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OUR MISSION

A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal’s principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.
Sara Rex, University of Pennsylvania

Dear Reader,

We are proud to present to you the fifteenth edition of the Penn Undergraduate Law Journal. In this issue, our authors offer unique perspectives on a broad array of legal issues, ranging from algorithmic decision making to the history of Supreme Court clerks. Their exceptional work stimulates and contributes to narratives surrounding noteworthy legal developments today.

Our first article, “The Constitutionality of Algorithmic Decision Systems Output in Light of the Probable Cause Requirement of the Fourth Amendment,” was submitted by Lacey Strahm of Columbia University. This article elaborates on the rise of the Fourth Industrial Revolution, identifying how its appearance diverges from those of previous industrial revolutions. As advances in pervasive technology now perform an unmistakably key role in ushering in this new wave of development, the effects of this revolution are near-ubiquitous. Given our increased access to data, Ms. Strahm investigates the legal ramifications of using algorithmic decision systems to establish probable cause to issue search warrants. Ms. Strahm weighs previously published opinions on these matters to formulate her argument. She concludes these methods do not establish probable cause due to a reportedly doubtful adherence to the explainability standard.

In our second piece, “My Data: A Hybrid Property-Based Licensing Approach to Data Privacy,” Harshini Malli from Carnegie Mellon University offers another perspective on increased access to data, considering the ethics behind data collection and possible remedies for apparent shortcomings. She directs readers toward several avenues to conceptualize the meaning and usages of data privacy, anticipating a need for greater control over individual data in the event of a large-scale breach. Ms. Malli ultimately proposes creating a licensing system that allows technology users to revoke access to their data. This proposal lends itself to increasing individual privacy while avoiding blocks to innovation.

Our third article, “Judicial Review: Understanding Classical Adaptations for Contemporary Society,” comes to us from Jacob Maxwell Boarnet from the University of California, Irvine. He leverages a qualitative coding system to study the interchanges between theory and practice in judicial review. Seven Supreme
Court cases serve as central vehicles by which the article surveys a range of outcomes, namely with adjustments to contexts based on time and sociological minority categories. Mr. Boarnet studies both political and legal perspectives, arriving at the conclusion that political approaches can lead to favorable outcomes, and morality and historic inequality must be addressed.

In our fourth piece, “Changing of the Guard: The Ascendance of Supreme Court Clerks,” Aria Hejazi from the University of California, Santa Barbara illustrates the history of the Supreme Court clerkship. Using anecdotes about clerks from the past, she describes the impact of support from the Justices on the Court and evolving paths to the clerkship over time. Justices such as Horace Gray, Oliver Wendell Holmes, and Louis Brandeis paved the way for the entrenchment of clerks on the Supreme Court. This article would be of particular interest to undergraduate and law students considering next steps in their legal trajectories.

Our final article, “The Impact of an International Civil Court for Corporate Violations of Human Rights,” was submitted by Sotiris Pafitis of the University of Leeds. He explores the potential effects of creating an international civil court to monitor corporate dealings with human rights, focusing on the role of multinational enterprises. Mr. Pafitis concedes there are high expenses associated with creating such a monitoring body. His argument hinges on legal precedent for this type of policy and explores relevant limitations, namely practical and doctrinal considerations for non-state actors.

Thank you to all who contributed to this publication: our authors, readers, writers, sponsors, and members of our Journal all played critical roles in compiling these outstanding pieces. I would like to thank Editor-in-Chief Emeritus Lorenza Colagrossi, who led the team during this editing process and introduced me to the Journal. I am honored to publish this edition and present these works to our readers.

Sincerely,

Sara Rex
ARTICLE

THE CONSTITUTIONALITY OF ALGORITHMIC DECISION SYSTEMS OUTPUT IN LIGHT OF THE PROBABLE CAUSE REQUIREMENT OF THE FOURTH AMENDMENT

Lacey Strahm, Columbia University

1. INTRODUCTION

As we enter the Fourth Industrial Revolution, ushered in by ubiquitous cyber-physical systems, the Internet of Things, and the Internet of Systems, our legal precedents are lagging behind our technical innovations. In his 2017 book, *The Fourth Industrial Revolution*, Klaus Schwab describes how this revolution is different from all the previous epochs. The First Industrial Revolution began in the latter half of the 18th century and focused on the power of the steam engine, which led to the mechanization of many manufacturing industries. The Second Industrial Revolution began late in the nineteenth century and was characterized by scientific advancements such as electricity that enabled mass production. The Third Industrial Revolution began in the late 1950s and marked the shift from analog to digital through computing. The Fourth Industrial Revolution, Schwab explains, is happening now and does not resemble anything we have seen before. It is disrupting nearly every academic discipline, professional industry, and the global economy in a non-linear way. The Fourth Industrial Revolution is characterized by the way in which the physical, digital, and biological spheres of an individual’s life are connecting at a speed previously unseen. The speed, quantity, and efficacy with which the Fourth Industrial Revolution is raging throughout the globe have strained the legal frameworks tasked with protecting citizens from the unintended consequences of such massive innovation.¹

Advances in Artificial Intelligence (AI), Machine Learning (ML), Algorithmic Decision Systems (ADS), and other approaches to training computers in decision-making are at the forefront of a new set of challenges to our legal frameworks. These systems are becoming so sophisticated

that institutions are replacing human decision-makers with automated systems to boost efficiency and consistency. We see their dissemination in policing decisions, such as in so-called ‘predictive policing,’ where “police apply statistical or machine learning algorithms to data from police records to look for potential patterns that predict when, where or what crime may be committed.”\(^1\) We see their dissemination in courtroom decisions where judges use computerized systems risk assessments to inform “who can be set free at every stage of the criminal justice process.”\(^2\) We see their dissemination in insurance decisions where state government agencies use automated systems to determine if a claimant has committed insurance fraud.\(^3\) In short, we see their dissemination across a wide range of industries that utilize complex decision-making in their operation.

One important question that arises from these advances and their dissemination throughout society is whether and how these systems’ output can be used in legal proceedings. Under the Fourth Amendment of the United States Constitution, “no Warrants shall [be] issue[d], but upon probable cause.”\(^4\) This stipulation means citizens are secure from searches and seizures of their persons, houses, papers, and effects unless probable cause can be established. In United States criminal law, probable cause is the standard of reasonable grounds by which police have a suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person’s belief that specific facts are probably true.\(^5\) An Algorithmic Decision System (ADS) could be built to address applications for search warrants, trained to look at evidence to establish whether probable cause exists and produce an output of probable cause with given statistical likelihoods. Under this definition, could a judge consider the output of the aforementioned ADS to establish probable cause for a search warrant?

Legal scholarship has not yet definitively answered this question,

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\(^3\) Ryan Felton, Michigan unemployment agency made 20,000 false fraud accusations – report, THE GUARDIAN (December 18, 2016, 6:00 AM).

\(^4\) U.S. Const. amend. IV.

\(^5\) Probable cause, Ballentine’s Law Dictionary (Legal Assistant ed. 1994).
although Orin Kerr, a professor of law at the UC Berkeley School of Law, wrote a compelling defense for keeping quantification out of the courtroom. Kerr suggests quantification specifically of “probable cause would eclipse intuitions and instead facilitate distortions of probability resulting from cognitive biases.” He reveals how quantification would lead to less accurate probable cause determinations because humans determine varying degrees of reasonableness through intuition, which is a feature of cognition that machines lack. Quantification, Kerr explains, “would override the critical intuitions of judges about missing information in the affidavit that are critical to assessing probable cause accurately.” Kerr’s analysis hints at a human desire to quantify immaterial things that are not quantifiable, forcing such quantifications to use poor input or proxy variables that lead to inadequate measures of the outcome. This potent desire for reification forces immaterial things that no one has a good way of quantifying to be reduced to an outcome that does not always make sense in a particular context.

Think of doctors asking patients to rate their pain on a scale from one to ten. Everyone’s tolerance for pain is different depending on what injuries, ailments, or diseases a patient has been exposed to before. Yet the scale remains the same 1-10. An experienced athlete who had dislocated their knee before can give a new dislocation a grade of six when previously they gave the same injury a grade of eight. A fifth grader who caught the flu for the first time can also rate their pain as a six, whereas the mother who catches that same strain of the flu from her child can rate her pain a two. The flu and a dislocated knee are very different kinds of pain, yet they both can receive the same pain grade, revealing a shortcoming in the pain quantification system. It is the doctor’s responsibility to determine the reasonableness of the pain grade by utilizing their critical intuition contrived from their knowledge of the patient and the ailment to assess the pain accurately, and ultimately successfully do their job. If pain quantification were to eclipse doctors’ critical intuition in diagnosing patients and guiding them to appropriate healing options, what would our healthcare system look like? This error-ridden vision of quantified-centric institutions is precisely the reason why Kerr’s defense is so tenable. Many immaterial

things are multi-dimensional, so quantification becomes tricky when you try to compare multiple points, on multiple axes, in multiple planes. The question of what becomes your combining rule for these various combinations of points, axes, and planes would require a complete mathematical theory for how to solve this problem. However, the mathematician’s personal values would be baked into the framework of the theoretical structure because their choice in picking which variables to compute would be a direct reflection on their values. This speaks to the differing values humans can ascribe to a situation that complicates the problem even further, as it is highly unlikely two humans have the same value base. Humans can have similar values but tend to differ on nuanced contexts or situations that distinguish their value set from others.

I agree with Kerr’s disposition towards opposing quantification of probable cause. However, in the ten years since the publication of Kerr’s article, advances in technology have made progress toward the opposite, making quantification of probable cause seem not only plausible but highly attractive in some spaces. I will take Kerr’s argument to keep quantification out of the courtroom a step further and contend that ADS output cannot meet the explainability standard required to establish probable cause in a legal proceeding, and thus should not be a viable option in the courtroom. ADS provide black and white answers to color-filled questions with no explanation as to how they arrived at their conclusion. In the event the system does produce some form of an explanation, the explanations are often unintelligible to humans because the machine’s infrastructure is not designed to justify its work. ADS have no mechanism to interpret and understand the cause of a situation nor explain how it arrived at its decision output. Therefore, a legal claim established from ADS does not meet the standard necessary for establishing probable cause under the Fourth Amendment. ADS cannot provide enough reliable evidence to justify the output and thus could not meet the explainability requirement needed for a search warrant.

8 Questionable citation: The explainability standard will be defined infra as we survey United States legal history. Reference explainability section.
2. TECHNICAL APPROACHES

The Fourth Industrial Revolution is profound because of the vast and far-reaching progress made in computing machinery and intelligence research. The fuel that has excited the modern explosion of innovation has been in place for years, finding its genesis largely in the work of Alan Turing, widely considered to be the father of theoretical computer science and Artificial Intelligence (AI).\(^1\) Turing’s seminal paper, *Computing Machinery and Intelligence*, centers around the question “Can machines think?”; in the paper, Turing explores this concept in detail and answers what he presumes may be common objections towards the idea.\(^2\) Two years later in 1952, Claude Shannon, a Bell Labs researcher, shared one of the first examples of machine learning with the world.\(^3\) Theseus, a robotic maze-solving mouse, could ‘remember’ its path through telephone relay switches.

With trailblazing electromechanical devices such as Theseus emerging out of research labs, John McCarthy, an assistant Professor of Mathematics at Dartmouth college, recognized there was an opening for some development in the research area of thinking machines. In the summer of 1956 McCarthy organized the Dartmouth Summer Research Project on AI, where mathematicians, scientists, and people interested in the subject were invited to study features of intelligence that a machine can be made to simulate.\(^4\) The U.S. government was particularly supportive of machine translation research at this time because Cold War politics fueled their heightened interest in automatically translating documents, particularly of Russian origin. In 1958, the U.S. Navy funded Frank Rosenblatt, the head of the cognitive systems section at Cornell Aeronautical Laboratory, in his perceptron project.\(^5\) The perceptron algorithm learned by trial

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\(^{2}\) Alan Turing, *Computing Machinery and Intelligence*, 59 MIND 433 (October 1950).


and error using a specific kind of neural network that simulated the human thought process. Rosenblatt built the perceptron algorithm with the hopes of gaining insights into the human brain by organizing computer systems in a way that he believed mimicked the organization of the human brain.

In 1964 the United States government desired to evaluate the progress of computational linguistics and machine translations, so it set up a committee of seven scientists called the Automatic Language Processing Advisory Committee (ALPAC). The report subsequently produced from ALPAC’s inquiry encouraged a more basic approach to computational linguistics and machine translation compelling the research discipline to take a step back and reevaluate where it was focusing its energy.¹ Following ALPAC’s findings in 1969, Marvin Minsky, a cognitive scientist best known at the time for co-founding the Massachusetts Institute of Technology’s AI laboratory, published, *Perceptrons: An Introduction to Computational Geometry*, a book harshly criticizing the work of Frank Rosenblatt on his perceptron algorithm.² This book introduced major controversy within the AI community centered around the fundamental divide between believing Minsky’s pessimistic predictions on the limitations of the perceptron or hoping that Rosenblatt’s work would usher in more research that could lead to ground-breaking innovation. Minsky’s pessimism was able to win the debate for the time being, and U.S. support for AI research was drastically decreased.

Across the pond, the British government harbored similar reservations about the progress of AI research. James Lighthill’s report compiled for the British Science Research Council in 1973 entitled, *Artificial Intelligence: A General Survey*, was a cynical prognosis of academic research in the AI field that confirmed the British crown’s suspicions.³ Now, both the U.S. government and the British government had ended general support for further academic research into AI, leading to a period of reduced funding known as an ‘AI winter’.

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15 Ibid., 13.
Significant AI research would not resurrect until the 1980s when Japan’s Ministry of International Trade and Industry (MITI), embarked on the Fifth Generation Computer Systems (FGCS) initiative to build supercomputers that could yield a platform for future advances in AI. In response the British Government used their substantial war chest to fund the Alvey Programme, which supported research in knowledge engineering and opened AI research in England again.¹ The U.S. government also reacted to the changing sentiments by founding the Strategic Computing Initiative under the Defense Advanced Research Projects Agency (DARPA) which tripled funding for AI research between 1984 and 1988.² This period in AI research was centered around a rule-based approach where computer scientists would give the system a set of rules and constraints to follow and observe how the program operated under such conditions. A popular programming language associated with AI at the time was Prolog. Programs coded in Prolog expressed logic in terms of relations, represented as facts and were useful for particular tasks that benefited from rule-based logical queries such as searching databases.³

Some early AI systems required specialized hardware for their processing power. However, advances in hardware technology from companies such as Apple and IBM collapsed the market for such specialized hardware. As predicted by Moore’s Law in 1965, the speed and memory capacity of computers doubles every two years so the fundamental problem of ‘raw computer power’ would gradually be overcome.⁴ IBM used this shift to their advantage and became a leader in the AI industry, most notably for Deep Blue, their chess-playing computer that was the first computing system to defeat Garry Kasparov, the reigning world chess champion in 1996. Games became the new playground for researchers to test the capabilities of their AI-powered computing systems. DeepMind followed suit in 2015 with their creation of the first deep learning AI model to “successfully learn control policies directly from high-dimensional

17 Igor Aleksander, Decision and Intelligence, 185 (2013).
20 G.E. Moore, Cramming more components onto integrated circuits, 38 ELECTRONICS 8 (April 19, 1965).
sensory input.” The model played seven Atari 2600 games and outperformed previous approaches to six of the games while surpassing human experts on three of the games, achieving a superhuman level of play. The gaming programs and advances in computer vision that came out of this time period were early attempts at AI focused computing. However, they were limited in functionality because their logic was hard-coded, only being capable of executing specific tasks to accomplish specific goals such as playing chess. Thus evolutionarily, these advances were a technological dead-end.

At the turn of the century, the concept and use of big data was popularized, and it revolutionized old conceptions about how researchers could approach computing. Big data typically refers to data sets with a size so great that they are beyond the ability of regular software tools to process the data within a reasonable amount of time. With so much data now available, researchers discovered they could dramatically improve the performance of neural networks with many layers as opposed to the few layers they were previously using. This breakthrough in deep neural network learning transformed research in AI as deep learning applications could be used across various industries. In the automotive industry, deep learning is pioneering the automated driver charge, helping vehicles automatically detect objects such as pedestrians, traffic lights, and street signs.

Big data is the foundation for today’s machine learning methods, which are ubiquitous within individual’s public and private lives. People not only interact with AI almost every day whether they are aware of it or not, but people also contribute to machine learning algorithms with their personal data. The Fourth Industrial Revolution was made possible through this growing frequency of human-computer interactions, but the road to getting here had been in place for decades.

22 Ibid.
23 The concept of hard-coded programs will be discussed infra in the Machine Learning section. Reference Machine Learning section.
A. Algorithmic Decision Systems

One of the technical approaches ubiquitous within our public and private institutions is Algorithmic Decision Systems (ADS). As a generic term, ADS encompass any deterministic rules-based algorithmic system. Algorithmic, in this context, refers to an explicit process or set of rules to be followed in calculations or other problem-solving operations. Algorithms themselves are finite and well-defined instructions that can be executed routinely. This broad definition does not explicitly require machine computing, although in society and in terms of this paper, algorithms usually refer to complex machine computing operations. This more conventional brand of machine-centric algorithms can be statically hand-coded by programmers or automatically generated from data input. In ADS, algorithms define the rules for which the system can then analyze high quantities of data to find correlations and parse relevant information out for decision-making.

When evaluating ADS, individuals must consider every piece of information that goes into an algorithm and contextualize it within the programming goal. ADS typically have training data, which is the initial set of data used to understand how to apply its algorithm to given data points. Similar to humans, algorithms learn from exposure and experience, so training data functions as algorithms’ exposure and experience. If an ADS is built to estimate if there is probable cause for a police officer to search a vehicle, the training data could include the number of stops that turned into arrests, the number of stops that did not turn into arrests, and any other recorded data points that the coder feels necessary to include. They also have parameters that are values passed into the function, which set the bounds for what data the argument will evaluate. That same ADS built to estimate if there is probable cause for a police officer to search a vehicle would be passed a parameter such as ‘arrest’ that corresponds to the training data. The algorithm would have learned how to handle similar parameters and would instruct the system to evaluate the arrest data point based on its education. ADS also can have classifiers that relate given input to particular categories of output.\textsuperscript{1} Sticking with our previous ADS

\textsuperscript{24} The concept of classifiers will be discussed infra in the Bad Classifier section. Reference Bad Classifier section.
example, classifiers in that system could be ‘arrest’ and ‘no arrest,’ which assign what the system evaluates into these two categories to then inform the output prediction. In considering how ADS are constructed, observers can understand with more clarity how the system functions, for what purpose, and what recourse needs to be taken to rectify an error.

Humans are involved in the construction process of building the algorithms out by selecting appropriate training data for the system to model and correctly labeling data for supervised algorithmic systems. Coders who create the algorithm make judgment calls on what is or is not possibly relevant to ADS, constructing the algorithm’s logic base on values they wish to codify. These values maybe personal, corporate, philanthropic or driven by some other factor that helps achieve the desired engineering goal. After this creation stage, human intervention in ADS output is not necessary and often entirely removed from the equation.1 Once the algorithm is built, trained, and tested, it is ready to be deployed in the real world, subject to all the chaos that comes with reality.

Public discourse around ADS has increased through recent news regarding Roger Stone, a prominent Republican political consultant and lobbyist, who was convicted of seven felonies and sentenced to around four years in federal prison. Attorney General William Barr and the Department of Justice (DOJ) decided that Stone’s convictions should remain in place, but the sentence did not have to reflect the prosecution’s recommendation of nine years.2 In every federal criminal case involving a defendant who has been convicted, U.S. Sentencing Guidelines are used to prescribe sentences or punishment in broad terms with the goal of ensuring equity.3 The guidelines offer a calculation of what the sentence should be within a range of months based on the offense and the characteristics of the offender. This range is then plotted on the U.S. Sentencing Table, which is a grid where the offense and offender characteristics are given numerical values. The offense numerical value is plotted on the vertical axis and can be increased or decreased by various factors such as threat of

27 Ibid.
violence or pleading guilty. The offender’s characteristics numerical value is plotted on the horizontal axis and can be increased or decreased by evaluating the defendant’s criminal history with input such as how many prior convictions the offender has and how many crimes the offender has committed while on probation, to name a few. The point at which the offense level and criminal history category meet generates the recommended sentence.

Although humans currently administer the U.S. Sentencing Guidelines, this type of nonautomated algorithmic-based decision-making process lends itself as one of the more basic examples of what ADS can do and where ADS are deployed in society.

However, dissimilar to many other ADS discussed below, the U.S. Sentencing Guidelines have explainability. Humans operate the guidelines, and fashion all judgments remaining at the heart of every decision. Hence the decisions produced from these guidelines are explainable to humans, empowering the U.S. Sentencing Guidelines to be a more acceptable form of ADS- despite their controversial record with overriding sentence guidelines. There are many other types of ADS percolating throughout individuals’ everyday lives, but the most powerful and criticized models are Artificial Intelligence (AI) and Machine Learning (ML).
B. Artificial Intelligence

AI, as defined by MIT Technology Review, is “the quest to build machines that can reason, learn, and act intelligently.”\(^1\) It is a quest that started with Turing and has been around for many decades but has barely scratched the surface of its potential. AI, as an umbrella term, is used to describe much of the innovation seen in machine intelligence today, although many technical approaches fall under this field of study. The theory behind AI is to develop computer systems that can perform cognitive functions conventionally associated with the human mind. Some examples of these functions include visual perception, learning, language translation, problem-solving, speech recognition, and, most importantly for this paper, decision-making. AI research seeks to display in machines an intelligence comparable to the natural intelligence possessed by human beings. Engineers model AI devices to be intelligent agents that can perceive their environment and take actions that maximize their chance of successfully achieving their goals.\(^2\) AI as a broad field of academic study can be broken down into subfields based on technical applications. Since AI draws on so many different academic disciplines, the space for this division is vast and continually growing.


\(^{29}\) David Poole, Alan Mackworth, & Randy Goebel, “Computational Intelligence: A Logical Approach” (1998).
C. Machine Learning

Machine Learning (ML) is a practical subfield of AI that has garnered much attention recently for its advanced computing capabilities. On a technical level, ML is a method of data analysis that automates analytical model building.\(^1\) It does this by iterating through data autonomously and adapting to new data by relying on previous computations. The algorithm is trained to learn what some unknown variable looks like. Then that association is assigned a numeric value through various linear algebra calculations and told to produce repeatable results within a given probability. Matrix operations can be used directly to solve key computations or provide the foundation to use more complex operations in the description of a machine learning method.\(^2\) To further explain how ML functions, consider Privee, a software architecture that analyzes website privacy policies. Privee uses ML to perform automatic classifications on inputted privacy policies by checking if the inputted privacy policy matches privacy policies in its repository.\(^3\) If so, the policy is labeled with an overall letter grade that is based on the classification metrics it was trained on and displays the label to the user. If the inputted privacy policy does not match privacy policies in its repository, the policy is evaluated by either the rule classifier, the ML classifier, or both to determine the policy’s classification.\(^4\) Once the classification is determined, the algorithm trains itself on the new policy and stores that classification with the other training policies it has learned, completing the nonlinear feedback loop. Then the policy is labeled and displayed to the user.

The foundational idea for ML arose when AI based systems were trying to solve the problem of how to address hard-coded programs.\(^5\)

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33 The concept of classifiers will be discussed infra in the Bad Classifier section. Reference Bad Classifier section.
D. Supervised & Unsupervised Learning

Like AI in general, ML has a broad array of methods it can deploy in programs, two of them being supervised learning and unsupervised learning. Supervised learning uses data sets containing training examples with associated correct labels as prior knowledge to anticipate what the output will be. The program learns the relationship between the training example and the associated correct label by identifying patterns in the data and forming heuristics. Heuristics are techniques designed to expedite the problem-solving process and find approximate answers. They are short-cut rules of thumb that guide decision-makers to a satisfactory solution, not an optimal or perfect one. In ML, heuristics are derived from the compilation of previous experiences that make up the algorithm’s general information base.

Once a supervised learning program forms its heuristics, it can apply that understanding to new examples the machine has not seen before and emit a label for those new matches. The data presented in new examples can be a discrete or continuous value. If the data presented is a continuous value, meaning it can take any values, the system will parse it through a regression where the input is mapped to continuous output. Continuous, in this context, refers to the mathematical concept that between any two possible numbers there can always be another number. Between 6 and 7 is 6.5, between 6.5 and 6.6 is 6.55 and so on without exception. If the data presented is a discrete value, meaning it can take only a specific value, the system will parse it through classification where the input is mapped to output tags. Discrete values have specific numeric or non-numeric values such as 6 or “book.” There is no obvious way to merge, average, or combine these discrete categories because the values are independent points disconnected from each other.

Unsupervised learning starts with unlabeled data and performs learning tasks that output clusters of items that are similar to each other in some mathematical sense. It does this without trying to attach a label or particular name to any of the output clusters of items. Depending on the

purpose of a project, unsupervised learning can distinguish pattern structures from input data through clustering, dimensionality reduction, and representation learning.\(^1\) Clustering, a popular learning task in unsupervised learning, can group old and new data by similarity such that points in different clusters are dissimilar while points within a cluster are similar.\(^2\) Dimensionality reduction, another popular learning task in unsupervised learning, tries “to reduce the complexity of the data while keeping as much of the relevant structure as possible.”\(^3\) The fundamental difference between supervised and unsupervised learning lies in the formation and understanding of the ground truth of the program. Unsupervised learning starts without a notion of ground truth and applies various mathematical techniques to draw patterns out in the data. The program bases its clusters off of a mathematical equation that it derives from inputs’ similarity. Supervised learning, on the other hand, starts with a notion of ground truth that it is taught through training data and finds patterns in the data based on its training. This type of program attaches specific labels to unknown sets of input based on the clusters of output.

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38 Ibid.
39 Ibid.
E. Neural Networks

A popular data modeling structure underlying many ADS frameworks is neural networks. The concept of neural networks was first proposed in 1943 by Warren McCullough and Walter Pitts, two University of Chicago researchers, in their paper *A logical calculus of the ideas immanent in nervous activity*.¹ Research on neural networks followed the peaks and gullies that came with the AI winters of the twentieth century but has enjoyed a massive resurgence recently thanks to the increased processing power of specialized graphics chips used for video on all modern computers.² Neural networks have neurons, inspired by biological neurons, that represent mathematical functions. Originally, neural networks were an attempt to model the brain, but today, with developed understandings of the brain, it is clear that the brain and its neurons are more complicated and work differently than scientists initially thought.

The neural network can consist of millions of simple processing nodes that are densely interconnected and organized into layers of nodes that are “feed-forward,” meaning the data fed into them moves through in only one direction.³ The neural network is organized into layers of these nodes with outputs from one layer connected to inputs of the next layer.⁴ An individual node can be connected to several nodes in the layer beneath it and above it, receiving data from nodes below it and sending data to the above nodes.⁵ When a network is active, a node can receive data, a different weighted number, over each of the connections beneath it. It can then multiply these numbers by the associated weight assigned to each of the incoming connections. After all the products of the incoming connections have been calculated, the node can add them together and determine if that calculated weight meets the threshold to send the weight up to its outgoing connections.

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³ Ibid.
⁵ Ibid 37.
On a more general level, each neuron in a neural network has a mathematical function that calculates a weighted sum of its inputs which is then fed into a complex non-linear function. This function passes data through successive layers until it arrives radically transformed at the output layer. The structure learns by starting with random values set for its weights and thresholds. It takes sample input or training data and adjusts its neurons’ weights based on the network’s performance on this data. The weights and thresholds are adjusted continuously until the example input consistently yields homogenous output. The adjustment of its neurons’ weights is a crucial component of a neural network’s ability to learn, as the calculation of new weights is how the network improves itself. Thus, this component of neural networks is at the heart of modern advances in ML.
3. FOURTH AMENDMENT HISTORY

The Fourth Amendment to the United States Constitution was added as a part of the Bill of Rights on December 15, 1791, but its founding sentiments arose in the 1600s when colonists began reacting to Britain’s abuse of power. Seventeenth-century American colonists were typically well-educated Englishmen aware of their rights as British citizens. These rights covered the maxim “Every man’s house is his castle” as demonstrated in Semayne’s case, argued in 1604, which established the notion of a search warrant.¹ These assumed rights also included limits to executive power with respect to searches as revealed in Entick v. Carrington (1765), a landmark case in UK constitutional law which decreased the scope of executive power and established civil liberties for the people.² So, when colonists’ homes were invaded under oppressive “writs of assistance,” they felt Britain was abusing its warrant power, and this motivated them to include protections from such violations in the Bill of Rights.³

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴

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¹ Semayne’s Case, Rep 62 5 Co Rep 91 a Cro Eliz 908 Moore KB 668 Yelv 29 77 ER 194 (1604).
² Entick v. Carrington, 19 Howell’s State Trials 1029, 95 ER 807 (1765).
³ “In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize “prohibited and uncustomed” goods and commanding all subjects to assist in these endeavors. Once issued, the writs remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism. Otis lost and the writs were issued and used, but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.” History., Legal Information Institute, Cornell Law School, www.law.cornell.edu/constitution-conan/amendment-4/history.
⁴ U.S. Const. amend. IV.
This language addressed the colonists’ ultimate concern of protecting citizens’ privacy and safeguarding their freedom from unreasonable intrusions by the government. The scope of this amendment does not include protection from all searches and seizures, only searches and seizures that can be seen as an abuse of power by the government by not meeting the “probable cause” standard to the satisfaction of a neutral magistrate. This provision carries the original sentiments of the founders who were responding to direct government abuses of power and were not challenging the general grounds of government searches and seizures. Protected warrantless searches and seizures include instances where an officer asks for and is given consent to search, searches that are incident to a lawful arrest, probable cause, and exigent circumstances.¹ For a citizen’s Fourth Amendment right to have been violated, the citizen must prove that a justifiable expectation of privacy was arbitrarily violated by the government. Proving this arbitrary violation can be difficult when the violation arose from probable cause, a standard vague by design.

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A. Probable Cause

One of the first definitions of probable cause was put forth by Chief Justice Marshall in *United States v. Aaron Burr* (1807): “I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it.” This early definition laid the groundwork for the idea that probable cause is inextricably linked with “good reason” or “reasonableness,” as the modern term encapsulating the iteration of this concept. However, after this early and still vague definition, the courts did not enforce probable cause under the Fourth Amendment until about 150 years after their inception. The Bill of Rights stood as a formal declaration of federal rights and thus as held in *Barron v. Baltimore*, 32 U.S. 243 (1833), the Bill of Rights only applied to the federal government, not the states. This position changed in the latter half of the nineteenth century when the courts started interpreting the Fourteenth Amendment after its adoption in 1868.

The Fourteenth Amendment was born out of concerns regarding citizenship rights and equal protection under the law as they related to former slaves following the Civil War. As one of the Reconstruction Amendments, the Fourteenth Amendment was monumental in broadening federal enforcement within state boundaries through the Due Process Clause and the Equal Protection Clause. The Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³

The Due Process Clause prohibited states and local governments from

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52 U.S. Const. amend. XIV.
depriving persons of life, liberty, or property without a fair procedure. The Equal Protection Clause required each state to provide equal protection under the law to all people, including all non-citizens, within its jurisdiction. The Supreme Court interpreted both of these clauses in conjunction with the entirety of the Fourteenth Amendment to incorporate most of the Bill of Rights as applicable legislation to be applied to the states as it is to the federal government. This new interpretation was reflected in *Chicago, Burlington and Quincy Railroad v. City of Chicago* (1897) and in *Gitlow v. New York* (1925). Both cases applied Bill of Rights protections against the states and it was upheld.

With this new legal precedent, the temperance movement helped institute one of the most notable broad-reaching federal crimes due to the Eighteenth Amendment by banning the production, transport, and sale of intoxicating liquors. Before the Prohibition Era, crimes were mainly contained at the state level. The Courts did not see many cases reach the federal level, and thus very few federal criminal offenses had been tried, so little case law existed. Nevertheless, prohibition ushered in a new era of jurisprudence with the difficulties of nationwide enforcement taking their toll on cities. To help enforce the Eighteenth Amendment, police officers leaned on the Fourth Amendment’s probable cause stipulation for help. Although prohibition formally ended in 1933, officers continued to use the probable cause stipulation to help enforce new liquor laws that arose.

One of the landmark decisions that came out of this was *Brinegar v. United States*, 338 U.S. 160 (1949). Brinegar had a reputation for illegally transporting liquor and drove past an officer parked on the highway with a vehicle that appeared “heavily loaded.” The officer stopped Brinegar, alleged that he saw liquor in the front seat of the car (although Brinegar denied this allegation), and arrested Brinegar, seizing all the alcohol in the vehicle as it was in violation of the Liquor Enforcement Act of 1936. Brinegar challenged his arrest under the Fourth Amendment, asserting that the officer did not have a search warrant for the evidence used against him.

The Court held that “Probable cause exists where the facts and circumstances within the officers’ knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant
Thus the facts presented to the officers who pulled Brinegar over were sufficient to establish probable cause for the search and seizure—hence they were admissible in the trial. This definition of probable cause aligns nicely with Chief Justice Marshall’s 1807 definition making the substance for all explanations of probable cause a “reasonable” ground for belief of guilt, up until this point in legal history.

B. Aguilar v. Texas

Another landmark case shaping the probable cause definition came in 1964 when Nick Alford Aguilar’s home was searched for narcotics on a warrant that had been issued. The warrant was based on an affidavit stating that officers had received reliable information from a credible person.\(^1\) In *Aguilar v. Texas, 378 U.S. 108 (1964)* Justice Goldberg held:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime.\(^2\)

Justice Goldberg is keen to highlight that the process of getting a warrant approved by a judge is embedded into the Fourth Amendment as a safeguard for maintaining the integrity of the investigative process. This distinction forces the warrant process to be subject to objective review by an entity not directly involved with the criminal proceeding, which preserves the founding vision of the Fourth Amendment as a mechanism to stifle government abuse of power. However, in the case of probable cause, which stands as an exception to this safeguard, reasonableness stands at the center of determining whether the search was justified. If an officer determines they have probable cause to search a petitioner, and the petitioner later files to suppress based on this officer’s probable cause determination, the judge presiding over the case will assess the reasonableness of the officer’s probable cause claim, bearing in mind an officer’s ability to abuse the governmental power inherent within their job.

Justice Goldberg understood this reasonableness requirement to establish probable cause and expanded upon this definition by detailing what information can provide the reliability needed to affirm reasonableness. He explains:

\(^55\) Ibid.
Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concludes that contraband, such as narcotics, is where he claims it is, and some of the underlying circumstances from which the officer concludes that the informant, whose identity need not be disclosed, is credible or his information reliable.\textsuperscript{1}

Thus, officers must produce some sort of evidence or documentation that the information an informant is providing is reliable. The form of evidence may vary depending on the case’s specific factual background, but the essence of the evidence must be substantial enough to convince a reasonable person that a crime is being committed where their information suggests.

This holding established a legal guideline for evaluating the validity of probable cause: the magistrate must know why an informant is credible and on what underlying circumstances this reliable informant relied on when providing the information. The added layer of consideration this holding provided to the reasonableness standard that already existed for probable cause determinations is significant when determining the reliability of ADS to establish probable cause. Through understanding the dubious black box infrastructure of many ADS, can the resulting output be considered a reliable informant under this standard?\textsuperscript{2}

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item The concept of black box infrastructure will be defined infra in the Black Box Properties section. Reference Black Box Properties section.
\end{enumerate}
\end{footnotesize}
C. Spinelli v. United States

In *Spinelli v. United States*, 393 U.S. 410 (1969), the courts added another level of consideration to the judicial guideline created in *Aguilar* by introducing a “sufficiency” component to an officer’s affidavit explanation. Similar to *Aguilar*, William Spinelli was suspected to be partaking in criminal activity, illegal interstate gambling, and evidence uncovered by a warranted FBI search was used against him in trial. The affidavit that authorized the FBI’s search warrant was informed by a confidential reliable informant.

Justice Harlan delivered the opinion of the Court, which held that “the informant’s tip, an essential part of the affidavit in this case, was not sufficient (even as corroborated by other allegations) to provide the basis for a finding of probable cause that a crime was being committed.” He supported this holding, stating:

The tip was inadequate under the standard of *Aguilar*, supra, since it did not set forth any reason to support the conclusion that the informant was ‘reliable,’ and did not sufficiently state the underlying circumstances from which the informant had concluded that petitioner was running a bookmaking operation or sufficiently detail his activities to enable the Commissioner to know that he was relying on more than causal rumor or general reputation.

Spinelli’s case raised the question of how to handle insufficient justification provided in an affidavit, particularly concerning when the information is fully or partially corroborated by independent sources. In Spinelli’s case, the affidavit did not give any explanation for why the tip should be considered reliable. It merely corroborated other allegations, and thus the judge had no reason to believe the evidence because it could not pass the *Aguilar* requirement on its own. The *Spinelli* holding added to the *Aguilar* requirement by taking the judicial standard a step further and requiring the magistrate to understand how the informant concluded that a crime had been committed. This development created a two-pronged test known as the *Aguilar-Spinelli* test which established an explainability re

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60 Ibid 45.
requirement to satisfy probable cause. This is significant when determining the reliability of ADS to establish probable cause under the Aguilar-Spinelli judicial guideline because if ADS cannot explain in an intelligible way how it produced a given output, how would the output suffice under this standard?
D. Ybarra v. Illinois

After Spinelli, Ybarra v. Illinois, 444 U.S. 85 (1979) extended the judicial guideline for establishing probable cause to include an individualized suspicion requirement, such that officers must have a particular belief with respect to the person to be searched or seized. Ventura Ybarra was in a tavern where police obtained a search warrant to look for evidence of possession of controlled substances. The officers decided once in the tavern that they would search all patrons present, and upon frisking Mr. Ybarra, officers felt a cigarette pack that ended up containing heroin. The officers charged Mr. Ybarra with unlawful possession of a controlled substance and Mr. Ybarra challenged his conviction.

Justice Stewart delivered the opinion of the court holding:

Even though police possess a warrant based on probable cause to search a location in which a person happens to be at the time the warrant was executed, a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.¹

This particularization requirement added another layer of depth to the probable cause definition by requiring individualized suspicion. Ric Simmons, the Chief Justice Thomas J. Moyer Professor for the Administration of Justice and the Rule of Law at Moritz College of Law at the Ohio State University, describes this particularity requirement as “not merely a statistical likelihood that a suspect is guilty based on his membership in a certain group, but a reference to particular characteristics or actions by the suspect that shows that he specifically is likely to be guilty.”²

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² Ric Simmons, Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our 59 Criminal Justice System, Ohio State Public Law Working Paper No. 362 (July 29, 2016),
“Demographic probabilities” as Arnold H. Loewy, the Judge George R. Killman Jr. Chair of Criminal Law at the Texas Tech School of Law, calls it, “are insufficient to create probable cause or reasonable suspicion; the police must also notice something specific to the defendant to create the probability as to him.” The presence of additional factors that are specific to what the suspect does in terms of the case, not who the suspect is, becomes a critically important concept for establishing probable cause under the Fourth Amendment. This is significant when determining the ability of ADS to establish probable cause under the particularized suspicion requirement of the Fourth Amendment because if ADS is fundamentally based on generalized statistical probabilities and likelihoods, how could its output satisfy this standard?
By 1979, the probable cause standard encompassed a reasonable, explainable, and individualized ground for an individual to believe that another person was guilty of some crime. However, *Illinois v. Gates*, 462 U.S. 213 (1983) reassessed this standard by taking a closer look at the rigid two-pronged test instituted after *Aguilar and Spinelli*. The Bloomingdale, Illinois Police Department received an anonymous letter that alleged that Lance and Susan Gates were trafficking drugs. The letter stated when the drugs were being moved, how they were being moved, and where the Gates kept them, among other details. Police officers acted on the anonymous letter’s tips and confirmed the drug trafficking allegations.

A search warrant was obtained based on the Bloomingdale police officer’s affidavit which included a copy of the anonymous letter. Officers searched the Gateses’ home and automobile to find the drugs and other contrabands. Prior to the trial, the Gateses moved to suppress evidence seized during the search, and the trial court approved, ordering the suppression of all items seized. The Illinois Appellate Court affirmed this decision on the holding that the anonymous letter and affidavit were inadequate to sustain a determination of probable cause for issuance of a search warrant under *Aguilar* and *Spinelli* since they failed the two-pronged test.\(^1\) The anonymous letter failed the test because it “provides virtually nothing from which one might conclude that its author is either honest or his information is reliable [and] gives absolutely no indication of the basis for the writers’ predictions regarding the Gateses’ criminal activities.”\(^2\)

After receiving briefs and hearing oral arguments regarding the questionable validity of the Bloomingdale Police’s search warrant, Justice William Rehnquist delivered the decision of the Supreme Court in favor of the State of Illinois. Justice Rehnquist questioned:

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, should to any extent be modified, so as, for example, not to require the exclusion of evi

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65 Ibid.
dence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.¹

This line of questioning led to the decision to overturn the rigid two-pronged test established under Aguilar and Spinelli in favor of the more flexible “totality of circumstances” approach. This approach placed significant value on independent police work that corroborated details of an informant’s tip, thus shifting the probable cause standard to a “fair probability” on which a reasonable and prudent person would act.

The adjusted standard to establish probable cause under the Fourth Amendment created in Gates reflects a shifting affinity towards considering reasonable intuition. A qualitative legal standard such as “fair probability” allows judges to account for facts missing in police affidavits instinctively. Under this definition, probable cause means, after assessing the totality of circumstances, it is with a fair probability that an individual can assume contraband or evidence of a crime will be found if searched. The judicial privilege of accounting for missing facts intuitively is important for establishing probable cause under the Fourth Amendment because it values human instinctive feeling over conscious intelligent reasoning when determining probable cause. This is significant when determining the capability of ADS to establish probable cause under the totality of circumstances approach because, if ADS can only simulate conscious intelligent reasoning and not human instinctive feeling, how could its output fulfill this approach?

⁶⁶ Ibid.
F. Ornelas v. United States

Ornelas v. United States, 517 U.S. 690 (1996), similar to Gates, brought up another new perspective that compelled an introspective look at the then current probable cause definition. Detective Michael Pautz of the Milwaukee County Sheriff’s Department noticed a car with California license plates in a motel parking lot. He recognized the car as a popular model for drug couriers because it was easy to hide drugs within the interior and noted that California was a “source state” for drugs. He radioed his dispatcher to inquire about the car’s owner and was informed the car was registered under either Miguel Ledesma Ornelas or Miguel Ornelas Ledesma.

Upon checking the motel registry, Detective Pautz discovered that an Ismael Ornelas accompanied by a second man checked into the motel with no reservations. He called his partner, Detective Donald Hurrle, who came to the scene to assist Detective Pautz. Together they contacted the local office of the Drug Enforcement Administration (DEA) and asked them to run Ismael and Miguel Ornelas names through the Narcotics and Dangerous Drugs Information System (NADDIS), which is a federal database of known and suspected drug traffickers. Both names appeared in the databases, confirming that Miguel and Ismael were drug dealers. The officers then summoned Deputy Luedke and the department’s drug-sniffing dog, to the scene to replace Detective Pautz.

Detective Hurrle and Deputy Luedke waited at the scene until the petitioners emerged from the motel and got in the car that Detective Pautz had originally noticed. Detective Hurrle and Deputy Luedke approached the car and asked if the petitioners had any illegal drugs or contraband in their possession to which the petitioners answered no. Detective Hurrle asked for identification and was given two California drivers licenses identifying the petitioners as Saul Ornelas and Ismael Ornelas-Ledesma. After confirming their identities Detective Hurrle asked if he could search the car and the petitioners consented. Deputy Luedke noticed a panel above the right rear passenger armrest had a screw that was rusty, which indicated to him that it had been removed at some time. He dismantled the panel and discovered drugs, prompting an arrest of the petitioners.
The petitioners filed pretrial motions to suppress the evidence found during the search alleging the officers violated the petitioners’ Fourth Amendment rights by conducting the search without a warrant and detaining them in the parking lot. Chief Justice Rehnquist upheld the magistrate’s ruling, which acknowledged the consent given by the petitioners to search the car did not authorize the officers to search inside the panel under Seventh Circuit precedent. They also acknowledged that when the officers approached the petitioner’s car, a reasonable person would not have felt free to leave the scene, so the statement of consent could be considered coerced, and the encounter is considered an investigatory stop. Investigatory stops are permissible under the Fourth Amendment if they are predicated by reasonable suspicion to stop the vehicle and probable cause to perform a subsequent warrantless search of the vehicle. Therefore, for the warrantless search to be legal in the absence of valid consent, a neutral magistrate must support an officer’s claims to reasonable suspicion and probable cause.

In arriving at this holding, Justice Rehnquist explains the court’s standard for reasonable suspicion and probable cause by stating:

articulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act… The principal components of a determination of reasonable suspicion or probable cause [for investigatory stops and warrantless car searches] will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.¹

This standard follows the totality of circumstances approach which takes all-things-considered into a determination of probable cause from the perspective of an objectively reasonable police officer. Police officers are subjected to many variations of crimes in their line of work that allow

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them to look at the historical facts of an incident and infer varying levels of guilt from their experience. This inference from experience allows officers to operate within a similar framework that is used in the judicial branch of government, as judges rule based on precedents set in previous cases in order to maintain fair application of the law among all petitioners.

In this case the factual background that informed the police officer’s inference to decide whether probable cause existed was the NADDIS data, the model of the car, the issuing state of the license plate, the location of incident, the time of year, the nature of the motel check-in, the body language of the suspect, and finally the loose car door panel. The confluence of these factors created the context under which a reasonable police officer could draw an inference of guilt based on their experience in such a line of work, whereas a layman could view the confluence as mere coincidence and the loose panel as general automotive wear and tear that comes with time. This is significant when determining the capability of ADS to establish probable cause under the totality of circumstances approach because, if ADS was given the same factual background to establish the necessary case-specific context, would it be able to make a reasonable police officer inference, or would it fall short and view the scene with a layman’s perspective?
G. Florida v. Harris

*Florida v. Harris, 568 U.S. 237 (2013)* was another case that compelled an introspective look at the then-current probable cause understanding with specific regard to who or what can influence probable cause. The case centered on the reliability of a narcotics dog during a routine traffic stop. Officer Wheetley pulled over Clayton Harris for a routine traffic stop, prompted by an expired license plate, when he noticed an open beer can and Harris’s nervous demeanor. This prompted Officer Wheetley to ask Harris’s consent to search the vehicle to which Harris refused. Officer Wheetley proceeded to execute a “free air sniff” test with Aldo, his narcotics trained dog, who alerted at the driver’s-side door handle. Aldo’s alert led Officer Wheetley to conclude he had probable cause to search Harris’s vehicle, which turned out not to contain any of the substances Aldo was trained to detect. However, Officer Wheetley did find ingredients for manufacturing methamphetamine and arrested Harris on illegal possession of those ingredients. Harris was released on bail and in a subsequent stop, prompted by a broken brake light, was administered another “free air sniff” test by Aldo. Aldo again alerted at the driver’s-side door handle but nothing of interest was found this time.

In Harris’s suppression hearing, his attorney focused on Aldo’s performance in the field rather than Aldo’s extensive drug detection training and its respective merit. The trial court denied Harris’s motion to suppress the evidence on the grounds they believed the officer had probable cause, but the Florida Supreme Court (FSC) reversed the decision and held that in every case, the officer must present an exhaustive set of records outlining the dog’s reliability, specifically the dog’s field performance records. Without the dog’s field performance records, the FSC held that an officer would be unable to establish probable cause to search the vehicle. This holding is the antithesis of the totality-of-the-circumstances approach and is inconsistent with the “flexible, common-sense standard” of probable cause previously established by the Supreme Court of the United States, thus the ruling of the FSC was reversed.

The FSC held, “[W]hen a dog alerts, the fact that the dog has been
trained and certified is simply not enough to establish probable cause.”¹ To prove a dog’s reliability, the FSC believed that more supporting evidence needed to be produced such as:

- the dog’s training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog’s reliability.²

The FSC continued by stressing the need for “evidence of the dog’s performance history,” including documentation revealing “how often the dog has alerted in the field without illegal contraband having been found.”³ False positives, as believed by the FSC, could help to expose dangerous confounding factors that influence a drug detection dog’s ability to accurately do its job and thus problematizes its reliability.

Justice Kagan delivered the opinion for a unanimous Supreme Court of the United States in which it disagreed with the FSC’s holding based on the rigid evidentiary checklist it required to establish probable cause. She notes that “an alert cannot establish probable cause under the Florida court’s decision unless the State introduces comprehensive documentation of the dog’s prior ‘hits’ and ‘misses’ in the field.” Justice Kagan contests this notion on the precedent that a gap in the factual background for establishing probable cause can be compensated for by other strong indicators of reliability. She continues by refuting the false positives argument presented by the FSC by introducing the concept of false negatives that would be impossible to capture in field data. False negatives could occur if a dog failed to alert to a car containing drugs, if a dog alerts for a spot where drugs were previously held in a car that still has residual odor, or if a dog alerts to a car containing drugs but the officer cannot find them and thus deems there are no drugs in the car, among other things. Through this Justice Kagan demonstrates how standard training in controlled environments makes a better metric for a dog’s performance because con

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² Ibid.
³ Ibid.

founding variables are limited. This is all to say a flexible all-things-considered approach to probable cause is best and remains the best approach because it gives police and magistrates proper discretion to do their job without bureaucratic handicaps.

Moreover, Justice Kagan added that, “a defendant must have an opportunity to challenge such evidence of a dog’s reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses” and they “may contest training or testing standards as flawed or too lax, or raise an issue regarding the particular alert.” If all these facts (viewed by a reasonably prudent person) would lead them to conclude that a search would uncover evidence of a crime, then probable cause can be established. This is significant when determining the capability of ADS to establish probable cause under the flexible all-things-considered approach because, if a defendant has the right to interrogate ADS reliability, how would it go about such a task considering the technical limitations of current technology?

71 Ibid.
72 Limitations of current technology will be discussed infra in the Limitations of Technical Approaches section. References Limitations of Technical Approaches section.
H. Explainability

From the signing of the Bill of Rights to the twenty-first century, the probable cause definition has grown, shifted and adjusted to the changing times. Brinegar determined probable cause to be a reasonable ground for belief of guilt. Aguilar and Spinelli expanded this to include explainability, making the standard for establishing probable cause include an explanation of the reasonable ground for belief of guilt under their two-pronged test. Ybarra went a step further and added an individualized suspicion requirement. Then, Gates took a step back and reexamined the probable cause definition, abandoning the two-pronged Aguilar-Spinelli test for the totality-of-circumstances approach that required a fair probability on which a reasonable and prudent person would act to establish probable cause. Ornelas followed suit with the totality-of-circumstances approach taking all-things-considered into its determination of probable cause. Harris rounded the probable cause definition out by encapsulating it in a flexible all-things-considered approach while introducing nuanced factors into the equation.

Together these cases reveal that at the heart of probable cause determinations is the idea of a rational agent explaining why a belief of guilt is reasonable. Explainability is a core function of our legal system intrinsic to its operations, exhibited through the structure of our courts having petitioners explain to the judge what happened, attorneys explaining to juries their positions, and judges explaining to petitioners why the outcome of their cases resulted in their innocence or guilt. In terms of determinations of probable cause, a rational agent’s ability to explain the question of why persuasively to another rational agent is the key element in the determination that probable cause exists. The explanation must be sophisticated enough to convince another person that the determination is correct but reasonable enough that the other person can understand the rationale. If an individual comes up with a sophisticated explanation that stems from an advanced understanding of a given truth, but others cannot understand this sophisticated explanation, can this individual’s explanation be validated as true? If an explanation is so complicated that only a specialist can understand the rationale, is this explanation considered permissible?

Considering that a defendant must be convicted by a jury of his
peers and not specialists, accessibility is an essential component of the explainability standards upheld in the courts. Our trial by jury system demonstrates accessibility as an embedded value of explainability in our legal system. Explanations that are accessible to a common man and a specialist alike are the standard by which they can constitute probable cause.

4. LIMITATIONS OF TECHNICAL APPROACHES

Despite all the recent groundbreaking innovations in AI research and computer science, there are still significant limitations that handicap the legal system’s ability to trust ADS wholeheartedly. Foremost among them is a failure to meet the explainability standard required to establish probable cause. ML models, beneath all the advanced programming, are simply instantiations of a predetermined policy. In light of recent efforts to solve this predetermined policy problem, ADS remain error-ridden when faced with edge cases and complexity beyond what the model was designed to tackle.

Take satire as an illustrative example of an edge case with which an algorithm might be faced. Twitter could have an ML algorithm that scans its feeds for propaganda. It comes across an article entitled “CIA’s ‘Facebook’ Program Dramatically Cut Agency’s Costs.” Without the proper context, the algorithm could label this piece as propaganda because it knows Facebook is a technology company, not a CIA program, and thus the article is making a false claim. However, what it misses is the nuanced satirical nature of the piece, criticizing Facebook’s invasive practices that violate an individual’s privacy. ML cannot distinguish complex and nuanced human concepts such as satire and irony from propaganda and hatred because algorithms lack perspective. These concepts do not fit nicely within the puzzled pattern of human life, meaning they do not follow rigid rules. Rather, they are fluid ideas that change based on the person using or viewing them. Individuals can disagree on where the boundary lies between categorizing a piece of work as propaganda or satire, making confusion an endemic part of these concepts’ construction. Thus, if humans can be confused by such concepts, coding algorithms with predetermined policies to detect these concepts is a difficult task.

This illustrative example highlights ADS’ core operational scheme which is designed to find the fact patterns upon which they were trained to act. When straightforward fact patterns ADS were trained to find exist, ADS work wonderfully. However, when a fact pattern does not exist or is hard to determine, ADS are horribly conservative, sticking to their pattern despite potential erroneous output. In these instances, the algorithm must fill in its knowledge gap by generalizing between the policy implied by its training data and the new case. The systems are designed to be accurate, not creative, so they struggle when new vectors that they were not trained on are presented. This lack of creativity stunts their ability to be dynamic when faced with changing circumstances that produce novel fact patterns. Change implies there is no pattern to be detected, and thus the systems fail to do their jobs in this instance.

This pattern-centric approach taken by ADS reduces the value of each individual piece of data down to binary categorizations. ADS can find a pattern, but they cannot determine whether the pattern is a good pattern or a bad pattern and how the pattern can affect real people that are represented by the data points. ADS and systems analogous to it have no way of assigning notions of right and wrong to patterns; these notions have to be taught. Teaching systems to understand concepts of right and wrong is a difficult task when there is no absolute consensus on what differentiates something as right as opposed to being wrong. These notions lay on an evolving spectrum of understanding, hence teaching ADS to patternize this understanding is next to impossible.
A. Black Box Properties

Although we can understand how ADS form patterns, ADS still lack explainability. In many cases, they cannot explain to users how they determined one piece of input fit into one pattern as opposed to another piece of input that did not fit into the same pattern. This lack of explainability is attributed to a property of its design known in the computer science world as the Black Box problem. The Black Box problem touches all types and styles of ADS in some form, taking on different properties in each iteration. The problem describes the void between human understanding of machine algorithms and algorithm functionality.

Yavar Bathaee, a litigator at Bathaee Dunne Limited Liability Partnership (LLP.) and a self-proclaimed AI enthusiast, eloquently defines the Black Box problem “as an inability to fully understand an AI’s decision-making process and the inability to predict the AI’s decisions or outputs.”

He divides the problem into two parts, Strong Black Boxes and Weak Black Boxes. “Strong black boxes,” as he calls them, “are AI with decision-making processes that are entirely opaque to humans. There is no way to determine how the AI arrived at a decision, what information is outcome determinative to the AI, or to obtain a ranking of the variables processed by the AI in the order of their importance. This form of black box cannot be analyzed ex post by reverse engineering the AI’s outputs.”

Weak Black Boxes, on the other hand, are also opaque to humans but can be reverse engineered or probed to determine a loose ranking of the importance of the variables the AI takes into account. “This in turn may allow a limited and imprecise ability to predict how the model will make its decisions.”

Both types of Black Boxes have the capability of functioning outside the creators’ initial goals in ways the creators are not able to understand or predict. The lack of transparency generated by ADS’ Black Box feature is referred to as a system’s complexity. Depending on the problem, an engineer is trying to solve, the complexity of an algorithm can

\[75\] Ibid.

\[76\] Ibid.

\[77\] Ibid.
get incredibly dense. Coupled with all the advancements in ADS that are allowing for computational power beyond what was previously comprehensible, the Black Box problem of ADS is only growing. The Black Box problem helps explain why ADS output cannot establish probable cause under the Fourth Amendment because the lack of transparency generated within these systems cannot meet the explainability requirement needed for probable cause. ADS algorithms rely on geometric relationships that humans struggle to visualize; thus, human audits cannot understand the machine’s decision-making process and therefore render the output unexplainable.

B. Adversarial Machine Learning

Due to ADS’s Black Box nature, figuring out why a system decided to categorize a data point in one way as opposed to another can be difficult. But, coders smart enough to reverse engineer the decision process and understand the machine’s decision can manipulate the system’s design. Adversarial Machine Learning is a technique used to deceive models. It works similar to an optical illusion where coders can intentionally design an input that forces the model to make a mistake.\(^1\) A famous adversarial example is described in a 2015 paper published at the International Conference on Learning Representations entitled, *Explaining and Harnessing Adversarial Examples*.\(^2\) Google researchers Ian Goodfellow, Jonathon Shlens, and Christian Szegedy began with an image of a panda. By adding an imperceptibly small change to the panda image they were able to change the panda image’s classification to gibbon with high confidence. To the human eye the image was still clearly a panda, but to the machine, the image was best classified as a gibbon. Because the machine cannot articulate what made it reclassify the panda to a gibbon, nor can it consider why this question matters, the machine makes this judgment presuming it is correct—though a human would know otherwise. In this benign example it is easy to miss the significance of this flaw, but when considered in terms of an autonomous car that misidentifies a stop sign and speeds


through a busy intersection, the significance of this flaw is magnified.\(^1\)

Adversarial examples illustrate important limitations of ADS, revealing how they can be unknowingly fooled and thus vulnerable to miscalculations. Small imperceptible difference makes ADS unreliable because it is hard for human audits to understand why the system changed its classification when no change is visible to the human eye. There is an incommensurability between the way in which the human brain and ADS interpret the world, which allows for adversarial flaws. Therefore, in a legal sense, machine statements of probable cause can produce inaccurate determinations because their interpretation of the world is vastly different from that of humans.

C. Bad Classifiers

Another limitation of ADS is the possibility for bad classifiers in ML algorithms. Classifiers, in this case, refer to the mathematical function that maps input data to a category. Bad classifiers thus map undesirable correlations that are difficult to detect. In a contrived example produced by a 2016 paper, ‘Why Should I Trust You?’: Explaining the Predictions of Any Classifier, Marco Tuli Riberio, Carlos Guestrin, and Sameer Singh, all researchers with connections to the University of Washington, hand-selected twenty images of wolves and huskies to train a model.\(^2\) The training images of wolves all deliberately had snow in the background while the husky images did not. An additional sixty images were given to the system and the classifier predicted wolf if there was snow or a light background at the bottom and husky otherwise regardless of animal color, position, pose, etc.\(^3\) This bad classifier delineated snow and light backgrounds as the distinguishing factor to determine whether the image was a husky or a wolf.

Any human observer would know that a wolf is not a wolf because of its environment. Rather, a wolf is a wolf because of its physical char
acteristics, anatomy, and other specific traits unique to the wolf species.
A husky similarly is a husky because it has husky physical characteristics, anatomy, and other specific traits unique to the dog species. A human observer would also know that a husky can be found in wintery environments, so making that the distinguishing classifier would be a bad classification.

Although this example was explainable, the room for how nuanced machine thinking can be with bad classifiers is a vulnerable limitation of ADS. Such poor classification metrics speak to ADS’s capability to optimize for wrong utility functions that, in complex systems, would be opaque to humans and can result in harm. Since ADS cannot determine whether they are using a bad classifier or not in their computing the system’s output would not be able to constitute probable cause.
D. Proxy Variables

Similar to bad classifiers, proxy variables, as a technical limitation, prove to be a substantial legal restriction on ADS’s capability to establish probable cause because they are discriminatory in effect. Proxy variables are variables that have a close correlation to the goal of the program but inherently represent something unrelated and often discriminatory. They arise from confounding variables that can produce anomalous correlations and thus faulty output. Confounding variables can be anything such as race or age that are not directly inputted into the system but are accounted for through proxy variables such as zip code or credit score, making the output legally discriminatory and accordingly impermissible in a court of law.¹

Algorithms are very good at discovering proxy variables, although they are not the first to use them for discriminatory practices. Take qualified voters in America throughout fluctuating historical time periods for a perfect example of proxy variables discriminating against marginalized populations. The Constitution does not definitively spell out who is eligible to vote. Over time four amendments have been passed prohibiting the disenfranchisement of certain marginalized demographics. The Fifteenth Amendment, ratified in 1870, prohibited the disenfranchisement of citizens “on the account of race, color, or previous condition of servitude.”² The Nineteenth Amendment, ratified in 1920, prohibited disenfranchisement of citizens “on the account of sex.”³ The Twenty-Fourth Amendment, ratified in 1964, abolished the poll tax qualification for Federal Elections.⁴ Finally, the Twenty-Sixth Amendment, ratified in 1971, prohibited the disenfranchisement of citizens on the account of age, setting the minimum age to 18 years old.⁵ Aside from these federal prohibitions the rest was largely left up to the States. The States leveraged proxy variables such as property ownership, religious tests, free status, poll taxes, literacy tests, and recently incarceration as means to keep marginalized populations from...
voting and maintain disenfranchisement in their elections.\textsuperscript{1} Although none of these qualifications directly related to discriminatory categories, because of institutional inequalities and systemic racism these qualifications correlated exceedingly well with race, ethnicity, age, and gender, among other protected categories. Thus, the implications of these proxy variables had discriminatory effects.

Outside of voting the practice of redlining encompassed a number of proxy variables that correlated exceedingly well with minorities and had discriminatory implications on their communities. Redlining is the process of systematically denying various public and private services to residents of specific neighborhoods through raising prices.\textsuperscript{2} Services such as banking, insurance, mortgages, health care, or even retail businesses are denied to residents because their neighborhoods are deemed ‘riskier’ than similar neighborhoods of different racial compositions, and thus prices in their neighborhood for service providers are higher. Bill Dedman, an investigative journalist for Newsday, won the Pulitzer Prize for his series of articles, *The Color of Money*, where he divulges how banks and other mortgage lenders in Atlanta were discriminating against black neighborhoods. Despite giving loans to the poorest white neighborhoods in Atlanta, Dedman discovered that many banks and other mortgage lenders did not lend in middle-class or more affluent black neighborhoods. He explained how the banks made use of proxy variables such as:

...poor quality housing and lack of home sales in black neighborhoods, fewer applications from blacks, and limitations in the federal lending data… influenced by real estate agents, appraisers, federal loan programs… banking officials said they would make more loans to blacks if real estate agents sent them more black applicants. Real estate brokers who work in black neighborhoods confirmed that they often don’t send black homebuyers to banks or savings and loans, but said that is because

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those institutions have not been responsive and do not solicit their business.\footnote{Bill Dedman, \textit{Atlanta Blacks Losing in Home Loans Scramble: Banks Favor White Areas by 5-1 Margin}, Atlanta J.-Const. 1 (May 1 1988).}

Dedman’s discovery of proxy variables leveraged by many banks and other mortgage lenders in Atlanta revealed a cyclical feedback loop that continuously excluded black neighborhoods from further development and thus perpetuated a toxic brand of racism. Similar to exclusionary voting qualifications, although none of the bank’s lending factors directly related to race, institutional inequalities and systemic racism correlated these factors exceedingly well with attributes of being non-white. Thus, the implications of these proxy variables had discriminatory effects.

Both exclusionary voting qualifications and discriminatory redlining reveal how proxy variables have been embedded in public policy long before computer algorithmic policies started shining interrogative spotlights on them. ADS had nothing to do with proxy variables used in the Jim Crow South or in the banks of redlined Atlanta, yet they were still there. This phenomenon is a call to look introspectively and retrospectively at our society to understand that bias is not something ADS created. However, it is something ADS encodes. Although societal and political norms concerning fairness have progressed over the natural course of human history, the evolution of these norms should not be conflated with their erasure.

Bias is endemic to every known community. People make decisions on what is or is not possibly relevant for an algorithm to be trained on, which means that fallible, biased people are inserting their own values into the “objective” algorithms. “Bias in, bias out,” an adapted version of the computer-science idiom “garbage in, garbage out,” coined by Sandra G. Mayson, an Assistant Professor of Law at the University of Georgia School of Law, encapsulates this notion.\footnote{Sandra Gabriel Mayson, \textit{Bias In, Bias Out}, 128 Yale L. J. 2218 (2018).} Algorithms’ predictions are only as good as the data on which they are trained, so if they are trained on garbage they will produce garbage, and if they are trained on biased input they will produce biased output.
ProPublica, an independent nonprofit newsroom, revealed the implications of algorithms trained on biased data producing biased output in its in-depth review of how proxy variables can manifest in risk assessment scores. The risk assessment scores investigated in ProPublica’s report concern scores that “inform decisions about who can be set free at every stage of the criminal justice system,” from assigning bond amounts to priming judges during criminal sentencing.¹ ProPublica examined risk assessment scores assigned to over 7,000 people arrested in Broward County, Florida, as their case study. These scores were calculated by a product created by a for-profit company called Northpointe. ProPublica’s report detailed how machine bias was disproportionately impacting Black America; Tim Brennan, a research scientist at Northpointe, explains that it is “difficult to construct a score that doesn’t include items that can be correlated with race such as poverty, joblessness, and social marginalization.”² Ruha Benjamin, an associate professor at Princeton University, comments on this problem of machine bias disproportionately affecting Black America in her book, Race After Technology, where she explains how ML is trained on data manufactured through histories of exclusion and discrimination.³ In her book, she coins the phrase “New Jim Code,” which illuminates how biased data reinforces notions of White Supremacy and deepens social inequity. She implores her readers to consider the decisive question, do algorithms reduce existing inequities or make them worse?⁴ Similar to bad classifiers, the room for how nuanced machine thinking can be when such biased data is authorized to produce such random proxy variables is a vulnerable limitation of ADS.

As mentioned previously, algorithms are very good at discovering proxy variables, such as the ones described by ProPublica in their report, but they have no way of accounting for them to produce fair and just outcomes. Proxy variables act as confounding factors that subject algorithms to anomalous and even spurious output. This output can result in discrimination, thus encoding bias in a mathematical sense. ADS have no contextual conception of what makes a proxy variable a proxy variable

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² Id.
⁴ Id.
and thus have no corrective measure to address this kind of discrimination. The intent of the algorithm is to find correlations that facilitate arriving at their goal, not to understand the cause of said correlations and how they may produce discriminatory effects. Thus, this potential for discriminatory output is socially and legally unacceptable, inhibiting ADS from establishing probable cause that could be permissible in a court of law.
E. Human v. Machine Decision Making Process

All the previously mentioned limitations of ADS contain some aspect of how machines arrive at decisions in a manner that is radically different from that which humans employ. This divide in the decision-making process is vital when considering the capacity for machines’ decision output to be viable in court. To better understand this difference, consider how humans arrive at decisions and contrast that with how machines arrive at decisions in order to formulate the differentiating factor(s) that omit machine decision output from legal validity.

The human capacity of “judgment” describes the “various steps we use when trying to reach beyond the evidence we’ve encountered so far, and to draw conclusions from that evidence.”\(^1\) Thus by its nature, human judgment requires a level of extrapolation. To deal with this extrapolation, humans employ different thinking strategies dependent on the format of the data set and the type of evidence being considered.\(^2\) Research in psychology, the scientific field of study that explores the human mind and its functions, suggests that humans make judgments by relying on a small set of shortcuts called judgment heuristics.\(^3\) The two major heuristics we deploy are the availability heuristic and the representativeness heuristic.

The availability heuristic is the strategy of judgment that uses how easily an example comes to mind as the basis for assessing how common that example is in the world.\(^4\) When an individual is faced with a decision, an individual wants their conclusion to rely on not just one observation but on a pattern drawn from various observations that summarize multiple experiences. This summary generally requires a comparison among frequency estimates or an assessment of how often an individual has encountered a particular example. These frequency estimates are central for human judgment, but often the human mind has difficulty recalling an objective record of experience. Humans think of specific cases relevant to the particular judgment at hand, and if the example comes to mind easily, individuals can conclude that the circumstance is a common one. On the

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96 Henry Gleitman, James Gross, Daniel Reisberg, Psychology § 348 (8th ed. 2010).
97 Id. at 353.
98 Id. at 348.
99 Id. at 349.
other hand, if it takes an individual a longer period of time to arrive at the judgment outcome, an individual can conclude that the circumstance is nuanced. For many judgment calls, the availability heuristic strategy works because events that are frequent in the world are likely to be frequent in our personal experience and are therefore well represented in our memories. However, there are circumstances in which this strategy is misleading because the organization of memory creates a bias in what is easily available, leading to an error in frequency, a distorted perception, and inadequate precautions exercised in the present case.

The representativeness heuristic relies on broader knowledge to make some forecast about the decision at hand. This heuristic of human judgment hinges on the categorization of examples assuming that each member of a category is representative of the category and each category is relatively homogenous so that every member resembles every other member. The general uniformity in categories allows us to extrapolate from our experiences what to expect next time and thus allows us to make judgments off this expectation. However, overuse of this heuristic can be dangerous because making one member of a category representative of an entire group ignores atypical cases and can lead to erroneous conclusions.

Although these heuristics provide critical insights for the human decision making process, individuals often rise above these heuristic shortcuts and rely on other more laborious but often more accurate judgment strategies. Humans can think within a dual-process theory of judgment meaning that they can utilize two different types of thinking, one that is fast and efficient in a wide range of circumstances, the other that is slower and takes more effort but is less risky and often avoids errors. Similar to ADS, humans can form patterns from presented situations through the aforementioned heuristics that act as a policy for the human brain to instantiate.

However, what differentiates the human decision-making process
from that of ADS is humans’ ability to recognize patterns outside of what they were taught through utilizing their dual-process theory of judgment. If input from a presented situation correlates with experiences the human mind has seen in the past, the mind can deploy the fast and efficient type of thinking because it is a familiar case, similar to that of ADS. If input from a presented situation is outside what the human mind has previously experienced, humans can take a step back and evaluate the situation, taking the necessary time to come to the best decision possible with the information with which they have been presented combined with the information they already know, vastly different from that of ADS. This reflective action of recognizing what an individual does not know and allocating the needed time and care to figure out the best course of action is a differentiating factor between ADS and human decision-making. Humans’ reflectivity permits refinement and adjustment of their decision-making models for missing information and allows them to change their models on the spot before they make a decision that affects others. This reflective step allows humans to produce an output that is closer to being the right decision where ADS would be blatantly wrong.

This unique trait of the human decision-making process arises from humans’ capability to consider inefficient suboptimal considerations that factor empathy, kindness, and ethics into the equation when necessary. Humans understand that not all questions have a corresponding right answer, or a definitively correct decision output associated with the particular problem. Many times, decisions are convoluted, and the right decision for one person may not be a suitable decision for another person. Considerations that factor in curiosity, exploration, curation, love, or an experience are all inherently inefficient variables that machines struggle to find the value in, yet humans know to be invaluable resources. The human brain also exercises imagination, allowing it to imagine possibilities beyond a training set. These possibilities may seem illogical or improbable but can be conceivable within a given context that if the circumstances were right, they would be able to grapple with. This gives humans a unique ability to deal with fringe cases with which ADS immensely struggle.

As a direct implication of the divide between ADS decision making and that of humans, ADS would not be able to establish probable cause under the Fourth Amendment because human judgment in judicial disre-
tion is an essential part of probable cause determinations, and current technology cannot adequately substitute for wisdom produced by the human mind. Kiel Brennan-Marquez, an associate professor of Law and William T. Golden Scholar at the University of Connecticut School of Law, affirms this view in his paper, *Plausible Cause: Explanatory Standards in the Age of Powerful Machines*, where he argues that statistical accuracy of ADS is not enough of an explanation to substitute for judicial scrutiny.1 He explains the concept of value-pluralism, which assesses “which values are at stake in a given decisional environment and ask[s], where necessary, if those values have been properly balanced.”2 Our judicial system’s practice of navigating complex lines of value-pluralism:

enables judges (1) to consider the plurality of values implicated by the exercise of state power and (2) to resolve conflicts between those values in a context-sensitive way. At day’s end, the rationale for individualized review, costly and inefficient as it may be, is that in some settings we cannot be sure in advance which values will be implicated by the exercise of power. And when that is true, decisionmaking resists automation. Decisions must be subject—or at least susceptible—to case-by-case evaluation in order to ensure that no particular value or set of values subsumes others.3

Human dual-process theory of judgment allows us to grapple with value-pluralism in ways that ADS cannot because of their unimaginative and rigid policy instantiations that are a predetermined and essential part of their structural framework. Despite trans-humanist views of modern advances in technological approaches to solving this problem of predetermination, ADS still fundamentally lack a capacity to make prudent judgments, which is a crucial aspect of a judge’s decision. Therefore, their output cannot establish probable cause under the Fourth Amendment.

107 Id.
108 Id.
F. Thought Experiments

To further illuminate the limitations of current technological approaches let us examine two distinct ML techniques within a legal context. Consider the illustrative example of an imaginary judge who is given an affidavit. The judge feeds the affidavit into a supervised learning algorithm which has been trained on affidavits labeled by humans and learned what characteristics correspond with particular affidavit labels. The algorithm checks if the inputted affidavit matches any previously labeled affidavits that were a part of the program’s training data. The algorithm then can find commonalities across similar classes of crimes through affidavits’ stylized language patterns. For example, drug case’s affidavits typically include the phrases “trafficking,” “conspire,” “possess with intent to distribute,” and “in violation of 21 U.S.C.” among other phrases that can help the algorithm cluster them together. After finding the similarities, the supervised system produces an answer that fits the label it was trained on and accompanies that answer with a confidence level. The algorithm was trained on a corpus of legal data including other affidavits that at least resemble the new affidavit being input into the algorithm, but the algorithm was not trained on the nuances of this case. It may have been trained on previous cases that involved home, car, or office searches but its training set did not include computer searches. How meaningful would the affidavits’ similarities be in this case?

Consider the difference between the physical search of a home, car, or office compared to that of a digital computer search. A physical search and a digital search are approached in different ways, require different specialists, and discover different pieces of evidence. Although the varying evidence may lead to the same conclusion, the narrative each piece of evidence tells is important for informing the judges outcome. If drugs were found in a home, the owner of the drugs could be anyone living in the house or any visitors to the house, with varying degrees of likelihood. If evidence of drug sales were found on a computer, the sale could be linked

to an individual username which could have been hacked or used by someone other than the individual linked to the account, but this likelihood is vastly different from the likelihood associated with the drugs found in the house. It is evident to any reasonable person that the computer search should not match any other type of search because no other type of search is similar enough to be clustered together with a computer search. However, an algorithm may disagree and label the computer search as a match with another type of search because it does not consider the semantics. How useful would the supervised learning output be here to deal with the nuance of a computer search?

In a similar manner, the imaginary judge feeds the same affidavit into an unsupervised learning algorithm which evaluates the affidavit by different metrics. Dissimilar to the supervised learning algorithm that compares the given affidavit with affidavits on which it was trained, the unsupervised learning algorithm looks at the given affidavit and clusters it with other affidavits it finds to be similarly matched based on its own metrics. After it matches a cluster of affidavits, humans have the option to go in and label the clusters. Based on the cluster in which the given affidavit falls, the judge will be able to make a historically consistent decision by following the precedent set by the given affidavits’ cluster.

The algorithm could run for years, producing reasonable outcomes and keeping the judge aligned with precedent. However, some day a defendant could challenge the algorithm’s metrics necessitating an audit of the system. The algorithm could have been clustering affidavits based on key terms such as ‘loitering,’ ‘traffic violation,’ or ‘uncooperative.’ These terms may suggest and, in many cases, may be linked to criminal activity, but the algorithm has no way to check if these clusters are structured on proxy variables that often marginalize minority communities. With this understanding, how would the imaginary judge who feeds the aforementioned affidavit into an unsupervised learning algorithm be able to audit the system to ensure the algorithm clusters the affidavits by a permissible legal standard and not by proxy variables?

A system where this process was in part digitized could prove these thought experiments viable. With society’s growing lean towards digitalization, a future where this possibility is a reality raises interesting
questions about whether ADS’s output can constitute probable cause to issue a search warrant. In the thought experiment produced above, neither supervised nor unsupervised learning algorithms declared definitively if there is or is not probable cause. They merely assisted the judge’s determination by evaluating aggregated historical data. But the validity of this assistance is problematic when considering the limitations of both technical approaches in conjunction with the current operations of modern-day courtrooms in America.

Federal courts very rarely reject affidavits for search warrants; instead, they instruct officers how to rework the initial affidavit so it could be accepted on the next submission. This creates a shortage of rejected affidavits that can no longer teach the algorithm the standard for permissible and impermissible evidence. Fortunately, the courts have a good faith exception, which permits evidence if the law was not clear on a particular point, thus providing the algorithm with affidavits that were not sufficient, but evidence that was permissible. This exception provides a better source of rejected affidavits for the algorithm to determine the standard for permissible and impermissible evidence. On account of these two realities of legal proceedings, there are very few cases where evidence is suppressed because of insufficient affidavits; hence there would not be enough training data for the algorithm to run efficiently and satisfactorily. Digitizing this process with current technology would undermine our constitutional commitment to provide individualized and equal justice for all.
5. CONCLUSION

In *Kyllo v. United States*, 533 U.S. 27 (2001), Danny Lee Kyllo was indicted for growing marijuana in his house through police use of a thermal-imaging device from the street. The case immediately became controversial as the thermal-imaging device was seen as a direct invasion of Kyllo’s privacy and infringement on his Fourth Amendment rights. The Supreme Court agreed that the warrantless use of a thermal-imaging device aimed at a private home from a public street constituted an unlawful search within the meaning of the Fourth Amendment and reversed the decisions of both the Oregon District Court and the Court of Appeals for the Ninth Circuit to deny Kyllo’s motion to suppress the seized evidence.

Justice Scalia delivered the opinion of a divided court offering crucial insight into how to deal with technology in the future constitutionally. He addressed the elephant in the room, asserting, “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”

Justice Scalia then fixated his opinion on the pertinent question of “what limits there are upon this power of technology to shrink the realm of guaranteed privacy.” He came upon the broad idea of “general public use” that because the thermal-imaging device was not in “general public use,” it constituted an intrusion into a constitutionally protected realm of citizen life. Justice Stevens acutely points out in his dissent that in Justice Scalia’s “general public use” explanation, he created an “all-encompassing rule for the future” that shackles the Court to a “prematurely devised constitutional constraint.” This dissent begs the question of what happens when thermal-imaging devices or any technology for that matter become “general public[ly] use[d]” products. Justice Scalia’s timely question concerning the limits of technology on space for individual privacy is complicated by the growing ubiquitous nature of technological devices that are inherently invasive to one’s privacy.

There is something dangerous about buying into the idea that technology’s pervasiveness in generally-used public products can constitu
tionally evolve at the expense of citizens’ right to privacy. I would oppose Justice Scalia’s “general public use” rule, bearing in mind how the average citizen interacts with advanced complicated technological systems. Citizens encounter ADS every day through their habitual use of Google, Netflix, Facebook, and Amazon, among other platforms. Yet many citizens do not entirely understand how Google’s search engine works, how Netflix recommends movies, how Facebook populates its timeline, how Amazon suggests items, and what the implications of using these platforms are for their privacy. Simply because many ADS may appear familiar to individuals does not make them reasonable tools for invasions of traditionally shielded areas of private life. Still, Justice Scalia’s “general public use” rule would determine ADS do not constitute an intrusion into a constitutionally protected realm of citizen life because ADS are universally employed throughout society. How will the courts rectify this tension moving forward?

To start, if ADS become explainable, then the limit bounds of their use in society may change. Explainable AI, as a research discipline for computer scientists and academics, is a growing field as the need for comprehensive automated answers increases. The inaugural Association for Computing Machinery (ACM) Conference on Fairness, Accountability, and Transparency took place in 2018 and has taken place in each successive year since convening to discuss issues including explainable AI. The conference draws academics from all around the world to explore multi-disciplinary approaches to computing machinery ethics. Resulting conversations focused on explainable AI mention potential solutions to the interpretability problem faced when human experts seek to understand AI output. However, none of the proposed solutions are entirely explainable, despite revealing a promising start.

The question of how much individuals can trust explainable AI outputs would still remain, as explainability does not correct all the other vulnerabilities inherent within ADS, such as bias and discrimination. Societal norms change with every new generation born, but ADS encode generational bias without a proper mechanism to adjust to changing generational norms that work as an anecdote to bias. When new generations realize the discrimination faced by their ancestors, they find a corrective apparatus to mitigate such bias. Explainable ADS would need to work as
such a corrective apparatus continuously retraining itself on new data that accurately reflects changes in culture. New data may look different to the system since it was stripped of old biases, but explainable ADS must be capable of adapting to such flux while maintaining satisfactory functionality. This ability to adapt to changing norms must extend to handle new Supreme Court interpretations that update the standard of acceptability in society. Until fully operational explainable AI is common practice in ADS, the above analysis and this conclusion remain unchanged as they are both rooted in the technology of today.

As made evident above, bias is one aspect of ADS’s lack of explainability that disqualifies its output from establishing probable cause under the Fourth Amendment, as anything discriminatory in nature is impermissible in criminal court. Bias is not something ADS created. Rather, it is an endemic feature of communities that ADS encode in their algorithms and perpetuate in their output. Congress needs to pass laws that align with the Supreme Court’s stance on bias starting with the Algorithmic Accountability Act of 2019 that was introduced to the 116th Congress in April 2019 and referred to the Subcommittee on Consumer Protection and Commerce.1 This bill seeks to regulate bias in automated decision-making systems by requiring companies to audit their ML algorithms for discrimination in an impact assessment.2 The impact assessment will provide necessary transparency about how companies approach the question of fairness in their models and thus will bring accountability back into the fold.

The Algorithmic Accountability Act and other bills similar to it will help alleviate the strain that massive innovation placed on the legal frameworks tasked with protecting citizens from the unintended consequences of the Fourth Industrial Revolution. Progressions towards the near future where ADS are used in more contexts connected to criminal justice are not out of the question, and Congressional support through bills will help address the immediate risks posed by such a future. There is a strong

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constitutional case to be made, as demonstrated supra, that current ADS
do not meet the rigid legal explainability standard required to establish
probable cause under the Fourth Amendment because they cannot provide
enough reliable evidence to justify their output. Therefore, under present
legal interpretations and available technology, probable cause determi-
nations established from correlations found by ADS are impermissible in
United States Courts.
MY DATA: A HYBRID PROPERTY-BASED LICENSING APPROACH TO DATA PRIVACY

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Abstract

Individuals’ personal data is increasingly important to data companies such as Google and Facebook. However, the mass collection of personal information leaves individuals with little control over the data that encompasses their identity. Although data privacy may not be top of mind for most data subjects, the freedom with which data companies currently have access to data leads to serious questions about what may occur in the event of large scale data breaches, as well as the extent to which individuals are truly autonomous online. This article explores the different approaches to developing a conception of data privacy that allows data subjects to have greater control and knowledge over the collection of their personal information. This article proposes implementing a licensing system, potentially based in blockchain, that allows individuals to contractually license a revocable right to access their personal data to data companies. This system will incentivize individuals to protect their own data privacy while still allowing data companies to innovate.
I. Introduction

Imagine that you are a regular user of Facebook. You create posts and update your status, “like” other posts and pages, and include information in your biography such as where you work, where you live, and who your friends are. You have not only shared a large portion of your life with friends who may or may not actually know you, but you have also shared this data with Facebook. Currently, increasingly accurate algorithms use data points such as Facebook Likes to predict a variety of characteristics, including “sexual orientation, ethnicity, religious and political views, personality traits, intelligence, happiness, use of addictive substances, parental separation, age, and gender.” \(^1\) This means that even without you directly revealing this information, data companies can infer these personal details about your life. Moreover, Facebook has the power to share any amount of this data with third parties, such as external websites on which you click an embedded Facebook Comment or Share button. \(^2\) As ordinary users of Facebook, individuals do not know exactly what data about them Facebook is sharing with other companies, \(^3\) and this lack of information makes it difficult to decide what data users would consent to sharing. \(^4\)

Imagine a simpler case: your smartphone. A smartphone typically carries much of the same data about a person on one physical device, including pictures, contacts, and the contents of conversations and applications. It would be reasonable to think that one would not want just anyone to look through your smartphone, let alone share this private information with others. Although it may be the case that you would show the data in your smartphone to some people, you would want to know who those people were and control the information that you showed them. However, companies such as Facebook and Google have access to this data on their platforms and can profit from sharing this information with virtually anyone. \(^5\) This is not something general users of these sites consider when quickly clicking “yes” to privacy terms or agreements. \(^6\)

The key problem with this situation is that individuals providing their personal data do not have accurate knowledge about who is gaining access to their data or what data is being collected or transferred. Therefore, data subjects

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4 Winston Smith v. Facebook, Inc., No. 17-16206 (9th Cir. 2018).
do not have control over their personal data even though there is a clear sense in which this data belongs to them. If a user were aware that Google was selling information about them to a company they did not like or simply sharing information that the user intended to share only with Google, they might make a different decision about whether to use a particular Google service or even share that data about themselves in the first place. However, individuals cannot make this decision with incomplete information. To give informed consent to data companies, a user must be a capacitated or competent individual who understands what data is being collected by whom.

Moreover, the current system entails a clear imbalance of power in Google’s ability to gain information from an individual. Today, when the use of services such as Gmail is almost necessary in the workforce and everyday interactions, and when the collection of personal data is essential to these services, it is vital to change the current system to reverse the domination of data companies over individuals. To my knowledge, solutions to protect data privacy have not been analyzed in a decade, with the current scholarship in major law reviews dating back to 2010. Therefore, it is crucial to revisit these concerns and determine the best approach to protecting privacy in the modern technological context.

To reinvigorate this debate, I first explain the three popular types of solutions: the regulatory approach, the market approach, and the hybrid approach. Then, I analyze the benefits and limitations of a hybrid property-based approach with a licensing system, which combines the strengths of each of the suggested hybrid solutions. Finally, I propose a blockchain application of the licensing system that can alleviate the current severe lack of privacy.

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9 In re: Google Cookie Placement Settlement Consumer Privacy Litigation, No. 17-1480 (3d Cir. 2019).
II. Current Landscape

Definitions

In order to explain the current landscape of data privacy protection, I will first provide working definitions of the main relevant terms.

I use the widely accepted definition of personal information provided by the European Union’s General Data Protection Regulation (GDPR):

any information relating to an identified or identifiably natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier[,] or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.11

In short, personal data is information about a person, which would include something like an individual’s location or interests, but not something like their recipe for a favorite food. The recipe does not include any information directly about the person, whereas personal data would allow others to get to know that person in some way. This definition helps clarify that personal data is quite broad but can be meaningfully distinguished from other types of information by analyzing whether the data relates to a specific person. Moreover, any reference to data in this paper will be limited to personal data and information, not public or aggregate data such as that used for governmental or academic purposes.

Yet, as the GDPR’s definition of data privacy is not very specific, the definition of privacy provided by Alan Westin is more apt, defining data privacy as “the ability to determine for ourselves when, how, and to what extent information about us is communicated to others.”12 This definition captures the real problem that users face: lack of knowledge about which third parties are accessing their personal data and what kinds of data they have access to. The American Civil Liberties Union bolsters this idea by stating that “every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes.”13 Essentially, data privacy allows users to be informed about the uses of their data and have control over who has access to their data.

With these definitions in mind, I will now discuss the three main camps of solutions.

12 Alan Westin, Privacy and Freedom 200 (1967).
Regulatory Approach

The regulatory or non-market approach to data privacy involves protecting privacy through regulations and the legal system. Proponents of this approach believe that individuals have a constitutional or legal right to privacy that the government must protect through laws and the court system—similar to rights such as the freedom of speech. Currently, the US government attempts to protect privacy through the tort system, constitutional law, and statutory protections.

William Prosser first introduced the idea that four main torts from the Restatement of Torts govern the area of privacy: the tort of intrusion, the tort of disclosure, the tort of publicity, and the tort of appropriation.\(^{14}\) Protecting privacy through this system requires individuals to file lawsuits against those who violate these torts. For example, in *Dwyer v. American Express Co.*, the plaintiffs challenged the profiling practices of American Express, which collected information about their behavioral characteristics and spending histories. However, the court ruled that this did not violate the tort of intrusion because the plaintiffs voluntarily disclosed this information and did not show how the companies’ practices constituted unauthorized intrusion.\(^ {15}\) Furthermore, the tort of appropriation, which protects against “exploitation of ‘the name or likeness of another’ to defendant’s own ‘use or benefit’” has not been extended to information practices despite numerous cases being brought before the courts.\(^ {16}\) These rulings exemplify how these torts require that plaintiffs meet high standards of harm, which they are often unable to do, such that these cases are very costly to litigate.\(^ {17}\) Worse, this approach is only able to remedy past invasions of privacy and cannot prevent future breaches. Thus, torts have largely been unhelpful to address privacy concerns.

The federal government has never specified a constitutional right to information privacy. Although other constitutional amendments relate to other types of privacy such as privacy within one’s home and over one’s body, the nature of information privacy is quite different and has not been frequently addressed by the Supreme Court. One of the few examples is *Whalen v. Roe*, in which the Supreme Court recognized an “individual interest in avoiding disclosure of personal matters.”\(^ {18}\) This case concerned whether a statute requiring patient data to be turned over to the New York State Health Department was


Nevertheless, the Court limited the privacy protection to certain types of personal information and ruled that the statute was constitutional. Recently, in *Carpenter v. United States*, the Supreme Court recognized an expectation of privacy for individuals’ location data collected by cell phone carriers. Although the decision was narrow, it has the potential to be extended to information collected and exchanged between companies. The ruling, however, was based on the claim against governmental intrusion of individual privacy, not against the cell phone carrier collecting this data in the first place. Additionally, there is no constitutional need to obtain an individual’s consent before the government accesses this data. This ruling, therefore, will likely not help to ensure that individuals have control over their information’s privacy.

The two most significant recent regulatory attempts to protect privacy are the EU’s GDPR, which became enforceable in May 2018, and California’s Consumer Privacy Act (CCPA), enacted in June 2018 and effective since January 2020. Both of these legislative acts codify new rules for data collection and processing and institute penalties for companies who violate them. The GDPR alludes to a property-based solution to data privacy, as it asserts a shift from the perception that companies own the data they collect to one in which companies lease data belonging to the data subject. Thus, a company requires revocable “explicit consent” to collect and process user data. The CCPA does not specify any right of ownership over personal data, but it does emphasize four main rights for California consumers: “the right to know what personal information is collected, used, shared or sold;” “the right to delete personal information;” “the right to opt-out of sale of personal information;” and the “right to non-discrimination in terms of price or service when a consumer exercises a privacy right under the CCPA.” These rights do, however, have some semblance to a bundle of property rights, which will be further explained in the hybrid approach section.

Although these regulations enforce privacy protections that seem to address the issues discussed at the beginning of this paper, they leave compliance to a company’s discretion. This presents two main issues: 1) it may not be possible for the government to track and detect companies who do not comply with these laws, especially as consumers are accustomed to current privacy

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19 *Id.*
20 *Id.*
23 *Id.*
violations, and 2) it will be difficult for customers to understand the varying privacy practices of different companies. Furthermore, the policy approach is inherently reactionary, as there is no incentive for companies to implement effective privacy measures until they are threatened with a significant lawsuit.26

**Market Approach**

The market approach to privacy requires a property interest in personal data which then allows people to exchange data as a good. If data subjects own their data, they can sell it to a company based on their own valuation of the data. Because this approach involves individuals gaining initial control of their data and retaining the choice of selling to a company, proponents of this approach believe that it can help protect privacy.27

To explore this approach, it is first necessary to define property. The commonly used definition from Calabresi and Melamed is “entitlement is protected by property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”28 Essentially, property gives an individual total control to use or sell a particular object or item. This appears to be the sentiment regarding personal data; individuals should “own” their personal data.29

When conceiving of personal information as traditional property, scholars such as Lawrence Lessig argue that the current system allows a strange and seemingly unjust act to occur. He uses the example of a car that is driven into a parking lot where parking is governed by a contract. In the contract, the owner of the parking lot includes numerous rules, including a stipulation that this contract may be changed at any time. When the driver returns to pick up the car, the lot management states that it sold the car, which was allowed under the new contract rules.30 In the United States legal system, individuals have a property right in their cars, so this scenario would not be allowed to occur. However, since there is no protected property right in personal data, these kinds of situations occur normally with personal data. Thus, companies like Google and Facebook can sell individuals’ data within the terms of the privacy policies to which users typically automatically agree. Therefore, users need a legally enforceable right of property in personal data to prevent data companies from using their personal

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29 Id.
Important, when defining personal data as property, Richard Murphy highlights that individuals should be assigned the right to their data in order to control its dissemination and offset transaction costs. Clearly, if the data company owned someone’s data, he or she would not have any control over it and would have limited resources to “buy back” privacy. While data companies might argue that they own the data they collect on their services, this data is initially private to the individual. Only when individuals choose to share their birthdays or locations to Facebook does Facebook even gain access to this information. Jerry Kang further argues that it would be more economically efficient for individuals to own their personal information because the data companies already know what data they want to collect and how to treat it; individuals, on the other hand, currently lack knowledge and therefore have less bargaining power to gain back information. Thus, it makes sense to award the property right to the individual.

Opponents of the market approach, such as Pamela Samuelson, emphasize how this approach presents the issue of free alienability of property and ignores moral qualms about selling one’s data. If data is considered property, once the data is sold, an individual’s control over it is relinquished and the new owner is free to use or sell the data in any way they wish. This seems inherently contradictory to the main aim of data privacy: to monitor and control any use of one’s data and possibly revoke access to data. Furthermore, Samuelson views privacy as a civil liberty, and argues that propertizing information would be “morally obnoxious.” It could lead to access to privacy that is dependent on socioeconomic status, as only those with greater financial means would have an advantage in protecting their privacy. Worse, if personal information is viewed as an extension of the individual, and since it contains the personality traits or characteristics that define a person, a property approach could arguably allow individuals to sell themselves.

Hybrid Approach
The hybrid approach attempts to combine parts of the legal and market approaches to develop a solution that avoids the limitations of each. Specifically, the hybrid approach adjusts the property approach to address the issue of alienability; essentially, data subjects do not want to sell or transfer their property right to the data company, but instead only want to allow the company to access

31 Murphy, supra, at 2381.
33 Samuelson, supra, at 1138.
34 Samuelson, supra, at 1143.
35 Id.
this information for a period of time that the individual can determine.

Most solutions that have been recently proposed fall under the hybrid approach. No market approach can exist without some level of regulation. Furthermore, the traditional regulatory approach is not very helpful, as greater incentives are clearly needed for data companies to respect user privacy and for individuals to know how their data is being treated. Thus, I consider solutions proposed by Paul Schwartz, Pamela Samuelson, and Kalinda Basho, and analyze the benefits and limitations of each.

Schwartz provides one of the most popular hybrid approaches to privacy that has not yet been critically analyzed. Schwartz imagines a different construction of property, which allows the market approach to protect the inalienability of personal data among other interests of the individual. Unlike the exclusive definition of privacy suggested by Calabresi and Melamed, Schwartz argues that property is a bundle of interests. This conception of privacy is widely held to be true, as property rights typically include the right to use the asset, the right to exclude others from using it, and the right to sell the asset. Because the notion of property is legally and socially constructed, Schwartz argues that there is no reason to limit its reach to policy goals. His model for propertized personal information includes five main elements:

1. Limitations on an individual’s right to alienate personal information
2. Default rules that force disclosure of terms of trade
3. Right of exit for participants in the market
4. Establishment of damages to deter market abuses
5. Institutions to police the personal information market and punish privacy violations

These five elements combine the market and regulatory approaches: propertizing information would allow for transfers as in a market approach while establishing damages and policing institutions appears similar to the regulatory approach. In describing property with these five elements, Schwartz is able to respond to many of the criticisms of the market approach. As the last three elements are fairly clear, I will focus on explaining Schwartz’s reasoning behind the first two elements.

38 Samuelson, supra, at 1125.
40 Schwartz, supra, at 2095.
41 Miceli, supra, at 162.
42 Schwartz, supra, at 2095.
43 Schwartz, supra, at 2056.
First, Schwartz defines inalienability with Susan Rose-Ackerman’s definition: “any restriction on transferability, ownership, or use of data.” It is important to note that the commonly used definition of inalienability is “That which is inalienable cannot be bought, sold, or transferred from one individual to another.” Schwartz’s use of “inalienability” is therefore not absolute, whereas the common criticism of the market approach assumes the latter definition that completely prohibits transfer. Schwartz does not respond to the philosophical argument that personal information is inalienable because it is an extension of oneself. Instead, Schwartz introduces a use-transferability restriction to respond to the threat of “downstream data use and subsequent transfers” as well as information asymmetries.

Schwartz’s use-transferability restriction “runs with the asset” and protects the individual’s interests through downstream transfers. Essentially, a transfer agreement only permits transfer for an initial category of use of personal data. The individual has the opportunity to block further transfers or use by unaffiliated entities and, under the default rule, the individual would actually have to opt-in to allow a future transfer to occur. To ensure that users have the appropriate and accurate knowledge to opt in, Schwartz highlights that the government would have to regulate privacy notices. Furthermore, Schwartz notes that when data is transferred, verification of the data is also necessary to determine its value. He cites Hansmann and Kraakman, who provide that “third parties must be able to verify that a given piece of personal information has in fact been propertized and then identify the specific rules that apply to it.” For this, Schwartz suggests the creation of nonpersonal metadata in the form of a tag or barcode to specify the conditions of a particular asset.

The second element of Schwartz’s model is introducing default rules to ensure that the individual maintains choice over data use. He justifies this with the economic principle of information-forcing, which requires “plac[ing] pressure on the better-informed party to disclosing material information about how personal data would be used.” He argues that this should be mandatory to shift the power of knowledge that currently rests with data companies to the individual. The default rule would be the opt-in requirement, which requires companies to obtain

44 Schwartz, supra, at 2095.
46 Schwartz, supra, at 2097.
47 Id.
48 Schwartz, supra, at 2098.
49 Schwartz, supra, at 2099.
51 Schwartz, supra, at 2099.
52 Schwartz, supra, at 2100.
consent and thus incentivizes them to reveal information to secure that consent. Schwartz directly responds to the criticism that such a rule could deter transactions by arguing that it is unlikely that the value of personal data would be lower than the increase in transaction costs, that individuals will likely opt in if given the right incentives and information, and that technology can be leveraged to minimize costs.53

An arguably larger criticism Schwartz addresses is that companies are currently obtaining consent from individuals very easily and might do the same without individuals truly understanding what they are agreeing to. Schwartz points to other consumer protection regimes such as the used car market, which relies on regulation that forces companies to share information.54 Although laws help ensure that companies reveal terms and guarantees, individuals may still not have incentives to understand these terms. For Schwartz and many other scholars, the emphasis is on incentivizing companies to be transparent, but there is an equally difficult issue in incentivizing individuals to protect their data. A market approach to data privacy can capitalize on users’ sensitivity to price by pricing their data. Individuals will be more likely to understand the value of their data when observing these prices and gain an incentive to learn about how companies may be using their data, so they can choose the best option.

Adopting Schwartz’s model requires rejecting the “Exclusivity Axiom... in which the right to trade one’s personal information is viewed as an inexorable part of the underlying entitlement.”55 In other words, a conception of property inherently requires the ability to sell all rights to it. Under Schwartz’s model, he clearly wants the individual to maintain control over the information with the use-transferability restriction to avoid the issue of free alienability. However, critics argue that this defeats the idea of the market approach entirely.56

**Samuelson’s Modified Trade Secrecy Default Rules**

Although Pamela Samuelson is a critic of the traditional market approach because of the issue of inalienability, she proposes a solution that contains market elements in a heavily restricted approach. Because her true issue is with propertizing information, Samuelson advocates for a licensing system based on modifying trade secrecy default rules, for which “there is no need to say that a property right exists in the protected information.”57 Under agreement- based trade secrecy, if A has secret information that B wants to access, A might agree to give B access under certain terms, such as specified limitations on use and payment. The information remains private when firms possess it in this manner

53 Schwartz, supra, at 2105.
54 Schwartz, supra, at 2103-2104.
55 Schwartz, supra, at 2091.
57 Samuelson, supra, at 1153.
because they are in an “implicit or explicit pledge to maintain the nonpublic status of the information.”58 She asserts that trade secrecy is similar to data privacy because it seeks to balance “protecting the interest of the claimant to restrict access or unauthorized use of secret information” with the “interest in giving firms/individuals control over their commercial exploitations.”59 These default terms for trade secrecy also help set and enforce minimum standards of commercial morality, the establishment of which would be beneficial for the data market to govern what companies can ethically do with personal data.60

Mapping trade secrets to personal information makes logical sense, because if companies can have proprietary information about themselves and their products, individuals should have proprietary information about themselves: personal information. Just as trade secrets are valuable to an industry, individuals’ information is ultimately valuable to marketing interests in companies who want to learn about an individual’s preferences.61

Specifically, Samuelson argues that this system is a better solution to protecting data privacy because it avoids the problem of free alienation. When an individual grants a license agreement to another individual or entity, those license rights are non-transferable unless the licensor grants a specific right to sublicense.62 Furthermore, under trade secrecy licensing, if the licensor provides data for a particular purpose, it cannot be used for other purposes without obtaining information for new uses.63 Such a system would thus protect individuals’ right to control access to their personal information both by restricting unauthorized access by third parties and by specifying the exact use(s) of their personal information. Samuelson also provides that trade secrets can be enforced against a third party, meaning that there are right-holding third parties accountable for unauthorized use.64 This licensing approach mirrors Schwartz’s use-transferability restriction under an already established system that would just have to be modified to adapt to personal data.

Though Samuelson clearly wants to avoid relying on propertization of information in her solution, her licensing approach requires an acknowledgment of a property interest in personal data. Samuelson states that courts have sometimes loosely referred to trade secrets as “property” of the firm, as in Ruckelshaus v. Monsanto Co., a case involving a pesticide manufacturer who submitted data and trade secrets to the Environmental Protection Agency, which

58 Samuelson, supra, at 1152.
59 Id.
60 Id.
62 Samuelson, supra, at 1156.
63 Samuelson, supra, at 1155.
64 Uniform Trade Secrets Act §1(2) (1985)
they wanted to publish.\textsuperscript{65} She argues that the more appropriate way to characterize these regulations is as a protection against breaches of contracts and confidential understandings as well as against use of improper means to obtain such information.\textsuperscript{66} However, the establishment of these contracts and defense against use of improper means requires an underlying justification, which appears to be an interest similar to an ownership interest. In \textit{Ruckelshaus}, the Supreme Court held that

To the extent that appellee has an interest in its health, safety, and environmental data cognizable as trade secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment. Despite their intangible nature, trade secrets have many of the characteristics of more traditional forms of property.\textsuperscript{67}

Samuelson fails to recognize that the law is protecting some underlying interest. The Court clearly held that Monsanto had a property interest in the data in \textit{Ruckelshaus}; I therefore try to map this interest to personal information.

In \textit{Ruckelshaus}, the Court stated that “[b]ecause of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others.”\textsuperscript{68} Therefore, public information is not a trade secret and cannot be protected as property. Although it may seem that some personal information is public, as it is shared online, the purpose of personal data privacy is to give users the choice to keep their information from being disclosed to others.\textsuperscript{69} As in the case of trade secrets, there are instances when individuals would like to share their information with others—but without affirmative consent by individuals to share their data, there is as much interest in protecting the secrecy of personal information as in protecting trade secrets.

Another consideration is the fact that the trade secret was protected for a company in the case of \textit{Ruckelshaus} and therefore may not translate to a person’s secret or personal information. However, the Court’s determination of property in Monsanto’s data did not hinge on the fact that it was a company.\textsuperscript{70} If there were any issue with this distinction, this would affect Samuelson’s overall comparison of trade secrets to personal information, as trade secrets are inherently a company’s protected information.

\textsuperscript{65} \textit{Ruckelshaus v. Monsanto Co.}, 467 U.S. 986, 104 S. Ct. 2862 (1984)
\textsuperscript{66} Samuelson, supra, at 1154-1155.
\textsuperscript{68} Id.
\textsuperscript{69} Rochelle C. Dreyfuss, \textit{Do You Want to Know a Trade Secret? How Article 2B Will Make Licensing Trade Secrets Easier}, 87 Cal. L. Rev. 191, 268 (207)
\textsuperscript{70} \textit{Ruckelshaus v. Monsanto Co.}, 467 U.S. 986 (1984).
Kalinda Basho’s Licensing System

Stemming from similar concerns about the current system and need for privacy, Kalinda Basho’s goals for an online privacy system include choice, notification, verification, compensation, ease of use, and enforcement and redress. While these goals align with the interests expressed by Schwartz and Samuelson, Basho’s solution seems to combine portions of each of their solutions. Basho supports licensing, which she defines as “a contractual system based on the exchange of commodities that gives the contracting parties the right to determine the terms of the contract.” Basho’s proposed licensing system allows individuals to retain ownership over their personal information and grant companies revocable permissions to use. This solution would function with agreements similar to that explained by Samuelson with specified limitations on types of information that can be collected, uses of this information, and transfers to third parties with specified payment for these transactions. She cites the Uniform Computer Information Transactions Act (UCITA), which is designed to standardize licensing practices for software, as a framework for transactions with data. She assumes that sending personal information over the Internet is a computer information transaction and can thus fall under UCITA.

In her solution, Basho has reconstructed the traditional market transaction to protect against alienability of property. Because her construction relies on “ownership” over personal information, it is necessary to recognize a property right in personal information. While Basho does not explicitly defend this premise in her paper, adopting her approach requires justification for a property right, whereas Samuelson’s licensing approach does not. As Basho’s approach is similar to Samuelson’s solution, it appears more evident that a property right in personal information must be established to justify a licensing approach.

Basho addresses several limitations of her licensing approach. One important limitation is that businesses would still have the power to only choose to provide services to individuals who would submit their data, which could lead to the exclusion of those who wish to keep their information private from the Internet. However, this is the inherent issue with the nature of services such as search engines and social media, as they require the collection of data from individuals. Furthermore, this might mean that privacy-concerned individuals have to pay higher prices to use services because of their limited data sharing.

71 Kalinda, supra, at 1510-1511.
72 Id. at 1525
73 Id. at 1510
74 Id. at 1525
75 Id. at 1528
76 Id.
Overall, creating agreements with each data company would be time-consuming and costly for individuals to execute,\textsuperscript{77} so Basho advocates for infomediaries: electronic agents who are given individuals’ privacy preferences and can negotiate and complete contracts on their behalf.\textsuperscript{78} These agents could help solve the power imbalance that might remain between individuals and firms, with increased negotiating power when they represent a group of individuals. Electronic agents are a central component of Basho’s solution, as she proposes that they can help both individuals and businesses enter licensing agreements to reduce costs and allow for specialized services to negotiate terms.\textsuperscript{79}

\textsuperscript{77} Samuelson, supra, at 1137.
\textsuperscript{78} Id. at 1528
\textsuperscript{79} Id. at 1533-1534
III. Defense of Hybrid Schwartz-Samuelson Approach

I propose adopting the hybrid Schwartz-Samuelson approach, which blends their proposed hybrid solutions to achieve the best framework to protect data privacy. The structure of this approach will be a licensing system based on a property right in personal information, analogous to trade secrecy, that is regulated by the government. The main contribution of my approach will be a clear incentive for individuals to understand their own conception of privacy, inform themselves about how companies may use their data, and translate their privacy needs to infomediaries who will help protect their interests.

The first component of this approach is a property right in personal information based on Schwartz’s argument. A property right in personal information is justified by individuals’ inherent property right in themselves, and their personal information as an extension of these selves. The idea that people own themselves has been supported since John Locke’s Second Treatise on Civil Government in 1690 and continues to be supported by the constitutional right to privacy over one’s body. Based on the definition of personal information provided earlier, the totality of an individual’s personal information encompasses his or her identity, which is essentially equivalent to their “self”. Similarly to protecting a right to privacy over an individual’s physical body, this justifies protecting a right to privacy over an individual as defined by his or her personal information.

Thus, just as individuals have a claim of ownership over their physical bodies, they should have a claim of ownership in their personal information. Moreover, this claim of ownership should be exclusive to the individual. Although there are some valid arguments that data such as patient health data is collectively owned by the community, these arguments generally support research and advances made for the benefit of the community. The discussion of personal information in this paper is limited to data about an individual considered for individual purposes, not for collective research purposes.

To define this property right, I use Schwartz’s idea of property as a bundle of rights. However, I simplify Schwartz’s approach to specify what rights individuals maintain and which rights they may give to a company. A property right in personal information should include the right to access the information, the right to exclude others from accessing the information, and the right to alter the information. The right to dispose or transfer ownership is not

80 John Locke, Second Treatise of Government, 11 (1690)
82 Angela BallIntyna, How should we think about clinical data ownership? Journal of Medical Ethics (2020).
83 Schwartz, supra, at 2095.
84 Charles Fried. Oxford Essays in Jurisprudence by A.G. Guest, Col. L. REV. 61 No. 7, 1384 -
present in the bundle of rights for personal information because the original owner - the individual whose information this is - cannot surrender control of this information. This qualification of the property right in personal information ensures that individuals cannot sell themselves, if their information is conceived to be an extension of the self. This also protects individuals from making decisions about providing data that they would like to reverse. The only way they would not be able to do this is if they sold their data entirely and gave up this property right.

Schwartz mentions a use-transferability restriction, which I rename as the “right to access.” Obviously, individuals have the right to access their personal information; in fact, this is often information they inherently know. This right to access is the only right in this bundle that an individual can sell to a data company. The company can then use this data to extract value from it. However, this right can be revoked at any time, thus the data should be stored in a secure location to which the company has access, but from which it cannot copy and store data for its own purposes. This is similar to workout equipment at a local gym. If people want to use this equipment at the gym, they can pay a membership fee to access and use it at the gym, but this does not mean they can take the equipment home. Schwartz also specifies that his use-transferability restriction will allow the individual to specify the exact uses of the data. This can be specified in the licensing agreement that establishes the terms of the right to access for the data company.

I advocate for the implementation of a licensing system based on trade secrecy rules as suggested by Samuelson. The personal information market should be structured using a licensing system rather than a traditional market for a good because of the many default rules that must protect personal information and protect one’s privacy. While Schwartz seems to suggest that a traditional market can accommodate the unique needs of personal information, there would be no precedent for an infomediary-like entity to intervene in these transactions. Even in the example of a real estate agent aiding in executing the transactions of selling a house, the house does not have a use-transferability restriction on it, and therefore could be sold more easily than access to one’s personal information. Thus, a licensing approach would better capture the many restrictions on transactions of personal data.

The hybrid property-based licensing system should not adopt Basho’s construction of a licensing approach based on UCITA for three main reasons. First, UCITA is controversial and has not been adopted by every state. Basing the licensing of personal information on an act that only two states have adopted

85 Schwartz, supra, at 2098.
86 Samuelson, supra, at 1137.
87 Schwartz, supra, at 2069.
since 2001 would not be promising for the widespread adoption of this approach. Some of the problems with UCITA are that it allows shrink-wrap licenses which require customers to accept the terms of agreement before reviewing them, reduce consumer rights by not transferring ownership to them, and place the control in the hands of the licensor. This is a significant reason against basing a personal information licensing system on UCITA, because if it has not been adopted on its own, a modified version is less likely to be adopted than a separate law governing solely personal information transactions. Second, UCITA applies mainly to computer information transactions with a company who is licensing software or online access as the licensor. In personal information transactions, the individual is the licensor and thus will have the upper hand in the agreement. Basing personal information transactions on the same rules as those established for computer information companies is likely to cause confusion. Finally, UCITA includes some provisions that are not favorable to individual control of personal information. Chiefly, “section 307 provides that neither party is entitled to any rights in new versions of, or improvements or modifications to, information made by the other.” Although this would work for standard computer information, changes to personal information would be made by the individual, such as a name change or address change. It would be absurd to think that the individual would then lose rights over this updated information. However, there could also be cases in which data companies combine and produce new information by aggregating personal information from a large sample of individuals. Those marketing insights would likely be considered the company’s property because they combined information that, separately, each individual would not have access to.

Samuelson’s construction of a licensing system based on trade secrecy rules would be a better approach to establishing a legal basis for personal information transactions. Trade secrets are a form of a firm’s intellectual property, which fits the notion that personal information is a different form of intellectual property. Trade secrecy law makes the use of trade secrets illegal when they are acquired through improper means or if the acquisition involves a breach of confidence. Furthermore, licensing law accommodates the intentions of the licensor even if they have not explicitly identified a limitation on use. These properties of trade secrecy law map well to the principles of data privacy and thus could be modified to conform to the technicalities of personal data. However, three concerns with using trade secrecy are: that trade names or

89 \textit{Id.}
90 Basho, supra, at 1534.
92 Samuelson, supra, at 1156.
trademarks may actually be more analogous to personal information, reverse engineering to figure out trade secrets is legal, and inadvertent disclosure of trade secrets leaves that information unprotected.  

First, the definition of a trade name aligns closely with the definition of personal information, which identifies a person rather than a business. A trade name is defined as

>a word, name, symbol, device, or other designation, or a combination of such designations, that is distinctive of a person’s business or other enterprise and that is used in a manner that identifies that business or enterprise and distinguishes it from the businesses or enterprises of others.  

In contrast, a trade secret is often defined as a lucrative process for an industry that a company has an interest in protecting. Using trade secrets contradicts my solution’s interest in preserving ownership with the initial owner, because while trade names can be licensed for use to another, they can also be sold to another - which should be avoided for personal data. However, this discussion simply concerns semantics, and as Samuelson intended trade secret default rules to provide a template for a licensing system, the licensing system can be constructed for personal information to account for these technical differences.

The latter two issues also concern the construction of trade secrets specifically and could be adjusted in the personal information context. However, they are still useful to note. In the default rules for trade secrets, although use of trade secrets acquired through “improper means” is illegal, the definition of improper means does not include reverse engineering or inadvertent disclosure. Thus, under trade secrecy law, a business might “accidentally” discover a secret by figuring out a process on its own, or because the company with the trade secret has mistakenly revealed it. When data companies use data they collect, such as search terms, to predict an individual’s characteristics or personality traits, they are essentially “reverse engineering” a person’s personal information. This may be a way to find out undisclosed personal information about an individual with data they did provide, which the licensing system solution may want to prevent by defining reverse engineering as an improper means of acquiring personal information. It would be more difficult to prevent individuals from revealing personal information accidentally, but the main question with both of these issues is whether to penalize data companies from using personal information discovered through reverse engineering or inadvertent disclosure.

93 Miceli, supra, at 202.
95 Id. at 34.
96 Id. at 46.
I argue that it should be illegal for data companies to use such information under personal information default rules, because this would allow for abuses of the licensing system in which data companies could persuade unassuming individuals to reveal their data without proper licenses.

Addressing the Limitations of My Approach
The three main limitations of the Schwartz-Samuelson approach are: that selling a right to access personal information is immoral, that propertizing personal information is not a sufficient incentive to ensure that individuals protect their own privacy, and that high transaction costs will disincentivize parties from participating in the licensing market.

Immorality Argument
One of the main criticisms that Samuelson raised about the property approach was that establishing a property right in personal information simply to protect user privacy would be morally obnoxious. If information privacy is viewed as a fundamental civil right, establishing a market to sell this right to privacy would be inconsistent with this value. Samuelson compares commodifying this right to commodifying voting rights. I have addressed the argument that one should not be able to sell one’s self; however, because my approach allows an individual to sell only the right to access personal information, this criticism can still apply to my approach as it can allow for disparities in the right to privacy based on income inequality.

One example of a constitutional right that has been commodified is the Sixth Amendment right to counsel. Although the Constitution guarantees representation for criminal defendants, there is a large market for criminal defense attorneys to improve the defendant’s chances of succeeding at trial. In fact, hiring a good defense attorney can be crucial to obtaining the other rights promised by the Sixth Amendment such as a speedy and public trial and an impartial jury. Still, it is important to acknowledge that the injustice in the United States criminal justice system could be partially attributed to the market for defense attorneys. Just because this market exists does not mean it is morally good.

Nonetheless, the right to privacy is a unique right, as each individual has a different conception of privacy. While one person may not be okay with revealing their birthday to strangers, another person who likes being celebrated

97 Samuelson, supra, at 1143.
98 Id.
100 Frank T. Beke, Felix Eggers, & Peter C. Verhoef, Consumer Informational Privacy: Current Knowledge and Research Directions, (2016).
by everyone might want to give out this information. Privacy, as I have defined it in this paper, is about understanding how one’s personal data is used and how control is maintained over access to that data. With regards to voting rights, society has an interest in ensuring that each individual expresses their opinion through a vote rather than selling this right to another person with a different opinion. With regards to privacy, society ought to instead afford protection for privacy while allowing some individuals to reveal their personal information if they would like to. Thus, protecting a right to data privacy through commodification of personal data seeks to give individuals the control to protect their own privacy, and a property approach would best allow for the individual to determine how much data they are willing to provide.

In the current state, in which protecting privacy depends on filing expensive lawsuits, the right to privacy appears restricted from disadvantaged individuals anyway. Still, there could be the threat of disadvantaged individuals selling the right to access their data because they need the money, even if this decision does not reflect their privacy preferences. Because this appears to be an issue with systematic inequality in society, I defer this discussion.

Furthermore, in contrast to the freedom of speech, which is a claim by an individual on the government, the right to privacy discussed here is a claim by an individual on a company. A company is recognized as a person under the law as well, and protecting the claim of one person on another person requires law enforcement and the court system to police and adjudicate these conflicts. If “data police” were established to monitor the Internet to protect privacy violations, they would be faced with an extreme amount of complaints by individuals and would likely not have the capacity to deal with minor, “harmless” issues. Instead, transactions enforced by licensing contracts could institute this enforcement with a technological solution, which I will expand on in the next section.

**Insufficient Incentive Argument**

The second criticism of my approach is that it will not successfully incentivize individuals to inform themselves about data practices and protect their own privacy, which is my proposed goal. As I have previously addressed, each transaction between an individual and company is likely to be of very small monetary value. Data subjects may make the same careless decisions that they do when currently providing data just to get to their favorite website more quickly. If individuals are simply motivated by money and do not have a strong sense of their preferences over data privacy, they may choose the option that would maximize the money they receive from the transaction without

considering the relevant risks.\textsuperscript{102}

The ultimate goal is to provide individuals with incentive to inform themselves, but I admit that this would require a significant cultural shift. The intermediate objective in attaining this cultural shift should be to give individuals the best-case scenario to inform themselves and make a sound choice over their data. I do not intend for this approach to severely reduce the amount of data provided to companies; in fact, that would probably decrease society’s overall benefit from data in creating better technology and services. However, if the licensing approach requires the individual to complete more steps to enter into a personalized contract with companies over data access and have the option to then redact access to their data, individuals will be forced to think a little bit more about these decisions and will learn about their privacy preferences over time. This cultural shift will be aided by new platforms to execute these contracts and the introduction of regulations that governments should publicize and educate their citizens about.

High Transaction Costs Argument

Current transaction costs to exchange personal data are very low from both the individual’s and the data company’s perspectives.\textsuperscript{103} The licensing approach would inevitably increase transaction costs, in terms of time if nothing else. However, it is implausible to think that higher transaction costs would disincentivize individuals from providing their data. Ultimately, individuals will want to provide their data in order to participate in online transactions, social media platforms, and the Internet as a whole. The larger issue may be on the side of data companies, especially smaller data companies who cannot afford higher transaction costs and thus may not be able to collect data.\textsuperscript{104} Under the licensing approach, the default rule does not allow companies to sell the right to access data to third parties. Therefore, it is likely that many individuals would not take the affirmative step to allow companies to sell data to third parties, either to protect their privacy or because they were lazy. Smaller companies may be affected from not being able to afford to pay individuals for their data and simultaneously not having access to this data from another party.

The CCPA has limited its application to companies with an income of over $25 million and with a majority of their revenue derived from selling personal information; The licensing system could be limited to such companies.\textsuperscript{105}

\textsuperscript{102} Cynthia E. Cryder, Alex John London, Kevin G. Volpp, George Loewenstein, Social Science & Medicine, Vol. 70, Issue 3, (2010).
\textsuperscript{104} Basho, supra, at 1529.
However, the issue of transaction costs will greatly depend on the implementation of the licensing system for personal information. I recommend using blockchain as an implementation tool in the next section, chiefly because it is likely to reduce transaction costs to a level that would eliminate this limitation.

**Implementing the Licensing System**

Implementing an effective licensing system for personal information requires a technological solution that can enable quick, yet secure transactions for individuals and data companies. This solution must achieve three main objectives: the first is choice, it must provide individuals with a fair set of options of what to do with their personal data and the implications of those choices; the second is control, it must protect the individual’s data under the option that they have selected; and the third is transparency, it must provide a simple record of what is happening with the individual’s data.

One proposed method to implement this system is with infomediaries, which are trusted electronic agents that would act as a filter between individuals and data companies. An infomediator could help an individual and company negotiate a licensing agreement for the individual’s data and then ensure that only authorized personal information is accessed by the company. Using infomediaries could help individuals with recognizing and understanding their choices and keep companies accountable for being transparent with how personal information is being used, achieving the first and third objectives. If the data company is sufficiently transparent about its actions with an individual’s personal information, an infomediator could track the company’s compliance with the individual’s data sharing choice, achieving the second objective of control. However, the data company could easily hide information from both the infomediator and the individual. Infomediaries on the market today, such as Digi.me, attempt to help users gain this control. Yet, the infomediator market has not gained traction, possibly because most individuals still do not recognize a need to invest in protecting their privacy and because infomediaries have failed to build trust with individuals.

Another method to implement the licensing system would be using blockchain, which would eliminate the need for an infomediator to monitor these transactions. Blockchain uses a distributed ledger and cryptography, two characteristics that make it useful for the licensing system. The idea of a

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106 Basho, supra, at 1528.
107 Basho, supra, at 1528-1529.
108 Digi.me, https://digi.me/what-is-digime/
A distributed ledger is similar to a book ledger used to record transactions, but it is distributed to all participants in a network so that everyone can view the transactions. When a transaction is approved through a public verification system, a block containing data about the transaction, such as the personal data transacted, can be appended to the blockchain.\footnote{Andrew Arnold, \textit{Here’s Why More Enterprises Are Considering Blockchain As Data Privacy Solution}, Forbes, (2019), https://www.forbes.com/sites/andrewarnold/2019/01/02/heres-why-more-enterprises-are-consideringblockchain-as-data-privacy-solution/#1dcddeb7eb73.} In order to protect the information on the blockchain, each user receives a public key and private key which can be manipulated to ensure that only intended recipients can receive certain messages.\footnote{Jeff Herbert and Alan Litchfield, \textit{A Novel Method for Decentralised Peer-to-Peer Software License Validation Using Cryptocurrency Blockchain Technology}, (ACSC 2015), p. 29.} The private key is like a personal password that allows one to access one’s account securely. The public key allows others to identify the account they wish to transact with. Smart contracts are computer code that is written onto the blockchain to specify conditions that will allow a transaction to occur.\footnote{Bodo et al., supra, at 315-316.} The code can verify whether a transaction meets these conditions and allow only valid transactions to be executed, which means smart contracts could serve as self-executing licensing agreements.\footnote{Id.} These contracts could then enable payments from data companies to individuals for their personal information at low costs because of their automatic nature.\footnote{Bodo et al., supra, at 316.} A blockchain system could thus allow the licensing system to achieve transparency by allowing all users to observe transactions of personal data on the blockchain, and it could use smart contracts to approve transactions of data that meet the specified requirements provided by the individual.

One example of a transaction on the blockchain under the licensing system would be a user selling the right to access their name, email, and birthday to Google when creating a Gmail account. First, they would encrypt this data and initiate a transaction on the blockchain. The user could send an encrypted message with a decryption key for their data, which Google could then decrypt with its public key and then decrypt the user’s data.\footnote{Guy Zyskind, Oz Nathan, and Alex Pentland, \textit{Decentralizing Privacy: Using Blockchain to Protect Personal 116 Data}, 2015 IEEE Security and Privacy Workshops, (May 2015), p. 2-3.} In exchange for providing this data, Google could pay tokens that have monetary value or value on the Gmail platform, such as the ability to gain more features on email.\footnote{Ariel Zetlin-Jones and Bryan Routledge, \textit{What is a corporate blockchain?}, IBM Blockchain Blog, (Jan 2019), https://www.ibm.com/blogs/blockchain/2019/01/what-is-a-corporate-blockchain/.} To allow for this data sharing to continue as the individual used Gmail, a smart contract could be written to codify their preferences for sharing data to automatically execute...
data-sharing transactions that they would approve. However, the clear issue with this transaction is that on the blockchain, there is no way to protect the user’s right to revoke access to this data, because once Google accesses this data, it can store it and keep it forever. Furthermore, there would be no way to control Google’s ability to pass on this data to a third party, as the smart contract would likely be enforceable only between the individual and Google.

Thus, an alternative use of blockchain might allow Google to never view personal data but only run computations on it and view the results. In this type of transaction, if a user sells their right to data access, Google will not be able to decrypt the data itself. Rather, the decryption key might be used to allow Google to run its algorithms on the data within the blockchain to obtain the results it requires. If Google can only then see the results of its algorithms, it will never have to view the user’s personal information. However, Google would still gain the same value from that personal information and pay for its value. This idea, called federated learning, is already being explored by companies such as Google to ensure privacy while conserving their power.

One serious concern with this approach would be that the purpose of Google’s algorithms is to predict characteristics about an individual to sell to third parties. Thus, the point of Google’s obtaining an individual’s personal information is to figure out more personal information to reveal to third parties. Shielding personal information from Google just for it to use the results of these algorithms means that Google and third parties will likely invade user privacy by predicting characteristics about them. However, there is little to be done to prevent Google from using predictive algorithms to sell information to third party marketers entirely. Preventing Google from viewing personal information directly protects the individual much more than the current system.

To implement a blockchain system, a regulation would still need to be passed either at the national or international level. The GDPR and CCPA are both strong efforts to protect privacy through the regulatory approach, and they intend to establish a right of ownership over one’s personal information. However, a new regulation passed with the licensing system approach would incentivize individuals to become informed participants in the exchange of their personal information by codifying their privacy preferences in licensing agreements and observing the actions companies take with their personal information. There is enormous potential for governments to use blockchain for many essential

118 Bodo et al., supra, at 315-316.
119 Zyskind et al., supra, at 3.
121 Tufekci, supra, at 210.
functions. Although adaptation of blockchain would require education for government officials and the public alike, adapting a licensing system to protect privacy would fit well with these advancements in government function.

IV. Conclusion

As technology improves and data companies require personal information to fuel increasingly complex algorithms and processes, it is crucial that data privacy be carefully examined. The status quo cedes control over an individual’s personal information to a company, but establishing a property right over one’s personal information will return control to the individual. A hybrid licensing system based on the scholarship of Schwartz\textsuperscript{123} and Samuelson\textsuperscript{124} will codify a regulated market for personal information. When such a market is established, individuals will have the incentives to consider their own privacy preferences and make informed decisions about which information they are willing to reveal and which companies they will allow to access their information. While blockchain is a strong potential platform to implement this licensing system, regulatory bodies must work with experts, data companies, and individuals to develop this system to ensure that all individuals can protect their interest in their personal information.

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JUDICIAL REVIEW: UNDERSTANDING CLASSICAL ADAPTATIONS FOR CONTEMPORARY SOCIETY

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Abstract

Judicial review grants the American Judiciary the power to recognize unlawful legislature in accordance with Constitutional rights. One of the main functions of judicial review is to recognize breaches of fundamental rights in order to protect those that have been historically maltreated. Two prominent socio-legal theories for reviewing legislation are the legal perspective, which emphasizes maintaining tradition and customs, and the political perspective, which contextualizes the precedent and modifies to reflect social and cultural growth. This study uses a qualitative coding system to explore the relation between theory and practice with seven Supreme Court cases as the archival data. Our hypothesis was that verdicts in favor of the marginalized plaintiff would include more political statements in their court opinion, and verdicts in favor of the defendant(s) would include more legal statements. These seven cases were selected to include demonstration across time and representation across a diverse range of sociological minority categories. Through the content analysis of each case’s majority, concurring, and dissenting opinions, we were able to explore relations between the theoretical perspectives used and the concluding case verdict. Results demonstrate that two of the seven cases (Brown v. Board and Obergefell v. Hodges) included more political statements, with those also being the cases that ruled in favor of the marginalized plaintiffs. The results exhibit that a more political approach is most effective in addressing marginalization, and that excluding considerations of morality and historic inequality can result in verdicts not favorable to the marginalized.

Keywords: judicial review, marginalization, theoretical perspectives, political, contextualist, legal, traditionalist, originalist, Supreme Court cases, archival
Judicial Review: Understanding Classical Adaptations for Contemporary Society

A considerable amount of society’s most prominent technological advancements were crafted due to the creation of electricity, such as computers, refrigerators, cellular devices, and air conditioners. If Thomas Edison had never constructed the light bulb, modern innovators might have attempted to use candles or other forms of illumination to fashion these devices. It seems satirical to consider using archaic modes of illumination to launch some of the most historic technological developments. Nevertheless, this is analogous to the United States’ current legal structure. Attempting to limit a rapidly evolving society to the confines of the late eighteenth and early nineteenth centuries is equivocal to using a candle as the energy and light source for a refrigerator.

Many legal and judiciary processes were created centuries ago, but social norms have since shifted and the cultural fabric of twenty-first century society is drastically different. If current legislative and judiciary processes are not fully representative of contemporary societal concerns, there can be unfavorable implications for minority communities. Every individual is influenced by legal and judiciary systems in some way, regardless of whether they directly encounter those systems. Personal thoughts, behaviors, and actions are influenced by understandings of laws and how the consequences of breaking these laws have a personal impact. A 2018 study by scholar T. Clark and colleagues found that the progressive perceptions the Supreme Court had in Unites States v. Windsor (2013) markedly influenced how the public then discussed same-sex marriage. Though this conscious consideration of the law may be more prominent in some people rather than others, the underlying thought process is present for most everyone to some degree.

The American legislature can be used as a tool for social change, and to rectify injustices toward marginalized people. Due process recognizes individual protection of rights, and equitable procedures of the law as a legal requirement.

Nevertheless, debates emerging since the latter half of the twentieth century are concerned with the inability to implement fair treatment through the current judiciary process. Our objective with this study is to understand how the classical judiciary process judicial review can be adapted to meet the needs of contemporary society. Conducting archival research on Court verdicts can affirm the role the legal and sciences has in ensuring a legislature that reflects all individuals in a nondiscriminatory manner.

6 Id.
Judicial Review

The landmark notion of judicial review was established in the *Marbury v. Madison* case, which centered around political figures John Adams and Thomas Jefferson, was a debate over political power and enforcement in the executive branch. After John Adams lost the popular vote to Thomas Jefferson in the 1800 presidential election, Congress went through excessive lengths to preserve aspects of federalism prior to the transfer of office. Just four days before Jefferson’s inauguration, Congress passed the Judiciary Act of 1801 permitting 16 new circuit judges and 42 new Justices of the Peace to be appointed. The power to appoint without Jefferson’s approval was established by the Judiciary Act of 1789. This act instituted a Supreme Court but left the subordinate federal courts in the control of Congress.

Though appointed during Adams’ presidency, these new judges and Justices of the Peace were not processed for validation until Jefferson’s term began. Thus, Jefferson’s appointed secretary of state, James Madison, now had the control to deliver the commissioning documents for these newly elected judges. Following Madison’s refusal to deliver the commissions, newly elected Justice of the Peace William Marbury petitioned the Supreme Court for Madison’s compliance. The Supreme Court’s objective was to assess Marbury’s right to receive his commission and Madison’s need to oblige; however, the Justices ultimately considered and questioned the legitimacy of the Judiciary Act of 1789. Eventually, the Supreme Court’s verdict declared that the Judiciary Act of 1789 contradicted the Constitution, which in turn refuted the power in demanding Madison to deliver the commissioning documents.

The Supreme Court recognized that the use of the Judiciary Act as a tool for federalist domination to mandate validation for the appointed judges and Justices was unconstitutional. Nevertheless, there was no establishment allowing them to formally declare the Act unconstitutional. The principle of judicial review was thus established, giving the Supreme Court the power to declare a law unconstitutional.

13 *Id.*
14 Van Alstyne, *supra* note 8, at 3.
15 *Id.* at 9.
The goal of judicial review is to ensure that all individuals are treated with dignity and receive maximum social welfare by recognizing legislation that is unconstitutional and inhumane.\(^{17}\) In *Marbury v. Madison*, the Justices recognized that Marbury’s request for judicial validation and a section of the Judiciary Act of 1789 went beyond the Judiciary’s original jurisdiction permitted in the Constitution.\(^{18}\) The fundamental question was whether Marbury had the authority to demand validation of his appointment as a Justice of the Peace. *Marbury v. Madison* is a classic civil dispute, where Marbury’s complaint was in accordance with the statute of the Judiciary Act of 1789.\(^{19}\)

Judicial review established the principles of grounding one’s legal argument in Constitutional doctrine as well as the principle of *stare decisis*—the implementation of precedents in subsequent judicial decisions.\(^{20}\) However, many socio-legal theorists (labeled theorists hereafter) argue that the preceding introduction of judicial review was to rectify issues that are no longer relevant in our existing society.\(^{21}\) *Marbury v. Madison* and the succeeding legal era was a period of debates over civil disputes and common law, often related to property.\(^{22}\) Though disputes of ownership and tenancy of property still exist today, theorists argue that our contemporary issues revolve around minority rights.\(^{23}\) Some theorists believe that the Supreme Court’s primary emphasis should be examining judicial scrutiny and identifying the minorities that have been historically marginalized.\(^{24}\) The fundamental separation between how scholars in the nineteenth century compared to the twenty-first century perceived judicial review is rooted in dissimilar understandings of societal issues.

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22 *Id.*; Rakove, *supra* note 16; Waluchow, *supra* note 19.
Theoretical Frameworks

There are several theories that scholars argue adequately reflect the intentions of judicial review. Since judicial review is designed to evaluate whether legislation is unconstitutional, theories discuss how perceptions of the judiciary process can produce effective decisions. Perspectives on effectively utilizing judicial review separates theorists into two groups: the legal perspective or political perspective.

Legal perspective:

Perhaps the more traditional approach to viewing judicial and legal processes is the legal perspective, due to their strict adherence to the Constitutional language. The principles of this position prioritize (1) legal positivism, (2) judicial neutrality, and (3) legal hierarchy. Legal positivism is the philosophy that judges have an obligation to the guidelines of the lawmakers ratifying conventions. Substantively, this theory connotes that concerns of justice and social policy should remain separated from legal issues. For example, in University of Alabama v. Garrett (2001), the Court was solely concerned with determining if unconstitutional discrimination was present. The Court’s objective was not if discrimination was present, but rather if there was enough evidence to claim the discrimination as unconstitutional. Similar to legal hierarchy, which argues that morality and ethics are subordinate to factual claims in the Constitution, legal positivism is a prominent framework for the legal perspective. The third conception underlining the legal view is judicial neutrality, which is the theory that judges should treat all litigants equally. Judicial neutrality is an aspect of due process, because they both attempt to prioritize fair treatment through the judicial system.

These three concepts are the structure for the legal perspective, which was the framework for the majority of America’s late eighteenth and early nineteenth century judicial and legal establishments. Maintaining judicial neutrality and legal positivism are perceived as forming the division

26 Reidar Edvinsson, Quest for the Description of the Law, at 5-14 (2009) Doi: 10.1007/978-3-540-70502-4; Nelson, supra note 9; Solum, supra note 25; Whittington, supra note 18.
27 Edvinsson, supra note 26. See also: Nelson, supra note 9.
28 Id.
30 Edvinsson, supra note 26.
31 Nelson, supra note 9.
32 Solum, supra note 25.
between factual evidence and ethical concerns related to empathy.\textsuperscript{33} Returning to \textit{Alabama v. Garret} (2001), the court’s concern was the amount of factual evidence, and they were not considering whether the plaintiffs were being marginalized unless it could determine unconstitutional discrimination.\textsuperscript{34} According to this perspective, decisions should be made through an objective lens to eliminate implicit bias. The legal perspective acknowledges striving toward objectiveness through ensuring judicial decisions are made on the basis of neutrality and legal positivism/hierarchy.\textsuperscript{35}

\textbf{Traditionalist/originalist perspectives.} In addition to the legal perspective, the traditionalist/originalist perspectives emphasize comparable theories. These three terms (legal/traditionalist/originalist) are predominantly used interchangeably; however, only the traditionalist/originalist terms should be interchangeable. The originalist, or traditionalist, methodology is essentially a support for the umbrella category of the legal perspective.\textsuperscript{36} Originalist legal theory is associated with retaining fidelity to our Founding Fathers, Judge Marshall, and the values that they embodied.\textsuperscript{37} These theorists favor adherence to the initial intentions of the substantive values our country was established on, and that those values should be preserved through generations.\textsuperscript{38} The principles of legal positivism, legal hierarchy, and judicial neutrality are what molded the Constitution and its succeeding cases (e.g. judicial review). The originalist perspective supports maintaining the legal perspective’s theories within our legal and judicial systems.

\textbf{Political perspective:}

Straying away from the theories of our Founding Fathers, the political perspective advocates that the judiciary can be a tool for social change through policy and reform. Within the last 70 years, legal scholars have formulated arguments for expanding judicial review to encompass the prominent concerns America is currently confronting.\textsuperscript{39} The theoretical components these theorists use are (1) \textit{symbolic legality} and (2) recognizing that advances in our society signify enhancements in our legal perceptions. \textit{Symbolic legality}’s initial definition referred to unenforced law, which indicated offenses that were technically illegal but not penalized in practice.\textsuperscript{40} However, the political

\begin{itemize}
\item \textsuperscript{33} Edvinsson, \textit{supra} note 26; Crowe, \textit{supra} note 11.
\item \textsuperscript{34} Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
\item \textsuperscript{35} Edvinsson, \textit{supra} note 26.
\item \textsuperscript{36} Solum, \textit{supra} note 25; Nelson, \textit{supra} note 9
\item \textsuperscript{37} Nelson, \textit{supra} note 9.
\item \textsuperscript{38} \textit{Id}.
\item \textsuperscript{39} Haney, \textit{supra} note 7.
\item \textsuperscript{40} Van Alstyne, \textit{supra} note 8.
\end{itemize}
perspective has now shifted this term to conceptually represent the interplay between politics, ethics, and the law.\textsuperscript{41}

The prominent emphasis embedded in the political perspective is understanding that the division between factual evidence and ethical concerns is blurring. Thus, it is exceedingly arduous for judges to attempt to decipher contemporary concerns without evaluating the political relevance. More specifically, current societal concerns are often related to addressing minority rights issues and the marginalization these communities experience.\textsuperscript{42}

The political perspective completely separates from the legal perspective’s theories on judicial neutrality and legal positivism. Rather than view social justice and policy modifications through a neutral lens, these theorists recognize the historic societal divisions and marginalization of minorities; to reach the egalitarianism intended by judicial neutrality, these theorists suggest implementing adjustments.\textsuperscript{43} In addition, the political perspective claims that legal positivism is no longer relevant for contemporary society.\textsuperscript{44} Legal positivism refers to the separation of legality and morality, which limits the ability to recognize contemporary societal developments.

**Contextualist perspective.** Within the literature, some theorists refer to the political perspective as the contextualist perspective.\textsuperscript{45} Contextualist and political are interchangeable labels, and both recognize that the social and cultural fabric of the United States is vastly dissimilar from what it was during the early nineteenth century. Theorists opposing the legal perspective are contextualizing and questioning the relevancy of those theories from centuries ago. Nevertheless, theorists of this perspective do not intend to completely disregard the values the United States of American was built upon.\textsuperscript{46} Rather, these theorists recognize the differences between contemporary society and the cultural fabric of the past. Political theorists suggest viewing aspects of the legislature and judiciary through a contemporary lens that venture toward fresh implementations embodying the context of our current society.\textsuperscript{47}

\textsuperscript{42} Nelson, supra note 23; Pollak, supra note 5.
\textsuperscript{43} Crowe, supra note 11; Posner, supra note 25; Wilson & Petersilia, supra note 17.
\textsuperscript{44} Nelson, supra at note 21.
\textsuperscript{45} Crowe, supra note 11; Solum, supra note 25.
\textsuperscript{46} Nelson, supra note 21.
\textsuperscript{47} Crowe, supra note 11; Posner, supra note 25.
The Current Study

The objective of this study is to continue building upon the existing literature on the effectiveness of judicial review for our current society. Using the legal and political perspectives, we will code statements that reflect one of the perspectives in select Supreme Court case opinions. Namely, these selected Supreme Court cases will all include a plaintiff whose argument regards minority rights. Through evaluating the perspectives in each court opinion, our objective is to connect the verdicts from each case with the perspectives used to support their rulings. This methodological approach should provide qualitative data that demonstrates possible patterns between court rulings and theoretical perspectives. Furthermore, this study should interpret how effective the Justices were in rectifying the issue brought forth, in relation to the perspectives used to support their reasonings (i.e., legal or political). The broad goal of this research is to determine whether judicial review appropriately recognizes the necessities of our modern community and implements decision-making from a nondiscriminatory perspective.

Research question, hypotheses, and predictions:

This study aims to examine the relation between theory and practice to begin to explore judicial review’s role in recognizing current societal concerns. More particularly, our research question asks which theoretical perspective (i.e., legal or political) will result in a verdict that recognizes marginalization by resolving the issue brought forth by the plaintiff. We hypothesize that the selected court cases will exhibit descriptive phrases that signify either the legal or political perspectives. These phrases will be used as the archival data to provide information about our research question. We hypothesize that verdicts that are concerned with rectifying wrongs towards minority groups will include more political perspective statements, and vice versa for the legal perspective. Namely, we presume that verdicts in favor of the marginalized plaintiff will include more political/contextualist statements in their majority opinion, whereas verdicts in favor of the defendant(s) will reflect a more legal/traditionalist/originalist approach. Lastly, we predict that the majority opinions that apply the political perspective will strive for verdicts that implement policy changes to rectify wrongs toward marginalized groups.

We also hypothesize that more current cases (i.e., late twentieth and early twenty-first centuries) will include a greater proportion of descriptive phrases that represent the political perspective. As such, we presume the mid-to-late twentieth century will include statements that are more representative of the legal perspective. Another expectation is that noteworthy Supreme Court cases that

49 *Id.*
embody political content revolving minority rights will offer more detectable data.\textsuperscript{50}

Our overarching objective and expectations with this archival research is that it will offer more insight on how judicial review has, or has not, been successful in representing minority communities. The American legal and judiciary systems should be equitable for all citizens, and overlooking marginalization needs to be understood and addressed in order to fully achieve the egalitarian society ensured by the Declaration of Independence ensures.

\textbf{Method}

\textbf{Supreme Court Cases}

Qualitative data for this archival study were selected from seven Supreme Court cases. The cases were selected based on criteria that would contribute variation with regard to time period and case content. The first criterion was the year of the cases, where we opted to generate variation and representation across time by selecting cases from different decades. Starting with the preceding decade (i.e., 2010 to 2019), we organized all of the Supreme Court cases within this decade, and then moved backward to the 2000s, 1990s, 1980s, 1970s, 1960s and concluded with the 1950s. This study aims to observe these theoretical frameworks in the context of contemporary societal concerns; thus, we began with the most current decade, and proceeded in reverse chronological order to account for the most relevant disputes. By having seven court cases (i.e., one from each decade), we also accounted for feasibility and validity. We included a number of cases that were feasible for reviewing, represented contemporary society, and extended enough through history where multiple judicial perspectives and philosophies could be evaluated.\textsuperscript{51}

The second, and most focal, criterion for selecting court cases was diversity in content being brought forth to the Court. Since this study’s objective is addressing marginalization, we selected cases that would reflect a diverse and ideally representative range of marginalized groups. According to scholar John Edwards, the most prominent sociological categories of minorities are based on (I) race/ethnicity, (II) gender, (III) economic status, (IV) religion, (V) citizenship and documentation status, and (VI) sexual orientation.\textsuperscript{52} Extending from these six characteristics, we added a seventh -- (VII) disabilities -- because the law includes disability as a protected characteristic through disability discrimination law.\textsuperscript{53} After selecting the seven categories, we then arranged each decade’s

\textsuperscript{50} Castro, supra note 4; Id.; Posner, supra note 25.


\textsuperscript{52} John Benjamins, Minority Languages and Group Identity: An Introductory Overview (2010).

list of cases based on them. We also added an 8th section -- (VIII) Other -- for cases that were not relevant to the study’s objective and should thus not be included. After each decade’s cases were arranged, we read through brief descriptions of each case to determine which would be the representative case for each decade. In addition, during the selection process, we ensured that each of the seven classifications were represented once to have a diverse group of “participants.”

Thus, the Supreme Court cases selected were:

1. *Brown v. Board of Education* (1954), which brought up the question of whether racial segregation in schools was discriminatory against Black children.

2. *Hoyt v. Florida* (1961), which brought up the question of whether women receiving an automatic exemption from jury duty was discriminatory against women.

3. *San Antonio Independent School District v. Rodriguez* (1970), which brought up whether the Texas tax expenditure system for public education was discriminatory against poorer families.

4. *Goldman v. Weinberger* (1986), which brought up whether prohibiting military personnel from wearing religious accessories was a violation of freedom of religion (First Amendment).


6. *Board of Trustees of University of Alabama v. Garrett* (2001), which brought up whether individuals could seek money damages under the Americans with Disabilities Act (ADA) of 1990.

7. *Obergefell v. Hodges* (2015), which brought up the legalization of same-sex marriage, and whether prohibiting it was discriminatory against same-sex couples.

**Procedure and Study Design**

We used the Public Access to Court Electronic Records (PACER) database to access the court opinion manuscripts for the seven selected cases. This includes any applicable concurring and dissenting opinions for each case, in addition to the majority opinion. Depending on the date of the case, PACER did not have the manuscripts uploaded; thus, accessible PDFs from Cornell Law School were used. Each of the transcripts were reviewed through a qualitative single coding system. In accordance with the objective of this study, the system for qualitative coding was focused on deciphering phrases, statements, and opinions of the Justices reporting in the opinions. Through reading each manuscript, our objective was to code quotations that demonstrated the legal or political perspectives.
Determining Legal vs. Political

We documented any statements that reflected our understanding of the legal perspective related to judicial neutrality, legal positivism, and legal hierarchy. As such, any statements that were solely concerned with the legality of the case were marked as a legal perspective statement. Statements by a Justice that emphasized focusing on the factual evidence of the case were also marked as a legal perspective statement. In addition, statements that reflected a desire to maintain the intentions of the founding lawmakers and judiciaries were coded as a legal perspective statement.

In contrast, the political perspective embodies advocating for the judiciary as a tool for social change. Therefore, statements that concerned symbolic legality or observing the case through a combined lens of politics, ethics, and law were coded as reflecting the political perspective. Statements that reflected maintaining neutrality and legal positivism as not feasible due to the nature of the case were also coded as a political perspective statement. In addition, any statements that reasoned the past is not always the precedent and the law should represent evolving societal norms were coded as reflecting the political perspective. Overall, any comments that concerned ethics, morality, social reform, and contextualizing the case through a contemporary lens were coded as reflecting the political perspective.

Tally System

The methodology used to track the codes was through a tally system. For each case, we utilized a table that had the Justices’ names on the left and political or legal perspective on the top. Depending on the number of concurring or dissenting opinions in each case, the number of Justices represented in each table varies. Therefore, each case’s table had a varied number of columns; however, all had three rows, with the top row/column being the “title.” Next, each statement that was deemed as reflecting a particular perspective was coded accordingly. In addition, select statements were written verbatim, on the bottom of the table, to be used as evidence for the Results and Discussion sections.

54 See Table 1
Results

General Comparison of Perspectives

As expected, the general pattern of the Supreme Court cases was that verdicts with a majority opinion in favor of the marginalized plaintiff demonstrated a preference towards the political perspective. The two cases where the majority ruled in favor of the plaintiff were Brown v. Board of Education (1954) and Obergefell v. Hodges (2015), where both opinions had an elevated number of political statements as compared to legal statements.\(^{55}\) As for Hoyt v. Florida (1961), San Antonio School District v. Rodriguez (1973), Goldman v. Weinberger (1986), Immigration and Naturalization Service v. Elias-Zacarias (1992), and Board of Trustees of University of Alabama v. Garrett (2001), all five cases rejected the marginalized plaintiff’s claims and reflected a more legal approach. As seen in Figure 1, these five cases have considerably greater legal statements supporting their verdicts as compared to political statements. Although this is the overall pattern, the theoretical breakdowns for each case become more comprehensible when reviewing them individually.

Figure 1

*Chart comparing results from the majority opinions of all seven Supreme Court cases.*

Brown v. Board of Education (1954)

Brown v. Board of Education’s unanimous ruling had only eight legal statements, as compared to 17 political arguments.\(^{56}\) The core purpose of this case was to determine whether the preceding ruling from Plessy v. Ferguson

\(^{55}\) See Figure 1

\(^{56}\) See Figure 2
was unconstitutional, thus whether racial segregation remained valid so long as it was “separate but equal.” The Supreme Court’s decision overturned the ruling from *Plessy v. Ferguson*, recognizing that racial segregation violated the Equal Protection and Due Process Clauses within the 14th Amendment. The primary concern of the case was centered on public education, and whether racial segregation in schools was giving a lesser education to Black children. Thus, the Supreme Court included positions on child development, motivation, and overall wellbeing to support their legal evidence.

*Figure 2*


As evident in *Figure 2*, although there was a clear distinction of preference for a contextualized approach, the Court used reasonings that represented both the legal and political perspectives to support their decision. Out of the total political and legal statements, 68% were deemed political with the other 32% representing the legal perspective. The Court used more traditionalist positions to claim racial segregation violated the essence of equal protection of the law, as guaranteed by the 14th Amendment of the Constitution. Furthermore, the Court went beyond concerns of the factual constitutional evidence, reasoning that they could not fully use the precedents from the 1888 14th Amendment or *Plessy v. Ferguson*. The predominant position of the Court was that determining if

58 Id.
59 Id.
60 See *Figure 2*
62 Id.
if racial segregation denied equal protection required considering “public education in the light of its full development and its present place in life throughout the Nation.” This acknowledgement signifies statements of the political perspective, with the central component of their opinion evaluating the evolution of public education and the consequences of unequal schooling.

The verdict for *Brown v. Board of Education* (1954) ruled in favor of the minority plaintiff, claiming that those of racial minority were being marginalized through unequal educational opportunities. In addition, it is evident from the 68% political/32% legal breakdown of statements that the Court embodied a combinative approach of both contextualized and traditional perspectives, whilst favoring the political lens.

**Hoyt v. Florida (1961)**

In the case of *Hoyt v. Florida* (1961), both the majority and concurring opinions demonstrated a preference for the legal perspective. The Justices unanimously decided that women receiving an automatic exemption from jury duty was not a form of discrimination. Their justification that the historic role of women was essential in the domestic realm represents a traditionalist approach. The plaintiff claimed exclusion of women from jury duty and that the prohibition resulted in a jury of twelve men that were not representative of her peers. Embodying the legal perspective, the Court’s position was the legality of the case and whether there was blatant discrimination of women in Florida’s jury system. Thus, the Court ruled there was not enough factual evidence to claim intended discrimination based on preceding circumstances of purposeful discriminatory exclusions.


For the verdict in *San Antonio Independent School District v. Rodriguez* (1973) the results demonstrate a preference for reasoning with legal perspective statements. The issue brought before the Court was whether the Texas tax expenditure system was discriminating against the district with poorer families. Their expenditure system allocated some expenses for public education in each district based on the tax revenue/assessable tax property received from their

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63 Id.
64 See Figure 2
66 Id.
67 Id.
68 Id.
69 See Figure 3
The plaintiffs claimed that this discrimination by revenue resulted in unequal educational quality, violating their First Amendment Rights to free speech through an intelligent manner. The Supreme Court ultimately rejected any claims of discrimination, reasoning that “even if the conceptual questions were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination.”

Furthermore, the majority ruled that the claims of discrimination were not within the scope of the Court’s responsibility, and that those arguments were to be resolved within state legislation. The third prominent justification for their verdict was that the First Amendment could not guarantee the right to informed and educated speech. The Supreme Court reasoned that Texas was giving all districts the minimum education required. All of these reasonings fall within legal, traditionalist, and originalist perspectives, with the precise language of the Constitution and factual evidence being the focal support for their ruling.

In dissenting opinions by Justice Brennan, Justice White, and Justice Marshall, the emphasis inversely shifted toward acknowledging the unethical and invalid aspects of the Texas tax expenditure system. Claims using the Equal Protection Clause as support represent the legal perspective, while reasonings...
that societal changes require a shift in perspective represent the political approach. Justice Marshall famously reasoned in his dissent that “[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.” 77 Justice Marshall claimed that fundamental rights may not be explicitly mentioned in the Constitution (e.g., quality education). Nevertheless, as those concerns become more apparent, the strict approach of judicial neutrality must shift to acknowledge and diminish discriminatory systems. 78 This is a clear representation of the political perspective, with all of three of the dissents using political reasonings to advocate for the plaintiff.

**Goldman v. Weinberger (1986)**

*Goldman v. Weinberger (1986)* raised questions of religious freedom when the United States Air Force prohibited Goldman from wearing his yarmulke on duty. Since Goldman was a commissioned officer, the Air Force argued the dress-code regulation be upheld for uniformity, while Goldman argued it was a violation of his First Amendment right to free exercise of religion. The Supreme Court ultimately ruled in favor of the Air Force, claiming that the desire for strict enforcement of dress code for uniformity reasons was justified. 79 Furthermore, their ruling returned to the First Amendment, citing how “the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations.” 80 The majority’s justification for their ruling is representative of legal hierarchy and factual evidence, embodying a preference for the legal approach.

77 *Id.* at 102-103.
78 *Id.* at 102-103.
80 *Id.* at 506-510
The dissenting opinions within this case are the sole occasion in this study where rulings in favor of the plaintiff were not representative of predominantly political statements. All three of the dissenting opinions are rooted within the factual evidence component of the legal perspective, emphasizing a lack of proper evidence for prohibiting Goldman from wearing a Yarmulke.\textsuperscript{81} Nonetheless, there were positions pertaining to the political perspective as well. One example is Justice Brennan claiming the reasons for restricting permission of wearing the Jewish headgear were because Goldman represented a minority group in the military.\textsuperscript{82}

Justice Brennan’s dissent demonstrates an almost even breakdown between legal and political statements, with a 56% legal and 42% political split.\textsuperscript{83} With these combinative aspects, the core component of his position was that “the Air Force has failed utterly to furnish a credible explanation why an exception to the dress code…is likely to interfere with its interest in discipline and uniformity,” expressing a lack of justification for restricting permission of wearing the yarmulke.\textsuperscript{84} The results from Justice Brennan’s dissent and the two others are dissimilar from the other cases. Interestingly, because their legal perspective statements outnumber their political reasonings, these dissents generally represent the legal perspective while still favoring the marginalized plaintiff.\textsuperscript{85}

\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} See Figure 5.
\textsuperscript{84} Goldman v. Weinberger, 475 U.S. 503 (1986)
\textsuperscript{85} See Figure 5
Immigration and Naturalization Service v. Elias Zacarias (1992)

The problem at the center of the Elias-Zacarias case concerned the justifications for immigrants seeking asylum in the United States. Elias-Zacarias claimed possible persecution by an independent organization in Guatemala and used a fear of persecution on the basis of his political opinion as the focal reasoning for seeking asylum in the U.S.\textsuperscript{86} The Supreme Court’s majority opinion ultimately ruled that there was a lack of factual evidence brought by the plaintiff to determine that a fear of persecution was warranted.\textsuperscript{87} Fear of persecution must be evident because of Elias-Zacarias’ political opinion, which the majority did not find apparent.\textsuperscript{88} The majority’s reasoning signifies a legal approach of judicial review, because of their primary concern being the abundance of evidence needed to justify asylum. The majority opinion consisted of no political or contextualized positions, with their foremost concern being the legal evidence brought to them.

On the other hand, the dissenting opinion brought by Justice Stevens demonstrated a preference for political statements. In disagreement with the majority, Justice Stevens claimed that they used a narrow-minded adherence to the Constitutional language when reviewing the case, and he further touched on the ramifications that deportation could have on Elias-Zacarias.\textsuperscript{89} Justice Stevens reasoned that Elias-Zacarias’ fear of persecution should be enough evidence to

\textsuperscript{86} INS v. Zacarias, 502 U.S. 478 (1992)
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
Justice Stevens reasoned that Elias-Zacarias’ fear of persecution should be enough evidence to warrant asylum.\textsuperscript{90} His ethical concern with the well-being of the plaintiff and his claims that the majority reviewed the legal evidence with a constricted perspective signify a political approach.

\textit{Board of Trustees of University of Alabama v. Garrett (2001)}

\textit{Board of Trustees of University of Alabama v. Garrett} (2001) is another case that rejected the claims from the minority plaintiff, while exemplifying more legal statements. In this case, the two plaintiffs were seeking money damages from their respective states, claiming discrimination on the basis of disability in violation of the 1990 Americans with Disabilities Act (ADA).\textsuperscript{91} Both plaintiffs were either fired or demoted to an inferior role and not given the necessary accommodations for their respective disabilities.\textsuperscript{92} The majority ruled in favor of the States, emphasizing the legality of the 11th and 14th Amendments in accordance to the evidence brought by the plaintiffs.\textsuperscript{93} The Court’s opinion consisted of three prominent aspects, all surrounding a more legal/traditionalist/originalist approach: (1) the 11th Amendment excludes seeking money damages from the State by private individuals; (2) there is an absence of explicit requirements to make reasonable accommodations for disabled individuals written in the 14th Amendment; and (3) the evidence brought by the plaintiffs lacked the historic record of evidence needed to determine unconstitutional discrimination.\textsuperscript{94} Through centering their decision around factual evidence and legal hierarchy, the Justices within the majority displayed a legal approach of review.

In contrast, the dissenting opinion by Justice Breyer reflects a more political/contextualist lens. His interpretation of the evidence was that the majority did not recognize historical maltreatment by the States as demonstrating unconstitutional discrimination.\textsuperscript{95} Justice Breyer combines aspects of a political and legal approach, reasoning with claims of inequality and contextualizing aspects of the 14th Amendment’s Equal Protection clause. Ultimately, the number of political statements prevail over the legal reasonings used to support his dissent.

\begin{itemize}
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} \textit{Board of Trustees of Univ. of Ala. v. Garrett}, 531 U.S. 356 (2001).
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id.
\end{itemize}

Lastly, *Obergefell v. Hodges* (2015) was the case that required all States to legalize same-sex marriage. The basis for the Supreme Court’s majority opinion is multi-layered, with combinative elements of political and legal perspectives. The legal arguments that contributed to the ruling were that marriage is a fundamental right and liberty that is a precedent by former Supreme Court Cases (e.g., *Loving v. Virginia*). Similar to what precedent cases have determined, the majority reasoned that the 14th Amendment’s Due Process and Equal Protection clauses deem prohibition of same-sex marriage unconstitutional. Furthermore, a prominent argument to the court’s position is that prohibiting same-sex marriage is continuing the unethical discrimination that ensures same-sex couples to be inferior to heterosexual couples that has been historically deemed as traditional. As Justice Kennedy states, “the imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”

Some of the arguments from the majority represent aspects of the legal approach through the factual evidence claims of judicial neutrality. However, a majority of the opinion represents a political approach, where the Justices surpassed the factual evidence of the claims. The majority was more concerned with morality, ethics, and historical discrimination of homosexuality. As seen in *Figure 6*, the

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96 See *Figure 6*.
98 Id.
99 Id.
100 Id. at 22.
majority’s statements were 59% political and 41% legal, exemplifying that the Justices used a combination of both perspectives while representing the political perspective more often.

Within the four dissenting opinions, their positions emphasize the legality of the case. The dissenting opinions are all fairly similar in claiming that the traditional definitions and systems of marriage should be upheld. Moreover, they claim that the Supreme Court does not have the constitutional power to federally legalize same-sex marriage, only the legislature does. As Chief Justice Roberts reasons, “judges have [the] power to say what the law is, not what it should be.” Although the Justices have comparable claims, each Justice used different methods of reviewing the traditional form of marriage. Chief Justice Roberts used the 1806 Webster’s Dictionary definition, while Justice Thomas utilized the Blackstone Law that was coined from England during colonial periods.

Regardless, a central theme among the dissents is legal positivism and understanding that “the Framers created our Constitution to preserve that understanding of liberty.” This is most notable when the dissenting Justices claimed that the majority strayed from the traditions that the Constitution was created on, demonstrating an overall concern for retaining fidelity to the values of the Founding Fathers.

101 Id.
102 Id.
103 Id.
104 Id. at 78-79
105 Id.
Overall Relation Between Theory and Practice

In a majority of Supreme Court cases, there is a combination of political statements and legal statements. With the exception of a handful of opinions, most of the Court’s reasonings included some form of interplay between the two theoretical perspectives. Particularly in the two cases that had verdicts in favor of the marginalized plaintiff (i.e., Brown v. Board and Obergefell v. Hodges), their theoretical breakdowns were over a third legal statements. These breakdowns begin to demonstrate results that can inform the relation between judicial theory and practice, and the theoretical perspectives that address marginalization.
Discussion

Interpretations

The results from this study support the hypothesis that verdicts in favor of the marginalized plaintiff will include more political statements to support their verdicts, and less legal statements. Both Brown v. Board of Education and Obergefell v. Hodges support this hypothesis. The other five cases from our sample support the converse of this hypothesis. Those verdicts ruled against the marginalized plaintiff and include more legal statements.

It is important to note which of the two perspectives was more predominant in each case because that assists in exploring the relationship between the theories and verdicts. However, our results demonstrate that most of the cases included statements from both perspectives. Focusing on Brown v. Board and Obergefell v. Hodges, both cases included a mixture of perspectives. Namely, Brown v. Board had a 68%/32% breakdown of statements and Obergefell v. Hodges had a 59%/41% breakdown. The results from these two cases begin to demonstrate how reasoning, with concerns of factual evidence and legality, expanded to consider the societal context can be most effective. Particularly, combining components of the legal perspective with morality and ethical concerns can result in a verdict in favor of the marginalized plaintiff. For example, in Brown v. Board the majority recognized that racial segregation was a violation of the 14th Amendment’s Equal Protection Clause; however, their reasoning focused more on the evolution of public education and consequences of inequality. The interplay between politics, ethics, and the law is a crucial component of the political perspective. Political perspective theorists argue to contextualize legislation through a more contemporary lens, to most effectively address current societal concerns.

Regarding our hypothesis that the more current cases will include a greater proportion of political statements, the results are inconclusive. Our results demonstrate that the 1950s’ case and 2010s’ case included more political perspectives, but the five intermediary cases included more legal statements. Future research should be conducted to support or reject this particular hypothesis. This research should expand the number of cases to include more variation across time (e.g., cases from the mid-to-late nineteenth century to the early twenty-first century) to further explore the relation between time and theory.

106 See Figure 2 and Figure 6
108 Crowe, supra note 11; Pollak, supra note 5.
Implications

This study provides implications for both society’s understanding of our judiciary process and the practical methodology of judicial review itself. First and foremost, this study provides an approachable platform for people to begin to understand these theoretical frameworks through an applied lens. Court manuscripts often include vast amounts of jargon that are particularly difficult for people outside of the legal realm to understand. This study summarizes the theoretical frameworks and Supreme Court cases, while exploring how these perspectives are expressed in the court opinions. Society needs to recognize these aspects of the legislature and judiciary, similarly to how important it is for citizens to remain aware of current societal issues. Socio-legal theory is a complex school of thought that highlights the interplay between law and society, and the public needs to be educated on both components to understand how their lives are influenced by the government.109

In addition to the societal implications, there are practical implications that this research can have on the practice of judicial review. This study provides more information about the relation between theoretical perspectives and verdicts by judges. The results demonstrate that judicial positions emphasizing the combinative elements of legality, ramifications of discrimination, and social justice were most effective in addressing marginalization. As exemplified in Brown v. Board and Obergefell v. Hodges, the verdicts used a combination of political and legal approaches to rule in favor of the minority plaintiffs. Both of the majority opinions acknowledged the legality and factual components of their respective cases, but they also recognized that the Constitutional language cannot fully represent the societal fabric during that time. The Constitution was created with principles that no longer fully reflect the values and necessities of the current generation; thus, it should not be interpreted completely verbatim.

As demonstrated from our results, five out of seven times using strict scrutiny when evaluating Constitutional language led to verdicts that did not rule in favor of the minority plaintiff. The issues brought forth in these cases were rooted in societal concerns, such as in University of Alabama v. Garrett (2001) where one of the plaintiffs did not receive accommodations for needing cancer treatment. Yet these concerns were often overlooked due to what was considered a lack of factual evidence but was more so a limitation in the ability of the Constitution to account for the plaintiffs’ claims. Although there were clear concerns brought forth, they were not fully recognized through the strict Constitutional lens, primarily because those concerns were not relevant during the eighteenth century. The preceding legal era of the late eighteenth and early nineteenth centuries was a period of coverture (the doctrine claiming women had

no legal independence from their husbands) and slavery, where concerns of marginalization were disregarded. This study further exemplifies that contextualizing the precedent and interpreting the Constitution through a contemporary lens can more effectively reduce discrimination for minorities.

**Limitations**

One of the most prominent limitations of this study is the lack of inter-rater reliability, which is important in reducing the invalid and unreliable results that may occur when data is collected by a single coder. The Supreme Court cases in this content analysis were single-coded, which inadvertently establishes concerns of reliability and validity. Through being single-coded, there was opportunity for subjectivity and human error when coding the data for statements reflecting the two theoretical perspectives. Judicial review and these two theoretical perspectives exhibit the complexities of human opinion; thus, the content of this study is more subjective because it explores the opinions, theories, and perspectives of each Justice. In future research, an additional coder would address these concerns of validity and reliability through the cross-referencing between the two coders.

Furthermore, another benefit from incorporating multiple coders in future research methods is the opportunity to include a more diverse and ideally representative group of coders. The methodological approach for this study was to include a variety of social identities, focusing particular attention on marginalized groups. Moreover, a prominent societal concern is that our legislature and judiciary branches are not representative of all members of society. This concern should be considered and applied to future research designs, where the coders would represent multiple social identities (e.g., different races, ages, genders, sexual orientations).

A second limitation of this study is that it is a relatively small sample size. In an ideal research design, this sample would include several additional court cases to provide more accurate results. Additional Supreme Court cases would provide more archival evidence that could either further support or begin to refute this study’s hypotheses. Furthermore, additional cases could continue exploring aspects of the methodological approach that this study did not investigate. The objective of this study was to include cases with a diverse range of marginalized plaintiffs and variation across time; however, only including seven cases did not allow for as much representation as possible. For example, the representative case for race/ethnicity was *Brown v. Board*, which examined how racial segregation discriminated against Black children. Another case that could have been included in this study is *Lau v. Nichols* (1973), which questioned whether failing to provide English language instruction for native Chinese
children violated the 14th Amendment. Although this study design was to select one case per decade and marginalized group, including a variety of cases within each subsection would further support the objectives of the selection criteria. Using a larger sample size would not only increase the accuracy of these results but would also give opportunity to collect more representative data from a variety of social groups and years.

Lastly, a third limitation of this study is that the selection criteria did not account for intersectionality. Intersectionality is a prominent framework that highlights the imperativeness in recognizing all aspects of someone’s identity (e.g., Black and woman, rather than Black or woman). In the selection process for this study, we wanted to represent as many minority groups as possible; however, we did not include cases regarding intersectionality. This is an important concern within the legislature and judiciary, particularly because Justices and judges historically have difficulty in recognizing discrimination on multiple levels. In *Degraffenreid v. General Motors* (1976), five Black women argued discrimination against both race and gender, but the court did not find factual evidence for gender or racial discrimination. However, the concern was that the relevant statues did not allow the plaintiffs to argue discrimination on multiple layers. Furthermore, the court could not recognize gender discrimination since not all women were discriminated against, and vice versa for racial discrimination. Courts historically perceive anti-discrimination law with race and gender as separate entities; however, intersectionality demonstrates that these entities are not always detached. Future research should consider including cases where a plaintiff was claiming discrimination on multiple aspects of their identity to account for the complexities of intersectionality.

**Future Directions**

In addition to the improvements suggested with the limitations of this study, there are several other stimulating directions this research can take. First, it could be beneficial for future research to obtain more statements and opinions from the Justices. The general process with court opinion transcripts is that the public receives the majority opinion; however, that only includes one spokesperson on behalf of the majority. Included along with the majority opinion are any concurring or dissenting opinions from Justices, but only if they feel inclined to do so. Although this process is necessary for confidentiality concerns

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112 *Id.*
113 *Degraffenreid v. General Motors*, 558 F.2d 480 (8th Cir. 1976).
114 *Id.*
regarding the content of the cases and the deliberation process, it does remove the perspective of some Justices. Judicial research would particularly benefit from obtaining more primary source data from each Justices.

Future methodological approaches should consider researching other cases that have similar content to their sample. This could then give possibility for a more precise depiction of the theoretical perspectives each Justice reasons with, which cannot be fully demonstrated in the majority opinion. For example, in *Obergefell v. Hodges* (2015) Justices Breyer, Ginsburg, Kagan, and Sotomayor joined with Justice Kennedy in his majority opinion. Since *Obergefell v. Hodges* (2015) is a case surrounding LGBTQ+ rights, researchers could also look at other cases with similar content to find possible majority opinions written by those other Justices. Either through federal or lower appellate cases, researching a Justice’s entire case history could provide more primary content on their perspective on a particular issue. Presumably the opinions of the majority are being relayed in secondary form through the majority opinion. Nevertheless, expanding the study design to research more case content related to each sample could increase the effectiveness of the research results. Judicial research could then begin to explore the perspectives of each Justice more clearly and how their perspectives may develop over time or possibly shift based on case content.

A second future direction for this research could be to include more current cases in the sample. Our objective with selecting cases was to be as representative as possible, with our first criterion highlighting variation across time; however, selecting a case per decade from the 1950s to 2010s allowed for reviewing case verdicts that may have been updated since their original rulings. For example, *Goldman v. Weinberger* (1986) ruled in favor of the Air Force, and justified the uniformity claims for dress-code regulation. Soon thereafter, Congress overturned this verdict through the Religious Apparel Amendment of 1987, permitting “neat and conservative” religious apparel that does not interfere with the commissioned officer’s duties.\(^{115}\) This is just one example of how case content can be overturned, and for *Goldman v. Weinberger* (1986) this new legislation also retracted the relevancy that the case’s verdict has in current societal concerns. The court did not rule in favor of the marginalized plaintiff in Goldman v. Weinberger (1986), but the Religious Apparel Amendment indirectly supported the verdict through overturning that original verdict. Comparably, several of the other cases in this sample may no longer be relevant due to policy reform or judicial amendments. To more effectively research the relation between these theories and contemporary societal concerns, future research should predominantly use the most current cases. Namely, selection criteria should

consider focusing on cases within a few years of the data collection process to provide the most current results.

**Conclusion**

As American society continues to develop, the era of the Founding Fathers and *Marbury v. Madison* is becoming seemingly less relevant to the fabric of contemporary society and culture. The Constitution included inequality as a structural societal component, using slavery, coverture, and economic division to systematically discriminate against certain social groups. Although marginalization of minorities was not a concern of the late eighteenth and early nineteenth centuries, it is a prominent concern for contemporary society. Thus, in order to most effectively address these current issues, the judiciary needs to have the ability to stray away from precedent and recognize concerns of morality.

Stare decisis says that only precedent should inform the present; however, precedent has not been able to adequately predict concerns relevant in the twenty-first century. Considerations of marginalization and historic minority discrimination are not within precedent because American society was established by structural inequality. Continuing to use precedent to review current concerns of minority rights results in marginalization that cannot fully be recognized. Using solely legal positivism and legal hierarchy for judicial review is ineffective in addressing and rectifying marginalization of minorities. Rather, the judiciary should be concerned with morality, ethics, and the historic disempowerment of minority communities, along with legal and factual components. Only then can judicial review effectively address current concerns by contextualizing classical adaptations for contemporary society.
Table of Cases

Degraffenreid v. General Motors, 558 F.2d 480 (8th Cir. 1976).
Bibliography


I. Introduction

It might strike some people as odd that the legal standard for protecting many treasured individual rights in America grew out of a case about dairy products. In the famous United States v. Carolene Products case of 1938, Justice Harlan Fiske Stone’s footnote advising courts to use higher levels of scrutiny with respect to individual rights became the most famous footnote in American constitutional history.\(^1\) The lesser-known history, however, is that Louis Lusky, Justice Stone’s law clerk during the 1938 term, wrote it. Perhaps more perplexing than why legal protections stem from a case about milk is the question of why one of the most influential legal footnotes was written by a 23-year-old clerk just one year out of law school.

Supreme Court clerks serve as assistants to the Justices and typically graduate from prestigious law schools, where they receive excellent grades and work on the law review. Today, clerks typically work for a circuit judge before heading to the Supreme Court. For much of the Court’s history, however, the assistants did not have any prior clerkship experience under another judge. Judge Richard Posner wrote that “even into the 1960s, law students could clerk at the Supreme Court right out of law school.”\(^2\) As more students grew interested in clerking and the judicial system experienced an increase in workload, the supply and demand for clerks grew and appellate judges and law students eventually developed a strong symbiotic clerkship institution. Clerks gained valuable legal experience and earned strong recommendations from respected judges during these experiences, which helped them land a clerkship with a Justice.

In modern times, clerks at the Supreme Court have often worked for multiple lower court judges in order to gain experience, increase their chances of landing a position at the Supreme Court, and become more desirable on the legal marketplace. During the 2017-2018 term, “15 out of the 34 clerks had worked for more than one judge,” while during the 2007-2008 term, “only 3 out of the 36 clerks” had done so.\(^3\) A trend toward multiple lower court clerkships appears out of students’ need to earn judicial credentials that will help win them a Supreme

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\(^1\) United States v. Carolene Products, 304 U.S. 144 (1938).
\(^3\) *Id.*
Court clerkship, and out of a Justice’s need to ensure that their chosen clerks are among the brightest and most experienced. With so many lower court clerkships offering ambitious law students experience, even serving as the editor-in-chief of a top law review might not cut it to win a job with a Justice.

Without a doubt, clerking for a Supreme Court Justice transforms the trajectory of one’s professional life. These young lawyers proceed to obtain remarkably successful careers in law practice or the legal academy, and many go on to serve as judges or Supreme Court Justices themselves. Students seek clerkships not only in pursuit of the enormous professional boost, but also for the opportunity to apprentice under the most powerful judges in the country. The responsibilities of the apprenticeship have varied since the first clerk’s hiring in 1882 and differ from one Justice to another. While clerkships began as a means for judges to gain assistance with mundane, administrative tasks, clerks later took on many more significant duties, such as helping to select cases for the Court to hear and drafting judicial opinions. The duties of Supreme Court clerks evolved in symbiosis with increased judicial demands from outside the Court as well as transformations within the Court, which together fostered a clerkship institution that is necessary to the Court’s functioning and created a pipeline from clerkships to careers in the judiciary.

4 Many clerks who serve as judges gain respect as “feeder judges,” whose own clerks go on to work at the Supreme Court. Appellate judges may gain a reputation as a feeder if their legal publications or decisions are highly respected and cited by Supreme Court Justices, if they are personal friends with a Justice and accordingly their recommendation of a clerk carries a lot of weight, and if they have previously recommended clerks that the Justices have found very helpful and bright. Judges Merrick B. Garland, Learned Hand, Robert Bork, Alex Kozinski, Richard Posner, and Guido Calabresi are among the most successful feeder judges. Many feeder judges themselves, including Brett Kavanaugh, even end up on the Supreme Court. See Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and “Feeder” Judges*, Justice System Journal (2010).
II. Legal Education and Adjudication in the Late 19th Century

In antebellum America, apprenticeships functioned “as the premier method of training lawyers.” In an apprenticeship, aspiring lawyers learned law by assisting licensed attorneys with their cases. Admission to the bar depended solely on an examination, and no rule required attorneys to hold law degrees, which made law school uncommon in legal education. As a result, law school admission was not competitive and institutions such as Harvard admitted any literate male able to pay tuition. Law school education stood in contrast to the active learning model of apprenticeships, where student learning occurred through recitation methods that required them to memorize vast amounts of laws absorbed from textbooks and lectures by judges.

During this time, legal instrumentalism, a form of judicial activism in which judges used the law to make decisions with attention paid to the result’s effects on society, served as the dominant judicial philosophy. For example, in the infamous case of *Dred Scott v. Sandford*, the Taney Court rejected the possible status of African Americans as citizens, with an eye to the decision’s consequences on the institution of slavery. After the Civil War, jurists and society at-large denounced *Dred Scott* as a stain on American morality, leading to an indictment of the instrumentalist approach that birthed it. To this end, legal practice underwent a transformation, occurring at the same time as a scientific revolution in academia where thought leaders in many disciplines boiled down their subjects’ methodologies to scientific precision. Universities “wanted to make modern science available to” students and with respect to the law, which resulted in the abandonment of instrumentality in favor of “apolitical, value free” legal principles. These changes made law a science where, as Harvard Law Dean C.C. Langdell declared, “all the available data of that science are contained in printed books.” This inflexible approach, known as legal formalism or classical legal thought, aimed at producing consistent rulings and fostering esteem for legal education and the profession at-large.

While some assess formalism as a dry approach to law that dulled legal education and the practice of law, prestigious law schools preached its virtues. Langdell instituted reforms that forever changed legal education at Harvard and beyond. One of his major reforms included hiring professors based on their raw academic legal knowledge and ability to impart formalistic knowledge, rather than looking for teachers with any experience practicing the law in trials or at

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6 *Id.*
7 *Id.* Judges often served as teachers in law schools and the job of a legal professor did not fully grow into a real career until Langdell’s formalism took hold at Harvard.
8 *Dred Scott v. Sandford,* 60 U.S. 393 (1857).
9 Carrington, *supra* note 5.
10 *Id.*
firms. To this end, Harvard abandoned the recitation method in favor of Langdell’s infamous case method. Students learned the law by reading judicial decisions in order to “derive the few true principles of law,” just as a student of science might conduct experiments to find the few laws of nature. Langdell also instituted the Socratic method in which professors peppered students with questions about particular cases and pressed them over the details and legal principles involved, again to make legal education rigorous and respected in a way similar to the sciences. Paul Carrington explained that law students typically engaged in close readings of judicial decisions before Langdell. Thus, the dean’s major innovation came down to requiring students to find an induction that justified the judicial decision by themselves, just as a student of science might make a hypothesis regarding a particular lab experiment. In light of the search for such value-neutral principles, Langdell preached a view of the law that maintained no “regard for its political consequences.” In this way, judges made decisions by applying the law’s letter to a case’s facts, which transformed judging into a mechanical, syllogistic exercise void of any serious exercise of discretion or judgment. In a testament to their educational power, formalist methods spread to other influential law schools such as Columbia.

Langdell’s extension of formal law school programs from a one-year to a fixed, three-year period might constitute his most significant and lasting impact on legal education. He imposed rigorous coursework requirements for the first two years in order to “provide students with the full benefit of academic preparation for professional work.” During this time, law schools such as Harvard became a trusted brand for legal competence. This was not only due to the academic methods instituted, but also because of their “elevation of admissions requirements,” which “produced a more mature group of students” that employers reliably trusted. It also contributed to the aggrandizement of the “status of the Harvard Law credential.” Langdell’s reforms created a pipeline from top schools like Harvard to lucrative corporate law firms, academic positions, and later, judicial clerkships. While some see Langdell’s methods as having turned law school into a monotonous environment where students stressed  

11 Id.  
12 Id.  
13 Id.  
14 Id.  
15 Id.  
16 Id. Many students who attended law school at this time did not appreciate the increased rigor that Langdell imposed on the legal curriculum. Some Harvard students who found the experience tough even transferred to other schools in the Boston area, but eventually the reforms at Harvard took hold in most places around the country.  
17 Id. Harvard’s early eminence among the nation’s law schools likely explains its storied history in producing famous lawyers, government officials, and academics as well as its early dominance in graduating students who clerked at the Supreme Court.
over legal axioms that supposedly governed law, his reforms made schools more rigorous and the discipline more respected. These educational changes transformed Harvard, along with a few other prestigious law schools, into consistent incubators for Supreme Court clerks.
III. Now Hiring: Legal Secretaries

A. Horace Gray and His Harvard Helper

In 1856, just one year before the *Dred Scott* decision, the Supreme Court heard only 63 cases.18 By 1886, however, the Court took about 300 cases, an increase due to constitutional disputes over the Reconstruction Amendments and legal uncertainty amid a rapidly industrializing national economy. Whereas Justices typically completed their Article III responsibilities themselves, including reading all petitions, hearing cases, and writing opinions, this dramatically augmented caseload meant members of the Court needed additional help. To this end, Justice Horace Gray hired Thomas Russell, a newly graduated lawyer from Harvard, as the Supreme Court’s first law clerk upon his confirmation to the bench in 1882. Russell’s responsibilities included writing down any text that Gray spoke aloud, retrieving law books that the Justice needed from libraries, and looking up information in law books at Gray’s direction for citing in judicial opinions.

Gray paid Russell’s salary himself because no government funding for clerks existed at this time. While some understood Russell’s hiring as a continuation of Gray’s practice of employing a recent law school graduate as a clerk from his time as the Chief Justice of the Massachusetts Supreme Judicial Court, it also demonstrated the consequences of an increased caseload at the Supreme Court. During this infant stage of clerkships, clerks mainly performed secretarial duties in order to further their legal education by engaging with the Justice’s cases while also managing the Court’s administrative work, thus making clerkships “a manifestation of the last vestiges of the apprentice model in American law.”19 Although his clerks only performed simple tasks, Gray’s usage of them markedly improved his productivity, and led Attorney General A.H. Garland in 1885 to explain to Congress that “it would greatly facilitate the business of the Supreme Court” if every Justice had a government-funded law clerk “whose duties shall be to assist in such clerical work as might be assigned to him.”20 In this way, both Gray and Garland laid the groundwork for an institution that would become essential to the business of the Court.

19 Id.
20 Id.
B. Holmes and the Clerkship Norm

Other Justices soon followed in Gray’s footsteps and hired clerks of their own, still paying the clerks’ salaries out of their own pockets.\textsuperscript{21} Justice Gray undoubtedly pioneered the Supreme Court clerkship, but Justice Oliver Wendell Holmes Jr. set the standard for the clerkship experience and established clerks as essential members of the Court’s tradition upon his ascendance to the bench in 1902. Like Gray, Holmes “never considered delegating his Article III functions to a young man,” but he avoided assigning his clerks purely administrative tasks.\textsuperscript{22} Instead, Holmes turned clerks into “his social and intellectual companions” and transformed the clerkship experience into an “institutionalized mentorship with very tangible benefits for both mentor and protégé.”\textsuperscript{23} While Holmes’ clerks did attend to tedious tasks such as balancing his checkbook and reading him Shakespeare’s works aloud, the Justice valued his clerks because they contested his legal philosophies and allowed him to “test his long-held views on a variety of subjects against the fresh ideas of a younger generation.”\textsuperscript{24} Holmes viewed it as a privilege to engage in intellectual debate with young lawyers who had just recently graduated from universities, where they absorbed the newest academic ideas. Holmes always “made up his mind” on his own regarding the cases before him, but he often asked clerks for their legal views on certain matters in order to clarify his reasoning.\textsuperscript{25} Holmes’ use of clerks demonstrated a growing professional respect for the intellectual abilities of clerks as well as an increased awareness that clerks provided the Justices prime subjects to shape the next generation of American attorneys and legal thinkers.

Holmes showed a stronger interest in the legal views of clerks than prior Justices such as Horace Gray, and he also committed himself to developing personal relationships with clerks. Holmes aimed to have a considerable impact on his secretaries, illustrated by the fact that he only hired recent Harvard graduates, even though experienced lawyers might offer greater assistance. He wanted young graduates because he knew they “were more susceptible to his influence and more likely to embrace the kind of mentoring he offered.”\textsuperscript{26}

\textsuperscript{21} It leaves one to wonder what might have happened to the clerkship institution at the Supreme Court if Gray’s clerks had not improved his productivity. If the Justice did not have a very positive experience with his assistants, it is likely that other Justices would not have followed his model and hired clerks of their own. Much is owed to Gray and his early clerks like Thomas Russell with respect to the institutionalization of clerks.
\textsuperscript{22} Scott Messinger, \textit{The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks}, 11 \textit{YALE J.L. & HUMAN.} 1 (1999).
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} Holmes studied philosophy at Harvard College and very much enjoyed wide-ranging philosophical debates, especially about the law. He wrote \textit{The Common Law} in 1882, an immensely influential treatise on the philosophy of law, before he served on the Court.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.}
Further, like other Justices at the time, Homes and his clerks worked out of his home, which added an even greater personal element to the clerkship. He refused to hire any married person, as he believed dedication to a spouse hindered a clerk’s ability to absorb all that a clerkship with him offered. Some of the most significant takeaways from a Holmesian clerkship included his insistence that clerks socialize, play golf, and read literature and philosophy in order to maintain relations with other lawyers and develop into well-connected and cultured attorneys.

Indeed, his legal assistants appreciated the opportunity to receive mentorship from a legal legend, as well as the resulting professional boost that led many to become prominent lawyers and academics, like future Attorney General Francis Biddle. Clerks grew loyal to Holmes and used their leading positions in society to create a “salutary image of Holmes.” For example, Biddle, who served as Holmes’ clerk during the 1911 term, also served as his authorized biographer. In writing *Mr. Justice Holmes*, Biddle “depicts the Justice’s past in almost mythical terms, especially when it comes to Holmes’ role in the Civil War.” Importantly, Holmes’ “enormous popularity in the elite legal community” established his clerkship standards as the dominant model that many Justices after him followed, although clerkships gradually became less personal as the Justices hired more clerks per term.

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27 *Id.* Although Holmes is remembered as one of the most respected thinkers and statesmen of his time, he sometimes faced scrutiny and his reputation, at times, needed repair. To this end, his clerks, including Biddle, had a particularly important role in restoring their storied Justices’ stature within the legal community.

28 *Id.*

29 *Id.*
C. Brandeis and Progressive Protégés

Louis Brandeis became one of the immediate heirs to the Holmesian clerkship model in which a Justice and his clerk maintained a personal relationship and assistants received professional mentorship. Just as he did for Gray and Holmes, Professor Felix Frankfurter of the Harvard Law School handpicked Brandeis’ clerks, and these young lawyers went on to hold prestigious government positions or academic positions later in their careers; however, whereas Holmes emphasized the personal and intellectual transformation of young law graduates into capable and respected attorneys, Brandeis sought to turn these young men into agents of progressive social change.30

After serving as a law clerk to Horace Gray during his stint as the Chief Justice of the Massachusetts Supreme Judicial Court, Brandeis gained notoriety in the legal sphere for representing the state of Oregon in Muller v. Oregon at the Supreme Court.31 Arguing before his future colleagues, Brandeis defended a state law that limited female working hours as a means of protecting their health. In order to make his case, Brandeis filed a brief replete with sociological data that revealed the effects of strenuous working conditions on women’s health. This “Brandeis Brief” became a hallmark of the sociological jurisprudence movement that emphasized understanding the law in light of its effects on people. Justice Brandeis subscribed to the underlying philosophy of sociological jurisprudence, and this thinking affected his mode of adjudication as well as his view on the importance of clerks.32

Given Brandeis’ commitment to sociological jurisprudence, the Justice hired clerks as assistants to help him collect data for his opinions, which, like Muller, incorporated sociological evidence. In this capacity, Brandeis trained his clerks in the methods of progressive lawyering so that they would be equipped for careers that stressed social change, either as attorneys or through legal scholarship. To this end, Brandeis sought clerks who both held liberal legal and political philosophies and had plans to become professors. The Justice refused to hire any clerks who wanted to “waste” their abilities as corporate attorneys.33 In further service of his goal to develop future academics and public interest lawyers, Brandeis limited the service of clerks to one or two years before he helped win them professorships at universities. This shorter clerkship model reflected the Justice’s view that assistants should use their time apprenticing under him to learn about progressive legal philosophies and immediately proceed.

31 Muller v. Oregon, 208 U.S. 412 (1907).
32 Messinger, supra note 30.
33 Id.
clerkships lasting one year became common practice and stood in contrast to earlier clerkship customs such as Russell’s, where service often continued for several years until the assistants won jobs in law firms, and represented one of Brandeis’ many enduring impacts on the clerkship institution. The most significant of the Justice’s influences involved applying “liberalism to the Office of Supreme Court clerk” in an attempt to cultivate influential attorneys who later achieved “liberal ends” in the law.34
D. The Institutional Entrenchment of Clerks

In 1919, Congress heeded Attorney General Garland’s advice when it appropriated funding for stenographic clerks, who would perform clerical duties within the chambers, in addition to law clerks, who now functioned as research assistants for the Justices. The funding enabled every Justice to employ one stenographic clerk and one law clerk at a time; the law clerks earned up to $3,600 per year (equivalent to roughly $54,000 today). The establishment of government funding revolutionized clerkships, as it not only moved clerks from administrative work to more legally challenging tasks, but also solidified the role of clerks within the Court in the eyes of the federal budget. As stenographic clerks adopted the role of taking dictation and retrieving books for the Justices, law clerks then “[edited] opinion drafts” and, in many cases, took on the responsibility of “reviewing certiorari petitions” for the Justices.35 Since the Justices completed these tasks before 1919, the increased responsibility given to clerks at this time helped make them an indispensable part of the Court. Without the establishment of federal funding for the assistants, Justices might very well have continued to write opinions and read all certiorari petitions themselves.

Amid this period of change in clerkship responsibilities, John Knox kept an extremely detailed diary of his experience as a “legal secretary” to Justice James McReynolds during the October 1936 term. Historians enshrined this period as monumental because President Franklin Roosevelt proposed legislation geared toward “packing the Court” to defend his New Deal policies.36 Published after his death as The Forgotten Memoir of John Knox, the diary provided readers a direct lens into the life and insights of a Supreme Court clerk, including detailed accounts of the day-to-day mundanities of his service to Justice McReynolds, as well as the excitements, illuminating the nature of clerkships during the early- to mid-twentieth century. His journal characterized a job where newly-graduated lawyers faced the expectation of attending to a Justice’s personal life while simultaneously carrying out legal functions that assistants undertake today.

Knox earned a rather unusual appointment as Justice McReynolds’ assistant, contrasting the Justice’s habit of hiring more conventionally. Knox wrote letters to every single sitting U.S. Senator while completing his law degree at Harvard, expressing interest in working for the government upon graduation and even enclosing photos of himself to help capture attention. He earned lackluster grades in law school and failed to impress the powerful and well-connected Professor Felix Frankfurter, who handpicked clerks for Justices

35 Ward & Weiden, supra note 18.
Cardozo. Still, the ambitious student deluged members of the Court with letters until he appeared on the radar of Justice McReynolds, who lacked an assistant. During the job interview, McReynolds made it clear to Knox that he needed an “acceptable ‘WASP’ conservative who never smoked cigarettes” as his clerk. When Knox passed McReynolds’ difficult handwriting examination, he earned his long-desired job in Washington.

With his commission as McReynolds’ new assistant in hand, Knox needed to fulfill the expectation of renting an apartment in the Justice’s building in order to remain “available at all times.” The model in which the boss decided the housing preferences of his assistants required clerks in the 1930s to transcend the role of research aide to also function as instrumental to the private sphere of their employers’ lives. Indeed, clerks were required to virtually dedicate their existence to work, as McReynolds commanded Knox not to drink, smoke, or date for the whole term. Further, the Justice made clear that if the new aide failed to pick up one of McReynolds’ phone calls to Knox’s apartment, irrespective of the hour of the day, the judge would fire him. One day while on a purely recreational road trip with McReynolds—another occupational demand of the 1930s clerk hardly imaginable today—Knox realized that “the Justice had taken [him] along to serve as Master Mechanic and Tire Changer in case anything went wrong!” These unconventional job responsibilities demonstrated how clerkships during the 1930s still retained some of the duties of past clerkships that did not relate to the law.

Still, Knox had his legal work cut out for him. He read hundreds of the Court’s petitions before the term started in October and provided the Justice with details of a case’s facts as well as his own recommendation regarding the appeal. In the face of such a daunting task, Knox took comfort knowing that his judicial assignments ended up “really quite unimportant after all” in comparison to the rest of his clerking responsibilities, as McReynolds commonly made up his mind regarding legal issues without Knox’s help. Thus, in his particular case, Knox did not affect the arc of American legal history.

Nevertheless, Knox’s lack of impact on his Justice’s adjudication did not necessarily represent the norm for clerkships during this time, and the level of

37 At this time, most clerks had recently graduated from the law schools at either Harvard, Yale, or Columbia. Historically, Harvard has produced the most clerks, followed by Yale. Nevertheless, some clerks defied this norm. For example, Wendell Mischler was a clerk to Chief Justices William Howard Taft and Charles Evans Hughes and his highest degree was from Ripley High School in Ohio! Mischler’s case is the exception to the rule, but lawyers and clerks like him needed only to gain admission to the bar.
38 Knox, supra note 36.
39 Id.
40 Id.
41 Id.
42 Id.
influence that clerks wielded varied extensively between Justices. For example, Louis Lusky, Chief Justice Harlan Fiske Stone’s clerk during the 1937-1938 term, stood in contrast to Knox because he composed the most famous footnote in constitutional history “less than a year after” graduating from Columbia Law School.  

Justices Stone and Hughes approved the clerk’s version of Footnote 4, demonstrating that although Lusky did in fact write it himself, Justices did their due diligence before including it in the Carolene Products decision. The clerk did not slip in a revolutionary legal text without his employer’s approval. Still, his production of the footnote demonstrated the increased responsibility and influence of clerks in the 1930s, at least among certain Justices, unimaginable under the earlier clerkship models of Justices Gray and Holmes.

The job described by Knox depicted a clerkship model with more private than professional demands. While clerks of later Supreme Courts undoubtedly faced immense professional demands that increased with time, restrictions on their lives have become antiquated, as prohibitions like banning romantic pursuits would hardly pass as permissible work expectations for the modern Court. Moving forward, clerks experienced a decrease in administrative chores and an increase in substantive assignments, a change that afforded clerks greater influence on the business of the Court.

44 *Id.*
VI. Auditioning before the Court: The Bench Memorandum and Dead List

When President Eisenhower nominated Fred Vinson, a former semi-professional baseball player, to serve as Chief Justice, Vinson fittingly hired a famous NFL star as his first law clerk. Byron White earned the nickname “Whizzer White” for his athleticism and dominance as a member of the Detroit Lions. Although he gained notoriety for his role as one of the nation’s best football players, White also distinguished himself intellectually, graduating first in his class during both college at the University of Colorado and at Yale Law School, while winning a Rhodes Scholarship in between. Vinson’s hiring of White in 1946 cemented the athlete’s place in United States legal history early in his career. He became the first law clerk in the history of the Supreme Court to return as an Associate Justice. More importantly, however, White’s clerkship came at a time of transformation when clerks were beginning to be expected to fill greatly expanded roles.

In 1942, the “number of cases petitioned to the Court exploded,” which led the clerk to transition “from being primarily a research assistant to being an active decision maker.” One of the new major responsibilities of clerks at this time included providing their Justices with bench memoranda. Justices used these memoranda during oral arguments, as they contained the facts of each case as well as proposed questions for the Justice to ask attorneys. Some interpret these memoranda as a sign of growing clerk influence, since questions written by these clerks could affect the litigation of a case; however, examinations of the bench memoranda of Justices Blackmun and Brennan revealed that these experienced judges asked less than half of “the questions their clerks submitted.” Thus, bench memoranda more likely represented additional clerkship responsibilities completed in accordance with a Justice’s suggestions, rather than the clerks recommending their own personal questions that the Justices would ask on their behalf. The clerks did not actually control the Court’s oral arguments from behind the scenes.

The increased number of cases also caused the Court to institute the “dead list,” which further increased the responsibility of clerks in the process of reading and granting petitions. In continuation of the practice in which clerks read petitions and wrote summaries, which started around 1919 with Congressional funding for law clerks, the Justices met in conference without clerks, discussed each petition, and decided whether to hear the case. As the number of petitions skyrocketed, the feasibility of Justices discussing every case in conference became increasingly difficult.

45 After Byron White, John Paul Stevens became the second future Justice to clerk on the Court. Stevens served Justice Wiley Rutledge during the 1947-1948 term.
46 Ward & Weiden, supra note 18.
petition together, as they once had, plummeted. Instead, Justices only discussed cases specifically placed on a list to consider in conference. Any other case not mentioned on this list fell to the dead list. Essentially, seemingly uncontroversial cases or petitions that the Court did not highly anticipate automatically joined the dead list, and every case on this list “would automatically have been denied without the Justices having ever discussed the case or voted on it.”

It became the job of clerks, who read every single petition sent to the Court and wrote memoranda for their Justices, to decide which cases to pitch to their Justices so as to prevent them from falling to the dead list. As “growing dockets meant that the Justices were less able to read the petitions themselves as a check against their clerks,” clerks became responsible for pushing promising cases onto a Justice’s radar that otherwise might have remained on the dead list.

At this point, assistants gained significantly more influence over the Court’s business than prior clerks. Whereas earlier clerks, such as Holmes’ proteges or Brandeis’ assistants, helped conduct research that supplemented a Justice’s official assignments, clerks at this point in the 1940s prepared Justices for oral arguments and played a significant role in determining which petitions the Court discussed.

During this period of increased clerk responsibility, a few Justices deviated from the Holmesian model of maintaining intimate ties with their assistants. For example, with his clerks like Byron White, Chief Justice Vinson intentionally kept a “professional, rather formal, relationship” and “was not close to” them. Whereas Chief Justice Vinson had a less personal relationship with his clerks, many others at this time, including Justice William J. Brennan, had extremely personal relationships with their clerks. Brennan famously had breakfast with his clerks every single morning, and held annual reunions for his assistants and their families.

Further, Judge Guido Calabresi of the Second Circuit Court of Appeals, who clerked for Justice Hugo Black during the 1958-1959 term, explained that he and Black, along with the other clerks, became “like family.” Calabresi had a personal relationship with Black not only during their clerkship, where they spent spare time playing games, but even after their clerkship, where they updated each other on their careers and debated the Court’s most contentious issues. Thus, it proves difficult to characterize this period in the clerkship institution

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49 Ward & Weiden, supra note 18.
51 Dennis J. Hutchinson, The Man Who Once was Whizzer White, 103 YALE L.J. 43. (1993).
52 Phone interview with Judge Guido Calabresi (Dec. 5, 2019).
53 Id. Calabresi noted that Black grew more conservative as his career went on, and they often disagreed more on issues, such as the protests at the peak of the Civil Rights Movement, after his clerkship term than during his actual time in Black’s chamber.
as conclusively less intimate than years prior. Nevertheless, the Chief Justice’s
development from the norm in terms of relating to his clerks does warrant
mentioning as a sign that the increased responsibilities of clerks might have
created an environment where Justices and their clerks had less time to bond
because they spent most of their time working through large caseloads.

Attaining a clerkship with a Supreme Court Justice remained a highly
coveted job for a new law school graduate, just as it always had been. In years
prior, however, most top law students typically worked at corporate firms after
graduation. Only some students, usually the most elite and academically-oriented
in their schools, sought clerkships to apprentice under highly regarded judges and
receive an experienced attorney’s wisdom and advice. During these early periods,
clerkships held immense prestige and professional value. While clerks typically
graduated at the top of their law school classes, the selection process greatly
contrasted that of today.\footnote{Id.}

Not only did Frankfurter handpick his best Harvard Law students to clerk
at the Court, but powerful law school deans maintained personal relationships
with the Justices, which entailed their intimate involvement in the selection of
clerks. The deans of prestigious and well-connected schools, such as Yale or
Columbia, called the Justices and asked for their preferences in a clerk. Next,
the deans returned to their schools and asked their top students about their
post-graduation ambitions. Finally, the deans played matchmaker between the
Justices and students whose profiles and goals aligned. For example, during the
late 1950s, Justice Hugo Black sought students with prior experience clerking
at a lower-court as a result of a poor experience with one particularly lazy clerk
who, despite his service as the Editor-in-Chief of the New York University Law
Review, did little work during his clerkship term and thereby spoiled Black’s
appetite for any inexperienced law student to serve as his clerk.\footnote{Id.} Whereas
winning a clerkship once depended on a student’s ability to stand out in the eyes
of their law school’s deans, as well as the respective weight that their dean’s
recommendation might have with a Justice, clerkship selection gradually became
a battle for winning a position under a well-connected “feeder judge” whose
recommendation held great weight with the Justices.\footnote{See discussion on feeder judges, supra note 4.}

While many students today chase clerkships for a professional boost in
the legal job hunt, Judge Calabresi suggested that students in the late 1950s faced
no pressure or professional anxiety to chase clerkships because graduates had

\footnote{Id.}
\footnote{Id. Despite his stated preference for an experienced clerk, Black hired Calabresi right out of
Yale Law School after his second-year clerk highly recommended Calabresi.}
\footnote{See discussion on feeder judges, supra note 4.}
many post-graduate opportunities, such as teaching, available to them without needing a clerkship on their resume to attain these positions. By the time that Byron White reached the Court as a clerk, however, clerkships became the natural step in an ambitious student’s professional journey. Clerkships became a highly coveted and seemingly superior alternative to working at corporate law firms immediately upon graduation, and thus became the holy grail of post-law school graduation options for top students at all of the best law schools, rather than just at Harvard, in their conquest toward prestigious career options. This trend of clerkships moving into the forefront of a law student’s consciousness regarding their next career steps after graduation contributed to increased competition for clerkships as well as a greater endowment of prestige. As more students sought clerkships, the ones who actually received them came to be seen as anointed members of the legal elite.

To this end, William Rehnquist went to work in the chambers of Justice Robert Jackson upon graduating at the top of his Stanford Law School class in 1952. Rehnquist’s clerkship under Jackson made the young lawyer the first future Chief Justice to clerk at the Court, as well as the third-ever future Justice to do so, only after White’s clerkship with Fred Vinson in 1946 and John Paul Stevens’ time under Wiley Rutledge in 1947. The fact that three clerks later served as members of the Supreme Court foreshadowed the growing importance and prestige of clerkships as a professional credential, as well as changes in clerk responsibilities during this time. With more obligations, clerks not only read all petitions, including those on the dead list to which no Justice paid any attention,

57 Calabresi, supra note 52. Calabresi discussed that during the 1950s and earlier, teaching positions at law schools were open to law students with strong grades. This straightforward path toward teaching law contrasts the legal academy’s current state, where many law professors or lecturers have had clerkships. Calabresi himself enjoyed working at a law firm for just one summer during law school, but knew he wanted to go into academia.

58 In 2018, roughly half of Yale Law alumni reported that a clerkship was their first job after graduation. “Judicial Clerkship Employment.” Yale Law School. https://law.yale.edu/student-life/career-development/students/career-pathways/judicial-clerkships/.

59 As of 2019, at least one Stanford Law School graduate has clerked on the Supreme Court for the past 46 consecutive years. Rehnquist is the first Stanford clerk to reach the Court as a Justice, and he served alongside Sandra Day O’Connor, his law school classmate, who is the only other Stanford Law alumni to have served as a Justice. Stanford has a remarkable rate of success in recommending clerks to the federal and Supreme Court level, and is only behind Harvard and Yale in the number of clerks it has produced. See “Judicial Clerkships - Career Possibilities.” Stanford Law School. https://law.stanford.edu/careers/career-possibilities/judicial-clerkships/.

60 Contemporary Supreme Court nominees have almost universally completed clerkships. President Trump’s two successful appointees to the Court, Justices Gorsuch and Kavanaugh, both clerked for the same Justice (Kennedy) during the same term (1993-1994). The fact that powerful judges and Justices started their legal careers as clerks speaks to the importance of apprenticing under a judge and the relationship between a judge and their clerk. Judges and their clerks grow close, and they help their proteges win academic positions at top law schools, clerkships with other judges, or lucrative jobs at prestigious law firms by providing powerful recommendations.
but also provided bench memoranda. These increased assignments not only made clerks play a more integral role in a Justice’s chambers and the Court as a whole, but also afforded clerks more credibility and experience with which to leave their clerkships and placed them onto a professional trajectory that consisted of prestigious legal opportunities, which led some back to the Court later in their careers.61

V. Junior Justices and Their Court

A. One Certiorari Pool to Rule Them All

Students of the Court categorized Lewis Powell’s tenure as historically important for his decisive opinion in *Regents of the University of California v. Bakke*, which protected affirmative action programs as a way to foster class diversity.62 Powell’s retirement led to the explosive and ultimately unsuccessful nomination of Judge Robert Bork in one of the most contentious confirmation processes in legal history.63 One can argue, however, that Powell’s ultimate legacy on the Court might have been his role in reshaping the Court’s mechanisms for reading petitions, which ultimately led to a turning point in the clerkship institution and brought with it a substantial increase in clerk influence.

Before 1919, when law clerks received government funding, each Justice read all petitions themselves. After the judges received authorization and funding to hire a law clerk, and appeals requests grew rapidly, clerks began reviewing petitions and providing summaries of them to their Justices, although some continued to examine the applications themselves.64 During the 53 Court terms between 1919 to 1972, every Justice received a certiorari memorandum about every single case from at least one of his clerks. Upon his ascendance to the bench in 1972, however, Powell found the practice of one clerk from every Justice’s chambers having one clerk read, summarize, and provide a recommendation on every single petition redundant and unnecessary. To this end, Powell successfully recommended that the Court institute a “certiorari pool” in which each petition received an examination by one clerk, who would write a memorandum about it for all of the Justices, or the “pool.”

Powell’s interest in changing the Court’s organizational structure and method of reviewing certiorari petitions had its roots in the Justice’s tenure as managing partner of the Virginia-based law firm Hunton, Williams, Gay, Powell, and Gibson LLP.65 The certiorari pool led to the production of one certiorari memorandum per petition for the entire Court, rather than one memorandum per petition for every Justice, in order to “to expedite the evaluating process.”66

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64 Calabresi, *supra* note 52. Guido Calabresi recalled that Justice Black resented the charge that the clerks seemed to be doing the jobs of the Justices because they read certiorari petitions. Black told his clerk that he was so busy with his official duties, he “even [reads] cert petitions on the pot.”
effect, the pool reduced the number of memoranda per petition from nine to one. While some Justices, including John Paul Stevens, opted out of participating in the pool in order to “provide an important check against potential mistakes,” the rest of the Justices enthusiastically embraced the new process as a way to reduce redundancy and allow their clerks to work on more substantive assignments, such as opinion writing.67

The certiorari pool immediately improved the productivity of clerks and forever changed the role of clerks within the Court. While the number of petitions received by the Court doubled after 1972, each clerk only read an average of 250 petitions per term, which amounted to half the number of petitions clerks read before the pool’s creation. The certiorari pool led to the simultaneous increase in the importance of clerks as an institutional body and a decrease in the potential influence individual clerks might have on the certiorari process.68 Given that the Justices relied on pool memoranda rather than reviewing appeals themselves, they needed their clerks to make decisions regarding petitions. Thus, the pool memorandum marked the formal end of the era in which clerk reviews of petitions merely assisted the Justices or made their jobs easier. Clerks and the certiorari pool they supported now played an indispensable role in the Court’s business and demonstrated the clerkship institution’s increased importance to the collective group.

Still, the composition of a single memorandum for use by every Justice in the pool reduced the individual influence of clerks because clerks had to write the memoranda without biased expositions of case facts or partisan recommendations toward granting or denying a petition. Given that the pool included Justices appointed by both conservative and liberal presidents, the memoranda needed to reflect an impartial and neutral assessment of cases. Before the certiorari pool is introduced, clerks who sought to influence their Justice’s vote on granting a petition had to write memoranda by using their intimate familiarity with their Justice’s personal, professional, legal, and intellectual leanings to design a piece that affected the probability that the judge would grant or deny a petition.

After his clerkship with Jackson, William Rehnquist revealed the potential for bias in the pre-certiorari pool memorandum system, reporting that conscious and “unconscious bias did creep into” the certiorari memoranda of clerks.69 Rehnquist admitted that he “was not guiltless on this score, and [he greatly doubted] if many of [his] fellow clerks were much less guiltless.”

67 Ward & Weiden, supra note 18.
68 Id.
although the future Chief Justice suggested that much of the bias in creating certiorari memoranda tended to come from clerks on “the political ‘left.’” This potential for certiorari memorandum bias fundamentally decreased in 1972 with the certiorari pool. A liberal or conservative bias in a memorandum would be met by objections from Justices of the opposing ideology.

Moreover, congressional funding for additional clerks, up to four assistants per Justice, coincided with the certiorari pool’s birth in the early 1970s. The combination of a decreased workload with respect to certiorari memorandum writing, along with the increased workload support that additional clerks provided, afforded clerks more time for other tasks, and their regular duties expanded to include drafting the Court’s opinions. In earlier years, very few Justices allowed clerks to draft opinions, so Louis Lusky’s writing of the Carolene Products majority opinion under the direction of Justice Stone represented an exception to the rule. In the 1950s, some Justices more regularly assigned their clerks to write the first draft of opinions before reviewing and revising the writing, but they also produced drafts of other opinions such that they still maintained an active role in the Court’s primary writing. For example, for each opinion in Justice Black’s chambers, he and a clerk wrote a separate draft. The Justice then compared the writings to determine if the case demanded a more balanced legal approach than either he or his clerk provided in their own works. By the 1970s, however, Justices maintained four clerks per year, and these assistants did not face the burden of slogging through as many petitions as John Knox and other earlier clerks did. Consequently, “clerks [took] up their judge’s pen” and made the image of Justices “laboring in solitude to handcraft an eloquently written opinion to endure the ages” now “wholly impractical” and no

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70 Id. As a result of his vexation with the supposed unprofessionalism of liberal clerks, Rehnquist suggested that the clerks ought to be confirmed by the Senate, just like judges. Guido Calabresi recalled that Justice Black, a former Senator, disliked Rehnquist’s suggestion and argued that the Senate ought not to subject young folks early in their careers to intense scrutiny.

71 C.C. Langdell’s educational transformation at Harvard Law School emphasized the intense study of appellate decisions in order to find precise legal rules. Since then, law students have been studying the words of the nation’s foremost jurists; however, with developments in clerkship responsibilities, students are now reading the words of the nation’s foremost twentiesomething law graduates. There might be no issue in this scenario, as the Justices do have final authority over the Court’s opinions. Nevertheless, the idea that law professors are teaching their students according to the work that clerks put in during their time at the Court strikes many as a violation of the hierarchy in legal education where young students should be learning from the most experienced people in the field.

72 Calabresi, supra note 52. Calabresi recalled that Black suggested that Justices with stronger senses of their own legal philosophies utilized clerks more because they were confident that anything released by their chamber represented their own view. Justices who were not as confident that they could hold their own in legal debates with their clerks, such as Justice Charles Evan Whittaker, did not use their clerks all that much.
longer reflective of the Supreme Court’s opinion writing process.\textsuperscript{73} Thus, whereas Justices once remained highly involved in the writing process of initial opinion drafts, the process no longer required their participation as the certiorari pool increased the time that clerks had to spend on opinions. Clerks now consistently write each of the first drafts and the Justices simply revise the drafts until they have confidence in the decision’s reasoning and believe that the writing is suitable for their chambers and to bear their names.\textsuperscript{74}

Legal scholars Jeffrey Rosenthal and Albert Yoo confirmed the offloading of opinion draft writing to clerks during this time by analyzing the writing of the Justices. They found that “with few exceptions, [Justices] exhibit significantly higher variability in their writing than their predecessors” from the 1950s, which indicates that more than just one Justice worked on the opinions.\textsuperscript{75} In writing the Court’s opinions, clerks attempted to embody the writing styles of their Justices in order for the opinions of their chambers to maintain a cohesive voice. In the past, however, scholars could not distinguish whether the Justice wrote an opinion or whether a clerk did the writing.\textsuperscript{76} While clerking for Black, Calabresi even forgot having written certain opinions because while he produced drafts, he expressed Black’s will to such an intense degree that it was as if the Justice had done the actual writing.\textsuperscript{77}

Not only did variability in the writing increase, but the Court’s opinions dramatically grew in length as well. In the 1950s, the average opinion hovered around 3,000 words per opinion. By 1975, the Court’s opinions grew to around 6,800 words per opinion, more than a 200 percent increase in just two decades.\textsuperscript{78} This meteoric rise in the word counts of opinions does not necessarily reflect the influence of clerks, as the Court reached many controversial landmark decisions during the 1970s, including \textit{Roe v. Wade}\textsuperscript{79} and \textit{United States v. Nixon}\textsuperscript{80}, and these cases might explain the higher word count necessary to make clear the

\begin{footnotesize}
\textsuperscript{73} Nadine Wichern, \textit{A Court of Clerks, Not of Men: Serving Justice in the Media Age}, 49 DEPAUL L. REV. 2 (1999).
\textsuperscript{74} Particular Justices including Scalia and Stevens were known to participate in the writing of an opinion’s first drafts, although in other chambers, the clerks wrote most of the first drafts.
\textsuperscript{76} Calabresi, \textit{supra} note 52. Calabresi remembered that one of the most flattering compliments that one could pay a clerk was for someone to say that they thought a particular opinion or line in their Justice’s writing represented that judge’s best work and to know that they, as a clerk, had written the particular work.
\textsuperscript{77} \textit{Id}.
\textsuperscript{79} 410 U.S. 113 (1973).
\textsuperscript{80} 418 U.S. 683 (1974).
\end{footnotesize}
complicated legal reasoning and decisions. Nevertheless, the normalization of clerks writing the Court’s opinions during a particularly controversial decade in the United States, where many cases required lengthier explanations in their own right, further attests to the Justices’ deepening trust in clerks and their writing abilities. If the Justices did not value the clerks for their legal acumen, then they undoubtedly would not charge clerks with the responsibility of regularly drafting the Court’s opinions at a time of tectonic shift in decision length and controversy. The certiorari pool deserves credit for dramatically redesigning the responsibilities of clerks, namely for moving opinion assignments into the core of a clerk’s assignments and thereby transforming the role of a clerk from an assistant to that of an active agent in the Court’s business.

Scholars including Edward Lazarus, who served as a clerk to Justice Blackmun during the 1988-1989 term, have suggested that enabling clerks to draft the Court’s opinions exhibits the extensive influence and power of clerks within the judicial system. Given the enormous magnitude of the Supreme Court’s opinions, clerks can get carried away with the power of writing drafts because “every opinion [is] an opportunity to make an impression on the law.” Critics can point to cases such as Lusky’s drafting of Footnote 4 and argue that clerks should not have such a major influence on the American judiciary. After all, the President nominates Justices, and they alone face the wrath of the Senate Judiciary Committee. Perhaps Constitutional provisions, regulatory monitoring of clerk duties, or official codes of conduct for the job might constrain the clerks’ seemingly vast responsibilities, and can help meet the sharp criticisms of those who argue that clerks wield too much power by taking over the Justice’s official duties.

Other scholars including Harold Koh, another former Blackmun clerk, have suggested that clerks writing opinions should not not cause alarm and that Justices receive far too many opinion assignments to reasonably write

81 The clerks are by-and-large highly political individuals. According to FEC filings, more than 70 percent of clerks donated to political causes and organizations. This statistic is fitting because clerks are lawyers and law school graduates, and people are commonly attracted to the study and practice of law as a way to influence public policy. See Adam Bonica, Legal Rasputins? Law Clerk Influence on Voting at the U.S. Supreme Court, J.L. ECON. & ORG. (2016).
82 Wichern, supra note 73.
83 Beyond Lusky and Footnote 4, many other clerks have had immense roles in shaping some of the Court’s major decisions. Mark Tushnet, who clerked for Justice Thurgood Marshall during the 1972-1973 term, wrote a “vital signifcant letter” across chambers to Justice Blackmun regarding Roe v. Wade. At the time, Blackmun viewed the end of a pregnancy’s first trimester as the logical deadline for an abortion because fetal development begins at 12 weeks. Tushnet’s memorandum successfully convinced Blackmun to change his position to permit abortion up to 24 weeks, or the end of the second trimester. See David J. Garrow, See How Roe v. Wade Was Written, 71 Washington and Lee Law Review 2 (2014).
themselves. In deciding opinion assignments, the Justices meet in conference without clerks. After debating the case from all angles, the Chief Justice assigns one Justice to write the majority opinion for a particular case. After the conference meeting, the Justices speak with their clerks to keep them apprised of “the result reached by the majority, and his or her views on how to write the opinion.” After receiving specific instructions, clerks return to their offices and write the first drafts of the opinion, tailored to their Justice’s specifications.

According to Koh, while clerks do in fact write the opinions, this process makes the clerks akin to “the students of Michelangelo,” because while “they may put the ink on paper...it is according to the Justices’ design.” Clerks not only follow their Justice’s instructions while writing, but the drafts undergo revision by the Justices before completion. If clerks slip in any content of which a Justice does not approve, then the Justice removes it. Lazarus’ point that clerks might seek to leave their mark on the law by writing opinions rightfully sparked discussion on the potential liabilities of clerk power, but a clerk’s main motivation can more likely be understood as a desire to serve their Justice properly, to constantly improve and maintain their relationship with their Justice. Thus, if a clerk seeks to impact the law, this goal might most efficiently manifest by customizing drafts precisely to their Justice’s orders so that the judges do not dramatically modify their assistant’s writing. Nevertheless, any discussion about whether the Court’s opinions represent the views of clerks or the Justices implicitly draws attention to the transformational effects of the 1970s on the Supreme Court clerkship. Powell’s institution of the certiorari pool enabled the clerks to take on important opinion drafting responsibilities, which not only proved the value of clerks to the Court but anointed clerks with greater power to write, or re-write, Constitutional interpretation than ever before.

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84 “Supreme Court cases, October term 2018-2019,” BALLOTPEDIA (2019). The current Court issued 74 opinions during the 2018-2019 term. Justice Thomas’ chambers produced the most opinions at roughly 28 while Justices Roberts and Kagan each wrote 12 opinions, the lowest number on the Court.

85 Wichern, supra note 73.

86 Ward & Weiden, supra note 18.
B. Sparring Partners

As a consequence of clerk influence, some scholars worry about the ideological closeness between Justices and their clerks. Critics, including former Ninth Circuit Appeals Court Judge Alex Kozinski, have argued that chambers where judges and clerks have similar legal views will lack any “hard questions.” For example, a Justice and a clerk with pro-death penalty views might not work as diligently in deciding a petition as would a judge and clerk with contrasting views on the death penalty. Just as the Judiciary Committee thinks of the ideological balance of the courts when considering a judicial nominee, some have suggested that this balance remains relevant in clerkship hiring practices. Justices hire the clerks themselves, and these assistants do not undergo any substantial vetting process outside of a Justice’s chambers. Thus, no government body necessarily oversees or studies whether the clerks hired by the Justices, by means of their ideological similarity with their bosses, can skew entire decisions or cases toward a more strict or uncompromising legal reasoning.

The ability to create an ideologically diverse chamber largely depends on a Justice’s willingness and ability to hire clerks with other viewpoints. His own criticism notwithstanding, Kozinski tended to hire conservative clerks early in their law school careers because he felt that not enough judges attempted to mentor young conservative and libertarian students. As an unintended consequence, left-leaning judges who in fact desired to mentor and hire conservative clerks remained unable to do so because conservative judges beat them to the punch by hiring students much earlier than the rest of the judiciary. Judge Guido Calabresi argues that hiring a diverse body of clerks greatly benefits the business of a chamber by invigorating legal debate, but judges like him miss out on the opportunity to work with conservative law students because other judges hired them during their first years in law school, much sooner than many chambers are ready to hire. As a result, some judges sought standards that could help judges gain access to a broader range of legal talent to diversify their chambers.

A federal hiring plan for law clerks, first instituted in 2003, attempted to remedy the issue of judges not being able to hire clerks with contrasting views. The hiring plan aimed to set limits on when clerks could be hired by preventing judges from receiving applications or making offers to applicants before the end of a student’s second year in law school.

88 Id.
89 Id.
90 Calabresi, supra note 52.
By starting the clerk hiring process in a student’s second year, judges have access to a much larger pool of talent, as opposed to an applicant body that does not include students who won clerkships during their first years in law school. Furthermore, hiring students later benefits the students as well, by removing anxieties concerning whether one should apply to a clerkship with only one year of law school experience, and by eliminating the pressure to fill out clerkship applications while simultaneously getting used to the demands of a law review, which may recruit students during the 2L year. The hiring plan also suggested that judges give applicants at least 48 hours to decide whether they will accept an offer or not. This timeline, while still not all too long, more closely resembles other industries in their hiring practices and prevents judges from pressuring applicants to accept positions on the spot.

The plan recognized that students benefit from increased time to consider an offer to clerk, and also allowed applicants to continue interviewing and fielding offers from other judges without the pressure to accept a prior offer. While the plan remains in effect today, no regulation compels judges to follow it and participating judges do so on an optional basis. While many members of the judiciary do in fact follow the hiring plan, the solutions have not fixed issues of ideological imbalance in various chambers. Still, the plan provided helpful and necessary options for students to apply to clerkships with less stress, and for judges to have access to the best students from across the ideological spectrum.

During the hiring process, no formal place exists for applicants to disclose their ideological views. Justices do not ask what political party a potential clerk commonly votes with, nor do they ask about their specific views on Congress or the President during interviews; however, most judges, including Justice Clarence Thomas, do not want clerks who are vehemently opposed to their ideological beliefs. Similar-minded clerks help judges effectively apply their ideologies to cases and create harmony among the clerks. Still, conservative law students commonly expose their own ideological preferences by self-identifying as members of their law school’s Federalist Society. Doing so allows a Justice to be more certain that an applicant agrees with particular legal views, especially on hot button political issues such as abortion or the death penalty, that might come before the Court.

Nevertheless, some Justices actively seek clerks who are not of the same ideological persuasions as them. Justice Scalia famously reserved one spot among his four clerk spots each term for a liberal, and John Paul Stevens was known for looking past ideology in most of his clerk hires because he believed.

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92 Id. “The chief judges of the U.S. court of Appeals for the Second, Seventh, Ninth, and District of Columbia Circuits” all supported the current plan. In the past, however, various federal clerk hiring plans had been instituted and failed. As recently as 2014 various circuit courts withdrew support for hiring plans because their judges lost top applicants to judges who refused to participate in the hiring plan’s schedule. The current attempt is just the latest iteration of such a plan.
vigorou...deciding cases would push him toward the correct outcome.93 Experts recognize that the Justices must interact with their clerks on a daily basis and entrust the clerks to help represent their views in certiorari memoranda and opinions, and thus rightfully leave the hiring practices of each chamber up to the individual Justices. Still, the Court ought to shy away from choosing clerks who have, for instance, outed themselves as staunch conservatives by identifying with the Federalist Society, or declaring an allegiance to liberalism, in order to foster a level of overt political detachment amongst the clerks. After all, the Justices themselves do not disclose the political parties they prefer or their personal stances on political issues. Still, the public might become aware of a Justice’s personal views or political loyalties by examining trends in their voting patterns on the Court, or taking the views of the President who appointed them as a likely representation of their own views.94 The Court must move past the expectation that each Justice will hire clerks who share their own ideologies, and more judges should shift toward hiring clerks with opposing viewpoints. Clerks and judges serve the judiciary and therefore the Constitution, not a particular president or, much less, a particular ideology.

94 There are many exceptions to the heuristic of approximating a particular Justice’s political views with those of the President who appointed them. For example, President Reagan nominated Anthony Kennedy to the bench in 1988 after Robert Bork’s failed confirmation. Reagan maintained a strong conservative and religious base, and would likely be disappointed to learn that Kennedy casted the swing vote in 2014 that effectively legalized same-sex marriage at the federal level.
VI. An Institution Under Attack

A. Media Sizzles

The reported increase in clerk usage by the Justices has led to intense media interest in the inner workings of the Supreme Court. Since Justices have historically shied away from public commentary on cases and have rarely spoken about the Court’s private matters, Washington Post reporters Bob Woodward and Scott Armstrong spent several years speaking with off-the-record sources in order to gain exclusive insights into the Court, which they squeezed into The Brethren in 1979. The book was highly criticized by the media, as The New York Times charged that the argument “consists largely of hearsay” and that it amounted to nothing more than “history written by leaks.” The Supreme Court also expressed sharp disapproval of the book. Privately, Justices stewed in anger over the widespread leaking of the Court’s private business to reporters. The book charged that “too much of the business of the Court is not conducted by the Justices but rather by their law clerks” because there is “too much work for the Justices to do,” which effectively increased the public’s curiosity about the jobs of clerks.

Woodward and Armstrong depicted the organization of the Court as overly bureaucratic. The Justices did not interact as a cohesive nine-member branch of government as they once did, and now had limited interactions with other Justices outside of conference. Rather, each Justice’s “office is now a unit in itself, a bureau within a department,” where a Justice commands their clerks to produce the opinions assigned to that chamber. Prior to The Brethren, neither the public nor the media explored Supreme Court clerkships in any depth, partly because widespread awareness regarding clerks remained limited until the book’s publication. After The Brethren reached beyond the confines of the legal community, the subject of clerks and their seemingly outsized responsibilities entered the public’s knowledge. The interest in clerks and their relationships with their Justices dramatically increased in the 1980s and brought the clerkship institution out from the Court’s shadows.

Some of the curiosity toward clerkships surrounded the diversity of individual clerks within a Justice’s chambers. Many pointed to the fact that the clerks formed a mostly-male body of assistants. In fact, all of the Court’s clerks were male until Justice William O. Douglas hired Lucile Lomen for the 1944-1945 term. Lomen graduated at the top of her class at Whitman College and

97 Id.
then attended the University of Washington’s Law School because Harvard Law School did not accept women at the time. Further, there were far fewer spots to clerk at the Court because the Justices only hired one clerk each. While Lomen studied at the University of Washington, American soldiers fought in World War II. As a result, “many of the male students did not [immediately] return to law school, which affected the recruitment of law clerks.”

Following a common World War II theme, the responsibilities of men abroad thrust women into a new array of duties at home, ranging from working on factory floors to clerking at the Supreme Court. This shift in women’s working opportunities culminated in Lomen’s hiring as a clerk, but unfortunately also ended with her clerkship.

After World War II, many American soldiers returned home with a deep sense of patriotism that led them to study the law. With the G.I. Bill’s passage in 1944, veterans studied at top law schools with tuition paid by the government. As a result, the market for clerks again grew saturated with men and, after Lomen, no woman clerked again until Margaret Corcoran worked for Hugo Black during the 1966-1967 term. Corcoran’s clerkship resulted from an increase in the number of law schools that allowed women to enroll, including Harvard, Corcoran’s alma mater, in 1950. Thus, the ability to receive clerkships related closely to access to legal education. As law school admissions policies transformed to allow women and other underrepresented groups, clerk diversity slowly improved as well.

In the last quarter of the twentieth century, the clerkship institution continued to face an issue of underrepresentation. Todd Peppers noted that since Thomas Russell’s hiring by Horace Gray, “eighty-five percent of clerks were male, and ninety-four percent of clerks were Caucasian.” Reports of such homogeneity within the Justices’ chambers led to renewed calls for diversity among the clerks. These cries for diversity climaxed in October 1998, when the “1000 civil rights activists” led by the National Association for the Advancement of Colored People (NAACP) and Congressman Gregory Meeks protested outside the Marble Palace on its first day of the term. Protesters demanded increased representation of African Americans, Hispanics, and women in the pool of clerks. They cited the fact that, across the entire tenure of every Justice on the bench

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during the 1998 term, the Court employed just seven African American clerks and four Hispanic clerks.\textsuperscript{101} Women fared better than racial minorities, as “about 25 percent [of clerks] were female” by the October 1998 term.\textsuperscript{102} Still, calls for the Justices to end the stark homogeneity of their clerks continued.

Many proposed that the Justices recruit their clerks from law schools all around the country rather than focusing heavily on so-called “feeder schools.” The law schools at Harvard, Yale, Stanford, and the University of Virginia positioned themselves as the top feeder institutions for federal and Supreme Court clerkships. Just as feeder judges helped their clerks work on the Court, feeder law schools achieved successful clerkship rates because of famous and influential faculty whose recommendations carried great weight with the Justices or circuit judges. Feeder schools also functioned as a scapegoat for the Justices to avoid drastically changing their hiring practices. Justice Thomas blamed the lack of diversity by citing the Court’s trend of hiring clerks from the appeals courts. He suggested that “it’s [not] up to us to increase the pool,” because the Justices hire applicants who have clerked for other judges.\textsuperscript{103} As a result, those who charge that the Court lacks diversity among its clerks point to the influence of feeder judges and feeder law schools as preventing qualified and talented students from less prosperous schools from having the chance to clerk.\textsuperscript{104}

As time went on, clerks slowly became a more diversified group but still did not proportionally represent minorities. By the 2018 term, women had won enough clerkships to push the total proportion of female clerks in the history of the Supreme Court up to roughly one-third.\textsuperscript{105} Still, the term had an overrepresentation of white clerks, who made up 85 percent of the clerk body.\textsuperscript{106} Specific Justices have responded to the call for increasing diversity, including Neil Gorsuch, who deviated greatly in hiring practices. Gorsuch made it a standard practice of his chambers to select applicants who were early in their professional academic careers as law school lecturers or professors,

\textsuperscript{102} Benson, \textit{supra} note 100.
\textsuperscript{104} Justice Clarence Thomas’ antipathy toward the Ivy league, despite his Yale degree, is well-known and he is famous for choosing clerks from outside of the top feeder schools, hiring from less prestigious institutions including the University of Florida, Pepperdine, and Louisiana State University.
\textsuperscript{105} Olson, \textit{supra} note 103.
nearly five years out of law school, in order to ensure his clerks have a strong professional and personal maturity that newly graduated students might not have. Impressively, “of the seven clerks Gorsuch has hired over his first two terms, three [were] nonwhite.”¹⁰⁷ The attention paid to the diversity of clerks showed how people offered normative judgements about the clerkship institution in an attempt to improve it, rather than simply learning about clerks to gather gossip about the Justices.

Edward Lazarus’ publication of *Closed Chambers* in 1998 continued to fuel curiosity toward the clerkship institution at the Supreme Court, as much of his book consisted of his criticisms of the Court’s increased polarization. Lazarus might have intended the book to foster discussion on the Supreme Court’s practices, which it undoubtedly did; however, the negative reactions toward the book highlighted the extreme surprise that Justices and other judges felt when a clerk wrote a book that critically assessed the Court, rather than canonizing their Justices or the Court as an institution. Many in the judiciary, including former Ninth Circuit Appeals Court Judge Alex Kozinski, excoriated Lazarus for filling his book with details from his time at the Court. Kozinski’s hatred of Lazarus reached such intense levels that the judge confessed he would recuse himself from any case that involved him, as Kozinski “has nothing but contempt” for the former clerk.¹⁰⁸ While Kozinski’s attitude represented one of the extreme reactions to the book, Lazarus also felt a personal rift between him and his former boss at the Court. In correspondence with members of Justice Blackmun’s staff, Lazarus suggested that the Justice himself, along with his former co-clerks, severed ties with him over the publication of *Closed Chambers*.¹⁰⁹ His relationships grew strained as a result of an apparent violation of the high level trust that the Justices maintained with their clerks throughout the term. Lazarus’ writing about the innermost aspects of his Justice’s chambers, often with a critical tone, marked a breach of that trust, a trust that is one of the most prized elements of a clerkship at any level of the judiciary.¹¹⁰

Judges also reacted negatively to *Closed Chambers* because of its insider and perhaps incomplete accounts of the personal relationships between the

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¹⁰⁷ *Id.*
¹⁰⁹ Email interview with Professor Laura Kalman (Nov. 13, 2019).
¹¹⁰ Calabresi, *supra* note 52. Judge Calabresi noted that he stayed lifelong friends with Justice Black and that the clerks were so close to Black that at his funeral at the National Cathedral, Black’s clerks sat with his immediate family. The President of the United States was seated after the clerks. With respect to his own clerks, Calabresi explained that everyone in his chamber becomes a family. He calls each of his former clerks on their birthdays, and his clerks keep in touch with him constantly. Clerks not only stay close to Calabresi, but they also stay in touch with each other for the duration of their lives. The close relationships between co-clerks and a common sense of loyalty to the chamber explains why many of Lazarus’ co-clerks resented his book. Any clerk could have leveraged their experiences to write such a book, yet none of them chose to do so.
Justices. The book offered details surrounding tension between particular members of the Court but failed to illuminate the full nature of the oftentimes complicated relationships between the Justices. Judge Calabresi conceded that while clerks like Lazarus have a right to share details from their clerkship experience, they should allow for an appropriate time to pass before exposing the most intimate details of the Court.\(^\text{111}\) For instance, Calabresi noted that he would be disappointed if one of his present or recent clerks shared private details from his chamber and discussed his views about other judges because this would alter the working relationship of members of the judiciary. After the particular judges retire or enough time has passed such that the business of the Court would not be interrupted, then clerks can share their unique historical perspectives; however, clerks must pay attention to how leveraging their experience to write a piece might hurt the credibility of a court or cause controversy and unhealthy gossip about the relationship between judges, as Lazarus’ book did. While judges saw *Closed Chambers* as an apparent violation of their personal expectations for their clerks, other perspectives regarding rigid professional expectations for a clerk’s post-clerkship behavior entered the legal sphere.

Law professors pounced on the opportunity to use Lazarus’ book as a means to discuss and produce papers regarding the ethical and legal obligations of clerks in terms of confidentiality. Professor Gerald Lynch at Columbia Law School argued that Lazarus’ book amounts to “the most fundamental breach of confidentiality you can think of,” and pushed for greater enforcement of non-disclosure-agreements at the Court.\(^\text{112}\) Others, including constitutional law expert Erwin Chemerinsky, suggested that “no consensus exists as to what former Supreme Court clerks can and cannot say,” and that the confidentiality agreements of clerks do not prevent them from speaking at all about their experiences, but that they can only not discuss privileged and legally sensitive information.\(^\text{113}\) Chemerinsky argues that confidentiality applies mainly during a clerk’s time at the Court, and that “Lazarus did nothing wrong,” because Lazarus based most of his book on the publicly-available papers of Thurgood Marshall as well as interviews he conducted while writing the book.\(^\text{114}\) Nevertheless, the debate within the judiciary and the legal scholarship regarding clerks and loyalty

\(^{111}\) Calabresi, *supra* note 52.


\(^{113}\) Chemerinsky, *supra* note 108. An analogy between law clerks and engineers at a technology company is helpful here. Engineers at Apple are bound by confidentiality agreements, but are not barred from ever writing about their experiences at the company or about their journeys in making an iPhone. These engineers are mainly limited from disclosing sensitive information that could expose the company’s trade secrets. Still, there are important relevant differences between the technology industry in Silicon Valley and the small group of lawyers within the Supreme Court.

\(^{114}\) Id.
to the Justices they serve *after* their clerkship demonstrated an extremely high level of contentiousness that exists surrounding the clerkship institution at the Supreme Court, particularly in the new public consciousness toward clerkships created after the *The Brethren’s* publication in 1979. Given that Lazarus published *Closed Chambers* 19 years after *The Brethren’s* release, many viewed his book in light of the accusations regarding clerk influence first offered by Woodward and Armstrong. While debates over books containing inside information regarding clerks grew highly contentious, tensions grew when a clerk’s own history at the court was scrutinized on his quest to the Chief Justiceship.

115 While Chemerinsky makes clear that Lazarus likely did not violate any binding rules, Dan Himmelfarb, a former Clarence Thomas clerk, suggests that Lazarus “certainly violated unwritten ones” that exist between a Justice and their clerks. See Dan Himmelfarb, “Review of Closed Chambers by Edward Lazarus,” *COMMENTARY MAG.* (1998).
B. Opening a Clerk’s Papers

Upon his nomination to the Court in 1971 by President Nixon, William Rehnquist became the third Supreme Court clerk to return as a Justice. Later, in 1986, President Reagan nominated Rehnquist to serve as the Chief Justice upon Warren Burger’s retirement. With his impending promotion, the judge faced another confirmation process with the Senate. Rehnquist’s second confirmation process, which occurred just six years after *The Brethren*’s release, demonstrated the extent to which clerkships had come under the scrutiny of the public. His confirmation battle in 1971 did include discussion over his work produced while clerking for Robert Jackson during the 1952-1953 term, including a memorandum written by Rehnquist to the Justice regarding segregation and *Brown v. Board*.\(^{116}\) In particular, Rehnquist’s memorandum argued that “Plessy v. Ferguson is right and should be reaffirmed,” though the future Chief Justice admitted that some might interpret his position as “unpopular and unhumanitarian.”\(^{117}\) Rehnquist faced charges of racism as many accused the Nixon nominee of intimidating African-American voters at polling stations in his home state of Arizona. When the Jackson memorandum surfaced, Rehnquist wrote a letter to the Senate Judiciary Committee stating that he affirmed the legal legitimacy of *Brown* and that the memorandum reflected the views of Justice Jackson. This investigation into his memorandum came after Rehnquist testified before the Judiciary Committee, so Rehnquist escaped without any intense face-to-face scrutiny regarding it.\(^{118}\) Further discussion of the memorandum during his 1971 confirmation arose from worries over Rehnquist’s potential racial prejudice, as opposed to an interest in uncovering the work that a nominee did while a clerk at the Court.

Rehnquist’s battle with the Senate for his Chief Justiceship in 1986 featured even more intense discussion of his work under Justice Jackson, likely due to the increased attention paid to clerks after Woodward’s and Armstrong’s book. Rehnquist himself wrote on the outsized role or bias that Supreme Court clerks can have, particularly through their recommendations for cases in the certiorari pool, and so the Senate Judiciary Committee responsible for considering his promotion to Chief Justice zeroed in on his segregation memorandum. Rehnquist again suggested that the piece reflected Jackson’s views at the time and that he simply drafted it under the Justice’s orders, although many who knew Justice Jackson, including his secretary and Rehnquist’s co-clerks, argued that Rehnquist wrongfully blamed Jackson for the memorandum both in

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1971 and 1986, for the sake of political expediency to secure his promotion.¹¹⁹

Regardless of Rehnquist’s views regarding the doctrine of separate-but-equal, the attention allocated to the memorandum by the media and Judiciary Committee in 1986 demonstrated the increased consideration given to clerks and writings from their clerkships in the aftermath of The Brethren, published just seven years before Rehnquist’s promotion. The memorandum poked its head above water in 1971, and its importance in 1986 undoubtedly related to the Democrat’s missed chance to bring it up before Rehnquist’s in-person testimony. The 1986 firestorm around the memorandum arose not only out of a desire to sink Rehnquist’s promotion on political grounds, but also emerged from an increased interest in his time as a clerk, as The Brethren had sparked interest in clerks and their work. In this way, by evaluating a memorandum from early in Rehnquist’s career as worthy of senatorial consideration, the Senate affirmed the importance of the work of clerks at the Court and made clear that clerks not only dutifully served their Justices, but also put forth legal opinions that they personally held and sought to cement in the law. The media’s intensified interest in clerkships shined a light on the Court’s most private matters, including sour relationships between Justices and the immense responsibilities given to clerks. In this way, the events of the 1980s were responsible for depicting clerkships as an important part of the Supreme Court to the public and for invigorating large scale debate, within the judiciary and among the public and media, over the proper role of clerks within American democracy. Debate over their roles extends to how clerks often choose their own assignments.

¹¹⁹ Perhaps if Jackson were alive during Rehnquist’s promotion, Jackson might have severed ties with his former clerk due to Rehnquist’s disloyalty, just as Blackmun felt toward Lazarus.
A Chamber’s Ambassador

One of the lesser-known and more informal functions of clerks within the Court includes case swapping. Case swapping occurs when one clerk trades their assignments with another clerk privately, after their Justice has already designated them to complete certain tasks. One motivation for case swapping includes removing a conflict of interest: if the clerk assigned to draft the opinion on a particular case determines that they cannot control their bias or had worked on the case during their time clerking at a lower court, the clerk relinquishes their responsibility to a colleague. Scholars defend this form of case swapping as a way of properly handling biases or preventing genuine conflicts of interest within the judicial system.

Another reason case swapping might occur, however, includes one clerk wanting to influence the outcome of a particular case by injecting memoranda and opinion drafts with their own biases to sway the final decision. For example, if a clerk who has been assigned a taxation case wants to draft the opinion on an abortion case, and the clerk assigned to the abortion case longs to write the taxation opinion, they might simply swap their assignments. The motivations behind such swaps include that the clerk feels that their country needs them to work on a particular case in order to, for instance, write the opinion persuasively enough to successfully convince a Justice to defend abortion rights. Senator Ted Cruz, who served as a clerk to Chief Justice Rehnquist during the 1996-1997 term, developed a reputation as an “ardent death penalty advocate” among his co-clerks. He sought to persuade Rehnquist to vote against emergency postponements of executions by providing the gruesome “facts and history of the case” while spending less time on the legal merits. Cruz’s co-clerks resented his impassioned support for the death penalty and found his insistence on denying execution petitions “obsessive” and unfair, indicating the passion with which clerks can approach their responsibilities.

Another motivating factor for case swapping might include a clerk’s desire to work on the most important case of the term. Critics saw these reasons as damaging to the Court as an institution, and in 1996 Chief Justice Rehnquist wrote the clerks to put an end to case swapping across chambers as a way to keep clerks “as neutral and detached as is desirable,” though his note did not forbid swapping within a Justice’s chambers. Still, case swapping rightfully alarms spectators of the Court who worry about the potentially overzealous clerk who

121 Id.
122 Id.
123 Ward & Weiden, supra note 18.
might swap a case with the belief that they can shape the direction of the nation. In order to remedy the potential for such a large magnitude of clerk influence, the Justices must assign cases with attention to the particular positions of their clerks. Further, it might suit the Court to forbid case swapping completely in the absence of a legitimate conflict of interest.

While case swapping was criticized within the Court in the 1990s for heightening clerk influence, the assistants still informally influenced decisions by interacting with clerks from other chambers through the “clerk network.” This network essentially consisted of the social interactions between clerks at the high Court, which occurred during lunch hours when clerks ate together in their designated cafeteria, played together at the Supreme Court's basketball court, or when clerks frequented Washington D.C. bars together. During these occasions, clerks often discussed pending cases with clerks from other chambers in order to ascertain how those Justices might vote or their legal reasoning on a case. When one clerk learned of how another Justice might lean on a case, the clerk then reported this information to their Justice to determine how to write their opinion or justify a decision in order to recruit the Justice to their side.

Some have argued that the limited interactions between the Justices outside of their conferences is one of the reasons that the responsibility to informally negotiate cases behind the scenes fell to the clerks. These limited interactions resulted from growing homogeneity of the professional backgrounds of the Justices: Justices did not see any reason to discuss cases with colleagues whose prior job experiences did not differ from their own and who had come to the bench with the identical views on the Court’s place in American democracy. Today, eight of the nine Justices on the Court served on the U.S. Court of Appeals before they moved to the Supreme Court. In this way, each Justice obviously knows that they might disagree on a case with their colleagues due to differences in ideology and years on the bench, but they also understand that no other Justice has a unique professional experience that they have not had themselves.

Judge Calabresi contrasted this Supreme Court with those of prior years, such as the Warren Court, where each Justice brought with them an entirely different perspective to the Court. Members of the Court valued Chief Justice Warren’s views on states’ rights issues because he served as Governor of California and thus knew better than other Justices how states might react to rulings that affect them. As just another example, Justice William O. Douglas served as Chairman of the Securities and Exchange Commission before his nomination to the

124 The basketball court is located on the fifth floor of the Supreme Court building at 1 First Street NE in Washington D.C. and is informally known as the highest court in the land.
125 Justice Elena Kagan is the only current Justice who was not a judge before her nomination to the Court. She previously served as Dean of Harvard Law School and Solicitor General of the United States.
126 Calabresi, supra note 52.
Supreme Court, so his experiences provided other Justices with a rich perspective about how other government agencies might react to certain court decisions. As a result, the Warren Court had rich and diverse experiences among the Justices, which motivated them to discuss cases with one another at a frequency that later Courts had no reason to maintain in virtue of the growing similarities between the professional backgrounds of the Justices.\footnote{127} 

In order to bridge the divide between the Justices, clerks assumed the role of working with other chambers when their bosses did not. Martha Minow, a former clerk to Justice Thurgood Marshall and former Dean of Harvard Law School, suggested that this network gave clerkships “almost an ambassadorial role, trying to pick up information behind the scenes” for their bosses.\footnote{128} This network attested to the changes not only within the institution of the clerkship but also within the Supreme Court itself. Clerks interacting in this way could not exist before roughly 1946 because clerks generally worked out of the homes of their Justices. John Knox, for instance, who worked out of Justice McReynolds’ apartment building, had no way of casually happening upon another clerk to discuss the merits or justifications of a case. Thus, the Court’s physical organization within their building in Washington fostered interactions among clerks that formed the network and increased the roles of clerks within their Justice’s chambers.

Most importantly, the network represented yet another progression in the reliance on clerks as assistants by the Justices. As the Court entered the 21st century, clerkship duties included regularly drafting the Court’s opinions as well as working the certiorari pool. Within the Court’s unique organization, which the Court’s building provided and Justice Powell restructured through the certiorari pool, clerks swayed decisions through the developing clerk network and growing tradition of case swapping. As a result of these immense responsibilities and opportunities to determine which cases the nation’s highest Court hears and how the Justices vote, clerks clearly grew into full-fledged junior members of the Court.

\footnote{127} Ironically, some might blame the Warren Court for the increased appointments of judges to the Supreme Court, as opposed to nominating people from various political backgrounds, because the Warren Court was attacked as having been overtly political and responsible for deciding controversial cases with dubious constitutional reasoning. Thus, the political explosiveness of the Warren Court might have, in part, led to the appointments of judges who have an established track record of their legal decisions for the public to examine. 
\footnote{128} Ward & Weiden, \textit{supra} note 18.
VII. Conclusion

A. From Apprentices to Associates

Whereas Justices including Horace Gray once relied on clerks simply to research footnotes and take dictation, mainly for the clerk’s benefit as a means of gaining a legal education under the apprenticeship model, clerks nowadays form a “Junior Supreme Court.” These newly graduated lawyers research each case petitioned to the Court and recommend whether it should be heard or not, bridge divides between the Court’s various chambers by discussing cases with other clerks, and draft the opinions in “almost all” of the most controversial cases of the Court, which often go “relatively unchanged” from initial draft to codification into law. This evolution depicts a clerkship institution whose growth has far exceeded the models embraced by Justices Gray or Holmes, often to the bitter consternation of many critics and students of the Supreme Court.

While Justices task clerks with many of the responsibilities that they once carried out themselves, including reviewing certiorari petitions or writing opinions, it is evident that the Justices can no longer carry out their duties without clerks. Within the legal industry, the Supreme Court might be likened to a corporate law firm, in which the senior partners consist of the Justices, and the clerks, the associates. When a law firm is hired to handle a case, the senior partners develop strategies and speak with clients, while associates generally work much longer hours than the partners in order to do much of the paperwork, sit in on meetings, and draft important memoranda. Further, while associates develop close relations with the partners and can persuade them to change their reasoning or opinion on a legal matter, the partners make final decisions.

Clerkships have clearly found a permanent place at the Supreme Court. Clerks are indispensable to the Justices, and the experience has become a time-honored American legal tradition that encompasses the mentorship of the nation’s best lawyers. In Washington D.C., many of the most important offices have assistants that greatly affect the office’s functioning. The President has an entire West Wing of staffers, many of whom recently graduated from college and received their jobs after working for the President’s campaign. For example, Jon Favreau served as then-Senator Obama’s speech writer in 2004 at the age of 23, just after he graduated from College of the Holy Cross. Once Obama moved into the White House, Favreau became his Director of Speechwriting and held the responsibility of drafting all of Obama’s speeches.

Congress also survives with the help of staffers, including younger, newly graduated ones as well as those more entrenched in the political arena, where these staffers help Representatives make decisions such as how to vote on

129 Id.
130 Rosenthal & Yoon, supra note 75.
a bill or how to design their own bills. It remains true that the responsibilities of clerks contrasts those of assistants in other departments, namely because the Supreme Court wields judicial review and if the White House or Congress comes up with a contested law, it falls to the Justices and their clerks to decide its fate. In this way, the clerks might have, in some ways, a final say over the ideas of members of Congress or the President. Thus, one should understand the clerks as some of the most powerful young men and women in Washington. Despite their immense powers, clerks play an integral part in the Court and the Justices clearly could not execute their duties without them, so suggestions that seek to greatly reduce the number of clerks are far from viable.
B. The Future of Clerking: Three Proposals

1. Lift the Curtain

While books such as *Closed Chambers* and *The Brethren* provided a vast amount of previously unknown knowledge about the Court to the American people, the judiciary remains the least well-known branch of government. The Court’s element of secrecy results, in part, because the Justices do not hold press conferences or town halls like members of Congress or the President, and their public appearances largely occur at law schools or academic panels. Thus, opportunities to interact with the Justices remain quite limited. The Supreme Court’s website currently includes a section on its current members with biographical information about each Justice publicly available, just as law firms websites feature about their partners. One potential idea to alleviate the intense scrutiny that the clerkship institution faces includes publishing biographical information about every Justice’s clerks alongside the descriptions of the Justices. A description of the members of each chamber allows any interested citizen to learn quick information about the clerks, including where they attended law school, which can affect one’s political and legal views, and their hometowns or other background information, which also might influence their political affiliations. This also enables the public to see the names and faces of each clerk who works on a particular Justice’s opinions, which helps make the Supreme Court’s business conduct more transparent and therefore less controversial to the public. Mystery is undoubtedly a major element that surrounds the clerkship institution, and publicly recognizing clerks as the influential assistants that they are, just as a politician’s senior staffers are well-known by the media, might assuage the worries of many scholars and lead them to temper their objections to clerks.

2. Hire Diverse Clerks

The clerkship story began as a consequence of the apprenticeship model of legal education, and perhaps certain aspects of this model can improve the experience for clerks and Justices today. Perhaps professors and lower-court judges ought to more strongly encourage law students and clerks to work for a Justice with differing views than them. Similarly, a Justice can greatly benefit from working with a clerk whose legal views contrast their own because these clerks would serve as great intellectual challengers to the Justice’s views by providing the newest and strongest arguments in favor of their contrasting opinions, just as Holmes’ clerks once did for him. In order to arrange for such diversity, circuit judges and the Justices must adhere to the federal clerk hiring plan, which would delay clerkship applications until a student’s second year in law school and therefore allows all judges to have equal access to diverse talent.

rather than enabling some judges to pick out students with certain leanings much earlier than other judges could offer them positions.

3. Pack the Bench

Critics have charged clerks with having too many responsibilities and too much influence on the Court, specifically because clerks read all petitions, write drafts of the opinions, and even interact with other chambers to influence outcomes. While the current structure of the Court needs clerks to help Justices get through the many thousands of petitions they receive, increasing the number of Justices on the bench might drastically reduce the amount of work that clerks have to do and might allow Justices to complete more of the work themselves. Scholars have not recommended this “court packing” suggestion to help reduce the influence of clerks, but increasing the number of Justices from nine to 15 or more might reduce the amount of work that each chamber receives and might create workloads that Justices can more reasonably handle themselves. Clerks can remain responsible for reading and analyzing a certain number of petitions, but the Justices themselves can pick up more of the work. Further, the Justices might even write their own opinions and only seek the clerks for revisions, just as Holmes did, because having more judges on the bench could help them get through their workload. Although suggestions aimed at altering the Court’s size can seem overtly political, “packing” might substantially reduce the workload of clerks and thus can serve as a viable means of placating the worries of many people about the outsized influence of clerks at the Court.
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The Potential Impact of an International Civil Court on Corporate Violations of Human Rights by Multinational Enterprises.

This paper examines whether the creation of an international civil court on corporate violations of human rights could improve the position of multinational enterprises (MNEs) as well as strengthen the rule of law in this particular area. To achieve this purpose, this paper will first examine the current state of affairs on this issue, focusing in particular on the lack of an adequate forum as well as the expenses, both direct and indirect, that are incurred by MNEs as a result. In order for the practical impact of the current situation to be understood, the Kiobel litigation, a case that is entering into its third decade and has been tried in two different jurisdictions, will be examined. In the second part, the potential form and the benefits the proposed Court could bring about will be set out. Focus will be placed on the problems this Court could solve as well as the other issues that may precede its creation or remain after it. Such problems include practical and doctrinal considerations that accompany the formation of an International Civil Court for non-state actors. This paper will find that all solutions currently available are unsatisfactory and that an International Court would help to redress them. Nevertheless, the potential difficulties that could accompany the process of its formation will have to be further studied.
Introduction

In an era when globalization has become the norm, “increasingly states [become] unable to efficiently regulate the growing cross border trade … and the accompanying behavior of multinational business enterprises.”1 This behavior has led in many cases to violations of Human Rights law by MNEs, including their subsidiaries, which are often based in many different jurisdictions around the globe. However, this seemingly international problem has been left to be resolved by national courts, leading to a system of award of justice and remedies that is “patchy, unpredictable, and ineffective.”2 This has urged many academics and practitioners in recent years to examine the possibility of an International Court that would adjudicate these matters, some even going as far as making very articulated suggestions about its form,3 or even publishing draft statutes.4

In this paper, it will be determined what exactly makes the current state of affairs so problematic and whether the creation of an International Court would bear any positive impact. In determining the issues with the current system, particular focus will be given to the absence of a suitable forum to hear these claims. The inadequacy of courts in both the United States (US) and Europe will be demonstrated and a general overview of the judicial systems in the Global South will be provided, utilizing the prisoners’ dilemma theorem. In addition, practical problems such as jurisdictional difficulties, the principle of separate legal personalities of parent and subsidiary companies, and the different state responses to this challenge will be analyzed. In order to offer a practical dimension to the issue, the case of Kiobel v Royal Dutch Petroleum (Shell) will be examined. The case concerns the arbitrary arrests and killing of several Ogoni people, including Dr. Kiobel, by Nigerian forces which were directly or indirectly financed by Shell’s wholly owned Nigerian subsidiary.5 This case serves as a perfect example of the parallel or sequential rounds of litigation that can result, spreading over different states and lasting many years.

In the second part of this paper, proposals for the establishment of the aforementioned Court will be scrutinized in an effort to determine what attributes could be beneficial for all sides. Not every possible form could bring about a positive impact. Instead, there are specific characteristics regarding the type of

2 Ibid.
5 Steinitz, supra note 3 at 70-2.
jurisdiction exercisable, the applicable law and the powers of the Court, which would make it useful. Following this, conclusions will be drawn as to which of the issues identified would be solved by the proposed Court. Benefits such as finality of decisions, certainty regarding the applicable law and reduction of costs for MNEs will be shown to make the establishment of the Court a desirable step. In the last part of this paper, issues that might threaten this proposal will be scrutinized. These issues include the alleged lack of international legal personality (ILP) for non-state actors and the dependency the Court will have on states both for its creation and for the implementation of its decisions. Based on all of the above, the conclusion will be reached that this Court could have an overall positive impact for MNEs and the rule of law, despite potential difficulties.
1. The Inadequacy of All Current Solutions and the Problems they Create in Practice

Problems for both MNEs and plaintiffs span over many different aspects of the lawscape, making all presently available routes inadequate as solutions. In this part, such problems will be examined in order to demonstrate later on why an International Court would be a positive contribution. It will start by demonstrating the issues that usually arise regarding jurisdiction over both parent and subsidiary companies, the uncertainty for corporations, and the inadequacy of state responses to the matter.

The different national approaches will be categorized in three groups. First, the US stance will be inspected on its own. This is because up until recently, courts in the States served as the epicentre for transnational human rights litigation, but this was reversed by the United States’ Supreme Court (USSC) in its 2013 *Kiobel* decision, hence instigating the ‘missing forum problem.’ In the following part, the European approach will be scrutinized. Even though different state approaches play a role, the focus will remain on the European Union (EU) as a whole, since regulations at a Union level constitute the entire bloc inappropriate for such cases.

Lastly, the state of affairs in the Global South will be examined in order to show that matters such as corruption, either perceived or real, or both, result in an unsuitability of such national forums for the current purposes. In the next subsection, a case study of *Kiobel* in both sides of the Atlantic will be undertaken, hence exemplifying the onerous results the current situation has for MNEs and plaintiffs.

1  Steinitz, *supra* note 3 at 83-108.
1.1 What is problematic about the current situation?

A. Imposing Liability on Parent Companies & the Corporate Veil

In our era, MNEs have adopted a role and shape that creates an oxymoron. On the one hand, such corporations wield an increasing amount of power that puts them in a position that can affect people’s rights tremendously.¹ On the other hand, however, due to the way MNEs are structured through parent-subsidiary relationships,² coupled with the “existing classical state-centric approach in international (human rights) law,”³ an “accountability gap”⁴ is created. This is because individual states will normally only exercise jurisdiction over local subsidiaries of a MNE, making it difficult to examine the actions of corporate groups as a whole.⁵

Establishing jurisdiction over both parent and subsidiary companies is the preferable course of action for most plaintiffs in any forum as subsidiaries alone will often lack the necessary documentary evidence to establish legal responsibility,⁶ or will not have sufficient funds to compensate the plaintiffs.⁷ Nevertheless, doing so requires the courts to ignore the separate legal personalities of the parent and subsidiary companies. This ‘corporate veil’ guarantees that the two companies are separate legal entities, with distinct rights and obligations.⁸ Piercing, in this context, means that the liability of the subsidiary can be attached to the parent company. Traditionally, courts have been very reluctant to lift or pierce the veil, often requiring particularly persuasive arguments to do so.⁹ Consequently, any such decision will always be very case specific so that the reasonable

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⁶ Weber & Baisch, supra note 8 at 694-5.
⁷ Vastardis & Chambers, supra note 10 at 393.
⁸ Id. at 394.
⁹ Weber & Baisch, supra note 8 at 688.
ness of establishing a separate personality is balanced against the need to clamp down abuses of the doctrine.\(^1\) Even though no definitive test exists to determine when such piercing should take place, factors that are usually taken into account are: (i) the percentage of ownership by the parent company;\(^2\) and (ii) directors serving on both boards.\(^3\) Nonetheless, the question of when the parent should be liable for the acts or omissions of its subsidiary remains far from being an easy one to answer and different national courts follow different paths when trying to answer it. It is possible that a company may have its veil pierced for a subsidiary in one jurisdiction but not for another in a different jurisdiction, regardless of whether all other material facts are the same. Due to this lack of definitive answers, much uncertainty exists.

Furthermore, different national courts have attempted to find ways to circumvent piercing the corporate veil, hence resulting in further uncertainty. One such example is France, where parent companies have a duty of vigilance over their foreign subsidiaries.\(^4\) This duty creates a “threefold obligation” requiring French domiciled MNEs “to put in place, disclose and effectively implement a vigilance plan” detailing measures to prevent serious human rights violations.\(^5\) Failing to adhere to any of the parts of the obligation may result in civil liability being imposed on the parent company.\(^6\) Of course, this remains problematic in many different ways. First, this law only applies to French MNEs and their subsidiaries, making it one of many different state answers to the problem. When viewed on a global scale, the actual impact of this answer is very small. Most importantly, it furthers the lack of uniformity for veil-piercing rules and creates more uncertainty.\(^7\) This absence of uniformity is so intense that it has led Professor Crespi to observe that “given the divergence among jurisdictions as to their piercing law, [different approaches] can have outcome-deter

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\(^5\) Ibid.


minative consequences.” It is only natural that this divergence of approaches in its transnational context causes confusion to enterprises which operate in a multitude of jurisdictions.

Another example is that of the UK, where courts have devised another way to impose liability to parent companies. Instead of piercing the veil to attach the subsidiary’s liability to the parent company, the UK Court of Appeal determined that a distinct duty of care may be owed by a parent company to those affected by the operations of its subsidiaries. Such duty can arise in two circumstances, either if the parent:

(i) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim; or
(ii) controls the operations which give rise to the claim.

In determining this, Simon L.J. bases his decision on an earlier judgement by Arden L.J. in the case of Chandler v. Cape Plc. There, the Lady Justice determined a set of factors that the courts ought to take into account to determine if such a duty of care exists. These included:

(1) the businesses of the parent and subsidiary are in a relevant respect the same;
(2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
(3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and
(4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.

This mechanism does seem to circumvent the corporate veil in an efficient manner, but it does also have flaws. Just like its French counterpart, it remains limited to British MNEs and their subsidiaries, thus leaving much of the world’s MNEs unaffected. In addition, it moves the legal state of

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4 Id. at para. 80.
affairs even further from the aim of uniformity.

It must be noted that in recent years the possibility of a universal approach on piercing the corporate veil has become visible. In 2014, the UN’s Human Rights Council (UNHRC) passed Resolution 26/9 which decides to create an “intergovernmental working group … whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations.” Based on this decision, Vastardis and Chambers have proposed the inclusion of a veil-piercing clause modelled after those found in International Investment Law (IIL) treaties. In IIL, veil-piercing is essentially used for parent companies to assume the rights, rather than the obligations, of their foreign subsidiaries. It enables foreign investors (parent companies) to “bring claims against the host State for the harm caused by the latter to the subsidiary’s business.” In contrast with the traditional conception of veil-piercing, IIL uses this notion in order to identify a corporation’s shareholders, thereby piercing the veil, for the purposes of finding out its nationality. This plays an important role since it “affects whether certain cases involving foreign investors may be heard by an international tribunal, as opposed to a domestic court.”

Ironically, the test for veil-piercing here sets a much lower threshold by focusing on ownership instead of the control of the subsidiary’s day-to-day business. The former being much easier to satisfy compared with the latter. According to Article 25(2)(b) of the ICSID Convention veil-piercing can take place where the parent company is ‘controlling’ the subsidiary. Even though the Convention does not provide a definition of control, subsequent cases have established that mere ownership of shares

1 Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (2014).
2 Vastardis & Chambers, supra note 10 at 397 – 403.
3 Ibid.
4 Ibid.
5 Katherine E. Lyons, Piercing the corporate Veil in the International Arena, 33 Syracuse J. Int’l L. & Com.
6 Ibid. at 523.
7 Vastardis & Chambers, supra note 10 at 403.
8 International Centre for Settlement of Investment Disputes (ICSID), Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art 25(2)(b) (1966) [hereinafter ICSID Convention].
will suffice,\(^1\) allowing for a much more flexible approach. For example, in the case of *Lanco International Inc. v. The Argentine Republic,*\(^2\) the ICSID Tribunal accepted that a mere 17.4% stock ownership by the claimant in its Argentine subsidiary was enough.\(^3\) This stands as evidence of the disproportionately little attention the law gives to separate personalities when they stand in the way of corporate gains. But when it comes to corporate accountability, the exact opposite happens.

Vastardis and Chambers then move on to provide some good arguments as to why the standard should be the same for International Human Rights Law (IHRL). They point out that just as MNEs are in a vulnerable position vis-à-vis the host state in IIL, claimants are in an even more vulnerable one, in terms of bargaining power, compared to MNEs when it comes to human rights violations. Consequently, they deserve the “substantive and procedural support of international law.”\(^4\) Since states are obliged to protect human rights against third parties, including MNEs, they argue that only by enabling this form of veil-piercing, states will be discharging their duties.\(^5\) The proposed solution is also supported by Michoud. In her article, she expresses the view that “no double standards should be exercised, allowing the same companies to act as free riders and cherry pickers.”\(^6\) Her endorsement of the views of Vastardis and Chambers is encapsulated in her emphasis on the need for coherence.\(^7\) The point where their proposal becomes problematic is where they argue that this mechanism should be implemented by national courts.\(^8\)

Implementation by national courts will take away any potential for uniformity of treatment, to the detriment of MNEs. Arguably, the concept of veil-piercing is an established one. What is troublesome about it in the present situation is that different national courts apply it differently. This means that MNEs have to develop different national strategies for the

\(^{1}\) Vastardis & Chambers, *supra* note 10 at 398-9.


\(^{3}\) Id. at paras. 4-5.

\(^{4}\) Vastardis & Chambers, *supra* note 10 at 404.

\(^{5}\) Ibid.


\(^{7}\) Id. at 157, 161-162.

\(^{8}\) Vastardis & Chambers, *supra* note 10 at 421-2.
states they do their business in, which leads to more legal and administrative expenses. Having the Proposal implemented by national courts simply means reinforcing, in Professor Vagts’ view, the “lack of uniformity in corporate and commercial laws around the world.”

The level of incoherence between veil-piercing jurisprudence around the world has reached the point that it can be described as a “compendium of ‘hundreds of decisions that are irreconcilable and not entirely comprehensible.’” Thus, it is submitted that the form of implementation argued by Vastardis and Chambers will intensify, rather than rectify the problem. So long as courts continue to set different precedents and develop the law in varying ways, the state-centric approach will continue to work against coherence. Their solution can only be utilized through an International Court. Such an organization will develop a consistent set of precedent which will apply to all of its cases and enable MNEs to develop a single, universally applicable strategy. Through this solution, corporations will save large sums of money from legal expenses both during the formation of their business strategies and during the application stage in each of their host states.

Another weakness of implementation by national courts is the feasibility of this suggestion. States have been traditionally reluctant on this matter, which was reflected in the “sharply divided vote” for the adoption of the Resolution. Based on this reluctance, no veil-piercing clause has been included on the released draft of the treaty. The sole provision that attempts to address the issue of parent-subsidiary relationships is Article 10(6). Nevertheless, no direct mention of piercing is made, leaving the
state of affairs in a vague position.\(^1\) Additionally, it has been suggested that even this unclear provision could be sufficient to spark fierce debates on the matter of veil-piercing.\(^2\) Consequently, it is doubtful whether a proposal as bold as that of Vastardis and Chambers would have a chance of inclusion in this treaty. Nevertheless, scholars have recognized the need for a supranational regulator of transnational corporate actors, with respect to human rights, which need to “be rescued from the deathbed of the traditional nation state.”\(^3\) Ergo, even though this treaty has not offered much fertile ground for the above-discussed solution, it remains a meritorious one that could be utilized in the future.

Of course, overcoming the barrier of separate legal personalities is only one aspect of the problem. It is possible that if national forums could otherwise attach liability to parent companies, none of this would be necessary. Unfortunately though, plaintiffs are faced with what Steinitz has named “the problem of the missing forum.”\(^4\) She argues that there are no national courts at the time both willing and suitable to hear cross-border corporate human rights violation cases. As will be demonstrated below, prior to 2013, the US was the only place where such cases were examined; ever since the USSC delivered its judgement in *Kiobel*, however, this all has changed.

**B. The Post-Kiobel US Courts as Inappropriate Forums**

In this section, the main reasons why American courts are no longer suitable for the adjudication of transnational corporate human rights violation cases will be discussed. It will start by analysing the *forum non conveniens* doctrine. This doctrine permits courts to decline hearing a case when they believe a different jurisdiction would be more suitable.\(^5\) This

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section will then move on to the milestone decision of the USSC in *Kiobel* which ended the extraterritorial use of the Alien Tort Statute (ATS), thereby closing the sole suitable forum for victims of transnational corporate violations of human rights.

It is a very common phenomenon for corporate defendants in their home states to request the dismissal of such cases based on the *forum non conveniens* doctrine. The application of this doctrine does not have the effect of ending a case forever; rather, with the understanding that there is a more suitable foreign court to examine the case, it leads to the case’s dismissal from the national courts of the state where the case was brought.\(^1\) A case is dismissed under this doctrine based on “the location of the parties, witnesses, evidence, and given that the local court is more familiar with the local law, which is often the law applied in the case.”\(^2\) Nonetheless, available empirical data “suggest that almost all cases dismissed on *forum non conveniens* grounds in the United States are never refiled in the alternate forum, leaving the victims without any remedy.”\(^3\) Therefore, procedural issues stand in the way of substantial legal redress in these types of cases.

The US was until recently the only jurisdiction where, despite the fact that the *forum non conveniens* doctrine was often applied, plaintiffs in transnational human rights cases had a chance to have their day in court. This was due to the use of the ATS, a legislative piece that laid dormant from its creation in 1789 until 1980, when it was used successfully in the case of *Filártiga v Penã-Irala*.\(^4\) The statute had the effect of allowing federal courts to exercise civil jurisdiction over violations of the law of nations, including customary IHRL, regardless of where they were committed, or the nationalities of the parties. Ever since its revival “the USA has proved magnetically attractive to foreign litigants.”\(^5\)

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3. Ibid.
This golden period for human rights activists came to an end in 2013, when the USSC delivered its judgement in the case of Kiobel. The case itself, as well as the effect it had on the parties, will be discussed in a later section of this paper. In this section, the focus will remain on the rationale of the USSC’s decision and why it demonstrates that presently, there is no court in the world both willing and capable of resolving these types of cases. The case was brought by Esther Kiobel, the widow of one of nine activists who in 1995 were executed by the Nigerian army, with the help of Shell’s wholly owned local subsidiary. When it finally reached the USSC, a cannon of statutory interpretation, called the “presumption against extraterritorial application” was invoked by the Court to reject it. The Court held that nothing in the statute rebutted that presumption. Instead, in order for ATS to be used, the claims must “touch and concern the territory of the United States…with sufficient force to displace the presumption.”

This decision was characterized by many as the “the death knell for ‘foreign-cubed’ human rights claims under the ATS,” but as it will be shown in the following paragraphs, ATS claims were far from being a panacea for all cases.

As Grear and Weston point out, the application of ATS was already very restrictive in terms of the substantive ground of the complaint. They point to another Supreme Court decision that stated that claims must be based on “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th Century paradigms we have recognized.” This had the effect of limiting ATS claims to the 18th century standards, hence making it unable to cope with violations of more modern human rights, such as the right to privacy. This restrictive scope demonstrates that even before Kiobel, the ATS was not ideal.

Furthermore, it was often argued that the ATS enabled the US

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1 Id. at 33.
3 Ibid.
5 Grear & Weston, supra note 56 at 32.
courts to assume a role of “worldwide human rights tribunal.”\textsuperscript{1} This exercise of jurisdiction has been seen as a form of “judicial imperialism.”\textsuperscript{2} It was also criticized for damaging the “foreign relations prerogative of the executive branch.”\textsuperscript{3} Indeed, there is no argument in favor of having the fora of a single state interpreting and applying international law for the whole world. Such practice goes against the concept of state sovereignty as it leads to the exercise of the sovereign will of a single state globally.\textsuperscript{4} Indeed, during the hearing of \textit{Kiobel} by the USSC, the government of the UK and the Netherlands, in a joined \textit{amicus} brief, invoked this exact principle\textsuperscript{5} so that the court would deny the request of the appellants. Again, even though the ATS could provide some relief to claimants, this was not achieved without causing problems.

It is also worth pointing out that American courts and, in particular, American juries, are biased against foreign parties.\textsuperscript{6} This meant that even when ATS claims were available, the hopes of the claimants were limited and their task further complicated. As a result, even in those cases where an outcome was reached, their validity could come under question. Anti-foreign bias evidences even more the unsuitability of US courts\textsuperscript{7} as well as the need for a novel solution.

Overall, it has been demonstrated that the US, although once a relatively adequate forum, can no longer be viewed as such. The decision of the USSC in \textit{Kiobel} has closed the door to foreign plaintiffs, essentially putting an end to transnational litigation for corporate human rights violations. Even while ATS claims were available, their substantial scope was extremely limited to archaic standards of customary IHRL, thus preventing many claimants from having their day in court. What is even more worrisome is that when decisions were made, their fairness and therefore their validity could not be guaranteed, due to an apparent xenophobic

\begin{thebibliography}{9}
\bibitem{2} Ibid.
\bibitem{3} Steinitz, \textit{supra} note 3 at 87.
\bibitem{4} Ibid.
\bibitem{7} Steinitz, \textit{supra} note 3 at 89.
\end{thebibliography}
stance towards foreign parties. Moreover, states could also be uncomfortable with the US assuming the role of a global court, and thus overlooking national sovereignty.\(^1\) This paper will demonstrate that none of these problems would exist if there was an International Court for such matters. Such a court would require a new treaty in order to be established, which would in turn specify the rights covered by its powers. As a result, the solution offered to both MNEs and plaintiffs would not be outdated. In addition, by agreeing to the treaty, sovereign states would give their consent to the Court’s exercise of jurisdiction while simultaneously lifting any claims to exercise their sovereign powers. Lastly, an International Court would be manned by panels of well-reputed judges, coming from a plethora of different legal systems. As a result, their individual interest in favoring one of the parties would be minimized, while their interest in reaching a fair outcome, thus upholding their reputation, would be maximized.

C. European Courts

Having examined the response of US courts, this paper will now cross the Atlantic in order to determine if European courts can offer a better alternative. While being the largest base for non-financial MNEs,\(^2\) Europe is also home to some very challenging forums for foreign plaintiffs.\(^3\) As it will be demonstrated, these challenges, which mostly regard the establishment of jurisdiction, make the EU as a whole an unsuitable forum for hearing the aforementioned type of cases.

Complexities are detectable from the early stages of a case’s life. It begins with the two jurisdictions that run in parallel, which are both relevant in the context of transnational human rights litigation. For companies which are domiciled in an EU Member State (MS), most likely the parent company, a set of EU rules applies, namely the Brussels I Regulation (Recast) (BIR).\(^4\) The rules that apply for non-EU subsidiaries are not the same though. Instead, every MS is free to apply its own rules of Private International Law (PIL),\(^5\) resulting in 28 different state responses and a

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1 Id. at 87.
3 Steinitz, supra note 3 at 93.
5 European Parliament, supra note 11 at 34.
high level of complexity. This is reflected in Enneking’s observations. She notes that many of the 40 cases brought between 1990 and 2016, are dismissed in their early stages as a result of jurisdictional issues,\(^1\) while only 3 have had a judgement on their merits.\(^2\) These numbers provide a strong indication of the unsuitability of EU national forums.

Additionally, Article 8(1) of BIR allows for all potential co-defendants to be sued in the domicile forum of one of them.\(^3\) This provision could offer a useful tool for plaintiffs in transnational cases because “procedural economy can be achieved, as it enables courts to rule on various but connected claims at the same time in an identical forum.”\(^4\) Nevertheless, the European Court of Justice (ECJ) has specified that this provision can only be used to attract defendants from within different EU Member States.\(^5\) As a result, the potential usefulness of Art.8(1) is limited to cases where both the parent and subsidiary companies are within the EU. This makes BIR a very limited tool for claimants just as the courts that rely on it.

Nonetheless, there are some advantages in comparison with US courts, particularly the absence of the *forum non conveniens* doctrine. According to the ECJ, Member States cannot decline exercising jurisdiction on the basis that a non-EU forum would be more appropriate.\(^6\) This liberal rule though only applies to EU-domiciled defendants. This makes the availability of European courts in transnational cases at best inconsistent,\(^7\) while plaintiffs “who sued the European parent company solely to obtain jurisdiction over injuries caused by … [its] subsidiary might be open to claims that they were abusing process.”\(^8\) Consequently, even though access to European courts may be the only means for an effective

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2. Ibid.
3. Regulation 1215, *supra* note 73 at art. 8(1)
7. Steinitz, *supra* note 3 at 95
award of justice for many third-country nationals,¹ the current jurisdictional regime will often make it undesirable.

Hurdles can also occur because of the European choice of law regime. This issue is regulated by the Rome II Regulation,² which provides that Member States’ courts must apply the law of the state where the damage occurred (lex loci delicti).³ Contrasted with the US, where IHRL is applied through American tort standards, the European approach is even less satisfactory. Consequently, in the cases of transnational human rights violations, courts will apply the law of what will often be an underdeveloped, low-income nation, ill-equipped to deal with modern mass tort litigation.⁴ Without any bias towards the legal systems of the Global South, academics have reached the conclusion that:

Generally speaking, parent companies are located in economically developed states that have had the opportunity to develop more sophisticated and generous rules for compensation . . . In most cases the tort principles in developing countries will not have been as fully elaborated through judicial decisions as the tort law in industrialized countries.⁵

As a consequence, Rome II prevents European courts from exercising two of tort law’s most basic functions: corrective justice and deterrence of potential future perpetrators.⁶ Such outcomes do not only go against the interests of the parties of a case, but most importantly, they go against the interests of the rule of law.

It is worth pointing out that this rule is subject to an exception where its application would go against the forum’s public policy.⁷ This in turn has led commentators to the conclusion that adherence to human

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¹ European Parliament, supra note 11 at 110.
³ Id. at Art.4 (1).
⁴ Steinitz, supra note 3 at 96.
⁶ European Parliament Regulation, supra note 84 at art. 26.
rights protection standards may be one such public policy consideration.\(^1\) Nonetheless, as Skinner argues, this proposal has remained only in theory, as there has not been any practical application of this approach.\(^2\) This proposal should also be viewed bearing in mind that derogations from the general rule are meant to be applied exceptionally,\(^3\) which further reduces any chances of a proper administration of justice. Consequently, it can be seen that national forums in the EU are unable to apply proper legal standards, making them unavailable for such cases.

To conclude, the European response to cases of transnational human rights violations has been flawed, both in terms of jurisdiction and applicable law. When it comes to establishing jurisdiction, BIR only governs MS behavior against EU-domiciled parent companies. Jurisdictional approaches over third-state-subsidiaries remain fragmented as each MS is left to regulate the issue by itself. The situation is even more problematic with regard to the applicable law as Rome II requires courts in MS to apply the law of the place where the violation was committed. Therefore, courts will often find themselves using laws they have no experience in and which are ill-equipped for the purposes of corporate violations of human rights. These two issues further demonstrate why European courts are unsuitable for the cases this paper is concerned with. Once again, Steinitz’s ‘missing forum’ problem seems to be confirmed. On the contrary, an International Court would not face any of the issues discussed here. Its jurisdiction to try the actions of both parent and subsidiaries would be provided in its treaty of establishment, leading to a set of rules that is both universally applicable and predictable. As for the substantial issues, it is only reasonable that a new treaty would provide adequate responses for most violations that could arise.

**D. Litigation in the Global South**

Having examined the possible routes of litigation in the two main bases of MNEs, no academic inquiry on the matter would be complete without an examination of the courts in the Global South. The term Global South encompasses the low- and middle-income countries in Africa, Asia,
and Latin America.\textsuperscript{1} These are often the places where the human rights violation has been committed. Unfortunately, courts in low-income countries “often lack the capacity and resources to prosecute even relatively simple civil cases.”\textsuperscript{2}

In this part, the issue of corruption will be analyzed. Corruption, whether real or perceived, can put an end to any chances of having a fair trial, thus failing both claimants, who are unable to access remedies, and MNEs which are forced to operate in environments of great legal uncertainty.\textsuperscript{3} Litigants are not the only ones who are affected. Nations as a whole can be harmed since effective courts are important for economic development.\textsuperscript{4} In this section, judicial corruption in corporate human rights violations cases will be analyzed, in order to demonstrate why corruption itself can be sufficient to make litigation in the Global South a bad choice, hence contributing to the missing forum problem. Recognizing that there is no blanket state of corruption over the judicial systems of all developing nations, this paper will examine the work of Gowder and Steinitz. They argue that even the perception of corruption is sufficient to lead to actual corruption in a developing country’s court, hence rendering it unsuitable for the cases this piece is concerned with.

Corruption can have many sources and take many forms. Courts often face pressures from political or private actors,\textsuperscript{5} who fear losing foreign direct investments.\textsuperscript{6} This could compel the claimants to attempt to corrupt the judiciary in order to neutralise any political influence in favor of the opposing party.\textsuperscript{7} When it comes to the forms corruption might take, a classic one is bribery.\textsuperscript{8} In other cases it might take the form of threats

\begin{footnotesize}
\begin{enumerate}
\item Steinitz, supra note 3 at 99.
\item Cronstedt & Thompson, supra note 1 at 66.
\item Jens Dammann & Henry Hansmann, Globalizing Commercial Litigation, 94 Cornell L. Rev. 1 (2008).
\item Liliana Lizarazo Rodriguez, UNGP on Business and Human Rights in Belgium. State-based judicial mechanisms and state-based non-judicial grievance mechanisms with special emphasis on the barriers to access to remedy measures, 73 (2016); European Parliament, supra note 11 at 17.
\item European Parliament, supra note 11 at 15; Alston & Goodman, supra note 7 at 1467.
\item Maya Steinitz & Paul Gowder, Transnational Litigation As A Prisoner’s Dilemma, 94 N.C. L. Rev. 751, 787 (2016).
\item Id. at 761.
\end{enumerate}
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for reprisals and intimidation,¹ or preventing the opposing party from accessing evidence.²

What makes these acts important in this analysis is that they go against basic rule of law, which demands the availability of non-corrupt dispute resolution processes.³ As it has been already mentioned, this is harmful not only to the parties of a dispute, but to the wider society in general,⁴ often culminating in intense social reactions. Examples of these include the revolutions in many Latin American states which originated, at least in part, from rapacious business practices.⁵ These events lead to the loss of investments⁶ despite the short-term gains from the corrupt acts. Therefore, no forum where the possibility of judicial corruption exists can serve as an adequate solution in cases of corporate human rights violations.

In order to demonstrate in practice the extent of the problem corruption poses, one can examine the 2018 study conducted by Transparency International which found that two-thirds of the 180 nations studied scored below 50 on a 100-point scale of perceived corruption.⁷ Moreover, in a survey of 60,000 respondents in 62 states, the following conclusions were reached:

i. Of the 8,263 people who had been in contact with the judicial system recently, 991, more than one in 10, had paid a bribe;

ii. In 33 of the 62 countries polled, a majority of respondents described the judiciary/legal system of their country as corrupt;

⁴ Steinitz & Gowder, supra note 99 at 756; Dammann & Hansmann, supra note 96 at 1.
⁶ Steinitz & Gowder, supra note 99 at 756-7.
iii. In 35 countries, respondents singled out judges (from a list that also included: police, prosecutor, lawyer, court staff, witness/jury and ‘other’) as the actors they most needed to bribe to obtain a ‘fair’ judgment.¹

Consequently, it can be seen that the threat of corruption is widespread, especially in developing countries.² Hence, none of these courts should be relied upon to resolve corporate human rights disputes.

Accordingly, it is also reasonable that not all developing-country fora will be corrupt or corruptible with the same ease. This is where Gowder’s and Steinitz’s game theory analysis of the situation comes in. They rely on the ‘prisoners’ dilemma’ paradigm, “a structure of strategic action … in which it is individually rational to not cooperate even though both parties would benefit from cooperation.”³ Through this, they argue that:

[J]udicial corruption as a prisoner’s dilemma suggests that both litigants have an incentive to litigate corruptly, even when it would be collectively rational to litigate honestly if they could trust one another. In other words, it is rational—though not moral—to preemptively act corruptly when commencing many transnational lawsuits.⁴

To put this into perspective, the following diagram⁵ demonstrates the payoffs paid to each litigant, whereby the party that chooses the columns gets the payoffs listed first:

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2 Id. at 13.
3 Steinitz & Gowder, supra note 99 at 753.
4 Ibid.
5 Id. at 774-775.
The two academics then provide an analytic illustration of their point, demonstrating the strategic incentives of the litigants with the use of game theory.¹ They then provide a qualitative illustration of their theory by chronicling how perceptions of corruption of the Ecuadorian judiciary led to actual corruption in the *Chevron-Ecuador dispute*,² the longest and highest-yielding transnational litigation case. This leads them to the conclusion that corruption breeds more corruption. Or, in other words, that even in non-corrupt fora, the mere perception of corruption will eventually lead one or both parties to interfere with the judicial procedures, hence contributing to the ‘missing forum’ problem.

Nonetheless, this theory does not come without its critics,³ who argue that legal scholars use this paradox because it is easy, readily amendable to a standard toolkit of solutions, and provides a unique equilibrium.⁴ However, the prisoners’ dilemma describes a universal human tendency to cheat on mutually beneficial orders, including legal orders, in order to obtain the maximum benefit while the other party obtains a less favorable one. Indeed, even if one accepts that the application of the paradox by Gowder and Steinitz is not flawless, empirical data suggest that corruption is a widespread condition among the developing world’s judiciary. Even if an incorruptible forum can be found, it is unlikely that it will have the resources to solve a global lack of suitable adjudication for such cases.

Therefore, it has been demonstrated that courts in the Global South are insufficient to resolve this situation, just as their European and American counterparts. Any cases that reach national courts lead to judgements that are defective or do not even lead to a judgement, all while consuming large amounts of money and time for litigants. In the following section, a qualitative analysis of the dysfunctionality of the current situation will be provided through an examination of the *Kiobel* litigation.

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¹ *Id.* at 767-779.
² *Id.* at 779-798.
⁴ *Id.* at 212.
1.2 Case Study – Kiobel

In order to understand the practical difficulties created by the current state of affairs, it is necessary to examine the impact of a case on the contesting parties. There are many cases that have had detrimental effects on their parties, but this paper chooses to analyze the Kiobel litigation as a key example. Though not the lengthiest--this title belongs to the now infamous Chevron-Ecuador litigation, which is currently in its 27th year--Kiobel exclusively considers human rights violations. After providing a reiteration of the facts, two main detriments will be analyzed: the lack of finality due to the many sequential rounds of litigation, and the many expenses--both direct and indirect--that result because of the long proceedings.

The case stems from the violations of human rights that took place in Ogoniland by the Nigerian Army with the help of Royal Dutch Shell’s wholly owned subsidiary, Shell Petroleum Development Company of Nigeria (SPDC). Ogoniland is an oil-rich area of the Niger Delta in Nigeria, where Shell has been carrying out drilling operations since 1958.1 In the 1990s, locals formed the Movement for the Survival of the Ogoni People (MSOP) to protest the contamination of their lands and the lack of compensation.2 In 1993, after a shutdown of Shell’s local facilities due to protests, the Nigerian authorities detained thousands of demonstrators. Among them were nine leading members of MSOP, including its founders Ken Saro-Wiwa and Barinem Kiobel.3 This led to their execution in 1995, following what has been considered a “blatantly unfair trial.”4 After fleeing to the U.S., Dr. Kiobel’s widow filed an ATS class action against Shell, Shell Transport & Trading Company (STTC) and SPDC.5

2 Steinitz, supra note 3 at 70.
3 Ibid 71.
5 Steinitz, supra note 3 at 72.
Specifically, the plaintiffs claimed that Shell “financially supported the operations of...military units directly and indirectly, including the purchasing of ammunition” through SPDC, and “by...providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use [Shell’s] property as staging ground for attacks.”

Nevertheless, in 2010, the District Court for the Southern District of New York handed down a ruling against the plaintiffs, which was later reversed by the U.S. Court of Appeal for the Second Circuit. These judgments resulted in the 2013 decision of the USSC discussed above. By this time, eleven years had passed since the litigation had started and eighteen since the killings. Nevertheless, in June 2017, the plaintiffs filed a civil case in the Netherlands, where Shell is based. In May 2019, the District Court of The Hague ruled that it had jurisdiction over the case, and that “Shell may now face questioning on what it knew about the Nigerian military’s operations against environmental protesters and the execution of the Ogoni Nine.” Finally, after eighteen years of litigation, the case might have its first chance to be heard on its merits, surpassing jurisdictional issues at last.

It is also worth pointing out that, apart from the main Kiobel-branch of the litigation, Shell’s actions in Ogoniland have led to many other cases in different jurisdictions. This includes filings in Nigeria, where claimants have faced many obstacles in accessing justice, four additional cases in the Netherlands and two in the U.K. Twenty-five

3 Steinitz, supra note 3 at 73.
5 Amnesty International, supra note 120.
6 Ibid; Martinetto, supra note 117 at 116.
9 European Parliament, supra note 11 at 75-78.
10 Id. at 78-81.
years since the killings of the Ogoni nine, the *Kiobel* case has completed almost twenty years of litigation over four different jurisdictions, and likely costing millions--if not billions--in legal and other expenses.

Based on the above analysis of the case facts, the current international lawscape is quite hostile towards transnational corporate human rights cases. One of the main reasons that emanates from the *Kiobel* litigation is the lack of finality. This in turn leads to many parallel and sequential rounds of litigation. Parallel litigation refers to instances when the same case is tried simultaneously in different jurisdictions.\(^1\) Sequential litigation refers to instances when the same case is tried over and over again in different jurisdictions.\(^2\) Both of these phenomena are products of the “disaggregated nature of transnational litigation and the lack of cross-border preclusion,”\(^3\) and are the main drivers behind the immense cost that accompanies such cases.\(^4\)

Regarding *Kiobel*, parallel litigation can be observed with the various related cases--apart from the main litigation branch--that are tried at the same time in different jurisdictions. This is mostly detrimental to the defendant, since the plaintiffs might be different. The Southern District of New York recognized this danger in its judgements, commenting that parallel litigation “forces its target needlessly to defend itself in many fora… [with] no adequate remedy in law for this coercive effect.”\(^5\) Contrastingly, had there been an International Court, all similar cases would be joined, hence requiring the parties to adjudicate the matter only once.

As for sequential litigation, this is best exemplified by the main branch of *Kiobel*. After the end of the U.S. litigation saga, there was nothing stopping the plaintiffs from trying their chances in the Netherlands. Indeed, this strategy could carry on forever in as many jurisdictions as the parties wish. No rule forces the fora of one state to refuse to hear a case just because it was rejected in another one. Sequential litigation can also occur even when a judgement is already obtained. This occurred in the

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2. Ibid.
3. *Id.* at 77.
4. Ibid.
Chevron-Ecuador dispute, where a judgement in favor of the plaintiffs was obtained in Ecuador, but “numerous proceedings are currently underway globally in connection with the Judgment. These include: recognition and enforcement actions in Argentina, Brazil, and Canada.” This is due to the fact that Chevron’s assets in Ecuador do not suffice, and because of allegations of corruption in the Ecuadorian judiciary. As a consequence, “more such actions [are] expected in some of the other seventy-plus jurisdictions in which Chevron has assets.” There is no reason why Shell would oppose any judgement obtained by Esther Kiobel in her favor, thus subjecting this case to endless rounds of litigation. In contrast, sequential litigation would not occur in any form had there been an International Court. The Court’s decision would be final, binding all state-parties to refrain from exercising jurisdiction to cases already tried at this new forum. As for the sequential (enforcement type) litigation, all signatories would be required to give effect to the Court’s judgements without any further judicial procedures. Therefore, all of a defendant’s assets in all state parties would be readily at hand to compensate the plaintiffs.

At this point, it would be useful to examine another product of the aforementioned lack of finality, the huge expenses--both direct and indirect--that occur while litigating such cases. Of course, an International Court would not erase all of the expenses, but, as it will be demonstrated in this paper, it would alleviate a great deal of them. Nevertheless, first it is necessary to identify what these expenses are in order to determine how they would be affected by an International Court.

The first major category is direct litigation costs. Here, apart from legal fees, one could also include other professionals, like discovery service providers, translators, and service processors. To these expenses forum shopping procedures must be added, which is a cost unique to cross-border litigation. These proceedings alone can last for years, just as in the Chevron-Ecuador case, raising the fees even higher. It is only reasonable that this type of litigation, which traverses through different

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3 Id. at 431.
4 Steinitz supra note 3 at 111.
5 Id. at 112.
jurisdictions can lead to a considerably higher amount of costs than single-jurisdiction litigation. This is mostly because “attorneys, investigators and other personnel must be flown and accommodated in the foreign country. Documents and testimony must be translated. Evidence could be located in remote areas that are difficult to access.”¹ In the case of Wiwa v. Royal Dutch Petroleum (Shell), a sister-case of Kiobel, Shell paid legal fees equal to that of the final settlement,² an amount that is estimated to be in the hundreds of millions of dollars.³ These costs are further exacerbated because of parallel and sequential litigation, since parties will have to pay the fees again and again, in multiple fora, forcing them to navigate through irreconcilable legal regimes for decades.

Establishing an International Court would ameliorate the situation by taking away parallel and sequential litigation, as well as forum shopping. Of course, experts, lawyers and translators would still have to be paid, and witnesses and others would still have to travel and be accommodated, but these would happen only once and for a considerably shorter amount of time. These reductions in cost render the proposed Court a far better economic solution than any presently available.

Consideration should also be given to the indirect costs that can result from litigation. These affect corporate defendants almost exclusively, and not the plaintiffs. One of the most detrimental consequences of these cases is the uncertainty they cause for the MNE’s future. In turn, this leads to financial distress, even if there is no fear of bankruptcy, by generating fear among lenders, thus affecting the cost of capital and making it harder for the company to obtain credit.⁴ Hesitance may also be created among business partners and suppliers,⁵ placing extra burden on the MNE. Subsequent reputation harm can make stakeholders lose faith in the corporation’s promises or non-contractual notions, especially with regards to its production and employment providence,⁶ as employees would worry that

¹ Ibid.
³ Ibid.
⁴ Steinitz, supra note 3 at 114.
⁶ Kathleen Engelmann & Bradford Cornell, Measuring the Cost of Corporate Litigation: Five
the defendant may cut corners and make their positions unsafe.\textsuperscript{1} Even in relatively insignificant cases, negative publicity, regulatory attention, and barriers from raising capital can become disproportionately high.\textsuperscript{2} This has been acknowledged by the U.S. Chamber of Commerce in its brief during Kiobel, commenting that such cases “impose a severe social stigma that may scuttle stock values or destroy debt ratings.”\textsuperscript{3} Additionally, reputation harm can damage the goodwill a MNE has built over time,\textsuperscript{4} and it can make public unfavorable information about its prospects.\textsuperscript{5}

The backlash from stakeholders’ reactions can easily drop a MNE’s productivity, thus diminishing its shares’ value.\textsuperscript{6} In certain cases, the damage to shareholders can be even greater, since a court may issue a freezing order on a company’s assets and may even specifically forbid it “from paying dividends.”\textsuperscript{7} Overall, there is academic consensus that indirect litigation costs can surpass--and often dwarf--direct costs.\textsuperscript{8}

The reputational and financial detriments listed above can be significantly ameliorated through an International Court. This institution would provide a fast and final judgement on a case’s merits, thus providing closure for plaintiffs\textsuperscript{9} and putting an end to speculations about the tortfeasor MNE’s future. Even if one accepts that an appeals process should be available for reasons of fairness and legitimacy, the Court would still be more expedient than any of the current solutions. Therefore, even if such costs will always accompany litigation, their detrimental effect can be severely reduced if an appropriate institution exists. The end to parallel and sequential litigation would mean that those economic consequences would last for a much shorter time than they currently do, with some even

\begin{thebibliography}{9}
\bibitem{1} \textit{Id.} at 382.
\bibitem{4} Engelmann & Cornell, \textit{supra} note 147 at 380-381.
\bibitem{6} Engelmann & Cornell \textit{supra} note 147 at 377.
\bibitem{7} Steinitz, \textit{supra} note 3 at 116.
\bibitem{8} Engelmann & Cornell \textit{supra} note 147 at 395; \textit{Maya Steinitz, Incorporating Legal Claims, 90 Notre Dame L. Rev.} 1155, 1172 (2015).
\bibitem{9} Steinitz \textit{supra} note 3 at 120.
\end{thebibliography}
ceasing to exist. For an International Court to achieve this, it is imperative to be equipped with the right features. As it has been already mentioned, since the early 2000s, proposals for courts that would examine human rights claims have been revived.¹ In the following section, such proposals will be examined so that it can be determined how such a court should be established and how it should look.

2. An International Court for Corporate Human Rights Violations

The idea of an International Court for human rights is not something new. It was first expressed in 1948 during the Australian government’s drafting of the Universal Declaration of Human Rights.¹ Indeed, attaching a judicial remedial mechanism to the nascent international human rights legal corpus seemed like a logical need.² While that attempt never came to fruition, the need persisted, sowing the seeds for the proposal’s revival. In the following years, supervision was left to the UN treaty-body system, which was limited to “a system of self-reporting by states, with a soft form of naming/shaming using non-binding treaty-body observations and recommendations which are often carefully and diplomatically phrased.”³ By the end of the 20th century, the lack of effective remedies to human rights violations in combination with the inefficient “supervision of state compliance”⁴ led to a rebirth of such proposals. These proposals can be considered part of a wider tendency in the post-Cold War period towards the multiplication of international courts.⁵

¹ *Id.* at 2.
⁴ Kozma, et al., *supra* note 4 at 47.
2.1 The Form of the Court

Recent proposals have exerted significant influence over this paper. A comparative analysis of these proposals must be undertaken to see which characteristics of the Court would best close the gap demonstrated in previous chapters. The first of the two main proposals to be examined is that of Kozma, Nowak & Scheinin, which brought the notion to the surface at the beginning of the 21st century. Then a more recent one by Maya Steinitz will be scrutinized. The following section will focus on two pivotal aspects of the Court: personal jurisdiction and applicable law. These characteristics are of fundamental importance towards the establishment of an organ that will truly improve the situation analyzed above.

A. Personal Jurisdiction

Exactly whom a claim can be directed against is possibly the most important aspect in a case. This is also an issue where the two examinable proposals take different positions. Kozma et al. support that their World Court of Human Rights (WCHR) should be able to exercise jurisdiction over states and ‘entities,’ which includes “any inter-governmental organization or non-State actor, including any business corporation.” Any such entities can accept the WCHR’s jurisdiction through a declaration.

Placing states and non-state actors on the same footing has significant drawbacks. By making these two very different categories subject to the same legal obligations and to the same modes of enforcement (the UNHRC and the Security Council), a “wholesale according of status and personality to ‘entities’” is created. Such rush changes in the law come with “radical implications that seem not to have been thought through or even considered.”

1 Kozma, et al., supra note 4.
2 Steinitz, supra note 3.
3 Kozma, et al., supra note 4 at 12.
4 Id. at 11.
5 Id. at 27.
6 Philip Alston, Against a World Court for Human Rights, 28 Ethics & Int’l Aff. 197, 207 (2014).
7 Ibid.
Moreover, giving an international organization such a broad mandate over this large variety of subjects is almost certainly going to be detrimental to any prospects of acceptance the Court may have. To bring an international court to life, the consent of a critical number of states is necessary. It is unlikely that a Court with such broad powers, that can confront states directly with their international human rights obligations, would be viewed positively. It must also be borne in mind that two of the world’s most influential states, the US and China, “are not known for their unwavering support of the international judiciary.”

Consequently, it seems imperative to curtail the powers of the WCHR in order to gain acceptance among the international community.

Steinitz, on the other hand, has made a much more moderate proposal with regard to personal jurisdiction. She supports the creation of a Court with jurisdiction over all persons: both natural and corporate. In her monograph, Steinitz discusses how the possibility of states being subject to the Court is not even a valid consideration. This might be viewed as an advantage since holding states and corporations to the same standard is neither fair towards the latter nor beneficial for the development of the law.

Another feature Steinitz suggests is that the Court’s jurisdiction should be compulsory, instead of the traditional two-stage consent to international jurisdiction. The latter required a subject not only to join a court’s statute but also to accept separately the Court’s jurisdiction, either generally or over specific disputes. Contrastingly, the new-style jurisdiction, which has been gradually gaining acceptance over the years, following the increased success of some international courts in attaching a critical mass of ex ante acceptances of their jurisdiction...and with the rise of international courts endowed with compulsory jurisdiction...the centrality of consent as a jurisdictional condition has declined.

1 Steinitz, supra note 3 at 37.
2 Id. at 157.
3 Ibid.
5 Yuval Shany, Questions of Jurisdiction and Admissibility before International Courts, 64 (2015).
This would mean that upon ratification of the Court’s treaty by a state, MNEs in its jurisdiction will automatically fall within the International Court’s jurisdiction as well. This is another difference with Kozma et al., who require MNEs to consent to the Court’s jurisdiction separately.\(^1\)

It is the author’s belief that the position adopted by Steinitz is superior, both in terms of the subjects as well as the type of personal jurisdiction. Allowing a Court to exercise jurisdiction over both states and corporations and applying the same standards to these two vastly different categories of legal entities would create a disanalogous mixture of judicial powers. Such a concentration of “frighteningly broad powers in the hands of a tiny number of judges”\(^2\) brings any chances for the Court to gain acceptance to demise. On the contrary, allowing the Court to specialize solely on MNEs will be viewed more positively by the international community, and it will allow its judiciary to develop a coherent body of case law. As for the type of personal jurisdiction, Kozma’s two-stage jurisdictional consent simply adds more complexity and takes away valuable time, thus reducing the Court’s efficiency. Furthermore, the emphasis on consent in the international legal stage has to do almost exclusively with states, not persons. This is why the International Court of Justice (ICJ), which adjudicates between states, uses the stricter two-stage method, while the International Criminal Court (ICC), which deals with physical persons, uses compulsory jurisdiction. Ergo, this new Court, which would also be dealing with physical and legal persons, falls closer to the ICC and therefore it is more reasonable to use the same type of jurisdiction.

### B. Applicable Law

Turning to the issue of applicable law, the two proposals contradict again. Starting from Kozma et al., their suggestion is that the Court should be able to adjudicate over violations of any human right in any of the UN’s 21 treaties on the field of human rights.\(^3\) In theory, this approach has the advantage of saving the time and effort that would be required to formu

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1 Kozma, et al., *supra* note 4 at 27.
2 Alston, *supra* note 168 at 197.
3 Kozma, et al., *supra* note 4 at 11-12.
late new international law standards while drafting the Court’s statute, something that would spark intense debates among the states involved in this procedure. Nevertheless, this analysis falls short of recognizing that “the prospect that every right in every one of the treaties that a given state has ratified would be subject to binding international adjudication would in fact provoke hugely contentious debates in any society that takes the rule of law seriously.” It is entirely possible that the burden placed upon the Court would be unbearable, since it will have to reconcile a vast magnitude of diverse and potentially contradicting provisions.

In addition, this proposal fails to take into account the fact that the provisions in the UN’s treaties were designed for states. It would be absurd to expect states and MNEs to adhere to the same standards, in spite of their vastly different nature and available means. This paper argues that it is far more reasonable to hold MNEs accountable against obligations designed for them. Such obligations should still protect the same rights as obligations found in other treaties, but at the same time they should guarantee that no over-exhaustive burden is placed upon corporations. Striking this balance would make the Court’s proposal more attractive to both states and the corporate world, who could see it as a means to improve their corporate social responsibility performances.

Furthermore, as Nowak comments, in order for the proposed Court to gain jurisdiction over the twenty-one treaties, the “cumbersome process of amending all UN core treaties” would be required. In order for the creation or amendment of an international treaty to have legal effect, the signing and ratification of a sufficient number of states is required. This process may take years, even decades, for a single treaty, doing so for twenty-one seems like a herculean task.

Instead of this course of action, Nowak seems to adopt a position similar to Steinitz’s. He suggests that the rights protected by the Court

1 Alston, supra note 168 at 201.
2 Id. at 202.
3 Ibid.
4 Id. at 207-208.
should be based on a new treaty,\(^1\) thus enabling states to “be free to decide on the rights which they wish to subject to the Court’s jurisdiction.”\(^2\) Indeed this suggestion coincides with the position adopted by Maya Steinitz.\(^3\)

The only contentious aspect in Steinitz’s proposal is the limited extent of the rights covered. She mentions that the Court’s statute should only deal with “the most severe kinds of harms – the kinds in which people lose their lives, limbs, and livelihoods.”\(^4\) Such a limited extent of rights makes the usefulness of the Court questionable. This is because all regional human rights courts at the time of this writing cover a much wider range of rights, without of course being able to enforce them directly against MNEs. In order for a new Court to actually contribute to the protection of human rights, it needs to offer something more than what its European,\(^5\) African,\(^6\) and American\(^7\) counterparts do. In other words, the proposed Court must protect a substantially similar range of rights, against a different kind of perpetrators, MNEs.

Overall, this paper adopts neither the position of Kozma et al., nor that of Steinitz on the issue of applicable law. Instead, it favors a course of action that is somewhere in the middle of these two proposals. As has been argued above, conferring jurisdiction over the UN’s human rights treaty is an almost impossible task to achieve and its outcome would not do justice to MNEs. On the other hand, drafting a new treaty that only covers a very limited range of rights will not do justice to any of the potential victims. It is submitted that the Court should apply legal provisions which are designed to apply to MNEs and which cover a range of human rights substantially similar to those covered by regional human rights courts.

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1 Ibid.
2 Ibid.
3 Steinitz, supra note 3 at 154-156.
4 Id. at 154.
7 Organization of American States (OAS), Statute of the Inter-American Court of Human Rights (1979).
2.2 Potential Problems

Up until now, the necessity of such a Court and the form it should adopt have been analyzed. Nevertheless, it is now necessary to examine how realistic this proposal is. To achieve this, two potential threats to its realization will be scrutinized. These are the practical problems international courts face, in the form of their dependency upon state parties, and the more theoretical problem that is the alleged lack of an International Legal Personality (ILP) by corporations. It is recognized that these issues cannot be examined to their fullest extent in this Article since that would fall outside of its scope. It is nonetheless necessary to address them in a manner that helps in answering the question set at the beginning.

A. Becoming State Dependent

A problem faced by most international organizations, including international courts, is their dependency on states. This vulnerability is mostly evident in two different periods of a Court’s life: during its creation and during the implementation of its decisions. As it has been already mentioned, the statutes of international organizations are drafted by state delegates, international lawyers, academics, and other experts. They are then opened for signing. In order for any instrument to gain legal effect, a predetermined number of countries must sign and ratify the statute. Drafters seek to balance contrasting national interests without compromising the statute’s quality. States’ hesitations often have to do with giving up some aspect of their sovereign autonomy to an international tribunal.

Nevertheless, as it is evidenced in the first part of this paper, “states have shown virtually no interest in pursuing and prosecuting those who have committed human rights abuses.” At the same time, however, “states are required by international law to ensure that third parties (including corporations) comply with binding human rights requirements.” The outcome of these two factors is a legal framework that needs to be

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implemented inter alia against MNEs, but those responsible (i.e. states) are unwilling to do so. As a result, human rights protections are being implemented by the same people who violate these and other voluntary guidelines, such as the United Nations Guiding Principles.\(^1\) One can easily conclude that this framework is bound to be ineffective since it lacks both an enforcing mechanism and detrimental consequences for its perpetrators.

Academics like Gibney, on the other hand, have offered a solution that might take international human rights standards out of this gridlock. For him, the message is clear, “the lesson that emerges from actual state practice is...[that] individuals must be given the means to enforce and protect their own rights.”\(^2\) The only means through which victims will be able to achieve this sought-after protection is through an International Court. He argues that “all of the international human rights law in the world will not amount to much without the means to enforce this law.”\(^3\)

Therefore, it is clear that states have an incentive to sign up for an international civil court on corporate violations of human rights. Doing so will enable them to discharge their obligations in international human rights law, while avoiding the burden of dealing directly with those violating it. However, these incentives will have to be contrasted with the international community’s reluctance to impose direct international obligations to private parties, a hesitation that is diachronically present in the global legal scene.\(^4\) Accordingly, it is possible to overcome the first of the two forms of dependencies this proposed Tribunal might face, if emphasis is placed upon the exigency to close this accountability gap and thus allow states to fulfil their obligations. At the same time, further study is necessary to determine the realistic chances of acceptance the Court could have.

The second point of reliance between the Court and state-actors is

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\(^2\) Gibney, supra note 191 at 49.

\(^3\) Id. at 52.

during the implementation of its decisions. International courts have been characterized as “giants without limbs.”\(^1\) Since there is no international executive power to implement its decisions,\(^2\) enforcement will inevitably lie with the executives of the states concerned in each case. Since the proposal deals with a civil, not a criminal Court, its decisions will mostly regard remedies. Steinitz suggests that these remedies will have one of the three following forms: monetary compensation, declaratory, and injunctive relief.\(^3\) Consequently, save for declaratory reliefs, the cooperation between states and the International Tribunal is imperative. Arguably, in those cases where the cooperation is not fruitful, any judicial decision will be of minimum significance. It is possible that in those cases, plaintiffs would turn towards the judicial systems of the non-cooperative state. This possibility takes away any benefit the Court could offer to its state-parties, since, again, national judicial systems would be burdened with complex transnational corporate human rights litigation. Lastly, any decision not to cooperate with the Court’s decisions could also have diplomatic costs, since the uncooperative party would be seen to undermine any prospects of “international cooperation and legal coherence.”\(^4\) Based on the example of the ICC, the proposed Court could refer any cases of uncooperative members to the UN Security Council.\(^5\) Such possibility may have grave outcomes since the Security Council has a very broad arsenal that can be utilized against non-cooperative nations.

Conclusively, the international legal settings at place make some degree of dependence unavoidable. Nonetheless, there are some good reasons supporting state cooperation in favor of the Tribunal’s formation. Yet, more research is still necessary for the prospects of acceptance the Court could have. As for the enforcement stage, states have both practical and legal incentives to collaborate. One the one hand, national courts would be relieved from some very complex cases that would otherwise fall on them. On the other hand, non-compliance with the Court’s decisions may lead to serious diplomatic sanctions.

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1 Nyamuya Maogoto, *supra* note 190.
2 *Id.* at 110.
3 Steinitz, *supra* note 3 at 175.
5 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, art.87(7) (1998); Nyamuya Maogoto, *supra* note 190 at 125.


B. International Legal Personality for MNEs

Modern business realities that flow from an ever-increasing environment of globalization mean that “international lawyers can no longer ignore the increasing role of [MNEs] in international society.”\(^1\) However, the ability of corporations to be the bearers of obligations under IHRL, hence being its subjects, is still contentious.\(^2\) So far, no such obligations have ever been imposed. In recent years, however, a new generation of scholars has been calling for IHRL to become “a matter of private law (horizontal) applicability wherein corporate conduct may be regulated through direct civil liability which is capable of attaching to harm caused by corporate conduct outside a state’s own territorial space.”\(^3\)

Traditionally, ILP has been limited only to state actors, ergo the debates on the possibility of MNEs being subject to IHRL. Indeed the ICJ has recognized since 1949 that non-state actors could obtain an ILP:

[Being an international person] does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.\(^4\)

Accordingly, scholars have concluded that ILP is nothing more than a mere epistemological fiction, not a “reality of positive law or of nature”\(^5\) but a “thoroughly formal concept.”\(^6\) In turn, this implies that new actors can be attributed with the qualities of an ILP.\(^7\) Consequently, if the

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1 De Brabandere, supra note 9 at 67.
2 Id. at 68-71.
6 Id. at 152.
7 Janne E. Nijman, Non-State Actors and the International Rule of Law: Revisiting the ‘Realist
possibility of MNEs acquiring ILP exists, one must then determine if they already have ILP or, if not, how this can be achieved.

It can be argued that MNEs have already been accorded rights in international law through international investment treaties. Based on Kelsen’s analysis, this should have meant that the status of MNEs on the international legal stage would be unquestionable. However, their conception as subject of international law remains debatable.

As a result, a new generation of academics has argued that settling this question “would necessitate the intervention of states.” This could have arguably been achieved through the proposed treaty on business and human rights. Even so, as the first draft of the treaty came out, no direct corporate human rights obligations were included. If this form of the treaty comes into force, it would represent a lost opportunity to settle the question of corporate ILP.

At the same time, this does not mean that the solution of a treaty has been excluded for the future. Such a treaty would convert states from subjects of IHRL to enforcers, which could be seen as undesirable by many nations. Nevertheless, an International Court could take away any undesirability through its horizontal enforcement effects. One could say that such a treaty could be dually beneficial for states. On the one hand, the accountability gap for corporate human rights violations would close and the status of MNEs under international law would be settled. On the other hand, states would be avoiding the responsibility to enforce those obligations by creating an International Civil Court, thus enabling for

1 ICSID Convention, supra note 34; Nijman. supra note 208 at 96.
2 De Brabandere, supra note 9 at 86.
3 Bernaz, supra note 196.
horizontal enforcement, by the victims directly. Conclusively, this paper finds the question of ILP for MNEs more of an incentive in favor of an International Court rather than a problem towards its creation.
Conclusion

In conclusion, it has been shown that there is a need for an international civil court on corporate violations of human rights. Admittedly, the doctrine of the corporate veil stands as a significant obstacle for anyone seeking redress for such atrocities. Nonetheless, it is virtually guaranteed that no satisfactory remedy can be obtained without the veil being pierced. At the same time, however, no mechanism is in place, either nationally or internationally, which can offer a universally accepted solution. Through the analysis made in this paper, Steinitz’s ‘missing forum’ problem can be confirmed. Indeed, there is no national court in the world right now which is both able and willing to try such complicated cases. This has been shown through separate analysis of each region’s courts and the reasons preventing them from exercising that function. Then, in the last section of the first chapter, the Kiobel litigation saga was examined. It was demonstrated how such cases can give rise to endless rounds of parallel and sequential litigation, resulting in huge sums of money wasted on both direct and indirect expenses. These are the products of a legal system which is unable to offer finality to those who rely on it. This problem, just like all of the issues mentioned above, could be solved if the correct arrangements are put in place. Such arrangements should have the form of a new International Court, whose potential characteristics were elaborated in the subsequent chapter. It was determined that if such a Court is created, its personal jurisdiction should only be limited to corporations, not other organizations and certainly not states. More importantly, the Court should be able to exercise jurisdiction automatically on any corporation residing within the borders of a state party. On the issue of applicable law, it was determined that giving the Court jurisdiction over all of the 21 UN human rights treaties is an impossible task. Instead, the rights protected should all be included in the treaty for the new tribunal and they should not be as limited as suggested by Steinitz. over all of the 21 UN human rights treaties is an impossible task. Instead, the rights protected should all be included in the treaty for the new tribunal and they should not be as limited as suggested by Steinitz.

Finally, the potential problems for such courts were taken into account. Namely, the danger that the proposed organization might become dependent on its state parties as well as the alleged lack of ILP for
corporations. As noted previously, these hurdles fall outside of the scope of this paper and were only examined to the extent they contribute to the present question. More research is required before one can safely conclude that this international civil court solution can be realized in the foreseeable future.

As it can be concluded from all of the above, the international community needs to find ways to regulate corporate conduct in the field of international human rights. This paper has highlighted that a new International Civil Court is the optimal solution to corporate violations of human rights.