholder value, provided momentum for the change to more transactional, market-mediated, and fissured employment. Shareholder value is grounded in a “portfolio theory of the firm” that conceptualizes firms as bundles of assets rather than discrete, bounded organizational entities whose sole purpose is to increase value, defined in terms of the short time profits associated with appreciating share price. 38 Today, firms are conceptualized less in terms of relationships and more as streams of cash flow that can be shuffled and transformed when economic conditions change. 39 Managing labor costs is an important strategy in the financialization of the firm, and when combined with a shift in public policy away from an emphasis on achieving full employment to a focus on price stability, has produced the domestic dereg-

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33. See Erin Hatton, The Temp Economy: From Kelly Girls to Permatemps in Postwar America (2011) (providing parallel discussion of rise of temp industry); David Weil, Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division 9 (2010) (detailing conclusions about workplace conditions resulting from employers distributing workplace functions to other organizations).

34. See Bidwell et al., supra note 24, at 70 (describing effect of adding intermediary into employment relationship).


36. See Weil, supra note 33, at 9 (clarifying role of administrative agencies in implementing workplace fairness).


lation of industries and the outsourcing of production to low-wage countries, policies that have weakened the bargaining power of workers.

The decline in union density is certainly a cause and consequence of shifting work arrangements as well. The percentage of workers represented by unions fell to 11.3% in 2012, the lowest percentage since 1916, according to the Bureau of Labor Statistics. Without the process of collective bargaining, workers are left to negotiate on their own. Workers have neither the power nor information to challenge employer practices. The effect of the lack of unionization for employee control over scheduling is clearly demonstrated by cross-country comparison. In Germany and Denmark, for example, collective bargaining agreements require employers to provide significantly greater advance notice of schedules (twenty-six and sixteen weeks respectively).

B. Hours Instability in Low-Wage Part-Time Work

In the face of market-mediated, transactional employment, work has become “uncertain, unpredictable, and risky,” particularly so for today’s low-wage workers. Trapped in models that prioritize containing labor costs, many low-wage workers are forced to adapt to non-standard, often variable and unpredictable scheduling. Advances in scheduling technologies make this possible. Software allows employers to track activities in


44. See Schedule Flexibility, supra note 16 (discussing scheduling challenges and overall predicament of low-wage workers); Susan J. Lambert, Making a Difference for Hourly Employees, in Work-Life Policies 175–76 (Ann C. Crouter & Alan Booth eds., 2009) [hereinafter Lambert, Making a Difference] (discussing specific issues for hourly employees in context of family and organizational dynamics); Susan J. Lambert, Passing the Buck: Labor Flexibility Practices that Transfer Risk onto Hourly Workers, 61 HUM. REL. 1203 (2008) [hereinafter Lambert, Passing the Buck] (elaborating on nature of incentives causing employers to reduce hours and flexibility for workers); Jennifer E. Swanberg et al., Schedule Control, Supervisor Support and Work Engagement: A Winning Combination for Workers in Hourly Jobs?, 79 J. VOCATIONAL BEHAV. 613 (2011) [hereinafter Schedule Control] (suggesting institutional and organizational responses to lower workplace flexibility for hourly workers); Jennifer E. Swanberg et al., Workplace Flexibility for Hourly Lower-Wage Employees: A Strategic Business Practice Within One National Retail Firm, 11 PSYCHOLOGIST-MANAGER J. (2008) (examining flexible work options offered to workers in lower-wage hourly posi-
fifteen-minute increments (or less) and to adjust staffing levels daily to respond just-in-time.\textsuperscript{45} The move to just-in-time scheduling and the hours instability it creates is most prevalent for workers in the retail section where businesses are expected to be open 24/7 and “nonstandard (and indeed variable) working hours are the norm.”\textsuperscript{46} These precarious workers face real and perceived job insecurity,\textsuperscript{47} earning volatility,\textsuperscript{48} and a loss of workplace benefits,\textsuperscript{49} along with the challenges of obtaining affordable and reliable child care, transportation to work, and access to education described earlier.

The workers that face the highest levels of unpredictability and variability in scheduling are part-time workers, a workforce that has increased steadily over the last decade. As noted earlier, two-thirds of part-time workers are women. In June 2013, the total number of part-time workers in the United States exceeded 28 million. Approximately 7.8 million workers were classified as involuntary part-time workers, forced to downgrade from full-time to part-time because of the economy.\textsuperscript{50} Employment growth after the so-called Great Recession has come from lower-wage part-time jobs;\textsuperscript{51} sixty percent of the jobs added nationally in July 2013 were part-time. In 2012, the National Employment Law Project found that lower-wage occupations constituted twenty-one percent of recession job losses, and fifty-eight percent of recovery growth, emphasizing the way that

\footnotesize{\textsuperscript{45} See Watson \& Swanberg, supra note 11, at 13 (discussing technology which allows employers to readily adjust schedules and make use of practices that prioritize labor cost containment).}
\footnotesize{\textsuperscript{46} Francoise Carré \& Chris Tilly, Short Hours, Long Hours: Hour Levels and Trends in the Retail Industry in the United States, Canada, and Mexico 2 (Upjohn Inst. for Emp’t Research, Working Paper No. 12-183, 2012) [hereinafter Short Hours].}
\footnotesize{\textsuperscript{47} See Kalleberg, supra note 25, at 7 (explaining how working conditions foster job insecurity for low-wage hourly workers).}
\footnotesize{\textsuperscript{48} See Bruce Western et al., Economic Insecurity and Social Stratification, 38 ANN. REV. OF SOC. 341, 341, 344–45 (2012) (discussing, fully, economic insecurity among low-wage workers).}
\footnotesize{\textsuperscript{49} A recent study estimated that only twenty-six percent of large employers provided these benefits in 2011 compared with sixty-six percent in 1988. See Kaiser Family Found. \& Health Research \& Educ. Trust, Employer Health Benefits: 2012 Annual Survey 171 (2012), available at http://kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/ (reporting conditions for low-wage workers and showing loss of benefits).}
\footnotesize{\textsuperscript{50} See U.S. Dep’t of Labor, Bureau of Labor Statistics, Economic News Release: Employment Situation Summary (Nov. 8, 2013), http://www.bls.gov/news.release/empsit.nr0.htm (noting that 7.8 million part-time workers were forced to downgrade from full-time positions).}
employment in the U.S. has shifted towards more precarious work.\textsuperscript{52} The practice of controlling labor costs through the use of part-time workers and shortened minimum hours for full-time workers is expected to continue to grow to more than half the workforce in the years ahead.\textsuperscript{53}

Part-time work is most often low-wage work. The Organization for Economic Cooperation and Development (OECD) reported that in 2009, one-fourth of U.S. workers were in low-wage jobs, the highest number in any of the OECD countries.\textsuperscript{54} A job was defined as low-wage if workers earned less than two-thirds of the national median.\textsuperscript{55} “The incidence of low-wage work in the United States was higher in 2010 (almost 27 percent) than it had been in 1979 (about 22 percent).”\textsuperscript{56} The low-wage workforce has changed over the last three decades to include fewer teenagers (one in four in 1979 to less than one in eight in 2011), higher levels of education, and more men (thirty-five percent of low-wage workers in 1979 and forty-five percent in 2011), a reflection in part of the most recent recession.\textsuperscript{57}

Although there is general consensus among management scholars that contingent employment relationships are becoming more prevalent, particularly in some sectors,\textsuperscript{58} reliable estimates of the numbers of workers who face the hours instability associated with non-standard scheduling are hard to find. This is true, in part, because we do not yet have the vocabulary to adequately capture the “new normal” for the conditions these workers face.\textsuperscript{59} While the Bureau of Labor Statistics provides data that distinguish working part-time for economic and non-economic reasons, there are few studies that “drill down” to the question of the kinds of schedules workers want and, most importantly, any differences between how many hours employees wish to work and what they are actually scheduled to work. In a recent Bureau of Labor Statistics Study, roughly twenty percent of female part-time workers and twenty-nine percent of male part-time workers were working part time for economic reasons, demonstrating


\textsuperscript{53} See Short Hours, supra note 46, at 7 (explaining that trend of using low-wage working policies as method of controlling labor costs is likely to continue).

\textsuperscript{54} See Schmitt, supra note 51, at 1 (discussing low-wage working statistics in comparative context).

\textsuperscript{55} See id. (discussing evolving definitions of low-wage employment).

\textsuperscript{56} Id. at 4.


\textsuperscript{58} See Bidwell et al., supra note 24, at 70 (examining significant changes in nature of employment relationships).

a desire for more hours. Further, analyses of the 2004 Current Population Survey revealed that nearly one in five workers (eighteen percent of respondents) worked a non-standard shift, including a “regular” night shift. Similarly, Professors Tuttle and Garr’s analysis of the 2008 National Study of the Changing Workforce revealed that twenty-six percent of respondents reported working flexible schedules or shift work, some by choice. In a study of the retail work force in New York City, nearly sixty percent of those surveyed were hired as part-time, temporary, or holiday workers; only seventeen percent had a fixed schedule. A majority of the New York City retail workers report that their hours vary from week to week; forty percent face changes without their consent.

Unfortunately, inconsistencies in the measurement of nonstandard work make comparability across studies difficult. This problem is compounded by the fact that the experiences of workers do not fit neatly into study categories. For example, studies that ask respondents to identify a particular schedule that best describes their work in a given period of time fail to recognize that workers in retail and service often move in and out of work schedule types. Fifty percent of the mothers responding to the Fragile Families and Child Wellbeing Study (that allowed respondents to report more than one schedule) indicated that they worked both standard and nonstandard schedules in their current job.


64. See id. at 9 (observing further that when workers requested shift changes, their managers often punished them by assigning less overall work hours or less favorable shifts).

65. See Rachel Dunifon et al., Measuring Maternal Nonstandard Work in Survey Data, 75 J. Marriage Fam. 523, 524 (2013) (“Additionally, accurate estimates of the prevalence of nonstandard work are difficult to determine when one survey allows for a more expansive definition of nonstandard work than another.”).

66. See id. at 524 (contrasting this survey with others that only allow respondents to choose one type of shift, standard or nonstandard, that best describes their work schedule).
C. Scheduling Shortfalls and Pay Equity

Part-time and variable schedules have particular consequences for the financial well being of families in which women are the primary wage earners. To start, part-time workers face an earnings penalty compared to full-time workers; they are paid less per hour than the same or equivalent work done by full-timers.\(^67\) Nearly two-thirds of those part-time workers who are paid less are women, and more than one-third of women work part-time, according to an analysis by the U.S. Congressional Joint Economic Committee.\(^68\) A U.S. Government Accountability Office (GAO) analysis of the gender pay gaps among low-wage workers found that while hourly wages were similar for men and women in 2009, the annual personal earnings of women were less than men, regardless of marital status or the presence of children in the household, in part because women worked fewer hours.\(^69\) Professors Budig and Hodges find the motherhood penalty to be largest among the lowest-wage workers, also explained, in part, by hours.\(^70\)

But do mothers always work fewer hours by choice? Recent studies, including estimates of the number of part-time workers who work part-time involuntarily, suggest otherwise. Professor Swanberg reports unpublished data from the CitiSales project that thirty-three percent of full-time and forty-three percent of part-time workers would like to work more hours.\(^71\) Shortfalls in hours occur because they are either not offered or

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67. See Joint Econ. Comm., supra note 5, at 2 (“Part-time workers across a spectrum of occupations earn hourly wages below those of full-time workers, which contributes to the wage gap between men and women. For example, for every dollar of earnings a full-time worker receives in a sales or related occupation, a part-time worker receives 58 cents.”); see also Arne L. Kalleberg, Part-Time Work and Workers in the United States: Correlates and Policy Issues, 52 Wash. & Lee L. Rev. 771, 780–82 (1995) (showing that this is so even on pro-rata basis and controlling for age, race, organizational size, occupational prestige, and tenure).


70. See Michelle J. Budig & Melissa J. Hodges, Differences in Disadvantage: Variation in the Motherhood Penalty Across White Women’s Earnings Distribution, 75 Am. Soc. Rev. 705, 707 (2010) (“Differences in work hours and weeks worked per year will therefore account for a larger proportion of the motherhood wage gap at the lower end of the women’s earning distribution.”).

71. See Watson & Swanberg, supra note 11, at 23 (noting that most survey respondents elaborated that additional hours were not available or could not be reconciled with family responsibilities). The CitiSales study included interviews with employees and senior management within 388 stores. See Univ. of Ky., CitiSales Study—Research Design, http://www.uky.edu/Centers/iwin/citisales/study-design.html (last visited Jan. 2, 2014).
they must be turned down because they cannot be planned for in advance, contributing to both weekly and annual pay gaps.

Pay inequity and the scheduling challenges that may exacerbate it is a family issue as more and more primary wage earners are women and part-time workers. Professor Shaefer estimates that the percentage of part-time workers who are primary wage earners has grown substantially over the last several decades to thirty-six percent of all part-time workers in 2007. Not all part-time, primary workers do so voluntarily. Ten percent of part-time wage earners are primary earners who are working part-time because of economic conditions beyond their control. A recent study by the Pew Research Center revealed a record forty percent of all households with children under the age of eighteen include mothers who were either the sole or primary source of income for the family, compared to eleven percent in 1960. Sixty-three percent of the so-called “breadwinner moms” were single mothers.

IV. The Case For Hours Equity in the Law

To address the growing pay gap facing female workers, the law needs to shift from a narrow focus on minimum wage and antidiscrimination efforts towards a larger lens of “pay equity” as “hours parity.” As witnessed in Parts II and III, hourly workers face a growing irregularity of schedules that injects instability in the number of hours and timing of hours worked. This instability has significant negative consequences for hourly workers, who are disproportionately female.

In examining the pay inequities between female and male earners, there are two under-developed dimensions of this pay gap. First, there exists an earnings penalty for part-time work, where part-time workers earn less per hour than their full-time counterparts in the same job. Second, because of sex stereotypes, female hourly workers receive fewer and less desirable scheduled shifts. Both of these dimensions work to increase the gender pay gap. With this growing inequity is also the reality that the worker protection laws put in place between fifty and seventy-five years ago have not kept up with today’s changing workplace and workers’ needs, creating a protection gap alongside the pay gap.

A. The Protection Gap in Wage and Hour Law

While our workplaces have changed dramatically over the last century, the federal statutory regime put in place to regulate the wages and


73. See id. at 6 chrt.1 (acknowledging that author calculated these figures based on 2008 Current Population Survey Annual Social and Economic Supplement).

hours of American workers has hardly changed at all.\textsuperscript{75} Passed as part of the New Deal legislation during a time of unprecedented unemployment, the Fair Labor Standards Act of 1938 (FLSA) had the dual purpose of protecting workers from job insecurity and unemployment, while also protecting the gainfully (and luckily) employed from chronic overwork.\textsuperscript{76} The congressional intent was for employers to “spread the work” by employing more people working non-abusive hours.\textsuperscript{77} As President Roosevelt testified in support of the Act: “A self-supporting and self-respecting democracy can plead no . . . economic reason for chiseling workers’ wages or stretching workers’ hours.”\textsuperscript{78}

Enacted to address those goals, the FLSA regulates two aspects of work: minimum wage and overtime.\textsuperscript{79} It established a minimum wage “floor”\textsuperscript{80} for most workers,\textsuperscript{81} and mandated premium overtime pay for work exceeding forty hours in a workweek, with exceptions for certain

\textsuperscript{75} See Nantiya Ruan, Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low-Wage Workers, 30 HOFSTRA LAB. & EMP. L.J. 355, 357 (2013) [hereinafter Ruan, Same Law] (referring specifically to Fair Labor Standards Act of 1938 and noting that it “was enacted during a time when workers desired more leisure time away from their jobs but also wanted protection from job insecurity and unemployment.”).

\textsuperscript{76} See Scott Miller, Revitalizing the FLSA, 19 HOFSTRA LAB. & EMP. L.J. 1, 2–3 (2001) (“Workers desired more freedom (time) from their jobs for personal, home, community, and cultural life. They were also concerned about unemployment, arguing that employers should ‘spread the work’ by employing more people working shorter hours, rather than employing fewer people working longer hours.”).

\textsuperscript{77} See id. (observing that FLSA addressed issues of overwork, underpay, and spreading hours among more employees).


\textsuperscript{79} See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2012) (providing section 206 to govern minimum wage requirements and section 207 to govern overtime requirements). Indicative of the time of enactment, the FLSA also prohibited child labor and required employers to keep accurate time records. See id. §§ 211(c), 212 (providing record keeping requirement and child labor provisions respectively).

\textsuperscript{80} States can go above this minimum wage “floor,” and often do, but cannot statutorily go below it.

\textsuperscript{81} The FLSA does not cover all workers; for many low-wage earners, the FLSA simply does not apply. For example, home health care workers subject to the FLSA’s companionship exemption are not covered by the minimum wage protection. Similarly, agricultural workers and live-in domestic workers are not subject to overtime requirements. And tipped employees can have their wages reduced by half of the minimum floor with only minimum tip generation. See Rebecca Smith & Catherine Ruckelshaus, Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centpiece of Immigration Reform, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 555, 561 (2007) (citing 29 U.S.C. § 213(b)(12), (21) (2000)).
types of administrative, managerial, and professional work. Although seventy-five years post-enactment, the FLSA remains the primary wage protection law of our country, and as several commentators have noted, it is beginning to show its age. "Overwhelming workloads" and the need to regulate overtime continues to be worrisome mainly to salaried professionals, who are exempt from overtime pay. And while premium overtime pay is an important part of one's take home pay for the hourly workers who can get it, for most hourly workers, "undertime," not overtime, is the growing concern.

As currently structured, the FLSA fails to address the "hours" need. Much like the economic impetus of the Great Depression that spurred the push for the FLSA, today's working poor struggling in a slack economy lack legal protection for hours promised but undelivered. The FLSA focuses on compensation for "work performed" as opposed to "work promised." State laws go only part way in filling this gap in wage and hour protection. For hourly workers that are scheduled and report to work just to be summarily sent home, some states provide a minimum number of


83. But such calls to action have gone unheeded as the FLSA’s wage protections have only been amended once (in the 1940s) with little current discussion of legislative fixes. See Portal to Portal Pay Act, 29 U.S.C. §§ 251–62 (2012) (amending various aspects of original FLSA).

84. See Miller, supra note 76, at 46–77 (examining “Overworked American” thesis and maximum hours permissible under FLSA); Ruan, Same Law, supra note 75, at 358 (discussing various scholarly criticisms of FLSA, specifically highlighting those focused on need for it to be updated to provide for employer flexibility, worker compensatory time, and expansion of its protections to new categories of workers); David J. Walsh, The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?, 20 BERKELEY J. EMP. & LAB. L. 74, 79–110, 126–36 (1999) (discussing major arguments for and against comp time reform and concluding comp time reform might diminish workers’ rights); Daniel V. Yager & Sandra J. Boyd, Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace, 11 LAB. L. AW. 321, 331–41 (1996) (analyzing various exemptions under FLSA used by employers to minimize use of overtime and need for reform in this area); Gretchen Agena, Comment, What’s So “Fair” About It?: The Need to Amend the Fair Labor Standards Act, 39 HOUS. L. REV. 1119, 1126–56 (2002) (commenting on need to reform FLSA’s Duties Test and Salary Test); Ashley M. Rothe, Comment, Blackberries and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?, 54 ST. LOUIS U. L.J. 709, 726, 732 (2010) (articulating need for reform of FLSA exemptions to cover employees who utilize modern technology and work more from home).

85. See, e.g., Misra v. Decision One Mortg. Co., 673 F. Supp. 2d 987, 991 (C.D. Cal. 2008) (noting defendants misrepresented to employees that they were exempt and not entitled to overtime pay); Kamens v. Summit Stainless, Inc., 586 F. Supp. 324, 328 (E.D. Pa. 1984) (observing that plaintiffs alleged affirmative misrepresentations by employer about overtime which were sufficient to toll statute of limitations applicable to their claims); Gentry v. Superior Court, 165 P.3d 556, 567 (Cal. 2007) (“The likelihood of employee unawareness is even greater when, as alleged in the present case, the employer does not simply fail to pay overtime but affirmatively tells its employees that they are not eligible for overtime.”).
hours to be paid to those workers. While over a dozen states have such “reporting pay” statutes, most provide only minimum coverage (e.g., two hours at minimum wage) and cover a narrow worker population. Similarly, a smaller handful of states provide a minimum number of hours for workers who are not scheduled but called in to work during their “off days.”

As employers in the new labor economy move to scheduling practices that embrace labor “flexibility” by sending people home early and calling them in when needed (in order to lower labor costs), more hourly employees are finding themselves scheduled to be “on call.” However, under the FLSA and state wage and hour laws, “on call” time is only compensable in certain, narrow circumstances, limited to times when workers are “engaged to be waiting” as opposed to “waiting to be engaged.” Because hourly workers are often afforded some measure of freedom during their “on call” time (thanks largely to technology such as smart phones), the hours spent are rarely compensable.

As scheduling practices become more attuned to labor costs and sales fluctuations, part-time hourly workers find their hours become less sta-


87. See id. at 31–32 (observing that “the majority of states require two hours of guaranteed pay,” and that “[s]ome states’ call-in pay laws apply only to particular categories of workers”).

88. See id. at 30 (“States’ call-in pay laws generally resemble call-in provisions in union contracts, requiring a designated number of hours of pay for workers who are summoned to work during non-scheduled times.”).

89. See id. at 39 (“[S]ome restaurant managers already maintain a large pool of on-call wait staff ready to come to work when customer demand requires.”).

90. See Skidmore v. Swift & Co., 323 U.S. 134, 136–37 (1944) (holding that neither FLSA nor common law expressly precluded waiting time from being considered working time under FLSA, but noting that such determinations of whether waiting time is compensable under FLSA will be determined on case-by-case basis).

91. See, e.g., Renfro v. City of Emporia, 948 F.2d 1529, 1538 (10th Cir. 1991) (holding that district court properly found that city firefighters should receive overtime compensation for on-call time, given specific facts at hand that made it difficult for firefighters to pursue other interests during on-call time); Cent. Mo. Tel. Co. v. Conwell, 170 F.2d 641, 646 (8th Cir. 1948) (holding that plaintiffs were on duty for all hours which they may have had to respond to calls and should receive overtime pay despite frequent long periods of inactivity and rest); Campbell v. Jones & Laughlin Steel Corp., 70 F. Supp. 996, 998 (W.D. Pa. 1947) (holding that plaintiffs should be compensated for overtime pay when required to be at work premises, despite intermittent periods of rest).

92. See Schedule Flexibility, supra note 16, at 298 (“When labor costs are mostly variable and employers can incur additional costs when employees work more but not fewer hours, logic dictates that work hours will be scarce rather than overly abundant and schedules erratic rather than fixed.”).
ble and often reduced. But federal wage laws, and with little exception, state wage laws, fail to address those fluctuations and reductions, and instead, leave the “hours” out of “wage and hour” protection.

B. The Protection Gap in Equal Pay Law

Although pay equity has been a theme of gender rights litigation and feminist jurisprudence for at least the past half century, equity in hours distribution is rarely part of the conversation. Yet, women disproportionately feel the scheduling fluctuations and shortfalls facing part-time workers. First, women make up the vast majority of all part-time work done in this country.93 But another dimension of the pay equity issue is that hours are often given to male workers because of the sex stereotypes at play in today’s workforce. The disparity felt by female part-time workers who lose hours to their male counterparts is not adequately addressed in the current pay equity argument.

The EPA came into being during the mid-twentieth century’s fight for women’s equality, although “[t]he idea of equal pay for equal work ‘dates from the early days of the factory system when women were introduced to industrial labor.’”94 It prohibits discriminatory payment of lower wages to individuals who perform work substantially equal to work performed by those of the opposite sex.95 The EPA predates the Civil Rights Act of 1964 by one year; it was codified in the FLSA, which originally made its claims subject to all FLSA exemptions.96 Today, for purposes of the EPA, the white-collar exemption was eliminated, allowing professional, executive, and administrative employees to bring EPA claims.97 Additionally, pursuant to the FLSA’s unique collective action mechanism, Rule 23 class actions are not permitted.98 Instead, plaintiffs seeking collective action must

93. JOINT ECON. COMM., supra note 5, at 1 (noting that in 2009, sixty-four percent of all part-time workers were women).
95. See 29 U.S.C. § 206(d)(1) (2012) (“No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than [that paid to] . . . the opposite sex . . . .”). Under the EPA, any employer subject to the minimum wage provisions of the FLSA must refrain from paying female employees unequal wages for equal work. The EPA also extends to executive, administrative, and professional employees who are exempted from FLSA coverage for most purposes. See BARBARA LINDEMANN SCHILEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 437–38 (2d ed. 1983).
96. 109 CONG. REC. H9182, 9193 (daily ed. May 23, 1963) (statement of Rep. St. George) (“[T]he prohibition against discrimination because of sex is placed under the Fair Labor Standards Act, with the act’s established coverage of employers and employees. All of the Fair Labor Standards exemptions apply . . . .”).
98. See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).
bring a claim on their own behalf and all others “similarly situated,” and each affected employee must “opt in” to the case by filing a consent form—a significant “second-class” status as compared to other class actions.\(^99\)

To state a prima facie case under the EPA, a female claimant must prove that her job is substantially equal to that of a male worker who receives a higher wage in the same establishment: “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .”\(^{101}\) All three factors—skill, effort, and responsibility—must be satisfied. Once the claimant makes the requisite showing that she is being paid at a lower rate than her male counterpart for equal work, the burden shifts to the employer to justify the disparity.\(^{102}\) The EPA provides for four affirmative defenses: unequal pay is lawful if the disparity is the result of payments made pursuant to a: (1) seniority system; (2) merit system; (3) system measuring earnings by quantity or quality of production; or (4) if the disparity is based on any factor other than sex.\(^{103}\)

In claims of lower hourly rates of part-time workers as compared to their full-time counterparts, although part-time workers are technically covered under the EPA,\(^{104}\) courts are divided as to whether the practice of paying part-time workers at a lower hourly rate than full-time workers implicates the EPA.\(^{105}\) When a female part-time worker is paid at a lower

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\(^99\). See id. “Under the FLSA, typical class actions are not permitted.” Eisenberg, supra note 94, at 29 n.102 (citing 29 U.S.C. § 216(b) (2006)). “Each individual plaintiff must file a consent form to ‘opt-in’ to the action.” Id.


\(^101\). 29 U.S.C. § 206(d)(1). While the EPA applies equally to both women and men, the author here uses an example from the perspective of a female claimant.

\(^102\). See Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974) (“All of the many lower courts that have considered this question have so held, and this view is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.”).


\(^105\). Compare Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611, 620–21 (E.D. Va. 2003) (concluding that part-time female worker could compare herself with full-time male worker for purposes of establishing prima facie case under
hourly rate than a full-time male worker, their employer can raise the fourth affirmative defense ("based on any other factor other than sex") to justify the disparity. The employer will raise the defense to say that the pay disparity is based on the part-time status, which constitutes a "factor other than sex." Although many part-time workers could successfully state prima facie cases of discrimination under the EPA, their claims are often not successful when the employer raises the fourth affirmative defense.108

But, sometimes, courts see the gender pay equity issues at play in such a dynamic.109 As the federal district court found in Lovell v. BBNT Solutions, Inc.,110 if part-time workers who brought EPA claims are prohibited from presenting comparative evidence of treatment of full-time workers, "such a rule would allow an employer to avoid the EPA’s strictures by simply employing women in jobs with slightly reduced-hour schedules and paying them at a lower rate than their male counterparts," thereby “completely subvert[ing] the EPA’s purpose.”111

A more commonly successful EPA claim exists when female part-time workers know about, and can prove that, their hourly rate is lower than their male part-time counter-parts—as long as they work in the same enterprise and can also prove that their work is structurally the same.112


107. See id. (creating difficult burden for female part-time workers in providing their lower pay is based on gender).

108. Id.


111. Id. at 621 (allowing issue of whether plaintiff, who was working reduced hours—approximately three-quarters of full-time hours—performed substantially equal work to her full-time counterpart to go to jury).

112. See Chamallas, supra note 106, at 740 (noting that interpretation of fourth affirmative defense in EPA promulgated by Wage and Hour Administrator of Department of Labor “clearly outlaws paying female part-time workers a lower hourly wage than male part-time workers doing identical work”); Williams & Westfall, supra note 109, at 39 (“[I]f a female plaintiff who works part-time brings a Title VII or Equal Pay Act claim and seeks to prove her case circumstantially, she would be required . . . to produce comparative evidence of favorable treatment of
On the issue of claims of scheduling discrimination, where male part-time workers are given better and more hours, the inequity would have to be viewed in terms of total compensation of part-time work instead of hourly units. For pay disparity in part-time work, courts look at the singular unit of an hour for pay by comparing the hourly rates. What, instead, if courts look at pay disparity in total number of hours given by the employer, much as they do when examining salary differentials between male and female professionals? In other words, could courts analyze shortfalls in scheduling of hours as a pay disparity issue? How would a female hourly worker make an EPA argument for disparity in scheduled hours of part-time workers? That male (part-time or full-time) workers were given more hours than their female counterparts because they were deemed a better, more “ideal”113 worker?

Perhaps, female hourly workers can prove scheduling discrimination based on the sex stereotypes that motivated the scheduling shortfalls. There is evidence to support the finding that sex stereotypes play an important role in hours allocation. Managers and supervisors who give more hours to men because they are the main “breadwinners” might not even be consciously engaging in overt bias.114 As one team of social science researchers found in 1986, female and male part-time workers are perceived differently: “For women, part-time employment is generally associated with substantial domestic obligations, and female part-time employees are consequently perceived as similar to homemakers . . . .”115 In contrast, part-time employment in men is associated with difficulty in finding full-time employment.116 More recent studies support the conclusion that these stereotypes remain in place today.117 Such stereotypes motivate managers to rely upon their male part-time workers as the “ideal” worker supporting his family, while female part-time workers are left with filling scheduling holes around the ideal workers.

In fact, the U.S. Supreme Court has noted the role sex stereotypes can place in the workplace. In Nevada Department of Human Resources v. male part-time workers. . . [In most workplaces] no such comparators exist because no males work part-time.”).

113. See Nicole Porter, Synergistic Solutions: An Integrated Approach to Solving the Caregiving Conundrum for “Real” Workers, 39 STETSON L. REV. 777, 777–78 (2010) (explaining that female workers are often compared to ideal workers and struggle to meet that idealized version).

114. See Marion Crain, “Where Have All the Cowboys Gone?” Marriage and Breadwinning in Postindustrial Society, 60 OHIO ST. L.J. 1877, 1940 (1999) (explaining that incentive structures urge employees to work more hours).


116. Id.

117. See Porter, supra note 113, at 828–29 (noting that part-time worker is often synonymous with working mother); Lambert, Making a Difference, supra note 44, at 176 (recognizing that stratification of hourly workforce often gives workers of color, women with young children, and less educated individuals fewer opportunities for capturing benefits).
Hibbs,\textsuperscript{118} the Court examined a family leave policy and held that the state’s administration of leave benefits fostered “the pervasive sex-role stereotype that caring for family members is women’s work” and “fostered employers’ stereotypical views about women’s commitment to work and their value as employees.”\textsuperscript{119}

Scholars have remarked that sex and family caregiving responsibility stereotypes increasingly have found their way into a variety of employment litigations.\textsuperscript{120} Whether the EPA can be expanded to include hours parity as part of the statutory charge of protecting against pay disparities would require a broadening of the concept of “pay” to include total compensation, as opposed to hourly rates. Given the focus on compensation for “work performed” as opposed to “work promised” in the FLSA, such a reading is unlikely without further legislation.

\section*{C. Closing the Protection Gap Through Antidiscrimination Law}

Employment decisions based on sex stereotypes can violate the second major federal antidiscrimination legislation based on gender—Title VII—even “when an employer acts upon such stereotypes unconsciously or reflexively.”\textsuperscript{121} Title VII prohibits discrimination based on “sex,” as well as other protected categories including race, color, religion, and national origin.\textsuperscript{122} For some types of claims, the practice is lawful if it is “job related for the position in question and consistent with business necessity,”\textsuperscript{123} and no alternative practice with less adverse effect exists.\textsuperscript{124}

Enacted one year after the EPA, Title VII was also born in the Civil Rights Era. “The primary political impetus for Title VII stemmed from the civil rights crisis that erupted in Birmingham, Alabama in the early 1960s when the city’s unapologetic police chief unleashed fire hoses and police

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\textsuperscript{118} 538 U.S. 721 (2003).
\textsuperscript{119} Id. at 738.
\textsuperscript{120} See Chamallas, \textit{supra} note 106, at 737 (explaining that most courts have been reluctant to find that less pay for predominantly female jobs created sex discrimination claim); Williams & Bornstein, \textit{supra} note 6, at 172 (citing four-hundred percent increase in family responsibilities discrimination from 1996 to 2006, as compared to last decade).
\textsuperscript{122} Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012) (“It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .”).
\textsuperscript{123} Id. § 2000e-2(k) (1) (A) (i).
\textsuperscript{124} See id. § 2002e-2(k) (1) (A) (ii) (explaining that complaining party must demonstrate alternative employment practice exists and respondent refuses to adopt such alternative employment practice).
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dogs to quash a peaceful antidiscrimination protest.”125 Public support for government action to protect racial minorities from such denigration grew as television coverage broadcasted night after night of the horrific scenes playing out in the South. In response, “literally overnight,” the Kennedy Administration crafted the first draft of a federal civil rights bill.126 As the political process of passing the bill played out, the proposed civil rights law was substantially reworked to pass both Houses of Congress.

As is well documented, the language and protections changed dramatically as conservative opponents proposed liberal amendments in a strategic attempt to kill the bill.127 Many commentators believe that one of the attempts to kill the civil rights bill included adding “sex” as a protected category.128 Others maintain that: “Such authors and commentators are wrong. The prevailing conclusions misconstrue the complete story behind the battle to add ‘sex’ in Title VII. . . . Congress added sex as a result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women.”129

Regardless, “the intense congressional debates that accompanied the bill’s passage illustrate the competing interests, bitter battles and various values that undergird the legislation.”130 It also helps to explain the complexity of the law and the acknowledged difficulties in the judicially-created complex burden-shifting framework that has been borne from that history and compromise.131


126. See id. (explaining that drafters finished proposal for federal civil rights bill in two days).

127. See Robert C. Bird, More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 WM. & MARY J. WOMEN & L. 137, 137–38 (1997) (noting that Congress’s addition of sex to Title VII’s prohibitions was widely seen as joke).


131. See Martin J. Katz, The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law, 94 GEO. L.J. 489, 491 (2006) (recognizing that Congress has forced courts to try to determine type of causation required by disparate treatment law); Michael Selmi, Was the Disparate Impact Theory a Mistake?, 53 UCLA L. REV. 701, 751 (2006) (acknowledging that few courts have attempted to dismantle standard business practices without stronger statutory mandate); Charles A. Sullivan, Disparate Impact: Looking Past the Desert Palace Mirage, 47 WM. & MARY L. REV. 911, 940 (2005) (explaining that many aspects of Title VII, such as
In addressing part-time hourly workers, Title VII currently has very little precedent. Yet there are two Title VII frameworks and both have potential for remedy: disparate treatment theory and disparate impact theory. Disparate treatment theory has potential to address the scheduling shortfalls that female hourly workers face when their managers allocate more and better hours to their male counterparts based on sex stereotypes about family obligations. Disparate impact theory holds promise for remediating both scheduling discrimination (when company practices are at the heart of the inequity), as well as the earnings penalty felt (mostly) by female part-time workers who are paid an hourly rate lower than their full-time counterparts. As discussed below, even within Title VII’s current framework, courts should conceptualize gender discrimination as protecting female hourly workers from discrimination in scheduling.

1. **Disparate Treatment Theory**

Title VII prohibits disparate treatment on the basis of sex (among other protected categories) with regard to all “terms and conditions of employment.” As legal commentators have noted, the Supreme Court has never been precise in defining what constitutes disparate treatment. But it clearly requires causation: adverse employment decisions are prohibited only where they occur “because of” protected characteristics, including sex. “Yet, the words ‘because of’ do not tell us what type of causation is required” and courts struggle with the concept because there is no “literal direct evidence of a state of mind.” As Professor Charles Sullivan has opined:

how sufficiently linked specific trait must be to race or sex to count as discrimination, remain unclear); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 Wash. & Lee L. Rev. 3, 8 (2005) (noting that Title VII case law has analytical errors).


134. Katz, *supra* note 131, at 491 (illuminating ambiguity in applying Title VII when employers rely on both legitimate and illegitimate reasons for firing employee).

135. *Id.*

Disparate treatment doctrine, whether individual or systemic, relies ultimately on a finding of intent or motive to discriminate, and no consensus exists as to what those concepts embrace or, indeed, whether they are synonymous. Certain core conduct is clearly prohibited, namely conscious decision making to exclude members of particular races either because of animus or other reasons. But the extent to which less conscious influences count is unclear forty years after Title VII’s passage, and equally unclear is when a trait will be viewed as sufficiently linked to race or sex to count as race or gender discrimination based on that trait.  

Female hourly workers that face hours discrimination based on their managers’ preference to give better and more hours to male workers might be able to prove that the schedule shortcomings they face are because of their gender, if given enough evidence of sex stereotyping or other discriminatory animus by the manager. But that only gets them part way towards establishing a disparate treatment claim. In sum, there are three potential shortcomings. First, to make a prima facie showing, a plaintiff must provide proof of a “tangible” or “adverse” employment action, which currently does not include scheduling changes. Second, because the disparate treatment framework is based on an equal treatment model, courts often require comparator evidence, which might be lacking given the high percentage of part-time work in gender-segregated workplaces. Lastly, because workplaces that require part-time employees (such as retail and other service providers) use scheduling models that emphasize flexibility and reduction of labor costs, courts currently view part-time work as part of a desirable, flexible workplace. This ignores the scheduling discrimination or hours equity issue, and instead, as currently conceptualized, excludes it from protection by Title VII.

a. Hourly Workers’ Scheduling Shortfalls as Adverse Employment Actions

In making a prima facie case of disparate treatment discrimination where the female plaintiff is relying upon circumstantial evidence to prove that she was treated differently because of her sex, courts rely on the familiar McDonnell Douglas burden-shifting framework: a plaintiff must first make a “showing that she was a qualified member of a protected class and was subjected to an adverse employment action in contrast with similarly situated employees outside the protected class.” The burden then shifts to the employer to show that there is a legitimate, non-discriminatory rea-

137. Sullivan, supra note 131, at 940.
son for the adverse action, which can be rebutted by the plaintiff showing that the employer’s reason was pretext for discrimination.\textsuperscript{140}

Although the prima facie showing is deemed “not onerous,”\textsuperscript{141} federal courts approach the adverse employment action element from very different standpoints.\textsuperscript{142} Several courts have a broad view of the types of actions that meet the standard, requiring merely a “tangible” employment action, such as a negative performance review.\textsuperscript{143} Others take a “restrictive” view, requiring that the plaintiff suffer an “ultimate employment action,” such as a termination.\textsuperscript{144} Another subset of courts adopts the “intermediate” position as to what constitutes an adverse employment ac-


\textsuperscript{141} Id.

\textsuperscript{142} See Ray v. Henderson, 217 F.3d 1234, 1240–41 (9th Cir. 2000) (explaining that circuit courts were split in determining what constitutes adverse employment action); see also Rosalie Berger Levinson, Parsing the Meaning of “Adverse Employment Action” in Title VII Disparate Treatment, Sexual Harrassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?, 56 Okla. L. Rev. 623, 623 n.3 (2003) (noting three different circuit frameworks for adverse employment actions).

\textsuperscript{143} See Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002) (stating adverse action requirement is met whenever financial terms of employment are diminished, transfer significantly reduces career prospects, job is changed in some other way that injures employee’s career, or where working conditions are changed so as to cause “significantly negative alteration in [the] workplace environment”). But see Longstreet v. Ill. Dep’t of Corr., 276 F.3d 379, 383–84 (7th Cir. 2002) (holding that employee’s “negative performance evaluations and [the requirement that she] substantiate . . . her absences from work [as] illness-related” were not “tangible job consequences and therefore . . . not adverse employment actions . . . under Title VII”); Oest v. Ill. Dep’t of Corr., 240 F.3d 605, 612–13 (7th Cir. 2001) (finding that neither unfavorable performance evaluations nor oral or written reprimands sufficiently implicated tangible job consequences, even though “each . . . reprimand brought [plaintiff] closer to termination,” absent evidence of any “immediate consequence of the reprimands”); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (requiring that retaliation must be “tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment”).

\textsuperscript{144} See Soledad v. U.S. Dep’t of Treasury, 304 F.3d 500, 507 (5th Cir. 2002) ("[L]ateral transfer . . . with no change in pay is not the type of ultimate employment action necessary for an adverse employment action . . . in a retaliation claim." (citation omitted)); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) ("[A]ction complained of may have had a tangential effect on [plaintiff’s] employment, [the employer’s action must] rise to the level of an ultimate employment decision to be actionable under Title VII.”); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (holding that only “ultimate employment decisions” are actionable); see also LaCroix v. Sears, Roebuck, & Co., 240 F.3d 688, 691–92 (8th Cir. 2001) (holding that, even if employee received poor performance review as result of her report of sexual harassment, “a negative review is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient’s employment”); Cross v. Cleaver, 142 F.3d 1059, 1073 (8th Cir. 1998) (finding that in order to make out prima facie case of retaliation, employee must suffer “ultimate employment decision”).
tion. But even in decisions that adopt the broadest view, harms deemed actionable are overwhelmingly narrowly construed.

While courts typically find compensation reduction to be sufficiently adverse in nature to meet the legal standard, changes to scheduling shifts are often not. Accordingly, part-time female plaintiffs who can effectively argue that unwanted schedule changes come in the form of hour reduction resulting in total compensation loss will be successful in showing an adverse employment action. And as long as they can show through competent evidence that they wanted those hours and were denied them because of their gender, a disparate treatment claim should be met.

145. See Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 539 (6th Cir. 2002) (holding that to make out prima facie case of discrimination, plaintiff must allege “a materially adverse change in the terms or conditions of . . . employment” and “[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions”); Traylor v. Brown, 295 F.3d 783, 788–90 (7th Cir. 2002) (quoting Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996)) (requiring that, to establish prima facie case, plaintiff must do more than show she was treated differently than other employees, but rather, must prove that “she suffered a materially adverse employment action,” which is defined as “more disruptive than a mere inconvenience or an alteration of job responsibilities”); Weeks v. N.Y. State Div. of Parole, 273 F.3d 76, 86–87 (2d Cir. 2001) (affirming district court’s granting of motion to dismiss because alleged claims, which included filing grievance, notice of discipline and counseling memo, and transferring plaintiff to another office failed to state prima facie case that she suffered “material” harm to term, condition or privilege of employment), abrogated by Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002) (“[A] charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.”); Harlston v. McDonnell-Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (“Changes in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make out a prima facie case.”); Crady v. Liberty Nat’l Bank & Trust Co. of Ind., 993 F.2d 132, 135 (7th Cir. 1993) (finding that “materially adverse employment action” is element of prima facie case under Title VII).

146. See Levinson, supra note 142, at 634–36 (citing various cases where Title VII’s reach has been limited by courts, such as to circumstances involving only ultimate employment decisions); Rebecca Hanner White, De Minimis Discrimination, 47 Emory L.J. 1121, 1126 (1998) (“[T]here is a real and growing disarray concerning which improperly motivated employment decisions are legally actionable.”).

147. See, e.g., Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (“[R]etaliiatory conduct must be serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment . . . [to] constitute [an] ‘adverse employment action.’”).

148. See, e.g., Watts v. Kroger Co., 170 F.3d 505, 511–12 (5th Cir. 1999) (finding that allegations that employer changed employee’s work schedule and asked employee to perform new tasks after she filed complaint about her supervisor did not rise to level of adverse employment action because neither change in schedule nor new tasks affected employee’s salary; there is not adverse employment action where pay, benefits, and level of responsibility remain same).
For claims of undesirable scheduling changes in the form of undesirable and variable shifts, there are a handful of courts willing to find such schedule changes actionable, as long as the plaintiff can effectively prove that the change was a “material and adverse” change in the terms and conditions of employment.\footnote{149} For example, in \textit{Spees v. James Marine, Inc.},\footnote{150} the Sixth Circuit held that the plaintiff suffered an adverse employment action when she was forced to take the night shift because it “adversely affected her ability to raise her daughter as a single mother.”\footnote{151} Part-time workers must show that the change occurred because they were women, was “more than a mere inconvenience,” and resulted in a substantial harm to them.

One hindrance to being able to prove scheduling discrimination in this way is that employers might let go of complaining part-time workers, barring their ability to gather evidence of disparate treatment. In service industries that employ cadres of part-time hourly workers, managers, and supervisors engage in “informal lay offs” to avoid “formal” terminations that trigger adverse employment actions. Professor Lambert, who conducts empirical-based research studies on hourly work, calls this practice “workloading,” noting that it allows “managers to reduce the number of workers for whom they were expected to provide hours without the need for formal action.”\footnote{152} While this practice advantages employers (who can more easily match labor costs to sales fluctuations), it disadvantages employees, both because of the loss of pay but also because it forestalls Title VII action by avoiding the formal termination procedure that triggers obvious adverse employment actions, hiding them from Title VII scrutiny. In such cases, courts should take their cues from EPA decisions, such as \textit{Lovell v. BBNT Solutions, Inc.}, recognizing that “such a rule would allow an employer to avoid the EPA’s strictures by simply employing women in jobs with slightly reduced-hour schedules and paying them at a lower rate than their male counterparts,” which would “completely subvert the EPA’s purpose.”\footnote{153}

\footnote{149. See, e.g., Ginger v. Dist. of Columbia, 527 F.3d 1340, 1344 (D.C. Cir. 2008) (“As the officers convincingly argue, inconvenience resulting from a less favorable schedule can render an employment action ‘adverse’ even if the employee’s responsibilities and wages are left unchanged.”); Freedman v. MCI Telecomms. Corp., 255 F.3d 840, 844 (D.C. Cir. 2001) (holding transfer to night shift as adverse employment action because “the change in hours interfered with [the plaintiff’s] education”).}

\footnote{150. 671 F.3d 380 (6th Cir. 2010).}

\footnote{151. Id. at 392.}

\footnote{152. See Lambert, \textit{Passing the Buck}, supra note 44, at 1220–21 (“This practice had the additional advantage of maintaining a ready pool of workers who could be put back on the schedule when demand increased.”).}

\footnote{153. Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611, 621 (E.D. Va. 2003) (allowing issue of whether plaintiff, who was working reduced hours—approximately three-quarters of full-time hours—performed substantially equal work to her full-time counterpart to go to jury).}
b. Finding Hourly Female Workers’ Comparators

At its core, disparate treatment theory rests on the equal treatment doctrine, whereby an “employer must treat women like men only if the women are similarly situated to the men.”\footnote{154} If a worker gets to the final stage of the \textit{McDonnell Douglas} burden-shifting framework, the plaintiff employee must prove pretext, where the courts often require proof of comparative evidence that the employer treated other similarly situated employees more favorably than the plaintiff employee.\footnote{155} Comparator employees are similarly situated to the plaintiff employee when they have “similar jobs and display similar conduct.”\footnote{156}

Again, courts are split as to how “similarly situated” the plaintiff and comparator must be, with some courts holding that they “need not be identical,” but rather “similar in all material respects,”\footnote{157} while others demand that they be “nearly identical” in “all relevant respects.”\footnote{158} The Eleventh Circuit, which has adopted a more restrictive approach to comparator evidence, held that requiring “identical” evidence keeps “courts from second-guessing employers’ reasonable decisions and confusing apples with oranges.”\footnote{159}

Accordingly, most courts reviewing Title VII gender disparate treatment cases require some showing of comparator evidence in order to successfully prove pretext. In the case of part-time hourly female workers, proving that a male counterpart received hours that the female wanted is a difficult, if not impossible, standard. Even under the less rigorous “similar in all material respects” standard, employers can easily show that managers made rational choices around scheduling needs that have nothing to do with gender, such as seniority, shift rotations, reliability, job experience, and others. This is especially problematic in gender-segregated workforces, such as cashiers or wait staff where the predominant class of workers are female. Finding male part-time counterparts might be impossible because they are nonexistent.


\footnote{155. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713 n.2 (1983) (recognizing that plaintiff provided sufficient evidence to demonstrate white persons were consistently promoted and detailed over him and all other black persons); Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006) (reiterating elements of \textit{McDonnell Douglas} analysis); Vasquez v. Cnty. of L.A., 349 F.3d 634, 641 (9th Cir. 2003) (“Employees in supervisory positions are generally deemed not to be similarly situated to lower level employees.”); Little v. Republic Refining Co., 924 F.2d 93, 97 (5th Cir. 1991) (requiring plaintiff to show preferential treatment was given to younger employee under “nearly identical circumstances”).}

\footnote{156. \textit{Vasquez}, 349 F.3d at 641.}

\footnote{157. Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1157 (9th Cir. 2010) (internal quotation marks omitted).}

\footnote{158. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1091 (11th Cir. 2004).}

\footnote{159. \textit{Burke-Fowler}, 447 F.3d at 1323.}
However, another avenue exists for certain types of cases where comparator evidence is lacking. A handful of courts (and several scholars) have argued that comparator evidence “is not required by Title VII jurisprudence” in cases of family responsibility discrimination (FRD), where plaintiffs sue their employers for discriminating against them based on their responsibilities to care for family members. In those situations, comparative evidence is difficult, if not impossible. In fact, the Equal Employment Opportunity Commission (EEOC) recently endorsed FRD discrimination as a legitimate cause of action under Title VII. But again, there are limitations to FRD claims as applied to female hourly workers losing out on hours to their male counterparts. Even FRD claims must prove that the workers suffered an adverse employment action because of their sex, on top of proving that gender stereotypes operated to their disadvantage. While sex stereotype evidence is helpful in showing pretext, hourly workers will have difficulty proving the prima facie case to begin with.

c. Scheduling Shortfalls Affecting Female Part-Time Workers Is Not a “Choice”

Although the U.S. Supreme Court has recognized that “schedule changes matter to mothers,” most courts recognize part-time work, in the scanty handful of cases that do examine it, as a “choice” made by women to balance work and family. This “flexibility” is attractive to family caregivers who need a workplace that can accommodate their responsibilities, and courts are clear that choosing a part-time, flexible path is not protected by antidiscrimination law because workers place themselves on


162. See Williams & Calvert, supra note 161 (describing difficulty in obtaining comparative evidence).

163. See EEOC ENFORCEMENT GUIDANCE, supra note 161 (“Employment decisions based on stereotypes violate Title VII.”).

such a path deliberatively for the flexibility it can provide. Sex stereotypes play an important role in the courts’ view that part-time work is a “choice” that Title VII does not protect. Legal scholars, such as Professor Martha Chamallas, have persuasively argued that the inferior status of part-time work “stems in part from sex discrimination.”

This line of reasoning muddies the water for future scheduling discrimination cases because the courts fail to differentiate between workers for whom part-time work is voluntary versus involuntary (meaning they want more hours or full-time status but are denied from those positions or hours). Courts continue to insist that part-time status is a life-style choice of women looking for flexible work conditions.

But, as witnessed in Parts II and III, (and what is not currently recognized by the courts is that) for many part-time female workers, part-time status is not a “choice” and in fact, many would take additional hours for added compensation if available. Social science researchers have convincingly shown that women are disproportionately affected by inconsistent scheduling practices, and would choose more hours if offered. Because they work without any minimum hours guarantee, unrequested reduction of hours is not legally protected.

Moreover, any forced “flexibility” comes at a high price when one considers the need for stable schedules to allow for planning of child care, education, and other part-time work. Instead, it is the employers who benefit from flexible scheduling. In scheduling part-time hourly workers, employers have “a great deal of built-in flexibility to adjust hours downward in part-time jobs,” and can do so without fear of Title VII exposure, even when they “flex out” mainly women because work in a part-time job is seen as a “choice” women make.

In sum, disparate treatment is a viable avenue for redress, not only based on the current legal precedent where evidence in discriminatory animus based on family caregiving responsibilities is actionable, but also for female hourly workers whose main claim is that they suffer hours ineq-


166. Chamallas, supra note 106, at 711.

167. See Meyer v. United Air Lines, Inc., 950 F. Supp. 874, 877 (N.D. Ill. 1997) (“As valid as these concerns may be, they still are ‘personal reasons unrelated to the job.’” (citing U.S. v. City of Chicago, 853 F.2d 572, 579 (7th Cir. 1988))); Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1278 (4th Cir. 1985) (standing for proposition that discrimination is not present “when the quit is motivated by personal reasons unrelated to the job or as a matter of personal convenience”).

168. See Schedule Flexibility, supra note 16, at 310 (“Even if workers are grateful for the opportunity to restrict their work hours, they may not be fully aware that they risk an earnings penalty when they restrict their availability for work, and if they are aware, their family responsibilities may limit their ability to choose otherwise.”); McCrate, supra note 10 (providing empirical evidence to demonstrate that women are disproportionately affected by inconsistent scheduling practices).

169. Lambert, Passing the Buck, supra note 44, at 1214.
utilities and “undertime” in disparate proportion to their male counterparts. It requires, however, specific evidence of discriminatory motive because of the workers’ gender, which is a difficult evidentiary hurdle.

2. Disparate Impact Theory

If some female part-time workers find it difficult to prove that managers intentionally schedule female hourly workers differently because of their sex or make decisions influenced by sex stereotypes, might scheduling practices violate Title VII’s other theory—one that does not require intentional discrimination, but instead, bans practices that result in unintended, but very real, disparities for women?

In contrast to the deliberate or intentional (if sometimes unconscious) discrimination at the heart of disparate treatment, disparate impact theory prohibits employer practices that negatively impact protected classes, including women, regardless of their intent. The Supreme Court in Griggs v. Duke Power Co. 170 first approved the theory in 1971, 171 and the Court continued to endorse the analysis in subsequent cases. 172 A sea change occurred in 1989, when the Court changed course and severely restricted the disparate impact analysis in Wards Cove Packing Co. v. Atonio. 173 Congress quickly rejected Wards Cove in the Civil Rights Act of 1991, by adopting statutory language defining the burden of proof under disparate impact theory and restoring the burden-shifting to a pre-Wards Cove standard. 174 However, Congress did codify the “specific practice” requirement, stating that the plaintiff must demonstrate that “each particular challenged employment practice causes a disparate impact.” 175


171. See id. at 424–31, 436 (disapproving of employer’s use of high school diploma requirement and written tests that had severe racial disparate impact where employer had not evaluated whether these requirements were “reasonable measure of job performance”).

172. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989–91 (1988) (holding that disparate impact analysis can be used to challenge subjective decision-making processes that produce significant racially disparate impact); Albemarle Paper Co. v. Moody, 422 U.S. 405, 427–34 (1975) (applying Griggs to disapprove employer’s use of written tests with severe racial disparate impact without considering whether tests measured job performance).

173. 490 U.S. 642, 658–59 (1989) (holding that employers need only offer evidence of “business justification” for challenged business practice and that plaintiffs in disparate impact cases have burden of proof in rebutting employer’s proffered business justification).


175. 42 U.S.C. § 2000e-2(k)(B)(i). However, the 1991 Act did provide a narrow exception to the specific practice requirement. For cases where the plaintiff “can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” Id.
Proving disparate impact, although returned to its originally intended analysis, remains a daunting challenge to plaintiffs.\(^{176}\) It requires both sophisticated statistical analysis to show disparate effects and identification of the “specific practice” causing these effects.\(^{177}\) Legal commentators agree that although vitally important in combating “invidious acts of prejudiced decision-making,” today, it is “very rare for plaintiffs other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII on a disparate impact theory.”\(^{178}\) This remains especially true for low-wage hourly workers, because first, the statistical analysis is expensive and out of reach for most low-wage workers absent well-funded impact litigation, and second, the scheduling practices of employers in service industries are not likely to be a “specific practice” causing the effects, as required under current law.

a. Statistical Proof (and Class Litigation) Should Be Made Available to Low-Wage Hourly Workers

With regard to scheduling, to prove discrimination under this theory, plaintiffs would have to provide statistically significant evidence that more hours and preferred schedules were allocated to male hourly workers over female hourly workers in a given worksite. First, statistical analysis required to demonstrate the disparate effects is both hard to prove and not cheap to come by. Proving discrimination through statistical proof requires exacting evidence to a statistically significant degree demonstrating disparity. In order to have probative value, statistics need not reach “the level of scientific certainty,” but must be of “legal significance.”\(^{179}\) Such statistics must take into account both the appropriate labor pool and the significant nondiscriminatory factors, typically through a multiple regression analysis.\(^{180}\)

Any multiple regression analysis that must take into account the relevant labor pool (of the particular service industry job market) and other nondiscriminatory factors (such as preferences, requests, seniority, and experience) is set up to fail because of the high proof standard and because

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177. See Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005) (holding that plaintiffs failed to identify with sufficient precision exact “practice” that caused disparate impact on basis of age in city’s formula for raising salaries of junior public safety officers to compete with other jurisdictions).


179. See Bazemore v. Friday, 478 U.S. 385, 400 (1986) (noting that plaintiff’s burden is to “prove discrimination by a preponderance of the evidence,” not with “scientific certainty”).

180. See, e.g., Lavin-McElency v. Marist Coll., 239 F.3d 476, 482 (2d Cir. 2001) (“It is undisputed that multiple regression analysis . . . is a scientifically valid statistical technique for identifying discrimination.”).
of the multiple factors involved in managerial scheduling decisions. Moreover, even if that statistical proof was likely to be found, obtaining it is costly and outside the resources of most hourly workers. The statistical analysis is usually drawn by an expert retained by a lawyer, who passes the costs on to the defendant (if successful) or absorbs the costs (if unsuccessful). That necessarily means that individual litigation of disparate impact claims is nearly impossible because lawyers are not willing to take on that magnitude of risk unless they can aggregate claims, making class actions the only realistic avenue of redress. Courts, including the Supreme Court, recognize this, acknowledging the importance of aggregate litigation as the only means of relief where a plaintiff’s claim is too small economically to support individual litigation and “private attorney generals” are needed to diffuse the costs and risks among the class.

But class actions have come under attack in recent years, and as a result, savvy plaintiffs’ lawyers wanting to tackle untried legal theories are likely to be thin on the ground. First, in Wal-Mart Stores, Inc. v. Dukes, the Supreme Court heightened the standard for commonality in class ac-

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181. In fact, having a significant amount of discretion in making decisions in workers’ scheduling is an explicit element in what makes one a manager for purposes of the FLSA. See Thomas v. Speedway SuperAmerica, LLC, 506 F.3d 496, 507 (6th Cir. 2007) (providing that scheduling is important managerial function).


183. See Nantiya Ruan, What’s Left to Remedy Wage Theft?: How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, 2012 Mich. St. L. Rev. 1103, 1118 (2012) [hereinafter Ruan, Remedy Wage Theft] (“The courts, including the U.S. Supreme Court, routinely recognize the importance of aggregate litigation because it often remains the only means of judicial relief where a plaintiff’s claim is too small economically to support individual litigation.”); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”) (internal quotation marks omitted)); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (“Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”); Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 LBSJCF, 2011 WL 2671813, at *4 (S.D.N.Y. Jul. 7, 2011) (“In this case, the plaintiff would be foreclosed from bringing her pattern or practice claim . . . by the practicality of economic pressures limiting the value of her claim compared with the cost of prosecuting it . . . .”); Mascol v. E & L Transp., Inc., CV-03-3343 CPS, 2005 WL 1541045, at *7 (E.D.N.Y. June 29, 2005) (holding “the class action form is superior to alternative methods of adjudicating this controversy” because claims were negative value); Iliadis v. Wal-Mart Stores, Inc., 922 A.2d 710, 725 (N.J. 2007) (“Because of the very real likelihood that class members will not bring individual actions, class actions are ‘often the superior form of adjudication when the claims of the individual class members are small.’”).

tion certification, making it more difficult for plaintiffs to prove class commonalities when separate, independent decision-makers are involved.\footnote{185. See id. (providing that evidence of gender-based decision-making by supervisors “does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common”).} The Supreme Court reversed the lower court’s certification of Title VII gender discrimination claims based on a theory that individual managers’ unbridled discretionary decision-making was influenced by impermissible gender stereotyping, resulting in statistically significant pay disparities.\footnote{186. See id. at 2547 (describing circumstances giving rise to litigation).} The Dukes Court found that the commonality requirement was not satisfied on the record before it and held that to satisfy Rule 23(a)(2), plaintiffs only need to identify one common question of law or fact, but that question must be central to the validity of each class member’s claim.\footnote{187. See id. at 2551 (“Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.”).} With regard to statistical proof, the Court, in dicta, cast doubt on the lower court’s conclusion that Daubert did not apply to expert testimony at the class certification stage.\footnote{188. See id. at 2553–54 (“The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, [the expert’s] testimony does nothing to advance respondents’ case.”).}

Second, in Behrend v. Comcast Corp.,\footnote{189. 133 S. Ct. 1426 (2013).} the Supreme Court revisited the Rule 23(b)(3) predominance inquiry in the context of damages, holding that “the proper standard for evaluating certification” requires a showing “that damages are capable of measurement on a classwide basis.”\footnote{190. Id. at 1432.} In Comcast, an antitrust class action, the district court and Third Circuit did not credit defendant’s challenge to plaintiffs’ regression model because “those arguments would also be pertinent to the merits determination.”\footnote{191. Id. at 1433.} The Supreme Court reversed class certification, holding that the Third Circuit should not have “simply concluded that respondents provided a method to measure and quantify damages on a classwide basis,” without deciding “whether the methodology [was] a just and reasonable inference or speculative.”\footnote{192. Id. at 1433 (internal quotation marks and citations omitted) (emphasis added).}

Lastly, in AT&T Mobility LLC v. Concepcion,\footnote{193. 131 S. Ct. 1740 (2011).} the Supreme Court examined the viability of mandatory arbitration clauses that prohibit class actions, and determined that mandating individual arbitration is consis-
tent with federal labor policy.\textsuperscript{194} The plaintiffs in \textit{Concepcion} brought a class consumer fraud suit, but the defendant moved to compel arbitration, which included a class waiver.\textsuperscript{195} The Court upheld the arbitration clause, including the class waiver, finding that “[a]rbitration is poorly suited to the higher stakes of class litigation” because, in part, “class arbitration greatly increases risk to defendants.”\textsuperscript{196} As one of this Article’s authors has explained, changing the forum from public litigation to private arbitration and prohibiting aggregation of claims incentivizes unscrupulous employers to profit from the work of hourly workers by closing “the doors of justice on low-wage workers.”\textsuperscript{197}

Together, this recent litany of Supreme Court class action decisions reflects the growing judicial hostility towards class treatment. As Justice Kagan recently recognized in a dissenting opinion: “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”\textsuperscript{198} Such judicial hostility casts doubt on the likelihood of success of worker class actions moving forward. Given the importance that aggregating claims has for low-wage workers, this hostility has significant consequences.

b. Recognizing Scheduling as a Specific Practice

Disparate impact claims brought by hourly workers for scheduling disparities might fail under the specific practice requirement because of the plaintiffs’ inability to show a specific employment practice that disadvantages female part-time workers.\textsuperscript{199} In order to make a successful disparate

\textsuperscript{194} See \textit{id.} at 1748 (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”).

\textsuperscript{195} See \textit{id.} at 1744 (describing circumstances giving rise to litigation).

\textsuperscript{196} Id. at 1751–52 (providing reasons why arbitration is poorly suited for class litigation).

\textsuperscript{197} Ruan, \textit{Remedy Wage Theft}, supra note 183, at 1105 (listing factors that disenfranchise low-wage workers). This argument is even more important given the recent Supreme Court decision of \textit{American Express Co. v. Italian Colors Restaurant}, where, in an antitrust class action, the Court declined to apply the “effective-vindication rule,” that recognizes when an arbitration mandate is a barrier to the vindication of meritorious federal claims, requiring it insulates wrongdoers from liability. \textit{See Am. Express Co. v. Italian Colors Rest.}, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting). As Justice Kagan noted in her dissent, “the majority disregards our decisions’ central tenet: An arbitration clause may not thwart federal law, irrespective of exactly how it does so. Because the Court today prevents the effective vindication of federal statutory rights,” joined by Justices Ginsburg and Breyer. \textit{Id.} at 2313.

\textsuperscript{198} \textit{Am. Express Co.}, 133 S. Ct. at 2320.

impact claim, plaintiffs are required to show “each particular challenged employment practice causes a disparate impact.” This exacting standard results in many disparate impact cases failing at the proof stage because the plaintiff could not identify a specific employment practice that linked statistical differences to sex. “For example, employees who base disparate impact claims on managers’ preferences or on informal practices as opposed to company policy often see their claims fail because of the specific practice requirement.”

With regard to earnings penalties for part-time work as compared to full-time work, courts analyzing the specific practice requirement will likely require that part-time workers make a specific showing of particular scheduling practices with statistical proof to have caused the disparate impact. Allowing managerial subjectivity in decisions regarding scheduling could be seen as an informal practice unable to have redress under this theory. Moreover, courts may require that the workers be similarly situated to other part-time workers in their claims. For example, in Payne v. Huntington Union Free School District, the federal district court held that a part-time, temporary employee must compare herself with other part-time, temporary employees, and not full-time employees, in granting summary judgment against her.

In the case of a female part-time worker comparing herself to other male part-time workers in claiming a disparate impact in scheduling shortfalls, the plaintiff would also have an uphill battle. She would have to necessarily rely upon managerial preferences and informal practices because few workplaces have a formalized corporate policy that can be successfully challenged under this theory. Instead, managers would likely

384, 403 (N.D.N.Y. 1998) (“Comparing women working part-time with men working full-time provides no guidance because it is impossible to discern from those statistics whether any disparity is based on gender or on part-time status, a classification not protected.”); EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1285 (N.D. Ill. 1986) (requiring “a specific, facially neutral practice of the employer which disproportionately excludes members of a protected group”).


201. See, e.g., Gullet v. Town of Normal, 156 F. App’x 837, 842 (7th Cir. 2005) (holding that hiring male full-time street maintenance worker from all-male waste division was not company policy but rather manager’s preference, and thus female plaintiff did not establish specific employment practice).

202. See, e.g., Mathis v. Wachovia, 509 F. Supp. 2d 1125, 1143 (N.D. Fla. 2007) (holding that absence of policy to investigate apparent racial inequities is not considered company policy sufficient to meet specific employment practice requirement).

203. Linos, supra note 176, at 142 (noting frequent failure of disparate impact claims based on informal practices or manager preferences).


205. See id. at 281 (stating court’s holding).

206. Any theory that individualized decision-making is a specific corporate policy in violation of Title VII would probably fail, given the theory’s demise in Wal-Mart v. Dukes. For a further discussion of Wal-Mart v. Dukes, see supra notes 184–88.
successfully assert that they used other preferences (such as reliability, experience, and seniority) to defeat the specific practice claim. For example, in *Gullet v. Town of Normal*, 207 a circuit court held that hiring a male full-time street maintenance worker from an all-male waste division was not a company policy but rather a manager’s preference, and thus the female plaintiff did not establish a specific employment practice. 208 Accordingly, disparate impact claims will be an unlikely source of protection for scheduling discrimination and earnings penalties until the courts recognize that scheduling is a specific employer practice with significant consequences for workers, and that procedural barriers should be breached if they prevent the vindication of substantive rights. 209

V. REMEDYING THE SCHEDULING SHORTFALLS AND RECOGNIZING HOURS EQUITY

The pay inequity between women and men is not just about a woman making a percentage of every dollar that a man makes. In today’s workforce, where nearly two-thirds of the part-time workforce are women, the pay gap is exacerbated by both the earnings penalty of part-time work (where part-time workers make less per hour than their full-time counterparts) and female part-time workers suffering fewer scheduled hours because of discriminatory sex stereotypes at play. With only minor reconceptualizing, legal protection for female hourly workers can be more comprehensive and effective. But if courts fail to incorporate scheduling shortfalls into their understanding of current antidiscrimination laws, this Part suggests statutory fixes to specifically address these important issues and highlights the need for renewed advocacy for part-time low-wage workers. Three potential avenues to address and combat these underdeveloped components of the gender pay gap are identified below: statutory redress; community organizing and collective action; and renewed public regulation and enforcement.

A. Existing Legal Remedies and Statutory Fixes

Addressing the pay inequities of female hourly workers is unlikely to enjoy much success without legal remedies available to combat the discrimination they face. The federal statutes addressed in Part IV can be

207. 156 F. App’x 837 (7th Cir. 2005).
208. See id. at 842 (stating court’s holding).
209. Courts have recognized that procedural rules that prohibit the adjudication of substantive rights ought to be amended to allow such claims, but those cases are in the clear minority and are often overturned. See, e.g., *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 218 (2d Cir. 2012) (holding that class action waiver in agreement between American Express and merchants “would grant Amex de facto immunity from antitrust liability by removing the plaintiffs’ only reasonably feasible means of recovery”); *In re Am. Express Merchs.’ Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) (same); *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (same).
employed more expansively in impact litigation efforts, while others need amending to fully represent female hourly workers’ needs.

First, existing worker rights laws could be a source of redress for hourly workers if they were able to find private or government attorneys open to challenging harmful scheduling practices. At the state level, reporting pay laws can assist part-time workers with additional wages when sent home or called in to work, while also educating and encouraging employers to adopt fairer scheduling practices.210

At the federal level, impact litigation challenging the disparate treatment of female hourly workers in the preferential scheduling of hours to male workers should be brought under Title VII. As explained in Part IV, such an attempt might fail unless courts are persuaded by social science and other evidence that sex stereotyping remains rampant in today’s workplace. Similarly, disparate impact challenges under Title VII to the corporate practice of paying full-time workers more per hour than part-time workers could be challenged. Innovative and well-funded legal advocates that have the resources to retain expert statistical analysis and data collection might be able to successfully argue that the practice of paying part-time workers less per hour for the same work, while non-discriminatory on its face, has a disparate effect on female hourly workers. These suits would be challenging, but with the right clients, evidence, resources, and creative lawyering, these impact litigations could move the law in the direction of hourly worker protection.

Second, legislative efforts to address the pay gap specifically, and part-time work generally, would have a tremendous effect on pay inequities. The FLSA is due for a face-lift. Recent legislative efforts to amend the FLSA have been solely focused on eliminating and curtailing overtime premium pay. The most recent attempt is the confusingly named “Working Families Flexibility Act,” which would allow employers to pay their workers nothing extra for overtime work, other than the potentially empty promise of compensatory time that can only be used at the employer’s discretion.211 Instead, the efforts to amend the FLSA should specifically address the unfair labor practices of disparate hours allocation and scheduling fluctuations that negatively impact female hourly workers.

Legislative efforts could also focus on part-time work more generally. Prior scholars have recognized this hole. For example, Professor Nicole Porter suggests that Congress enact a “Part-Time Parity Act” to “alleviate the marginalization of part-time workers” by mandating that employers pay part-time workers proportional wages and fringe benefits at a propor-

210. See Alexander, Haley-Lock & Ruan, supra note 86 (detailing “call-in” and “send-home” pay laws).

211. See H.R. 1406, 113th Cong. (2013), available at http://www.govtrack.us/congress/bills/113/hr1406/text (‘An employee may receive, in accordance with this subsection and in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.”).
tional rate as full-time employees performing equal work.\footnote{212} Such legislative efforts might not ultimately be successful, but even so, such efforts would raise public awareness about the pay inequities entrenched in our workplaces. One way to raise awareness would be for the federal government to update the 2001 Current Population Survey to provide meaningful, updated statistics on work hours and the desirability of more hours for part-time workers.\footnote{213}

Lastly, legal remedies are meaningless if low-wage hourly workers are unable to access them. For hourly workers unable to attain attorney representation for their individual claims, aggregating them with other workers is often the only way to have them addressed.\footnote{214} It is only through combining hourly workers’ relatively small damage award with multiple similarly-situated workers, do class action attorneys have an incentive to become “private attorney[s] general” combating discriminatory workplace harms.\footnote{215} As class action practice comes under greater judicial scrutiny and the legal standards for class certification become more difficult to meet (as outlined in Part IV), fewer private plaintiffs’ attorneys are willing to risk the high costs of these cases. Impact litigation nonprofits (such as the NAACP Legal Defense Fund, the Impact Fund, and National Employment Law Project) are needed to fill that hole in pushing employers to redress pay inequities.

B. Legal Mobilization: The Call to Worker Centers, Worker Unions, and Collective Action

The lack of legal rules that address problems of scheduling shortfalls and “the withdrawal of government’s hands in the labor market”\footnote{216} create significant challenges for workers. As discussed earlier, a significant body

\footnote{212} Porter, \textit{supra} note 113, at 828–35 (outlining facets of Part-Time Parity Act to address caregiving discrimination faced by working mothers).


\footnote{214} See generally Nantiya Ruan, \textit{Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers}, 63 \textit{Vand. L. Rev.} 727 (2010) (recognizing need for, and advocating, collective litigation for under-represented groups, such as low-wage workers, to ensure adequate legal remedies); Ruan, \textit{Remedy Wage Theft}, \textit{supra} note 183, at 1115 (“Given the financial barriers to bringing individual private causes of action, aggregating low-wage workers’ claims has been the primary source of private enforcement of wage theft.”).


\footnote{216} Bernhardt, \textit{supra} note 51, at 356.
of scholarship describes how workplace law has become increasingly unfriendly to workers over the past decade. As importantly, the agencies charged with enforcing workplace law are underfunded and understaffed. In the ten years prior to 2007, the number of wage and hour investigators employed by the U.S. Department of Labor (DOL) decreased by more than twenty percent, and the total number of federal wage enforcement actions decreased by almost forty percent. Although the Obama Administration added 350 investigators in 2010, the number of personnel devoted to investigation falls short when compared to the 130 million workers covered. State enforcement is similarly constrained. The Policy Matters Ohio study of state enforcement of wage and hour laws calculated that there is one wage and hour investigator for every 146,000 workers. Florida, for example, has only six DOL wage and hour investigators for the entire state and no state equivalent to a DOL to investigate wage and hour complaints. Without resources, workplace regulators rely on workers to complain. This is simply not enough in low-wage workplaces where “the threat of employer retaliation is too great to depend on individual workers to carry the weight.”

Equally important (albeit beyond the scope of this Article) are larger, cultural and discursive frameworks for understanding the concepts of labor, work, and the employment relationship itself that may inhibit workplace complaints. Professors Vallas and Prener locate the current precariousness of work within a “culture of enterprise,” that combines the dual rhetoric of self-fulfillment and individual responsibility. They suggest that workers have internalized the concept of “responsibilization,” or “the obligation of perfecting themselves, and of bringing out the full value of their human capital, the better to take advantage of the opportunities that exist for the entrepreneurial self.” Placing responsibilization on the shoulders of employees in a context of unilateral employer control over the timing of and production of work most certainly works to the advantage of employers. Taking on the problems as their own in this


219. Cf. Weil, supra note 33, at 8 (“Compounding these resource limitations is the fact that a significant percentage of [Wage and Hour Division] investigations arise from worker complaints.” (citation omitted)).

220. Bernhardt, supra note 51, at 363.


222. Id. at 343.

223. In her analysis of the Family and Medical Leave Act, Catherine Albiston reminds us that the time norms and production schedules we take for granted
way, workers may be less inclined to formally complain or to join worker associations that might collectively negotiate for them.

Tapping into the current structure of worker centers can be one road of advocacy for female hourly workers. Worker centers are “community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers.”224 Located in many urban areas,225 worker centers already are organizing and collaborating with other nonprofit advocacy and government bodies to advocate for important wage issues. “The National Employment Law Project, Interfaith Worker Justice, Make the Road in New York, the Employment Law Center, and the UCLA Center for Labor Research and Education in Los Angeles are a few examples of successful organizations that are already working to provide support for low-wage workers.”226

Thus far, worker centers have focused attention on the pressing need of immigrant worker populations, who suffer a disproportionate amount of wage abuses, including wage theft and unsafe work conditions.227 However, worker centers are already beginning to partner with other community nonprofits to address systemic harms, rather than singularly focusing on individual cases and needs.228 Centers across the country are celebrating great successes in drafting and helping to enact local legislation to

were the product of historical contests over the meaning of work. See Catherine Albiston, Institutional Inequality and the Mobilization of the Family and Medical Leave Act (2010); see also Rachel Arnow-Richman, Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance, 42 Conn. L. Rev. 1081, 1085 (2010) (“[E]mployees in an at-will system remain subject at all times to employers’ unilateral changes in work structure—a reality that may more heavily burden caregivers whose personal responsibilities are likely to be schedule-dependent.”).


225. In fact, one study estimated that in 2006, there were 139 worker centers in the United States. See Rebecca J. Livengood, Organizing for Structural Change: The Potential and Promise of Worker Centers, 48 Harv. C.R.-C.L. L. Rev. 325, 328 (2013) (citing Fine, supra note 224, at 421).

226. Ruan, Remedy Wage Theft, supra note 183, at 1142; see also Kim Bobo, Wage Theft in America 103–16 (2d ed. 2011) (detailing organizations that help low-wage workers fight wage theft).


228. See Fine, supra note 224, at 419 (noting partnerships between immigrant worker centers and African American communities); Livengood, supra note 225 (arguing that worker centers should shift focus away from individual cases and toward structural changes).
combat wage abuses, and participating in impact litigation for worker rights. Worker centers are primed to collaborate with women’s rights organizations, such as 9to5 (advocates for working families), to advocate for hourly workers, which could be an important tool in the fight for equal pay.

Moreover, unions are another potential source of part-time worker advocacy. Today’s labor scholars study the unions’ struggle to rebrand themselves and make themselves relevant in the twenty-first century, given the declining rate of union membership. While the traditional union structure might not meet the needs of part-time workers, “next wave organizing” could include part-time and hourly worker advocacy, encouraging employers to provide equal hourly rates to full and part-time workers, as well as parity among female and male hourly worker schedules. Workers themselves are organizing outside the traditional union framework to bring attention to workplace fairness issues.

For example, established in 2011, Our Walmart is a worker-led organization advocating for change in the working conditions at Walmart stores. A cornerstone of Our Walmart’s action is a Declaration of Respect that calls on the Walmart Corporation to “publicly commit to respect” and “listen to its Associates and to recognize freedom of association

229. See Fine, supra note 224, at 436 (citing New York and other legislative successes).


231. See 9TO5: WINNING JUSTICE FOR WORKING WOMEN, www.9to5.org (last visited Nov. 9, 2013) (advocating for women in workplace).


233. In 2012, the rate of union membership in the private sector dropped from 6.9% to 6.6%; the combined rate of American workers (public and private) belonging to a union was 11.3%, down from 11.8% the previous year and the lowest figure ever since the Bureau of Labor Statistics started collecting the data in 1983, when the rate was 20.1%. See Economic News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Membership News Release (Jan. 23, 2013), http://www.bls.gov/news.release/union2.htm (providing union membership statistics).


and freedom of speech.” It asks for increased wages (thirteen dollars an hour) and, importantly, dependable and predictable schedules, as well as affordable health care that would ensure that “no Associate has to rely on government assistance.” According to its members, these changes would allow workers to succeed in their careers, the company to succeed in business, and customers to receive great service and value. In October 2012, Our Walmart members went on strike, a first in the company’s fifty-year history.

Hourly workers, as non-unionized workers, can also rely upon labor laws to protect their right to act collectively to negotiate and advocate with their employers for fair scheduling practices and hourly rates. The National Labor Relations Act (NLRA) protects all workers, not just unionized employees, from employer action that impinges upon their right to concerted activity, which might protect hourly workers in a variety of contexts. For example, the NLRA has been found to protect workers who communicate on social media sites from adverse action by their employers. In In re Hispanics United of Buffalo, five employees were fired after making critical remarks about their employer on Facebook; the National Labor Review Board ordered their reinstatement because it violated their right to protected concerted activity. When workers make complaints about their pay, work schedules, or other terms and conditions of employment, the NLRA might provide protection from retaliatory measures.

Given the recent judicial scrutiny imposed on class action litigation, employee-driven advocacy is needed more than ever to address growing pay inequities.

C. Renewed Government Attention to Wage Rights

In 2009, the Obama Administration publicized its commitment to wage and hour enforcement, committing additional resources for hiring


240. The argument that worker advocates should look to the NLRA for protected worker activity is strengthened by the fact that early courts looked to the NLRA in interpreting Title VII. See Franks v. Bowman Transport. Co., 424 U.S. 747 (1976) (applying NLRA caselaw in Title VII case and requiring award of retroactive seniority); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (noting that backpay provision of Title VII was modeled on NLRA, then applying standard under NLRA to Title VII that backpay ordinarily should be rewarded).
more DOL Wage and Hour Division investigators,\textsuperscript{241} engaging in a new "regulatory philosophy" of requiring employers to audit themselves to ensure they are complying with the law,\textsuperscript{242} and voicing a renewed commitment to investigate the misclassification of employees and enforcement of wage and overtime laws.\textsuperscript{243} It is hard to calculate the success of these initiatives, given that the latest report analyzing DOL enforcement measures dates back to 2008.

However, the Joint Economic Committee (tasked with reviewing economic conditions and analyzing the effectiveness of economic policy) reported on April 20, 2010, that the earnings penalty for part-time work is a significant obstacle to pay equity between women and men—a sure sign that the issue is at least on the federal government’s radar. With the help of advocates like Kim Bobo of the Interfaith Worker Justice group, who tirelessly lobbies the federal, state, and local governments to systemically address wage theft of low-wage workers,\textsuperscript{244} government officials are already becoming aware of a variety of wage abuses. Including pay equity in hourly allocation and rates is the next topic for advocates to include in their fight against wage abuses.

\section*{VI. Conclusion}

Hours equity is the new pay equity. While many low-wage worker advocates focus on living wage and pay inequalities in their fight for workplace fairness, the modern workplace requires regulation and protection in scheduling shortfalls. Scheduling fluctuations make it impossible for part-time workers to plan, budget, take additional work or responsibilities, and generally wreak havoc on their lives. This is especially true for female workers, who disproportionately represent high numbers of part-time workers and who remain at the mercy of their supervisors in scheduling hours. Hours equity would provide much-needed stability to scheduling that would allow female part-time workers to have a reliable schedule with guaranteed hours so that they make an expected amount of pay. While

\textsuperscript{241} See News Release, U.S. Dep’t of Labor, Statement by U.S. Secretary of Labor Hilda L. Solis on Wage and Hour Division’s Increased Enforcement and Outreach Efforts (Nov. 19, 2009), http://www.dol.gov/opa/media/press/whd/whd20091452.htm.

\textsuperscript{242} See U.S. DEP’T OF LABOR, Regulatory Agenda Narrative (Spring 2010), available at http://www.dol.gov/regulations/2010RegNarrative.htm ("Employers and others in the Department’s regulated communities must understand that the burden is on them to obey the law, not on the Labor Department to catch them violating the law.").

\textsuperscript{243} See News Release, U.S. Dep’t of Labor, Statement of Secretary of Labor Hilda L. Solis on Introduction of Legislation Regarding Issue of Misclassification (Apr. 22, 2010), http://www.dol.gov/opa/media/press/whd/WHD20100541.htm ("I look forward to working with the Congress to address the important issue of misclassification of workers.").

\textsuperscript{244} See Bobo, supra note 226, at 245–60 (providing avenues for addressing wage theft); INTERFAITH WORKER JUSTICE, http://www.iwj.org (last visited Nov. 9, 2013).
current statutory protections might not fully remedy these shortfalls, they have the potential to do so if courts reconceptualize hours equity as being worthy of protection. New remedies can and should be ordered to address this persistent problem facing many of our female workers today.
MOOCs AND LEGAL EDUCATION: VALUABLE INNOVATION OR LOOMING DISASTER?

PHILIP G. SCHRAG*

I. INTRODUCTION

THE MOOCs are coming. Scratch that; they are already here. Massive open online courses (MOOCs)—distance learning with interactive bells and whistles, available via the internet throughout the world—have burst upon the world of education and are proliferating rapidly. Throughout 2012, these courses were offered primarily to undergraduate students and to people who were not enrolled in any academic institution. In that year, completion of a MOOC usually did not provide credit toward an academic degree, and nearly all MOOCs were free of charge to students. But in 2013, four new developments occurred. MOOCs on legal subjects became available for the first time. Universities and MOOC-producing corporations began to create business models through which students could be charged tuition for taking MOOCs for credit toward degrees. Undergraduate institutions and some law schools began offering credit for MOOC-based courses. And a major law school announced plans for awarding online LL.M. degrees. These concurrent evolutionary changes suggest that in the future, MOOCs might become an important aspect of the law school curriculum, or that MOOCs could even displace traditional legal education.

In this article, I describe the rapid evolution of MOOCs and speculate on how MOOCs may change legal education during the next decade. MOOCs bring organized information to very large numbers of people, and much of the literature on MOOCs perceives this development as an unalloyed benefit. But while MOOCs may therefore ultimately enable more people to earn law degrees, they will likely dilute the education offered to those future lawyers. They may also hasten the demise of many traditional law schools.

Part II describes MOOCs, their nature, and the investments that have fueled them. It also reviews the literature extolling the value of MOOCs. Part III explores the search by MOOC developers for a viable business model and the current debate within universities over whether academic credit should be granted for courses taught through MOOCs. Part IV considers the possible relevance for legal education of the coming MOOC

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“avalanche”\textsuperscript{1} or “tsunami.”\textsuperscript{2} It suggests three scenarios in which law schools may respond to two simultaneous developments: the economic crisis in legal education and the rapid technological advances that have dramatically lowered the costs of distance learning. In one of these scenarios, a few elite law schools will survive, but most law schools will disappear, leaving students to learn to become lawyers by interacting with computers in their homes or with the screens on their smart phones while they jog to their gyms or jobs. But perhaps we can do better.

II. \textbf{MOOCs and Their Enthusiasts}

Distance learning is nothing new. A book offers a type of distance learning; the author is rarely face-to-face with members of her audience but can educate vast numbers of readers throughout the world through propagation of her printed words. Radio and television added another dimension to distance learning; an educator’s voice and image, as well as other sounds and images, could be spread to learners at least through the nation, and sometimes internationally. But educational broadcasting never really took off.\textsuperscript{3}

The advent of the internet significantly lowered the cost of transmitting the equivalent of video programming to large numbers of people. Every person who had access to a computer could select among an enormous amount of video content and could view it on an individually chosen schedule. Restrictions imposed by televised bandwidth, and by limited time slots for broadcasting and rebroadcasting particular content, became irrelevant, as did the inconvenience of tuning in to a broadcast from a distant time zone. The internet also made it possible for those in the “audience” to talk back or to contribute content (by posting comments on a discussion thread).

Massive open online courses\textsuperscript{4} may be just a further step in the continuum of bringing technology to education. Or they may represent such a

\begin{itemize}
  \item 3. See Andrew Delbanco, \textit{MOOCs of Hazard}, NEW REPUBLIC (Mar. 31, 2013), http://www.newrepublic.com/article/112731/moocs-will-online-education-ruin-university-experience (“From 1957 to 1982, the local CBS channel in New York City broadcast a morning program of college lectures called ‘Sunrise Semester.’ But the sun never rose on television as an educational ‘delivery system.’”).
  \item 4. See Ann Kirschner, \textit{A Pioneer in Online Education Tries a MOOC}, CHRON. OF HIGHER EDUC. (Oct. 5, 2012), http://chronicle.com/article/A-Pioneer-in-Online-Education/134662/ (noting that term has been derided as “one of the ugliest acronyms of recent years”). The term was coined in 2008 by Dave Cormier, the manager of web communications and innovations at the University of Prince Edward Island. \textit{See} Audrey Watters, \textit{Top Ed-Tech Trends of 2012: MOOCs}, HACK EDUC. (Dec. 3, 2013), http://hackeducation.com/2012/12/03/top-ed-tech-trends-of-2012-
dramatic departure from previous forms of distance learning that they de-
serve the approving phrase that their advocates use to describe them: “dis-
ruptive technology.” MOOC developers hope to disrupt is higher education as it has been practiced for at least a century.

A. What Are MOOCs?

MOOCs are internet-based courses that are built around pre-re-
corded video presentations, often by professors who are famous in their
fields, which may incorporate still images, audio recordings, or other
videos. In some MOOCs, the length of each presentation is similar to the
length of a university lecture, but in others, they may be offered as shorter
units, ten to twenty minutes each. Students can watch the lectures at any
hour of the day. But MOOCs are more than one-way presentations. They
also include assigned readings that can be perused online or printed from
a website, computer-administered quizzes and examinations, an associated
website on which students can post essays in response to assignments or
write messages to each other in virtual study groups, links to websites with
related material, and, at least for science courses, simulated laboratories.
Some MOOCs include “tools for students to plan ‘meet-ups’ with [other
students] in about 1,400 cities worldwide,” though it has been known to
happen that at the appointed time, nobody shows up.

The proliferation of MOOCs in 2012 resulted from the work of three
computer science professors at Stanford University. In 2008, Andrew Ng,
then 32, was using artificial intelligence software to enable helicopter
drones to learn to fly themselves. He was also teaching courses but dis-
liked how much of his time was taken up by grading. He thought about
how to automate higher education and concluded that, at least in the hard
sciences, computers could not only grade problem sets but could provide

5. See, e.g., Catharine R. Stimpson, On Becoming a Phoenix: Encounters with the

6. See D.D. Guttenplan, Europeans Take a More Cautious Approach Toward Online
Courses, N.Y. TIMES (Feb. 17, 2013), http://www.nytimes.com/2013/02/18/world/europe/18iht-educside18.html?_r=0. To date, MOOC development is primarily an
American phenomenon, as “the reaction in Europe is distinctly cautious” although
European educators may be “desperately playing catch-up.” See id.

7. See Laura Pappano, The Year of the MOOC, N.Y. TIMES (Nov. 2, 2012), http://
www.nytimes.com/2012/11/04/education/edlife/massive-open-online-courses-
are-multiplying-at-a-rapid-pace.html.
hints or other guidance to students who, responding to assignments on computers, were making mistakes that the computer could recognize.  

At about the same time, his Stanford colleague, Sebastian Thrun, was also turning his attention from education. Thrun, one of the world’s leading robotics experts, had increasingly done work with Google while teaching at Stanford. He founded Google’s X Lab and led the teams that developed Google’s self-driving car and Google glass. In 2011, he taught an online course on artificial intelligence which was begun by 160,000 students and completed by 23,000 students. The following year, he resigned from his tenured position at Stanford (where he still teaches on a part-time basis), to devote most of his time to educational reform through technology.  

In 2012, Ng and his Stanford computer science department colleague, Daphne Koller, founded Coursera, a for-profit company to create and offer MOOCs, and Thrun founded Udacity for the same purpose. Neither company’s founders had a clear conception of how they would make money, but start-up funding came easily to professors with genius reputations. Coursera received more than $18 million in venture capital from New Enterprise Associates and Kleiner Perkins Caufield & Byers during its months, in addition to an investment of nearly $4 million by the California Institute of Technology and the University of Pennsylvania. Udacity initially obtained $5 million from Charles River Ventures, and within a year, it had raised more than $21 million.  

MOOC corporations and universities gave grants of tens of thousands of dollars to professors willing to create MOOCs and offered the online courses for free. In short order, very large numbers of people signed up


11. See Young, supra note 8.


for some of them. By the end of 2012, the “year of the MOOC,” Coursera had more than 2 million registrants, and several of its courses had registrations of more than 100,000 students, although completion rates hovered around 12% and in some difficult courses fell to 2%. By May 2013, Coursera was offering 370 different courses and it had signed partnership agreements with thirty-three universities, including Princeton, Brown, and Columbia.

Six-digit course registration numbers for courses managed by for-profit companies soon caught the eye of professors and administrators at the nation’s most prestigious universities. Within months of the founding of Coursera and Udacity, MIT and Harvard teamed up to form a nonprofit alternative to these enterprises. With $30 million of their own funds, they started edX, invited a few other well-known colleges and universities to join them (contributing additional funds of their own), and encouraged their professors to create MOOCs. By May 2013, edX was offering thirty-three “free courses from leading universities” taught by

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15. See Pappano, supra note 7; see also Watters, supra note 4.
17. See id.
19. See Pappano, supra note 7.
20. See, e.g., Georgetown Joins Harvard and MIT’s edX to Enhance Learning on Campus, Globally, GEORGETOWN U. (Dec. 10, 2012), http://www.georgetown.edu/news/edx-georgetown.html. Georgetown University became the sixth member of edX in December 2012. See id. This author has no involvement in the Georgetown effort and is not developing or offering a MOOC.
faculty members from Harvard, MIT, the University of Texas at Austin, and the University of California at Berkeley.22

Most MOOCs offered during the first year of these companies’ operations dealt with subjects related to science and technology. Of the 370 courses offered by Coursera in May 2013, 304 were listed in fields of science and mathematics.23 Udacity listed twenty-five courses; seventeen of them were in computer science, five in mathematics, and one each in physics, psychology, and business.24 EdX listed thirty-five courses, twenty-nine of which dealt with science, mathematics, and engineering.25 The initial focus of MOOCs on the natural sciences was probably a result of two factors. First, the creators of the MOOCs were themselves experts in computer science and undoubtedly knew colleagues, both at Stanford and elsewhere, who could be interested in offering MOOCs. More important, courses in science, mathematics, and particularly computers are well-suited for MOOCs. In a computer science course, the MOOC can assign exercises such as the creation of bits of code which the student performs on his own computer while taking the MOOC, and MOOC software can instantly evaluate whether or not the task has been performed correctly. It can also respond to common errors by providing instant feedback to point the student in the right direction. In addition, science and mathematics questions tend to have correct answers, or at least less often involve matters of opinion than questions in the humanities and social sciences, so it is relatively easier for the programmer to design quizzes and tests and for the computer to grade them.

22. See id. Within the overall “edX” name, the affiliated universities are offering online courses from “HarvardX,” “MITx,” and the like. See id. Why do they use these names? Marc Bousquet, a professor of English at Emory University, suggests that these universities “are trying to have their brand cake and dilute it too by branding their Edx courses as the product of ‘Harvardx’ and MITx.” Marc Bousquet, Good MOOC’s, Bad MOOC’s, CHRON. OF HIGHER EDUC. BLOG (July 25, 2012), http://chronicle.com/blogs/brainstorm/good-moocs-bad-moocs/50361.

23. See Take Great Courses, supra note 21. Coursera itself grouped its courses by fields. See Coursera Courses, supra note 18. The 304 science courses included 42 courses in biology and life sciences, 9 in chemistry, 86 in computer science, 12 in energy and earth sciences, 21 in engineering, 43 in health and society, 35 in information, technology, and design, 3 in physical and earth sciences, 17 in physics, and 26 in statistics and data analysis. See id. Other fields with substantial numbers of Coursera courses included “humanities” (64 courses) and “education” (44 courses). See id. Coursera counts some courses in two different fields; for example, “Nutrition, Health and Life Style” was listed both in “Biology and Life Sciences” and in “Food and Nutrition.” See id.

24. See Udacity Courses, supra note 18.

25. See Take Great Courses, supra note 21. The courses that were not on natural sciences subjects were “Ideas of the 20th Century,” “The Ancient Greek Hero,” “Justice,” “The Challenges of Global Poverty,” “Copyright,” and “Age of Globalization.” See id.
B. Enthusiasm for MOOCs

Early reporting on MOOCs has featured statistics showing the impressively large numbers of students who enroll in some of the most popular courses. They include such offerings as computer science by David Malan (Harvard), with more than 100,000 participants; Ancient Greek Heroes by Gregory Nagy (Harvard) with 27,000 students, Introduction to Finance by Gautam Kaul (Michigan), with 130,000 students, and Sebastian Thrun and Peter Norvig’s Artificial Intelligence course with 160,000 enrollees. Even much smaller MOOCs, such as the Operations Management course taught by Northwestern’s Gad Allon, with 4,400 students, have audiences quite a bit larger than teachers can reach in traditional university classrooms.

Teachers who provide these offerings often express their enthusiasm. Princeton’s Mitchell Duneier offered a Coursera course on Introductory Sociology to 40,000 students. He reported that when he lectures on C. Wright Mills’s The Sociological Imagination in a lecture hall:

I usually receive a few penetrating questions. In this case, however, within a few hours of posting the online version, the course forums came alive with hundreds of comments and questions. Several days later there were thousands. Although it was impossible for me to read even a fraction of the pages of students’ comments . . . . I was quickly able to see the issues that were most meaningful . . . . I arranged live exchanges via a video chat room, in which six to eight students from around the world—some selected from the online class, others volunteers here at Princeton—participated with me in a seminar-style discussion . . . while thousands of their online classmates listened to the live stream or to recordings later.

Duneier was particularly pleased with having an international student body in which students could communicate with each other:

There were spontaneous and continuing in-person study groups in coffee shops in Katmandu and in pubs in London. . . . [Some
students) got to know those [other students whose postings on the course website revealed] a common particular interest, such as racial differences in IQ, the prisoner abuses that took place at Abu Ghraib, or ethnocentrism . . . . [One student posted a comment stating that], “It started as intellectual activity but it’s ending in an indescribable emotional relationship with all my classmates.”

Similarly, Michael S. Roth, president of Wesleyan University, intrigued “by the prospect of sharing my class with a large, international group of people who wanted to study,” taught a Coursera MOOC on The Modern and the Postmodern. He was “surprised that almost 30,000 people enrolled in the course,” but worried that because he improvises his lectures, “some silly joke I make about Freud could go viral and become my epitaph.” Nevertheless, he was impressed when, after the first lecture, he found online study groups forming in Spain, Portugal, Bulgaria, Russia, the United States, and India, and by the diversity of the ages and prior education of the students. What pleased him the most were the discussion threads, in which students reacted to the course; one talked about the class “igniting” his fire for learning, one about never having had the opportunity to attend a university. One enrolled with his mother so that they could discuss the material together, and one reported being “captured” by Baudelaire. “It’s the differences among [the students], and how they bridge those differences through social networks, that energize their MOOC experience and mine.”

Students who have written about taking MOOCs tend to report satisfaction as well. For example, Joe Alfonso, a financial planner, took Professor Kaul’s Introduction to Finance MOOC as a refresher course. He reported that: “In a weird way, you have this connection with [Professor Kaul]. You almost feel like he’s speaking directly to you.” The lecture segments were only twenty minutes long, so Mr. Alfonso could fit them in between meetings with clients. Jacqueline Spiegel, a “mother of three from New Rochelle, N.Y., with a master’s in computer science from Columbia” offered a similar observation: “You feel like you are sitting next to someone and they are tutoring you.” She tried taking in the lectures on her smart phone during a daughter’s ice skating lessons but was able to

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32. See id. Duneier later became disillusioned and stopped teaching his course. For a discussion of Duneier’s opinion, see infra note 127 and accompanying text.


34. Id.
35. See id.
37. See id.
38. Pappano, supra note 7.
concentrate better when watching them on her desktop. She also made friends with women in South Asia who were taking the same course and started an online study group for women taking science and technology MOOCs.\footnote{See id.}

A.J. Jacobs, an editor at large for \textit{Esquire} magazine, signed up for eleven MOOCs, finished the two with “lighter workloads and less jargon,” and wrote up his experience for the \textit{New York Times}.\footnote{See A. J. Jacobs, \textit{Two Cheers for Web U!}, N.Y. TIMES (Apr. 20, 2013), http://www.nytimes.com/2013/04/21/opinion/sunday/grading-the-mooc-university.html.} He gave them an overall grade of “B.” He gave them an “A” for convenience (he watched lectures while striding on his treadmill and while eating a spinach salad, and he watched some at double speed), but a “D” for teacher-student interaction (he lost a lottery for an exclusive ten-person Google hangout with a genetics professor and was not among the “handful of lucky students” who received responses from professors on the discussion boards).\footnote{See id.} Although he reported that, “[M]y retention rate was low, and I can’t think of any huge practical applications for my newfound knowledge,” he was glad that he spent the time because “MOOCs provided me with the thrill of relatively painless self-improvement and an easy introduction to heady topics. . . . [As well as] relief from the guilt of watching ‘Swamp People.’”\footnote{Id.}

But most of the published praise for MOOCs has come from “motivated students, often adults, who seek to build on what they have already learned in traditional educational settings.”\footnote{See Delbanco, supra note 3.} It is too early to assess whether they will be equally popular or valuable for more easily distracted college students (or law students).

Some of the reports on high enrollments in MOOCs include the caveat that the percentage of dropouts from such courses is very high, as Jacobs’s experience demonstrates. For example, 154,763 people signed up for an electronic circuit course offered on MITx, the precursor of \textit{edX}. But only 69,221 of them looked at the first problem set, only 26,329 received at least one point on that set, only 9,318 passed the midterm exam, and only 5,800 passed the final exam. It was possible to pass the course without passing that exam (by doing well on the problem sets), but even so, only 7,157 students completed the course successfully, a 5\% pass rate based on original enrollment.\footnote{See Sue Gee, MITx: The Fallout Rate, I PROGRAMMER (June 16, 2012), http://www.i-programmer.info/news/150-training-a-education/4372-mitx-the-fallout-rate.html.} Coursera offered a 2012 MOOC in Social Network Analysis. About 61,000 students enrolled, but only 1,303 (2\%) earned a certificate for completing it, and only 145 (.24\%) submitted a
final project of whom 107 (.17%) earned the equivalent of a certificate with distinction.\textsuperscript{45} The overall MOOC completion rate is reportedly around 10%.\textsuperscript{46}

The dropout rate does not trouble most of the MOOC enthusiasts, however. As Michael Roth explained: “[S]aying someone ‘failed to complete’ a free open online class is like saying someone ‘failed to complete’ \textit{The New Yorker} . . . . Most don’t sign up for the class or the magazine for purposes of ‘completion.’”\textsuperscript{47} In other words, it isn’t appropriate to compare the dropout rate for MOOCs to those of college courses for which students receive credit and pay tuition, or to anticipate that the dropout rate would remain so high if students received degree credit or were paying for the experience.

III. MOOCs for College Credit: The Search for a Business Model

Venture capital firms—and universities—do not usually provide services out of charitable motives. They seek revenue. To date, nearly all of the MOOCs have been provided free of charge to those taking the courses. Doing so has made good business sense for Coursera and Udacity, establishing themselves as the front-runners in what could turn out to be an important new industry. It has also made good business sense for the initial university members of edX, providing vast amounts of free publicity to them (particularly to Harvard and MIT), and even more widely spreading the brand names of schools whose brands were already known throughout most of the world.

But the three entities, as well as smaller MOOC-making companies, are frantically trying to design a business model that will produce substantial revenues—profits for the for-profit firms, and reimbursement and new revenues for the non-profit universities that funded edX. Some of the MOOC backers are patient. “We invest with a very long mind-set, and the gestation period of the very best companies is at least 10 years,” a Coursera financier said.\textsuperscript{48} But others, particularly university officials, are less patient. “We don’t want to make the mistake the newspaper industry did, of giving our product away free online for too long,” one university provost told the \textit{New York Times}.\textsuperscript{49} EdX, the non-profit, may be the least patient MOOC provider. Harvard’s online courses were free in 2011 and 2012, but Harvard planned to begin “revenue experiments” in the fall of 2013, because “[t]he university regards its thirty-million-dollar pledge [to edX]

\begin{itemize}
\item \textsuperscript{46} See Delbanco, supra note 3.
\item \textsuperscript{47} See Roth, supra note 33. It is not apparent that anyone has yet surveyed MOOC dropouts to learn why they did not complete the courses.
\item \textsuperscript{48} See Lewin, supra note 14 (quoting Scott Sandell, partner at New Enterprise Associates).
\item \textsuperscript{49} See id. (quoting Peter Lange, Provost of Duke University).
\end{itemize}
as a ‘venture capital’ type of investment, and hopes to get its money back.\textsuperscript{50}

Their thinking to date has revolved primarily around three ideas: (1) selling names and contact information for successful MOOC graduates to potential employers, (2) selling certificates of completion to those who take MOOCs, and (3) selling MOOCs for university course credit, either by licensing lectures or whole courses to universities (with the universities paying the companies for the rights), or by persuading universities to accept MOOCs for course credit, with the students paying the companies for credits that they could use at any of several universities.\textsuperscript{51} Under either of these university course-for-credit models, both the MOOC companies and the universities would share in the revenues from tuition. Under the first of those course credit plans, a university would pay either a flat fee or a per-student fee for its students to take a MOOC for credit, and the university would charge the student, just as universities do now for students in residence. Under the other plan, the individual student would pay “tuition” to the MOOC provider and would receive transfer credits that could be applied toward a degree at any university that is willing to accept them, just as high school students who take advanced placement courses or college students who transfer to another school receive credit for courses taken elsewhere.

A. Selling Customer Information

One early foot in the door into the world of profit is the relationship that Udacity is building with corporate employers, particularly those in the high-tech world, where Udacity’s courses are concentrated. The company is already selling contact information for its “high performing students” to Facebook and Twitter, among others.\textsuperscript{52} Udacity charges less than employers would have to pay professional talent-hunting companies for similar referrals.\textsuperscript{53}

Coursera has gotten into this business as well. When a company is looking for an entry-level candidate with particular skills, it contacts Coursera, which emails one of its students to obtain consent. The company introduces the student to the employer, and when an employment offer is


\textsuperscript{51} See Jeffrey R. Young, \textit{Inside the Coursera Contract: How an Upstart Company Might Profit from Free Courses}, CHRON. OF HIGHER EDUC. (July 19, 2012), http://chronicle.com/article/How-an-Upstart-Company-Might/133065/. Selling banner ads along with educational material has also been mentioned as a possible revenue source for MOOC providers but does not seem likely to flourish, at least so long as university professors are providing the content or universities are offering credit for taking the courses. \textit{See id.}

\textsuperscript{52} See Lewin, \textit{supra} note 14.

\textsuperscript{53} See Delbanco, \textit{supra} note 3.
accepted, the employer pays Coursera a finder’s fee, a portion of which goes to the university whose faculty member designed the course.\footnote{See id. One author has suggested that selling lists of successful students to corporate recruiters “could raise privacy concerns.” See Mangan, supra note 9. But presumably obtaining student consent eliminates that problem. See id.}

B. Selling Certificates of Completion

Coursera gives away or sells certificates of completion to students who complete its courses. Presumably students who purchase the certificates believe that the credential will help them to gain employment, and company officials may hope that the certificates will eventually become alternatives to college or university degrees, at least in specialized, technical fields, which would give them great value. At least some of these certificates are issued jointly by Coursera and by the university of the professor who taught the course.\footnote{For a discussion of these certificates, see infra note 59 and accompanying text.}

Actually, Coursera offers at least three different kinds of certificates. The basic certificate, a “Statement of Accomplishment,” is, at present, free of charge to those who sign the “honor code” electronically and satisfy the course requirements (which may include homework, tests, and a final examination). The Coursera “Honor Code” states that “My answers to homework, quizzes and exams will be my own work,” that the student “will not make solutions to homework, quizzes or exams available to anyone else” and that the student will “not engage in any other activities that will dishonestly improve” the student’s results.\footnote{See Honor Code, COURSEa, https://www.coursera.org/about/honorcode (last visited Nov. 10, 2013).} At least at present, Coursera does not police compliance with the code for those who receive the basic certificate, so it is possible for a student to cheat by having someone else help with the tests or even sign in with the student’s account and complete the tests online.

At the second level, a “Statement of Accomplishment with Distinction” is provided, also at no charge, to students who do extra work. For example, in one of Coursera’s first forays into legal education, its course on International Criminal Law taught by Professor Michael P. Scharf of Case Western Reserve University, students who viewed all eight video sessions and correctly answered at least six of the ten true-false questions on the final examination received the basic Statement of Accomplishment, but those who posted at least five online submissions of at least 200 words received statements “With Distinction.”\footnote{See Michael Scharf, Introduction to International Criminal Law, Syllabus, COURSEa, https://class.coursera.org/intlcriminallaw-001/wiki/view?page=syllabus (last visited May 14, 2013).}

At the third level, revenue from the student plays a role. Coursera has created a “Signature Track” through which a student can earn a “Verified
Certificate” of Accomplishment.58 Students in Professor Scharf’s course could earn a Verified Certificate of Accomplishment by paying $49, an “introductory price” discount from the “regular” $69 price.59 According to Coursera, this certificate would constitute “official recognition” from Case Western Reserve University which could help someone who had completed the course to “Build your qualifications and prove yourself in something new.” The certificate would enable its holder to highlight your course on “your resume or CV and along with applications,” and “anyone you choose” can see your detailed score, the course syllabus, and workload.60

Coursera has developed a system to make it likely that the person who receives a “verified” certificate is actually the person who took the course. During one of the first few course sessions, the student must communicate his or her “personal typing pattern” to Coursera:

Much like your handwriting style, your typing pattern is unique to you. As part of your Signature Profile, you’ll capture your personal typing pattern, which includes the time between your keystrokes and the amount of time you press a key down (in milliseconds).

To create a sample of your typing pattern, you’ll type a short sentence (provided by our system) into a special field twice.

Our system will learn to recognize your personal typing pattern, which you can then begin to use to link your coursework to your identity.61

In addition, the student must transmit electronically to Coursera a headshot taken by a webcam, and a copy of a passport or government-issued photo identification. Each time the student submits homework or completes a test, the student must provide a typing sample, a webcam


59. See Signature Track Guidebook, COURSEERA, https://www.coursera.org/signature/guidebook (last visited May 15, 2013) [hereinafter COURSEERA Guidebook]. The price of a verified certificate depends on the course, and currently the fee may be as high as $100. See id.; see also Empson, supra note 58. Coursera has its own financial aid program. See COURSEERA Guidebook, supra. Students may apply for financial aid electronically. See id. The application process requires them to show that “paying the cost of joining a course’s Signature Track would cause economic hardship. . . . [And] that the Verified Certificate is of significant value to [the student’s] education or career.” Id. The applicant must also “[d]emonstrate values of academic integrity and contribute positively to the course’s community.” Id.


61. COURSEERA Guidebook, supra note 59.
photo, or both to confirm that the person submitting the work is the person in whose name the verified certificate will be issued.\textsuperscript{62} According to one user, however, “this system is not without its flaws. It can easily be circumvented by merely giving your login credentials to another test-taker and having them ‘Save Answers.’ Then the registered student can login again and just ‘Submit Answers’ anytime before the deadline.”\textsuperscript{63} Presumably Coursera and others will develop even more secure verification systems as students exploit weaknesses in the companies’ current methods.

C. Selling MOOCs for Course Credit

Until substantial numbers of employers begin to regard MOOC certificates as valid substitutes for university education, sales of $69 certificates are unlikely to provide the revenues to fuel a new industry. The prospect of offering degree credit for MOOCs is therefore far more likely to generate significant revenues, but for several reasons, it is a controversial proposition. The concerns that objectors have raised involve the integrity of the grading process, uncertainties about the quality of the courses, and the concern that widespread acceptance of MOOCs will destroy many long-established educational institutions, starting with community colleges and small, lower-prestige four-year colleges.

Even though MOOCs are a very new phenomenon, and MOOCs for credit are an even newer idea, some institutions of higher education are already offering credit for MOOC completion. In September 2012, the Global Campus of Colorado State University\textsuperscript{64} announced that it would give three course credits to transfer students who successfully completed Udacity’s MOOC in “Introduction to Computer Science: Building a Search Engine,” an offering with 200,000 enrollees. To receive the credit, students would also have to take a test that is proctored online.\textsuperscript{65} The cost for the college credit would be only $89, compared with the usual $1050

\textsuperscript{62} See id. EdX has announced that it will also sell verified completion certificates. See ID Verified Certificates of Achievement, EdX, https://www.edx.org/verified-certificate (last visited Oct. 4, 2013).

\textsuperscript{63} See The Coursera Signature Track Experience, School Is Broken (Nov. 10, 2013 3:00 PM), http://brokenschool.wordpress.com/2013/04/21/the-coursera-signature-track-experience/.

\textsuperscript{64} The Global Campus is the university’s completely online school; it is accredited and offers both undergraduate and master’s degrees. See Katherine Mangan, A First for Udacity: A U.S. University Will Accept Transfer Credit for One of Its Courses, Chron. of Higher Educ. (Sept. 6, 2012), http://chronicle.com/article/A-First-for-Udacity-Transfer/134162/.

\textsuperscript{65} See Tamar Lewin, Colorado State to Offer Credits for Online Class, N.Y. Times (Sept. 6, 2012), http://www.nytimes.com/2012/09/07/education/colorado-state-to-offer-credits-for-online-class.html; see also For Credit Frequently Asked Questions, Udacity, https://www.udacity.com/for-credit-faq (last visited Oct. 18, 2013) [hereinafter Udacity for Credit FAQ] (web page has since been updated, but PDF version is on file with Villanova Law Review). Regarding testing, see infra notes 83–113 and accompanying text.
charge for a three-credit course at the university. A month later, San Jose State University announced that together with Udacity, it would create four mathematics courses and a psychology course. Four of the courses would be offered for college credit—one three-credit course, and four for the course in Introduction to Programming. The courses would cost only $150 each, compared to $450 to $750 that students would pay for taking the courses in a San Jose State classroom, and Udacity would pocket 49% of the net revenue, with the university keeping the rest. The credits earned online would be honored at California State University campuses, and according to Udacity, “[t]he course credits should be transferable to most U.S. universities and colleges.” Shortly thereafter, the California State University system announced a collaboration with edX, in which a course called “Circuits and Electronics,” taught by three MIT professors, including Anant Agarwal, the edX president, would be offered to students at eleven of the state university’s campuses.

It wasn’t long before California public officials weighed in to support MOOCs as the answer to problems of high cost and unsatisfied demand in the California system of higher education. The president pro tempore of the California State Senate introduced a bill to require educational officials to provide fifty online courses for the most oversubscribed lower division offerings at the University of California, California State, and the state’s community colleges. Sebastian Thrun, Udacity’s founder, “was involved in discussions that led to the bill.” The bill would have allowed commercial providers such as Udacity and Coursera to create the courses.

66. See Steve Kolowich, A University’s Offer of Credit for a MOOC Gets No Takers, CHRON. OF HIGHER EDUC. (July 8, 2013), http://chronicle.com/article/A-Universi
tys-Offer-of-Credit/140131/.
67. See Udacity for Credit FAQ, supra note 65.
68. See California State U., supra note 14.
69. Udacity for Credit FAQ, supra note 65 (emphasis added). Udacity adds, however, “For confirmation of transferability, please check directly with the registrar of the institution you would like to transfer credit to on their transfer policy.” Id.
71. Actually, the San Jose/Udacity partnership was reportedly initiated by a call from Governor Jerry Brown to Udacity’s Sebastian Thrun. See Tamar Lewin & John Markoff, California to Give Web Courses a Big Trial, N.Y. TIMES (Jan. 15, 2013), http://www.nytimes.com/2013/01/15/technology/california-to-give-web-courses-a-big-trial.html?_r=0.
but a panel of faculty members would have to approve them. As amended shortly thereafter, the bill would, among other things, have required academic officials to:

Develop a list of the 50 most impacted lower division courses [defined as those courses in the state higher education system for which demand most outstrips the supply of seats] . . . . [F]acilitate partnerships . . . between online course technology providers and faculty of [the state system] . . . with the goal of significantly increasing online course options for students for the fall term of the 2014–15 academic year. . . . [Such courses] shall be deemed to meet the lower division transfer and degree requirements for the University of California, the California State University, and the California Community Colleges.

Each course would have required association by a faculty “sponsor,” but the bill did not require that a faculty member teach the course. The bill was put on the “back burner,” however, when California’s state universities “promised to expand their own online courses” rather than relying on content provided by profit-making companies. Florida, however, did pass a MOOC law. It requires state officials to write regulations, within two years, that will allow MOOCs taken before entry into college to be used for college credit.

On the national level, the turn toward MOOCs for credit took a major step forward when the American Council on Education, the “nation’s most visible and influential higher education association,” with 1,800 members (most of them colleges and universities) endorsed five Coursera MOOCs for credit. This endorsement was touted as a move that “could make the economic significance of MOOCs more tangible.” The Council was also in the process of reviewing Udacity courses, and it has received


76. See id.


funds from the Bill & Melinda Gates Foundation to study how the courses
could improve post-secondary education. \footnote{See id.}

In May 2013, Coursera took a further giant step in the direction of
making money by providing MOOCs for credit. It announced partner-
ships with ten large public university systems, including the State
University of New York, the University of Tennessee, and the University of
Colorado, to create MOOCs that students could take for credit at schools
beyond the campuses of the originating system. Coursera would earn $30
to $60 per student per course taken at a school that had not created the
MOOC. \footnote{Tamar Lewin, \textit{Universities Team with Online Course Provider}, N.Y. Times (May
30, 2013), http://www.nytimes.com/2013/05/30/education/universities-team-
with-online-course-provider.html?_r=0.}

\section*{D. Resistance to MOOCs for Credit: The Testing and Grading Problem}

MOOCs for credit have momentum, but there has been resistance to
their acceptance by universities. The first problem is a technical one in-
volving testing and grading. Universities insist ferociously on honest work
by their students and fair grading of their work by teachers or at least by
their graduate student assistants. But how could honesty be assured for a
class of 100,000 students taking tests on their computers, and how could so
many students’ work be graded fairly? The testing problem threatened to
derail the MOOC movement before it could thrive.

As noted above, Coursera is attempting to verify the identities of stu-
dents submitting work by having students submit pictures of themselves
and samples of their typing (measuring the “milliseconds” between entries
of letters on their keyboards) whenever they submit work. Once any bugs
are removed from this system, it might be regarded as a sufficient safe-
guard for the granting of “verified” certificates from the company, but it is
doubtful that universities will have enough faith in this method of proctor-
ing to award college credit on that basis. The MOOC providers are, there-
fore, working on two other fronts to provide proctored examinations to
vast numbers of students.

One method is to hire a proctor to watch an individual student take
an online examination with a webcam trained on the student. While hir-
ing a proctor to observe a single student is considerably less cost-effective
than hiring a proctor to monitor an entire room full of students, the cost
is not prohibitively expensive, particularly if the student (or the university)
is being charged hundreds of dollars for the course. In addition, small
numbers of students can be assigned identical test times, and one proctor
with several screens can monitor up to six students simultaneously. \footnote{Anne
Eisenberg, \textit{Keeping an Eye on Online Test-Takers}, N.Y. Times (Mar. 3,
2013), http://www.nytimes.com/2013/03/03/technology/new-technologies-aim-
to-foil-online-course-cheating.html.} Both Udacity and Coursera have contracted with “ProctorU,” a company that
supplies proctors to observe students taking online examinations. The student makes an appointment in advance with ProctorU. As the examination is about to begin, the student allows the proctor to observe him over a webcam, shows government-issued photo identification, answers personal questions from the proctor that the proctor has compiled from “a public information database,” and lets the proctor observe, on the proctor’s computer screen, whatever the student is typing on his or her own screen.\footnote{See How Online Proctoring Works, ProctorU, http://www.proctoru.com/howitworks.php (last visited May 15, 2013); see also Udacity for Credit FAQ, supra note 65 (showing Udacity using ProctorU); ProctorU Testing Center, Coursera, http://www.proctoru.com/portal/coursera/ (last visited Feb. 17, 2014) (showing Coursera using ProctorU).}

One measure of the low cost of providing proctors is Udacity’s statement that if a student fails to make an appointment for a proctored examination in one of the courses at San Jose State, “the student can connect to a proctor on demand for a late fee of $8.75.”\footnote{See Udacity for Credit FAQ, supra note 65.}

More realistically, perhaps, Coursera plans to charge each student a $60 to $90 proctoring fee in the courses it plans to provide for college credit.\footnote{See Eisenberg, supra note 83.}

While online testing at a time of the student’s choice is convenient, and proctors might confirm the identity of a test-taker through photography and observation,\footnote{One expert has opined that computer monitoring, including photography, screen-sharing, and confirming typing styles of test-takers “may end up being as good—or even better—than the live proctoring at bricks-and-mortar universities.” See Eisenberg, supra note 83 (citing Douglas H. Fisher, computer science professor at Vanderbilt University).}

this method cannot prevent students who have taken an examination from sharing the questions with those who take it later. Moreover, “researchers at Ohio University found that students in fully online psychology courses who signed an honor code promising not to cheat broke that pledge at a significantly higher rate than did students in a ‘blended’ course that took place primarily in a classroom.”\footnote{Steve Kolowich, Far from Honorable, Inside Higher Ed (Oct. 25, 2011), http://www.insidehighered.com/news/2011/10/25/online-students-might-feel-less-accountable-honor-codes.} So the providers are also experimenting with requiring MOOC students to take proctored examinations simultaneously, in person, rather than on line. To provide proctoring for large numbers of students throughout the world, they needed testing centers in many places, just as the College Board has testing centers throughout the world that simultaneously administer the SAT to tens of thousands of college applicants. Private enterprise has already rushed to fill that niche. Both Udacity and edX have
contracted with Pearson VUE testing centers, which administer proctored tests at 4,400 test centers in more than 160 countries.

Proctoring is one thing, grading quite another. Computers can easily grade unlimited numbers of true-false or short answer questions, as well as mathematics and science examinations in which the answers consist of numerical values. But although MOOCs got their start from computer scientists, non-credit MOOCs have spread to the humanities and social sciences and, as we shall see, to law. In these fields, evaluation has historically required students to write term papers and to take examinations that require essays as answers. How can a MOOC grade tens of thousands taking such courses?

One answer is that the courses might no longer require essays. This is the route taken by the non-credit MOOCs, such as the one given by Professor Scharf, in which the final examination consisted of ten true-false questions. Short answer testing may not satisfy the educational standards of professors or universities, although one Harvard professor who offers a MOOC on Ancient Greek Heroes through edX believes that “multiple-choice questions are almost as good as essays . . . because they spot-check participants’ deeper comprehension of the text. . . . [The computer] explains the right response when students miss an answer. . . [And] lets them see the reasoning behind the correct choice when they’re right.”

Recognizing this fact of life, the MOOC providers are trying to develop artificial intelligence software that can grade essay tests instantly. EdX announced that it has already “introduced such a system and will make its automated software available free on the Web to any institution that wants to use it.” According to the edX announcement, students using the edX software will be required to type their examinations, enabling the computer to analyze them. MOOC teachers will then grade 100 of the essays manually, using either a letter or numerical grading system. The computer will compare any further essays that are submitted to the 100 graded essays and assign grades based on its analysis, apparently comparing the new essays to those that were graded by the professor. Anant Agarwal, the president of edX, claimed in April 2013, that its

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91. See Heller, supra note 50 (quoting Gregory Nagy).


93. See id.
software was already “good enough” and that “the quality of the grading is similar to the variation you find from instructor to instructor.”94

Although edX’s announcement made news around the world, edX’s website does not discuss the essay-grading project, describe whether Dr. Agarwal’s assessment was based on validation of its software, or, if so, whether the software has been tested with lengthy essays on complex topics in the humanities or social sciences (such as moral philosophy, race relations, or the causes of a war), or whether it was tested only with short essays of the type written in high schools.95

There is reason to be skeptical, however, about the ability of present-day computer software to grade subtle or complex essays at the college level, and it is noteworthy that the edX announcement did not suggest that its software was “good enough” for coursework that would be graded for credit. Actually, educators and computer specialists, including those at the Educational Testing Service,96 have done a great deal of experimentation with and evaluation of computer-scored essays, but nearly all of this work has involved middle school or high school level work.97 Typically, the people who evaluate computer scoring compare how well the grades assigned by computers correlate with the grades independently assigned by human graders, and at least with short middle school and high school essays, they report a high degree of correlation, while warning that “agreement with human ratings is not necessarily the best or only measure of students’ writing proficiency.”98 One recent experiment did extend computer scoring to the college level, though not to a graded course. It evaluated computer grading of a one-hour freshman English placement test administered at a large Midwestern university to see whether the agreement between the computer’s grades and the average of the six human scorers of the same essays was greater or less than the agreement among the six human graders. It concluded that “the computer model out-

94. See id.
96. Educational Testing Service research on computer graded essays is available online at http://www.ets.org/research/topics/as_nlp/written_content/.
98. See Shermis, supra note 97, at 26; see also Brent Bridgeman, Human Ratings and Automated Essay Evaluation, in HANDBOOK OF AUTOMATED ESSAY EVALUATION: CURRENT APPLICATIONS AND NEW DIRECTIONS 221, 229 (Mark D. Shermis & Jill Burstein eds., 2013) (“The gold standard for developing and evaluating automated essay scoring engines has traditionally been agreement with a human rater when both humans and the machine are evaluating performance on the same prompt [that is, in response to the same question]. Although this standard has the advantage of being relatively easy to compute, it is overly simplistic.”).
perform[ed] the multiple human judges” but it noted that the placement test was a “low-stakes venture,” meaning that college grades did not depend on it, and that “it is possible to ‘fool’ the computer into giving a high grade to a poorly written essay,” although “the probability of this being done by a poor writer is small.”99 An additional concern is that computers may grade essays by members of minority groups differently than human graders. The Graduate Record Examination (GRE) uses computers as a check on human scorers; if the computer’s grade is very different from that of the human, a second human scorer is called in. The variations between machine and human scorers are greatest for African-American men, who receive slightly higher scores from human graders.100

Despite these concerns, machine scoring is capturing the popular imagination because apart from its possible application to MOOCs, improved machine scoring could save hundreds of hours a year for vast numbers of teachers (particularly high school teachers). And if MOOCs for credit become the norm, computer grading of essays could make all the difference, for it is obviously impossible for a professor to grade tens of thousands of students who take an essay-type of examination. The New York Times article reporting on the edX announcement also reported on a contest run by the Hewlett Foundation in 2012, making the connection between the work currently being done on machine-scored high school essays and what may be in store for MOOCs. The foundation provided two $100,000 prizes to computer experts who could best improve software to grade essays. More than 150 teams competed, using nine “scoring engines” that had been developed by corporations, non-profit organizations, or universities.101 Vik Paruchuri was one of the two winners, and edX promptly hired Paruchuri to design its software. The supervisor of the competition was Mark D. Shermis, a University of Akron professor who has written extensively about essay-grading software.102 Along with Ben Hamner of Kaggle, a “big analytics” software company,103 Shermis authored a paper about the contest, evaluating the software that was used. Shermis and Hamner concluded that, “the scores of the automated essay scoring engines performed quite well. Most of the mean predictions were within 0.10 of the means of the [human] score.”104 This paper itself received almost as much international attention as the edX announcement,105 and it was featured in the New York Times article about the edX announcement.

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100. See Bridgeman, supra note 98, at 228.
101. See Shermis & Hamner, supra note 97.
102. See Markoff, supra note 92.
104. See Shermis & Hamner, supra note 97, at 24.
announcement that machine grading was “good enough” and “nearing the capability of human grading.”

Shermis and Hamner were careful to qualify their claims: “Automated essay scoring appears to have developed to the point where it can be reliably applied in both low-stakes assessment (e.g., instructional evaluation of essays) and perhaps as a second scorer for high-stakes testing.” But despite their qualification and the fact that most of the research has been limited to middle school and high school level work, both their paper and the whole concept of computer-scored essays have been the subjects of intense criticism, of two types.

First, some educators don’t believe that computers can appreciate the subtleties of student writing as humans can, or that they will be able to do so in the foreseeable future. As one secondary school teacher put it:

No software can or will ever be able to discern the stuff that rests between the lines of poetry and prose. . . . The things left unsaid, or the ambiguous, evocative clues, are as or more important than what is committed to paper. . . . The EdX people . . . [threaten] to dehumanize and digitize a significant part of education, from pre-school to post-graduate. . . . Essay-grading software is a horrifying affront to the students whose work is thusly judged. . . . The least important aspects of their work are the things that software can analyze. Grammar, spelling, punctuation, syntax, the extent to which their writing conforms to ‘standard’ essay structure . . . Yawn. Who cares? I want to know their ideas, their spirits, their hearts, their doubts and their fears.

In a similar vein, the National Council of Teachers of English issued a position statement stating that:

[High-stakes writing tests] erode the foundations of excellence in writing instruction . . . . [Because they] ignore the ever-more
complex and varied types and uses of writing found in higher education. These concerns . . . are intensified by the use of machine-scoring systems . . . . Machines might reduce the costs otherwise associated with the human labor of reading, interpreting, and evaluating the writing of our students. . . . [But] computers are unable to recognize or judge those elements that we most associate with good writing (logic, clarity, accuracy, ideas relevant to a specific topic, innovative style, effective appeals to audience, different forms of organization, types of persuasion, quality of evidence, humor or irony, and effective uses of repetition, to name just a few). . . . [Computer grading also] sends a message to students that writing is not worth their time because reading it is not worth the time of the people teaching and assessing them.109

The other critique of computer-graded essays directly challenges the research that has evaluated the current generation of software. For example, Les C. Perelman, formerly MIT’s Director of Writing Across the Curriculum, and currently an MIT researcher, published a lengthy critique of the Shermis and Hamner study.110 Perelman argues that the experimental design and analysis were flawed, that some of the student essays used for the research were really reading tests, not writing tests, and that different measures were used to assess the differences between human readers and the differences between the computers and the human readers. “The study clearly does not demonstrate that machines can replicate human scores,” he concludes.111 “Indeed, comparing the performance of human graders matching each other to the machines matching the resolved score still gives some indication that the human raters may be significantly more reliable than machines.”112

Similarly, a group called “Professionals Against Machine Scoring of Student Essays in High-Stakes Assessment” has published an annotated bibliography of critiques of computer-evaluated essay writing. Among other things, this organization cites works that argue that:

[M]achines cannot score writing tasks long and complex enough to represent levels of writing proficiency or performance acceptable in school, college, or the workplace . . . students who know that they are writing only for a machine may be tempted to turn

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111. Id. at 10.
112. Id.
their writing into a game to fool the machine into producing a higher score, which is easily done . . . [and] teachers are coerced into teaching the writing traits that they know the machine will count—surface traits such as essay length, sentence length, trivial grammatical mistakes, mechanics, and topic-related vocabulary—and into not teaching the major traits of successful writing—elements such as accuracy, reasoning, organization, critical and creative thinking, and engagement with current knowledge.\textsuperscript{113}

Even Elijah Mayfield, a defender of computerized essay grading (and the founder of LightSIDE labs, which competed in the 2012 grading machine competition), was horrified by the edX announcement, as reported in the press. “[T]he popular claims bear only the foggiest resemblance to academic results,” he wrote.\textsuperscript{114} “It’s unclear to me whether the misunderstanding is due to edX intentionally overselling their product for publicity, or if something got lost in translation while writing the story. . . . It’s dangerous and irresponsible for edX to be claiming that 100 hand-graded examples is all that’s needed for high-performance machine learning.”\textsuperscript{115} Mayfield suggests that computer-graded learning can supplement other instruction by providing feedback to students during a course, but notwithstanding the “aggressive claims” of edX, is not yet at the stage where it can be used to provide students with a final grade.\textsuperscript{116}

E. Resistance to MOOCs for Credit: Doubts About Educational Quality

The other basis for resistance to MOOCs has come from educators who worry not only about testing but also about the quality of the education. They do not question the caliber of the often highly polished lectures delivered by MOOCs through the medium of videos, but rather whether students can learn as much by watching such lectures—even when MOOCs are enhanced with computer-delivered quizzes and on-line discussion groups—as they can in a traditional classroom.

The backlash apparently began at Amherst College in April 2013, when by a vote of seventy to forty-one, the faculty rejected an offer, sup-


\textsuperscript{115.} See id.

\textsuperscript{116.} See id. EdX’s chief engineer on the machine-grading project, Vik Paruchuri, gave an interview that led the interviewer to conclude that the software “is not ready for grading papers, and—at least for now—is not intended to be that sort of tool.” Michael Fitzgerald, Automated Essay Grading Software Stirs Debate, INFO. WEEK (Aug. 5, 2013), http://www.informationweek.com/education/instructional-it/automated-essay-grading-software-stirs-d/240159419.
ported by the college president, to join the edX consortium. A few days later, the Department of Philosophy at San Jose State, one of the first universities to commit to using MOOCs to lower costs, issued a statement announcing that its teachers would not use materials from the edX course “Justice” offered by Harvard’s superstar professor, Michael Sandel. The statement objected to the educational methodology, saying that the prepackaged MOOCs are a “serious compromise of quality of education” for several reasons. First:

Students benefit enormously from interaction with professors engaged in [specialized] research. . . . [I]n classes, independent studies, and informal interaction, they are provided the opportunity to engage a topic deeply . . . . [But the] core of edX’s JusticeX is a series of videotaped lectures that include excerpts of Harvard students making comments and taking notes.

Second, “familiarity with one’s own students [is] simply not available in a one-size-fits-all blended course produced by an outside vendor.”

Third, “the thought of the exact same social justice course being taught in philosophy departments across the country is downright scary—something out of a dystopian novel” because each such department has its own “specializations and character.” Finally, the advent of MOOCs will mean the creation of two classes of universities: well-funded universities in which “privileged students get their own real professor” and other schools “in which students watch a bunch of video-taped lectures and interact, if in-

117. See Nick Anderson, As Amherst Rejects Online Lecture Model, Educators Ponder What’s to Gain from Trend, WASH. POST (May 1, 2013), http://articles.washingtonpost.com/2013-05-01/local/38945447_1_moocs-edx-coursera. Quite likely, the rejection would have been even more resounding if the proposal had come from Coursera or Udacity. At Stanford, which affiliated with Coursera:

[T]he single most important piece in this controversy [in the Faculty Senate] was the number of faculty in our department who felt blindsided by being encouraged to do this wonderful altruistic thing, making the material available to the world, only to find that there were two [for profit] companies being started on that basis.


Faculty concerns with the profit-making nature of the enterprise might dissipate, however, because the provost has promised that, “Any income that comes in will be shared among the faculty creator and his or her department and school,” although he added that: “We have not settled on what the appropriate percentages should be.” Id.


119. See id.

120. See id.
deed any interaction is available on their home campuses, with a professor [who has become] a glorified teaching assistant.”121

A few days later, after its Arts and Sciences faculty voted against the proposal, Duke University withdrew from a project called “Semester Online” in which, along with a group of other schools, it planned to create “live online courses” that students could take for credit.122 Several days after that, American University announced a “moratorium on MOOCs.” During the moratorium, individual faculty members were permitted to give online lectures but could not teach full online courses, could not offer online lectures for which students would have to pay or from which students would receive a certificate or credit, and could not engage in grading or assessment of the students.123 And the California Faculty Association, representing more than 23,000 teachers, supported the San Jose State teachers by stating that it was “alarmed by the expressed preference” of the University’s president for “private rather than public solutions” at California State University.124 It also cited research by Shanna Smith Jaggers reporting that “while some students favor online education for various reasons, there is a strong underlying pattern: Most students [do] not feel they learn the course material as well when they took it online.”125

121. See id. There appears to be some controversy about whether the administration at San Jose State, which had contracted with edX, had been putting pressure on the philosophy department to use the Sandel course. The provost said that no one had required the department to do so, but several professors said that there had been “administrative pressure” to offer the course to students. After the philosophy department rejected the course, the administration arranged for the English department to offer it, which caused the chair of the philosophy department to express concern that professors not trained in philosophy would have to rely particularly strongly on edX materials. See Tamar Lewin, Professors at San Jose State Criticize Online Courses, N.Y. Times (May 2, 2013), http://www.nytimes.com/2013/05/03/education/san-jose-state-philosophy-dept-criticizes-online-courses.html?_r=0.


Some of the resistance to MOOCs may reflect university teachers’ fears that they will be displaced—perhaps actually fired—if their courses are taught online by superstars from elite institutions, such as Professor Sandel.\textsuperscript{126} A variant of this objection is the fear that MOOCs may prompt legislatures to cut their support for state universities. Princeton’s Michael Duneier, who was once one of the leading MOOC enthusiasts, stopped teaching his Coursera sociology MOOC when the company asked him to license his course to colleges. He came to believe that state legislatures would use the advent of courses such as his to reduce their support of higher education, and he revealed “serious doubts about whether or not using a course like mine [in a university, rather than for free adult education] would be pedagogically effective.”\textsuperscript{127}

Even if professors who are leery about MOOCs are motivated in part by employment concerns, the concerns they raise may be valid. First, the professors usually note that although MOOCs may include discussion groups, online quizzes, and tests, they primarily offer the delivery of content through lectures (in some cases with associated readings) that offer little or no opportunity for interaction with the audience. Because interaction is so limited, students lack the incentive that arises from human contact to do more than the minimum amount of studying necessary to pass a course.\textsuperscript{128} They point out that traditional university educations provide much more than informational lectures in that they offer, among other resources and institutions, small group student discussions, both in the classroom and, importantly, in dorm rooms and coffee shops; clubs,

\textsuperscript{126} The jobs of the teachers at non-elite schools may not be the only jobs threatened. If professors at those schools lose their jobs to MOOCs, there will be even less incentive than there is now for students to enter Ph.D. programs at elite universities with the hope of becoming professors elsewhere. As Ph.D. programs shrink, the faculties of the elite universities will shrink as well. “And every time the faculty shrinks, of course, there are fewer fields and subfields taught. . . . [And] bodies of knowledge are neglected and die.” Heller, supra note 50.

\textsuperscript{127} Marc Parry, A Star MOOC Professor Defects—At Least for Now, CHRON. OF HIGHER EDUC. (Sept. 3, 2013), http://chronicle.com/article/A-MOOC-Star-Defects-at-Least/141331/. For further information regarding Professor Duneier’s enthusiasm for non-credit MOOCs, see supra notes 31–32 and accompanying text.

\textsuperscript{128} Even some of the people most enthusiastic about MOOCs acknowledge this problem. Rich Seiter, who has completed 35 MOOCs, “often does minimal work on the essays he submits in courses that require them, and that based on the essays he has seen in peer grading, other students seem to be doing the same.” Young, supra note 4.
sports teams, and other social activities; physical rather than virtual laboratories; professors' office hours in which students and teachers at least occasionally talk one-on-one; placement offices; health clinics; learning disability experts; athletic facilities; and financial aid advisors. Second, they claim that despite their stated goal of democratizing higher education by offering quality courses to everyone, MOOCs will inevitably lead to a two-tier system of education: education on campuses for the well-off, and, for everyone else, “an industrialized version of higher education that . . . could replace mid-sized state institutions or less-selective private colleges.”

In addition, these professors worry that minorities will fare less well as the trend toward online education accelerates.

MOOC enthusiasts dismiss these concerns by observing that the higher education system in the United States already has two tiers (separated largely by the income and educational levels of the students’ parents), and that the critics of MOOCs are unaware of the extent to which university education has already become industrialized for those who do not attend elite liberal arts colleges. “At most institutions, students are in mostly large classes, listening to second-rate lecturers, with very little meaningful faculty student interaction,” according to Professor Robert Archibald of the College of William and Mary. This argument was reiterated in a recent New Yorker article on MOOCs:

The vast majority of people who get education beyond high school do so at community colleges and other regional and non-selective schools. . . . The teachers there . . . may seem restless and harried. Students may, too. Some attend school part time, juggling their academic work with family or full-time jobs . . . . [This] accounts for about eighty per cent of colleges in the United States.

MOOCs are especially advantageous to students for whom trips to a campus make such “juggling” difficult, and who may need more years to obtain a degree than most colleges allow. In addition, the advocates of MOOCs argue that as a nation, we simply can’t afford the type of education we might like to offer to more people, so the world of higher education should be further divided into elite and non-elite categories. According to John Hennessy, the president of Stanford, “If elite universities were to carry the research burden of the whole system, less well-funded schools could be stripped down and streamlined. Instead of hav-

129. Scott Carlson & Goldie Blumenstyk, For Whom Is College Being Reinvented?: ‘Disruptions’ Have the Buzz but May Put Higher Education out of Reach for Those Students Likely to Benefit the Most, CHRON. OF HIGHER EDUC. (Dec. 17, 2012), http://chronicle.com/article/The-False-Promise-of-the/136305/. David Stavens, a Udacity founder, predicted that “the top 50 schools are probably safe.” Id.

130. See Smith Jaggers, supra note 125.

131. See Carlson & Blumenstyk, supra note 129.

132. Heller, supra note 50.
ing to fuel a fleet of ships, you’d fuel the strongest ones, and let them tug the other boats along.”

The critics respond that the shabby state of secondary and post-secondary education in the United States is no justification for further stratification, and that instead of embracing the headlong rush to MOOCs for low-cost education for the masses, in a way that will benefit wealthy Silicon Valley entrepreneurs, Americans should demand greater public investment in improving the entire system for all students.

IV. IMPLICATIONS FOR LEGAL EDUCATION

Legal education is in many ways different from undergraduate education. Nevertheless, three recent developments make the debate that is going on at the college level relevant for law schools as well. First, most law schools are facing an economic crisis. Law school applications declined by 38% between 2010 and 2013, reaching their lowest level of applications received in thirty years. First-year law school enrollments also declined, from about 50,000 in 2010 to about 38,000 in 2013, as law schools admitted fewer students either because they did not have enough applicants to fill their classes or because they did not want to lower their standards, fearing either that unqualified students would not be able to keep up with the required work or that accepting students with lower than usual test

133. Id. Apparently, not all university presidents are as enthusiastic as Mr. Hennessy. Teresa A. Sullivan, the president of the University of Virginia, was fired by the University’s Board of Visitors in 2012. At least one reason for her dismissal was her disagreement with the trustees that the University needed to move quickly to offer MOOCs. The rector (the Board’s chair) had sent a “why we can’t afford to wait” email to the vice chair, enclosing a Wall Street Journal column that praised online education for substituting inexpensive technology for expensive labor. Sources reported that Sullivan “had expressed skepticism about the idea that it was a quick fix to solving financial problems, and that she viewed distance education as having the potential to cost a lot of money without delivering financial gains.” See Scott Jaschik, The E-Mail Trail at UVA, INSIDE HIGHER ED (June 20, 2012), http://www.insidehighered.com/news/2012/06/20/e-mails-show-uva-board-wanted-big-online-push. Sullivan’s dismissal was later rescinded, and the University started its first MOOC; it is unclear whether those two developments were related. See Scott Jaschik, MOOC Skeptics at the Top, INSIDE HIGHER ED (May 2, 2013), http://www.insidehighered.com/news/2013/05/02/survey-finds-presidents-are-skeptical-moocs.

134. Patricia McGuire, president of Trinity College, warns: “Beware Chicken Little, because Chicken Little has a vested interest in this. There is an awful lot of hype about disruption and the need for reinvention that is being fomented by people who are going to make out like bandits on it.” Carlson & Blumenstky, supra note 129.


scores and grades would precipitate a drop in their U.S. News rank. Three-quarters of accredited law schools experienced declines in first year enrollments. With less revenue from a smaller class, some law schools laid off staff members and others were expected to do so. Some have already reduced the size of their faculties by not replacing retiring teachers, and at least one school notified untenured faculty members that their contracts might not be renewed at the end of the 2013–2014 school year. But as of 2013, the end was nowhere in sight. Some experts predicted “massive layoffs” during the 2013–2014 school year, that ten law schools would close within a decade, or even that “perhaps a dozen” would close “within a year.” Furthermore, most experts believe that the recession that started in 2008 precipitated a long-awaited, permanent restructuring of the demand for the services of lawyers, creating a “new normal” in which fewer lawyers are needed, or that it accelerated a restructuring that had begun a few years before the recession started. If

138. See Bronner, supra note 135.
141. See Bronner, supra note 135 (quoting William Henderson).
142. See id. (quoting Brian Leiter).
143. See Epstein, supra note 136.
144. See, e.g., THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010); RICHARD SUSSKIND, THE END OF LAWYERS? (2008); BRIAN Z. TAMANAH, FAILING LAW SCHOOLS 116–18 (2012); see also Claire Zillman, Law Firm Leaders Survey 2010: The New Normal, AM. LAW., Dec. 1, 2010, at 67 (showing that most lawyers believe that “the downturn has produced a fundamental shift in the legal marketplace” and reporting that managing partners of law firms “echo” view that recession heralded “long-term change”); CTR. FOR THE STUDY OF THE LEGAL PROFESSION, GEORGETOWN UNIV. LAW CTR., 2013 Report on the State of the Legal Market, PEER MONITOR 14 (2013), https://peermonitor.thomsonreuters.com/ThomsonPeer/docs/2013ReportLegalIndustryPeerMonitorGeorgetown.pdf (finding that more than ninety percent of managing partners at large law firms viewed recession as “permanent accelerator of trends that already existed” or “game changer”). The report concluded that, “the economic downturn served as a catalyst that has changed the legal market in fundamental ways.” Id. at 20; see also Rick Schmitt, Price and Perils of JD: Is Law School Worth It?, D.C. B. (Mar. 2013), http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/march_2013/law_school.cfm (“The recession . . . has added to the shock and woe. But structural factors also are playing a role, as corporations and other users of legal services are finding ways to cut their legal costs, which could permanently reduce the number of lawyers
so, there will be a corresponding permanent downward trend in the demand for legal education. These experts could all be wrong, and the markets for lawyers and for legal education could rebound. But this article assumes that the consensus of experts is more likely than not to be an accurate forecast.

The decline in applications resulted not only from reports about a declining market for legal services but also from the fact that for a long time, law school tuition and the average debt of graduating students had risen considerably faster than the consumer price index, apparently an inevitable result of economic factors known as “Baumol’s Cost Disease.”

As early as 1987, Tulane’s Dean John R. Kramer had warned about this trend. The most recent (and widely cited) compilation of data reported that average law school debt (not including undergraduate debt) for students at law schools that were not subsidized by state taxpayers had risen from $15,676 in the mid-1980s to $106,249 by 2010, and that average annual tuition at these schools had risen from about $8,000 in 1985–1986 to about $36,000 by 2009–2010. The deans of most law schools, and the presidents of their universities, realize that the law schools are on a glide path to extinction unless something arrests the twin trends of rising tuition and declining enrollments.

The second recent development that should focus the attention of law school administrators, faculty and students on the rise of MOOCs is needed in the future.

145. The economist William Baumol explained that when some industries achieved gains in productivity more rapidly than the gains achieved in other industries, prices would rise in the industries with small or no productivity gains. Productivity in the computer industry (among others) has increased very rapidly, allowing companies in that industry to raise wages without raising prices. Industries competing for talented labor had to raise prices to keep up, but in some industries, increases in productivity are virtually impossible. Baumol’s famous example is the string quartet; it takes just as much labor to play such a quartet in the twenty-first century as in the eighteenth century. Similarly, it takes just as much labor to teach a class of thirty students in the twenty-first century as in the twentieth century. See James Surowiecki, What Ails Us, THE NEW YORKER (July 7, 2003), http://www.newyorker.com/archive/2003/07/07/030707ta_talk_surowiecki. In higher education, “the only way to reduce costs is either to increase the number of students each professor teaches or to outsource the work to poorly paid adjuncts.” Id. Only by vastly increasing the student to teacher ratio can productivity in education be increased. But MOOCs present the question of whether the apparent productivity increases represented by online education are genuine or merely the façade of more efficient education, providing more credit for less cost, but perhaps without genuine advances in learning.


147. See TAMANAH, supra note 144, at 109, 129.
that they are not just the coming attraction for undergraduate institutions: they are already a presence in the field of law. In 2013, Case Western Reserve’s Professor Michael Scharf offered a Coursera MOOC on International Criminal Law, the University of London’s Dame Hazel Genn taught a Coursera MOOC on English Common Law, Harvard’s Professor William Fisher offered an edX MOOC on Copyright Law, and Yale’s Professor Akhil Amar is currently providing a Coursera MOOC on Constitutional Law.\footnote{148}{These MOOCs are featured on the Coursera and edX websites.} Those are all non-credit courses, but the University of Akron School of Law has already offered an online course, for J.D. credit, in Commercial Paper, and Case Western and Cleveland-Marshall law schools are reportedly considering offering, for J.D. credit, “several courses conducted solely through online lectures and tests.”\footnote{149}{Alison Grant, \textit{Cleveland’s Law Schools Venture into Cyber Classes}, CLEVELAND PLAIN DEALER (Jan. 19, 2013), http://www.cleveland.com/business/index.ssf/2013/01/clevelands_law_schools_venturi.html. The accreditation standards of the ABA’s Section of Legal Education currently allow a limited amount of distance learning for course credit. For a further discussion of distance learning, see infra notes 156–63.}

The third such development is that entire online graduate degrees are already on the market. Georgia Tech offers a graduate degree through a series of Udacity courses: a master’s degree in Computer Science for thousands of students. The students will have to pay only about $7,000 for the three-year program. Sixty percent of the revenue will go to the university, and forty percent to Udacity, and students will take tests at any of the four thousand proctored testing centers of Pearson VUE.\footnote{150}{Jeffrey R. Young, \textit{Georgia Tech to Offer a MOOC-like Online Master’s Degree, at Low Cost}, CHRON. OF HIGHER EDUC. (May 14, 2013), http://chronicle.com/article/Ga-Tech-to-Offer-a-MOOC-Like/139245/.} So with law school facing horrendous financial pressures, MOOCs by famous professors on important fields of law already in production and use, and reputable universities beginning to offer low-cost degrees for credit over the internet, it can’t be long before law school administrators begin to think of MOOCs as the answer, or at least a partial answer, to lowering costs and attracting students and their tuition dollars.

On a smaller scale, but closer to home for legal education, several law schools are already offering LL.M. degrees online, though not yet through large-enrollment MOOCs.\footnote{151}{Continuing Legal Education programs have also for decades provided distance legal education, but like the new LL.M. courses, they have not yet been offered as MOOCs. \textit{See, e.g.}, \textit{On Demand Learning, Practicing L. Inst.}, http://www.pli.edu/Content/On_Demand/_/N-8vZ1g?Npp=25&Ns=sort_title—0 (last visited Nov. 12, 2013).} For example, Washington University Law School is providing an online LL.M. degree in United States Law for foreign students.\footnote{152}{See Steve Kolowich, \textit{Washington U. Law School to Offer Fully Online Degree}, INSIDE HIGHER ED (May 8, 2012), http://www.insidehighered.com/news/2012/05/08/washington-u-law-school-offer-fully-online-degree. Several other law
the on-campus program, with courses taught by the same world-renowned faculty" and specifies that its admissions requirements will be the same as those for students who will be in residence. Unlike true MOOCs, in which students attend “class” at times of their own convenience, the students will connect at specific times, via webcam, for live discussions (which will evidently require middle-of-the-night classes for students in certain time zones). The law school is limiting admission for its first class in order to promise students that there will be no more than fifteen students per class, and is charging $50,040, hardly the kind of low-cost education that MOOCs envision, although the students will save the cost of transportation, food, and lodging in the United States. Those who complete the course will receive the same diploma as resident LL.M. students.

Two interrelated obstacles prevent law schools from providing J.D. degrees in whole or in large part through MOOCs: the accreditation standards of the Section of Legal Education of the American Bar Association, and the court rules of most states—California being the most notable exception—that require graduation from an accredited law school as a prerequisite for a license to practice law.

The ABA’s Section of Legal Education and Admissions to the Bar is the accrediting body for the nation’s law schools. Students may attend unaccredited law schools, but forty-six states require graduation from an accredited law school as a condition for a license to practice law. At present, an accredited law school must have an academic year with at least 130 days of scheduled classes; law schools must require “regular and punctual class attendance” in courses for at least 58,000 minutes of instructional time (which can be squeezed into two calendar years, but with no reduction in total classroom time), and 45,000 of those minutes must be “in regularly scheduled class sessions at the law school.”


154. See id.


156. See 2012–2013 ABA Standards and Rules of Procedure for Approval of Law Schools 22, ABA Sec. Legal Educ. & Admissions to B., http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012-2013_aba_standards_and_rules.authcheckdam.pdf (last visited Feb. 17, 2014) (referring to Standard 34). Through its Standards Review Committee, the Section is currently considering amending the standard to substitute requirements of eighty-
learning,” including MOOCs may be included in the curriculum, but are subject to certain restrictions:

- A student may not receive more than twelve credits for distance learning courses, a credit being equivalent to at least 700 minutes of instruction.
- A student may not take more than four credits of distance learning in any semester.
- No student may take a distance learning course for credit during the first year of law school. However, a traditional course may incorporate “substantial on-line interaction or other common components of ‘distance education’ courses” for up to one-third of the instructional time without violating the first-year restriction, the twelve-credit restriction, or the four-credit per semester restriction. (Apparently, therefore, under existing accreditation policies, students at a Section-accredited school can be provided with half of their legal education—a twelve-credit semester, plus a third of the “class” time in their other courses—through MOOCs).
- There must be “ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration.” Depending on whether “the instructor” could be a law school teacher at another school, and on whether “ample interaction” could include merely electronic interaction (i.e., through a threaded discussion board), this standard might preclude offering credit for MOOCs, even within the twelve-credit limit, in which the student merely engaged on a virtual basis with a professor at a distance law school offering a course to thousands of students. However, an official interpretation of the standard provides that: “Law schools shall take steps to provide students in distance education courses opportunities to interact with instructors that equal or exceed the opportunities for such

three and sixty-four semester credit hours (or their equivalent in quarter credit hours for schools on the quarter system) for the requirements of 58,000 and 45,000 minutes of instructional time. See Standards Review Comm., Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass’n, SRC April 2012 Meeting Materials 29 (Apr. 27–28, 2012), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/april2012/20120404_aprill2_src_meeting_materials.authcheckdam.pdf (suggesting change to Standard 304).

157. See 2012–2013 ABA Standards & Rules of Procedure for Approval of Law Schools, supra note 156, at 25–26 (referring to requirements and standards for distance learning credit described at Standard 306); see also id. at 22–23 (referring to Standard 304 and 700 minutes per credit requirement described in Interpretation 304-4).

158. Id. at 25–26 (referring to Standard 306 and Interpretation 306-3).

159. Id. at 26 (referring to Standard 306(c)(1)).
interaction with instructors in a traditional classroom setting.” The interpretation does not clarify how a school could know whether its program complies with the “equal or exceed” standard.

- The school must provide “ample monitoring of student effort and accomplishment as the course progresses.” The standard does not explicitly state that the monitoring must be done by law school personnel; conceivably, if the other standards were satisfied, the standard could be interpreted to permit monitoring by a distant teacher, or by a computer.
- The school must “establish a process that is effective for verifying the identity of students taking distance education courses and protects student privacy.”
- The school’s regular process for approving the curriculum must be used to evaluate the content, method of course delivery, and method of evaluating student performance.

The ABA is already under considerable pressure to relax these standards to permit more distance education, in view of the high and rising cost of traditional classroom-based legal education and the prospect that technology can lower those costs. Some scholars have urged such a change, but the real impetus comes from the fact that law school tuition has been rising with no end in sight, and the rapid advance of internet-based technology offers a possible respite. Barry Currier advocated for allowing more online legal education for credit when he was the dean of Concord Law School of Kaplan University, an unaccredited online law school. Currier is now the ABA’s Managing Director of Accreditation

160. Id. at 25–26 (referring to Standard 306 and Interpretation 306-4).
161. Id. at 26 (quoting Standard 306(c)(2)).
162. Id. (quoting Standard 306(g)).
163. Id. at 25 (describing Standard 306(a)).
164. See Ray Worthy Campbell, Law School Disruption, 26 GEO. J. LEGAL ETHICS 341, 363 (2013) (“Online instruction may not be, in many ways, as good as a current law school education, but there are reasons to think that it could be good enough.”); see also Letter from Rebecca Purdom, Working Grp. for Distance Learning in Legal Educ., to Jeffrey E. Lewis, Chair, ABA Standards Review Comm. (July 9, 2012), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20120712_comment_distance_education_working_group_distance_learning_legal_education.authcheckdam.pdf (commenting on proposed Rule 311, replacing Rule 306).
and Legal Education, directing the staff of the Council of the ABA’s Section of Legal Education, which reviews standards for legal education as well as whether law schools are complying with the standards.

The distance learning standards are already in the process of being relaxed by the Council, which has published the proposed revisions for notice and comment by interested parties. The revised Standard 306 would increase the number of credit hours for online education that a student could receive from twelve to fifteen, would repeal the four credit hour per semester sublimit, and the fifteen credit hours would be counted, as the twelve credit hours are at present, within the sixty-four credit hour requirement for “regularly scheduled classes,” as well as the eighty-three credit hour requirement for graduation. The standard that currently requires that students in distance education courses be able to interact with instructors that “equal or exceed” the opportunities for such interactions in other courses, a standard that suggests at least the possibility of quantitative measurement, would be replaced with one that requires only that there is “regular and substantive interaction” between the faculty member and students, and between students. In addition, as at present, one-third of each of a student’s traditional courses could be comprised of distance education.

While the Council considers accreditation changes that would allow MOOCs a larger role in legal education, the state appellate courts that decide bar licensure may be considering proposals that would change legal education even more radically. Professor Brian Tamanaha’s widely read book, Failing Law Schools, proposed, rather unrealistically, that the ABA require law schools to require only two years of legal education.


167. Memorandum from Solomon Oliver, Jr., Council Chairperson, ABA Section of Legal Educ. & Admissions to the Bar, and Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., ABA, to Interested Persons and Entities (Sept. 6, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf (commenting on Comprehensive Review of ABA Standards for Approval of Law School Matters for Notice and Comment).

168. See id. Under the revised standards, students would have to take eighty-three semester credit hours to graduate, of which sixty-four would have to be in regularly scheduled classes, including online classes. See id. (discussing Proposed Standard 311).

169. See id. (referring to Proposed Standards 306(a) and (d)).

170. See id. (referring to Proposed Standard 306(a)).

171. Tamanaha, supra note 144, at 173 (proposing that requirement be changed from 1120 to 747 hours of classroom instruction). Tamanaha does not offer examples of what a two-year curriculum (approximately sixteen courses) might look like, particularly if the current traditional first year courses are retained. In fact, it is quite difficult to construct such a curriculum that would enable students to explore any degree of specialization or to take courses in a variety
In an impromptu remark at the end of a speech urging lower-cost university education, President Barack Obama endorsed the call for two-year law school education.\textsuperscript{172} Recognizing that the ABA was unlikely to require less than three years (or eighty-three credit hours) of instruction, Tamanaha suggested an end run that “bypasses the ABA.”\textsuperscript{173} He suggested that state supreme courts retain their bar examinations, but eliminate the requirement that applicants for admission to the bar must first graduate from a law school accredited by the ABA Section of Legal Education. He noted that California does not impose that educational requirement,\textsuperscript{174} and that the eighteen law schools in that state that are accredited only by the State Supreme Court and not by the Section charge “around $10,000” in annual tuition, while all of the Section-accredited law schools in the state charge at least $30,000. (California also allows a person to take the bar examination without any law school education, even from an unaccredited school, by studying law for four years under the tutelage of a lawyer. But only thirty-nine people tried to do this in the five years before 2011, and only 26% of them passed the bar exam).\textsuperscript{175}

Graduates of the Massachusetts School of Law, which is not accredited by the Section (and which teaches some courses online) are eligible to take the Massachusetts or Connecticut bar exams and, if successful, are eligible to be licensed in those states.\textsuperscript{176} After being licensed in Massachusetts, they are eligible immediately to take the bar examination in seven other states, and after practicing for several years, they may also be admit-


\textsuperscript{173} Tamanaha, supra note 144, at 176.

\textsuperscript{174} See Legal Education, Str. B. of Cal., http://admissions.calbar.ca.gov/Education/LegalEducation/LawSchools.aspx (last visited Nov. 12, 2013). California accepts bar applications from eighteen law schools in the state that are accredited by the Committee of Bar Examiners but not by the Section of Legal Education, and from a substantial number of law schools, such as Concord Law School, that are entirely unaccredited. See id.

\textsuperscript{175} See Rene Ciria-Cruz, \textit{The Path Rarely Taken}, Cal. LAW. (June 2011), http://www.callawyer.com/Cltstory.cfm?eid=916106.

ted in other states.\(^{177}\) The school continues to petition other states to allow its graduates to take their bar examinations.\(^ {178}\)

Samuel Estreicher, a New York University Law professor, has made a licensing proposal that is somewhat more modest than abolition of the requirement for attending a Section-accredited school. He suggests that New York state (and presumably other states) allow students to be admitted to the bar after two years of law school classes, as New York did for college graduates from 1882 until 1911.\(^{179}\) Estreicher’s proposal would allow law schools to continue to require three years of education for the J.D. degree but not for obtaining a law license. Estreicher assumes that to retain its students for a third year, schools would try to make the third year of study attractive enough that despite the additional tuition, “aspiring lawyers of substance could not afford to pass [it] up,”\(^ {180}\) but he also recognizes that many schools would not be able to keep their students for three years and that law schools would “sustain financial losses that they cannot recoup,” a factor deserving little weight when compared with the interests of the students that they train.\(^ {181}\) The Estreicher plan may have generated some interest beyond academia. In January 2013, New York University held a conference on Estreicher’s idea, at which both he and Tamanaha spoke. The conference was attended by New York Court of Appeals Chief Judge Jonathan Lippman and Associate Judge Victoria A. Graffeo, and by “several members of the New York State Board of Law Examiners.”\(^ {182}\) Lippman told those present that “the concept deserves serious study.”

So there are two different ways in which traditional legal education could fairly rapidly morph into something very different from the form in which it has taken for the last century: if either the Section of Legal Education relaxes the current restrictions on distance education, or state supreme courts begin to eliminate their requirements for attendance at Section-accredited schools, law schools will have to adapt rather rapidly to a new environment. Even the possibility that these external influences could eliminate the requirement of three years of legal education could cause law schools to cast about quickly for ways to preserve the three-year program by providing a cut-rate version, using distance learning, of which

\(^{177}\) See id.

\(^{178}\) See Kolowich, supra note 152.


\(^{180}\) Id. at 607.

\(^{181}\) Id. at 609.


MOOCs are the most efficient (though not necessarily most effective) variant. If some law schools begin to use MOOC education to the full limit allowed by the existing accreditation rules, providing instruction through MOOCs for approximately half of a student’s program of study, and reduced its faculty and staff accordingly in order to lower tuition, the move away from the traditional model of education could snowball rapidly.  

A. Should Law Schools Go MOOCy?

There is reason to think that because of rising costs and student debt, reduced revenues as a result of falling enrollments, and advocacy for two-year law school programs by no less a figure than the President of the United States, Section-accredited law schools will turn to cost-cutting measures. They are already doing so, and they may explore MOOCs quite seriously as one way to offer education that is less expensive than what they now provide. Within a few years, some of them will probably offer course credit for at least some MOOCs, in compliance with existing or relaxed ABA standards for distance learning. MOOC-based J.D. degrees may follow. But whether the advent of either partial or complete online legal education would be a positive development is a different question.

Legal education achieves many different objectives. Two reports suggest that these include:

- Providing students with information about legal doctrine and institutions;
- Giving them tools for organizing massive amounts of information;

184. For a discussion of MOOC education, see infra notes 185–93 and accompanying text. On the other hand, most law schools might reduce faculty size drastically, require faculty members to teach many more courses per year, slash salaries, and relinquish aspirations for faculty to produce scholarship, before moving a significant portion of teaching to a largely unproved distance learning model, in part out of fear that a rapid move in the direction of MOOCs or other distance learning methods could cause rapid declines in their U.S. News rankings. I am grateful to Professor Zachary Schrag for this observation. Tamanaha would apparently approve of an increase in teaching loads and a reduction in scholarly output; he writes that:

    We must inquire whether it is appropriate that law students are forced to pay for the production of scholarship at current levels and to the same extent at law schools across the board. Not all law schools and not all law professors must be oriented toward research. . . . [S]ociety would not suffer if the mountain of writing now coming out of law faculties is cut down to a less extravagant size.

See Tamanaha, supra note 144, at 61. Marc Galanter opines that “just how much value there is in the research product of law faculties” is “an interesting empirical question.” He wonders whether it would be better to limit scholarship at most law schools and create, instead, “a dozen ‘Max Planck’-type institutes where full time research professors surrounded by apprentice researchers could conduct long-term sophisticated projects that would be published in peer-reviewed [electronic] ‘journals.’” E-mail from Marc Galanter to author (July 9, 2013) (on file with author).
• Teaching modes of analysis that are different from those of an undergraduate education;\textsuperscript{185}
• Enabling students to see the relationships between legal rules and social and economic policies;
• Inculcating students with a sense of justice and enabling them to understand competing concepts of justice;
• Helping them to understand the interactions between conflicting ethical standards;
• Providing them with skills for researching facts and law;
• Guiding them to be able to understand the legal relevance of facts;
• Teaching them the acceptable forms of legal writing, and improving their ability to write successfully within those forms;
• Enabling them to understand dense, complex statutes such as the Internal Revenue Code or the Uniform Commercial Code;
• Giving them the confidence to speak in public;
• Teaching them to work effectively in small groups (such as study groups or journals);
• Teaching them how to set professional standards for themselves;
• Providing them with different perspectives (such as those of litigator, judge, mediator, arbitrator, and legislator);
• Enabling them to work in an environment in which the facts and the law are uncertain and frequently changing;
• Helping them to choose appropriate career fields, or at least an initial job that is personally and professionally satisfying;
• Teaching particular practical (and particularly interpersonal) skills such as interviewing, counseling, negotiation, and witness examination;
• Helping students to identify and name their values and to consider other values, such as those held by faculty members, other students, judges, opinion leaders, and the clients whom they will represent; and
• Providing them with the ability to continue to learn on their own after leaving law school, a skill often called “learning how to learn.”\textsuperscript{186}

\textsuperscript{185} These are what many people mean when they say that law school teaches students to “think like a lawyer.” These analytic skills, which students are exposed to intensively in the first year of law school, include reading at a level of detail that is more like analyzing poetry than like reading essays or undergraduate texts; learning to analogize new fact patterns to those of precedents, and to distinguish them from other precedents; and spotting legal issues in a set of facts.

In addition, law schools are places where deep and lasting friendships are made through common study and law-related activities; this may not be an objective of legal education, but it is an important by-product. Some of the objectives of legal education may be more easily achieved through computer-based distance learning than others. But which are they? If some but not all of the goals of legal education can be achieved online, can legal education be disaggregated in a way that would incorporate MOOCs so as to lower costs and increase value, or at least not substantially decrease the education that future lawyers will need?

Fortunately, some thought has already been given to these questions. In 2000, long before MOOCs were invented in name or substance, Professor Stephen M. Johnson, a member of the Board of Directors of the Center for Computer Assisted Legal Instruction (CALI), wrote about the possible advantages and disadvantages of distance learning for legal education.\textsuperscript{187} Johnson pointed out that for three decades, skills training (including not only clinical education but also training in research and writing) had increasingly become a central focus of the law school curriculum, in part because students, employers, and judges had complained that law schools did not sufficiently prepare their graduates to practice law.\textsuperscript{188} He argued that skills instruction requires students to engage in reflective self-evaluation and also to receive individual evaluation from a qualified teacher.\textsuperscript{189} He noted that students learn skills best by exercising them, preferably in an actual practice setting and, failing that, in a simulation.\textsuperscript{190} Computerized simulations are an “inadequate substitute” even for live simulations, in part because they are unlikely to engage the student on an emotional level and thereby seem artificial.\textsuperscript{191} He also noted that it is difficult to teach “professionalism and values through virtual classes.”\textsuperscript{192} Most saliently, though, Johnson pointed out that most non-clinical legal

\textsuperscript{188.} See id. at 104–05.
\textsuperscript{189.} See id. at 107.
\textsuperscript{190.} For a discussion of the relative merits of live-client clinics and simulations, see Philip G. Schrag, \textit{Teaching Legal Ethics Through Role Playing}, 12 Legal Ethics 35 (2009); see also Philip G. Schrag & Michael Meltsner, \textit{Report from a CLEPR Colony}, 76 Colum. L. Rev. 581 (1976).
\textsuperscript{191.} See Johnson, supra note 187, at 107 & n.137.
\textsuperscript{192.} Id. at 109. Johnson’s conclusion in this regard may be correct, but his reasoning seems incomplete. Johnson argues that students learn professionalism and values by observing their professors and hearing their personal stories “in the classroom, hallway, or clinical setting” and that students will not identify with a “depersonalized speaker on the Web.” \textit{Id.} While some students may be exposed to and inspired by stories of lawyering by their professors, it seems likely that most students hear little, if anything during their law school years about the personal experiences of their teachers, and surely such teaching is not systematic. Professionalism and values can be taught systematically in a well-constructed professional responsibility class that relies heavily on the problem method and on role plays and simulations. See Schrag, supra note 190; see also Lisa G. Lerman \& Philip G. Schrag, \textit{Ethical Problems in the Practice of Law} (3d ed. 2012).
education in the United States is based on some version of the Socratic method and that though the Socratic method has had its critics, it is “an important teaching tool in legal education because it encourages students to think on their feet, articulate their views in a coherent manner, and understand the deeper reasoning behind black-letter rules of law.”

He noted that because the “central features” of the method are “personal interactions and immediacy,” it is “impossible to replicate the Socratic method in a classroom-free world.”

Some educators are more optimistic about the capabilities of technology that they believe will become available before too long. Eli M. Noam, a professor of finance and economics at Columbia, and its director of the Institute for Tele-Information at the business school, sees a bright future for online law schools, because:

Technology will not stand still. In time, there will be realistic simulations of court proceedings, well-crafted lectures by star professors, provided in quality video, even 3-D; “virtual worlds” that provide interactive legal situations and other forms of practice and apprenticeship; simulator programs to practice thinking on one’s feet; and wikis and other community tools for peer-to-peer education.

Professor Stephen Ruth adds enthusiastically that “there are technology approaches in MOOC’s that can allow face-to-face contact with a local instructor/mentor and other fellow students in a blended format. . . . [And] there would be less need for tenured or tenure-track teachers, since the best lectures and teachers would reach many more students.”

B. What Might Happen: Three Models of the Future

Predicting the future is of course very hazardous. I will offer a few guesses about what might happen in law schools during the next decade as MOOCs continue to encroach on undergraduate and graduate education. All three of these scenarios that follow are ones in which legal education will not be as deep and rich as it is today, except for a few students in elite, highly selective schools. In other words, unless there is a major turnaround in the demand for services by lawyers, we may look back on the

193. See Johnson, supra note 187, at 110.
194. Id.
197. The author invites readers to conjure other, perhaps more optimistic scenarios, taking account of present trends, economic realities, and technological changes.
198. This phrasing reflects my belief that there are, and will continue to be, enormous demands for legal services, but not necessarily for such services from
second half of the twentieth century as the golden age of legal education, to which there is no return.\textsuperscript{199}

1. Law Schools Might Resist MOOCs to the Death (of Most Law Schools)

Law schools, the Council of the Section of Legal Education, and state supreme courts might largely ignore what the internet has wrought and continue to conduct business as usual. Tuition and graduates’ debt will continue to rise, making law school less and less affordable.\textsuperscript{200} After subsisting for a few years by cutting salaries and services, reducing faculty size by not hiring replacements for retirees, increasing teaching loads for those who remain, relying more on low-paid adjunct teachers, and (except for stand-alone law schools) by accepting temporary subsidies from parent universities eager to keep the law schools in business until the subsidies can again flow the other way, some schools—perhaps a dozen, perhaps more—will find themselves unable to balance their books, and they will fold. This process will continue until a new equilibrium is reached between enrollees and first year spaces available. If the market for legal services continues to contract, still more schools will go out of business. A few might be able to stay afloat by offering degrees in addition to the tradi-

\textsuperscript{199} These scenarios are all so depressing that the author, who had a fine education a long time ago at a physical law school, thinks that he could not have written this article early in his career and continued to teach. While he does not yet think of himself as a cranky old man, he suspects that he is more able to write about what he thinks will be a downward spiral for much of legal education because he will not have to teach for many decades in the environment he describes. At the same time, he is saddened by all of the scenarios that he imagines may come to pass. He hopes that his predictions are wrong, and that the market for legal services will rebound so much that law schools continue to be able to provide the kind of in-person rather than online education that he enjoyed. For the view that although “online [legal] education is not as good as the best classroom teaching” but “for some students . . . it may be good enough for the kind of learning they have in mind,” see Campbell, supra note 164, at 351.

\textsuperscript{200} Brian Tamanaha argues that law schools are already unaffordable for most applicants. See TAMANAH, supra note 144, at 135–59. He fails to give due weight to the federal government’s Pay as You Earn student loan repayment plan, which significantly eases the loan repayment burden for graduates who have high educational debt relative to their incomes. See generally Philip G. Schrag, Failing Law Schools: Brian Tamanaha’s Misguided Missile, 26 GEO. J. LEGAL ETHICS 387 (2013). Although his timing is therefore off, the thrust of his argument is sound. Tuition and debt can’t simply continue to rise, indefinitely, more rapidly than the consumer price index. Absent an unexpected economic boom that creates many more lucrative law jobs, even if debt can be repaid at a moderate rate, the sticker price of law school will sooner or later—perhaps quite soon—scarce off so many applicants that many of the nation’s approximately two-hundred accredited law schools will have to lay off staff, then faculty, and then shutter their doors.
tional J.D.; for example, by providing one-year or two-year programs leading to a new degree for limited licensed legal professionals who could provide routine low-cost services to average-income Americans who do not need the full range of services or expertise that lawyers offer. Those legal fees would be lower than lawyers would charge in part because unlike paraprofessionals who are supervised by lawyers, the licensed professionals would not require supervision by lawyers and they would not have to repay such large educational debt. Washington State has already created a licensing program with this type of service in mind, but it contemplates educating the licensees through apprenticeships rather than at law schools.\(^\text{201}\)

Some readers may applaud this scenario, either because they think that the nation has too many lawyers already or because law schools should cease to exist if they don’t have a sufficient number of paying customers. There is, however, a large, national unmet need for legal services for low- and moderate-income individuals.\(^\text{202}\) If only the elite law school with very high, ever-increasing tuition remain in business, lawyers in the future will be available only to serve substantial corporations and wealthy individuals who can pay high fees. It would be better to lower the cost of legal education than to provide lawyers only for the wealthy.

A variant of this model is that rather than folding altogether, law schools might be forced by the economics of their industry to reduce the period of instruction to two years (except at “elite law schools” that might attract enough students to a more expensive three-year program), as recommended by Professor Tamanaha, and echoed by President Obama,\(^\text{203}\) with most professors teaching far larger course loads and abandoning aspirations to research.\(^\text{204}\) Tamanaha does not mention MOOCs. Perhaps he would prefer a reduction in the length of time for legal study to the dilution in the quality of education that could accompany a substantial amount of distance learning, or perhaps he thinks that MOOCs would not reduce the cost of legal education by as much as a third.


\(^{203}\) See supra note 172 and accompanying text.

\(^{204}\) See TAMANHA, supra note 144, at 27, 45.
2. A Small Number of Elite Law Schools, or Possibly Just One Such School, Might Serve Nearly All Law Students, Through MOOCs

Alternatively, MOOCs might largely take over from traditional schools as the primary institution through which new lawyers are educated. Aspiring lawyers might continue to attend twenty or more high-prestige law schools. But imagine, for example, that one of those schools offered enough online courses for credit to qualify students for a law degree, and that for a mere $10,000, a student could earn a law degree this way. (This scenario presupposes, of course, either that the Section of Legal Education withdraws its restriction on online education, or that state supreme courts cease to require graduation from a school that has the Section’s seal of approval and accept online degrees, at least those offered by this hypothetical prestigious institution). A student could earn a law degree for about 6% of the current cost of law school—less than 6% if one takes the cost of room and board into account. Why would a prestigious law school offer such an inexpensive degree? Because about 45,000 first-year students enrolled in U.S. law schools in the fall of 2012, and if the school offering the MOOC attracted only 35,000 of them, the tuition would bring in $350 million in annual revenue. Additional revenue might be expected from students who don’t apply to law schools at present because of high tuition and other expenses, or from those (including foreign students, students with full-time jobs, and certain disabled students) for whom attendance at a physical law school would be very inconvenient. And why would a student sign up for a MOOC rather than attend a physical law school? Besides the savings realized by obtaining the degree online, the student would learn from nationally or internationally famous scholars, as opposed to the teachers at a local or regional law school. In addition, today’s students are more accustomed than those in preceding generations to getting their information from screens, much to the chagrin of those employed in another industry that is on the ropes: newspapers.

Of course students would realize that large law firms and corporations might prefer to hire lawyers who had attended a physical law school. That is precisely why twenty or more physical law schools might survive the advent of MOOCs for credit, even if one such school cornered the legal education MOOC market. But in a bifurcated market for legal services, in which most of the highest paid, highest prestige jobs already go to graduates of the law schools near the top of the U.S. News rankings, a student

205. ABA Section of Legal Education Reports Preliminary Fall 2012 First-Year Enrollment Data, supra note 137.

206. See William D. Henderson & Rachel M. Zahorsky, The Pedigree Problem: Are Law School Ties Choking the Profession?, A.B.A. J. (July 1, 2012), http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession/; TAMAHA, supra note 144, at 148–49, 148 fig. 12.1. The figure shows the relationship between law school rank and the percentage of 2009 graduates who reported a full-time private sector salary (a proxy for those who have the
who could not be admitted to a top school might well conclude that her chances of getting one of the most sought-after legal jobs are mediocre at best, so attending online lectures by well-known professors and obtaining a low-cost degree is better than going $150,000 into debt to attend a low-ranked law school. Under this scenario, half or three quarters of the nation’s law schools could be bankrupted within a year or two after a major university first offers a low-cost online law degree.

The student’s education would be far less rigorous than what most law schools offer today, with their back-and-forth dialogue even in large first-year classes, their seminars, their intensive legal writing instruction, their clinics and externships, and their student activities. And the quantity of legal scholarship would become vanishingly small. But advocates of this model would note that even at present, many students do not participate in dialogue with professors, do not attend office hours, and do not sign up for clinics, moot courts, law journals, or other activities. They attend classes (most of the time), take exams, and collect their degrees. In addition, even with present technology, some out-of-class facets of law school could be replicated online. Online journals could be published, with student editors, just as most journals are already edited by students. Students could be assigned by the professor leading the MOOC to write briefs in pending or “moot” cases, and other students could comment on them.\textsuperscript{207} The MOOC director could also provide some group feedback after reading a random sample of submissions. With present technology, grading would probably have to be based on multiple choice examinations taken either at the proctored test centers around the world or through a verified online system based on video observation, keystroke measurement, or other remote techniques.

3. \textit{Law Schools Might Survive, and Even Continue to Offer Three-Year J.D. Degrees, by Incorporating MOOCs into Less Expensive Forms of Their Own Legal Education}

Writing about the market forces that are overwhelming and threatening liberal arts education, Frank Donoghue states that he has painted “what could be called an unremittingly bleak picture of what the future holds in store for humanities professors, and I offer nothing in the way of uplifting solutions to the problems that I describe.”\textsuperscript{208} Even my most better salaries, based on the assumption that those whose incomes are “poor” do not report their jobs in response to inquiries by their law school placement offices); see also Anayat Durrani, \textit{Does Law School Rank Determine Success?}, L. CROSSING, http://www.lawcrossing.com/article/693/Does-Law-School-Rank-Determine-Success/# (last visited Nov. 12, 2013).

\textsuperscript{207} See supra notes 55–59 and accompanying text. In Professor Scharf’s Coursera MOOC, students are randomly assigned (for the “extra credit” that will yield a certificate of achievement “with distinction”) to write arguments for and against the indictment or conviction of real or hypothetical alleged war criminals.

\textsuperscript{208} Frank Donoghue, \textit{The Last Professors: The Corporate University and the Fate of the Humanities} xi (2008).
hopeful scenario is almost as bleak as his predictions that professors “will be absorbed into broader categories of professionals and service workers” and that the liberal arts model of higher education “is crumbling as college credentials become both more expensive and more explicitly tied to job preparation. With every passing decade, the liberal arts education will increasingly become a luxury item, affordable only to the privileged.”

But perhaps law schools can hang on to a fraction of the identity that has distinguished them by embracing MOOCs to a point and harnessing their ability to provide vast amounts of information in an inexpensive, convenient way, but refusing to give up some of the most distinctive features of their educational models.

In the debates about MOOCs at the undergraduate level, one of the phrases most often used is “blended courses,” referring to courses that rely on MOOCs for information delivery (through video lectures, associated readings chosen by the MOOC professor, and bulletin board discussions), and on live teachers (who are sometimes but not always professors) for work with students individually or in small groups to cement the knowledge provided by the lectures, create supplemental exercises, and evaluate papers and essay examinations. This model might turn professors into “glorified teaching assistants” as the philosophy department at San Jose State put it, or it might lead to the elimination of most professorial jobs in favor of hiring recent graduates on short term contracts as teaching assistants or tutors under the supervision of a small number of professors or administrators. But it may preserve some semblance of a program of higher education, including legal education, which relies on live interaction between teachers and students.

This model might have some appeal for law schools that are struggling to survive. By reducing faculty and staff and lowering tuition, they might attract enough students to keep afloat in the face of rising costs and threatened competition from inexpensive education that is entirely online. These schools could reduce costs both by replacing high-priced professorial labor with low-cost entry-level labor, and by reducing the amount of in-school instruction that students would have to pay for, as

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209. Id. at xvii.

210. See, e.g., Jimmy Daly, Blended Learning Is a Comfortable Alternative to MOOCs and Online Learning, EdTech (Jan. 11, 2013), http://www.edtechmagazine.com/higher/article/2013/01/blended-learning-comfortable-alternative-moocs-and-online-learning-infographic; Tamar Lewin, Adapting to Blended Courses, and Finding Early Benefits, N.Y. Times (Apr. 29, 2013), http://www.nytimes.com/2013/04/30/education/adapting-to-blended-courses-and-finding-early-benefits.html?_r=1&&gwh=C5EE6DE52AD735DB8CFFA116AFD97EC9. Any Google search for terms such as “blended courses” or “blended MOOCs” will turn up dozens of descriptions of such courses, many of them posted by universities already using them.

211. See supra notes 118–21.

212. Even Barry Currier, the most senior staff member of the ABA’s Section of Legal Education, “foresees legal education becoming a mix of face-to-face instruction and online coursework, each tapping its strengths.” See Grant, supra note 149.
students could be assigned to watch MOOC lectures by acclaimed professors on their own time, paying a relatively small amount for each MOOC lecture (or course of lectures) because of the economies of scale provided by the internet. The students would go to a physical school to supplement their online education, and they would receive their law degrees from the institution they actually attended. Like the previous model, this one would probably leave the highest ranked law schools untouched, but it would radically and quickly change legal education at most law schools. And it might possibly enable legal education to remain a three-year endeavor while lowering tuition substantially.

With this model, designed not to eliminate law school tuition but to reduce it by thirty-five to fifty percent, law schools would have to study their curricula and programs to determine what they offer that could be replaced by MOOCs and what aspects of their educational models require in-person training. They would have to ascertain approximately what fraction of the education they offer is simply informational and figure out how to separate out the informational aspect of each course and replace it with an appropriate MOOC. They would also have to delegate the thrust of the educational message to one of the leading lecturer-scholars in each field of study, although probably those who would survive the competitions for those roles would be dynamic instructors who could capture the attention and imagination of large numbers of students. One structural possibility (among others) would be to leave the first semester (or year) of law school largely intact, because in the first semester or year, information delivery is so closely tied to the development of analytic skills that require rapid-fire questions and answers, immediate feedback from a professor to observations or questions from students, and instant pulse-taking by professors to understand whether or not the students are following their trains of thought. It may turn out to be the case, however, that most students do not need additional semesters of Socratic dialogue, even though they may need individualized assistance or drill in understanding the doctrinal and institutional information that MOOCs could provide in subsequent semesters. Such assistance, along with exercises, could be offered in groups of thirty or more and integrated temporally with the MOOCs. In other words, a student might watch a video lecture by a nationally prominent teacher at any convenient time (perhaps at a slower or faster speed, and perhaps more than once, and perhaps in a study group that would stop it for discussion) on Mondays and Wednesdays and meet with an instructor—perhaps a recent graduate or an adjunct professor with a full-time job outside the school—to discuss it on Tuesdays and Thursdays. The instructor would also grade an essay examination at the end of the course.

What else can only physical law schools provide, besides small group discussions of, and exercises based on, the information provided electronically? They can and should offer each student at least one writing seminar, and perhaps more than one, as there is no way that a MOOC instructor can discuss original paper topics with thousands to tens of
thousands of students, read and comment on drafts, and grade the final papers. Clients, employers, judges, and other consumers of legal services want law graduates who can perform legal research and write easily understood memoranda and other analytical documents. MOOCs are not the answer to this need.

Physical law schools should also continue to provide courses in professional responsibility. That particular course is best taught through a problem method that puts students in the roles of lawyers and requires them to make choices among courses of action that reflect desirable but mutually inconsistent values. In addition, the type of training that MOOCs most self-evidently cannot offer is clinical education. A MOOC cannot replicate the complexities of interacting with clients, supervisors, allies, adversaries, and adjudicators; dealing with constantly-changing facts, finding and interviewing witnesses, threading ethical needles, or the many other tasks with which practicing lawyers daily engage. Here I must disagree with Professor Tamanaha, who states that if legal education is not cut to two years, law schools should turn the third year into apprenticeship programs in which the schools

\[P\]lace students on a wholesale basis in already-existing practice settings (law firms, government legal offices, courthouses, etc.) as many law schools already do through ‘externship’ programs. This is more cost-efficient than in-house clinics. Law school personnel responsible for these programs will not be scholars but experienced staff lawyers-supervisors who monitor outplaced students.

Tamanaha states that the law school would offer “a supplemental educational component on the side.” But he provides no details about how either a placement with harried law firm associates or legal services providers, or a “supplemental educational component” could replace the extensive one-on-one supervision and encouragement of reflection that in-house clinics currently provide. Nor does he estimate the cost.

213. See Schrag, supra note 190.

214. See Tamanaha, supra note 144, at 175. As an alternative, Tamanaha suggests providing full-time assistance from third-year law students to legal services offices or “[p]rivately financed, privately run versions of low-cost legal services” such as tax services. See id.

215. See id.

216. There exists lengthy scholarly literature on the goals, values, and methods of clinical legal education; the many perspectives on it are too numerous to cite here. See, e.g., J.P. Ogilvy & Karen Czapanskiy, Clinical Legal Education: An Annotated Bibliography (revised 2005) (unpublished manuscript), http://faculty.cua.edu/ogilvy/biblio05cr.htm. For the authors’ own perspectives, see Philip G. Schrag & Michael Meltsner, Reflections on Clinical Legal Education (1998); see also Center for Applied Legal Studies, Georgetown L., http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/CALS/ (last visited Nov. 11, 2013) (follow links to Educational Goals and Teaching Methods.)
The professor-directed clinical experience is poles apart from the MOOC experience and can only be provided by professional educators. If law schools are able to cut costs by providing a significant portion of their education online, clinics should be one of the last, not one of the first, aspects of the current educational model to be jettisoned.

The typical thriving law school ten years from now, then, might be one in which the first semester, or possibly the first year, would not be very different from the law school of today. But the next four or five semesters would consist largely of MOOC-assisted learning, in which students elect courses, much as they do today, with lectures delivered via internet, from the most gifted law teachers in the nation, to the students’ own laptops. Students would go to physical law schools at least twice a week to have small section discussions with lawyers, related to the lectures and to assigned readings. The lawyers would be paid for their time, but not at the levels that professors are currently paid, would hold other full-time or nearly full-time jobs, and would not be expected to do research. A small professorial faculty at each school would teach the first semester and first year courses, the writing seminars, the professional responsibility course, and the clinics, and every student would have a clinical semester (or a semester that was primarily clinical) during the third year of school, closely supervised by a professor. The school would offer J.D. degrees to those who completed the three years of work, but it might also offer degrees after one year to persons training to be limited licensed legal technicians, who would perform routine tasks for low- and moderate-income individuals and small businesses. And these “typical” law schools would exist side-by-side with a few elite, higher-cost law schools that produce and export the MOOCs but provide their students with three years of education that resembles the law school education offered in the first decade of the twenty-first century, further accelerating the bifurcation of the legal profession that Heinz and Laumann described more than thirty years ago.

To those of us who had the benefit of a twentieth century legal education, this is not a pretty picture. But nostalgia for the law school of yester-

217. Certain developments could cause major changes to occur even sooner than ten years. As previously noted, the Section of Legal Education could significantly relax the restrictions on distance learning, or state bars could relax admission requirements. Or law school applications and enrollments could fall much further, threatening many schools with imminent bankruptcy unless floated by their universities. But an additional possibility is worth noting. If Congress significantly altered the statutes affecting loans to law students (for example, by capping the amount that a student could borrow for legal education, or by denying loans to students at schools whose graduates did not obtain legal jobs at sufficiently high rates), the present law school structure would begin to crumble almost immediately.

year will not turn back either the clock on the economic or technological changes that seem to occur with increasing velocity.

V. Conclusion

MOOCs did not create the crisis in legal education that is provoking the current rush to downsize law schools and that is threatening the very existence of many of them. The recession that has sparked major declines in law school enrollment predated the advent of MOOCs, which burst upon the scene only in 2012, four years after the recession. But MOOCs may become the coup de grace that ultimately dooms traditional legal education at most of the nation’s law schools. There are, as of yet, no online J.D. degrees from accredited law schools. But in recent months and years we have seen many developments, referenced in this article, that point the way to radical changes heralded by new technology. These include:

- The foundation and capitalization of two for-profit and one non-profit corporation to create MOOCs;\textsuperscript{219}
- A rapid proliferation of non-credit MOOCs in courses of the type often offered to undergraduates;\textsuperscript{220}
- Charges for various levels of certificates for completing MOOCs;\textsuperscript{221}
- The awarding of academic credit for MOOCs for undergraduate courses;\textsuperscript{222}
- Endorsement of MOOCs for college credit by the American Council on Education;\textsuperscript{223}
- State legislative efforts to require colleges to award academic credit for MOOCs;\textsuperscript{224}
- The creation of non-credit MOOCs for law school courses;\textsuperscript{225}
- The opening of online law schools, whose graduates can be admitted to the bar in some states;\textsuperscript{226}
- ABA Section of Legal Education accreditation rules that allow law schools to accept up to twelve credits for courses taken through distance learning, and to include distance learning in all the other courses for up to a third of the student’s educational experience;\textsuperscript{227}
- ABA Section consideration of expansion of its current limits;\textsuperscript{228}

\textsuperscript{219} See supra notes 8–22 and accompanying text.
\textsuperscript{220} See supra notes 23–30 and accompanying text.
\textsuperscript{221} See supra notes 55–63 and accompanying text.
\textsuperscript{222} See supra notes 64–82 and accompanying text.
\textsuperscript{223} See supra notes 79–80 and accompanying text.
\textsuperscript{224} See supra notes 71–78 and accompanying text.
\textsuperscript{225} See supra note 148 and accompanying text.
\textsuperscript{226} See supra note 165 and accompanying text.
\textsuperscript{227} See supra notes 157–63 and accompanying text.
\textsuperscript{228} See supra notes 167–70 and accompanying text.
• Some law schools already offering credit to J.D. candidates for online courses;\textsuperscript{229}
• Some law schools offering entire online LL.M. degrees through distance learning; and\textsuperscript{230}
• Steady growth in the debt accumulated by law graduates, while applications to law schools have plummeted.\textsuperscript{231}

The ABA Section has its finger in the dike, temporarily holding back an advancing tide that may replace what we think of as law school education with J.D. degrees that are earned entirely online. And state courts have thus far cooperated by not relaxing the requirement that lawyers graduate from Section-accredited law schools. But as the battles over internet pornography, Wikileaks, and digital copyright piracy have shown, technology has a way of overtaking and swamping regulation or, in some cases, forcing radical changes in a regulatory structure.

The simultaneous proliferation of the new MOOC technology and economic turmoil in most law schools may provide a fine opportunity to educate many more people in legal subjects, a democratization of legal education. But the inevitable cost is a decline in the type of legal education that evolved during the twentieth century, which featured not only the transmission of factual knowledge to students but also the opportunity to hone skills in the classroom and clinic and to explore values so that students could become critical thinkers and citizens. Leading universities, including the one at which I teach, are falling over themselves in a rush to join edX or Coursera and become part of the newest wave in law teaching. Their administrators may see the prospect of substantial revenues within a few years, when the MOOCs created by their faculties become required coursework at less prestigious schools. But in the view of this author, if they value the type of education that their law schools offer, they will give considerable thought to what elements of traditional legal education should be preserved, and how MOOCs can interact with and support, rather than destroy within a few years, a system of legal education that the nation’s universities have taken a century to develop.

\textsuperscript{229.} See supra note 149 and accompanying text.
\textsuperscript{230.} See supra note 152 and accompanying text.
\textsuperscript{231.} See supra notes 135–47 and accompanying text.
CAREGIVER PAYMENTS AND THE OBLIGATION TO GIVE CARE OR SHARE

MERLE H. WEINER*

INTRODUCTION

The law disserves parents who are the primary caregivers for their children. Some parents perform a disproportionate amount of caregiving labor, but receive little or nothing in return from the other parent. In order to be eligible for any sort of remedy for this freeloding, the law generally requires that the caregiver was married and performed the disproportionate caregiving during the marriage. Unmarried caregivers are left with few, if any, remedies, and divorcing caregivers find that alimony (or, as it is sometimes called today, “spousal support” or “maintenance”) fails to address adequately their post-divorce caregiving.

This article argues that parents should have a legal obligation to share fairly the caregiving responsibility for their children, regardless of whether the parents are married, unmarried, separated, or divorced. Every parent should be obligated “to give care or share,” i.e., to pay compensation to the other parent for any disproportionate and unfair caregiving that occurs. This general obligation should be imposed without delay, despite the fact that the legal solution will be untidy. A broad mandate that a court make “fair” a breach of the obligation to give care or share will allow courts to determine immediately, on a case-by-case basis, the appropriate remedy for each caregiver’s particular situation. A broad mandate will also lay the groundwork for improvements to a complicated area of the law. The claimants’ awards and judicial assessments of “unfairness” can inform the development of future adjudication guidelines.

This article proceeds in six parts. First, it explains why a legal remedy is needed for some disproportionate caregiving. It isolates disproportionate and unfair caregiving as the problem, and suggests that freeloding (by one parent off of the caregiving labor of the other parent) constitutes the unfairness. Second, the article argues that all caregivers, not just married caregivers, should have a remedy for freeloding because “mooching” is wrong regardless of the parents’ marital status. If anything, the rise of

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unwed childbearing and the extreme freeloading that unmarried caregivers sometimes experience suggest that a legal remedy is essential. Third, the article describes the inadequacy of the existing law for divorcing caregivers, that is, even for those caregivers who are thought “deserving.”

The second half of the article then discusses ways in which the law might change to better redress the unfairness experienced by caregivers. The fourth part examines contemporary reform proposals, including those by the American Law Institute and several scholars. These proposals, if adopted, would move the law in the right direction, but they all fail as complete solutions because they exclude certain caregivers and rely on rigid formulas or theories. The article’s fifth part proposes a general legal obligation applicable to all parents, and argues against ossifying the law’s development by selecting now a particular approach or theory to govern the claims. Rather, courts should assess “unfairness” by examining the relevant facts and then use the full range of available theories from the alimony context to craft the most appropriate remedy for each case. Finally, the sixth part of the article explores the disadvantages that might arise if this proposal were adopted.

This article is one part of a much larger project by this author that focuses on the development of a legal status for parents of the same child. Cambridge University Press will publish that longer work, entitled *The Parent-Partner Status in American Family Law*. That book details several other inter se legal obligations that arguably should also exist between parents. If adopted, the proposed obligations together would create a new legal status for parents and further a reconceptualization of American family law around parenthood. Consequently, this article’s proposal for caregiver compensation is best understood as one possible component of a new legal status. The book contains several justifications for the new status that are not reproduced here, but those justifications also support this particular proposal. I commend the forthcoming book to readers interested in a more complete picture of the role that caregiver compensation might play in the development of a new status and the benefits that such a status would provide.

I. FREeloading OFF OF THE CAREgIVER

“Caregivers” are defined here as parents, whether married, divorced, or unmarried, who perform a disproportionate amount of caregiving for their children. Parents rarely split caregiving labor in half. Caregivers often experience economic and other disadvantages from performing a disproportionate amount of this work, especially when they are not in a sharing relationship such as marriage. However, without more, neither the disproportionality of the caregiving nor the hardship associated with disproportionate caregiving justifies the imposition of a legal obligation on the other parent to redress the situation. Rather, a legal remedy is
appropriate because some caregivers’ disproportionate burden is “unfair,” or more particularly, the other parent acts “wrongfully.”\(^1\) Wrongful behavior exists when a parent unilaterally retains the benefit of the caregiver’s labor without giving anything of sufficient value to the caregiver in exchange, even though caregiving for their child is their shared responsibility. This type of wrongful behavior is typically called “freeloading,”\(^2\) and unfortunately, it is widespread among parents.

### A. Freeloading Patterns

The type of behavior that causes concern falls into some pretty identifiable patterns. Sometimes one parent is freeloading off of the other parent by allowing her\(^3\) to perform all of the caregiving and giving her nothing in return. The most egregious situation is when one parent totally abdicates his responsibility and leaves the other parent with no choice at all about how to share work or resources. The abdicating parent gives the caregiving parent nothing for her efforts and may not even provide child support, but instead goes off to do his own thing. The caregiving parent must then struggle to provide for the child’s material and non-material needs alone. A similar lopsidedness can arise when a court awards primary custody to one parent while the other parent is free of most caregiving obligations, and the court provides the caregiver with no compensation for her future caregiving work.

Another unfair pattern arises when the parties have an agreement about the sharing of caregiving and market labor, but the agreement is repugnant in some way that makes the arrangement unjust. Imagine, for example, that the caregiver agrees to do all the caregiving in exchange for the market worker’s promise not to beat her. The market worker already has that legal obligation, so he is giving her nothing in exchange for the caregiving.\(^4\) In addition, the very nature of the exchange is offensive to

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2. Norman E. Bowie has described well how freeloading violates Kant’s first categorical imperative, a variation of the golden rule. See Norman E. Bowie, Kantian Ethical Thought, in The Ethics of Human Resources and Industrial Relations 61, 62–64 (John W. Budd & James G. Scoville eds., 2005). The other moral and policy bases for a caregiver payment can be found in Merle Weiner, The Parent-Partner Status in American Family Law (Cambridge University Press) (forthcoming).

3. The female pronoun is used for the caregiver and the male pronoun is used for the market worker, as these gendered patterns persist. Of course, the gender of the caregiver and market worker could be reversed, or the roles could be shared, or the pronouns could be the same for the caregiver and market worker in same-sex couples, but for simplicity’s sake, the stereotypical genders are assigned to these roles. [Editor’s Note: The Villanova Law Review requires the use of gender-neutral language, but has permitted the author’s use of gender-specific language for the purposes of this article.]

4. Contract law would classify such a contract as lacking “consideration.” The absence of consideration is not always determinative of “unfairness.” For example,
modern sensibilities. Or, consider a situation in which the parties’ agreement violates public policy. The parties agree, for example, that the mother will do all of the caregiving in exchange for the father’s promise not to contest custody if the parties ever divorce. Such a contract would be unenforceable because it violates the public’s interest in having a court determine custody based upon the best interests of the child.5 The caregiver who acts for years on the assumption that she would get something in exchange for her efforts, experiences an unfairness when the benefit of her bargain disappears, even for a good reason like public policy.

Unfairness can also exist when one party breaches an otherwise unobjectionable agreement. Imagine, for example, that the parties agree that the mother will provide caregiving and the father will work in the market, and both parties will share the father’s income. If the father withholds his income from the mother, he would breach their agreement and would be acting unfairly. Similarly, spouses may agree that the mother will stay home and watch the child until the child is ten years old and the father will support the family financially. If the father refuses to support the mother because they divorce, but the child is only five years old, the father is treating the mother unfairly.6

Some people might dispute whether any unfairness exists in the last example because, they would claim, the couple’s original agreement no longer governs their relationship once they divorce. After all, both parties assumed that they would be romantically involved forever, or at least until the child turned ten years old, and that assumption turned out to be incorrect. Sometimes—but not always—a party can be released from a contract when a fundamental assumption underlying the contract dramatically changes.7

But this reasoning is questionable. First, it assumes that the parents’ agreement about the caregiving and related compensation is an enforceable agreement, subject to the normal rules of contracting. However, it is not. Courts will not enforce contracts between spouses about such fundamental family arrangements. Sometimes a statute precludes it.8 Other times, courts employ common law contract doctrine and find a lack of

5. One might label this contract unconscionable. Unconscionable can mean the contract tries to eliminate “fundamental duties otherwise imposed by the law,” or “seek[s] to negate the reasonable expectations of the nondrafting party,” or the main terms are “unreasonably and unexpectedly harsh.” 8 SAMUEL WIListon & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:10 (4th ed. 2012).


7. See 17A Am. Jur. 2d Contracts § 651 (2012) (discussing contract that is “frustrated because of changed conditions” not due to party’s fault, and where parties did not assume that condition would ever occur).

8. See, e.g., MISS. CODE ANN. § 93-3-7 (2013) (“Husband and wife shall not contract with each other, so as to entitle the one to claim or receive any compensation from the other for work and labor, and any contract between them whereby one
consideration, or they refuse enforcement because the agreement violates public policy.\(^9\)

Second, even if the couple’s agreement were an enforceable contract, as it might be if they were unmarried,\(^10\) the father’s breach should only be excused if the couple’s romantic relationship is an essential foundation of their agreement. Arguably, however, the parties’ co-parenting relationship is the essential foundation of their agreement, and that relationship continues until their child reaches the age of majority. The parties’ agreement never specified that the caregiving arrangement would end upon the termination of the parents’ romantic relationship, even though the parties could have foreseen that possibility and addressed it. Their silence suggests that the romantic relationship was not an essential foundation of their agreement.

Third, the reasoning assumes that the father’s obligation going forward has no connection to the caregiver’s past acts, which may have been performed in reliance on their agreement. While her past acts may have been compensated already, either during the relationship or with a property award upon divorce, that is not necessarily so, especially if the family had few resources. Therefore, his obligation to pay her in the future may represent compensation for her past work. Consequently, even if changed circumstances were to release the father from any future obligation under their agreement, the changed circumstances would not affect his liability for obligations already incurred.

Fourth, the father’s argument also assumes that the mother’s caregiving going forward should be uncompensated, or that he can unilaterally determine the terms of the compensation. Even if the couple’s original

shall claim or shall receive compensation from the other for services rendered, shall be void.”).

\(^9\) See Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 230–31 (1982) (“Frequently by statute, and even more often by judicial precedent, spouses are prohibited from varying the legal terms of the marriage ‘contract.’ This prohibition is grounded either directly on the bar against varying the incidents of marriage, or indirectly on related theories of no consideration. Based on these policy analyses, courts have refused to enforce such agreements between spouses as: payment by one spouse to another for domestic, child care, or other services in the home; [and] . . . alteration of statutory duties of support . . . .”); see also Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 16–17 (2003) (noting that household labor is an essential of marriage and essentials cannot constitute consideration under contract law).

\(^10\) See Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. Ky. L. REV. 125, 148 (2005) (“Traditionally, agreements between unmarried couples that attempted to create rights and obligations similar to marriage were unenforceable. However, the recent trend has been to enforce contracts between cohabitating adults unless the agreement depends solely on unlawful meretricious relations. Courts have been willing to enforce contracts between unmarried couples based on common law principles of implied contract, equitable relief and constructive trust. Most of these cases deal with contracts for distributing assets when a relationship ends. Still, the decisions imply that the courts will enforce contracts specifying transfers during marriage and liquidated damages at dissolution.”).
agreement assumed the existence of a romantic relationship, and that agreement ceases to apply because of changed circumstances, there is no reason why the costs of future caregiving should be allocated solely to one of the parties by default.

B. Freeloading, Really?

Now some readers might think that it is too harsh to use the term “mooch” to characterize the fathers in the above scenarios. While they might benefit from the other parent’s performance of a disproportionate amount of the caregiving labor, in many situations the caregiver appears to be volunteering her labor. It is wrong to label someone a mooch just because that person provides nothing in exchange for a gift, because—after all—it was a gift. And it is true that caregivers typically provide their services without expectation of compensation in the traditional sense.

But it also goes too far to say that all caregivers choose to give their services away for free. It is simply impossible to assess whether caregivers intend to gift their labor or whether they merely acquiesce in a regime that often fails to compensate them for the freeloading. In many situations, there is no remedy available, especially if the caregiver never married the child’s other parent. In fact, it makes more sense to assume that caregivers are merely acquiescing, and not gifting their labor, because when caregivers do have a remedy—which tends to be at the time of divorce for married caregivers—those caregivers seek redress and point to their caregiving contributions as justifying the remedy. They do not act as if they were gifting their services, with no need for redress.

Certainly, many caregivers provide their caregiving without an express promise of compensation because they do not believe the other parent will treat them unfairly. They believe they are getting (or will get) something of value in return, including a share of the fruits of the other parent’s market work. The caregiver’s assumption about the fairness of the arrangement is most likely to be vindicated when the parents are, and stay, in a long-term loving relationship, typically marriage. But often relationships end and expectations become frustrated.

Still other caregivers probably care for their children without a promise of compensation because caregiving is a core component of who they are, and they are happy to do the work for free. For these caregivers, the other parent’s (or child’s) appreciation for their efforts may be sufficient remuneration. These caregivers’ feelings are reinforced by strong cultural norms surrounding motherhood: society highly values the act of mothering and expects it to be uncompensated.

The martyrdom of these caregivers may be noble, but their selfless behavior is cheapened because they often forego something that they never had a right to anyway. Put another way, they forego nothing. Their martyrdom, coupled with the law’s assumption that their caregiving is usually a gift, masks and fosters exploitation by the other parent. It is one
thing for a caregiver to waive compensation voluntarily because she feels that she does not need or want it, but it is quite another thing to make her automatically a “volunteer” by denying her any legal claim to compensation.

Now some might point out that caregivers are not forced to do the caregiving so that their continued act of caregiving means that the situation must be Pareto-optimal. In many other situations in which there is an unfair allocation of work, the party who is suffering the disproportionate and unfair work burden can simply walk away. If the person does not walk away, then the situation is typically thought to be Pareto-optimal and the person is not “exploited,” at least not sufficiently to justify government intervention.11

But, of course, caregiving is not like any other relationship of exchange. Children are not commodities. A caregiver’s connection to her child and her desire to do what is best for her child mean she cannot simply walk away if the situation is unfair. Nor would we want that result. Nor does the law allow her to remedy the situation as others in the commercial world might. Caregivers cannot simply say, like Little Red Hen in the famous folk tale, “You did not do a fair share of the work to raise this child so you do not get to share in the joy of knowing him or her.” The child is not like a loaf of bread to be parceled out.

Finally, some people may caregive without compensation because that arrangement is a quid pro quo for a sole custody award at the end of the parents’ romantic relationship. The parents may never even discuss this bargain. The parent who wants sole custody may fear that even asking for caregiver compensation would trigger a counterproposal for shared caregiving, and so no request is made. In fact, the fear is understandable because some parents do seek custody solely for purposes of lowering their child-support obligation.12

The law facilitates a parent’s ability to take advantage of the caregiver by ignoring the issue of caregiver compensation. To see how, compare the law’s treatment of child support. Caregivers are under less pressure to forego child support in exchange for custody because the child’s right to child support is unwaiveable, and the caregiver’s income is irrelevant to a custody determination. If caregivers had an unwaiveable right to caregiver compensation, the law could similarly minimize the pressure to forego caregiver compensation in exchange for custody.

The unique dynamics of caregiving require that the law provide a remedy to rectify the unfairness that can sometimes attend this activity.


Otherwise, freeloading and exploitation will continue. Lest there be any misunderstanding, the remedy proposed is a monetary one for the caregiver. While lawmakers might try instead to equalize the disproportionate caregiving between the parents, that response would be foolish: no remedy should ever require a parent to perform caregiving. Apart from the fact that the Thirteenth Amendment of the United States Constitution might preclude such a remedy (the Amendment prohibits involuntary servitude), such a remedy might endanger the child. A parent who is reluctant to caregive may become resentful if he or she has to caregive, and may take the resentment out on the child. Rather, here the proposed remedy is simply to award the caregiver sufficient financial compensation to rectify the unfairness.

II. The Absence of a Remedy for Unmarried Caregivers

Unmarried caregivers typically lack a remedy for disproportionate and unfair caregiving. Contrary to some popular misconceptions, child support does not provide unmarried caregivers an adequate remedy for their efforts, just as it does not negate the divorcing caregiver’s need for

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14. Child support does not incorporate adequate compensation for caregiving efforts expended by the child’s custodian. At best, child support may include funds for some, but not all, of the costs associated with third-party care. Child support regimes differ in their treatment of child care costs, but they usually employ one or more of the following methods to address them: incorporate the cost of child care into the base child support award; provide an add-on for child care expenses on top of the base award and allocate those expenses between the parents; consider child care expenses or time spent with the child to be a deviation factor; and, permit deductions from gross income for child care costs. See generally Laura Morgan, Child Support Guidelines: Interpretation and Application § 7.02 (2013). “Regardless of the method used, all guidelines require that child care expenses be work-related and reasonable.” Id. The income-shares model, which is the most popular method for calculating child support, incorporates the cost of child care into the base amount. The figures found in child support tables are based upon expenditure data from the Census Bureau’s Consumer Expenditure Survey. That data includes child care and education expenses as a category. See Commonwealth of Mass., Massachusetts Child Support Guidelines Quadrennial Review: Final Report of the 2012 Task Force 20–21 (June 2013) [hereinafter Quadrennial Review]. However, a child support award that relies solely on the base amount to cover child care costs likely undercompensates for those costs because the expenditure data comes from intact households only. The amount of caregiving that is “paid for” in intact families is presumably less than in divorced or non-marital/non-cohabiting families because an intact family may have a second parent available to watch the child when the first parent works. Consequently, a child support award may undercompensate for the real expense of child care in a divided family. Moreover, since any expenses incurred must be reasonable, courts may require the custodial parent to shoulder alone “unreasonable” expenses, which may be determined by the care’s cost rather than the caregiver’s need. For example, a state that allows incurred expenses to be deducted from gross income may depart downward from the guideline amount if the expense was disproportionate to the custodial parent’s income. See, e.g., Office of the Chief Justice,
a property division or alimony award. A caregiver’s non-marital status does not result in any more child support than a divorcing caregiver receives.

The law tends to use marriage to differentiate between parents who will, and will not, have inter se obligations to the other parent beyond child support. The marriage line seems antiquated because so many children are now born outside of marriage. Over thirty years ago, New Zealand recognized the need for change and extended a “maintenance” remedy to any parent who provided day-to-day care for the child, even if the parents never lived together.\textsuperscript{15} It is time for the United States to update its laws.

\textbf{A. The Marriage Divide}

In the United States, unmarried caregivers (unlike divorcing caregivers) typically have no access to alimony and property awards to

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remedy disproportionate and unfair caregiving. Most states lack domestic partner legislation,16 which might afford such remedies; but even when a domestic partnership option exists, unmarried couples with children often do not opt into the system.17 Similarly, common-law marriage, which changes an unmarried couple into a married one, would provide some cohabiting caregivers with access to property division and alimony. But few states still allow common-law marriage, and many caregivers do not qualify even where it exists. The few progressive states that automatically impose marital-like remedies on unmarried couples generally require that those couples had a marriage-like relationship,18 and not all caregivers qualify.

While many states allow unmarried parties to access the equitable remedies discussed in Marvin v. Marvin,19 the Marvin remedies are relatively unhelpful. Claimants often lack evidence of any of the following: an unjust enrichment (i.e., that the caregiving was not a gift),20 a monetary


17. One gets a rough sense of this reality by examining the number of couples with domestic partnerships in Nevada, a state that permits both same-sex and opposite-sex couples to register. According to the U.S. Census Bureau, approximately 7.3% of 1,000,000 households in Nevada were unmarried partner households. See U.S. CENSUS BUREAU, AMERICAN FACT FINDER, 2012 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, S1101. Although there are approximately 73,000 unmarried partner households, there are only 3,790 registered partnerships as of June 20, 2012. See Secretary of State, Ross Miller, Biennial Report July 1, 2010–June 30, 2012, at 15 (Sept. 15, 2012).


20. See Cynthia Lee Starnes, Alimony Theory, 45 FAM. L.Q. 271, 286–87 (2011); see also Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) (“As a matter of human experience personal services will frequently be rendered by two people living together because they value each other’s company or because they find it a convenient or rewarding thing to do.”). Caregiving itself has been insufficient to support a quantum meruit claim to another’s property. See, e.g., Rowson v. DeNoyer, No. 11-P-1156, 2012 WL 2051151, at *1–2 (Mass. App. Ct. June 8, 2012)
contribution to the property in dispute, a common intention to share ownership of the property, wrongdoing (often narrowly construed), or a “confidential relationship.” Reform efforts exist to expand the equitable remedies, but these efforts are not necessarily that beneficial for caregivers. For example, the Restatement (Third) of Restitution and Unjust Enrichment has a new remedy for unmarried couples. The commentary suggests that services qualifying for a remedy must not be part of the “reciprocal contributions normally exchanged between cohabitants whether married or not,” and one commentator stated that the Restatement’s express language does not apply to the situation in which an unmarried cohabitant raises the couple’s children while the other cohabitant

(allowing claim for quantum meruit for actual value of services performed remodeling house; domestic partnership alone did not give rise to claim for one-half of house titled in partner’s name); Northrup v. Brigham, 826 N.E.2d 239, 243–44 (Mass. App. Ct. 2005) (allowing quantum meruit claim, but distinguishing case from one in which person provided services “ordinarily rendered by a wife in maintaining the home and in performing the usual household duties” (internal quotation marks omitted)); Mangsen v. Costa, No. 050313, 2009 WL 1082377, at *7 (Mass. Super. Ct. Mar. 4, 2009) (holding that quantum meruit claim requires underlying agreement about exchange). Another historic limit on unjust enrichment is that it is not available “to claimants who reasonably could have negotiated a consensual exchange.” See Emily Sherwin, Love, Money, and Justice: Restitution Between Cohabitants, 77 U. COLO. L. REV. 711, 712 (2006).


22. See 76 AM. JUR. 2D Trusts § 132 (2013) (discussing resulting trusts “where the acts or expressions of the parties indicate an intent that a trust relation result from their transaction”).


24. See Northrup, 826 N.E.2d at 245 (finding record did not support constructive trust and unjust enrichment theories).

25. See Jordan, 705 So. 2d at 461 (“A confidential relationship exists when ‘confidence is reposed by one party in another, and the trust or confidence is accepted under circumstances which show it was founded on intimate personal and business relations existing between the parties, which gave the one [advantage or] superiority over the other.’” (citation omitted)). A constructive trust can be imposed for abuse of a confidential relationship, but cohabitation alone—without marriage—is not per se evidence of such a relationship. See id. at 461–62. This can be true even if the parties have a child together. See, e.g., Tarry, 649 N.E.2d at 1, 6–7 (fourteen years of cohabitation and birth of child did not create confidential and fiduciary relationship between parties).

26. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 (2011). Section 28 allows a claim upon dissolution of a relationship when two people have “formerly lived together in a relationship resembling marriage,” and one “made substantial, uncompensated contributions in the form of property or services” to a specific asset owned by the other. See id.

27. Id. at cmt. d.
acquires all the assets.\textsuperscript{28} Moreover, the Restatement requires that the unmarried couple had a cohabiting relationship “resembling marriage” in order for one of its members to invoke the new provision’s protections.\textsuperscript{29}

While an unmarried caregiver might contract for a remedy,\textsuperscript{30} contracts between unmarried parents are “rare,”\textsuperscript{31} probably because unwed parties mistakenly believe that “some legal protections are available,”\textsuperscript{32} or they never think of entering a contract. Of course, contracts may also be rare because one party has nothing to gain by contracting. Moochers are unlikely to want to contract since the current law benefits them so completely. Implied contract claims are not a solution either because courts often want to see marital-like cohabitation,\textsuperscript{33} which may not exist, or courts find the terms of the agreement too amorphous to be enforceable.\textsuperscript{34}

The bottom line is that many unmarried caregivers are out of luck when it comes to having a successful remedy for their disproportionate and unfair caregiving.\textsuperscript{35} Moreover, the patchwork of available remedies leaves most unmarried caregivers in legal limbo while they caregiving. The caregiver rarely knows ahead of time whether or not a court adjudicating

\textsuperscript{28} See Sherwin, supra note 20, at 729–30. Professor Sherwin also recommends against courts adopting the Restatement’s relaxed interpretation of unjust enrichment in the cohabitation context. See id. at 736–37. Her words of caution may stop courts from adopting the relevant Restatement’s recommendations at all. The author, in fact, recommends that perhaps status-based claims would be a better way to afford relief. See id. at 720.

\textsuperscript{29} Restatement (Third) of Restitution and Unjust Enrichment, supra note 26, § 28(1).

\textsuperscript{30} Elizabeth S. Scott, Marriage, Cohabitation and Collective Responsibility for Dependency, 2004 U. CHI. LEGAL F. 225, 255 (2004) (“Many courts have adopted this view [that ordinary contract principles apply to agreements between cohabiting parties] in recent years and have been ready to enforce these contracts.”).

\textsuperscript{31} See Ira Mark Ellman & Sanford L. Braver, Lay Intuitions About Family Obligations: The Case of Alimony, 13 THEORETICAL INQUIRIES L. 209, 234 n.32 (2012); see also Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1367 (2001) (“[F]ew couples (married or unmarried) . . . . make express contracts at all . . . .”).


\textsuperscript{33} See Goldberg, supra note 18, at 488; see, e.g., Goode v. Goode, 396 S.E.2d 430, 437–38 (W. Va. 1990) (holding court may order property division between unmarried cohabitants who held themselves out as husband and wife; order may be based on implied contract principles); Maria v. Freitas, 832 P.2d 259, 263–65 (Haw. 1992) (holding implied-in-fact contract did not exist to benefit cohabitant of nineteen years and co-parent, and refusing to award her separate property of partner or support payments even though couple was known as “husband and wife” to some members of public and claimant had homemaking role throughout relationship).

\textsuperscript{34} Cause of Action by Same-Sex or Heterosexual Unmarried Cohabitant to Enforce, 35 CAUSES OF ACTION 2d 205 § 2 (Dec. 2013).

\textsuperscript{35} See Berenson, supra note 19, at 297 (“[F]ew ‘palimony’ plaintiffs receive significant recoveries from the courts.”).
claims at the end of her romantic relationship will find present all of the prerequisites necessary to recovery. This uncertainty gives caregivers false hope and leaves them vulnerable if the relationship ends.

B. The Prevalence and Difficulty of Unwed Caregiving

The current legal framework is unfortunate because of the number of unmarried caregivers, the frequency of disproportionate caregiving, the effects of the disproportionality, and the externalities imposed on innocent parties.

First, non-marital births are no longer an anomaly. In 2009, almost 1,700,000 children were born to unmarried parents.\(^{36}\) In percentage terms, approximately forty-one percent of the births each year are to unmarried women, up from about five percent in 1960.\(^{37}\)

Second, unmarried caregivers often do a disproportionate share of the caregiving labor. Whenever the parents live apart, the caregiving work will fall largely on the parent with physical custody of the child. In one study, approximately fifty percent of the unwed mothers did not cohabit with the father at the time of birth, and nine percent of the mothers had little or no contact at all with the fathers.\(^{38}\) Unwed mothers overwhelmingly have physical custody of their children.\(^{39}\) Over time, unmarried mothers’ relationships with their children’s fathers often deteriorate, and the fathers’ involvement in their children’s lives falls off. In the study mentioned above, by the child’s fifth birthday, sixty-three percent of all fathers were living away from the mother and child,\(^ {40}\) and less than half of


\(^{39}\) See Glendessa M. Insabella et al., Individual and Coparenting Differences Between Divorcing and Unmarried Fathers, 41 Fam. Ct. Rev. 290, 298 (2003) (finding at initiation of court proceedings, 86 percent of unmarried mothers had primary physical custody, 8.3 percent of fathers had primary physical custody, and 5.6 percent had joint physical custody).

the children with nonresident fathers had ongoing contact with their fathers. Thirty-seven percent of the children with nonresident fathers had no contact with their fathers in the previous one to two years.\footnote{See \textit{id.} at 473.} In another study, unwed fathers who paid child support averaged only sixty-one days of contact per year with their children.\footnote{See Robert I. Lerman, \textit{Capabilities and Contributions of Unwed Fathers, Future Child.: Fragile Families}, Fall 2010, at 73–74, available at http://www.futureofchildren.org/futureofchildren/publications/journals/article/index.xml?journalid=73&articleid=531.} Fathers with regular visitation commonly exercise their visitation on evenings and weekends—an arrangement that minimizes the chance that caregiving will interfere with his work obligations.

These patterns are evident among teenage mothers too. Approximately 400,000 children each year are born to teenagers.\footnote{See \textit{CDC Vital Signs, Preventing Teen Pregnancy in the U.S.} 1 (2011), available at http://www.cdc.gov/vitalsigns/pdf/2011-04-vitalsigns.pdf.} Most teen fathers are not married to the mothers of their children, nor do they live with them.\footnote{See Resilience Advocacy Project, \textit{Who Cares About Teen Dads? How Family Court Reform Can Help Break a Cycle of Poverty} 2 (Resilience Advoc. Proj. Policy Brief No. 1, 2012), available at http://resiliencelaw.org/wordpress2011/wp-content/uploads/2012/06/Teen-Father-White-Paper-FINAL-VERSION.pdf.} Many of these girls find themselves doing a disproportionate amount of the caregiving. Some scholars report that “teenage mothers are likely to receive little in the form of direct caregiving from the baby’s father.”\footnote{Loretta Pinkard Prater, \textit{Never Married/Biological Teen Mother Headed Household, in Single Parent Families: Diversity, Myths and Realities} 305, 314 (Shirley M. H. Hanson et al. eds., 1995); see also Celeste A. Lemay et al., \textit{A Qualitative Study of the Meaning of Fatherhood Among Young Urban Fathers}, 27 Pub. Health Nursing 221, 222 (2010).} While other family members often help these girls,\footnote{See Rachel Connelly \& Jean Kimmel, \textit{The Time Use of Mothers in the United States at the Beginning of the 21st Century} 131 (2010).} a girl’s parenting obligations still reduce her leisure,\footnote{See Margaret Mietus Sanik \& Teresa Mauldin, \textit{Single Versus Two Parent Families: A Comparison of Mothers’ Time}, 35 Fam. Rel. 53, 55–56 (1986).} exact psychological costs (such as increased worries and anxieties), and require considerable physical labor.\footnote{See Prater, supra note 45, at 311–12.} While teenagers are not the largest group of unmarried parents, the imbalance in parenting responsibility among this population is notable because the youngest mothers are likely to have the greatest vulnerabilities among unmarried caregivers generally.

Third, unmarried caregivers of all ages experience hardship from their caregiving. Being a “single parent” is difficult, especially when that parent also works or attends school. One divorced mother described

\begin{footnotesize}
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\item See \textit{id.} at 473.
\item Loretta Pinkard Prater, \textit{Never Married/Biological Teen Mother Headed Household, in Single Parent Families: Diversity, Myths and Realities} 305, 314 (Shirley M. H. Hanson et al. eds., 1995); see also Celeste A. Lemay et al., \textit{A Qualitative Study of the Meaning of Fatherhood Among Young Urban Fathers}, 27 Pub. Health Nursing 221, 222 (2010).
\item See Rachel Connelly \& Jean Kimmel, \textit{The Time Use of Mothers in the United States at the Beginning of the 21st Century} 131 (2010).
\item See Prater, supra note 45, at 311–12.
\item See James T. Fawcett, \textit{The Value of Children and the Transition to Parenthood, in Transitions to Parenthood} 16 (Rob Palkovitz \& Marvin B. Sussman eds., 1988) (identifying categories of costs of having children, including physical costs).
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Caregiver Payments

Caregiving without a partner: “‘Being a single mom is exhausting. When you parent alone, you are the breadwinner, the bread maker, the police, the comforter, taxi driver. Not to mention all the things that go along with owning a home and an automobile.’”50 A contributor to SingleMom.com revealed that being a single mother is hard because “it’s unending, there isn’t ever a break, there isn’t a backup plan. No matter what, everything hinges on you.”51 Even women who parent alone by choice (typically an economically privileged bunch) speak about the tremendous work it entails. Lori Gottlieb’s article in The Atlantic chided “single-mom books” for not mentioning the following:

[O]nce you have a baby alone, not only do you age about 10 years in the first 10 months, but if you don’t have time to shower, eat, urinate in a timely manner, or even leave the house except for work, where you spend every waking moment that your child is at day care, there’s very little chance a man—much less The One—is going to knock on your door and join that party.52

Professor Anne Alstott’s words seem particularly apt for caregivers who do not cohabit with the other parent: “[I]t is not that parents feel burdened, but . . . they are burdened.”53

Caregiving often has adverse economic consequences for the caregivers. Caregiving can come at the expense of market work, and market work brings income, retirement benefits, and Social Security credit.54 Even a caregiver who combines market and non-market work with a flexible or part-time job faces economic repercussions from those accommodations.55 Caregivers who work fulltime suffer financially too. Researchers have repeatedly noted a wage gap for women with children.56 Estimates vary, but several researchers have mentioned a wage penalty of approxi-

51. This is a Marathon, SINGLEMOM.COM, http://www.singlemom.com/this-is-a-marathon/#comments (last visited Oct. 28, 2013).
mately four to five percent if a woman has one child.\textsuperscript{57} The economic effects of caregiving persist over time and leave an indelible mark of “caregiver” on these workers’ paychecks. The American Law Institute reported: “Economic studies demonstrate that responsibility for the care of children ordinarily has a significant continuing impact on parental earning capacity. This effect is not limited to parents who withdraw from full-time employment. It is also observed among primary caretakers who continue full-time market labor.”\textsuperscript{58}

In contrast, the other parent—the one who does less than half of the caregiving—experiences real economic benefits from being less encumbered by caregiving responsibilities. A person can usually earn much more money by being the perfect employee, that is, someone with few caregiving obligations to divert him or her away from employment responsibilities. Studies show that workers without children tend to make more money, even after controlling for variables like education and years of employment.\textsuperscript{59} Similarly, fathers whose partners are stay-at-home moms earn on average thirty percent more than fathers in families with two-career parents.\textsuperscript{60} Having less responsibility for caregiving means that a market worker has more time for work. Even an unemployed parent benefits if the other parent does most of the caregiving. The unemployed parent has more time to look for a job, go to school, or engage in leisure.

Fourth, and finally, the absence of a remedy for unmarried caregivers produces externalities. While the economic repercussions of caregiving are often imposed on the caregiver, the costs are sometimes also imposed on those with no biological connection to the child. For example, taxpayers bear some of the costs of caregiving when the caregiver receives public assistance, although this externality might be unavoidable if the father is poor too. Additionally, the costs often are shifted to the caregiver’s subsequent partner. Unmarried parents, like divorced parents, frequently re-

\textsuperscript{57} See Budig & England, \textit{supra} note 56, at 220 (finding “remaining motherhood penalty of about 4 percent per child”); Glauber, \textit{supra} note 56, at 954–55 (discussing how findings of current study are consistent with Budig and England study in which “women with one child pay a 3% wage penalty”).

\textsuperscript{58} \textit{Principles of the Law of Family Dissolution, Analysis & Recommendations} § 5.05 cmt. d (2002) [hereinafter Principles]; see also id. reporter’s notes, cmt d; Cynthia Lee Starnes, \textit{Mothers as Suckers: Pity, Partnership, and Divorce Discourse}, 90 Iowa L. Rev. 1513, 1523–24 (2005).


A couple with others after breaking up, although a child can reduce a caregiver's likelihood of re-partnering. If the caregiver's new relationship is a marital relationship, then her new spouse will have a legal obligation of support. That support obligation will include the obligation to pay alimony at their relationship's end, even if her need for alimony arises from caregiving for a non-joint child. If the unmarried caregiver enters a cohabiting relationship, rather than marriage, then her new partner frequently contributes to her support, despite the absence of a legal obligation to do so. At the same time, the non-custodial parent will typically


Women with children under six years old have the lowest remarriage rate of all. See Megan M. Sweeney, Remarriage of Women & Men After Divorce, 18 J. Fam. Issues 479, 493 (1997) (finding thirty-seven percent reduction in chance of marriage compared to women with no children). Perhaps not surprisingly, a divorced woman's chance of cohabitating with a new partner is also negatively affected if she has a child at home. See Paul M. de Graaf & Matthijs Kalmijn, Alternative Routes in the Remarriage Market: Competing-Risk Analyses of Union Formation After Divorce, 81 Soc. Forces 1459, 1462–66, 1489 (2003); see also Bzostek et al., supra, at 820. In contrast, fathers' remarriage prospects decline generally only when their children are teenagers or older, probably because fathers are not typically the primary custodian for their young children; therefore, their children are less of an impediment to new relationships. See Sweeney, supra, at 496–97. But see Frances Goldscheider et al., Navigating the “New” Marriage Market: How Attitudes Toward Partner Characteristics Shape Union Formation, 30 J. Fam. Issues 719, 722 (2009) (citing studies that showed children have no effect, or even positive effect, on men’s union formation, although noting studies rarely distinguish residential status of parent).

63. A woman with a nonmarital birth is much more likely to cohabit with than marry her new partner. See Zhenciao Qian et al., Out-of-Wedlock Childbearing, Marital Prospects and Mate Selection, 84 Soc. Forces 473, 481 (2005).

64. See Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation, 9 J.L. & Fam. Stud. 1, 23–24 (2007) (“A majority of [ ] cohabitants . . . maintain joint finances.”). While “virtually all” cohabitants with a common child pool their income, similar statistics are not available for situations in which the cohabitants have a child in the home, but that child is the child of only one of the parties. See id. at 35. Chances are, however, that the sharing behavior is higher than for cohabitants without a child in the home, but lower than for cohabitants with a common child in the home. While the number of cohabitants who support a partner who cares for a non-joint child is unknown, it appears unexceptional judging from all of the questions on the internet about the tax consequences of doing so. See, e.g., Bez513, How/Can I Claim Deductions for My Girlfriend and Her Daughter That Lived with Me All Year?, TurboTax AnswerXchange (2011), https://ttlc.intuit.com/questions/1474490-how-can-i-claim-deductions-for-my-girlfriend-and-her-daughter-that-have-lived-with-me-all-year; Can I Claim My Girlfriend and Her 2 Sons as Dependents on My Taxes?, Yahoo! Answers (2009), http://answers.yahoo.com/question/index?qid=20100108052926AAVJpGh; If My Girlfriend and Her Children Live with Me and Their Father Isn’t Around, Can I Claim My
pay nothing for the economic effects of the caregiving. The biological father’s obligation to the caregiver differs significantly from his support obligation to his child, where biology determines which adult has financial obligations to support the child.65 States are very reluctant in the child support context to impose the cost of raising a child on someone who is not the biological parent, such as a stepparent.66

C. An Unjust Line

While marriage imposes on spouses the legal obligation to support each other during the ongoing relationship and, at times, when it is over, unmarried caregivers cannot rely on marriage to the other parent as the solution. First, many people do not want to marry, often for good reasons. Some consider the institution unjust and blame it for perpetuating rigid gender roles.67 Some do not want to marry because the other party is abusive or a risk to the family.68 Yet others refuse to marry until they and their partners are economically secure, so that their marriage will have a greater chance of surviving.69 Second, marriage is not an option for everyone because the law sometimes makes it unavailable, such as for many gay and lesbian parents, or for parents who have children with already-married individuals. Third, and particularly important, it takes two willing parties to marry. There are cases where the caregiver wants to marry, but the other parent does not agree, thereby depriving the caregiver of the law’s divorce remedies for disproportionate and unfair caregiving. In sum, marriage is not a solution for everyone.

65. See Leslie Joan Harris, The Basis for Legal Parentage and the Clash Between Custody and Child Support, 42 IND. L. REV. 611, 612 (2009).


67. See Joanna M. Reed, Not Crossing the “Extra Line”: How Cohabitators with Children View Their Unions, 68 J. MARRIAGE & FAM. 1117, 1124 (2006) (giving examples of individuals dissuaded from marriage because of gender roles associated with it); cf. Brad Pitt, My List, ESQUIRE MAG., Oct. 2006, at 166 (explaining his reluctance to marry until same-sex marriage is legal).


69. See KATHRYN EDIN & MARIA J. KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 129–30 (2005); Edin & Reed, supra note 68, at 122–23.
III. The Inadequacy of Existing Remedies for Married Caregivers

Channeling people into marriage also does not solve the freeloading problem because the law permits freeloading among divorced parents. Married couples frequently divorce. The law governing divorce is itself insufficiently attentive to justice for caregivers. In fact, couples typically divorce when their children are very young and there remains considerable caregiving to be done. But, courts rarely focus on this fact to justify a compensatory remedy for future caregiving work.

A. The Segmentation of Caregiving

The inadequacy of divorce law is best seen by breaking caregiving into three time periods: caregiving that occurs before the marriage; caregiving that occurs during the marriage; and caregiving that occurs after the end of the marriage. Caregivers are likely to receive a remedy for the caregiving that occurs during the marriage, but not for caregiving during the other two time periods.

Most states provide divorcing caregivers an equitable share of the couple’s marital property, and thereby reward disproportionate marital caregiving when it would be unfair not to do so. The 1973 Uniform Marriage and Divorce Act (UMDA) specifically mentions as a relevant factor to the division of property the “contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.” The theory behind the UMDA’s approach is that marriage is a partnership, and both parties are entitled to share in the fruits of that partnership, whether the fruits are well-adjusted children or the acquisition of material wealth. The UMDA also permits the court to consider the caregiver’s need, which can be influenced by marital caregiving. A few

70. See Nat’l Marriage Project & Inst. For Am. Values, The State of Our Unions: When Marriage Disappears: The New Middle America 71 (W. Bradford Wilcox ed., 2010) (“The average couple marrying for the first time now has a lifetime probability of divorce or separation somewhere between 40 and 50 percent.”).


74. For example, the Uniform Marriage and Divorce Act (UMDA) sets forth a number of factors to consider. See Unif. Marriage & Divorce Act § 307 notes of decisions 151–270 (amended 1973), 9A U.L.A. 347–98 (1998). Only Alternative A expressly sets forth the needs of the parties as a relevant factor to consider.
states also use a property award to address a caregiver’s premarital caregiving, so long as the caregiver later married the other parent.

Divorcing caregivers can also receive alimony, although the reasons for which caregivers receive it differ from place to place. Alimony is sometimes used to compensate the caregiver for her marital caregiving activity. She might be entitled to part of the other parent’s enhanced earning capacity when her caregiving contributed to the market worker’s enhanced earning capacity. Alternatively, alimony is sometimes used to remedy the caregiver’s loss in earning capacity caused by marital caregiving, especially when the divorcing couple lacks adequate property to compensate the caregiver for her economic sacrifices, which is often the case. This approach is recommended in the American Law Institute’s Principles of the Law of Family Dissolution: Analysis and Recommendations (ALI Principles), as discussed below.

Perhaps most commonly, however, alimony is used to address the divorcing caregiver’s “need” that arose from marital caregiving, so long as her husband has the ability to pay. Depending upon the jurisdiction and era, the alimony award might reflect what the recipient needs after divorce to stay off welfare, perhaps what she needs to survive at the same standard of living as during the marriage, or perhaps only what she needs to rehabilitate herself so that she can reenter the work force and support herself.

Parents who will caregive after divorce might also receive alimony for their need. Courts still tend to allocate physical custody primarily to one


76. Most states do not consider enhanced earning capacity to be property since the income is only realized after the marriage ends; therefore, courts sometimes capture it instead through an alimony award.

77. See Starnes, supra note 20, at 273.


79. The UMDA allows an award for maintenance and includes a list of factors relevant to the determination of a just award. See Unif. Marriage & Divorce Act § 308(b) (amended 1973), 9A U.L.A. 446 (1998). Need seems to be the dominant consideration. In fact, a prerequisite to an award is that the recipient lacks sufficient property to provide for his or her reasonable needs and cannot work to meet those needs, or is a custodian of a child and should not be expected to seek employment outside the home. See id. § 308(a). The Reporters for the American Law Institute note that while need is the dominant justification for spousal support, need is a weak explanatory rationale for why the ex-spouse is obligated to pay the support as opposed to society. See Principles § 4.09 cmt. d.


81. See id. § 308(b) (3).

party at divorce, typically the mother, who then does most of the caregiving. The caregiving may reduce that parent’s ability to support herself. The UMDA explicitly states that need plus ongoing caregiving (that might interfere with paid labor) can justify a maintenance award. However, courts are uncharitable in permitting caregiving after divorce to substitute for paid labor, and they rarely award alimony for this purpose. Any such award is generally limited to a short duration. In fact, one study found that financial awards are often inversely related to the amount of caregiving to be performed after the relationship ends: the more custody a woman receives (e.g., sole custody), the less likely she is to receive alimony.

Most importantly, apart from a property award for past caregiving and an alimony award predicated on need, divorcing caregivers are unlikely to receive anything else. Caregivers are usually not compensated for caregiving that occurs during the post-divorce period. Courts rarely recognize that regardless of need, caregivers deserve a remedy because they give something to the other parent that deserves compensation. Former Ohio State law professor Joan Krauskopf explained a long time ago that an award for post-divorce caregiving could be accommodated under existing alimony theory because alimony is available to “fairly share gains and losses in personal earning capacity” in order to prevent unjust enrichment. However, courts then, and still today, rarely make the parties share the economic burden of (or gains from) caregiving after divorce.

83. See Insabella et al., supra note 39, at 298 (reporting at initiation of court proceedings, 60 percent of mothers had primary physical custody, 8 percent of fathers had primary physical custody, and 32 percent had joint physical custody). After the court proceedings conclude, it appears that mothers have primary custody more often. See Nancy E. Dowd, Stigmatizing Single Parents, 18 HARV. WOMEN’S L.J. 19, 61 n.264 (1995) (maternal custody exists in approximately 90 percent of cases, and most cases are decided by settlement instead of litigation); see also Maria Cancian & Daniel R. Meyer, Who Gets Custody?, 35 DEMOGRAPHY 147, 149–50 (1998) (reporting that between 1992 and 1994, 73.7 percent of mothers were awarded primary physical custody in twenty-one Wisconsin counties).


85. Professor Ann Estin reports that few courts award alimony to allow one parent to care for the couple’s child. See Ann Laquer Estin, Maintenance, Alimony, and the Rehabilitation of Family Care, 71 N.C. L. REV. 721, 727, 731 (1993).

86. See id. at 738.


88. Joan M. Krauskopf, Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery, 25 FAM. L.Q. 253, 266 (1989). There are other purposes, including to compensate for loss of marriage prospects and for physical or mental injury. See id. at 266–67.

89. See id. at 260.

90. See id. at 265. As a general matter, spousal support is a relatively rare remedy. Only six percent of the total cases examined in 2003 at all income levels had alimony awards. See NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 128 (2008). Ann Estin noted twenty years ago, “caregiving . . . is almost entirely irrelevant when courts resolve the fi-
The reason courts have been reluctant to provide caregivers a remedy for their post-divorce caregiving relates to the “clean break” philosophy that has infiltrated divorce law. That philosophy encourages courts to disentangle the couple economically at divorce, if possible. The idea emerged from the UMDA, promulgated approximately forty-five years ago, and remains strong today. In 1996, Professor Milton Regan called it “the predominant aim” of divorce law’s treatment of financial obligations. In 2012, Professor Starnes reported that the laws at divorce still “remain wed to the clean-break myth that divorce can end or minimize all economic ties between spouses with children.” The doctrine has remained steadfast even though it is now antiquated, in light of the way divorced parents today are entangled during their child’s minority, including from child support and custody.

financial incidents of divorce, even where it has produced substantial long-term economic effects for family members.” Estin, supra note 85, at 721. As she points out, this is especially true for younger families “subject to new and different norms of family life in which self-sufficiency and autonomy are of primary importance.” Id. at 722. Scholar Joan Williams noted that poor women “have not traditionally been awarded alimony.” See Joan Williams, Is Coverture Dead? Beyond a New Theory of Alimony, 82 Geo. L.J. 2227, 2231 (1994). Permanent alimony appears to have become increasingly disfavored over time. Lenore Weitzman reported that approximately fourteen percent of divorced women received alimony in 1978. LENORE WEITZMAN, THE DIVORCE REVOLUTION 168 (1985). In 2009, approximately thirty years later, the number of people receiving permanent alimony appears to be more like two percent. Compare U.S. CENSUS BUREAU, Marital Status of People 15 Years and over, by Age, Sex, Personal Earnings, Race, and Hispanic Origin, tblA1 (2009), http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html (reporting 13,308,000 as number of divorced women age fifteen years and older), and U.S. CENSUS BUREAU, Current Population Survey, Annual Social and Economic Supplement, Source of Income in 2009—People 15 Years and over, All Races (2009), http://www.census.gov/hhes/www/cpstable/032010/perinc/new08_181.htm (reporting 320,000 women age fifteen years and older receiving alimony); see also Heather Ruth Wishik, Economics of Divorce: An Exploratory Study, 20 Fam. L.Q. 79, 81, 85 (1986) (finding “less than 7% of spouses receive spousal maintenance awards, and less than 2% receive awards of unlimited duration” in study of Vermont divorce cases from October 1982 to February 1983).


B. Uncaring Reforms

Recent reforms of alimony law have disadvantaged caregivers and have made it more unlikely that they will receive adequate compensation at divorce for their marital or post-marital caregiving. For example, Massachusetts’s Alimony Reform Act of 201194 hamstrings judges in their efforts to afford caregivers’ justice, although it is touted as “the latest and the most comprehensive” of efforts to reform alimony in the United States,95 and a “model for consideration elsewhere.”96 The Act is problematic for caregivers in at least six ways.

First, caregiving is not expressly relevant to an alimony award. Nowhere are courts told to remedy a caregiver’s disproportionate and unfair caregiving, performed either during the marriage or after divorce. The fact that someone is, has been, or will be the caregiver for the parties’ child is not listed as a relevant factor to a court’s determination of the type, amount, or duration of alimony.97 While caregiving might be relevant indirectly to some of the listed factors,98 Massachusetts’s new statute specifically eliminated as a relevant factor the “contribution of each of the parties as a homemaker to the family unit,”99 although it was included in the prior law. Nor is caregiving mentioned in the nonexclusive list of factors that could support deviation from the guidelines, either for an initial award or for a modified award.100

Second, the statute insufficiently recognizes a compensatory rationale for marital caregiving. The statute has four categories of alimony: general term, rehabilitative, reimbursement, and transitional. The statute does not mention as one of alimony’s purposes the compensation of a caregiver for her lost earning capacity attributable to her marital caregiving.101 Nor

94. MASS. GEN. LAWS ch. 208, § 34 (2012).
95. Kindregan, supra note 75, at 15.
96. Id. at 18.
97. The factors to be considered are the following: length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material. Ch. 208, § 53(a).
98. Professor Kindregan’s notes elaborate a little on each of these factors, but they do not discuss caregiving. See Kindregan, supra note 75, at 37–38 & nn.132–41.
100. See ch. 208, § 53(e). Nor do Professor Kindregan’s notes mention caregiving as a factor in this context. See Kindregan, supra note 75, at 39–40 & nn.149–57.
101. See Kindregan, supra note 75, at 35–36 & n.124.
is there any entitlement to a market worker’s enhanced earning capacity. Instead the emphasis is on economic need. While “reimbursement alimony”\(^\text{102}\) potentially affords a caregiver access to the other parent’s enhanced earning capacity, a caregiver must have been married less than five years to qualify for this type of alimony\(^\text{103}\) (as well as for transitional alimony).\(^\text{104}\) Reimbursement alimony is limited to recently married couples because these couples are the most likely couples to have an insufficient amount of property accumulated for compensating a spouse’s contribution.\(^\text{105}\) Of course, couples married longer than five years might also have inadequate property available for compensatory purposes, but the statute draws a bright line regarding eligibility.

Third, and very importantly, post-marital caregiving is ignored as a reason for compensation; it is potentially relevant only to general term alimony. Reimbursement alimony only reimburses for marital contributions;\(^\text{106}\) it does not address a caregiver’s future contributions to the other parent’s prosperity through caregiving. “Rehabilitative alimony” is available for one who can “become economically self-sufficient by a predicted time.”\(^\text{107}\) Its focus is not on compensating caregiving, but rather helping one transition away from caregiving to paid work. “General term alimony” is available for one who is “economically dependent,”\(^\text{108}\) and future caregiving may justify economic dependence.\(^\text{109}\) However, the Massachusetts’s statute lacks a provision, like in the UMDA, that says a court can excuse a recipient’s lack of labor force participation when the recipient is caregiving. A caregiver’s eligibility for general term alimony is made even more ambiguous because the statute allows a court to impute income to a caregiver,\(^\text{110}\) and its express inclusion of rehabilitative alimony, with no exemption for caregivers, makes a caregiver’s continued economic depen-

\(^{102}\) “Reimbursement alimony” is “to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training.” Ch. 208, § 48. It is not for support but is compensatory. See Kindregan, supra note 75, at 25 n.56. It is not modifiable. See ch. 208, § 51(b).

\(^{103}\) See ch. 208, § 48.

\(^{104}\) “Transitional alimony” is “to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce.” Id. It is only available if the recipient has been married less than five years. See id. It is essentially meant to help the recipient get back to a premarital standard of living after a short marriage. See Kindregan, supra note 75, at 36. It terminates within three years of divorce. Ch. 208, § 52(a). Transitional alimony is clearly not designed to help a caregiver “transition” to a life of caregiving without simultaneous market work.

\(^{105}\) See Kindregan, supra note 75, at 35.

\(^{106}\) The contribution must have been made to the “payor spouse,” and after divorce neither party contributes anything to a “spouse,” since the parties are divorced. See ch. 208, § 48.

\(^{107}\) Id.

\(^{108}\) Id.


\(^{110}\) See ch. 208, § 53(f).
dence on the other parent questionable. Although rehabilitative alimony had previously been viewed suspiciously by the Massachusetts courts, one court recently observed that the reform legislation specifically provides for it.\footnote{111}{See Kowalska-Davis v. Davis, No. 10-P-2191, 2012 WL 602770, at *1 n.5 (Mass. App. Ct. Feb. 27, 2012).}

Fourth, even if a caregiver might receive alimony for her post-divorce caregiving, the law imposes some strict time limits on the alimony’s duration, unless a deviation is required in the interests of justice. For a marriage lasting between five and ten years, general term alimony shall continue “for not longer than 60 percent of the number of months of the marriage.”\footnote{112}{Ch. 208, § 49(b)(2).} Only if the marriage lasted more than twenty years is indefinite alimony expressly permissible.\footnote{113}{See id. § 49(c).} A caregiver who divorces after six years of marriage is entitled to only about forty-three months of general term alimony (seventy-two months multiplied by sixty percent). If the caregiver has a two-year-old child at the time of the divorce, the child will be less than six years old when the general term alimony ends. Moreover, rehabilitative alimony is presumptively limited to five years.\footnote{114}{See id. § 50(b). It may be extended for unforeseen compelling reasons if it would not cause an undue burden on the payor. See id. § 50(b)(1), (3); Kindregan, supra note 75, at 34.} While the statute allows a court to delay the beginning of alimony until the conclusion of child support payments,\footnote{115}{Ch. 208, § 53(g).} the relevant provision does not appear to extend the alimony time limits otherwise, although as one commentator said, “the meaning of this provision is far from clear.”\footnote{116}{Witmer & Warner, supra note 14, § 9.6.}

Fifth, the statute caps the amount of alimony someone can receive and thereby potentially undercompensates the caregiver. With the exception of reimbursement alimony (for which someone married more than five years is ineligible and which only focuses on marital caregiving), alimony is not supposed to “exceed the recipient’s need or 30 to 35 percent of the difference between the parties’ gross incomes established at the time” the alimony order is entered.\footnote{117}{Ch. 208, § 53(b).} While a court can deviate from this limit,\footnote{118}{Id. § 49(c).} the numerical formula sends a powerful message. Even if a parent will perform one-hundred percent of the caregiving going forward, the caregiver is not entitled to half of the other parent’s income as a presumptive matter. In addition, the cap is calculated at the time of divorce, so a caregiver will never recover for her labor’s enhancement of the other parent’s income over the coming years. In fact, the law expressly excludes as a reason to modify an order the fact that the obligor has additional income from a second job or overtime, so long as that additional source of

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\item \footnote{111}{See Kowalska-Davis v. Davis, No. 10-P-2191, 2012 WL 602770, at *1 n.5 (Mass. App. Ct. Feb. 27, 2012).}
\item \footnote{112}{Ch. 208, § 49(b)(2).}
\item \footnote{113}{See id. § 49(c).}
\item \footnote{114}{See id. § 50(b). It may be extended for unforeseen compelling reasons if it would not cause an undue burden on the payor. See id. § 50(b)(1), (3); Kindregan, supra note 75, at 34.}
\item \footnote{115}{Ch. 208, § 53(g).}
\item \footnote{116}{Witmer & Warner, supra note 14, § 9.6.}
\item \footnote{117}{Ch. 208, § 53(b).}
\item \footnote{118}{Id.}
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income was acquired after the entry of the initial order.119 This bar exists even if the obligee’s disproportionate caregiving is the reason the obligor could earn the additional income.

Sixth, both general term alimony and rehabilitative alimony end if the caregiver enters a new relationship. Not only does it terminate when the recipient remarries,120 but the 2011 reform also specifies that general term alimony would terminate upon cohabitation with someone for three months or longer,121 so long as the cohabitants have a “common household.”122 It is irrelevant if the cohabitants do not share a life together as a couple, or if the cohabitant has no legal obligation, or desire, to support the caregiver.123

In sum, the segmentation of caregiving into time periods helps show the gaps and inadequacies in the law. When the romantic relationship ends, most states only provide a remedy for a caregiver’s past caregiving so long as the parties were married at the time. Even divorcing caregivers, however, may encounter an inadequate remedy for marital caregiving if the couple lacks much property, and the judge employs alimony reluctantly to address the injustice. Unwed caregivers typically lack any remedy at the end of their romantic relationship to address the unfairness attributable to past caregiving. Future caregiving, whether by divorced or unmarried individuals, will typically also be uncompensated. Recent reform efforts in some places will hamper judges’ ability to use alimony to afford divorcing caregivers an adequate remedy for future caregiving.

The law should tie the remedies for disproportionate and unfair caregiving to the act of caregiving and not to marriage. The costs of caregiving and the benefits conferred by caregiving do not differ depending upon whether the parents are unmarried, married, or divorced. The law should provide a remedy to any parent that provides disproportionate and unfair caregiving. Such is necessary to deter parents from taking advantage of the caregiving parent.124

IV. The Incompleteness and Rigidity of Reform Proposals

Family law scholars have recommended that the law in the United States change to better recognize caregivers’ efforts. Proposals have been made to both expand the categories of caregivers who are eligible for awards and to better address post-divorce caregiving. One important ef-

119. Id. § 54(b).
120. See id. §§ 49(a), 50(a). This applies to general term and rehabilitative types of alimony.
121. See id. § 49(d); Kindregan, supra note 75, at 31. Remarriage and cohabitation rules do not apply to reimbursement or transitional alimony. See ch. 208, §§ 51, 52.
122. Ch. 208, § 49(d).
123. See Kindregan, supra note 75, at 31 n.94, 32.
fort is found in the ALI Principles.\textsuperscript{125} Other recent and important contributions include the works of Professors Ayelet Blecher-Prigat and Cynthia Starnes.\textsuperscript{126} Despite the fact that all of these reform proposals would move the law forward if adopted, these reform proposals are uniformly problematic in two ways: first, the proposals do not apply to all caregivers; and second, the proposals try to limit judges’ discretion.

A. The ALI’s Proposal and Its Problems

The ALI Principles use three tools to remedy the unfairness that caregivers experience: a child support supplement, a property award, and a spousal support award upon divorce. All of these awards, even together, fail to provide a complete remedy for all caregivers. In addition, the ALI Principles lack any sort of coherent normative message that all parents have an obligation to the other parent to share the costs of caregiving fairly. In fact, the ALI Principles send the opposite message because of the eligibility requirements for its three awards.

Many parents are ineligible for the property and spousal support remedies because these require either a marriage or a domestic partnership. The ALI Principles define domestic partners as two people who “for a significant period of time share a primary residence and a life together as a couple.”\textsuperscript{127} Couples with a “common child” who maintain “a common household” for a “cohabitation parenting period” also have a domestic partnership.\textsuperscript{128} The state sets the length of the “cohabitation parenting period,” but the drafters implied that a two-year period would be a reasonable choice.\textsuperscript{129} The requirement that the individuals share a “primary residence” is meant to exclude “casual and occasional relationships, as well as extramarital relationships conducted by married persons who continue to reside with a spouse.”\textsuperscript{130} Of course, this formulation will exclude many couples who have children but who do not cohabit or will not cohabit for the requisite period of time. The child support supplement covers a wider array of parents but nonetheless excludes many categories of caregivers, and it is quite limited in the amount of relief it confers, as described below.

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\item \textsuperscript{125} See generally Principles. The provisions in the American Law Institute’s Principles are heavily influenced by Professor Ira Ellman’s earlier work, The Theory of Alimony. See generally Ira Mark Ellman, The Theory of Alimony, 77 CAL. L. REV. 1 (1989).
\item \textsuperscript{126} Ayelet Blecher-Prigat, The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-parents, 13 THEORETICAL INQUIRIES L. 179 (2012); Starnes, supra note 93, at 238.
\item \textsuperscript{127} Principles § 6.03(1).
\item \textsuperscript{128} Id. § 6.03(2).
\item \textsuperscript{129} Id. § 6.03 cmt. d.
\item \textsuperscript{130} Id. cmt. c.
\end{itemize}
1. **Child Support Supplement**

The ALI Principles’ child support supplement is designed so that parents, whether married or unmarried,\(^{131}\) share the caregiver’s loss of earnings from “appropriate limits on market employment in order to provide care for a child.”\(^{132}\) The caregiver’s loss is calculated as the difference between what the caregiver would earn in full-time employment and what the caregiver does earn (or would earn) in employment consistent with the child’s needs. That loss is allocated between the parents in proportion to their full-time incomes, unless that would be “inequitable.”\(^{133}\) The drafters of the ALI Principles made the child support supplement available to all caregivers, regardless of marital or cohabitation status, by attaching it to child support.\(^{134}\) Broad eligibility advances thought on this topic considerably, although the ALI’s child support supplement is not a panacea.

As an initial matter, the remedy does not permit all caregivers to recover their losses. If the caregiver works full-time, she is ineligible for the remedy even if caregiving “foreclose[s] more lucrative employment opportunities.”\(^{135}\) So, a full-time store clerk cannot recover her loss even though she rejected a higher paying management position because the position’s inflexible hours would have interfered with her care for their child. In addition, certain caregivers may not benefit from the remedy because they are outside of a category that makes it “presumptively” permissible to limit market employment: when the child is under three; when there are three or more children under ten; when the child is disabled; or, when the cost of child care is more than the parent’s expected earnings.\(^{136}\) Even a caregiver that benefits from the presumption may receive nothing if her care is “inappropriate or excessive in terms of the child’s needs.”\(^{137}\) Parental care is not automatically deemed more appropriate than day care for children in these categories that trigger the presumption. That parental care can be “inappropriate” or “excessive” for a two year old is arguably an outrageous proposition. Nor need any weight necessarily be given to an earlier parental agreement that parental care would occur. Consequently, if a caregiver can access employment with “on-site

\(^{131}\) Id. § 3.01 cmt. b.

\(^{132}\) Id. § 3.052A(1).

\(^{133}\) See id. § 3.052A(5)–(6).

\(^{134}\) See id. § 3.052A cmt. a. By moving and relabeling the provision, it became subject to the principle that a parent’s support obligation to the child does not depend upon the parent’s legal or social relationship to the other parent. See id. § 3.01 & cmt. b. One of the objectives of Chapter 3 is to treat residential parents fairly and to ensure that “child-support rules take into account a child’s need for care.” Id. § 3.04(3), (6).

\(^{135}\) Id. § 3.052A cmt. d.

\(^{136}\) See id. § 3.052A(2). These are not the only times when a child may need parental care, but the other situations will not benefit from a presumption. See id. § 3.052A cmt. b.

\(^{137}\) Id. § 3.052A(3).
child care," for example, then her effort to limit market employment may be inappropriate, and her caregiving "excessive,"\footnote{138} despite the facts that her child is an infant and the parties’ previously agreed that in-home care was desirable.

Moreover, the court need not allocate the caregiver’s loss proportionally between the parents if it would be “inequitable to do so.” The ALI Principles state that it is inequitable to share the loss if the caregiver makes much more money than the market worker.\footnote{139} It is unclear at what precise income level it would be considered “equitable” for the market worker to contribute. It is also unclear why the disparity of income should relieve a parent of all financial responsibility if he can otherwise afford it. Imagine a situation in which the primary caregiver works part-time for $125,000, although she could earn $175,000 if she only had to shoulder half of the child-care responsibilities. Why should a father who earns $75,000 working full-time be absolved of all responsibility for the caregiver’s loss?

Additionally, the child support supplement provides payment only for a very short period of time, even if a caregiver qualifies for it.\footnote{140} Compensation is presumptively available only until a child turns three (if the child is an only child).\footnote{141} No remedy is likely for the caregiver’s wage loss throughout the remainder of the child’s minority. Even during the first three years of the child’s life, the remedy is a narrow one: it “reaches only certain current costs of reduced labor-force participation.”\footnote{142} It excludes, among other things, “nonaccrual of work experience, seniority, and Social Security coverage.”\footnote{143}

Finally, this supplement is part of child support and not an award to the caregiver for her own use. Although the supplement is meant to compensate the caregiver for her injury, the recovery is technically her child’s. Consequently, the caregiver’s spending is subject to some limits,\footnote{144} and she may have to account for the money.\footnote{145}

Given the limited scope of the child support supplement, the ALI Principles provide two additional methods of compensating a caregiver for caregiving, at least for a caregiver who was married or in a domestic partnership. At the end of a marriage or a domestic partnership, the caregiver

\footnotesize\begin{itemize}
\item \footnote{138}{\textit{See id.}} § 3.052A cmt. c.
\item \footnote{139}{\textit{Id.}} § 3.052A illus. 4. A remedy in this situation would be “inequitable.”\textit{ See id.} § 3.052A.
\item \footnote{140}{\textit{See id.}} § 3.052A cmt. d.
\item \footnote{141}{\textit{See id.}} cmt. c.
\item \footnote{142}{\textit{Id.}} cmt. d.
\item \footnote{143}{\textit{Id.}}
\item \footnote{145}{\textit{See, e.g., MO. REV. STAT.} § 452.342 (2011).}
\end{itemize}
may qualify for an enhanced share of the marital property or for a compensatory spousal payment.146

2. Property

The drafters of the ALI Principles proposed a “rough compromise” between the competing approaches courts presently employ to allocate marital property,147 whether that is “in proportion to the spousal contributions to its acquisition [or] . . . according to relative spousal need.”148 The ALI’s approach is to award a presumptively equal amount of marital property to each party, with departures allowed to compensate for recognized losses.149 The remedy is grounded in the idea that the spouses contribute “to the entire marital relationship, not just to the accumulation of financial assets,”150 and domestic labor permits “the couple to raise children as well as accumulate property.”151 The drafters felt it was reasonable to adopt a presumption of equal contribution to the financial assets because “no-fault divorce [permits] either spouse [to] unilaterally terminate the marriage . . . [if he or she] believe[s] their relationship is seriously one-sided . . . .”152 Since the presumption of equal division can be rebutted to compensate for recognized losses, a caregiver might receive a larger award of property to compensate for her earning capacity loss attributable to marital caregiving. Not all couples have enough property to cover the caregiver’s loss, however.153 Therefore, the drafters also devised compensatory spousal support, which one scholar has described as “a residual claim” that fills in the gaps left by the property division and child support awards,154 but which—as described next—is a key mechanism in its own right for addressing caregiver losses.

3. Compensatory Spousal Support

The ALI Principles authorize caregiver compensation in the form of compensatory spousal support to married caregivers and domestically partnered caregivers.155 Compensatory spousal support is a claim of entitlement and is not based on need.156 The award is justified because the “the cost of raising the couple’s children is their joint responsibility.”157

146. See Principles §§ 4.09(2).
147. See id. § 4.09 cmts. a & b.
148. Id. cmt. a.
149. See id. § 4.09(1), (2)(a).
150. Id. § 4.09 cmt. c (emphasis added). The presumptively equal division of marital property “follows from the sharing premise.” See id. cmt. b.
151. Id. cmt. c.
152. Id. (emphasis added).
153. See id. § 5.10 cmt. b.
154. See Carbone, supra note 1, at 57.
155. See Principles §§ 5.03, 6.06.
156. Id. § 5.02 cmt. a.
157. Id. § 5.05 cmt. a.
The remedy is specifically designed to compensate caregivers for the earning capacity losses experienced from disproportionate caretaking during the marriage.\textsuperscript{158} The ALI’s remedy addresses the caregiver’s frustrated expectation that she would share the obligor’s income in foregoing her own earning capacity.\textsuperscript{159} The ALI Principles also contain other bases for a compensatory award, and a caregiver might qualify on one of those alternative grounds too; however, the one just discussed is the only one that focuses on caregiving per se.\textsuperscript{160} Adoption of the ALI Principles would be a significant legal advance for caregivers because the Principles make explicit that caregiving causes the caregiver loss and that loss should be compensable as part of spousal support.

The ALI Principles include a formula for computing compensatory spousal support.\textsuperscript{161} Others have called the formula a “pragmatic solution” because assessing the precise earning loss would be quite difficult.\textsuperscript{162} Essentially, the caregiver receives the difference between the non-caregiver’s and the caregiver’s incomes at dissolution multiplied by a factor that reflects the length of time that the caregiver cared for the children.\textsuperscript{163} This measure supposedly calculates the approximate value of the caregiver’s loss because she likely married someone from a similar socio-economic background; therefore, the caregiver could have earned a similar amount as the breadwinner, at least theoretically.\textsuperscript{164} The formula, however, does not permit the caregiver to achieve income equality with the other parent.

\textsuperscript{158} Id. § 5.02(3)(a), § 5.05 & cmt. a.

\textsuperscript{159} Id. § 5.06 cmt. b. The importance of the caregiver’s expectation is reiterated in other parts of the commentary. See, e.g., id. § 5.05 cmt. e (explaining choice of “proxy measure” to calculate earning-capacity loss); id. § 5.05 cmt. a. Similar language is found again in an academic article by one of the Reporters. See Katharine T. Bartlett, \textit{Saving the Family from the Reformers}, 31 U.C. DAVIS L. REV. 809, 847 (1998) (“[The provision] takes sacrifice seriously and encourages it by treating it fairly. It assumes that when different roles led to disproportionate individual earning capacities, it was expected that those shared roles were part of a shared enterprise rather than a lop-sided bargain favoring one partner over the other.”).

\textsuperscript{160} For example, the ALI Principles permit recovery for a loss in a spouse’s standard of living if the marriage was of significant duration and the claimant has less earning capacity or wealth. See Principles § 5.03(2)(a).

\textsuperscript{161} See id. § 5.05(4).

\textsuperscript{162} See Carbone, supra note 1, at 69.

\textsuperscript{163} The award is the difference between the incomes of the spouses at dissolution, multiplied by a percentage, entitled the “child-care durational factor,” which represents the period during which “the claimant provided significantly more than half of the total care that both spouses together provided for the children.” Principles § 5.05(4)(a). The award is to be a periodic payment with an indefinite duration, if the claimant is old enough and the marriage long enough, but otherwise with a fixed duration for “the length of the child-care period multiplied by a factor specified in the rule.” See id. § 5.06(1)(a)–(b). The award is meant to end when the loss is compensated, i.e., “the obligee will, after the specified period, have recovered all lost earning capacity.” Id. § 5.06 cmt. b. It can be a lump sum. See id. § 5.10(2)(c).

\textsuperscript{164} See id. § 5.05 cmt. e.
The obligor is never required to pay the caregiver more than forty percent of the difference between the two incomes. 165

The ALI’s approach to spousal support is susceptible to a number of criticisms even apart from the fact that it explicitly requires a marital or domestic partnership before it is available, and it never permits income equality. First, a caregiver is only eligible for this remedy if her earning capacity at divorce is “substantially less than that of the other spouse.” 166 If her earning capacity is the same or slightly less than her spouse’s, it is irrelevant that the caregiver’s earning capacity is lower than what it otherwise would have been without the caregiving responsibilities.

Second, a presumption of entitlement exists only if the claimant provided “substantially more than half of the total care that both spouses together provided for the children.” 167 This requirement gets at the notion of disproportionality, but it excludes some worthy claimants and creates inequities. For example, a caregiver who does slightly more of the caregiving than the market worker but never shares in any of his income may face more injustice than someone who does a substantial amount of caregiving but fully shares in her partner’s wealth.

Third, and very importantly, the remedy does not compensate for future loss caused by post-dissolution caregiving. 168 By using the market worker’s income at dissolution and the years of caregiving during the marriage, 169 the caregiver’s remedy is addressed to the effects of marital caregiving, not the effects of post-divorce caregiving. As already discussed, the child support supplement can compensate for the effects of some post-dissolution caregiving so long as the caregiver does not work full-time or earn much more than the other parent, but the supplement typically is

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165. See id. § 5.03 cmt. b; Starnes, supra note 93, at 237.
166. PRINCIPLES § 5.05(2)(c); see also id. § 5.05 cmt. d. This is so even though the Reporters acknowledge that “some may have a loss.” Id. Why?

[I]t would be contrary to existing law virtually everywhere to require the less affluent spouse to compensate the wealthier one, particularly if their income gap is large. One could argue that allowing these claims would give lower-earning spouses an incentive to fulfill the primary-caretaker role in order to avoid potentially devastating liability at dissolution, and would in this way encourage a more efficient allocation of household duties. But the most efficient allocation may not be the best one, all things considered, so it is unclear whether the law should attempt such an impact on spousal choices. And it is far from clear that such a rule would in fact influence marital behavior, and if it did not the result would be large awards against spouses who cannot afford to pay them. On balance, therefore, such claims are not allowed.

Id. The rule is touted for administrative reasons, and the Reporters acknowledge that it “is not entirely consistent with the section’s basic rationale.” See id.
167. Id. § 5.05(3).
168. The Reporters acknowledge that the section “does not compensate the loss of earnings incurred by the spouse unable to realize the value of his or her earning capacity because of post-dissolution custodial responsibilities.” Id. § 5.05 cmt. f.
169. See id. § 5.05(4).
only available for a very limited time. The clean-break philosophy is still embedded within the ALI Principles, and compensatory spousal support is an example of it.\footnote{170}

Fourth, the compensatory spousal support award typically terminates on remarriage or when the recipient enters a domestic partnership.\footnote{171} While spousal support typically terminates on remarriage, it makes little sense when the award is not premised on need, but on compensation. When an award is premised on need, the law assumes that any new spouse will meet the recipient’s need. However, when the award is premised on compensation, the award is akin to a payment for a debt owed for work done. The caregiver’s new relationship should not extinguish a compensatory award, just as it would not extinguish any other debt.

The ALI’s approach to remarriage, just like the current law in most places (including Massachusetts), imposes the costs of caregiving on a legal stranger to the child. It essentially shifts responsibility for the caregiver’s financial loss from the child’s other parent to the caregiver’s new spouse. A second husband will be obligated to pay compensatory spousal support if his wife cared for a non-joint child during their marriage and she suffered a loss of earning capacity.\footnote{172} The ALI justifies this financial allocation by explaining that “[t]here is no basis for imposing [the loss] on the noncustodial parent, who is not generally responsible for voluntary earning-capacity losses incurred by his or her former spouse after the end of their marriage.”\footnote{173} But that, of course, is the point: the law should provide a basis to make the noncustodial parent an obligor for the caregiver’s loss related to the care of their child.

Fifth, the ALI’s remedy will fail to remedy some caregivers’ frustrated expectations, even though addressing frustrated expectations is one of the goals of the remedy. Married and domestically partnered caregivers are not the only caregivers who rely on the availability of the other parent’s income in foregoing their own. An unmarried caregiver, for example, may expect to share the other parent’s income because the parties cohabited (albeit too briefly to become domestic partners), and/or were actually sharing, and/or had an agreement to share (even if not a legally enforceable agreement). The ALI Principles foreclose a more factually intensive inquiry that could address all caregivers’ frustrated expectations.

The ALI Principles also foreclose the use of alternative legal theories as a basis to afford a remedy, although other theories might sometimes

\footnote{170}{The award is modifiable if the loss upon which the order was based “is substantially smaller than was expected . . . because of an increase in the obligee’s income.” \textit{Id.} § 5.08(1)(b).}
\footnote{171}{\textit{See id.} §§ 5.07 & cmt. a, 5.09. Joan Williams raised many of these and other criticisms to Ira Ellman’s initial proposal to compensate women for financial loss by measuring their earning capacity loss, and the ALI Principles addressed some of her concerns. \textit{See Williams, supra} note 90, at 2254–57.}
\footnote{172}{\textit{See Principles} § 5.05(1).}
\footnote{173}{\textit{Id.} § 5.05 cmt. b.}
better remedy injustices than the ALI Principles. Loss theory undergirds the ALI’s remedy, but, as explained below in Part V.C, it is not the only approach to compensatory payments. Sometimes another remedy might be more appropriate given the facts of the case. Consider the married caregiver who never experienced any economic loss from her ten years of caregiving because she was market challenged (i.e., she had low skills and would have never advanced beyond an entry-level position even without a child). Nonetheless, her caregiving allowed the other parent to experience a financial or other benefit, and he will continue to benefit from her labor in the future. Imagine also that the couple has little property to divide. The absence of a remedy under the ALI Principles means that the Principles permit morally problematic freeloading.

For unknown reasons, the rules in the ALI Principles on alimony and child support have not caught on among the states. To the extent they have, states sometimes incorporate only the worst aspects of the ALI Principles. Massachusetts is an example. Most notably, Massachusetts did not amend its child support law to provide anything like a child support supplement when it reformed its alimony law, although it did revise its child support guidelines in 2013. It also did not broaden alimony eligibility to include domestic partners, or expressly recognize loss theory or the related formula. Instead, perhaps influenced by the ALI Principles’ option for a compensatory spousal payment of a presumptively fixed duration, Massachusetts adopted an outer time limit for general term alimony. Like the ALI Principles, Massachusetts capped the percentage that could be awarded after computing the difference between the two parties’ incomes; Massachusetts, however, chose even a smaller percentage than the forty percent proposed by the ALI Principles. Massachusetts followed the ALI Principles in requiring termination of alimony upon remarriage

174. See Lynn Dennis Wardle & Laurence C. Nolan, United States of America, in 6 International Encyclopedia of Laws: Family and Succession Law 242 (Walter Pintens ed., 2011) (“‘[N]o state has yet to formally adopt [those] Principles.’ Indeed, a comprehensive 2008 review of the impact of the ALI Principles on family law in the states found that only one state has statutorily enacted any part of the ALI Principles, and the dozen of [sic] so cases each year (average) that cite the Principles do so as an ‘obligatory citation’ but neither adopt nor rely upon its recommendations.” (footnote omitted)).

175. See Kindregan, supra note 75, at 17 (noting Massachusetts “partially incorporated” some of the ALI Principles, but in other places “the text of the Alimony Reform Act of 2011 varies widely from the ALI Principles”).

176. Massachusetts did amend its child support law. See Child Support Guidelines, supra note 14. Minimal attention was given to how child support and alimony are related. See id. at 5. Judges were given discretion to designate child support as alimony if the difference in tax consequences would be more equitable for the child and the parties. See id.; see also Quadrennial Review, supra note 14, at 66–67.

177. Compare Alimony Reform Act of 2011, Mass. Gen. Laws ch. 208, § 53(b) (2012) (“Except for reimbursement alimony or circumstances warranting deviation for other forms of alimony, the amount of alimony should generally not exceed the recipient’s need or 30 to 35 percent of the difference between the
or cohabitation, although Massachusetts is even tougher on cohabitants.\textsuperscript{178} Finally, neither Massachusetts nor the ALI Principles provide sufficient compensation for post-divorce caregiving.

B. Scholars’ Thoughts

For a long time, scholars who cared about caregivers focused primarily on married and divorcing caregivers when thinking about inter se obligations between parents.\textsuperscript{179} Recently, unmarried caregivers have received more attention from scholars.\textsuperscript{180} Often, however, scholars favor just a subset of unmarried caregivers, and make only that subset eligible for any sort of remedy.

For example, Professor Karen Czapanskiy recently recommended the adoption of “chalimony” for caregivers, and made eligibility independent of parties’ gross incomes established at the time of the order being issued.\textsuperscript{178}, with \textit{Principles} § 5.03 cmt. b (establishing 40 percent difference).

\textsuperscript{178} \textit{Compare Principles} § 5.09 (automatic termination on finding establishment of domestic-partner relationship), \textit{with Mass. Gen. Laws} ch. 208, § 49(d) (general term alimony “shall be suspended, reduced or terminated” if recipient maintains common household with another for three months).

\textsuperscript{179} \textit{See, e.g.}, Baker, \textit{supra} note 82, at 1221; Martha Ertman, \textit{Reconstructing Marriage: An InterSEXional Approach}, 75 \textit{Denver. U. L. Rev.} 1215 (1998) (arguing for adoption of Premarital Security Agreements to account for labor done by homemakers); Estin, \textit{supra} note 85, at 722 (arguing for revitalizing ethic of care and according it recognition at divorce in economic awards); Martha Albertson Fineman, \textit{The Social Foundations of Law}, 54 \textit{Emory L.J.} 201, 226 (2005) (suggesting that when marriage with children ends, equal treatment of parties might require that assets should be divided “so that the party who is assuming caretaking responsibilities, usually the mother, is able to maintain a living standard nearly equal to that of the other spouse. Under this theory, one could argue that periodic payments should continue for a substantial period of time to supplement the reduced amount the caretaker will be able to provide in working for pay.”); Mary Ann Glendon, \textit{Family Law Reform in the 1980’s}, 44 \textit{L.A. L. Rev.} 1553, 1559 (1984) (recommending “children-first principle” to guide marital property law); Elizabeth S. Scott, \textit{Rational Decisionmaking About Marriage and Divorce}, 76 \textit{Va. L. Rev.} 9, 91 (1990) (recommending “more substantial support obligations . . . and [ ] property distribution schemes that are beneficial to children”); Singer, \textit{supra} note 6, at 2454–60 (arguing for income sharing); Williams, \textit{supra} note 90, at 2255–58 (suggesting equalization of two households’ income post divorce, for at least child’s minority plus two years); Judith T. Younger, \textit{Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform}, 67 \textit{Cornell L. Rev.} 45, 90–91 (1981) (proposing property rules for married couples with children that would allow court to “delay ultimate property division between parents until all the children reached eighteen”); \textit{cf. Susan Moller Okin, Justice, Gender, and the Family} 170–86 (1989) (recommending greater amounts of child support for unmarried mothers, but not discussing compensation for unmarried mothers themselves).

\textsuperscript{180} \textit{See, e.g.}, Polikoff, \textit{supra} note 90, at 26. Professor Polikoff recognizes that “there is no principled basis for restricting support awards today only to husbands and wives” since the “[c]ontemporary justification for ongoing support after a relationship dissolves rests on the economic consequences of one person forgoing individual financial stability while making uncompensated contributions to a family.” \textit{Id.}
of marital status.\textsuperscript{181} The award would be in addition to child support and alimony, and would be for caregivers of children with disabilities or chronic illnesses when the child’s care impacted the caregiver’s labor force participation.\textsuperscript{182} To qualify for a remedy, however, the caregiver’s loss must be “beyond the degree common for other caregiving parents.”\textsuperscript{183} In addition, “at least one of the parents . . . [must] not be living in the household with the child,”\textsuperscript{184} and the caregiving must reduce the caregiver’s income-earning capacity.\textsuperscript{185} While her proposal has much to commend it, its narrowness is of little benefit to most caregivers and, arguably, even to those in the subset that she is trying to assist.

1. \textit{Limiting the Eligible Claimants}

Others have also limited their proposals to a subset of caregivers, even if marriage is not a prerequisite. Professor Ayelet Blecher-Prigat and Professor Cynthia Starnes have discussed the inadequacies of existing remedies for caregivers and have argued that the parents’ relationship to each other as parents should justify a new remedy when one parent alone bears the costs of disproportionate caregiving.\textsuperscript{186} These academics wrote after the ALI’s Principles were published and, in some respects, their recommendations are a reaction to the ALI’s recommendations. Neither author embraced a remedy for all caregivers who suffer disproportionate and unfair caregiving, however. Both think a remedy should exist only for those caregivers who had a child within an intended, committed co-parenting partnership.

Professor Starnes’s latest article focuses primarily on spouses and ex-spouses, as they had a “mutual commitment to take on the economic support and physical labor required to raise shared children,”\textsuperscript{187} although she envisions possibly expanding her remedy to “intimate relationships other than marriage that evidence commitment.”\textsuperscript{188} Qualifying relationships might include those with an express contract for a “co-parenting commitment,” or relationships that “clearly evidence intimate commitment” even if they lack an agreement.\textsuperscript{189} However, for Professor Starnes, “couples engaged in a one-night stand are clearly not committed and do not enter a co-parenting partnership.”\textsuperscript{190}

\textsuperscript{182} See \textit{id.} at 255.
\textsuperscript{183} \textit{Id.} at 264–65.
\textsuperscript{184} \textit{Id.} at 265.
\textsuperscript{185} See \textit{id.} at 263.
\textsuperscript{186} See Blecher-Prigat, supra note 126; Starnes, supra note 93.
\textsuperscript{187} Starnes, supra note 93, at 234.
\textsuperscript{188} \textit{Id.} at 237.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
Despite a professed willingness to extend her proposal beyond married couples, Professor Starnes’s actual willingness appears quite grudging. Her formulation would exclude most non-cohabiting couples who become parents, as well as some cohabiting couples with children. She explains, “[n]or do marriage-eligible cohabiting intimates qualify as committed couples, unless perhaps the circumstances of their relationship trigger a state-imposed status, as the ALI has proposed.” Most surprisingly, she even excludes some married caregivers from her remedy. Professor Starnes excludes caregivers whose spouses were divided on their desire to add a child to the family, unless they stayed together after the child’s birth (potentially evidencing co-parenting commitment), and neither parent rebutted the “rebuttable presumption” of a co-parenting partnership.

Professor Blecher-Prigat similarly limits the availability of her remedy. Professor Blecher-Prigat suggests that the obligations to the caregiver should only apply if the parties are voluntarily joint parents, such as those who “enter into explicit agreements to have and raise a child together.” She wants the obligations that are imposed by parenthood to be a “choice.” She therefore limits her remedy to parents who planned to have a child, even for those in a committed relationship such as a marriage. She appears most concerned about fathers who might be unfairly subjected to obligations, because women alone have the right to abort and, sometimes, to place the child for adoption. She concludes: “My suggestion, then, is that the obligations imposed by a planned shared parenthood and those imposed by unintended parenthood should be different.” Because unintended conception is so common, even among married and cohabiting couples, Professor Blecher-Prigat’s requirements drastically limit the applicability of her proposal.

Professor Blecher-Prigat and Professor Starnes both choose to emphasize voluntary co-parenting commitment, although they come at the issue of voluntariness differently. “Unintended parenthood” would not bother Professor Starnes so long as the parties both welcomed the child and exhibited some form of co-parenting commitment. Professor Blecher-Prigat, on the other hand, does not differentiate between “intimate committed relationships” and other relationships, but seems only concerned with whether the parties have a planned pregnancy and agree to co-parent.

191. Id.
192. See id. at 238.
193. Blecher-Prigat, supra note 126, at 205–06.
194. Id. at 207.
195. Id. at 207 n.77.
196. Id. at 207 (emphasis added).
Both authors’ formulations are problematic, apart from the fact that they will exclude potentially large numbers of caregivers. Consider first Professor Blecher-Prigat’s recommendation, which appears to require both a planned pregnancy and a post-conception agreement to co-parent. Why should a father be relieved of an obligation if both parents intended the pregnancy, but the father absconds shortly after birth, thereby abandoning the child and the mother? Why should the woman’s right to abort or relinquish the child for adoption make any difference to the father’s obligation if neither party took steps to avoid the pregnancy and the father knows that the law allocates to the mother alone the decision to abort or relinquish the child? Why should a post-birth agreement be necessary if the couple was in a committed, intimate relationship at the point of conception or childbirth, since about half of all pregnancies involve unintended conception?\textsuperscript{198} If “unintended conception” relieves a parent of any obligation to the caregiver, won’t there be countless disputes about whether the child was planned or not?

Apart from these questions, Professor Blecher-Prigat’s articulation of when the obligation should arise is the wrong result as a matter of theory. Professor Blecher-Prigat rests her case for an obligation only on the parents’ consent and then defines consent narrowly. A broader notion of consent would justify imposing the obligation on almost all parents and seems a more defensible line: voluntary sexual relations can be construed as consent to the legal repercussions that follow from the act, including compensation for disproportionate and unfair caregiving. This approach to consent currently justifies the imposition of child support obligations on fathers who claim they never consented to the birth of a child.\textsuperscript{199} In addition, the obligation to give care or share need not be justified solely on grounds of consent. Dependency causation can also support an obligation that is imposed by virtue of parenthood, even when parenthood was “unintended” or achieved without an explicit agreement to have a child.\textsuperscript{200}

Professor Blecher-Prigat wants the imposition of an inter se obligation to be fair—an admirable goal. But she fails to realize that “choice” is not the linchpin of fairness; rather, “wrongdoing” is the main component. To see why this is so, compare childbirth that results from a mother who lies to the father about whether she is on birth control, and childbirth that results after a mother forgets to take her birth control. While both acts

\textsuperscript{198} See id.

\textsuperscript{199} See Jill E. Evans, In Search of Paternal Equity: A Father’s Right to Pursue a Claim of Misrepresentation of Fertility, 36 Loy. U. Chi. L.J. 1045, 1047 (2005) (“Both case and statutory law effectively hold a putative father strictly liable should sexual intercourse result in the birth of a child. Child support obligations attach immediately upon birth, without regard to whether fatherhood was desired or conception occurred through the mother’s deceit as to her fertility or use of birth control.”).

deprive the father of a choice to parent, the latter scenario should not relieve him of his inter se obligation. What differentiates these two scenarios is wrongdoing: parties having sex assume the risk of the innocent or careless mistake, but not the risk of intentional deception.

The importance of wrongdoing becomes even more obvious when one considers rape leading to involuntary parenthood, something not mentioned by Professor Bletcher-Prigat. No one should equate the rapist’s actions with the victim’s subsequent decision not to abort; yet, under Professor Bletcher-Prigat’s analysis, both acts are similar. Both parents are subjected to involuntary parenthood, and both would be excused from inter se obligations under her formulation. The mother’s parenthood would be involuntary because of the rape, and the rapist’s parenthood would be involuntary because of the mother’s decision not to abort. Yet only the woman should escape the inter se legal obligations caused by the child’s birth in this scenario, and this result requires that one focus on wrongdoing instead of each party’s unimpeded choice.

Professor Starnes’s formulation is problematic for different reasons. Why is an ongoing commitment between the parents necessary for inter se obligations that address the repercussions of an intimate commitment? Why should a person who voluntarily participates in conception be absolved of responsibility for the costs of caring for the child just because he or she does not stick around? Why should it be a legal anomaly for an unmarried, non-cohabiting couple to have a sufficient intimate commitment to trigger an obligation for caregiver compensation?

A much simpler and better approach would be to create a remedy for all caregivers, regardless of whether or not the couple exhibits committed co-parenting. Apart from the practical problem of how to assess committed co-parenting (a problem illustrated by some of the questions above), requiring committed co-parenting essentially requires parents to opt in to a framework that makes the legal remedy available, and that requirement is unappealing for several reasons.

First, a requirement of committed co-parenting sends the wrong normative message. If the law requires couples to be committed co-parents before they share the costs of caregiving, then the law signals to individuals that freeloading is permissible among other couples. It also signals that it is acceptable for parents to avoid some of the obligations that should attend parenthood and for caregivers to be left without a remedy.

Second, if caregiver compensation is only triggered when parties opt for committed co-parenting, then the law will deter committed co-parenting. For example, some parties may leave the marital residence after the birth to ensure that evidence exists to rebut the inference of a co-parenting commitment. In contrast, if the obligation to give care or share is triggered at childbirth, then the law does not deter a co-parenting commitment because no legal repercussion attaches to the act of becoming committed partners. Rather, an obligation triggered at childbirth would
incentivize parties to consider the wisdom of reproduction before they reproduce, and that is a good outcome.

Third, an opt-in approach leaves parties vulnerable to their own cognitive errors, including the following: ignorance (couples may not know the consequences of failing to opt in); discounting of risk (couples may assume that a pregnancy will not occur or that they will never split up); and, irrational decision-making in the heat of passion (couples may copulate without discussing the issue of caregiving costs). It also leaves parties vulnerable to advantage-taking, such as when one party falsely represents his or her intention to stick around and help raise a child, but then does not.

Some readers may be wondering about fraud, and whether it is fair to impose the new obligation on someone if the other parent lied about his or her fertility or contraceptive use. In fact, the best solution for fraud is debatable because there are legitimate arguments on both sides. On the one hand, the law rarely allows fraud to excuse the imposition of a child support obligation. Courts reason that it would be an administrative nightmare to allow fraud to defeat a child support obligation, as allegations of fraud are easy to make and hard to resolve (they are often he-said/she-said disputes). Courts also reject the relevance of fraud in the child support context because the remedy might diminish the child’s receipt of economic support.

These same arguments apply in the context of caregiver payments. The determination of fraud is difficult. The child would suffer if the caregiver’s fraud could defeat a remedy. The child is advantaged by caregiver payments because the caregiver shares a household with the child and, together, they constitute “one economic unit.” While imposing an obligation of caregiver payments on a defrauded parent might seem unfair to the defrauded parent, the defrauded parent, rather than the innocent child, should arguably bear the repercussions. The defrauded parent could have used contraceptives to protect against the possibility of the other parent’s fraud, or could have abstained from sex until the party’s trustworthiness was assured.

On the other hand, making a defrauded parent pay caregiver payments seems more unfair than making that parent pay child support. The equities in the two contexts do differ. Caregiver compensation mainly benefits the dishonest parent at the expense of the defrauded parent, and any benefit to the child is more attenuated than in the child support context. Nonetheless, the administrative difficulties involved in adjudicating fraud still weigh in favor of disregarding fraud altogether in this context, just like allegations of fraud are disregarded altogether in the adjudication

201. See, e.g., Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630, at *4 (Tenn. Ct. App. June 28, 1999) (noting that suits in which father tried to recover damages from mother for false representations concerning birth control have been universally rejected, primarily on basis of public policy).

202. See Principles § 7.05 cmt. c.
of child support. This approach also has the advantage of remedying the law’s longstanding disregard of fraud at the time of conception that disadvantages caregivers. There is no real legal repercussion for a parent who falsely promised to stick around and help raise a child, especially if he pays child support and maintains some minimal contact with the child. Overall, the caregiver remedy should be available to all caregivers, even those who engage in morally problematic behavior.

2. Limiting Judicial Discretion

The works of Professor Blecher-Prigat and Professor Starnes also diverge from this article’s recommendation in another important manner. Both authors are committed to limiting judicial discretion. Professor Blecher-Prigat’s article is the more problematic of the two in this regard. While the article is incredibly vague about the appropriate remedy for caregivers, it simultaneously dismisses judicial discretion as a means to move the law forward.

While Professor Blecher-Prigat’s article argues well for a financial obligation between parents, she does not propose a specific remedy, nor does she tackle the difficult issues involved in formulating an appropriate remedy. She does, however, acknowledge that the undiscussed issues pose “theoretical dilemmas and practical difficulties.” The scope of her article prevented her from exploring these complicated issues. Professor Blecher-Prigat admits that the remedy is the “most significant practical difficulty,” and briefly suggests that wage penalty data might help create a formula, but that other childrearing costs “would require further thinking.” She leaves the reader wondering whether the nonfinancial benefits of childrearing would be part of her formula or not, saying that the question is a “policy decision.” She hints that she wants those benefits ignored but gives scant reason to do so. Her silence on these and other practical issues is unfortunate, both because the devil is in the details and because she needs them resolved before her own proposal can be adopted.

Despite the title of her work, The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-parents, Professor Blecher-Prigat avoids discussing in detail the appropriate theoretical basis for any particular remedy. She hints that she likes the idea that caretakers might be compensated for losses or supported as they caregive. She makes passing reference to the ALI’s approach, although she does not discuss the ALI’s

203. See Blecher-Prigat, supra note 126. At bottom, Professor Blecher-Prigat’s argues “that joint parents should share the costs of raising their children,” as this is a component of co-parenthood. Id. at 190.

204. Id. at 203.

205. See id.

206. Id. at 204.

207. See id.

208. See id.
caregiver supplement. She presumably would not like the supplement because she disapproves of attaching the remedy to child support: “[C]hild support payments end once the child reaches majority” and the effects of childrearing may impact the parent much longer.209

Professor Bletcher-Prigat clearly dislikes using a partnership model (predicated on a romantic or other, non-parental relationship), as a way to determine the scope or content of the parents’ obligations to each other. She dismisses it because such a partnership model values the caregiver’s labor “only as a contribution to the spousal or partnership relationship.”210 She believes, without explanation or justification, that “[t]he obligations that joint parents owe one another should be addressed through the prism of their relationship as joint parents and not as spouses and partners.”211 That position seems rather naïve in the specific context of caregiver compensation. After all, caregiving is valuable, at least in part, because it affects the parties’ positions as defined within their broader relationship. Also, the expectations related to caregiving can differ dramatically depending upon whether the couple is married or cohabiting, or whether the parents are non-cohabiting friends or strangers. Any agreement between them should be understood in terms of their entire relationship.212 The obligation to compensate a parent for caregiving should be sensitive to the other aspects of the parents’ relationship. In addition, these other aspects of the parents’ relationship matter to the remedy because not all theories for compensation work equally well in all contexts, as shown below.

Despite leaving unresolved all of these difficult issues, Professor Bletcher-Prigat is not willing to give judges discretion to figure out the answers to these questions. Professor Blecher-Prigat rejects this approach by stating, “It is not desirable that the costs of childrearing be legally calculated on a case-by-case basis.”213 The law should establish “presumptive results,” rather than use a “discretionary standard.”214 Yet, if lawmakers must develop such presumptive results before they can offer a remedy to even her subset of caregivers (those that have “planned shared parenthood”), then a remedy may not be forthcoming for a long time. Her subset of caregivers encompasses couples with very different relationships and circumstances, and it is debatable whether her “planned shared parenthood” should erase those differences. Certainly, if one wants to make a remedy available for all caregivers, then one cannot forsake a discretionary standard.

Professor Cynthia Starnes does an excellent job of proposing and justifying a remedy, albeit for divorced co-parents, primarily mothers, who

209. Id. at 199.
210. Id. at 190.
211. Id. at 190–91.
213. Blecher-Prigat, supra note 126, at 203.
214. Id. at 203.
bear the “disproportionate responsibility for the costs of parenting.”

She proposes income sharing for these parents, and she grounds her recommendation in the idea that the couple’s entire relationship is a partnership, including the co-parenting. By emphasizing the notion of partnership, she builds on her earlier work. Professor Starnes recognizes that her proposal will raise a lot of questions, including “some of them tough ones” that will require future conversations. She tackles some of them, albeit briefly, including the “appropriate level of income sharing.”

Professor Starnes gives the nod to the approach found in the ALI Principles. Professor Starnes, like Professor Blecher-Prigat, rejects giving judges discretion to craft a remedy, although Professor Starnes’s position is more subtle: “Whatever level of income sharing is chosen, it should be clear, predictable and widely known, published perhaps in the form of guidelines.”

Professor Starnes’s rejection of judicial discretion is perhaps understandable, given that she has a specific proposal for a specific population. Nonetheless, there are still open issues with her proposal, and giving judges discretion to ensure that the relief is appropriate would be an advantage. Of course, if one wanted to expand her recommendations in any way to reach more couples, then judicial discretion would become a necessity because income sharing is inappropriate for some caregivers, as mentioned below.

In sum, it is unrealistic to seek a formula in this context, at least at the outset, and at least to the extent that one wants to provide a remedy to all caregivers. The requirement that a formula or clear guidelines exist before the adoption of a general caregiver remedy will thwart legal change.

V. Remedying Disproportionate and Unfair Caregiving

A. A General Obligation to Give Care or Share

Judges should be instructed to make the situation between the parents fair when a caregiver experiences unfairness from disproportionate caregiving during the child’s minority. Such a broad mandate leaves open the questions of how a court should determine whether unfairness exists and what amount of money would be adequate to redress the injustice.

215. Starnes, supra note 93, at 238.
216. See id. at 232–34.
217. Cynthia Starnes had previously suggested using a “contribution” rationale because the reliance justification casts mothers as “victims of misfortune” and advocated for a continuing award during the wind-up of the partnership. See Starnes, supra note 55, at 1527.
218. See Starnes, supra note 93, at 236.
219. Id.
220. See id. at 237.
221. Id. at 238.
The next two sections set forth factors and theory that should help judges answer those questions.

Here, first, an explanation is provided about why a general obligation is the right approach. Simply, decades of family law doctrine and policy have made coming up with a simple remedy controversial and difficult. No consensus currently exists even about the appropriate alimony doctrine for divorcing couples. As one legal scholar said in reference to that topic, “reformers cannot agree on principles that will lead to fair outcomes in the majority of cases.” Even the most recent attempts to craft remedies, such as the ALI Principles discussed above, have drawn upon a mixture of rationales and have thrown in some new ones, sometimes in an inconsistent and incoherent manner, but in a way that still has merit. That hodgepodge was necessary because, as Professor June Carbone put it: “The interests that should be protected at divorce are necessarily multiple, conflicting, and incapable of full reconciliation without sacrificing some for the benefit of others.” Similarly, parties to non-marital co-parenting relationships also exhibit multiple and conflicting interests, in part because these co-parenting relationships are embedded in other relationships of varying types. To make matters even more challenging, alimony theory does not always transfer well to address the situation of non-marital couples that are ending their romantic relationship. In short, the law, reform proposals, and legal theory are not presently at a place that permits a particular solution, such as a formula or uniform approach, for the vast array of caregiving situations.

Unfortunately, the doctrine is not sufficiently settled, nor have opinions sufficiently coalesced, to apply particular theories or approaches to specific categories of caregivers either. In addition, no theory fits well every situation for which it was intended, and empirical evidence is lacking about the merit of particular proposals, especially with regards to their eligibility criteria and their remedies. For example, should the law deny recovery to a caregiver who loses half of her post-divorce income due to her caregiving responsibilities, just because her income exceeds the other parent’s income, as the ALI proposal requires? Should an unmarried parent that is abandoned by the other parent and left alone to care for their child have no remedy, just because she was not in a committed relationship at the time of conception, as some current proposals would suggest? If gain theory provides a caregiver with a share of the market worker’s post-divorce earning capacity (attributable to the caregiver’s post-divorce labor), should that theory be used if the caregiver’s infidelity caused the parties to divorce? Answers to these sorts of questions must emerge after

223. See, e.g., Carbone, supra note 1, at 66–67, 70–72 (discussing various rationales and justifications).
224. Id. at 78.
judges wrestle with the particular facts of cases, consider the values of a community as embodied in existing law, and consider the policy implications of their answers. The answers are best determined on a case-by-case basis, over time, through judicial reasoning. Only by tackling the many unresolved questions incrementally through the adjudicatory process will all caregivers begin to receive justice.

Fortunately, judges are up to the task of resolving claims for caregiver compensation, despite the unresolved questions. Family court judges are skilled at taking facts and applying them to general principles in order to arrive at “just” outcomes. In fact, judges have exercised similar discretion before, such as when they ordered child support without the benefit of child support guidelines, or currently, when they award an “equitable” division of property, or an appropriate amount of alimony. Judges do not require formulas to operate. In fact, judges often want the flexibility to do justice. For example, they seek “wide discretion in choosing the amount and nature of the [alimony] award,” even in relatively straightforward cases that focus only on a spouse’s need and an obligor’s ability to pay. Many state legislatures recognize that judges need discretion to decide the amount and duration of alimony, in part by refusing to embrace alimony guidelines. When legislators do give guidelines to judges, judges sometimes ignore them or apply them inconsistently in their quest to do justice.

Embracing the common law method, with all of its uncertainty, will help improve the law. First, it allows judges to gain experience from actual cases, find patterns, develop proxies and presumptions, and move the law along to a better place through experience. Over time, the common law turns patterns into rules and even formulas, as has happened with child support. The actual cases provide the substance and detail that permits appellate courts, and eventually legislatures, to craft limits on judicial discretion. The common law method promotes judicial ingenuity.


226. See Baker, supra note 222, at 337 (“[A]ll commentators would agree that alimony remains the least coherent and most discretionary area of family obligation.”).


229. See Baker, supra note 82, at 1195 (describing legal confusion that surrounded factors used to determine alimony awards twenty-five years ago).
Second, the common law method is the only way that scholars will get a clear sense of a “fair” outcome for all caregivers. No baseline yet exists that establishes fairness for all caregivers. Once actual cases are resolved, patterns will emerge from the varied circumstances. Academics and law reformers can then think about guidelines to help judges become more efficient at their task. The case outcomes will constitute important empirical evidence. Without this first step, the law may ossify instead of develop in a more holistic manner.

Canada provides evidence of the advantage of such an organic law-making process. Canada struggled in the alimony context for many years with notions of rehabilitation (to permit a clean break), compensation, and need. Initially, Canadian courts imposed a “broad obligation” on marital and marital-like couples at the relationship’s end, but the law lacked “a sense of guiding principles” so that the obligation was “somewhat uncertain and unpredictable in its actual contours.”

Courts applied the standard on a case-by-case basis, making each case subject to the trial court’s discretion. Over time, however, a national set of guidelines emerged that made sense of the courts’ decisions, and could address typical cases. The reformers found patterns in cases between couples with dependent children and those without, came up with a formula, embodied the formula in a computer program, and thereby gave litigants and courts a range of possible awards in both amount and duration. Now, claimants with children receive compensation (after the payment of child support) both for past caregiving and future caregiving, regardless of the marriage’s length. Typically, the recipient receives an indefinite award of between forty and forty-six percent of the parties’ combined net incomes, after child support is deducted. This award is subject to modification when the youngest child completes high school.

The United States should follow a similar approach to developing guidelines, but the United States should start with an obligation that would apply to all parents. Eventually the case law could provide the foundation for guidelines that would assist with the adjudication of claims for all caregivers.

Despite the reasons that judicial discretion should be embraced as a necessary part of legal reform and as an essential mechanism for affording all caregivers access to a remedy sooner rather than later, judicial discre-

232. See Rogerson, supra note 230, at 106.
234. See id. at 256–57.
235. See id. at 256.
236. See id. at 257–58.
tion makes people nervous. After all, there has been a consistent trend away from discretion in family law over the last half century. Child support is no longer calculated according to a “just and proper” standard, but is set according to guidelines. Child custody is often not determined pursuant to a best interest standard alone, but pursuant to a best interest standard modified by a number of presumptions. In some places, an approximation approach exists that uses the couple’s past caregiving pattern to establish the future allocation of custody, at least presumptively. In many places, divorce determinations are no longer made within a fault-based regime, which required courts to determine if fault existed and how much a property award should reflect fault, but are made in a no-fault system coupled with presumptions that a homemaker and market worker each contributed equally to the acquisition of property. Proposals to limit judicial discretion have emerged in the alimony context specifically, with some recommendations, like those in Massachusetts, becoming law. The ALI Principles are chock-full of formulas and rebuttable presumptions to help achieve consistency and predictability.

For some, judicial discretion is so undesirable that it is better to come up with a formula, any formula, even if it is unfair, inaccurate, or arbitrary. Formulas are applauded because they provide “quick, stable numbers.” Stated another way, formulas are valuable because they assure an answer quickly, although sometimes (and perhaps often) the answer is wrong.

People dislike judicial discretion because they equate it with uncertainty, arbitrariness, and inefficiency. Judges might misapply the various alimony theories. Or, judicial discretion might “devolve[] policy to the predispositions of individual judges.” Judges might also undervalue caregiving out of ignorance about its worth, or fail to award much caregiver compensation because they equate it with alimony. The uncertainty associated with judicial discretion may inhibit claimants from invoking the remedy at all: one source reports that the uncertainty surrounding alimony determinations has caused litigants to “forego even attempting to

237. For example, a popular idea is to base a formula on the length of the marriage and the income disparity between the spouses as a way to decide the level and duration of alimony. See Baker, supra note 222, at 359. The American Academy of Matrimonial Lawyers proposed a formula in 2007 that reflects these factors. There are also factors that allow for deviation, including if the spouse is the primary caretaker of a dependent minor. See Am. Acad. of Matrimonial Lawyers, Considerations When Determining Alimony, Spousal Support or Maintenance (Mar. 9, 2007).

238. See Baker, supra note 222, at 361–62.

239. See id. at 362.

240. See id. at 321. It also leads to criticism of the legal system. See Krauskopf, supra note 88, at 276.

241. See Rogerson, supra note 230, at 95.

242. Principles § 1.01 cmt. a.
secure alimony because bargaining for it is too difficult.”\textsuperscript{243} Others have mentioned the difficulty lawyers have advising clients about alimony and engaging in “cost-effective settlement negotiations.”\textsuperscript{244} The unpredictability also means, apparently, that alimony contests are “a disproportionate source of litigation.”\textsuperscript{245}

Although these concerns may be compelling, it is best to evaluate them a little more critically before deciding that a broad general obligation, with its benefits, is untenable. First, a new caregiver remedy might not add delay or uncertainty to proceedings since the available remedies are already described as chaotic. The benefits of expedition, achieved with formulas, may not be essential for this remedy anyway. Expedition is important in the child support context because “so many children and adults [are] dependent on child support,”\textsuperscript{246} but no one is yet dependent upon caregiver payments since they do not currently exist. Alimony awards, to the extent that they overlap with caregiver payments, are reported to be few and far between anyway. No reason exists why courts should not award alimony pendente lite and child support while they determine the more complicated remedy for disproportionate and unfair caregiving. This approach should eliminate a major reason to fear delay.

Second, while litigants might experience inconsistent outcomes, this criticism has to be kept in perspective: many claimants would receive nothing at all without a caregiver compensation remedy. Moreover, divergent awards are likely to decline over time with appellate guidance.

Third, the proposal here is not one for unfettered judicial discretion. Decisions ought to rest on the four considerations of fairness set forth below and, primarily, the three compensatory theories that have developed within the context of alimony. These factors and theories should help judges exercise discretion within reasonable limits and permit meaningful review by an appellate court. Courts will have case law, scholarly writing, and policy makers’ insights to help guide their decision-making.\textsuperscript{247} In fact, a study that examined the exercise of judicial discretion in the context of alimony awards found that judges’ decisions were not determined by the individual proclivities of the judge; rather, identifiable factors predicted outcomes.\textsuperscript{248} The same was found in Canada before the advent of guidelines.\textsuperscript{249} The same should be true for caregiver payments, with certain factors predicting particular outcomes over time.

\textsuperscript{243} Baker, supra note 222, at 359; see also Elgin, supra note 87, at 47; Rogerson, supra note 230, at 96.
\textsuperscript{244} Rogerson, supra note 230, at 96.
\textsuperscript{245} Ellman, supra note 78, at 813.
\textsuperscript{246} Baker, supra note 222, at 362.
\textsuperscript{247} See, e.g., Principles § 5.03.
\textsuperscript{249} Although Carol Rogerson criticized the unpredictability of Canada’s spousal support system with its conflicting rationale before the adoption of guide-
A discretionary standard also has some real advantages, apart from those already discussed. First, uncertainty as to the size of a potential award can encourage a couple to settle the matter themselves, contrary to the assertion of some scholars who argue that uncertainty necessarily hampers settlement.\(^{250}\) People bargain in the shadow of the law.\(^{251}\) Uncertainty only harms settlement if the parties have particular risk preferences.\(^{252}\) If both parties are risk averse, for example, then uncertainty actually increases the rate of settlement.\(^{253}\) When only one party is risk averse, the effect on settlement is hard to predict.\(^{254}\) It is only when both partners prefer to gamble that uncertainty fosters litigation.\(^{255}\) Even if both parties are gamblers, however, the uncertainty will not tempt them to litigate if the caregiver payment is intertwined with other issues about which one or both of the parties are risk averse. Uncertainty can also increase the rate of settlement if the parties cannot afford to litigate the issue,\(^{256}\) and most people in domestic relations litigation, in fact, lack the resources to do so.\(^{257}\) Finally, litigiousness declines when people see the remedy as an entitlement that they either expect to receive or pay,\(^{258}\) which should be the case with the caregiver remedy.

If history is a guide, then the uncertainty surrounding the precise remedy for disproportionate and unfair caregiving should not hamper settlement. Family law remedies have almost always been clouded by uncertainty, especially in the past. Over thirty years ago, law professors Robert Mnookin and Lewis Kornhauser wrote: 

\[\text{[E]xisting legal standards governing custody, alimony, child support, and marital property are all strik-}\]

lines, she admits that the most problematic cases—that is, the least predictable—were those that are based on need, not compensation, and those typically did not involve relationships with children. See Rogerson, supra note 230, at 98–100. In fact, in some cases, it was easy to discern patterns, especially in long-term marriages where the spouse bore a disproportionate amount of the childrearing responsibility. See id. at 100. While other caregiving relationships produced less predictable results, Rogerson noted increasing judicial attention to the economic costs of ongoing custody responsibility and the children’s standard of living in the household. See id. at 102.

\(^{250}\) See Blecher-Prigat, supra note 126, at 203–04; George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1, 14–16 (1984).


\(^{252}\) See id. at 970.

\(^{253}\) See id. at 976.

\(^{254}\) See id. at 977. While the “risk preferer” usually has the advantage in negotiations, it is hard to know which parent, if either, would prefer the risk in this context. See id.

\(^{255}\) See id. at 976–77.

\(^{256}\) Cf. id. at 972.


ing for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty.”

This uncertainty did not foster litigation, however. It fostered settlement. As Mnookin and Kornhauser explained: “[M]ost divorcing couples never require adjudication for dispute settlement.” Rather they settled because they wanted to avoid the risks, uncertainties, and transactions costs.

In addition, any uncertainty about how a court might resolve a claim for caregiver payments may encourage parties to work out these issues themselves before conception or at the outset of parenthood, or to avoid parenthood altogether. Parties can minimize uncertainty by negotiating a solution that will apply to their relationship, assuming that such an agreement is either enforceable or relevant to the court’s assessment of an appropriate remedy. This article proposes that a court give weight to any such agreement in its assessment of fairness, thereby giving the parties a strong incentive to work these issues out themselves.

The uncertainty surrounding the remedy also has the benefit of placing the parents in an equal bargaining position when they are negotiating such an agreement. When the litigated outcome is clear and favorable to one of the parties, the other party may have insufficient bargaining power to get an agreement that alters that outcome. Many unmarried caregivers are in such a position presently. An unmarried caregiver is unlikely to convince the other parent to compensate her for caregiving since the caregiver is legally entitled to nothing. However, a caregiver would be more likely to convince the other parent to reach an agreement about sharing if a court were required to provide a remedy for disproportionate and unfair caregiving, and the amount of the remedy was uncertain.

In sum, the world is not going to end if judges are told to remedy disproportionate and unfair caregiving without more specific guidance. The law can and should move forward instead of being stymied by complexity and the desire for simple answers. A discretionary approach is the most pragmatic solution at this time and the only realistic way to achieve a caregiver remedy for all caregivers.

B. The Factors That Make Caregiving “Unfair”

Judges would have two important tasks when adjudicating a claim for a caregiver remedy. A judge must first determine eligibility for the remedy

259. Mnookin & Kornhauser, supra note 251, at 969; see also Brinig & Carbone, supra note 1, at 904 (discussing alimony); Ellman, supra note 125, at 4–5 (same).


261. See id. Admittedly, the authors criticize uncertainty in the context of custody disputes. See id. at 977–80. However, the dynamics involved in custody litigation are entirely different than the dynamics related to a new remedy for economic compensation. It is not clear Mnookin and Kornhauser would disapprove of the uncertainty in this context, although they would certainly point out that such uncertainty could increase transaction costs. Id. at 979.
and then determine the precise remedy that rectifies the unfairness. A
determination that disproportionate caregiving is or was “unfair” is cer-
tainly not mechanical. A determination of “unfairness” is highly individu-
alized and requires an assessment of four intertwining factors: (1) the time
each parent spends working in the market and the home; (2) the relative
allocation of market work and non-market work between the parties; (3)
the couple’s sharing behavior; and, (4) their agreement, whether explicit
or implicit, about their allocation of market and non-market work and
their sharing of economic resources.

1. The Time Each Parent Spends Working in the Market and the Home

If one parent earns all the income and does all the non-market work
(e.g., child care and related housework), and the other parent engages
solely in leisure, then the allocation of work between them seems unfair, at
least on the surface. Our assessment of fairness might change if we knew
that the couple takes turns, i.e., they alternate on a yearly basis who en-
gages in the work activities. Nonetheless, a comparison of the time each
parent spends at work or in leisure is useful information, even if we must
sometimes enlarge the timeframe to capture what is really happening.

In many cases, comparing the parties’ work hours may not unearth
much unfairness at all. Most couples do not have very lop-sided arrange-
ments, and enlarging the timeframe does not typically change this fact.
Both parents typically work consistently in ways that benefit their child,
whether their labor is expended at home, in the labor market, or in both
places. Men and women are generally doing about equal amounts of work
(approximately eight hours a day on a combination of home and paid
work) and have similar amounts of down time.\footnote{262} Even when the focus is
on families with children, women still only spend about twenty minutes
more a week on work.\footnote{263}

Nonetheless, there are some times when caregivers do much more
work. When both parents are fully employed and their child is under six,
for example, women’s total working time exceeds men’s total working
time by about five hours a week.\footnote{264} In addition, if the mother is the sole

\footnote{262. See United States: Work-Life Balance, OECD Better Life Index, http://www.oecdbetterlifeindex.org/countries/united-states (last visited Nov. 10, 2013) ("[M]en are more likely to spend more hours in paid work, while women spend longer on unpaid domestic work. Men in the United States, spend 154 minutes per day cooking, cleaning or caring, more than the OECD average of 131 minutes but still less than American women who spend 258 minutes per day on average on domestic work. . . . [B]oth men and women devote approximately 14 hours per day to personal care and leisure.").}

\footnote{263. See Ruth Davis Konigsberg, Chore Wars, Time (Aug. 8, 2011) http://content.time.com/time/magazine/article/0,9171,2084582,00.html (“For [married couples] who had children under the age of 18, women employed full time did just 20 min. more of combined paid and unpaid work than men did . . . .”).}

\footnote{264. See id. (reporting “a difference of five hours more of combined paid and unpaid work for women a week” according to data from 2003–2005 among dual-earner couples with children under age of 6); cf. Pew Research Ctr., Modern
breadwinner, the combination of her paid work, child care, and house-
work exceed her partner’s workload by an additional twenty-five hours a
week; in contrast, if the father is the sole breadwinner, his total workload
exceeds his partner’s by eleven hours per week.265

The amount of leisure each parent enjoys is another way to assess
relative contributions. Each party’s leisure time is not a mirror image of
that party’s work time. Leisure time is a residual category and reflects the
time that is left after one subtracts all paid and unpaid work, personal
care, and transportation time from the twenty-four hours in the day.266
Arguably leisure time is an appropriate point of comparison because lei-
sure time strongly affects how one perceives the quality of one’s life.267

Certain parents have a leisure deficit compared to the other parent.
Comparing the leisure time of male and female sole breadwinners, for
example, reveals that female sole breadwinners have twenty hours less lei-
sure per week than their partners, and male sole breadwinners have four
hours less leisure per week than their partners.268 In addition, mothers
have much less “uncontaminated leisure” time than do fathers, that is, lei-
sure time apart from other activities such as housework or child care.269

Mothers who are single and poor, have custody of their child, and
work both inside and outside the home270 sometimes have the greatest

Parenthood: Roles of Moms and Dads Converge as They Balance Work and
Family 29, 39 (2013) [hereinafter Pew Research Ctr., Modern Parenthood] (finding fathers in dual-income couples spend ten to eleven hours more than
mothers in paid work, while women spend about nine hours more per week in
household work and child care; additionally, “the gender gap in leisure is about
five hours per week”). Married fathers have three hours per week more leisure
than the mothers when their children are under eighteen years old, and cohab-
ting fathers with similarly aged children have about four hours per week more
leisure than the mothers. See id. at 7, 41. Leisure time represents time relaxing in
various activities. See id. at 7. While researchers sometimes arrive at different num-
bers for the amount of time men and women spend engaged in work or leisure, it
is not the point of this article to reconcile any discrepancies. For example, accord-
ing to the Pew Research Center, married men with children under eighteen work
1.4 hours per week more than married women with children under eighteen. See
id. at 29. The most accurate assessment of the leisure time enjoyed by particular
mothers and fathers would be their time diaries.

266. See, e.g., id. at 46.
270. To the extent these lower-income mothers are not working in the labor
market, it is often because they cannot find affordable child care for their chil-
dren. See generally Joan C. Williams & Heather Boushey, The Three Faces of
Work-Family Conflict: The Poor, the Professionals, and the Missing Middle
issues/2010/01/pdf/threefaces.pdf.
leisure deficit of all. These mothers were recently blamed for the fact that the United States ranks twenty-eighth in the world in the work-life balance, just above Mexico. Not only do mothers in single-parent households often work more hours in the workforce than employed married women, but labor-saving devices and life’s conveniences may be unavailable to them. They frequently feel stressed because they are largely going it alone. Researchers in the Netherlands noted that these mothers “seldom have any leisure time.”

The results for couples might change if we include personal time (e.g., time spent eating, sleeping, grooming, etc.) with leisure time, but it is best to exclude personal time. Time spent on these activities is heavily influenced by cultural expectations and physical needs, and can feel less discretionary. Moreover, caregivers’ “personal time” often involves simultaneous acts of caregiving. A mother’s “personal time” eating and sleeping, for example, is much more likely to be encumbered by her child’s presence. A mother, more than a father, is likely to be the one cuddling with the child when the family sleeps. If one were to focus solely on “adult free time” (free time spent alone or with other adults, but not with children), one finds that mothers have less of it. As one set of sociologists noted, adult free time is “perhaps the most refreshing kind of leisure.”

271. See Sanik & Mauldin, supra note 47, at 56 (noting that single employed mothers sacrifice time in personal care, such as sleeping, and recreation to meet family’s needs).


273. See Pew Research Ctr., Modern Parenthood, supra note 264, at 41 (comparing paid work between married and single mothers in chart titled “Mothers’ Time by Family Structure”); cf. Sanik & Mauldin, supra note 47, at 55 (reporting single employed mothers spent less time with children than married employed mothers when age of younger child was controlled).


275. Cf. Pew Research Ctr., Modern Parenthood, supra note 264, at 1 (reporting 56 percent of working moms feel stressed about juggling work and family life, as compared to 50 percent of working dads).


278. See Bianchi et al., supra note 269, at 102–03.

279. Id. at 103.
Perceptions of fairness tend to correlate with how much market work the caregiver is doing.\textsuperscript{280} Women who are substantial economic contributors tend to object more than other women about the division of household labor.\textsuperscript{281} That makes sense because their partners often have a “leisure surplus,”\textsuperscript{282} while they suffer a “leisure deficit.”

In the overall scheme of things, however, these sorts of time differences are not the biggest component of unfairness that may exist between the parents, although a disparity of five hours a week can seem hugely unfair in the moment. Rather, most of the unfairness relates to the fact that caregiving has negative economic repercussions compared to market work. Many caregivers do not focus on the long-term, negative repercussions of disproportionate caregiving because they assume that they will be treated well by their partners,\textsuperscript{283} they do not know the negative, long-term effects associated with the caregiving role, and/or they realize that no legal remedy exists.

2. The Relative Allocation of Home Work and Market Work Between the Parents

Doing more of the non-market work has economic costs that are very real and at times very substantial. Work patterns are frequently gendered. A mere 6.6% of employed fathers engage in part-time market work, compared to 26.6% of employed mothers.\textsuperscript{284} For every stay-at-home dad, there are thirty-two stay-at-home moms.\textsuperscript{285}

Women typically engage in a higher percentage of household and caregiving activities than men as an overall component of each party’s “work.” The Bureau of Labor Statistics reports that on an average day, only nineteen percent of men do housework (e.g., cleaning or laundry) compared to forty-eight percent of women.\textsuperscript{286} With respect to child care, mothers with children under six years old spend 1.1 hours providing physical care for their children, but fathers spend only twenty-six minutes doing the same.\textsuperscript{287} Mothers also multi-task more often than fathers, by


\textsuperscript{281} See id. at 155.


\textsuperscript{283} See Grittenden, supra note 54, at 89 (2001).

\textsuperscript{284} Pew Research Ctr., Modern Parenthood, supra note 264, at 37.


\textsuperscript{287} Id. at 3 & tbl.9.
caring for their children while engaging in another primary activity, such as cleaning the house. Therefore, a mother with a child under six spends, on average, approximately 6.5 hours per day with her child in tow, while a father spends approximately 4.25 hours per day with his child in tow. Consequently, despite the total number of hours worked being similar between mothers and fathers, “[w]omen still do twice as much housework and child care as men” in two-parent families.

Even when both parents are employed in the paid workforce, and even when women earn more than half the household income, most husbands do less than a fair share of the domestic labor. In one study, forty-one percent of the men in dual-income households with “higher-earning” wives did “a substantial portion of the domestic labor” (i.e., one-third to one-half of that labor), but approximately fifty-nine percent of these men performed less than one-third of that labor.

When the parents live apart, the unequal allocation of caregiving usually intensifies. Unwed and divorced mothers do huge amounts of caregiving by themselves. Both unmarried and divorced fathers’ involvement with their children tends to decline after their romantic relationship with the mothers end. One set of researchers noted that the father’s prior “nontrivial” help with housework and caregiving disappears upon divorce, causing the caregiver to face increased time pressures that go uncompensated. As a consequence, at the point of family breakup, freeloading can either begin or intensify.

The allocation of domestic labor affects women’s work patterns. Regardless of whether a woman is a high or low earner, caregiving affects her market participation. The New York Times reports, for example, that four out of ten female doctors between ages thirty-five and forty-four work part-time, and full-time female doctors work on average 4.5 fewer hours each

288. See id. at 3 & tbl.10; cf. Pew Research Ctr., Modern Parenthood, supra note 264, at 3 (finding that fathers spend approximately seven hours per week on child care and mothers spend approximately fourteen hours per week on child care).

289. Bianchi et al., supra note 269, at 113; see also Bureau of Labor Statistics, supra note 286, at 3 & tbl.9 (showing women spend approximately twice as much time caring for children as men no matter age of youngest child).


291. See William Marsiglio et al., Scholarship on Fatherhood in the 1990s and Beyond, 62 J. Marriage & Fam. 1173, 1184 (2000) (mentioning decline in “quality and quantity of contact between fathers and children” after divorce).

292. See Connelly & Kimmel, supra note 46, at 124.
week than male doctors. As Part II.B discussed, the choices reflected in these patterns have real economic consequences. Caregivers suffer economic loss and market workers enjoy economic gains, and these results are enduring. Any assessment of fairness must be informed by the fact that disproportionate caregiving likely has long-term, negative economic consequences for the caregiver.

Parents themselves recognize the unfairness inherent in these patterns. In one national sample of 234 married parents, mothers were more likely to think things were “unfair” to them when fathers “were actually doing less nurturant parenting than the mothers thought was ideal.” Likewise, fathers believed the labor division was “unfair to the mother” when the fathers reported “doing more breadwinning” than the fathers thought was ideal. Simply, both parents recognized that when work becomes polarized by gender more than the couple thinks is ideal, the caregiver is the one to experience the unfairness.

The Noneconomic Costs and Benefits

What about the world of noneconomic benefits that is also associated with non-market work? Some undeniable noneconomic rewards are associated with caregiving, such as emotional satisfaction from comforting one’s crying infant or witnessing one’s preschooler successfully tie her shoe for the first time. In Dr. Laura Schlessinger’s book, In Praise of Stay-at-Home Moms, one woman revealed that she “can’t compare” being there for her twenty-month-old daughter’s “firsts” “to anything in the world.” Raising her daughter “is what life is all about.” Should these noneconomic benefits be considered when assessing whether the parents’ allocation of work is unfair? Are caregivers not compensated for their income loss by their children’s smiles?

The pleasure from a child’s smile should not be underestimated, even if the pleasure—like the smile—is only fleeting. Nonetheless, the noneconomic rewards from caregiving should be ignored in assessing the fairness of the parents’ arrangement. No one would deny that these bene-

294. Id.
295. For a discussion of economic consequences, see supra notes 54–60 and accompanying text.
296. Melissa A. Milkie et al., Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being, 47 Sex Roles 21, 21, 36 (2002).
297. Id.
298. LAURA SCHLESSINGER, IN PRAISE OF STAY-AT-HOME MOMS (2009).
299. Id. at 137.
300. Id. at 138.
fits exist, but they are difficult to measure. The difficulty explains why we say it is “priceless” for a parent to witness his or her child’s first steps. The term “priceless” acknowledges the subjectivity involved in valuing the experience. We might try to insert some objectivity into the valuation exercise by asking what a “reasonable parent” would say the experience is worth, but it is a lot easier and more comfortable to conclude that the experience is simply “priceless,” precisely because the value of the experience is so individualized. Courts that have been asked to monetize the noneconomic benefits of family life have sometimes refused to do so, reasoning that, “While the benefits of family life may be significant . . . the benefits are intangible and too difficult to measure.”

Valuation becomes even more problematic when its purpose is to offset the amount of economic harm that the caregiver experiences. A caregiver would be put in the uncomfortable position of minimizing her emotional benefits from her child in order to reduce the offset effect. More importantly, the emotional benefits of childrearing do not actually diminish the very real monetary sacrifices associated with the activity. A caregiver cannot put food on the table with the joy that she feels from watching her child score a soccer goal. Comparing noneconomic benefits and economic costs is like comparing apples and cars, not even apples and oranges, because they are truly incommensurable.

Moreover, if noneconomic benefits are relevant to a fairness assessment, then so too are the “noneconomic costs” of caring for children. But it is equally difficult to put a dollar value on the unpleasantness involved in cleaning up after a sick child or the aggravation felt from dealing with a disobedient child. Again, that is not to say that these costs are not real, or in some general sense measureable. In fact, author Diane Ehrensaft documented that the day-to-day burdens of caregiving are particularly great for mothers, even when mothers and fathers are equally co-parenting. Mothers tend to worry more than fathers. She explained:

[T]he mother will tend to carry the child around in her head, even when the child is not with her. This can be referred to as the psychological “labor” of childrearing. It embodies thoughts, feelings, and even obsessions about how the child is doing.

The father, in contrast, even in the shared parenting family, appears to feel more separate from his child.


302. See, e.g., DIANE EHRENSAFT, PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN 57–75 (1987) (using clothing choices, worrying, and psychological management as examples of greater burdens on women, even in equal parenting relationships).

303. See id. at 65–66.

304. Id. at 67.
This disparity existed regardless of the mother’s and father’s professional obligations. Consequently, men were better at being “off” when at work, whereas women had their children on their mind throughout the day.

Regardless of whether it is mothers or fathers who experience more of the noneconomic burden of childrearing, these noneconomic burdens (just like the noneconomic benefits) are virtually impossible to monetize. In fact, it makes a lot of sense to assume that caregivers experience an equal amount of nonmonetary costs and benefits and that these nonmonetary components balance each other out. This reasonable assumption means that noneconomic considerations can be ignored in an assessment of fairness. That is a good outcome, because no one wants to go swimming in a swamp.

3. The Living Arrangement of the Couple

The parents’ caregiving arrangement may not be unfair even if they do not split caregiving equally. The primary breadwinner may be sharing his or her income with the caregiver and the parents may be content with the arrangement. When the parents are living together, each parent is likely benefiting from the other’s labor regardless of whether they have agreed to their respective roles and regardless of whether these allocations meet both parents’ ideal preferences. In these “sharing” relationships, the market worker is sharing his earnings but typically also his companionship and emotional support, and the caregiver is sharing her caregiving and homemaking, as well as her companionship and emotional support.

Couples’ sharing behavior is typically influenced by their marital status, cohabitation arrangement, and romantic relationship, although these three factors are imperfect determinants of it. Selfish behavior sometimes exists between cohabiting spouses, and generous sharing behavior sometimes exists among unmarried, non-cohabiting, non-dating parents. While couples exist that are exceptions to the general patterns, these proxies are convenient and generally accurate indicators of sharing behavior.

Sharing occurs in most marital and marital-like relationships, in part because that is the societal expectation. Unmarried couples share less than married couples, although unmarried couples that act like married couples, especially if they have children, are more likely to share than other unmarried couples. Law professor Cynthia Bowman reports that “a majority of both cohabitants and married couples do maintain joint fi-

305. See id. at 67–68.
306. See id. at 99.
307. See, e.g., McGuire v. McGuire, 59 N.W. 2d 336 (Neb. 1953) (describing husband’s treatment of wife, which included refusing to install plumbing or working furnace in home).
rances,” and “virtually all” cohabitants with a common child pool their income. A romantically-involved couple that lives apart is less likely to be sharing resources than is a cohabiting-married or cohabiting-unmarried couple, but more likely to be sharing than non-cohabiting parents with a platonic relationship.

After the romantic relationship ends, voluntary sharing behavior often ends too, regardless of whether the couple was previously married, cohabiting, or romantically-involved but non-cohabiting. People tend to view themselves as individuals and not part of a couple. For most caregivers, it is as if they receive a pay cut after the romantic relationship ends despite the fact that they are doing the same amount, or more, of the caregiving. Whereas the market worker before shared his income (and some of the day-to-day caregiving labor), now he shares none (or less) of his income and provides no (or little) day-to-day help. The task of caregiving going forward continues to disadvantage the caregiver economically while her efforts continue to benefit the market worker. He gets the services of a nanny par excellence at bargain basement prices, if he has to pay anything at all. He can be the ideal worker and see gains in his earning power. He can have a disproportionate amount of leisure time. He can freeload and the law permits it.

Some might dispute the existence of any unfairness after the couple splits, noting that the market worker’s employment typically benefits the couple’s child and the caregiver after the couple has broken up. After all, the earnings of the primary breadwinner reduce the caregiver’s need to contribute economically to their child. Courts typically allocate child support in proportion to the parents’ ability to pay. The argument, therefore, is that the market worker’s labor benefits the caregiver even after the romantic relationship ends, just as a caregiver’s labor benefits the market worker. Both are carrying a disproportionate burden in their respective spheres.

This argument has appeal until numbers are attached to a scenario. Imagine, for example, that the market worker makes $62,445 a year ($5,204 per month), the average earnings for a full-time male worker in 2009. The market worker is required to pay approximately $804 per month in child support for one child if the caregiver is unemployed and

309. Bowman, supra note 64, at 23.
310. See id. at 35.
expected to contribute nothing. If the caregiver were also working in the paid work force, and she earned the average earnings of a full-time female worker in 2009, or $44,857 ($3,738 per month), then her monthly child support obligation would be $427 and his would be $589. Consequently, his labor (and his higher payment of child support) arguably benefits her either $427 per month (if she is out of the labor force entirely) or $81 per month (if she is also employed (the difference between $589 and $427, divided by two)). Yet those amounts are less than the value of her labor to the market worker. Her caregiving is worth more to the market worker than $81 per month or even $427 per month.

How do we measure the value of her caregiving to him? At a minimum, the value of her care is the cost of purchasing equivalent care in the market. The caregiver is not quite like the average child-care worker, who earns approximately $9.28 per hour, but is more akin to a nanny, because she gives the child one-on-one attention. A full-time live-out nanny earns about $705 per week, or $2,820 per month. Stated another way, the market worker provides the caregiver a benefit of $427 per month, but the caregiver provides the market worker a benefit of $1,410 per month (half the cost of $2,820). Of course, her caregiving likely has a higher value to the market worker than is reflected in the cost of a live-out nanny. The $1,410 per month does not reflect the added value of having a loving parent care for one’s child, and the peace of mind that accompanies knowing that such a person is the caregiver. Nor does it reflect the fact that the non-custodial parent is able to enhance his earnings, acquire seniority, earn credit towards social security benefits, and sock away retirement benefits, while the caregiver is getting no such benefits.

If the couple has a more egalitarian relationship with respect to the allocation of their caregiving and market work, the difference in the value of their exchange may diminish, but it does not disappear. Assume both parents are working full-time and earning an average amount, and the caregiver has custody of the child sixty percent of the time while the market worker has custody of the child forty percent of the time. The caregiver will still provide the market worker with child care worth much more than $81 per month. Assuming she cares for the child eight hours more each week than he does, or thirty-two hours more a month, and even


314. See U.S. Census Bureau, supra note 312, at 459 tbl.703.


assuming her labor is worth only what a child-care worker is paid ($9.28 per hour), she still provides a service worth $297 per month. Moreover, the caregiver will probably not receive the full $81 benefit from the father’s market work because the father’s higher level of caregiving should reduce his child support obligation.

The economics of the situation can certainly change depending upon a myriad of factors. Altering the parties’ income and the value of the caregiver’s labor can affect the calculations. Sometimes these changes will diminish the disparity in the value of their contributions; sometimes these changes will increase the disparity. The point, however, is not to prejudge the likely effects here. Rather, these sorts of factors should be examined to see whether any unfairness exists, and, if it does, the law should provide a remedy.

4. **Any Agreement, Explicit or Implicit, Regarding the Allocation of Market and Home Work and the Sharing of Economic Resources**

The final factor that influences an assessment of fairness is whether the parties have agreed to their allocation of labor and resources, and whether they are acting consistently with their agreement. Generally, if the parents have agreed to an arrangement and the parties are acting consistently with it, then there is no unfairness between them. This conclusion is consistent with one of the premises of contract law: the parties’ freely negotiated agreement is assumed to be the best outcome for the parties, unless the contract is unconscionable.\(^{317}\)

In fact, most married couples see the division of labor during their ongoing relationship as fair. A study by Paul Amato and his colleagues found that few married men and only about one-fifth of married women thought the allocation of housework and child care between them was unfair.\(^{318}\) Others have reported similar results.\(^{319}\) Parties’ own assessment of fairness is notable because the couples’ arrangement often differs from their expectations at an earlier time in their relationship: “Before the arrival of the first child, couples tend to share the housework fairly equally. But something about a baby encourages the resurgence of traditional gender roles.”\(^{320}\) Research on the views of unmarried cohabiting couples is


\(^{318}\) See Amato et al., *supra* note 280, at 154.


\(^{320}\) Crittenden, *supra* note 54, at 25; see also Amato et al., *supra* note 280, at 148.
hard to find, but presumably these couples are similarly content with their division of labor.321

Not only do many people characterize their division of labor as fair, but their division of labor usually reflects their preferences. Mothers often prefer not to work outside the home full time.322 Lower-income women especially express resentment about their paid employment, in part because their jobs are unfulfilling. They would rather be home with their children, but economic circumstances make that impossible. Similarly, fathers are generally happy working in the market: seventy-two percent of fathers thought a full-time job was the ideal situation for them,323 although twelve percent would prefer part-time work and sixteen percent would prefer working solely inside the home.324 While men are increasingly finding themselves in a work-family bind, men do not necessarily want to give up their breadwinning role.325

Well, what about those men and women who are unhappy with their division of labor? Does one party’s dissatisfaction mean that their agreement is unfair? After all, some situations are suboptimal for one of the parents because he or she would prefer a different arrangement. Consider, for example, a woman who prefers to work full time and have her spouse care for their children, despite the fact that this arrangement would bring the family less income than if the roles were reversed. The woman prefers paid employment because she finds adult interaction rewarding. She also wants her husband to stay at home with their children because she strongly believes that one parent should do so. However, her partner is unwilling to agree to her plan. When she ultimately acquiesces


322. The recession increased the number of married mothers with minor children who preferred full-time work from seventeen percent to twenty-three percent, and had a similar effect on unmarried women (from twenty-six percent to forty-nine percent). See PEW RESEARCH CTR., MODERN PARENTHOOD, supra note 264, at 13.


324. See id. at 3.


to an arrangement in which she stays at home with the children and her partner works full time in the market, is that unfair? Is her frustrated preference relevant to an assessment of fairness?

Probably not. While we certainly should have some sympathy for this woman, she probably deserves no more sympathy than any other person who finds their choices constrained by life’s circumstances. We may fault her for inadequately vetting her partner before conception, but perhaps she did so and her partner later changed his formerly egalitarian orientation. Or, perhaps, her own views about the importance of market work only crystallized once she had children. Going forward, she is not without options. No one can stop her from taking a full-time job and enrolling her children in day care, not even her partner. Nor can anyone stop her from leaving the relationship and requesting visitation instead of custody. Of course, neither of these options is a great solution, nor even a good solution. Nonetheless, her decision to stay home with her children—if freely made—is not the sort of decision that the law should be concerned about just because it does not reflect her ideal preferences. Most people’s lives have been influenced and constrained by reality. The law should only be concerned if her partner does not fairly compensate her for that caregiving.

Not everyone would agree. Reporter Ann Crittenden would argue, for example, that women do not bargain from a point of equality after the first child arrives. At that point, the woman’s bargaining power decreases because she is less likely to leave the relationship. “If he refuses to clean up after dinner, what is she going to do? Threaten to leave with the baby? Not likely.” While a woman has less bargaining power the more she becomes dependent upon her partner for money, similar pressures exist for the market worker after the child’s birth. A market worker may have the money to leave the relationship, but he may remain in a relationship because he fears losing contact with his child, or losing the other parent’s ability to caregive (especially if maintaining two households would require her to work more in the labor market). To put it another way, if she refuses to clean up after dinner, what is he going to do? The child probably constrains both parties’ ability to bargain about their respective roles, but it certainly does not eliminate their ability to bargain, or even to leave. In fact, women with children initiate more divorces than men with children.

327. The fairness of their arrangement is not affected by the economic rationality of the decision. The same conclusion could be drawn even if she would have made more money than her spouse.
328. See Crittenden, supra note 54, at 113.
329. See id.
The parties’ agreement is an important component of assessing fairness because it also provides a standard against which to measure the adequacy of the parties’ sharing behavior. Breaches of an agreement are generally an indication of unfairness. Breaches can occur during the romantic relationship or at its conclusion. A breach is essentially when one parent alone decides to change the arrangement so that it solely or predominantly benefits him or her. The parents can certainly change their agreements as their circumstances change, but the beauty of an agreement is that both people must decide together what is a fair arrangement for the new normal.

Assuming the parties’ have an agreement, the agreement by itself should not be the sole measure of whether unfairness exists. Otherwise, the adjudication would be akin to a contract-based claim. As Professor Ira Ellman explained in his important article, *A Theory of Alimony*, certain limits exist to a contract-based approach to alimony. Similar limits exist to a contract-based approach to caregiver payments. While some of his concerns might be obviated by a requirement that a written agreement exist, others remain. For example, a contractual approach necessitates an assessment of who was at fault for breaching the agreement, and assessing fault is now passé in the divorce context in many locations. Also, a contractual approach suggests that a market worker should be entitled to a remedy if the caregiver ceases or reduces her caregiving in a way that is contrary to their agreement, and that seems misguided. A purely contractual remedy would also work only for unmarried caregivers, as spouses cannot enforce a contract about compensation for household labor under existing family law. If the agreement were an important component of any fairness analysis, instead of an enforceable contract, then the law could treat all parents similarly. Although all parents could also be treated similarly if all contracts were enforceable, this approach is inferior because the level of compensation has sufficient public importance that the parties’ determination should not be definitive. Family circumstances can change overtime, including the parents’ romantic and legal relationship to each other, and a contract can become unfair.

Although an agreement is an important component of assessing fairness, making the parties’ agreement relevant to a legal action is not without its downsides. If the agreement was oral, there may be disagreement about its existence, its terms, and its subsequent modification, and assessing credibility in this context might be difficult and time consuming. For this reason, judges may limit relevant agreements to those that are written.

331. Among other things, he argues that the parties’ understanding is rarely known and too vague if known. See Ellman, *supra* note 125, at 20.

332. A remedy requires a material breach of the agreement even if the dissolution will cause her disproportionate hardship. See *id.* at 19.

333. See *id.* at 11, 23.

334. For a discussion of the unenforceability of household labor compensation contracts under current law, see *supra* notes 8–9 and accompanying text.
Another concern is whether parents might start “bean counting” during the relationship if an agreement is an important component of the fairness assessment. That is, will parents undertake elaborate record keeping to track who is doing what and their sharing behavior? Such record-keeping might be burdensome and foster distrust. This concern should not be discounted, but its importance should not be overstated either. Certainly a party will need to prove who does what type of work, in what proportion, and for what type of remuneration, in order to prevail in court on a claim for disproportionate and unfair caregiving. However, bean counting is triggered by both the availability of a remedy and a party’s feeling that the arrangement has become unfair. It seems misguided for society to ignore the potential injustice just because addressing it requires the aggrieved party to document it. Moreover, bean counting is not something to be feared. Recording actual patterns of behavior can help the parties resolve their dispute without court intervention. A recording helps parents visualize what is actually happening, thereby allowing them to better understand it and change it.

Finally, courts will eventually need to resolve many subsidiary issues if agreements matter to an assessment of unfairness, and this takes time and energy. In the absence of an actual agreement, should the law infer an agreement for certain categories of couples? If so, what would that agreement look like? For example, should a court presume that the parties agreed to the existing allocation of labor and an equal sharing of income in any marital or marital-like relationship until the child reaches eighteen, even after the romantic relationship ends, absent a written contract suggesting otherwise? Should a court presume that a non-cohabiting, unmarried couple did not agree to an equal sharing of income as compensation for disproportionate caregiving, absent a written contract suggesting otherwise? While these questions are important, they do not detract from a court’s ability to use the parties’ actual agreement to inform a determination of fairness when such an agreement exists. Moreover, some of these questions should be answered in the context of determining the appropriate alimony theory to apply to the situation, as discussed below.

In the end, the four factors set forth above should help a decision-maker decide whether the disproportionate allocation of caregiving is unfair. The next question is, “so what?” Judges will then need to canvas the available theoretical approaches to compensation and choose the most appropriate one in light of the parties’ circumstances.

C. Theoretical Tools That Will Help Determine the Remedy

The hardest part of the court’s task will be to craft the remedy for disproportionate and unfair caregiving in a particular case.335 The judge

335. The caregiver should have access to the remedy when she no longer cohabits with the other parent, or at any time if the couple never cohabited. This approach to the timing of the remedy best comports with family law doctrine. It
should award an amount to compensate the caregiver as opposed to remedy her needs, for reasons explained below. The judge should draw upon the existing theoretical work on alimony, as appropriate, to determine fair compensation. The most compelling theory will depend upon case-specific factors, such as the nature of the couple’s broader relationship, the contours of property and alimony law in that jurisdiction, and the difficulty of the fact-finding task at the time of the adjudication. The court must coordinate the new remedy with the existing remedies, such as alimony and property division. The new caregiver remedy must not harm divorcing caregivers by lowering the total amount of money they receive upon divorce, nor should it subject a divorcing obligor to pay for something twice.

Although courts should draw upon the existing theoretical work on alimony to fashion a remedy, two caveats are necessary. First, judges must not allow existing alimony theory to stymie their ingenuity. Alimony and its theoretical underpinnings are tied to the marital context. Equating caregiver payments to alimony, or embedding caregiver payments within alimony for married couples, may import a lot of unnecessary and inappropriate doctrinal baggage, such as a requirement of “need,” or the award’s termination upon remarriage of the recipient. It may also in-
hibit the development of totally new approaches to remedying this type of injustice.

Second, the focus here on alimony as a source of inspiration is not meant to suggest that the law of property should be ignored. Rather, alimony is discussed here because of the historic differentiation between property division and alimony, and because of the current legal gaps for remedying unfair, non-marital and post-marital caregiving. Professor Krauskopf explained that divorce law differentiates between assets and obligations on the one hand, and personal gains and losses on the other hand. The theory that justifies splitting a couple’s assets and obligations upon divorce is the idea that the marriage is a partnership to which both parties contribute time and effort for the benefit of the entire family and from which both expect to share any gains. In contrast, alimony is awarded to “fairly share gains and losses in personal earning capacity” in order to prevent unjust enrichment. Admittedly, Professor Krauskopf’s explanation is a little dated today, but it is still useful because it emphasizes that marriage involves an expectation that the parties will share the accumulated property. Co-parenthood, without more, does not have that same social meaning, although sometimes it might for a particular couple. Since the law’s present gaps mostly affect unmarried and divorced caregivers, and since these caregivers are much less likely than married caregivers to have a broader economic partnership or expectations about sharing all of their property, property doctrine seems less helpful. In contrast, alimony doctrine, which includes compensation for unjust enrichment, seems useful for a wide array of caregivers.

Alimony is also a good analogy for caregiver payments for another reason. Any new remedy needs to draw from a market worker’s future income if it is to be meaningful. A property award typically relies upon property in existence at the time of the award, whereas an alimony award typically relies upon the obligor’s future income. Most couples have too little property at the time of breakup to compensate for both past and future caregiving. As law professor Cynthia Starnes starkly noted,

339. See Krauskopf, supra note 88, at 257–58.

340. See id. at 258–59.

341. Id. at 266. There are other purposes, including compensation for loss of marriage prospects and for physical or mental injury. See id. at 266–67.

342. See id. at 260.

343. The lines demarcating alimony and property awards have become blurred over the years. Most courts draw on some of the same considerations to award both property and alimony according to “their own notions of fairness.” See Ellman, supra note 125, at 12.

344. See Starnes, supra note 93, at 211 (noting that average divorcing couple only owns property worth approximately $25,000 when home equity is excluded).
“[n]othing from [n]othing [l]eaves [n]othing.”345 Since the breadwinner will typically have a lifetime of earnings, that stream of income should be accessible to compensate the caregiver.

Although alimony is the better analogy for the new caregiver payment, nothing in this article is meant to prohibit a court from awarding property to compensate caregiving efforts, especially when courts already do so. A property award might even be an appropriate option to compensate future caregiving if a moocher has tremendous assets but no anticipated future income. It might also be appropriate when the parties agreed to share property as fair compensation for caregiving. The point is not to foreclose further legal developments or to limit courts’ discretion, but rather to point out those tools that are most likely to help courts remedy the situations that are most in need of a remedy.

1. Need Versus Compensation

While meeting economic “need” and affording “compensation” are both goals of alimony, and while both can justify an award to a parent for disproportionate and unfair caregiving, compensation is preferable to need as an objective. After all, not all caregivers are needy. A compensatory rationale is broader than a need rationale.

A compensatory rationale is also a preferable theory even for needy caregivers. First, a caregiver’s financial need may be unrelated to her caregiving. The caregiver may have needed public assistance regardless of whether she ever had a child. If so, there is scant reason that her co-parent should be responsible for her needs as opposed to the public, especially if they are unmarried. While caregiving may exacerbate the caregiver’s financial need, it would be a very complicated task to try to figure out how much her caregiving contributed to her need. The slipperiness of the need concept will also contribute to the challenges associated with a determination of need.346

Second, even if caregiving causes the caregiver’s dependency or need, most caregivers would probably prefer to receive compensation for a benefit conferred rather than support for their dependency, assuming the amounts were similar. Appropriate messaging is one of the reasons that the authors of the ALI Principles, discussed above, re-characterized the purpose of alimony from satisfying needs to affording compensation: it “transforms the claimant’s petition from a plea for help to a claim of entitlement.”347

Third, a compensatory rationale would probably attract less political opposition than a need rationale in light of the fact that the caregiver

345. Id. at 209 (quoting Billy Preston, Nothing from Nothing, on NOTHING FROM NOTHING (A&M Records 1974)).
346. See PRINCIPLES § 5.05 reporter’s note, cmts. a & f; Ellman, supra note 125, at 4.
347. PRINCIPLES § 5.02 cmt. a.
remedy will extend to unwed parents. Those who want to protect the institution of marriage may think that requiring an income transfer for need blurs the line between marriage and unwed co-parenthood too much. One of marriage’s hallmarks is that a spouse is required to support his or her partner when that partner is in need. Compensation, however, is a concept that is not tied to marriage. It currently justifies payments between all sorts of people, including strangers. In fact, the law regulating business partnerships embodies a compensatory concept, akin to restitution. A partner who contributed a disproportionate share of labor to the business partnership may be entitled to compensation after the partnership ends; it is an exception to the rule that partners have no ongoing obligations to each other after liquidation.

A study by Ira Ellman and Stanford Braver arguably challenges the assumption that a compensatory rationale will have more popular appeal then a need rationale. Their study indicated that people would rather see the law award alimony for current caregiving than as compensation for the loss in earning potential associated with past caregiving. In their study, subjects preferred to award alimony to a woman with adult children slightly more than a woman who was childless (forty-eight percent to forty-five percent), but subjects were most willing to award alimony to a woman with young children (fifty-eight percent received alimony). The authors concluded that the subjects “care most of all about the claimant’s responsibility as primary caretaker of the couple’s minor children, to some extent but noticeably less about the partner’s marital status and their relational duration, and very little at all about the claimant’s history of having cared for the couple’s now-grown children.” In fact, their survey may have even undercounted the full number of respondents who would favor an award for current caregiving because the respondents were told that the caregiver would receive child support; the respondents may have assumed that the child support was also meant for the caregiver.

The study’s results are certainly open to interpretation and may suggest little about the political feasibility of a compensatory rationale. After

348. See Ellman, supra note 125, at 37.
349. See id. at 35.
351. See id. at 224.
352. Id. at 239–40.
353. Survey respondents may have assumed that caregivers already received something equivalent to alimony (whether for need or compensation) through child support, and this assumption may have repressed their willingness to award additional amounts. Respondents were told that child support was being awarded and they may have inferred from the numbers that the child support award was also to benefit the caregiver. In fact, amounts were higher than what the child support guidelines required and had built in premiums for marriage and marital-like relationships, at least when the noncustodial parent had sufficient resources. See id. at 226–27. Survey respondents did award lower amounts of alimony for married couples when the child support amount was higher, although the effect was less evident for unmarried couples. See id. at 227.
all, almost half the respondents did want to award alimony to a woman with adult children for her past caregiving. If anything, the results may suggest that the survey respondents were expressing a preference about the timing of the remedy more than rejecting a “compensatory rationale” in favor of a “need rationale.” Respondents might have shown great support for a compensatory rationale if the award were given to the caregiver as she did the work. Caregiver compensation, as proposed in this article, would be available for many unmarried and all divorced caregivers as they did the caregiving work.

The discussion now turns to compensation, because a compensatory rationale often seems superior for the reasons specified above.

2. The Possible Theories Behind the Remedy If the Goal Is Compensation

The decision to compensate a caregiver instead of provide for her need does not end a judge’s task. What does it mean to compensate a caregiver? No single answer exists in the context of alimony, although scholars have successfully identified several theoretical approaches. Professor Cynthia Starnes has catalogued well the three basic approaches, noting that they correspond loosely to expectation, reliance, and restitution damages under contract law. The usefulness of these compensatory theories differs depending upon the particular caregiving fact pattern. As will become obvious, all three theories make some sense, some of the time, for some disproportionate and unfair caregiving. The inability to find one all-encompassing theory makes it essential that decision makers have access to all of the theories and match the best theory to the circumstances.

a. Gain Theory

Gain theory is the first possible approach to compensation. In the marriage context, this theory means that alimony should reflect the gain that the claimant would have obtained had she remained married. The amount would include a share of her husband’s post-divorce income to the extent that her efforts during the marriage contributed to his ability to earn this future income. Gain theorists recommend a remedy that is an amount either to “equalize income or household standards-of-living or . . . [that reflects] a percentage of income disparity based on the duration of the marriage.”

Gain theory makes a lot of sense for parents who were in a marital or marital-like relationship and are seeking a remedy at the end of that rela-

354. See Starnes, supra note 20, at 278–79.
355. See id. at 278. Although the contract law analogy is helpful, at least one of the theories—loss theory—is also justified on functional grounds unrelated to contract concepts. See Ellman, supra note 125 (arguing that contract and partnership concepts are futile and proposing functional understanding of alimony).
356. Starnes, supra note 20, at 290.
The remedy is appropriate because the parties’ marriage involved an implicit agreement that both would contribute to maximize the couple’s collective well-being and both would share in the bounty, including the couple’s economic prosperity. As mentioned, this theory already guides courts and legislatures in their approach to property division on divorce. Cynthia Starnes explains that this theory justifies awarding the caregiver a share of the market worker’s enhanced earning capacity since it is the “spouses’ combined efforts” that created it, and the market worker will continue to enjoy it. Professor Starnes herself recommends this remedy for married couples with children based on the parenting enterprise.

While gain theory is an attractive approach to remedy the effects of marital caregiving for divorcing parents (and perhaps also to remedy the effects of post-marital caregiving, see below), it seems like the wrong approach for some other parents, such as parents who only had a short dating relationship. In part, the measure helps compensate for a married individual’s foregone opportunity to marry another person who would have an obligation of support, but an unmarried caregiver does not lose that opportunity (although the child may diminish it). Moreover, gain theory rests on the idea that the caregiver had legitimate expectations to share the market worker’s income over the long term. Marriage involves a broad agreement between the parties. Professor Katharine Baker once noted: “Marriage involves an agreement to share profits and liabilities in all enterprises forever.” Nothing like that necessarily exists in a parenting relationship created by a one-night stand. Neither the caregiver nor the market worker is likely to expect long-term income sharing without a broader partnership akin to marriage. Marriage is the relationship that gives rise to such expectations, although certain marriage-like arrangements can do so also. If gain theory were always used to remedy disproportionate and unfair caregiving, regardless of the parties’ broader relationship, then the remedy would turn all parental relationships into something that felt like marriage, contrary to the parties’ expectations.

Relatedly, gain theory seems inappropriate when the parents lack a marital-like relationship because the market worker’s prosperity is less likely to be attributable to the caregiver’s efforts. A market worker’s enhanced earning capacity is likely attributable to his spouse’s caregiving, but also to her emotional support, companionship, general housekeeping, and perhaps activities like the hosting of business dinners. Gain theory seems to make the most sense when the parties are married or in a marital-like relationship, because the couple probably had a broad partnership that involved these other types of contributions too.

357. Starnes, supra note 55, at 1543–44. Starnes recommends, “[s]uch a husband should therefore buy out the interest of his wife at divorce.” Id. at 1544.
358. See Starnes, supra note 93, at 201.
359. See Brinig & Carbone, supra note 1, at 878.
360. Baker, supra note 82, at 1198.
Gain theory also seems the more appropriate for caregiving in marital relationships because the marital caregiver is more likely than other caregivers to share the market worker’s liabilities at break-up. It is questionable whether the caregiver should get to share in the market worker’s gains if the caregiver has no potential exposure for any of the market worker’s debts.

Finally, gain theory also has limited appeal for unmarried couples in some specific contexts. For example, it would be difficult to apply during an ongoing romantic (but non-cohabiting) relationship because the caregiver’s expectations of sharing in the gain may not have been conclusively frustrated, but only delayed.

Gain theory could also be used to compensate a caregiver for her post-divorce caregiving by awarding her the market worker’s enhanced earning capacity that is attributable, at least in part, to her efforts. This would rest on the idea that a marital couple expected to share the market worker’s future income in exchange for caregiving, that this expectation extended to the child’s entire minority, and that the caregiver’s post-divorce efforts will help the market worker enhance his earnings. On the other hand, gain theory may be an unappealing measure for post-divorce caregiving. After all, the caregiver can now remarry, and her post-divorce caregiving may contribute much less to the market worker’s enhanced earning capacity than the combination of caregiving, homemaking, companionship, and emotional support that she provided during the marriage. Additionally, after the marriage ends, the caregiver has no responsibility for the market worker’s financial failures. The market worker might also question whether the parties expected to share his post-divorce enhanced earning capacity in a world of prevalent divorce shaped by a “clean break” ideology.

Arguably, gain theory is inappropriate when the caregiver is to blame for the romantic relationship’s end. Imagine a married caregiver who walks away from the relationship and the sharing that the market worker was willing to do in order to be with her new boyfriend. To some, it will seem unjust to the market worker to award the caregiver the amount she would have received had she stayed in their relationship. Even assuming gain theory should be used as a basis for remedying her disproportionate and unfair marital caregiving (because the caregiving labor occurred before her blameworthy behavior caused the breakup of the marital relationship), it certainly seems problematic to give the adulterer a share of the other parent’s enhanced earning capacity accrued after the relationship ends, even if her post-marital caregiving contributes to his enhanced earning capacity. In fact, in some states, adultery and desertion could disqualify the caregiver from receiving alimony altogether, and in others it

361. Twenty-two statutes consider fault in determining support. See Carbone, supra note 1, at 55 (citing Principles).
could affect the application of a gain theory measure. If the parents never married, the philandering caregiver would not technically be an adulterer or deserter. Although no legal concept of fault is applicable, the caregiver’s behavior is still arguably condemnable. Without a clear definition of fault in the context of the unmarried co-parenting relationship, gain theory may always be inappropriate, or at least inappropriate for remedying disproportionate and unfair caregiving provided after the relationship’s end. On the other hand, if a no-fault state deems fault irrelevant to alimony determinations, then gain theory should be available both to married and unmarried couples regardless of fault (although other reasons might justify distinguishing between divorcing and unmarried couples for purposes of the theory’s availability).

b. Loss Theory

Loss theory is another approach to alimony. Under this theory, alimony compensates the claimant for her losses attributable to her marriage. Historically, the “most important loss was the opportunity to have married another” and receive support from that person. The availability of no-fault divorce makes the expectation of life-long marriage and support debatable, so losses are now identified as the lost economic opportunities from caregiving during the marriage. The remedy seeks to “put the injured spouse ‘in as good a position as he [or she] would have been in had the [marriage] not [occurred].’” The caregiver’s losses are shared because they will continue after divorce, and are not offset by the sharing that occurred during marital cohabitation. The measure of the loss is generally the claimant’s lost earning capacity (i.e., the difference between the claimant’s current earning capacity and that which she would have had if she had never married), so long as her efforts resulted in a financial gain to her spouse.

Loss theory rests on the idea that the caregiving spouse made her decision to care give with the expectation that her relationship and the sharing behavior would continue, at least long enough to get “a return” on her investment in the relationship. When the romantic relationship

362. See Carbone, supra note 1, at 44, 53 (explaining that expectation measure embodied in gain theory has historically been tied to fault, and measure may make most sense only for innocent recipients).
363. See generally Principles ch. 1 intro., topic 2, pt. III (giving reasons to exclude consideration of fault); see also Carbone, supra note 1, at 72–73 (describing why determination of who “breached” may not be relevant); Ellman, supra note 125, at 66 (arguing fault is not relevant under his proposal).
364. Brinig & Carbone, supra note 1, at 873.
365. See Rogerson, supra note 230, at 72.
366. Starnes, supra note 20, at 284 (footnote omitted).
367. See id. (citing Ellman, supra note 125, at 49).
368. See Ellman, supra note 125, at 67.
369. See Brinig & Carbone, supra note 1, at 894; see also Principles § 5.05 cmt.
ends, the caregiver should be compensated with an amount that would put her back in the position that she would have been in had she never married.

Loss theory has also been justified functionally: loss theory “encourage[s] socially beneficial sharing behavior in marriage.” Propo-
nents claim that it allows the couple to arrange the allocation of market work and caregiving between them according to their preferences because the caregiver’s investment is protected. Most couples will probably choose to have the higher-income individual engage in more of the paid work because that arrangement provides the couple with the most economic resources.

The loss measure has some distinct advantages over gain theory. Fault, or any other reason for a break up, appears irrelevant to an award predicated on loss theory, unlike with an expectation measure. Even a blameworthy caregiver deserves compensation for her past caregiving to the extent that it causes her enduring losses and the other parent benefited from her work. Fault, however, is probably not completely irrelevant. For example, courts would likely disallow this remedy for a claimant who wrongfully abducted the children and thereafter claimed that she was owed compensation for her lost earning capacity. Perhaps some types of fault are relevant because the blameworthy behavior undermines the functional rationale for the measure; the behavior makes impossible an agreement about the best allocation of market and caregiving work.

Just like the expectation measure, the loss measure seems consistent with the norms of some co-parenting relationships, but not others. Many couples enter the co-parenting relationship expecting to share the breadwinner’s income, although unmarried caregivers may have a more modest expectation about sharing than married couples. The unmarried caregiver’s expectation, however, may still be significant enough to cause her harm when the sharing stops. Other couples have no expectation of sharing anything, and, therefore, the measure seems misplaced for those couples. To the extent that the measure rests on a functional rationale (to encourage the best allocation of market and home work for the couple), then a loss measure seems appropriate for parents that make decisions together about the allocation of caregiving work and the sharing of resources, regardless of their marital and romantic status.

Even if loss theory seems applicable, it is not always the best compensatory measure. It can pose real challenges for a claimant in certain situations. Loss theory—to the extent that it addresses opportunity costs—

370. Ellman, supra note 125, at 12.
371. See, e.g., id. at 50–51.
372. See id. at 46–47.
373. See id. at 66; Brinig & Carbone, supra note 1, at 879, 895–96, 901–02.
374. For a discussion of a functional rationale where spouses allocate market work depending on income capacity, see supra notes 356–59 and accompanying text.
requires an assessment of losses actually experienced that were not offset by past sharing in a partner’s prosperity. Trying to assess whether a party has received the “full value during the marriage [or relationship] is impossible,” and determining precisely how much value a caregiver received may be even more difficult for unmarried couples that share. In addition, determining the caregiver’s actual losses attributable to caregiving can also be problematic. The caregiver’s current earning capacity may reflect factors like her ability and ambition, rather than factors related to her caregiving, at least in part. In addition, calculating actual earning capacity loss can be “costly to the extent it requires expert evidence.”

Loss theory also undercompensates those who are “market challenged,” i.e., people with low education or ability. These individuals may have little, if any, real income loss from caregiving, although they provide a useful service to the other parent.

The ALI Principles use loss theory as a basis for spousal compensation, but they do not try to compensate opportunity costs in a strict fashion. Among other adjustments, the ALI Principles get around some of these valuation problems with a unique formula for calculating loss, but this solution does not work so well for unmarried parents. Judges are supposed to subtract the caregiver’s current income from her partner’s income and then multiply the difference by a number that represents the number of years of caregiving. Her partner’s income supposedly reflects the level of income that she could have earned, and therefore likely lost, because people tend to marry someone from the same socio-economic background. Unmarried parents, however, are not married to each other, and it may be wrong to assume that they come from the same socio-economic background, at least without particular evidence establishing that fact.

Professor Starnes reports that the difficulties of calculating loss have led some proponents of loss theory to fall back on the remedies proposed by gain theorists. This solution seems particularly inappropriate if the parents lacked a broader partnership like marriage or lacked an expectation of sharing economic gains, or if the measure is applied to post-relationship caregiving in a jurisdiction where fault is relevant and the claimant’s wrongful behavior caused the relationship’s end.

c. Contribution Theory

Some courts rely on contribution theory, also known as “unjust enrichment,” in order to award a spouse the amount he or she has contributed to the other spouse’s prosperity. The remedy tries to address the

375. Ellman, supra note 125, at 55.
376. See Schneider, supra note 335, at 230.
377. See Rogerson, supra note 230, at 84.
378. See Singer, supra note 6, at 2443.
379. See Starnes, supra note 20, at 285.
situation in which one parent unjustly benefits at the expense of another. The focus is on the value of what the non-market spouse gave to the market spouse, measured either by the caregiver’s actual uncompensated monetary and nonmonetary contributions, or by the effect that these contributions had on the market worker’s earnings. This measure is typically used when one spouse contributes financially to the other spouse’s education, but then receives none of the benefits from the spouse’s degree because the parties divorce shortly after the degree is conferred. The claim disappears if the contribution conferred was conferred as a gift.

The rationale behind contribution theory makes sense for all parents regardless of marital status. It does not require that a party have any expectation about long-term sharing or an agreement to engage in any sharing at all; nor does it require a broader relationship that typically gives rise to expectations of sharing. A caregiver need not suffer a measurable loss to her income from caregiving in order to recover. Contribution theory is generally unaffected by whether the claimant is at fault.

Contribution theory is not a panacea, however. Contribution theory will not always be the best measure to remedy disproportionate and unfair caregiving because it sometimes does not comport with the parties’ legitimate expectations. Caregivers in a long-term committed relationship would be disappointed if they only received reimbursement for their efforts when they legitimately expected to share in the fruits of their partners’ prosperity. Also, valuing the contribution for purposes of reimbursement is fraught with difficulty. The market typically values caregiving at a very low rate. If a court only uses the actual market value of the care to determine the dollar value of the remedy, then higher-income individuals will be discouraged from caregiving. Perhaps a better measure of the care’s value is the true cost to the caregiver to provide the care; but that measure then requires one to calculate lost opportunities, with all of its difficulties.

Measuring the effect of the caregiving on the market worker’s earnings also poses problems. Earnings may not capture the true value of the service provided because parental caregiving confers unique benefits that defy monetization. The market worker receives important nonfinancial benefits, such as having his children “raised in accordance” with his “preference[ ] for direct parental care.” The market worker also gets to structure his time with fewer constraints, and this flexibility can produce a sense of personal freedom in addition to the job-related financial benefits.

381. See Carbone, supra note 1, at 44 (“[P]ortions of the divorce award, most notably those that approximate restitution principles, are independent of the reasons for the breakup of the marriage.”).
382. See Starnes, supra note 20, at 286.
383. See Baker, supra note 222, at 337.
384. See Ellman, supra note 125, at 72.
385. Carbone, supra note 1, at 68.
(from longer and more uninterrupted work hours). While some scholars and judges have called upon courts to capture these types of gains, courts generally do not do so because it is a complicated task, so they instead focus on what was given.

Some scholars dismiss unjust enrichment as a remedy for disproportionate caregiving for other reasons. Professor Starnes, for example, dislikes this compensatory remedy, in part, because it would require courts to “total up and compare [the spouses’] individual contributions” instead of working off a presumption that both contribute equally to the marriage. This concern has merit for marital couples (and Professor Starnes focuses on those couples), but it has no merit for non-marital couples, because no presumption is currently operating or should necessarily operate for them. Totaling up contributions is arguably a better approach than no remedy at all for unmarried couples, which is the position at present. Moreover, courts could develop tools to minimize the accounting involved, such as a rebuttable presumption that the caregiver’s contribution is as valuable as the market worker’s earnings during the relevant period, or that members of a cohabiting couple shared the breadwinner’s income fairly between themselves. The real question is whether such presumptions are warranted at all given the value of the activities and the absence of a broader economic partnership between the parents.

Professor Ira Ellman dislikes the restitution analogy for the marital context because any claim for excessive contributions requires the court to know a typical spouse’s contribution, and such a yardstick does not exist. Again, however, courts and legislatures could create a yardstick in the caregiver compensation context: the default rule could be one of equal caregiving effort during the parenting enterprise. Whether any disproportionate caregiving rose to the level of “unfair” would be the next question, and the answer would depend upon the factors identified above. As to whether their sharing behavior was adequate, the law could presume that a caregiver is entitled to the greater of either 1) half of the amount of the market worker’s income attributable to the time during which the caregiver did excessive work or 2) the market value of the caregiving. That measure would be the yardstick. If a caregiver did seventy percent of


the caregiving, then the market worker should owe the caregiver half of his income earned during the twenty percent of the caregiver’s time that covered his responsibility or an hourly wage based on the hours of care she provided, whichever is greater. If she received less than that amount from him, then she should be compensated for her disproportionate and unfair caregiving, absent an agreement or other facts that make their arrangement fair.

The discussion above illustrates the difficulty of choosing one measure to address all situations. Courts need access to all of the measures in order to do justice in the cases before them. It is not science, but arriving at a remedy is not unprincipled either.

VI. DISADVANTAGES TO THE PROPOSAL: THE FEAR AND THE SNEER

Giving all caregivers access to justice would be the main benefit of a new obligation to give care or share. In addition, a new obligation to give care or share would send a stronger normative message than any message that may currently exist from divorce remedies for marital caregiving (i.e., the message would be to give care or share). Do these benefits outweigh the potential disadvantages? Apart from process concerns related to judicial discretion, do other potential disadvantages outweigh the benefits from such a proposal?

One potential disadvantage is that an award for disproportionate and unfair caregiving may encourage caregivers to perform an economically inefficient amount of caregiving, that is, to become freeloaders themselves by engaging in excessive caregiving. The temptation may be especially great for caregivers who could get a caregiver payment as great or greater than what they could earn in the market.

Assuming for purposes of this analysis that caregiving can be “excessive,” this risk seems relatively minor, especially in light of the systemic freeloding done presently by market workers. After all, the caregiver payment may have little or no effect on the absolute level of caregiving performed by caregivers because people partake in paid labor for lots of reasons—including self-esteem, economic need, retirement benefits, and a Protestant work ethic. In addition, excessive caregiving would undermine a claim that the level of sharing is unfair. A court would probably consider any agreement the parties had about the appropriate level of caregiving, or, absent an agreement, use other tools to assess the argument’s merit, such as the work requirements found in Temporary Assis-

391. This discussion has avoided arguments that challenge the assumptions of the existing alimony theories, such as the fact that the parties’ expectations guide a decision about the appropriate theory. Arguably, the parties’ expectations should be irrelevant since the law heretofore has shaped those expectations, perhaps in an unfair way. Advocates, of course, could make these types of arguments when asking for a particular remedy, and it would be up to judges to determine what seems “just” given the circumstances.
tance to Needy Families (TANF)\textsuperscript{392} or demographic data that specifies the average amount of parental caregiving children receive in a particular socio-economic class. Courts could also look to information about the availability of safe and affordable child care in an area. In short, courts have ways to determine if caregivers are freeloading, assuming that the concept of excessive caregiving does not violate public policy.

Second, critics might claim that the remedy is unfair to market workers. Various arguments fall under this “unfairness” umbrella, including the concern that the proposal lacks a remedy for the market worker who does a disproportionate and unfair amount of market labor that benefits the child. Perhaps an assessment of fairness should not be limited to disproportionate caregiving but should encompass disproportionate effort generally that benefits the child? If so, then not only should some caregivers not receive a remedy, but some market workers should get a remedy instead.

This criticism has appeal only if it is considered at the highest level of generality. There are two important differences between a caregiver who performs a disproportionate amount of caregiving and a market worker who performs a disproportionate amount of market labor. First, the effect of the other parent’s freeloading is much more detrimental to a caregiver than a market worker. The market worker’s excessive efforts will produce its own reward in terms of benefits associated with market employment. The market worker captures these gains under the status quo. If he is unmarried, the gains are his alone. If he is married, the law likely gives him control over the use and disposal of the property he earns during the marriage.\textsuperscript{393} Even at divorce, the market worker may get a larger share of the financial pie due to his excessive contributions. Some of these benefits have no comparable counterpart for the caregiver.

Second, the likely income disparity between the caregiver and market worker makes it unwise to award the market worker a financial remedy from the caregiver, even assuming the correct focus is on parental effort and not parental caregiving. Requiring the caregiver to pay the market worker money would potentially harm the child because the child and the caregiver constitute one economic unit. Assuming the market worker deserves a remedy, an appropriate remedy may be a declaratory judgment acknowledging the disproportionate and unfair parental labor benefiting the child. However, the limited usefulness of this type of remedy may sug-


\textsuperscript{393} Most states have a common law (or “separate”) property regime, and not a community property regime. Even some states with a community property regime, however, allocate the control of assets (such as earnings) solely to the party that earned it. See, e.g., Leslie J. Harris, Lee E. Teitelbaum & June R. Carbone, Family Law (4th ed. 2010).
gest the claim itself is not a good idea, both because the market worker would have to impugn the caregiver’s efforts in a way that could corrode the parents’ relationship, and because there are public costs associated with resolving the claim.

Those critics who are willing to concede that a remedy should exist only for disproportionate and unfair caregiving might still argue that any financial sacrifices made by the market worker related to caregiving are relevant to an assessment of unfairness. For example, shouldn’t a court consider the financial sacrifices made by a divorced father who decides to relocate with the mother and child to be closer to them so that he can participate more in childrearing? If courts had to consider these types of economic sacrifices, then the adjudicatory task would increase in complexity. In addition, since caregivers also make financial sacrifices to benefit their children (like living in a safer but more expensive neighborhood), it is probably fair (and best) to ignore all such contributions. Nonetheless, valuing these types of sacrifices and offsetting the caregiver’s claim with their value may make sense in some cases. Acknowledging this fact does not negate the need for a caregiver remedy; it only affects its value in some cases.

Critics might also question the appropriateness of a remedy when the caregiver makes more money than the market worker. Should the other parent owe money to such a caregiver? There is no theoretical reason why a financially advantaged caregiver should be denied a remedy for the other parent’s mooching, although the caregiver may not collect much, if anything, given the market worker’s financial situation.

Third, and finally, critics might claim that a caregiver remedy will further entrench gendered patterns of caregiving. Because caregivers will be entitled to an award for disproportionate and unfair caregiving, women may opt into these arrangements more, guided by cultural expectations that they are ultimately responsible for this caregiving work anyway. The caregiver remedy may also reinforce female caregiving because the higher-earning party (most likely, but not always, a man) will probably want to compensate the lower-earning party to do the caregiving rather than do it himself. In contrast, the lower-earning parent may not earn enough to afford the other parent’s labor, depending upon the way the caregiver remedy is calculated. In short, the remedy might contribute to the gendered patterns of caregiving labor. If so, the remedy will also reinforce

395. Professor Ellman is not bothered by the higher-earning spouse making a claim, so long as the other party financially benefited from the higher-earning spouse’s foregone opportunity. See Ellman, supra note 125, at 59.
396. Alternatively, a court may find that the appropriate remedy is simply a declaratory judgment recognizing the disproportionate and unfair labor. This is Ellman’s proposal. See id. at 60–61.
397. Caregiver support payments might “foster traditional family roles, economic dependence, and the corresponding gender roles that many men and women find oppressive.” Estin, supra note 85, at 799–800.
gender inequality in the market, including the wage gap between men and women.\footnote{398}{See Singer, supra note 6, at 2441 (citing Gillian K. Hadfield, Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap, 82 GEO. L.J. 89, 95–96 (1993)).}

The dollar value of the remedy should affect who does the caregiving, but it is hard to predict what patterns, if any, will emerge. On the one hand, if the remedy for disproportionate and unfair caregiving requires that a wage earner split with the caregiver his income earned during the period of disproportionate caregiving, then the remedy would provide a strong incentive for the higher-earning parent to caregive. Imagine a person who earns $100 per day and has to give $50 per day to the caregiver if he does none of the caregiving. If he instead splits the caregiving labor with her, he would not have to pay her anything, although he may earn only $50 per day because he cannot work the same amount of hours. The cost to the market worker is the same whether he pays for caregiving or does it himself. Consequently his interest in the type of work, rather than his interest in money, should dictate his behavior.\footnote{399}{See id. at 2454–55 (arguing that income sharing for period of time after divorce would encourage more caregiving by men).} On the other hand, if the court only requires him to pay $20 a day for the caregiving, he would get an economic advantage by continuing the same level of market work.

The financial incentives will also affect the caregiver’s willingness to do the work. A low caregiver payment may cause caregivers to reassess their willingness to do a disproportionate share of the caregiving, and they may decide to engage in more market work instead. A lower level of compensation may also make it more likely, however, that a lower-income parent could afford to pay a higher-income parent to do a disproportionate share of the caregiving,\footnote{400}{The lower level of compensation could occur either from splitting the lower-paid parent’s employment income or using the market value of caregiving.} although the higher-income parent may find the compensation insufficient to take the caregiving. Depending upon how the remedy is calculated, the remedy may affect the parents’ choices, but the gender implications are unpredictable.

The fact that gender roles are currently in flux makes the concern about gender entrenchment less weighty. Undeniably, gender roles are changing. Women’s educational progress has been steady and now their educational achievement surpasses men’s.\footnote{401}{See generally Women in America: Indicators of Social and Economic Well-Being, WHITE HOUSE COUNCIL ON WOMEN & GIRLS, http://www.whitehouse.gov/administration/eop/cwg/data-on-women (last visited Dec. 27, 2013).} In 2011, seventy-one percent of mothers with children under eighteen years old were in the labor market, compared to forty-seven percent in 1975.\footnote{402}{BUREAU OF LABOR STATISTICS, U.S. DEPT’ OF LABOR, REPORT 1040, WOMEN IN THE LABOR FORCE: A DATABASE 19 tbl.7 (2013), available at http://www.bls.gov/cps/wlf-databook-2012.pdf.} More and more wo-
men are earning the majority of a couple’s income, and these results are particularly pronounced in many African American families.  

Men are becoming more involved in the home than ever before. Fathers today spend three times as much time with children each week and twice as much time on housework as fathers did fifty years ago. Young fathers are also spending much more time with children than in the past. Men are valuing family involvement more than ever before, too. In one survey, only twenty-nine percent of men surveyed were “work-centric,” i.e., someone who prioritized work; thirty-six percent of the men were family-centric; and thirty-five percent were dual-centric. A Pew Research Center survey confirms that men, ages eighteen to thirty-four, are more focused on parenting than in the past: forty-seven percent of the men said that being a good parent is one of the most important things in their life, up from thirty-nine percent in 1997. Quite amazingly, a recent study of approximately 1000 fathers with white-collar jobs found that fifty-three percent agreed or strongly agreed with the statement, “If my spouse/partner made enough money for our family to live on comfortably, I would feel okay if I didn’t work outside the home.”

The younger generations hold particularly strong views about the desirability of gender equality in the allocation of nonmarket work. See Sarah Jane Glynn, Ctr. for Am. Progress, The New Breadwinners: 2010 Update 3 (2012), available at http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf (“Among African American families, more than half (53.3 percent) of working wives earned as much or more than their husbands in 2010 . . . marking a dramatic increase from 1975 when 28.7 percent were breadwinners.”). Approximately thirty-seven percent of women up to age 44 earn as much as, or more than, their husbands, and that number increases to forty-three percent for women 45 and over. Id. at 4 & fig.4.

See Pew Research Ctr., Modern Parenthood, supra note 264, at 6, 27 (noting child care performed by fathers has increased from 2.5 hours per week in 1965 to 7.3 hours per week in 2011, while fathers also spend “more than twice as much time doing housework as they did in the 1960s”); see also Ellen Galinsky et al., Families & Work Inst., Times Are Changing: Gender and Generation at Work and at Home 14 (rev. Aug. 2011), available at http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf (finding that fathers with paid employment spend over one hour more time with their children on daily basis than they did thirty years ago).

See Galinsky et al., supra note 404, at 15 (reporting fathers under twenty-nine years old spend average of 4.1 hours per workday with their children in 2008 compared to 2.4 hours per workday in 1977).


Id. at 7.


Harrington et al., supra note 326, at 17.

See id. at 11; see also Matthew N. Weinshenker, Imagining Family Roles: Parental Influences on the Expectations of Adolescents in Dual-Earner Families, in Being To-
enty percent of boys and sixty-eight percent of girls expect to share housework equally, and seventy-eight percent of boys and sixty-six percent of girls expect to share caregiving equally.411 On the job front, equal numbers of both male and female millennials want jobs with great responsibility, and young women’s views do not vary depending upon whether they are mothers.412 Another survey found that sixty-six percent of women ages eighteen to thirty-four rate having a career high on their list of life priorities, while only fifty-nine percent of men do.413

Society is increasingly tolerant of departures from classic gender roles.414 In 2010, seventy-one percent of Americans surveyed thought that a marriage was more satisfying if both spouses had labor-market jobs, as opposed to a marriage in which the couple had traditional gender roles—up from fifty-eight percent in 2002.415 Most people favor gender equality, including the ability of women to work outside the home.416 Most men and women believe that equal participation in childrearing is important.417

Of course, there is still much work to be done to eliminate gender roles in the market and home spheres. Children accept a woman’s labor market participation much easier than they accept a father’s role as the caregiver.418 High school students differ by gender regarding their expectations of who will take time off from work when they get older, marry, and have children, with boys and girls both pointing to the girls.419 Even chil-

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412. See Galinsky et al., supra note 404, at 1–2.
413. Patten & Parker, supra note 408, at 1–2.
416. Id. at 1–2.
417. See Harrington et al., supra note 326, at 2, 23; Milkie et al., supra note 296, at 36.
418. See Stefanie M. Sinno & Melanie Killen, Moms at Work and Dads at Home: Children’s Evaluations of Parental Roles, 13 Applied Develop. Sci. 16, 22, 25 (2009); cf. Christine Schuette & Melanie Killen, Children’s Evaluations of Gender-Stereotypic Household Activities in the Family Context, 20 Early Educ. & Develop. 693, 707 (2009) (“[C]hildren were more stereotypic and inflexible about male-stereotypic activities than about female stereotypic activities.”); see also Ellen A. Greever, Patricia Austin & Karyn Welhousen, William’s Doll Revisited, 77 Language Arts 324, 326–27 (2000) (“Children who are influenced by adults to challenge gender stereotypes are more likely to be aware of that influence than those who are influenced by adults to accept gender stereotypes.”).
dren’s letters to Santa still show that girls, but not boys, want the toys that are related to domestic work. This is not surprising given that gender stereotypes still permeate the media. Nonetheless, society is headed in the right direction, and this fact makes any concern about entrenching gender roles less pressing because the gender roles today are more fluid.

It is impossible to predict accurately whether a new gender-neutral caregiver remedy would accelerate this change. Since a caregiver remedy would make caregiving costs a joint responsibility of both parents, it is possible that the gender-linked roles of caregiver and market worker would further weaken. As Ann Crittenden stated: “[M]en are more likely to share the increasing responsibilities involved in raising children if mothers have more leverage to convince fathers that the children come first.”

More predictable is the remedy’s likely effect on freeloading, which is largely done by men to women. It should reduce freeloading, regardless of which parent does a disproportionate amount of the caregiving. For this effect, this end-of-the-relationship remedy would have to affect behavior during the relationship. Scholars have raised legitimate questions about the efficacy of an end-of-the-relationship remedy on relationship behavior. Professor Carl Schneider once explained that the law of alimony was not an effective hortatory tool—i.e., to exhort couples to act fairly in their allocation and remuneration of child-related work—because people often “don’t know what the law’s incentives are,” or if they know, they never think it will apply to them because they do not imagine getting divorced. Nor do people investigate the law of divorce before marriage because that suggests they are not confident in the success of their own marriage. Professor Schneider also suggested that if a remedy were to have any possible effect on marital behavior, then a simple remedy was


421. See id. at 386 (finding that online Disney Store perpetuates gender stereotypes regarding domestic work); James Gentry & Robert Harrison, Is Advertising a Barrier to Male Movement Toward Gender Change?, 10 Marketing Theory 74, 89 (2010) (finding commercials aimed at children perpetuate gender stereotypes; specifically, only 7 of 225 commercials in one study showed father and no commercial showed father in nurturing role); Kimberly A. Powell & Lori Abels, Sex-Role Stereotypes in TV Programs Aimed at the Preschool Audience: An Analysis of Teletubbies and Barney & Friends, 25 Women & Language 14 (2002) (finding gender stereotypes infiltrate children’s television shows, such as Barney & Friends and Teletubbies).

422. Susan Okin argued, “[A]ny just and fair solution to the urgent problem of women’s and children’s vulnerability must encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor.” Okin, supra note 179, at 171.

423. Crittenden, supra note 54, at 130.

424. Schneider, supra note 335, at 205–06.

425. See id. at 207.
required, so that people could understand exactly what the remedy might be.\footnote{426}

Now Professor Schneider’s admonition has less force for the caregiver payments proposed here: this remedy should actually minimize the free-loading that occurs because the proposed remedy is simple. “Give care or share, or else the judge will make it fair,” is an easy slogan to popularize. This remedy, therefore, might assuage Professor Schneider’s concerns, assuming of course that individuals do not need to know the precise amount of the remedy, or understand the way it would be calculated. In addition, the remedy’s universality will make it common. The caregiver remedy will be like child support in its familiarity. Since most parents, regardless of marital status, experience difficulty in their romantic relationship upon the transition to parenthood,\footnote{427} the potential applicability of an end-of-the-relationship caregiver remedy will be salient almost immediately; the remedy, therefore, should affect the parties’ behavior during their parenting relationship.

In the end, it is hard to believe that providing a remedy for the current situation—a situation in which many parents (mostly men) freeload off of the other parent (mostly women)—is worse for women than the status quo. Of course, there is nothing inherently wrong with a commitment to caregiving or even to more women caregiving than men. It is only the social ramifications of the gender imbalance that are problematic. It seems misguided to blame a caregiver payment for the broader social inequalities between men and women. Nothing about a caregiver payment would stop simultaneous work on other social policies that might equalize caregiving by men and women or further reduce the disadvantages associated with caregiving. Scholars have noted the need for such things as equal pay, an end to job segregation, a flexible workday, paid maternity leave, affordable and safe child care, and paid family leave to care for sick family members.\footnote{428} Improvements in all of these areas are necessary to see true and sustained social change around gender roles. The caregiver payment has the advantage of making all parents invested enough in the act of caregiving that more parents might encourage employers and the government to accommodate families’ real needs.

\footnote{426}{See id. at 208. He believed Professor Ellman’s complex remedy did not qualify. See id.}

\footnote{427}{See Erika Lawrence et al., Marital Satisfaction Across the Transition to Parenthood, 22 J. Fam. Psych. 41, 47 (2008); Philip A. Cowan & Carolyn Pape Cowan, Changes in Marriage During the Transition to Parenthood: Must We Blame the Baby?, in The Transition to Parenthood: Current Theory and Research 118–19 (Gerlad Y. Michaels & Wendy A. Goldberg eds., 1988).}

CONCLUSION

The law should have a remedy to redress disproportionate and unfair caregiving. The law should recognize that freeloading off of a caregiver is not acceptable, regardless of whether the caregiver is married, unmarried, or divorced. The judge hearing the claim should assess unfairness by examining such issues as the amount of leisure time each parent enjoys, the allocation of market and non-market work between the parents, the extent to which the caregiver shares the market worker’s financial resources, and the parents’ agreement, if any, about caregiving and sharing. If a court determines that a caregiver has borne a disproportionate and unfair allocation of the caregiving, the court should provide compensation. The amount awarded should depend upon the most appropriate compensatory alimony theory (gain, loss, or contribution), which in turn should be influenced by the facts: the parties’ broader relationship, the parties’ agreement, the ability to prove damages under a particular theory, and the relevance of fault in the jurisdiction. The complexity and highly fact-specific nature of the task suggest judicial discretion is essential to afford caregivers justice. Practically, affording all caregivers access to a remedy for their disproportionate and unfair caregiving requires the adoption of a standard: courts should award a just amount in light of the obligation to give care or share. Adjudication under such a standard is also the best way to obtain empirical information about fair outcomes so that the law can continue to move forward.
PULLING ON THE THREAD OF THE INSANITY DEFENSE

R. GEORGE WRIGHT*

“The general delusion about free will [is] obvious. . . . One must view a [wicked] man, like a sickly one”1

I. Introduction

RECENTLY, the Supreme Court declined, over the dissent of three of its members,2 to decide whether the Constitution requires an insanity defense to a criminal charge,3 as distinct from a prosecutor’s proving any intent element of the offense itself.4 Whether the Constitution requires an insanity defense in an otherwise appropriate case certainly seems worthy of definitive resolution. As for when to resolve this important issue, we should all sympathize both with those seeking immediate judicial guidance, and with those preferring broader discussion before a definitive judicial resolution.

With regard to the nature and scope of the insanity defense, however, matters are actually much more complicated than we might imagine. It is tempting to believe that if the Court carefully approaches the question of the possible constitutional requiredness of the insanity defense with an informed judicial temperament, all can be tidily resolved. Either some version of an insanity defense will be required under appropriate circumstances, or it will not. Closure on the insanity defense would then readily be reached.

This Article suggests, however, that at this point in our cultural history, no such tidy resolution is at all likely. Real closure on the insanity defense and on related broader questions cannot be expected. Given our current collective beliefs, as discussed in this Article, judicially pulling at the apparently loose thread of the insanity defense is likely to be at best futile. This is true regardless of whether we seek to remove the supposedly loose thread, or to tie that thread more securely into our system of criminal adjudication. Pulling on the supposedly loose thread of the insanity

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1. CHARLES DARWIN, CHARLES DARWIN’S NOTEBOOKS, 1836–1844, at 608 (Paul H. Barrett et al. eds., 2009) (entry of September 6, 1838). For a contrasting perspective, see JOHN GRAY, STRAW DOGS: THOUGHTS ON HUMANS AND OTHER ANIMALS, at xii (2007) (“A truly naturalistic view of the world leaves no room for secular hope.”).


3. See id. at 504–05 (Breyer, J., dissenting). Justices Ginsburg and Sotomayor also dissented from the denial of certiorari. See id.

4. See id. at 505.

(221)
defense is instead likely to eventually result, perhaps inadvertently, in the unraveling of much of our closely-knitted jurisprudence of criminal responsibility.

The aim of this Article is to illustrate the unraveling of our current system of criminal responsibility and adjudication that is likely to result from any serious judicial attention to the insanity defense and its underly-
ing assumptions. This Article, for the sake of simplicity, refers to the unraveling “thread” of the insanity defense, in the singular. But there are actually numerous “threads,” in the plural, involved in any unraveling of the insanity defense’s logic, and of the broader logic of criminal responsibility.

II.  

**Delling v. Idaho: A Thread-Pulling Opportunity Declined**

On the basis of a 6–3 vote, the Supreme Court in *Delling* declined to consider the judgment of the Idaho Supreme Court that the Constitution does not require a separate insanity defense, at least as long as the prosecution must prove, beyond a reasonable doubt, any necessary intent or *mens rea* elements of the case. The particularities of *Delling* itself are, in the end, of no great consequence. Tracing some of those particularities will, however, allow us to follow one possible track of the unraveling of the insanity defense, and of the unraveling of the standard legal logic of criminal responsibility in general.

Justice Breyer wrote for those dissenting from the denial of certiorari in *Delling*. Justice Breyer begins his brief dissent by focusing on one particular form, among others, of an insanity defense. He observes that

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6. See id. at 712–13; see also State v. Bethel, 66 P.3d 840, 851 (Kan. 2003) (“Due process does not mandate that a State adopt a particular insanity test.”).
7. See *Delling*, 133 S. Ct. at 504.
8. Often, commentators recognize five distinguishable tests for insanity as a criminal defense. First, and most familiar, the *M’Naghten* test holds a defendant insane if, at the time of the offense, the defendant’s mental disease or deficiency resulted in a defect of reason such that the defendant either did not know the nature and quality of the act, or that the act was in a relevant sense wrong. See *Joshua Dressler, Understanding Criminal Law* § 25.04, at 350 (5th ed. 2009) (citing *M’Naghten’s Case*, (1843) 8 Eng. Rep. 718 (H.L.)); *Wayne R. LaFave, Criminal Law* § 7.2, at 207–08 (5th ed. 2010). The second test adds to the *M’Naghten* test a further exculpatory possibility, bearing upon matters of control or volition, rather than of knowledge or understanding. Insanity under this “irresistible impulse” test may take the form of an involuntary inability to “choose” but to perform the prohibited act in question. See *Dressler*, supra, at 353; *LaFave*, supra, at 411–12. The third test, the Model Penal Code test, as developed by the American Law Institute, revises elements of the *M’Naghten* and so-called “irresistible impulse” tests described above. This test finds insanity if as a result of mental disease or defect, the defendant lacked substantial capacity to appreciate the criminality of, as a drafting alternative, the moral wrongfulness, of an act, or else lacked the substantial capacity to conform to the relevant legal requirements. See *Dressler*, *supra*, at 354 (citing *Model Penal Code* § 4.01(1)); *LaFave*, *supra*, at 420–21. The fourth test, formulated by the distinguished Judge David Bazelon in the case of
“[t]he law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong.”

This particular formulation, whether intended as an insanity defense formulation or not, certainly does not itself tell us much about persons who could be thought of as insane, but who nevertheless can tell right from wrong at the relevant time. Nor does it convey much about persons who cannot tell right from wrong at the relevant time, but whose inability to do so did not causally stem from any form of insanity. Nor, finally, does this brief formulation begin to clarify whether the terms “right” and “wrong” are used here in an objective or a subjective sense; or in a legal, moral, or conventional sense; or some combination thereof. Nor, understandably, does this brief formula hint at whether the moral wrongness of an act is something we can really know or tell.

In any event, Justice Breyer then notes that under Idaho law, “prosecutors are ‘still required to prove beyond a reasonable doubt that a defendant had the mental capacity to form the necessary intent.’” There may be differences, however, between intent elements and whatever we take insanity to involve. How reassuring this intent element requirement by itself should be is unclear, as Justice Breyer then goes on to discuss.

But even before attending to Justice Breyer’s concern over proving mens rea elements as a substitute for an insanity defense, there are a number of inescapable, more basic questions. For one, what must be proved is

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Durham v. United States asks whether the criminal defendant’s act was “the product of mental disease or defect.” See Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); see also Dressler, supra, at 355; LFAVE, supra, at 414–15. The D.C. Circuit itself abandoned this test in United States v. Brawner. See United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Fifth and finally, Congress adopted in 1984 a general federal statutory test for insanity as a criminal defense. Under this M’Naghten-influenced test, the defendant bears the burden of proving, by clear and convincing evidence, that because of a severe mental disease or defect, the defendant was unable to appreciate either the nature and quality or the wrongfulness of the conduct. See 18 U.S.C. § 17(a) (2012); see also Dressler, supra, at 356 (citing 18 U.S.C. § 17(a) (2012)); LAFAVE, supra, at 414–15, 415 n.1.

9. Delling, 133 S. Ct. at 504 (Breyer, J., dissenting) (citing traditional authority).

10. Compare the alternatives listed supra note 8, with the critical commentaries cited therein.

11. Whether the accused was coincidentally insane at the time or not.


13. Delling, 133 S. Ct. at 505 (Breyer, J., dissenting) (quoting State v. Delling, 267 P.3d 709, 712 (Idaho 2011) (further quotation omitted)).

14. See id.
actually the “mental capacity” to form a particular intent, presumably at the relevant time.\footnote{15. See \textit{id}.} It would hardly do, one might imagine, to prove merely that the defendant had that mental capacity at other times, or only in some “background” sense. Yet in some cases, this more general, or background, mental capacity might be all that a prosecutor could reasonably be expected to show. Mental capacity to form any necessary intent at the precise time of the offense might unavoidably be inferred by a jury from evidence of the defendant’s background capacities. But inferring a defendant’s capacities at the relevant time from the defendant’s capacities at other times may often be questionable. A defendant’s general capacity, by analogy, to recite the alphabet backwards will often provide only modest evidence, if any evidence at all, of the defendant’s capacity to perform this feat at the time of the offense.

The idea of a “mental” capacity to form a particular intent is similarly unclear.\footnote{16. See \textit{id}.} Are there capacities that are distinctively mental? Is a mental capacity the only kind of capacity necessary for the formation of the relevant intent? Could there also be something like a physical, or a physiological, capacity to form an intent? Is the mental capacity, and not the physical or the physiological capacity, alone of any legal relevance? Why, if both forms of capacities, mental and physical, might be necessary to form the intent? Perhaps the specific reference to a mental capacity to form an intent is thus misleading.

More fundamentally yet, we might wonder why the law insists on focusing on whether the defendant had, at whatever time, the mere capacity—something like an underlying ability or power—to form a particular intent.\footnote{17. See \textit{id}.} It may sound as though having a capacity, at the relevant time, should always be crucial. But isn’t it possible to have the mere capacity to appreciate the wrongness of an act, at the time of the act, and yet to be somehow blocked or prevented from \textit{actually} appreciating the act’s wrongness, as by some outside interfering factor?\footnote{18. We might say that someone had the capacity to do something, or to appreciate something, but was momentarily distracted, and thus in a real, causal sense, unable to do that action at the relevant time.} What if an outsider, say, blocks affirmative exercise of our underlying capacity?

All of these preliminary problems may ultimately have satisfactory solutions. At the moment, though, jurisprudence and philosophy have no such consensually satisfactory set of solutions. And even more importantly, current trends in science and philosophy make any such broadly attractive resolution less likely. The jurisprudence of criminal insanity is, even on these preliminary matters, unraveling.

For the present, though, and much more specifically, Justice Breyer in the \textit{Delling} case points to an example of one apparently loose thread in the much broader unraveling skein. Justice Breyer notes that “the difference
between the traditional insanity defense and Idaho’s standard is that the latter permits the conviction of an individual who knew what he was doing, but had no capacity to understand that it was wrong.”

Justice Breyer then illustrates this apparently abstract distinction with a vivid hypothetical example, contrasting Idaho’s dissimilar treatment of two arguably relevantly similar cases.

Justice Breyer thus imagines two cases in which the criminal defendant seems crucially motivated by a clearly insane delusion. In the first case, the defendant believes that his human victim is in fact a wolf. In the second case, the defendant believes that he has been ordered to kill a particular human by a supernaturally empowered wolf. The idea is that under Idaho law, the defendant in the first case, but not the defendant in the second case, could be appropriately accommodated. The defendant in the first case did not know that he was killing a human being. Under Idaho law, this negates an element of the offense itself. The defendant in the second case, however, intended to kill a human and knew that he did so, however insanely motivated or grossly misapprehending of the circumstances, thus fulfilling the relevant mens rea element of the offense.

As Justice Breyer sensibly suggests, it is unclear why we should want to exculpate the defendant in the first case, but not in the second. There seem to be only inessential differences in the roles played by the two sorts of insane belief in the two cases. In light of the narrowed versions, or abolition, of the insanity defense, and the arguable tension between

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20. See id.
21. Note one complication for broader, mainstream conceptions of an insanity defense: a defendant in the second case might know, or somehow have the capacity to know, that law or convention typically considers killing human beings to be wrong. But a defendant who believes that he has been ordered to kill not simply by a wolf, but by a wolf with the right sort of supernatural qualities, might well also sincerely believe that in such case, the killing is morally right even if legally or conventionally wrong. This may again presume, though, that the moral wrongness of an act is something that sane persons can typically “tell” or “know.” And this is increasingly controversial. Metaethics itself is currently in a rather frayed condition. Many and various challengers to moral realism have arisen. See, e.g., Geoff Sayre-McCord, *Metaethics*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2012), http://plato.stanford.edu/entries/metaethics (last visited Mar. 11, 2013) (referring to proliferating and increasingly exotic options). For merely one interesting recent contribution, see Sharon Street, *A Darwinian Dilemma for Realist Theories of Value*, 127 PHIL. STUD. 109 (2006).
22. See *Delling*, 133 S. Ct. at 505 (Breyer, J., dissenting).
23. See id.
24. See id.
25. See id.
26. See id.
27. See id. (citing State v. Bethel, 66 P.3d 840, 843 (Kan. 2003)). The *Bethel* court concluded that “the affirmative insanity defense is a creature of the 19th century and is not ingrained in our legal system as to constitute a fundamental principle of law.” *Bethel*, 66 P.3d at 851.
such provisions and the due process clause,^{28} Justice Breyer would have granted certiorari in *Delling.*^{29} Had the Court done so, however, it would have been tempted by a variety of apparently loose threads, a number of which are inseparable from current understandings of the logic of the insanity defense and of criminal responsibility more broadly.

**III. The Underlying Logic of the Insanity Defense and the Process of Doctrinal Unraveling**

**A. An Initial Sense of the Unraveling of the Logic of Sanity and Insanity**

However controversial the idea of freedom of the will may be,^{30} the law of criminal responsibility commonly refers to, and is commonly thought to depend upon, such an idea. Consider, merely for example, the claim by Justice Jackson in the well-known case *Morissette v. United States*^{31} that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.^{32}

Justice Jackson relies on standard English and American authorities in support of this no doubt imprecise understanding of the nature and role of freedom of the will.^{33} In particular, Justice Jackson cites Dean Roscoe Pound for the claim that “[h]istorically, our substantive criminal law is

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29. *See id.* For other cases beyond *Delling* and *Bethel* that raise generally similar constitutional issues regarding the availability of an insanity defense, see, for example, *State v. Herrera*, 895 P.2d 359, 366 (Utah 1995) (“T]he common law and our basic principles of ordered liberty are not offended by the mens rea model.”); *State v. Searcy*, 798 P.2d 914 (Idaho 1990) (stating that common law does not conflict with *mens rea* model); *State v. Korell*, 690 P.2d 992 (Mont. 1984) (same). *But see* *Finger v. State*, 575, 27 P.3d 66, 84 (Nev. 2001) (en banc) (“We conclude that legal insanity is a well-established and fundamental principle of the law of the United States. . . . [P]rotected by the Due Process Clauses of both the United States and Nevada Constitutions.”). For one permissible revision of more robust insanity defenses, *see Clark v. Arizona*, 548 U.S. 735, 756 (2006) (“We are satisfied that neither in theory nor in practice did Arizona’s 1993 abridgment of the insanity formulation deprive Clark of due process.”). The *Clark* court was referring, in particular, to the narrowed insanity test adopted in *State v. Mott*. *See State v. Mott*, 931 P.2d 1046 (Ariz. 1997); *see also Clark*, 548 U.S. at 753 (“There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.”).
32. *Id.* at 250.
33. *See id.* at 250 n.4.
based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”34 A number of courts have since referenced Justice Jackson’s language in this regard.35 Scholars have often written of free will in similar terms.36

Such mere references to free will do not establish the nature or meaning of free will in any legal context. Neither do they establish the extent, if any, to which criminal jurisprudence actually does or should rely on some conception of free will. We must look elsewhere if we are to develop any more nuanced sense of the contested idea of free will and its actual or appropriate role in establishing criminal responsibility.

If we look to the best of what is being thought and said by contemporary philosophical specialists in this area, we find no consensus and no analytical short cuts. We might imagine that we need only identify basic opposing “camps” of thinkers on free will, or the few broad “schools of thought” on such matters. Unfortunately, references to schools of thought on free will and responsibility inevitably involve serious oversimplifications. Schools of thought on free will and criminal responsibility have multiplied and proliferated at a remarkable rate. It would not be much of an exaggeration to say that at this point, nearly every serious academic philosopher in the field is developing, at a certain level of detail, his or her own slightly distinctive approach to free will and criminal responsibility, or the lack thereof. At this point, nearly every imaginable variation

34. Id. (quoting Roscoe Pound, Introduction to Sayre, Cases on Criminal Law (1927)).


on the basic themes of free will, responsibility, and their meaning and roles has been articulated by at least one philosopher. If an approach can be imagined, it has likely been advocated.

Of course, it would be tedious and impractical to try to prove this latter claim, so we leave it to be casually inferred, if anyone is so inclined, from the numerous academic sources referred to throughout. But before we can glance at even a fragment of the contemporary complications, we must start out with some simplified, mainstream set of distinctions, however contestable any such framework may be. Merely for the sake of convenience, then, let us adopt for the moment a few basic distinctions as articulated by the well-respected contemporary philosopher Alfred Mele.37

B. Some Basic Distinctions Among Approaches to Free Will and Responsibility

To begin with, then, some people believe—rightly or wrongly—that whether we can ever choose, will, or act with the relevant sort of freedom depends on whether the world operates “deterministically.” Determinism is the controversial view that a complete description of the universe, at any point in time, along with a complete account of the laws of nature, would allow the prediction, no matter how far into the future, of every human decision, action, and choice.38

It might initially seem clear that determinism would rule out the relevant sort of freedom. But many philosophers think that determinism would be compatible with what we could fairly and meaningfully call free will and freedom of action. Conveniently, the belief that determinism is somehow compatible with some relevant and meaningful sense of free will is known as “compatibilism.”39 And in parallel, the belief that determinism is incompatible with the exercise of such free will is known as “incompatibilism.”40

Incompatibilism faces in two opposing directions, and divides into two large opposing camps. This should not be surprising, because incompatibilities in general between any two options can be resolved in more than one way. Some incompatibilists deny that the world is deterministic and, complications aside, also embrace the possibility of at least the occasional exercise of a meaningful freedom of will. Somehow, the world “leaves room” for free will. Such incompatibilists are known, in a non-political sense, as “libertarians.”41 And some incompatibilists, in contrast, accept that the world is deterministic, and at least partly on that basis,

38. See id.
39. See id.
40. See id. Again, we are setting aside all sorts of refinements and complications.
41. See id.
deny the possibility of any genuine freedom of the will.\textsuperscript{42} One might think here of a purely mechanical universe. These distinctions at least give us a starting point on some of the relevant terminology.

C. \textit{The Basic Distinctions Lose Their Hold and Begin the Jurisprudential Unraveling}

This exercise in specifying some basic terminology will at least allow the argument to move forward. The basic terms, however, today serve as much as a launching point for proliferating complications as for steering or directing a readily summarizable debate. Today, in a phrase, nearly everything is up for grabs. There is very little genuinely common ground.

Merely for example, it has been argued with great sophistication both that “free will . . . is not foundational for criminal responsibility”\textsuperscript{43} and that we can have some version of free will while rejecting the idea of moral responsibility in criminal contexts.\textsuperscript{44} Already, the complications are thus underway. But we need not think of free will as a binary, entirely present or entirely absent, capacity that one either possesses, at the moment, or that one does not. Perhaps free will comes in degrees, depending upon various circumstances.\textsuperscript{45} Or perhaps we should reject the apparently common sense idea of symmetry between the free will requirements for praising and for blaming.\textsuperscript{46} Perhaps, on such a theory, we can thus be confident enough in our belief in free will and responsibility for purposes of genuinely morally praising someone, while lacking sufficient confidence to justify blaming, or imposing retributive punishment on, criminal defendants.\textsuperscript{47}

Or, to take a somewhat different tack, perhaps praiseworthiness does not require the ability to have done otherwise than one did, whereas blameworthiness, or punishability in that sense, does, in contrast, require


\textsuperscript{44} See Bruce N. Waller, \textit{Against Moral Responsibility} 20, 44–45, 257–61 (2011).


\textsuperscript{47} See id. For an attempt to separate the capacity for (present) responsible agency from (absent) legal blameworthiness, see Nicola Lacey & Hanna Pickard, \textit{From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm}, 33 \textit{Oxford J. Legal Stud.} 1 (2013), available at http://ojls.oxfordjournals.org/content/33/1/1.full.pdf+html.
that the defendant have had the capacity to have acted otherwise.\textsuperscript{48} Or perhaps, on an entirely different path, responsibility should be considered not as a matter of free will, but as a matter of one’s rational powers, and as a matter of degree of control.\textsuperscript{49} Or perhaps the purportedly basic distinction between the rich varieties of compatibilist\textsuperscript{50} and incompatibilist\textsuperscript{51} approaches to free will may turn out not to be basic after all.\textsuperscript{52}

In any event, these few examples of a much wider range of emerging complications, or fraying threads, illustrate how little philosophical consensus on any issue underlies the jurisprudence of the insanity defense in particular and criminal responsibility in general.

D. \textit{Some Contemporary Doubts About Traditional Free Will: Another Perspective}

Another way to illustrate the unraveling of our basic understandings of free will, insanity, and criminal responsibility could start with the traditional legal theory, and then note the rapidly developing fraying. It has been observed, for example, that “[t]he law has long recognized that those who do not qualify as moral agents should not be punished.”\textsuperscript{53} To not qualify as a genuine moral agent is to be ineligible for deserved punishment. Traditionally, it has been thought that only a relative few criminal defendants could not justly be blamed for their actions,\textsuperscript{54} and thus did not deserve to be punished.\textsuperscript{55} The rest of us, most of the time, were thought of as moral agents.

This traditional understanding has, of late, been unraveling. Increasingly, thoughtful observers have come to distrust traditional ideas of genu-


\textsuperscript{50} See supra note 39 and accompanying text.

\textsuperscript{51} See supra note 40 and accompanying text.

\textsuperscript{52} See, e.g., Bruce N. Waller, \textit{A Metacompatibilist Account of Free Will: Making Compatibilists and Incompatibilists More Compatible}, 112 PHIL. STUD. 209, 211 (2002).


\textsuperscript{55} See id.
ine agency and of free will and responsibility, with the idea of free will in particular increasingly being thought of as a persistent illusion. The idea of freedom of the will is seen increasingly not as drawn from scientific investigation, but as derived instead from religion, or as otherwise suspect. Perhaps the illusion of free will is merely naturally "selected" for its evolutionary survival value. While neuroscientists have recently been conspicuous in this regard, substantial numbers of scientists in general and of philosophers have expressed their skepticism regarding a robust free will, or of genuine agency.

Along these lines, merely for example, the distinguished scientist Francis Crick has concluded that "You, your joys and your sorrows, your memories and your ambitions, your sense of personal identity and free will, are in fact no more than the behavior of a vast assembly of nerve cells and their associated molecules. . . . You're nothing but a pack of neurons." Are there, in effect, sane machines and insane machines, in the sense traditionally intended by the criminal law?

56. For introductory discussion, see, e.g., David Hodgson, Criminal Responsibility, Free Will, and Neuroscience, in Downward Causation and the Neurobiology of Free Will 227–41 (Nancey Murphy, George F.R. Ellis & Timothy O’Connor eds., 2009) (Hodgson was both first-rate philosopher and Justice of Supreme Court of New South Wales); Tamler Sommers, The Objective Attitude, 57 Phil. Q. 321 (2007).

57. See Hodgson, supra note 56, at 232.

58. See Gray, supra note 1, at xii.


60. See infra notes 62–64.

61. For a particularly straightforward example, see Richard Double, The Non-Reality of Free Will (1991) (noting claims to free will as not so much objectively false as incoherent or meaningless).

62. Francis Crick, The Astonishing Hypothesis: The Scientific Search for the Soul 3 (1995); see also Daniel C. Dennett, Freedom Evolves 2–3 (2003) ("We are each made of mindless robots and nothing else, no non-physical, non-robotic ingredients at all. The differences among people are all due to the way their particular robotic teams are put together, over a lifetime of growth and experience."); Anthony R. Cashmore, The Lucretian Swerve: The Biological Basis of Human Behavior
Also among the scientists and philosophers, Daniel Wegner, for example, has elaborated on the status of free will along these lines:

[I]t seems to each of us that we have conscious will. It seems we have selves. It seems we have minds. It seems we are agents. It seems we cause what we do. Although it is sobering and ultimately accurate to call all this an illusion, it is a mistake to conclude that the illusory is trivial. On the contrary, the illusions piled atop apparent mental causation are the building blocks of human psychology and social life.63

Again, if we do not have selves, minds, or agency, in what remaining sense can some of us be sane and others insane?

The widely respected philosopher Saul Smilansky has also reached a remarkably sophisticated but equally untidy conclusion in this regard. Professor Smilansky argues that:

[O]ur priority should be to live with the assumption of libertarian free will although there is no basis for this other than our very need to live with this assumption; but as we cannot accept this way of seeing things, and confront dangers to our beliefs, illusion must play a central role in our lives.64

Each of these emerging approaches to freedom of the will and to criminal responsibility, and their implications for an insanity defense in particular, is itself controversial. Jointly, however, they serve well enough as illustrations of the current unraveling of traditional ideas of free will, moral responsibility, sanity and insanity, and criminal responsibility. Unavoidably, at some point, the law of insanity must somehow acknowledge, favorably or unfavorably, the increasing influence of materialism,65 mech-
anism, physicalism, and some strong forms of naturalism, as illustrated above.

Judicially, threads will thus inevitably be pulled, and the largely unanticipated doctrinal unraveling will further proceed, for good or ill. Let us now further explore some complications raised, in their particular turn, by controversies over determinism and randomness, then by compatibilist approaches, and finally by the philosophical doctrines known as illusionism and fictionalism.

1. Determinism, Indeterminism, Randomness, and Further Doctrinal Unraveling

The strongest formulations of causal determinism pose serious problems for much of criminal and sentencing law, and for the law of insanity in particular. One leading contemporary philosopher, referring to strong formulations of determinism, suggests that:

The basic idea behind . . . determinist positions of this kind is that determinism undermines moral distinctions between the guilty and non-guilty, and so we should only be concerned with the danger to society posed by certain people. If a person commits a crime, the central issue is not his bad intention and similar issues with which the legal system is presently concerned but rather social-medical questions about his future behaviour.

If this view is right, trying to distinguish between legal sanity and insanity would be beside the point. Considerations of danger, however defined and measured, would displace our standard concerns with sanity and insanity.

contrary, THE WANING OF MATERIALISM (Robert C. Koons & George Bealer eds., 2010)).


See, e.g., David Papineau, Physicalism and the Human Sciences, in PHILOSOPHY OF THE SOCIAL SCIENCES: PHILOSOPHICAL THEORY AND SCIENTIFIC PRACTICE (C. Mantzavinos ed., 2009) (“We are all physicalists now. It was not always so. . . . This is a profound intellectual shift.”).


See supra notes 56–64 and accompanying text.

See supra note 38 and accompanying text.

Free Will and Illusion, supra note 64, at 85 (emphasis added); cf. Michael S. Moore, Causation Revisited, 42 RUTGERS L.J. 451, 489 (2011) (“Only the pure utilitarian [about punishment] believes that moral blameworthiness is irrelevant to punishability.”).
The less obvious point, however, is that concerns for the social dangers posed by a person—either before or after the commission of any crime—need not be reducible to benign, humane, and progressive forms of medicine, rehabilitation, resource equalization, denied opportunities, or to structural economic and social reform. Even if we think in terms of medicine, a narrow concern for danger and a broad concern for maximizing overall utility clearly need not lead to a progressive response to those we would otherwise have characterized as insane. Dangers may, frankly, be most cheaply reduced by non-progressive measures. Cost-effectiveness and overall utility maximization may well lead a legislature or a court either to humane, or to less than humane, screening based on genetic analyses, “quarantining,” or even to non-consensual psycho-surgery.

Thus abandoning our traditional concern for legal sanity or insanity in favor of a concern for overall danger, or other utilitarian considerations, could well lead our jurisprudence in unexpectedly unprogressive directions. Would it be possible, though, to minimize this risk by taking a more subtle approach to the idea of causal determinism?

It has been argued, in particular, that uncertainties about determinism, and about whether anyone is morally responsible, should affect our policy thinking. This approach does not argue that if we are uncertain about determinism and moral responsibility, we should find everyone not responsible. Rather, the conclusion is one of agnosticism. Thus in the absence of additional evidence, the moral and legal systems should on this theory seek to avoid, suspend, or withhold judgments as to responsibility, either way. Whatever the criminal justice system’s response to crime may be, such a response should not on this approach be based on attributing moral responsibility or non-responsibility to the defendant.

72. See Free Will and Illusion, supra note 64, at 85.
73. See Moore, supra note 71, at 489; see also R.B. Brandt, The Insanity Defense and the Theory of Motivation, 7 L. & Phil. 123, 124 (1988) (“More specifically, what the criminal law should aim to do is to maximize the general well-being, and to minimize the damage of crime and anxiety about the possibility of crime, at least human cost. . . .”).
75. Much more broadly, see J. Angelo Corlett, Forgiveness, Apology, and Retributive Punishment, 43 Am. Phil. Q. 25 (2006). Professor Corlett argues that: [I]f causal determinism is true in the hard deterministic sense, then there is no sense to be made of ethics and moral responsibility, and not even moral practices such as forgiving others make much, if any, sense. For we only forgive those who are blameworthy for wrongful behavior, not those who could not have done otherwise . . . . So forgiving such “persons” seems to make little or no sense (if “persons” is not too flattering a term for them in a completely deterministic world).
Id. at 35.
77. See id. at 295.
78. See id.
One problem with this “agnostic” approach is that it may be difficult, in practice if not in theory, to suspend judgment as to the defendant’s moral responsibility, while not treating the defendant, for practical purposes, as non-responsible. That is, we would want to clarify the real, practical difference between withholding judgments as to responsibility, and making implicit judgments of non-responsibility. Do both approaches in fact reduce to some sort of utilitarianism in the criminal justice system? And in practice, it may be difficult to permit our impressions, one way or another, of a defendant’s responsibility to have no impact on our ultimate disposition of the case.

As well, if suspending judgments as to the defendant’s moral responsibility could have moral advantages, why could such a practice not have moral disadvantages as well? For one, leaving convicted and—on some basis—sentenced persons in a haze of officially undetermined responsibility may tend to shift the real decision-making, even on matters of any possible fundamental dignity, away from legislators, judges, and juries, and toward the administrators of whatever systems the convicted defendant is assigned to.

The legal system could bypass these serious concerns if we could be sure that determinism does not hold, at levels relevant to human behavior. But we would then also have to remember that a failure of determinism would not guarantee a meaningful realm of freedom of the will, moral responsibility, or of sane and responsible behavior. Substituting a sphere of sheer randomness for determinism hardly suffices. Random mental processes and outcomes hardly suggest meaningful free will. Human decisions with their origins in random processes seem no more a matter of genuine free will than “decisions” that reflect the mechanisms of some deterministic process. As Professor Peter van Inwagen has phrased the argument, “if how an agent acts is a matter of chance, the agent can hardly be said to have free will.”

Thus a world of randomness, or pure chance, or even a world combining determinism in some spheres with spheres of randomness, would hardly seem to be fertile ground for a meaningful distinction between typi-

79. For merely one recent exploration of both measurement-induced uncertainties at a microscopic level, as well as more fundamental indeterminacies, or undefined values, that seem to be inescapably hard-wired into nature itself, see Lee A. Rozema et al., Violation of Heisenberg’s Measurement-Disturbance Relationship by Weak Measurements, 109 PHYSICAL REV. LETTERS 100404, 100404-1 (2012).

80. See id.

81. See generally Peter van Inwagen, Free Will Remains a Mystery: The Eighth Philosophical Perspectives Lecture, 34 NOUS 1 (14 Phil. Persp. 1) (2000).

82. Or, for that matter, be a responsible agent, or even an agent in general, or a genuine actor, at all. See id. at 10. For a recent critique of Professor van Inwagen’s own views, see Lara Buchak, Free Acts and Chance: Why the Rollback Argument Fails, 63 PHILOS. Q. 20 (2013).
cally morally responsible sane defendants, and typically morally non-responsible insane defendants.

This is of course not to try to assess the strength or weakness of determinist theories, or of world views with a randomness component. The important point is simply that the current popularity of such views, and the difficulties of accounting for an insanity defense on any such bases, again reflects the fraying and unraveling of the jurisprudence of the insanity defense.

2. The Complications of Compatibilism and Further Doctrinal Unraveling

The temptation to try to somehow reconcile moral responsibility, free will, and the familiar distinction between legal sanity and insanity with a purely determinist worldview is, for many contemporary thinkers, overwhelming. The belief that a form of free will, and usually the distinction between responsibility and non-responsibility, can be reconciled with universal determinism is the view known as “compatibilism.”

How free will, responsibility, and the sanity/insanity distinction are to be reconciled with determinism is approached by the various compatibilists in different ways. The complications are almost innumerable, and will not be explored herein. Familiar psychology ordinarily finds a meaningful distinction between, for example, the sane and insane; the addicted and the unaddicted; compulsive hand washers and those who are not; and those cooperating in crime only under a credible threat of imminent death and those far removed from such obvious, direct physical coercion. The problem is to somehow validate the basic differences in how we judge and treat all of the above categories if we assume that each category is subject to a relentless causal determinism.

Let us very briefly consider possible compatibilist solutions. Can a distinction between compulsion or coercion on the one hand, and mere universal causal determinism on the other, somehow validate the basic ways in which the law differently treats those it regards as sane and insane? Surely there is some sort of difference between coercion at gunpoint and the workings of neurological processes. Or we might try another tack: Would a distinction between those of our causally determined acts that we somehow identify with, accept, or endorse, as distinct from those we do not, better serve to distinguish the legally sane and in-

84. See id. at 154.
85. See id.
86. See id.
87. See id.
88. See id.
89. See id.
But what if some insane persons strongly identify with beliefs the law considers to be insane beliefs? What if those identifications themselves, though not socially coerced, are part of the universal deterministic network of causes and effects? It seems reasonable to believe that not every such endorsement of one’s legally insane beliefs necessarily must be a further element of one’s insanity.

This is again not to attempt to evaluate any form of compatibilism. The aim is instead merely to suggest that the contested popularity of compatibilist views and their rivals amounts to another dimension along which the standard logic of the insanity defense is not only fraying, but unraveling.

To its credit, modern compatibilism has not tried to reduce moral and legal responsibility, or the insanity defense in particular, to the narrowly cognitive question of merely what the criminal defendant knew or understood. Compatibilists typically recognize the relevance as well of emotions, desires, drives, and cravings to determinations of sanity and responsibility. They more specifically recognize that:

[To] be morally responsible someone must not be influenced exclusively by some irrational desire but must exhibit some kind of rationality in the formation of their intentions. A psychopath or someone acting solely under the influence of an overwhelming craving for heroin or agoraphobia without having any moral beliefs about the matter is not . . . morally responsible.

The standard approaches to the insanity defense, apart from those that refer to the possibility of an “irresistible impulse,” instead often


91. For a concise overview of the major forms of compatibilism, see Michael McKenna, Compatibilism, Stan. Encyclopedia Phil. (Edward N. Zalta ed., rev. ed. 2009) (2004), available at http://plato.stanford.edu/entries/compatibilism (last visited Feb. 15, 2014). For the classic critique of compatibilism, see Immanuel Kant, Critique of Practical Reason § 5.96, at 80–81 (Mary J. Gregor ed., 1997) (1788) (referring to compatibilism as “wretched subterfuge” or as “petty word-jugglery”). For a contemporary critique of compatibilism, see, e.g., Free Will and Illusion, supra note 64, at 49–53 (“There are two major inherent difficulties with compatibilism: the shallowness of desert and value, and the issue of injustice and victimization.”). “Without libertarian free will, no one is ultimately responsible for being a criminal . . . .” Id. at 49.


93. For discussion, see, e.g., Carrido, supra note 53, at 314–17, 316 nn.60–64 (citing Orndorff v. Commonwealth, 691 S.E.2d 177, 179 n.5 (Va. 2010)); see also Morgan v. Commonwealth, 646 S.E.2d 899, 902 (Va. App. 2007) (explaining irre-
seem to focus in large measure on broadly cognitive matters. These matters include what the defendant knew or had the “capacity” to know, understand, grasp, judge, or appreciate regarding facts and the relevant legal standard.\(^{94}\) A defendant’s knowledge and understanding differ from the defendant’s impulses, drives, motives, desires, and intentions. Knowledge and understanding also differ from acting and willing. Compatibilists often require, beyond the standard merely cognitive elements of sanity and insanity, something like intention, willing, and defendants’ “adequate capacity and opportunity” not to have acted as they did.\(^{95}\)

Requiring something like a defendant’s capacity to have acted otherwise typically makes sense. Would we really deny the possibility of an insanity plea to a defendant—regardless of what the defendant knew or understood—if the defendant were held bound by rigidly fixed “internal” or “external” constraints upon what the defendant could will or intend? Would we hold sophisticated but deterministically programmed robots legally responsible if we believed that they “knew” and “understood” what they were quite unavoidably doing?\(^{96}\) Presumably not. But, crucially, this judgment, extended to human defendants, would not depend upon whether the defendant suffered from anything we called a “disease” or not.

At some point, the courts must take at least an implicit stand on the basic claim of compatibilism: that even strict causal determinism in the broad natural realm is compatible with meaningful moral and legal responsibility. More specifically, courts must at some point eventually consider whether, in a determined universe, defendants are capable of being

\(^{94}\) See, e.g., supra note 7 (discussing classic M’Naghten insanity test). Compare the standard judicial test for due process in the context of competency to stand trial, which includes, among other elements, that the defendant not have “a mental condition . . . such that he lacks the capacity to understand the nature and object of the proceedings against him.” United States v. Mitchell, 709 F.3d 436, 439 (5th Cir. 2013) (quoting Drope v. Missouri, 420 U.S. 162, 171 (1975)).

\(^{95}\) Moore, supra note 59, at 243. While Professor Moore seeks to bypass broad questions of the truth or falsity of determinism, he expresses one element of the remaining problem in these terms: “Neuroscience’s concrete version of the lack of free will challenge(s) should be put as: in whatever sense and to whatever extent macro-sized natural events and natural processes are caused, so too are both human actions, and the choices that cause them, caused by brain states.” Id. at 263. But cf. Fischer & Ravizza, supra note 90, at 39.

\(^{96}\) See, e.g., Morse, supra note 56, at 116–17. Professor Morse argues, however, that free will is not crucial to criminal responsibility, and that the “folk psychology” on which the criminal law is largely based is compatible with causal determinism, even though the law presumes the capacity of most persons to both understand and to be genuinely guided by good reasons. See id. at 117, 119. But see supra notes 33–38 and accompanying text. The idea of being moved by a “reason” is itself murky. For reference to a narrow contrary phenomenon called automatism or unconscious behavior, see, e.g., Smith v. State, 663 S.E.2d 155, 156–57 (Ga. 2008).
moved by and responsive to what are called “reasons.”\textsuperscript{97} Again, it is not our aim to take sides on this or any other relevant controversy. But this controversy over the meaning and role of reasons will inevitably further contribute to the fraying and unraveling of our standard insanity jurisprudence.

Consider in this context an obvious question for the compatibilists, and others, who claim that a capacity to be moved by reasons should often be decisive in insanity and other kinds of cases. Are reasons in this sense simply links in a naturalistic, perhaps entirely determined, chain of causes and effects, unavoidably producing the defendant’s act? That would preserve the naturalistic and deterministic elements of the challenge to the traditional logic of insanity. But to do the work required of what we call a “reason,” must not reasons also amount to abstractions as well? That one’s acting in a particular way would result in more good than harm, for example, could be a reason for acting in that way. But that hypothetical effect of a possible future action is in itself just an abstract idea. How does a pure abstract idea insinuate itself, effectively, into an ongoing chain of “natural” or material causes and effects?\textsuperscript{98}

If, in sum, we “naturalize” our idea of a reason, it becomes far more difficult to explain why a reason—let alone, some sort of more general capacity for reasoning, in this naturalistic sense—should make any crucial difference to cases of insanity versus sanity, and of legal culpability. Someone with the capacity to reason in the naturalized sense is simply lucky to have that capacity, if we regard it as a good thing, or unlucky if we do not.\textsuperscript{99} Luck would seem to be a doubtful ground for imposing or not imposing criminal blame. And if it is argued that some people work in order to develop sufficient reasoning capacity to become morally responsible, the troubling answer may then be that having that very capacity, or that very disposition, is itself a matter of luck.\textsuperscript{100} Regardless of how one


\textsuperscript{99} For a very concise treatment of this and related issues by the renowned contemporary philosopher, see Galen Strawson, \textit{Luck Swallows Everything}, \textit{Times Literary Supplement} (June 26, 1998), http://www.naturalism.org/strawson.htm.

\textsuperscript{100} See \textit{id}. Relatedly, it is sometimes argued that a defendant’s insanity or insufficient capacity for reason, in whatever sense, means that judicial punishment is unlikely to deter future antisocial conduct by that defendant. \textit{See, e.g.,} LaFave, \textit{supra} note 8, at 393; Arenella, \textit{supra} note 36, at 273 (“futility”). Whether this traditional belief about insanity is actually well-founded, or is instead a fragile dogma of traditional insanity jurisprudence, amounts to yet another point of fraying and future unraveling.
thinks of these arguments, the unraveling of our traditional ideas of sanity and responsibility must take this additional form.

3. Illusionism and Fictionalism About Free Will as a Final Source of Insanity Defense Unraveling

Charles Darwin, in elaborating on the text chosen for our epigram, argued as follows:

We cannot help loathing a diseased offensive object, so we view wickedness. . . . Yet it is right to punish criminals; but solely to deter others. . . . [O]ne deserves no credit for anything. . . . [N]or ought one to blame others. This view will do no harm, because no one can be really fully convinced of its truth, except [the] man who has thought very much, [and] he . . . will not be tempted, from knowing every thing [sic] he does is independent of himself, to do harm.

Darwin thus crucially acknowledges that our legal and moral blaming practices do not make sense by our own ordinary standards. Still, those practices should, supposedly, remain stable and effective, because the few of us who grasp Darwin’s insights will continue to promote the perceived common good, and the rest of us will go on as before, unaware of the fundamental illusions embedded in our common sense views.

In this regard, Darwin is a forerunner of the increasingly influential schools of thought known respectively as illusionism and fictionalism. The merits, and the stability in practice, of illusionist and fictional-

101. See supra note 1 and accompanying text.
102. DARWIN, supra note 1, at 608 (entry of September 6, 1838). For brief discussion, see Galen Strawson, The Impossibility of Ultimate Responsibility?, in FREE WILL AND MODERN SCIENCE ch. 8, at 135 (Richard Swinburne ed., 2011).
103. See, e.g., FREE WILL AND ILLUSION, supra note 64; Saul Smilansky, Free Will and Moral Responsibility: The Trap, the Appreciation of Agency, and the Bubble, 16 J. ETHICS 211, 217 (2012) (“[I]llusory beliefs are in place, and . . . the role they play is largely positive. Humanity is fortunately deceived on the free will issue, and this seems to be a condition of civilised [sic] morality and personal value.”); Smilansky, supra note 64. For a brief critique of Smilansky, see, e.g., OWEN M. FLANAGAN, THE REALLY HARD PROBLEM: MEANING IN A MATERIAL WORLD 36 (2007); WALLER, supra note 44; WEGER, supra note 63; Cashmore, supra note 62; Greene & Cohen, supra note 36, at 1783 (“Free will, as we ordinarily understand it, is an illusion. . . . As consequentialists, we can hold people responsible for crimes simply because doing so has, on balance, beneficial effects through deterrence, containment, etc.”). This latter claim should be, and likely will be, increasingly controversial among ethicists, judges, attorneys, and legal commentators, in and beyond the context of insanity defenses.
104. The broader approach to fictionalism in various areas of philosophy, including moral philosophy generally, as distinct from a fictionalism regarding claims made specifically about insanity and criminal responsibility, is illustrated in MARK ELI KALDERON, MORAL FICTIONALISM (2005) and RICHARD JOYCE, THE MYTH OF MORALITY (2007). For the only vaguely related idea of “legal fictions,” see classically LON L. FULLER, LEGAL FICTIONS (1967).
ist approaches to criminal responsibility and to insanity in criminal contexts in particular are unclear, but potentially important. The rise of various forms of fictionalism and illusionism contributes to the unraveling of confidence in traditional insanity jurisprudence.

Some might reply that at least in some areas of the law, the idea of a “legal fiction,” in the sense classically explored by Lon Fuller, has generated only limited controversy. Professor Fuller thought of legal fictions as useful or expedient, but as neither truthful, nor as lies, nor as mere error, and perhaps not even as consciously false assumptions. In the context of criminal responsibility and insanity, though, it is far from clear that broad, widely, known basic judicial falsification, conscious or otherwise, will somehow avoid eventually unraveling. Punishing, or declining to punish, where the logic of doing so is admittedly basically defective, if in some sense still supposedly useful, is likely to seem in other respects unfair, and to be unstable over time.

In the end, the various versions of illusionism and fictionalism offer not a stable solution to insanity defense dilemmas, but only a further, and for our purposes final, aspect of the gradual unraveling of traditional insanity defense doctrine.

IV. CONCLUSION: INSANITY DEFENSE DOCTRINE AS INCREASINGLY A MATTER OF THREADS UNRAVELING

For the reasons explored above, it should now be clear that the most crucial difficulties with the insanity defense are not at the level of competing definitions, problems of proof, or of the mere existence of complex or difficult cases. These sorts of problems attach to all kinds of litigation, and have existed in one form or another at most times and in most places. The unstable condition of the current law of the insanity defense is different. The current law of insanity, admittedly, may well make some viable and useful distinctions. But despite these viable distinctions, the most fundamental distinction—that between persons who are legally classified as insane, and thus presumably as not bearing criminal moral responsibility, and persons not so classified, and thus who are presumably criminally responsible—is in crucial respects fraying and unraveling, for good or ill.

105. Illusionist and fictionalist approaches to civil, as distinct from criminal, insanity may or may not have immediately dramatic consequences. See, e.g., Dougherty v. Rubenstein, 914 A.2d 184, 193 (Md. Ct. Sp. App. 2007) (will contest case based on testator’s alleged insanity); see also Prop. & Cas. Ins. Co. of Hartford v. Davenport, 907 F. Supp. 2d (D. Vt. 2012) (insurance coverage limitations case).

106. See Fuller, supra note 104, at 7.

107. See id. at 5.

108. See id. at 7.
This unraveling process does not impeach everything we might want to say for any purpose about mental illness, mental capacity, or the determination of sanity and insanity. But we need to be collectively aware of the complex unraveling process discussed above. Where possible, we should try to manage the unraveling process in such a way as to validate our worthiest intuitions about fairness in the criminal justice system. Most assuredly, this unraveling process should not prevent us from identifying, critiquing, and remediing relevant structural inequalities, and economic and social injustices more broadly. A proper concern for structural and institutional justice is broader than the context of the insanity defense. But as is illustrated above, the law of insanity faces fundamental conflicts over even the near term future. This unraveling process calls for our most thoughtful collective responses.


110. See, e.g., Durrence, 695 S.E.2d at 230 n.3.

111. See the interesting New Hampshire approach summarized in State v. Fichera. See State v. Fichera, 903 A.2d 1030, 1035 (N.H. 2006) (“[T]he test for insanity does not define or limit the varieties of mental diseases or defects that can form the basis for a claim of insanity.” (citation omitted)).