INTRODUCTION

Each of the three scholars profiled in this volume of the Virginia Journal is deeply impressive. Together, they provide weighty evidence in a longstanding debate about the nature and relevance of legal scholarship. The central question of that debate is whether legal scholars should focus on the kinds of issues and problems currently facing judges and practicing lawyers or instead embrace and integrate the intellectual perspectives of other disciplines within the modern university. It is a trick question, and we at the University of Virginia School of Law have long responded, “Both, and.”

Dotan Oliar (trained in economics), Micah Schwartzman (trained in philosophy), and Barbara Spellman (trained in psychology) epitomize that answer. Indeed, the word that immediately comes to mind when one reads the interdisciplinary work of all three scholars is “current.” Through their very different methodological approaches, each stands at the cutting edge of the law. Their combined body of work makes a compelling case for the “both, and” proposition: that the incorporation of methods and perspectives beyond law actually enhances legal scholarship by prompting new insights into the most important and relevant problems of the law and the legal system.

For DOTAN OLIAR, the methods are quantitative, empirical, and economic, and the problems lie at the intersection of creativity, technology, and innovation. In asking what the future of creativity will look like, Oliar has started by better understanding the past and the present. His wide-ranging and eminently original scholarship attacks its subjects on multiple levels and from every possible vantage point. It tells us who creates, what they create, and why. It seeks to answer longstanding questions about the proper scope and extent of copyright protection by actually looking, empirically, at the current scope and extent of that protection. Oliar harnesses quantitative methods, behavioral law and economics, and empirical inquiry into new and informative datasets to probe, evaluate, and predict. The results of his prodigious research are provocative and important.

For MICAH SCHWARTZMAN, the issues are some of the thorniest constitutional questions our courts are facing and some of the most critical the nation faces in the political arena. A scholar of political liberalism and a staunch defender of public reason, Schwartzman has devoted his career to thinking deeply and carefully about why governors owe sincere and reasoned decisionmaking to the governed. Such questions could not be more current. Nor could Schwartzman’s crucial interventions into the constitutional status of religion. A major contributor to contemporary debates that have engaged, and will continue to engage, the Supreme Court as to the proper relationship between religion and government, Schwartzman’s profound theoretical insights are anything but abstract. Schwartzman is not merely a contributor to a whole host of national conversations of preeminent importance; rather, his rigorous analysis shapes those conversations in the most fundamental ways.

Trained as a cognitive psychologist, BARBARA SPELLMAN has spent much of her career encouraging lawyers and psychologists to learn from one another to enhance our knowledge of human behavior and to use that knowledge to improve the legal system. Spellman began her psychological inquiries where most law schools begin first-year legal training: with analogical reasoning. She has asked how judges decide, how juries assimilate information, and how lawyers should build on psychological understanding to make their cases and convince other actors in the legal system. Spellman’s more recent scholarship on evidence law—a pervasively psychological subject—is lucid and learned. It is also, and quite intentionally, accessible to readers in both law and psychology, and to practitioners as well as scholars. Spellman’s ambitious and influential work promises to change the very way meaning is made and truth contested in the adversarial process.

Risa L. Goluboff
Dean
EXPLORING MOTIVATIONS TO CREATE

DOTAN OLIAR’S work explores the creative ecosystem. By focusing on various legal and extra-legal incentives, disincentives and constraints, he seeks to shed light on what and how much people create in the expressive and technological arts. He teaches courses on intellectual property law, law and economics, and entrepreneurship. In his scholarship, he uses positive and normative law and economics and empirical, quantitative, and behavioral methods to evaluate creative activity across diverse contexts and industries.

A native of Israel, Oliar became interested in innovation when he served his national duty as an officer in the technology-infused intelligence Unit 8200. Oliar earned his undergraduate law and philosophy degrees at Tel-Aviv University, graduating first in his 123-student law section. He grew interested in American law while taking courses from professors who had obtained their doctorates in law from U.S. law schools. Following law school, Oliar clerked for Justice Jacob Kedmi on the Israeli Supreme Court.

After clerking, Oliar moved to the United States to pursue graduate legal studies at Harvard Law School, where he deepened his acquaintance with intellectual property law and gained exposure to the economic approach to law. His LL.M. thesis, conducting an economic analysis of copyright’s fair use doctrine in the digital age, won the Irving Oberman writing award. During his S.J.D. studies, he served as a fellow at the Olin Center for Law, Economics and Business and at the Berkman Center for Internet and Society. At Berkman, he was a member of the group that launched Creative Commons, a set of technologically embedded copyright licenses that facilitate the open sharing of content. He wrote his S.J.D. dissertation on the framing of the Constitution’s Intellectual Property Clause. The University of Virginia hired Oliar as an associate law professor in 2007, and he became tenured in 2011. He currently conducts graduate studies at the University’s Economics Department.

Oliar’s scholarship can be organized around four themes: (1) empirical analysis of U.S. Copyright Office records; (2) technological change and the
transformation of intellectual property rights; (3) the scope of Congress’s intellectual property power; and (4) behavioral analysis of incentives to create.

**EMPIRICAL ANALYSIS OF U.S. COPYRIGHT OFFICE RECORDS**

At its core, intellectual property law attempts to balance providing incentives to create, on the one hand, with ensuring a broad dissemination of expressive works and inventions, on the other. A trade-off exists since incentives are provided by awarding rights to exclude and restrict access. What copyright scope would strike this balance optimally? In recent decades, scholars have hotly debated whether copyrights are excessive or inadequate, but with little to no empirical support for their claims. To address this state of affairs, Oliar has turned, in a series of recent works, to analyzing the hitherto neglected records kept at the Copyright Office, which happens to be one of the few—and by far the largest—public registries of copyright claims in the world. These records contain much data about the operation, use, and performance of our copyright system, and can be used to improve it.

In “Copyright Preregistration: Evidence and Lessons from the First Seven Years 2005-2012,” 55 Ariz. L. Rev. 1073 (2013), Oliar and his co-author, UVA Law graduate Nicholas Matich ’13, examine copyright owners’ actual use of the 2005-minted preregistration formality. Several industries lobbied for this Copyright Act amendment, which was intended to enhance copyright owners’ ability to combat the leakage of content to the Internet prior to its official date of release. Based on interviews with users of the preregistration system and their attorneys, and on an originally constructed dataset of more than 6,000 preregistrations, the article finds that the system operates in ways that are markedly different from those anticipated in the legislative history. First, industry use of preregistrations was largely limited to (parts of) the movie and TV industries, while others—notably the music industry—made virtually no use of it. Second, preregistration was often used strategically in litigation, after infringement had already been detected rather than in advance of it. The case of preregistration should give Congress pause before acting on demands for greater intellectual property protections. Such demands may exaggerate actual need, and the protection afforded, which comes at a social cost, is unlikely to be revisited later.

In “Copyright Registrations: Who, What, When, Where and Why,” 92 Tex. L. Rev. 2211 (2014), Oliar and coauthors Nate Pattison and UVA Law graduate K. Ross Powell ’15 constructed and analyzed a dataset comprising the 2.3 million copyright registration records for the years 2008-2012. They downloaded these records from the Copyright Office’s online search page using a specially written computer program. The article provides a snapshot of contemporary copyright registration patterns. It describes the types of works being registered, how the registrations of individuals and firms differ, when works are being registered relative to their dates of creation and publication, the age distribution of authors in different creative fields, and the geographic distribution and concentration of registration claimants. As the article reports, corporate authors tend to be geographically concentrated and to register published works, computer software, periodicals, and movies, whereas individual authors tend to be geographically dispersed and to register unpublished works, music, and drama. Among registered works, authors of music tend to be most productive in their 20s whereas literary authors tend to be most productive in their 50s.

Oliar’s current work, “Registering Authors: Challenging Copyright’s Race, Gender and Age Blindness,” Geo. Wash. L. Rev. (forthcoming 2018), co-authored with George Washington University law professor Robert Brauneis, is the result of academic partnership with the Copyright Office, under which the office handed the authors all copyright registration data from 1978 to 2014. The article challenges copyright law’s theoretical abstraction from author-specific characteristics. Copyright law aims generally to provide authors with incentives to create, assuming a general, unitary author figure. The authors created probabilistic race and gender variables for all authors of registered works, basing them on U.S. Census data on the racial and gender makeup of individuals with particular last and first names, respectively. Among other things, they find that, statistically speaking, authors of different races, genders, and ages tend to register different types of works, often at different rates; that two-thirds of all authors are male; and that men and women tend to co-author with similarly gendered individuals. They suggest that copyright theory must explicitly account for the mechanism by which legal entitlements induce particular authors to choose which works to create and with whom to collaborate. This mechanism appears to involve social, cultural, and gender-related characteristics that the major theories of copyright law do not currently acknowledge.

Oliar plans to further use registration data in future work to assess the extent to which particular copyright law amendments tended to enhance creativity.
TECHNOLOGICAL CHANGE AND THE TRANSFORMATION OF INTELLECTUAL PROPERTY RIGHTS

Which IP rights should the state allocate, and when, to whom, and how should these answers evolve with technological change? In “The Copyright-Innovation Trade-Off: Property Rules, Liability Rules, and Intentional Infliction of Harm,” 64. Stan. L. Rev. 951 (2012), Oliar explores the way incentives to create content should be traded off against incentives to create new and better technologies to enjoy and reproduce content. Imposing liability on the makers of technologies such as record players, radio, television, photocopiersons, VCRs and file-sharing networks for related acts of infringement would incentivize the creation of content, but would disincentive technological innovation. Freeing them from liability would induce technological innovation but would disincentivize the creation of content. Cases concerning all the aforementioned technologies have reached the Supreme Court, but its ad-hoc rulings do not provide a general approach to striking the copyright-innovation trade-off. The article likens technological and expressive creativity to conflicting activities, just like those of a rancher and a farmer, where harm is the result of simultaneous operation. Oliar charts the disparate incentives that would follow from handling content-technology interferences under each of Guido Calabresi and A. Douglas Melamed’s four property and liability rules. He argues that none of these rules can produce optimal incentives to all. Oliar advocates the adoption of a new set of “modifiable” entitlements that produce superior incentives to create content and technology and to reduce the incidence of interference between these activities. Under “modifiable” rules, courts would be allowed to reallocate entitlements to the more efficient party based on a review, during litigation, of the parties’ earlier investment decisions. Oliar argues that copyright law, which allows courts to excuse infringement via the fair use doctrine, can be understood as embodying a modifiable property rule in authors.

Oliar continues to explore the optimal structure of IP entitlements and to draw on property theory in a current working paper, “Right on Time: First Possession in Intellectual Property Law,” co-authored with UVA Law graduate James Stern ’09, now a professor at William & Mary Law School. The paper analyzes intellectual property law as a rule of first possession. It surveys and motivates the many patent, copyright, and trademark law doctrines that award rights based on either the rule of capture or the rule of first committed searcher, rules which should be familiar to first-year law students from cases such as Pierson v. Post (NY. 1805). It emphasizes that the two rules differ in the time in which they allocate exclusive rights, and that the right rule should be the one that best balances the costs and benefits of early versus late awards of exclusivity to particular resources. The intellectual property context illuminates considerations of notice to third parties, which are often taken as given in the tangible property context but should be provided for explicitly when it comes to conflicting claims to intangibles. The intellectual property context is further unique in exhibiting relatively frequent doctrinal shifts between the two aforementioned conceptions of first possession, which the authors suggest might be explained by the possibility that the social costs and benefits of intellectual property rights are highly sensitive to technological change.

THE SCOPE OF CONGRESS'S INTELLECTUAL PROPERTY POWER

Oliar conducted his S.J.D. studies at a time when a hotly debated case was making its way up the court system. In Eldred v. Ashcroft (2003), the Supreme Court upheld the constitutionality of a 20-year retroactive extension of the copyright term. Much of the case rested on historical evidence on the scope of Congress’s power under the Intellectual Property Clause. Oliar's research informed his S.J.D. dissertation as well as three articles.

In “Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power,” 94 Geo. L.J. 1771 (2006), Oliar argued against the conventional wisdom according to which the first words in the clause, “to promote the progress of science and useful arts” are merely a nonbinding, hortatory preamble, an argument that relied on the framers' arguable intent. Reviewing overlooked parts of the framers' debates in the Constitutional Convention, Oliar rather concluded that the most likely inference one can draw from the convention’s records is that the framers, as a collective body of differently minded people, wished these words to be part of the grant of power to Congress and—most importantly—to also limit it at the same time. Oliar reached this conclusion by tracking proposals made by James Madison and Charles Pinckney during the convention to empower the future Congress not only in regard to copyrights and patents, but also to establish national educational, trade, and research institutions. The latter proposals were largely overlooked in the literature, but textual parts thereof, containing the progress language, made it into the text of the clause. Oliar reconstructed the framers’ intent relating to the progress language by a close reading, tracking which parts
of these proposals were adopted and which rejected, and by putting these
textual decisions in greater context. Further, while many have suggested that
limitations in the IP clause should be enforced using a heightened standard
of judicial review, Oliar proposed a way for courts to enforce the progress
limitation using a deferential one. In Golan v. Holder (2012), the Supreme
Court indeed enforced the progress limitation using a deferential standard.

In “The (Constitutional) Convention on IP: A New Reading,” 57 UCLA
L. Rev. 421 (2009), Oliar solved several factual puzzles surrounding the IP
debates at the Constitutional Convention that had long haunted scholars of
the IP clause. For example, analyzing textual differences among historical
sources statistically, Oliar could conclude that James Madison proposed in
the convention that Congress should have the power to issue patents, going
against the conventional wisdom of historians in the field. Oliar further
went against the conventional wisdom that proposes that the clause be
read disjunctively as embodying two distinct and unrelated congressional
powers, one over patents and the other over copyrights. Oliar’s historical
research and findings suggest that the clause should be read holistically as
granting Congress broad powers in the area of intellectual property law.

In “Resolving Conflicts among Congress’s Powers Regarding Statutes’
Constitutionality: The Case of Anti-Bootlegging Statutes,” 30 Colum. J.L. &
Arts 467 (2007), Oliar explores the question of inter-clause constitutionality
conflicts, which several IP-related enactments raise. The article zeroes in
on statutes that impose civil and criminal liability on those who make and
traffic in bootleg recordings of live concerts. Can these statutes, which
seem to exceed Congress’s IP clause power, nevertheless be upheld under
Congress’s Commerce Clause power? Oliar pushed the ball by reviewing
the full set of limitations in the IP clause that the statutes are in tension
with, and by introducing to the literature several Supreme Court cases
that serve as close precedents for disposing of inter-clause conflicts
regarding statutes’ constitutionality. Oliar suggests that these cases show
a particularist approach to the question, namely one that is mindful of
the extent of the clash between a particular enactment and the arguably
violated constitutional limitation. Though the Court’s jurisprudence is a
far cry from providing clear guidance on the issue, it is at least instructive
in dispelling the prevalent and diametrically opposed views that Congress
can either never or always circumvent limitations set in one enumerated
power by acting under another.

Oliar’s first article, “Incentives to Create Under a ‘Lifetime-Plus-Years’
Copyright Duration: Lessons from a Behavioral Economic Analysis for
Eldred v. Ashcroft,” 36 Loy. L.A. L. Rev. 437 (2002), written while he was
in the middle of his S.J.D. studies and co-authored with a then-fellow
S.J.D. candidate, Avishalom Tor (now a law professor at the University of
Notre Dame), was one of the first-ever to conduct a behavioral analysis of
intellectual property doctrine. The article explores the incentives that the
current copyright term, structured as the life of the author plus seventy
years, generates as compared with an alternative, otherwise equivalent,
fixed term of years that would last for the average author’s life plus seventy
years. For its first two centuries, U.S. copyright law used a fixed term of
years, but the Copyright Act of 1976 adopted the current rule based on
the international standard. The article argues that two well-documented
biases—over-optimism and subadditivity—result in having authors perceive
a life-plus-years copyright term as longer than an otherwise equivalent
fixed copyright duration.

Oliar returned to this behavioral theme several years later in “There’s
No Free Laugh (Anymore): The Emergence of Intellectual Property Norms
and the Transformation of Stand-Up Comedy,” 94 Va. L. Rev. 1789 (2008),
co-authored with Chris Sprigman (then a University of Virginia law
professor), exploring extra-legal social norms and behavioral regularities
among stand-up comedians. The project was inspired by the observation
that while joke-stealing accusations often fly between stand-up comedians,
there is a paucity of litigated cases involving comedy. The article explores the
various doctrinal hurdles that make it especially hard to win a lawsuit over
joke theft, and shows that comedians resolve disagreements over joke and
comedic routine ownership using a set of social norms. Violation of these
norms is privately policed using sanctions such as tarnished reputation,
refusals to share a stand-up bill and—when all else fails—a punch in the nose.
While this set of norms often orders the topics of ownership, transfer, use,
and sanctions in ways that are similar to copyright law, at other times norms
and law differ markedly. The article cautions against viewing social norms as
necessarily superior to law, and suggests that each system has relative merits
and demerits. Most interestingly, the article notes that joke theft was once an
accepted practice in the industry, and makes sense of the contemporaneous
evolution of the norm system and of standup comedy itself—from its earlier
“joke book” style to its current point-of-view-driven character.

Oliar’s research reflects an admirable attempt to better understand
human creativity, its determinants and correlates, and consequently shape the law to better let it flourish. In his quest to do so, he has not shied away from making bold methodological strides into the disciplines that best fit his research questions, be it a historical foray into the debates at the constitutional convention, a theoretical analysis of the economic incentives generated by alternative legal rules, statistical data analysis of government records, or the exploration of psychological biases and social norms. He has also recently acquired and used an improved set of quantitative skills, started a collaboration with the Copyright Office, and opened up a body of empirical copyright scholarship. True to his subject of study, Oliar has established himself as one of his generation’s most careful and innovative scholars of creativity.

EXCERPTS

THE COPYRIGHT-INNOVATION TRADE-OFF: PROPERTY RULES, LIABILITY RULES, AND INTENTIONAL INFLICTION OF HARM

Adapted and abridged
64 Stan. L. Rev. 951 (2012)

INTRODUCTION

Should copyright law impose liability on innovators of technologies used to copy, manipulate, or disseminate protected content? Intellectual property law’s goal, and constitutional mandate, is to promote both authorship and invention. Often, each of these goals can be pursued independently. Sometimes, however, they conflict. New technologies—such as record players, radio, motion pictures, photocopiars, VCRs, MP3 players, and file-sharing networks—often weaken copyright owners’ control over content. As the Supreme Court observed, imposing copyright liability on technology companies would promote authorship but chill innovation, while immunizing innovators from liability would promote innovation but chill authorship. How should the law balance these two interests?

This Article takes a first-principles approach to content-technology conflicts. It views authorship and innovation as two economic activities that interfere. It conducts a systematic analysis of how allocating property rules and liability rules to copyright owners and innovators would induce each group to invest both in pursuing its own trade and in minimizing the copyright-innovation interference.

For example, a property rule in innovators—an entitlement allowing them to manufacture any technology regardless of harm to copyright owners—may drive some of them to produce harmful technologies and to actively promote their use for infringement. Such inefficient investments in technology creation and harm generation may allow some innovators to extract value from copyright owners in return for shutting down. Imagine, for instance, an innovator contemplating a technology—that creates a small value of 10 but that also harms copyright owners by 100. Backed by a right to market this technology,
an innovator would produce it. The innovator and copyright owners would quickly realize that all can be made better off by shutting down the technology. In negotiations, the innovator would not accept anything less than 10 to shut down while copyright owners would pay 100 at most. Under equal bargaining power, the innovator would shut down in return for 55. Assume, however, that when the innovator creates the new technology, he can invest an extra 5 to increase the technology’s harmful effect to 200. While a net loss in social welfare, this investment in harm exacerbation would pay off for the innovator, because it would increase the copyright owners’ maximal willingness to pay to 200, thus increasing the innovator’s settlement amount to 105. This is just one effect of one legal rule—this Article provides a comprehensive analysis of the incentives generated by each of the four classic entitlements.

Charting the incentive effects of alternative legal rules can explain observed phenomena and predict future ones. For instance, before the rise of file-sharing networks over the past decade, the relevant Supreme Court precedent, Sony Corp. of America v. Universal City Studios, Inc., was largely understood as vesting a property rule in innovators. Several courts found that file-sharing networks actively induced infringement by end users, a behavior consistent with the predicted behavior of the similarly protected innovator in the numerical example in the preceding paragraph. Also consistent with that example were the negotiations between Napster, the file-sharing network, and music labels, pursuant to which Napster would shut down its harmful technology in return for value.

A major cost of legal rules is that they may drive protected parties to make clearly inefficient investments. For instance, the innovator in the numerical example above found it privately profitable to invest in a socially harmful technology. When it comes to technological change, lawmakers often cannot predict the nature of future technologies before they are invented. Their choice is often limited to allocating background entitlements under limited information regarding the future. Although lawmakers cannot observe the nature of the parties’ investments in real time, they might still be able to verify their type (socially beneficial or harmful) once a content-technology conflict occurs. A legal system that, upon observing a protected party who invested inefficiently, reallocates the entitlement to its counterpart, will provide the parties with improved incentives to invest. Contrary to conventional wisdom regarding content-technology conflicts, this prescription—which the Article calls “modifiable entitlements”—holds true even if the parties can transact costlessly at the time a conflict occurs. The purpose of this prescription is not to overcome transaction costs after the parties’ activities already conflict. In such a case, under costless bargaining, the efficient result will happen regardless of the applicable entitlement, as the example above shows. Rather, this prescription seeks to make the parties invest efficiently at an earlier time when they cannot yet transact, a time when improved incentives to invest may prevent a future conflict from arising. Further, modifiable entitlements are generally superior to traditional entitlements even if courts can observe the nature of parties’ investments only some of the time.

The Supreme Court’s decision in MGM Studios Inc. v. Grokster, Ltd. suggests that the legal system is at times capable of verifying the nature of the parties’ earlier investments during a conflict, and of reallocating entitlements accordingly. In Grokster, the Ninth Circuit allowed the technology company to rely on the background entitlement from Sony to manufacture its harmful technology. The Supreme Court likely believed that the technology was harmful (i.e., it was of little or no independent value yet created great harm to copyright owners) and so the Court reallocated the entitlement to copyright owners. Doctrinally, it did so by crafting a new theory of liability—intentional inducement—that led to a reversal of the outcome below. Providing improved investment incentives therefore requires mechanisms to reallocate entitlements from innovators to copyright owners in certain cases (such as by way of the Court’s doctrinal innovation in Grokster), but also from copyright owners to innovators in other appropriate cases. The fair use doctrine is one major way in which the latter reallocation can be done, and indeed Sony can be read as having used the doctrine in this way. The Article suggests creating a general “reverse fair use doctrine” that would allow courts to reallocate entitlements from innovators to copyright owners.

II. A FRAMEWORK FOR APPROACHING THE COPYRIGHT-INNOVATION TRADE-OFF: INCENTIVES TO INVEST UNDER DIFFERENT RULES

This Part studies the friction between two economic actors—copyright owners and technology innovators. It adopts Calabresi and Melamed’s focus on property rules and liability rules as major ways in which the law resolves conflicting use problems. It charts systematically the disparate incentives that different entitlements provide copyright owners and innovators to invest in their own activities and to reduce the interference between those
activities. Though the analysis is conducted in the context of content-technology conflicts, it builds upon work by Lucian Bebchuk and contributes to a literature of a more general applicability.

F. SUMMARY: Copyright Owners’ and Innovators’ Incentives to Invest Under Property Rules and Liability Rules

The distortions in the parties’ investment decisions can be summarized as follows:

TABLE 17 - Copyright Owners’ and Innovators’ Investment Under Different Rules

The contents of the table are included in Table 18, below.

III. ANALYSIS: HOW THE FRAMEWORK CAN BE USED TO PREDICT CREATORS’ BEHAVIOR AND TO MAKE BETTER LAW

2. Modifiable entitlements: a proposal to improve incentives to invest

The analysis has thus far assumed that the law’s role is limited to setting background entitlements that would apply in all types of content-technology scenarios. Indeed, oftentimes the most that lawmakers can do ex ante is choose the entitlement that produces the best investment incentives across all possible scenarios. However, viewing the question ex post, once a technology already exists, the legal system might be able to determine the scenario into which a particular technology’s interaction with content falls. When it can, how should it use that added information?

Much of the distortion in ex ante investments stems from the behavior of inefficient parties. Protected by an entitlement, an innovator might invest in a harmful technology. Protected by an entitlement, a copyright owner might invest in a business model that will soon be replaced by a revolutionary technology. In such cases, protected parties invest knowing that their investments are inefficient and will be shut down ex post. They invest nevertheless because owning the entitlement assures them that shutting down ex post will be accompanied by a payment. However, if the legal system can observe ex post that a protected party invested inefficiently, it should reallocate the entitlement in favor of the other party (and it does not matter whether it does so by a property rule or a liability rule). Such a principle of modifying initial allocations would deny entitlements ex post to copyright owners and innovators who planned to profit from inefficient investments. If parties expected such modifications to obtain ex post, they would not invest inefficiently ex ante.

Assume a legal system in which, for example, Congress sets initial entitlements that parties can later assert in litigation. We shall call them “modifiable” entitlements. In that system, courts can verify the type of content-technology scenarios in play. If Congress initially allocates copyright owners a modifiable property rule or a modifiable liability rule, a court that later observes a revolutionary-technology scenario in litigation could still afford the innovator a property rule that would allow it to market the technology freely. Likewise, if Congress initially allocates to innovators a modifiable property rule or a modifiable liability rule, a court that later observes a harmful-technology scenario in litigation could still afford copyright owners a property rule that would enable them to enjoin the technology. A court that observes an efficient-coexistence scenario will simply apply the initial entitlement chosen by Congress.

All modifiable entitlements provide optimal investment incentives to parties foreseeing revolutionary-technology and harmful-technology scenarios. Each modifiable entitlement in these scenarios would protect the efficient party, driving it to invest optimally, and would deny protection to the inefficient party, driving it not to invest (which is again efficient). Modifiable entitlements thus could only distort investment decisions of parties in efficient-coexistence scenarios. What would these distortions be?

To conclude, the parties’ investments under the modifiable rules would be as follows:

TABLE 18 - Investment Distortions Assuming that Scenario Types Are Verifiable in Courts

Entries in brackets represent distortions assuming that scenario types are never verifiable, as in Table 17.
Table 17 above, whose content is included in brackets in Table 18 here, reflects the cumulative distortive effect associated with different legal rules when lawmakers cannot determine the type of particular content-technology scenarios ex post. Table 17 thus reflects, among other things, investments by clearly inefficient parties. Table 18 reflects a much-improved incentive structure that would follow if lawmakers could always verify scenario types ex post and modify initial allocations so as to deny protection to inefficient parties. Modifications, we saw, might happen in harmful-technology and revolutionary-technology settings. For parties in these two scenarios, all modifiable entitlements would generate optimal investment incentives, and are therefore indistinguishable. The distortions of modifiable rules reflected in Table 18 are those stemming from efficient-coexistence scenarios only.

While Table 17 unrealistically assumed that lawmakers can never observe ex post parties that had invested inefficiently ex ante, Table 18 unrealistically assumes that lawmakers can always do so. In reality, the ex ante incentives associated with modifiable rules lie somewhere in the range between the values noted in the two tables. The better the courts’ ability to verify scenario types during litigation, the better the bundles of ex ante incentives from which policymakers can choose.

The point of the modification prescription is to make the parties invest desirably ex ante. If courts deny protection to harmful technologies ex post, for example, none would be created ex ante. This prescription differs from the conventional wisdom pertaining to content-technology conflicts, according to which courts should consider whether to reallocate entitlements through the fair use doctrine only if the parties are unable to transact at the time of conflict.

REGISTERING AUTHORS: CHALLENGING COPYRIGHT’S RACE, GENDER AND AGE BLINDNESS

Adapted and abridged (with Robert Brauneis) (Geo. Wash. L. Rev., forthcoming 2018)

INTRODUCTION

Who is the author in copyright law? To devise a successful copyright system, lawmakers must know more about the central figure in copyright law: the author. We believe that there is much to be gained from finding out who actually creates the books, articles, songs, movies, plays, art, and software that are the bedrock of American education, science, culture and entertainment. What is the race, gender, and age of the authors of those works?

In the pages to come, we pursue answers to these questions by examining a hitherto untapped data source: the United States Copyright Office Electronic Catalog. For the first time, through its Academic Partnership Program, the Office has provided us a full copy of the Catalog as it stood in late 2014.

Our empirical analysis focuses on three variables that are not in the Copyright Office’s data, but that we generate, namely authors’ race, gender and age. We are able to calculate authors’ ages by subtracting their birth year from the year in which they created their works. Establishing authors’ gender is not as simple. To answer this question we use probabilities drawn from the gender distribution of first names under the 1990 U.S. Census. Similarly, we determine authors’ probabilistic race and ethnicity using last name data based on the 2000 U.S. Census.

Relying on Census statistics involves the risk that the gender (race) make up of authors’ first (last) names might be different than the one in the general population, such that the statistics reported may not be accurate. This risk is not substantial in the gender context, since the vast majority of first names are exclusively male or female, or virtually so. Last names, by comparison, are not nearly as determinative of a person’s race and ethnicity. Therefore, first, as a benchmark, we use population racial and ethnic distribution of last names. We then use regression analysis to estimate the relative average ratio of racial and ethnic propensities to register copyrighted works as the one that best fits the observed data. We explain why the results reached under our first method somewhat underestimate the true racial and ethnic registration disparities. Qualitatively, however, these estimates are consistent with one another.

Part I below provides basic information about the Catalog and the subset of registration records that we analyze in this Article. Part II analyzes authors’ race and ethnicity. Among other things, we find that on average, authors of different races and ethnicities tend to register works at markedly different rates and tend to create and register different types of works. Part III analyzes authors’ gender. Among other things, we find that two-thirds of authors are male, that the gender gap has been decreasing over time, that men and women tend to register different types of works and that both men and women show a strong within-group bias in choosing coauthors. Part
IV focuses on authors’ age. It shows that the average age of authors has increased over time, on par with the general population age trend. Different works tend to be created by authors of different age mean and variance. While authorial participation has shown signs of greater diversity over time, this trend has neither been linear nor universal.

Part V details policy implications. Our findings suggest a need for a fundamental revision of copyright theory. Copyright theory—which tends to view the author in an abstract, uniform, a-historical and individualistic manner—needs to account for the mechanism by which copyright entitlements induce particular authors to choose which works to create. Our findings suggest that this mechanism contains important situating components, including social, cultural and biological characteristics. 

II. RACE AND ETHNICITY

A. Methodology: Inferring Race and Ethnicity from Last Names

Registration records do not specify individual authors’ race or ethnicity, so we use their last names as a proxy. Under federal policy, the Census Bureau asked people to self-identify as members of one or more of six races—white, black, Native American or Alaskan, Asian, Hawaiian or other Pacific Islander, and “Some Other Race.” In addition, it asked them to separately note whether they are “Spanish, Hispanic, or Latino,” which it regards as their ethnicity, rather than race.

We would like to emphasize that in conducting race and ethnicity statistics, we have not taken any decision as to which races and ethnicities exist, how they should be called, and which individuals belong in which group. Rather, our statistics reflect a list of races and ethnicities defined and named by the government, into which census respondents self-selected.

When, as shorthand, we make statements about the race or ethnicity of a certain cross-section of authors, we are referring to the average of the probable race or ethnicity of individuals in that cross-section.

MAKING SENSE OF THE INTELLECTUAL PROPERTY CLAUSE: PROMOTION OF PROGRESS AS A LIMITATION ON CONGRESS’S INTELLECTUAL PROPERTY POWER

Adapted and abridged

The question is whether intellectual property laws can be held unconstitutional for failure to “promote the progress of science and useful arts.” The Constitution’s Intellectual Property Clause empowers Congress “[t]o Promote the Progress of Science and Useful Arts, by securing to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries.” Below, the “ends” part of the clause (“to...”) is referred to as the Progress Clause, and the “means” part (“by...”) as the Exclusive Rights Clause.

II. THE FRAMERS’ STARTING POINT

The federal Constitutional Convention kicked off in Philadelphia on May 25, 1787. On August 18, James Madison of Virginia and Charles Pinckney of South Carolina proposed vesting several additional powers in the federal legislature, as follows:

<table>
<thead>
<tr>
<th>SUBJECT MATTER</th>
<th>POWERS PROPOSED BY MADISON</th>
<th>POWERS PROPOSED BY PINCKNEY</th>
</tr>
</thead>
<tbody>
<tr>
<td>PATENT</td>
<td>To secure to the inventors of useful machines and implements the benefits thereof for a limited time (“Madison’s patent power”)</td>
<td>To grant patents for useful inventions (“Pinckney’s patent power”)</td>
</tr>
<tr>
<td>COPYRIGHT</td>
<td>To secure to literary authors their copy rights for a limited time (“Madison’s copyright power”)</td>
<td>To secure to authors exclusive rights for a certain time (“Pinckney’s copyright power”)</td>
</tr>
<tr>
<td>EDUCATION</td>
<td>To establish a University (“Madison’s education power”)</td>
<td>To establish seminaries for the promotion of literature and the arts and sciences (“Pinckney’s education power”)</td>
</tr>
<tr>
<td>ENCOURAGEMENTS</td>
<td>To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries (“Madison’s encouragements power”)</td>
<td>To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures (“Pinckney’s encouragements power”)</td>
</tr>
</tbody>
</table>

These proposals were referred to the Committee of Eleven that recommended the adoption of the Intellectual Property Clause, as it now
appears in the Constitution.

The eight proposals by Madison and Pinckney and the eventual text of the Clause are the only sources that have survived the Convention regarding the discussion of intellectual property. For better or worse, Madison and Pinckney's eight powers are the only source material from the Convention on which one can draw.

Part III argues that the text of the Progress Clause was adapted from the "ends" parts in Madison and Pinckney's education and encouragements powers, and that the text of the Exclusive Rights Clause was adapted from Madison and Pinckney's patent and copyright powers.

IV. THE PROGRESS CLAUSE WAS INTENDED AS A LIMITATION

The process of the Clause's framing, reviewed in Part III in detail, suggests that the Progress Clause was intended as a limitation. This Part identifies three specific indications of the Framers' collective intent while they were framing the Progress Clause to have it limit Congress's power. These three, reviewed immediately below, are not presented as three absolute demonstrations that each proves the Framers' intent beyond any reasonable doubt. Rather, they each suggest that the inference that the Framers intended the Progress Clause as a limitation is more likely than the opposite inference. When viewed together, the three converge to form a consistent story according to which the Framers intended the Progress Clause as a limitation.

Madison and Pinckney's patent and copyright powers suggested vesting in Congress plenary patent and copyright powers. Had the rest of the Framers shared Madison and Pinckney's intentions, they would have likely adopted their proposals without change, and Congress's intellectual property power would have likely looked like the current Exclusive Rights Clause. Instead, the Framers as a group changed the proposals before adopting them, suggesting disagreement. Moreover, the nature of the change was such that they subjected Madison and Pinckney's plenary patent and copyright powers as a means to achieving ends they specified in the Progress Clause (but not other ends). The change that the Framers inserted tends to suggest that they did not wish to vest in Congress plenary powers over patents and copyrights, but rather wanted to limit the exercise of these powers to the end of promoting progress in science and useful arts.

The origin of the Progress Clause further tends to suggest that it was intended as a limitation. The Progress Clause originated from the "ends" parts in Madison and Pinckney's rejected encouragements powers, and Pinckney's rejected education power. The "ends" parts of the rejected powers served as a limitation on the rejected powers: there was strong contemporaneous opposition to vesting education and encouragements powers in the federal government. At the same time, Madison and Pinckney proposed these controversial means (but not less controversial means: patents and copyrights) with accompanying ends that directed the exercise of the rejected proposals. The correlation between widespread opposition to particular means and the fact that those means were proposed together with public-regarding ends implies causality between the two. Madison and Pinckney either shared some of the objections that the other Framers had toward vesting these powers in Congress and therefore limited these powers, or knew of the other Framers' objections and wished to increase the chances that their proposals would pass. Thus, the best reading of the ends parts in the rejected proposals is as a limitation. The fact that the Framers took the limiting ends language from the rejected proposals, and tacked it onto Madison and Pinckney's patent and copyright proposals, suggests that they wished the limiting language to serve in the same limiting role.

This argument is finally supported by contextualizing the Clause's framing process in the larger scheme of the Convention's political makeup. The delegates to the Convention agreed that the Continental Congress was too weak to act effectively, but they disagreed as to how much change to the Articles of Confederation was needed. On one side were nationalists (also “centralists”) who believed that a substantial invigoration of the central government was needed. On the other side were states-righters who believed that the Union should largely remain confederate, namely a loose association of independent states. The Constitution reflects the compromise struck between the camps.

Madison and Pinckney were nationalists, and thus their views reflect a more centralist line than that of the Convention as a whole, which was composed of nationalists and states-righters. Indeed, Madison and Pinckney would vest in Congress plenary patent and copyright powers. The Framers, a group whose collective view was less nationalist than Madison and Pinckney's, subjected the powers they proposed to public regarding "ends." The fact that this change was done by a body less centralist and more suspicious of the central government than Madison and Pinckney tends to suggest that the change was intended as a limitation on power.
Summing up, the three considerations—the fact that the Framers would not adopt the intellectual property proposals in the plenary form in which they were made, the political makeup of the Convention, and the origin of the words in the Progress Clause as qualifiers of other powers—all contribute to one consistent story according to which the Progress Clause was intended to limit Congress’s intellectual property power.

V. SOLVING THE PUZZLE OF THE CLAUSE’S STRUCTURE

Part III’s reconstruction of the Clause’s framing process also reveals that the Clause emerged from two types of grants of power formulated as “to” clauses. The Progress Clause stemmed from the “to” clause in Madison’s Encouragements Power, and the Exclusive Rights Clause stemmed from the “to” clauses in Madison and Pinckney’s Patent and Copyright Powers. At the same time, the Framers intended each grant of power to be limited and, significantly, to limit the power granted by the other. The Exclusive Rights Clause was intended to limit the “means” by which the “ends,” detailed in the Progress Clause, may be achieved. Conversely, the Progress Clause was intended to limit the ends to which the powers in the Exclusive Rights Clause could be put. The power granted to Congress under the Clause is thus demarcated by complex language that, in its whole, both delineates a power and its limitations as explained just above. This power is located at the intersection of the two clauses, each participating in defining the power and in limiting it at the same time. This can be represented graphically:

![Figure 4](image_url)

The unique textual structure of the Clause is best explained as reflecting the Framers’ intent regarding it. The Framers wished to vest in Congress an intellectual property power that would be limited to the promotion of progress of science and useful arts, and they also wished to exclude Congress from using other means to exercise this limited power, namely the founding of a university and the grant of encouragements. The Framers used language as best as they could to reflect this complex intent through the text of the Clause.

VII. TOWARD A JUDICIAL CONCEPT OF PROGRESS UNDER THE CLAUSE

This Part will assume that the aforementioned would lead courts to find that the Progress Clause is a constitutional limitation. As a matter of positive constitutional doctrine, Congress’s Article I powers are reviewed under a deferential standard, which the Supreme Court has explicitly applied to the Clause. One should reach the conclusion that the Progress Clause is a limitation that should be enforced by a deferential standard. There is much more that courts could and should do in order to give the Progress Clause meaning as a limitation under this standard.

“Progress,” of course, is not a clearly defined concept. What seems important, however, is that a discourse as to what “promote[s] progress” in intellectual property simply begin.

To get this discourse going, I suggest the following criterion. An intellectual property enactment does not “promote the progress of science and useful arts” and is therefore unconstitutional if its marginal benefits, in terms of creativity and knowledge, are extremely outweighed by its marginal costs in terms of creativity and knowledge.

Legislation whose positive effects on creativity and knowledge are non-existing, arguable, or very small, and whose negative effects are proven, material, and great, will present the right opportunity to determine that the limitation in the Progress Clause has been violated.

The suggestion that courts take into account the promoting and stifling effects on creativity and knowledge does not reflect a suggestion for a heightened standard of review. Rather, it regards the nature of the limitation set in the Progress Clause. The text of the Progress Clause speaks of “advancement.” Advancement means a forward movement. If an act has advancing and retarding effects on the arts and sciences, then advancement can only happen if the overall effect is positive. Thus, although a judicial balancing of merits and demerits is generally outside the scope of judicial review of other Article I powers, it is appropriate (although under a deferential standard) when it comes to the Clause because such weighing is called for uniquely in the text of the Progress Clause.

Would any of the recent, or recently challenged, enactments fail this test and thus be unconstitutional? That is hard to tell. The answer depends on the evidence that plaintiffs would be able to produce at trial. Regarding any challenged act, if evidence will show such a huge disparity between great costs and tiny benefits, then it should be found unconstitutional.
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MICAH SCHWARTZMAN works at the intersection of political philosophy, religion, and law. His affinity for these subjects is partly a matter of heritage. Schwartzman grew up in a rabbinic family. His grandfather, Sylvan Schwartzman, was a Reform rabbi and Professor of Jewish Religious Education at Hebrew Union College-Jewish Institute of Religion, the seminary for Reform Judaism in the United States. His father, Joel, is a rabbi who served for much of his career as a chaplain in the U.S. Air Force. And his sister, Ilana Schwartzman, is a congregational rabbi in Salt Lake City. “I was not drawn to join the rabbinate,” Schwartzman said, “but I have not strayed too far in terms of my interests.”

Schwartzman attended the University of Virginia as an undergraduate in the mid-1990s. During that time, the Supreme Court decided Rosenberger v. University of Virginia, in which a student-run, evangelical magazine, Wide Awake, sued for access to public funding of student activities. The University argued that funding the magazine would require spending taxpayer dollars to support religious speech, violating the Establishment Clause of the First Amendment. But the Supreme Court disagreed, ruling that in providing funding, the University had to treat religious and non-religious publications equally.

“Rosenberger left a deep impression on me,” Schwartzman said. “I came to the University with strong convictions about the separation of church and state. And here was the Court deciding a major case involving Mr. Jefferson’s University and casting doubt on Jefferson’s principle that ‘to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.’ At the time, I thought the Court had rocked the foundations of the wall of separation. But at the same time, there was a certain logic to the Court’s opinion. It was a hard case for me then, and in some ways, it still is.”

Schwartzman participated in the Government Honors Program at Virginia, writing his undergraduate thesis on the theoretical foundations
of liberalism. “In the 1990s, Virginia was a heady place for students of moral and political philosophy. Many of my professors—especially James Childress, John Arras, David Novak, George Klosko, John Simmons, and Richard Rorty—pushed me to think more carefully and systematically about the relationship between religion and politics. I was fortunate to have such good teachers. They made it possible to imagine a life of thinking and writing about some of the big questions in politics and philosophy.”

After graduating, Schwartzman pursued a doctorate in politics at the University of Oxford, where he studied as a Rhodes Scholar. His dissertation, supervised by Adam Swift at Balliol College, focused on political liberalism and the later work of John Rawls, especially his idea of public reason. According to this idea, when citizens and public officials exercise political power, they should justify their decisions by appealing to reasons that others can accept solely in virtue of their status as free and equal citizens in a democratic society. Schwartzman worked to explicate this idea and to defend it against various criticisms that he thought had been neglected in the existing literature.

“I did not go to Oxford with the ambition of writing a defense of public reason. My undergraduate thesis had been quite critical of Rawls’s later work. But with a few important exceptions, I found Oxford rather hostile to the idea of public reason and to the project of political liberalism, and I suppose I reacted to that. After a couple years of reading and thinking more about it, I came around to the view that there was more to say in favor of public reason than against it. So I switched positions and wrote some papers trying to work out the main ideas as carefully as I could.”

After completing his doctorate, Schwartzman returned to the University of Virginia for law school. “I loved living in Charlottesville. Most of my friends had moved on by that point, but it still felt like home. And I was persuaded by Vince Blasi, Jody Kraus, and others that someone with my theoretical interests could do well here.” During law school, Schwartzman was Articles Development Editor of the Virginia Law Review and received the Margaret G. Hyde Award, which is the highest award given by the faculty to a graduate of the Law School. He spent his summers at Latham & Watkins and thought he would begin his career working in the appellate practice there. But after clerking for Judge Paul Niemeyer, in the U.S. Court of Appeals for the Fourth Circuit, Schwartzman accepted a postdoctoral research fellowship at the Society of Fellows in the Humanities at Columbia University. A year later, in 2007, he returned to Charlottesville again, this time to join the law faculty.

Over the past decade, Schwartzman has published a body of scholarship animated by the idea that for the state to be legitimate, citizens and public officials must give public justifications for their political and legal decisions. This idea of public reason is controversial, and it has attracted significant criticism in recent years. Schwartzman has contributed to debates about public reason in two ways: by exploring the ethics of public reasoning, and by working out its implications in the context of law and religion.

First, in articles such as “Judicial Sincerity,” 94 Va. L. Rev. 987 (2008); “The Sincerity of Public Reason,” 19 J. Pol. Phil. 375 (2011); and “The Ethics of Reasoning from Conjecture,” 9 J. Moral Phil. 521 (2012), Schwartzman argues that citizens and officials have obligations of sincerity when they justify their actions to others. When public officials are insincere, they not only disrespect those whom they govern, but they contribute to the corruption of deliberative practices and institutions, which in turn undermines the quality of political and legal decisionmaking. Against various objections, Schwartzman defends the view that adhering to principles of sincerity, candor, and truthfulness is crucial for the integrity of our political and legal processes. Indeed, in a recent paper called “Is Lying a Political Wrong?,” Schwartzman returns to these themes to argue that in an era of “fake news” and “alternative facts,” it is more important than ever to have a clear and forceful account of the obligations of sincerity required of those engaged in public discourse.

A second strand of Schwartzman’s work turns from the ethics of public reasoning to its substantive content, especially as applied to questions of religious freedom. When Schwartzman moved from political philosophy to law, he found a fundamental discontinuity between prevailing theories of liberalism, especially those that make central the idea of public justification, and standard accounts of the First Amendment, with its two religion clauses, the Free Exercise Clause and the Establishment Clause. On one hand, liberal theory tends not to distinguish sharply, if at all, between religious views and other ethical and philosophical perspectives. Political liberals believe that the state should give equal treatment to citizens who have widely divergent conceptions of the good life, whether they are religious or not. But on the other hand, American constitutional law gives special treatment to religion, both in providing religious believers with exemptions from generally applicable laws and by prohibiting the state from supporting religion in various ways. What, then, should someone with liberal commitments say about the law? If those with religious beliefs and practices should be treated equally—no better or worse than those with secular ethical and
philosophical views—the law might seem to contradict the demands of liberal political morality. In which case, should the law be criticized and perhaps revised, or are there ways to reconcile liberal theory with law’s special treatment of religion?

Schwartzman has published a number of articles addressing these questions. In “Conscience, Speech, and Money,” 97 Va. L. Rev. 317 (2011), he revisits the “Jeffersonian proposition,” according to which taxing citizens to support religious speech is a violation of their freedom of conscience. This principle, which was at issue in Rosenberger v. Virginia, has played an important part in arguments for religious disestablishment going back to the Founding era. In recent years, however, critics have argued that the principle is open to an equality objection, namely, that taxation to promote religion does not violate freedom of conscience any more than taxation to promote other views to which citizens may conscientiously object. One way to answer this objection would be to take a broader view of the Jeffersonian proposition, applying it to compelled support for nonreligious ethical and philosophical views as well. But this response faces a further objection, which is that no government could function in an orderly way under a system that provides taxpayers with a general right of conscientious objection. The result would be anarchy.

Faced with these objections, some scholars have argued that the Jeffersonian proposition should be read narrowly, applying it only to support for religion, and others have suggested that it should be rejected entirely. Schwartzman takes a different view. Accepting the equality objection, he argues that the proposition must be broadly construed to cover nonreligious ethical and moral views. But to deal with the anarchy objection, he develops a balancing account of freedom of conscience, according to which the state may override claims of conscience when it has legitimate interests in promoting government speech. When the state seeks to promote religious speech, however, it may not have such countervailing interests. Schwartzman argues that this account makes it possible to vindicate the Jeffersonian proposition, and further, that it provides a better and more unified explanation of existing compelled support doctrine under both the Establishment and Free Speech clauses of the First Amendment.

One might continue to wonder, however, why the state does not have legitimate interests in supporting religion, at least when compared to supporting comparable secular ethical and philosophical perspectives. In other words, if religion is not special, at least as a matter of political morality, then why single it out for disestablishment? In “What If Religion Is Not Special?,” 79 U. Chi. L. Rev. 1351 (2012), Schwartzman addresses this question by situating it within a broader discussion of the ways in which the law treats religion distinctively. For example, in the context of disestablishment, courts have read the First Amendment to require that laws have a secular purpose, excluding religious convictions as the primary justification for state action. In this way, the law imposes a special disability on religious beliefs. But in the context of religious accommodations, the law often provides religious believers with special benefits in the form of exemptions from general laws, such as employment regulations, health care mandates, prohibitions on drug use, or requirements to serve in the military.

In thinking about these forms of special treatment, some scholars have attempted to argue that religion should be treated specially for purposes of disestablishment, but not for purposes of accommodation. That is, the state should exclude religious reasons as the basis for laws, but it should not provide religion with special accommodations. Others have argued in the opposite direction, that religion should receive equal treatment as a source of justification for laws, but that religious believers are entitled to special treatment when they request accommodations. And still others have taken the view that religious beliefs should be treated equally across the board, included as a source of justification for the law and accommodated to the same extent as comparable secular ethical beliefs.

In a comprehensive analysis of these different perspectives, Schwartzman argues that special treatment for religion cannot be justified as a matter of liberal political morality. On his view, religious reasons should not serve as the basis for justifying state action, but nor should reasons drawn from comparable secular ethical and philosophical doctrines. And with respect to legal exemptions, if the state grants accommodations to religious believers, it should extend the same consideration to those with secular claims of conscience, a position that Schwartzman has developed in more recent work, including “Religion as a Legal Proxy,” 51 San Diego L. Rev. 1085 (2014) and “Religion, Equality, and Anarchy” in Cécile Laborde & Aurélia Bardon, eds., Religion in Liberal Political Philosophy (Oxford University Press, 2017).

Schwartzman has extended this argument against the distinctiveness of religion to legal developments involving the rights of religious organizations. In an article co-authored with Richard Schragger, “Against Religious Institutionalism,” 99 Va. L. Rev. 917 (2013), he criticizes theories of “freedom of the church” and church sovereignty, which claim that religious organizations have special rights over and against the rights and
interests of their members. Schwartzman and Schragger argue that churches are best conceived as voluntary associations, similar to other expressive organizations, and that they should receive constitutional protections consistent with the individual rights of those who support them.

Schwartzman has continued to explore the rights of religious organizations and the rights of corporations more generally. After the Supreme Court’s decision in *Hobby Lobby v. Burwell*, he co-edited *The Rise of Corporate Religious Liberty* (Oxford University Press, 2016), which brings together a diversity of perspectives from some of the leading scholars in the fields of constitutional law, law and religion, and corporate law. With his colleague Steven Walt, he has also begun a project exploring the philosophical foundations of corporate rights. They argue that the ascription of rights to corporations and other organized groups does not depend on a particular theory of the nature or ontology of those groups, a view presented in “Morality, Ontology, and Corporate Rights,” 11 *Law & Ethics Hum. Rts.* 1 (2017).

In the last few years, Schwartzman has worked on a broad range of legal issues involving religious freedom, contributing to amicus briefs in a number of major cases. Frequently co-authoring with Nelson Tebbe and Richard Schragger, he has commented extensively on litigation over the contraception mandate, the scope and implications of the Religious Freedom Restoration Act, state laws accommodating religious opponents of same-sex marriage, and the Donald Trump administration’s travel ban. Across these issues, Schwartzman’s work is characterized by careful attention to legal doctrine and by his view that the government’s actions must always be justified by public reasons that account for the rights and interests of all those governed and affected by its decisions.

Schwartzman is currently co-authoring a casebook, *Constitutional Law and Religion*. Looking ahead, he is interested in exploring the role of legislative purpose and motivation in grounding the legitimacy of laws, both within theories of public reason and as a matter of legal doctrine. He plans to continue writing on matters of religious freedom, with articles on the limits of religious exemptions and on the role of religious minorities in political and cultural conflicts over liberalism and secularization. He is also planning book-length projects on the separation of church and state and on the philosophy of corporate rights.

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**EXCERPTS**

**JUDICIAL SINCERITY**

94 *Va. L. Rev.* 987

Do judges have a duty to believe the reasons they give in their legal opinions? A strong presumption against lying applies to most of our interactions with other people. The same presumption would seem to hold in the context of judicial decisionmaking. Since it is usually wrong to deceive others, judges should be truthful about the reasons for their decisions. At the very least, and barring exceptional circumstances, they should not knowingly make statements they think are false or seriously misleading. Indeed, this principle seems so straightforward that it may be hard to believe that anyone seriously doubts it.

Despite its presumptive appeal, however, the idea that judges must adhere to a principle of sincerity is surprisingly controversial. Some judges and legal theorists reject the notion that judges must believe what they say in their opinions. Although this view is probably a minority position in the academy and on the bench, it has been advanced explicitly with increasing force in recent years.

Those who oppose a strong presumption in favor of judicial sincerity raise a diversity of objections to it. They argue that sincerity and candor must often be sacrificed to maintain the perceived legitimacy of the judiciary; to obtain public compliance with controversial judgments; to secure preferred outcomes through strategic action on multimember courts; to promote the clarity, coherence, and continuity of legal doctrine; to avoid the destructive consequences of openly recognizing “tragic choices” between conflicting moral values; to preserve collegiality and civility in the courts; and to prevent the unnecessary proliferation of separate opinions. More generally, critics argue that a “purist” emphasis on the need for honesty in judicial decisionmaking ignores the myriad institutional considerations that judges must continuously balance in performing the “prudential” functions assigned to them. To argue for rigid adherence to a norm of sincerity or candor is said to be naïve, foolhardy, and even dangerously utopian.

With all of these institutional objections arrayed against conventional
wisdom, it may be difficult to see the initial normative appeal of a strong principle of judicial sincerity. There are two ways of recovering this principle from its prudentialist or pragmatist critics. The first is to marshal sufficient reasons of legal and political expediency to generate a strong presumption supporting adherence to a norm of sincerity. Accordingly, proponents of greater candor in the courts have argued that transparent decisionmaking constrains the exercise of judicial power, makes judges more accountable to the law, provides better guidance to lower courts and litigants, promotes trust and reduces public cynicism, and strengthens the institutional legitimacy of the courts. Like the arguments mentioned above, these claims rest on complicated and speculative empirical judgments, but they are the sort of arguments that pragmatists must take seriously. If following a general rule favoring sincerity or candor produces the most prudential or pragmatic outcomes—whatever those happen to be—then following the rule is probably justified.

The problem with this kind of prudential response is that it fails to explain the normative force behind the conventional wisdom that judges should not lie or deliberately mislead in their opinions. In our ordinary moral thinking, duties of truth-telling are not justified merely because they produce good outcomes. Rather, the duty to speak truthfully and openly is thought to be an independent constraint on our actions. This suggests a second way to defend a principle of judicial sincerity, namely, by explaining its appeal without relying solely on prudential considerations. My aim in what follows is to provide such an account. Although consequentialist claims will have an important role to play in this account, as we shall see, they will be subordinate in an argument motivated primarily by moral and political values central to the process of adjudication.

Here, then, is a sketch of the argument I have in mind for defending a principle of judicial sincerity: judges are charged with the responsibility of adjudicating legal disagreements between citizens. As such, their decisions are backed with the collective and coercive force of political society, the exercise of which requires justification. It must be defended in a way that those who are subject to it can, at least in principle, understand and accept. To determine whether a given justification satisfies this requirement, judges must make public the legal grounds for their decisions. Those who fail to give sincere legal justifications violate this condition of legitimacy. They act against the demands of the adjudicative role assigned to them. In extraordinary cases, judges may be justified in reaching beyond the limits of their authority. But this possibility defines a very narrow exception.

Under ordinary circumstances, judges have a general duty to comply with a principle of sincerity in their decisionmaking.

II. THE VALUE OF LEGAL JUSTIFICATION

B. Legal Justification and Legitimacy

[W]e can now ask why judges ought to comply with the principle of legal justification. Even if the principle is accepted as a necessary condition of legitimate adjudication, it is important to understand why judges must adhere to it. As before, we should look for reasons that can command wide assent. No justification will be entirely without controversy, but some arguments will be more robust than others with regard to competing theories of the judicial role. Here, then, are four reasons supporting the principle of legal justification:

First, some parties voluntarily submit their grievances to public adjudication for the purpose of obtaining impartial review. The parties to a case or controversy present reasoned arguments for their claims on the expectation that judges will be responsive to the strength of the reasons provided. Thus, a traditional argument for the principle of legal justification is that litigants are entitled to a reasoned assessment of their claims. If for whatever reason the parties preferred an arbitrary solution, adjudication would not be necessary. They could simply select a random decision procedure to resolve their dispute. When parties offer reasons for their claims in the form of legal arguments, however, they can reasonably expect that judges will weigh those reasons and provide a decision based on an evaluation of them. Decisions reached without regard to reasons are not responsive to the underlying conflict between the parties. The parties can therefore complain that the purpose of the adjudicative process has been corrupted or ignored. The reasons they presented were not given proper consideration in resolving the conflict between them. The winning party may be pleased with the outcome. But even the winner may realize that the decision was reached incorrectly or, worse yet, illegitimately.

Second, the parties to adjudication will often not have consented to adjudication in any meaningful way. The involuntariness of their participation does not, however, diminish the requirement that judges justify their decisions. On the contrary, the fact that litigants have no choice but to submit to adjudication greatly strengthens the demand for justification. As unwilling participants, they have even more reason to complain when
they are treated arbitrarily. When the parties have not chosen to settle their dispute by adjudication, the imposition of a decision without reason is a form of oppression. This claim may seem overstated. In the legal domain, however, the orders and judgments that follow from adjudicative proceedings are backed by the coercive power of the state. The threat of brute force conveyed by judicial decisions is perhaps most apparent in the domain of criminal law. But it is present all the same on every occasion in which judges invoke their legal authority.

Third, in many cases, judges make decisions that reach beyond disputes between particular litigants. In common law systems, cases or controversies arising from the same or similar circumstances are often governed by precedent. For that reason, the demand for justification can be issued not only by present litigants but also by any future parties whose claims will be controlled by a court’s prior decisions. Furthermore, as proponents of structural litigation have emphasized, it is a mistake to conceive of adjudication solely as a mechanism for resolving disputes between individuals with private ends. The judicial process is used, sometime to great effect, for the purpose of challenging large-scale social and political institutions. In such cases, judges are called upon to elucidate and apply public norms to correct systemic injustices. Indeed, if courts find breaches of constitutional values, they may exercise their equitable powers to order remedies with far-reaching consequences for the basic structure of society. By altering the patterns of opportunities and entitlements available to people, courts may have profound effects on life chances. Those influenced by such decisions have a strong interest in demanding justifications for them.

Fourth, and perhaps most fundamentally, the principle of legal justification is based on the idea that legal and political authorities act legitimately only if they have reasons that those subject to them can, in principle, understand and accept. This principle of political legitimacy permits a range of argument about what kinds of reasons might be accepted for the purpose of justifying the exercise of political power. But however we specify those reasons, adherence to the underlying principle expresses a commitment to treating citizens as capable of understanding and responding to the reasons that justify the rules by which they are governed. When legal and political officials lack sufficient reasons for their decisions, they fail to respect the rational capacities of those subject to their authority. They show disrespect for the fundamental interest that citizens have in being governed according to reasons and principles to which they can give their considered assent. This interest, which resonates with the idea that government should be based on consent, is at the core of liberal democratic conceptions of political legitimacy. Indeed, a basic commitment of liberal political thought is, as Jeremy Waldron has written, that “intelligible justifications in social and political life must be available in principle for everyone. ... [T]he basis of social obligation must be made out to each individual, for once the mantle of mystery has been lifted, everybody is going to want an answer.” Of course, not everyone will be happy with all of the answers all of the time. But the fact of reasonable disagreement does not excuse political officials, including judges, from their responsibility to justify their decisions. The losing party may often be dissatisfied with the reasons for judgment. That does not, however, make the obligation to produce a reasoned outcome any less significant. The exercise of legal authority must be justified especially to those whose interests are adversely affected. As rational and reasonable agents, they are owed a justification for the way they are treated under the law.

WHAT IF RELIGION IS NOT SPECIAL?
9 U. Chi. L. Rev. 1351 (2012)

Nearly thirty years ago, Frederick Schauer published an article asking the question, “Must speech be special?” That question, he said, was not the same as the question, “Is speech special?” The first question was about whether an adequate theory of the First Amendment must explain why the law provides special protection for speech. The answer to that question was, “Yes.” Otherwise, the theory could not provide guidance in determining the meaning of the constitutional text. But the answer to the second question was probably, “No.” As a matter of political morality, speech cannot be distinguished from many other activities as warranting special constitutional protection. These conflicting answers produced what Schauer described as an “intellectual ache.” On the one hand, the constitutional text makes speech special; on the other hand, there is no sound normative argument to support the text. If we think speech must be special and also that it is not, then we face a real conundrum. The law pulls in one direction, and political morality in the other. With a constitutional guarantee as fundamental as the freedom of speech, the need to resolve this tension seemed both pressing and inescapable.
In the last decade or so, it has become increasingly clear that similar concerns apply with equal, or perhaps even greater, force to the Religion Clauses of the First Amendment. If we ask Schauer’s question mutatis mutandis—“Must religion be special?”—the answer again would seem to be, “Yes.” The Establishment Clause says that Congress cannot pass any law respecting an establishment of religion. It does not prohibit the establishment of nonreligious ethical or moral views. Religion is special in the sense that it suffers from a legal disability that does not apply to secular beliefs and practices. Similarly, the Free Exercise Clause identifies religion as the subject of special protection. Congress is prohibited from passing laws prohibiting the free exercise of religion. There is no general prohibition on laws restricting the free exercise of nonreligious beliefs and practices. Thus, any theory that seeks to explain the Religion Clauses must provide an account of what is special about religion in terms of both its disabilities and protections. The problem, however, is that religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment. As a normative matter, religion is not special. Again, we find ourselves in something of a bind. Religion must be special, and yet it is not.

This conflict between the legal and normative status of religion is now at the center of debates about the Religion Clauses. For example, the Supreme Court recently decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, holding that religious institutions are entitled to a special constitutional exemption (the “ministerial exception”) from laws prohibiting employment discrimination. The Government had argued that religious groups are not entitled to protections beyond those available to nonreligious expressive associations under the Free Speech Clause. At oral argument, two Justices—from opposite sides of the political spectrum—found this position to be “extraordinary” and “amazing” and a unanimous Court eventually rejected the Government’s view, describing it as “remarkable” and “hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.”

Once it becomes apparent, however, the problem of religion’s distinctiveness is pervasive in thinking about the meaning of the Religion Clauses. Must the government provide special accommodations for religious citizens when their beliefs conflict with the law? If so, must those accommodations be extended to similarly situated nonbelievers? What about government speech promoting religion? If a state government can support gay rights, reproductive choice, and gun control, why not also prayer in public school, creationism, and displays of religious symbols? And why do taxpayers have a special right to challenge legislation taxing them to support religion, when they have no standing to object when the government spends their money on policies that might be more controversial and indeed of far greater consequence to them? If taxpayers cannot sue to stop the War in Iraq, why do they have standing to prevent Congress from spending money on, say, vouchers for religious schools? All of these questions, which are easily proliferated, turn on the constitutional status of religion.

Given the importance of the issue, it is not surprising that there have been numerous attempts in recent years to explain why religion is both morally and legally distinctive. There have also been numerous attempts to explain why it is not. This Article advances beyond the existing literature first by providing … a new taxonomy to describe how religion might (or might not) be special for constitutional purposes. Some theories hold that religion should not be treated differently from secular ethical and moral views under the Establishment Clause, but that it should be given more favorable treatment under the Free Exercise Clause. Another set of theories takes the opposite view, namely that religion should be distinctively disfavored under the Establishment Clause but not given any special treatment under the Free Exercise Clause. More recently, some have argued that religion is morally distinctive in both contexts, while others have argued that it is not special in either of them.

... Many of the most widely held normative justifications for favoring (or disfavoring) religion are prone to predictable forms of internal incoherence. Furthermore, accounts of religion’s distinctiveness that manage to avoid such incoherence succeed only at the cost of committing other serious errors, especially in allowing various types of unfairness toward religious believers, nonbelievers, or both. The upshot of all this is that principles of disestablishment and free exercise ought to be conceived in terms that go beyond the category of religion. Instead of disabling or protecting only religious beliefs and practices, the law ought to provide similar treatment for comparable secular ethical, moral, and philosophical views.

If religion is not special, then what attitude should we adopt toward the constitutional text, which says that it must be? Answering this question requires a more general theory of constitutional interpretation. Since such theories are at least as controversial as theories of the Religion Clauses, I consider two possible responses. The first says that if the Religion Clauses are interpreted according to their original meaning, then they should be criticized as morally defective. Departing from original meaning, the second
response attempts to reconcile the Religion Clauses with political morality by expanding the definition of religion to include secular ethical and moral doctrines. This approach faces some familiar difficulties, but it suggests one path to bringing existing law into line with the view that religion is not normatively distinctive. Without taking sides between these alternative responses, I argue that adopting either of them has profound implications for our understanding of the First Amendment.

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“PSYCHOLOGY IS ABOUT understanding human behavior. Law is about regulating human behavior. You would think that they would have a lot to say to each other.” This is how Barbara Spellman begins her signature course, Behavioral Decisionmaking and Law. She lectures about a wide range of topics from the behavioral sciences and has students participate in classic experiments, discussions, and negotiations that highlight how people, including the students themselves, might not always make optimal decisions. These insights are then applied to the content and practice of law. With a J.D., a Ph.D. in cognitive psychology, and past experience in a law firm and as a full-time psychology professor, Spellman has the rare ability to bring law and psychology together in both her teaching and her scholarship.

I. THE ROAD TO LAW AND PSYCHOLOGY

Spellman did not begin her career intending to unite law and psychology; in fact, she started out wanting to keep the two of them far apart. She received a B.A. from Wesleyan University in 1979 with a major that today would be called cognitive science (a mix of psychology, philosophy, computer science, linguistics, anthropology, and neuroscience). After receiving a J.D. from New York University in 1982, she spent five years in New York City as an associate at Chadborne & Parke and an editor at Matthew Bender. Then she changed location and direction, and enrolled in a Ph.D. program in cognitive psychology at the University of California, Los Angeles.

“The practice of law was not a good fit for me,” she said. “I sometimes say that in legal practice, you are given a fixed set of facts, a preferred outcome, and a deadline. In science, I got to choose my own research problems, find whatever answers were out there, and decide for myself when it was time to move on.”
When Spellman began graduate school, many people suggested that she do research in the field called “psychology and law.” But she wanted a total change and, except for being a teaching assistant for the Psychology and Law lecture class, she avoided law completely. Within cognitive psychology, Spellman specialized in research on memory and reasoning. Ironically, those topics led her back to law.

**Analogy**

Spellman's earliest research was on analogical reasoning. Her first empirical paper, “If Saddam is Hitler then Who is George Bush: Analogical Mapping between Systems of Social Roles” (with Keith J. Holyoak), *62 J. Personality & Soc. Psychol.* 913 (1992) uses surveys, experiments, and computational modeling to look at the many factors that affect when people will view an analogy as apt.

“We know that the analogies people choose to use in a situation may reveal their beliefs about what should occur next and may affect other peoples’ judgments and actions,” she said. “For example, for a long time, whenever the United States considered taking military action, people for intervention would argue that the situation was like World War II and people against intervention would argue that it was like Vietnam. In 1991, some analysts liked to analogize Saddam Hussein and his invasion of Kuwait to Hitler at the beginning of World War II. If you bought that analogy, you would be likely to want to go to war against Iraq.”

The paper shows how small changes in someone's knowledge of the events leading to World War II could affect how they constructed the analogy, but only in systematic ways. Emphasizing the role that the U.S. played in supplying troops and materiel led people to analogize the U.S. of 1991 to the U.S. of 1941, and President Bush to FDR. However, emphasizing that the U.S. did not enter World War II until after Pearl Harbor led people to analogize the U.S. of 1991 to Great Britain, and President Bush to Winston Churchill. Thus, people would vary the analog for country, and vary the analog for leader, but those two always systematically cohered in the analogy.

A second paper on analogical reasoning, “Pragmatics in Analogical Mapping,” presages Spellman's later work on appellate decisionmaking. That paper demonstrates how individuals' unrelated knowledge, goals, and values can affect which analogies they see as better. For example, study participants who have been asked to assess economic as opposed to military relations between countries will later value economic factors more highly when deciding which countries are most analogous to each other.

**Causation**

Spellman began working on causal reasoning for her dissertation, “The Construction of Causal Explanations,” much of which is published as “Crediting Causality,” *126 J. Experimental Psychol. Gen.* 323 (1997). She divides her causal reasoning research into two phases: cause-in-science and cause-in-law. In the former, she investigated how people create general causal rules after learning about the contingencies between cause and effect. For example, if someone sees fertilizer being applied to some plants but not other plants, then later sees which of the plants bloom, she can compare the cause/outcome combinations to evaluate the efficacy of the fertilizer. But life is not usually as simple as one cause acting in isolation leading to one effect. In other studies Spellman examined how people “conditionalize” their causal attributions on the existence of other potential causes. A simple example is this: Suppose it is true that people who drink coffee are more likely to get lung cancer than people who do not. Should we then infer that coffee causes lung cancer? Of course not. Perhaps coffee drinkers are more likely to be smokers, and smoking, rather than coffee, is doing the causal work. Thus, we should examine the effect of coffee independently of the effect of smoking; if coffee drinkers smoke more than non-coffee drinkers, this would provide an alternative explanation. Spellman showed that people can and do use this conditionalized reasoning, but only under some conditions are they likely to look for these types of alternative causal explanations.

Cause-in-law differs from cause-in-science in that in law there is often only one actual event triggering the causal inquiry. The fertilizer isn't put on many plants, rather, the poison masquerading as fertilizer is only poured on one prize-winning rosebush, which soon dies. Is the negligent gardener responsible for the damages?

How do people make causal inferences in such single-event situations? Spellman agrees with other researchers that people sometimes use counterfactual reasoning for these judgments. If we imagine that the gardener had not poured the poison, then we expect that the plant would not have died. People use such hypotheticals in the regular course of causal reasoning and those trained in law should recognize it as but-for causation.

However, Spellman noted, “Our legal training has also taught us
that but-for causation is neither necessary nor sufficient for attributing legal causation. When two fires combine to burn down a building or two people concurrently kill another one, neither alone is a but-for cause, but we nonetheless believe that both are legally responsible. And when poor Mrs. Palsgraf is injured, people do not suggest that oxygen was a cause, or the train tracks were a cause, even though the lack of either would have negated her injury.

Spellman shows how experiment participants solve such causal puzzles very similarly to how the law prescribes in “The Relation between Counterfactual (‘But for’) and Causal Reasoning: Experimental Findings and Implications for Jurors’ Decisions” (with Alexandra Kincannon), Law & Contemp. Probs., Autumn 2001, at 241.

The theoretical question is: How and why do regular people, unschooled in the intricacies of proximate and multiple sufficient causation, end up making normative legal judgments? Spellman argues that they do not simply think of counterfactuals. They also think of probabilities. How likely is it that a specific counterfactual would occur and, if it did occur, how likely would it be to change the outcome? This analysis explains many judgments of causation, including some tricky examples, like those of superseding intervening causes. For example, if Josh’s car has bad brakes, he lends it to Sarah, and she gets into a crash in part because of the brakes, who is responsible? What if he knew the brakes were bad but failed to tell Sarah when he lent her the car? If Josh didn’t know, experimental participants judged Sarah (and the brakes) to be responsible; if he did know but didn’t tell, Josh was judged to be responsible. Other examples plus the mathematical analysis appear in “Counterfactuals, Control, and Causation: Why Knowledgeable People Get Blamed More” (with others), 41 Personality & Soc. Psychol. Bull. 643 (2015).

Calibration
Calibration—people’s ability to judge the accuracy of their own or other people’s assessments—is a third psychological research area that has huge implications for law. Lawyers may tell witnesses to speak confidently because jurors are more likely to believe confident rather than unconfident witnesses. But Spellman shows that calibration is also important to credibility, in several papers with her former graduate student Elizabeth Tenney (now a business professor at the University of Utah), Stanford Law Professor Rob MacCoun, and others. Suppose there are two witnesses; each is highly confident about most details but one has low confidence about one detail. Overall, the totally confident witness will be judged as more credible. However, if both are proven wrong about some detail, and it is the detail that the less-confident witness doubted, then that witness will be viewed as more credible regarding everything else. That is, if a witness demonstrates that her confidence is well correlated with her accuracy, her judgments will be more credible. Spellman covers these topics in “Calibration Trumps Confidence as the Basis for Witness Credibility,” (with others), 18 Psychol. Sci. 46 (2007); “The Benefits of Knowing What You Know (and What You Don’t): How Calibration Affects Credibility” (with Elizabeth R. Tenney and Robert J. MacCoun), 44 J. Experimental Soc. Psychol. 1368 (2008); and “Credible Testimony In and Out of Court” (with Elizabeth R. Tenney), 17 Psychonomic Bull. & Rev. 168 (2010).

II. THE MOVE TO LAW AND PSYCHOLOGY
After dozens of empirical papers, a million dollars in research funding, four years in the University of Texas Department of Psychology and twelve years in UVA’s Department of Psychology, Spellman moved to the Law School. In the late aughts, Spellman realized that despite her initial desire not to be involved in psychology and law research, almost all of her research had taken a legal turn. Plus, she was enjoying teaching her Psychology and Law classes. She had often taught it as an undergraduate seminar; many of the students went on to law school, including some to UVA. But when she taught a class of ten psychology graduate students and ten law students, she saw how much could be done, but had not been done, in merging the two fields.

It was also a good time to begin working at the intersection of law and psychology. Previously, psychology research had not been very respected by the law or in the legal academy. Two things improved its status. First, DNA exonerations showed that psychologists had long been correct about the pitfalls of some kinds of evidence, for example, eyewitness testimony and confessions. Second, economics had infiltrated law. When behavioral economics grew popular, that, too, crept into law, resulting in the nascent field of behavioral law and economics. (Spellman is known to refer to “behavioral economics” as “psychology in disguise.”) Ultimately her goal was to connect law with psychology in her research and teaching, and, while doing so, to help others see that the connections between the two fields are much more abundant than what psychologists have chosen to empirically address so far.
Spellman’s papers on judges as decisionmakers address the roles of both trial judges and appellate judges. (She once taught a seminar called *Psychology of the Deciders: Judges, Jurors, & Juries.*) She argues that nothing in judges’ history, training, or experience should make them better factfinders than twelve jurors—although they might be more conscientious in following the law. (See excerpt from “On the Supposed Expertise of Judges in Evaluating Evidence.”) Her papers on appellate decisionmaking, informed by her research on analogy and other forms of inductive reasoning, argue against the strong legal realist view that judges first make a decision then find precedents to justify it. Instead she demonstrates how someone’s prior knowledge, goals, order of learning information, method of looking for similarities versus differences across cases, and other cognitive factors, can lead her to unconsciously come to the same result that an attitudinal model would predict. (See excerpt from “Judges, Expertise, and Analogy.”)

To bring additional ripe-for-research areas of law to the attention of experimental psychologists, Spellman has authored (and co-authored) articles and chapters for cognitive and social psychologists and for an international interdisciplinary group. “Editors still wanted me to include the well-trodden research on, for example, eyewitness memory and jury decisionmaking, although if I pushed enough they did let me describe some of the new directions I wanted research to go, including remedies, torts, contracts, property, and intellectual property. And, of course, evidence law.”

In 2010, Michael Saks asked Spellman to co-author a book with him that was to become *The Psychological Foundations of Evidence Law*. It was one of the first in a series of books, published by NYU Press, showing how psychological research can inform many areas of law. “Writing this book was a tremendous amount of fun,” Spellman said. “It was a great way of bringing together my background in both cognitive and social psychology, and my recent experience with, and occasional frustration with, teaching Evidence Law.”

Saks and Spellman argue that in designing and applying the rules of evidence, the “rulemakers”—drafting committees, legislatures, appellate judges, and trial judges—are “acting as applied psychologists.” These agents have beliefs about the quality of certain types of evidence and beliefs about how other people (lawyers, judges, jurors) would use such evidence. Saks and Spellman explain that sometimes the rulemakers get the psychology right and sometimes they seem off-target. For example, Federal Rule of Evidence 404 generally forbids the use of character evidence for the purpose of showing “propensity” to do an act. Saks and Spellman believe that is a good decision. Psychology research has shown that a person’s prior acts are, indeed, a slight predictor of their future acts—enough to overcome the very low standard for relevance required by FRE 401. However, psychology has also shown that people (especially in the United States) typically believe that a person’s prior acts are far more predictive of their future acts than actually is the case. (Situations matter much more than people typically acknowledge.) Therefore, not allowing character evidence to show propensity is a sensible rule.

However, character evidence may be allowed in criminal trials for other purposes—such as showing motive, intent, or preparation—but jurors may be instructed not to use that information to support propensity. Similarly, prior criminal convictions may be let in to impeach a witness—but jurors may be instructed not to use it to support guilt in the current trial.

“Writing the book made me aware, once again, how much the psychology literature focuses on just a few aspects of law,” Spellman said. “For example, the book has a whole chapter on instructions to disregard or limit the use of evidence. There are many federal rules of evidence that limit use, and the problem arises frequently in trials and can be quite nuanced, but there is little psychology research on it. On the other hand, there is a ton of psychology research on instructing juries to disregard evidence, which is not a major concern of the rules of evidence but sure seems to come up a lot on television.”

At the same time as she was working on the book, Spellman was editor-in-chief of the highly regarded journal *Perspectives on Psychological Science*. It was a sensitive time for research in the life and social sciences, psychology included, as more and more research was found not to replicate, more fraud was exposed, and more papers were retracted. Spellman sensed researchers’—especially younger researchers’—frustrations with the status quo, and positioned the journal as a leading outlet for articles analyzing the current problems in the field and proposing (and producing) solutions to what had become known as “the replication crisis.” After overseeing the publication of more than 100 articles relevant to the science-reform movement, Spellman presented her own historical analysis of the problem and her predictions for future reform in “A Short (Personal) Future History of Revolution 2.0,” 10 *Persp. on Psychol. Sci.* 886 (2015) (a version of the paper for a more general audience is available as “A Different Kind of Scientific Revolution,” *New Atlantis*, Spring/Summer 2016, at 46). She analogized the current situation to an internal revolution, like the French Revolution, in which citizens strive to overturn the status quo in their own country.
Much of the current strife is between those who have succeeded under the previous rules (i.e., leaders who want to keep the status quo) and those, especially younger people, who, given their ease with technology and their lack of fear of sharing research, want to make science more transparent and open.

III. THE ROAD AHEAD

What is next? In her lectures and writing, Spellman continues to push for better standards for research, teaching, and publication in psychological science, including in a forthcoming chapter, “Open Science” (with Elizabeth A. Gilbert and Katherine S. Corker), in John Wixted, ed., Stevens’ Handbook of Experimental Psychology and Cognitive Neuroscience, Volume V: Methodology (Wiley).

At the same time, she believes that psychological scientists know many things that could be of use to policy and law. The final issue of Perspectives under her editorship contained twelve papers, selected from more than 200 submitted abstracts, in which psychologists imagined that there was a Council of Psychological Science Advisors, analogous to the current Council of Economic Advisors. Papers addressed education, climate change, aging, intelligence analysis, ethics, diversity, and public health. David Halpern (advisor to David Cameron, then the British prime minister) and Cass Sunstein wrote comments on the plausibility of the proposed initiatives.

Spellman has recently written about the uses of psychological science for intelligence analysis and for various justice initiatives. She is currently working on a handbook chapter for forensic science laboratories that will help implement best practices as informed by psychology. She notes that some of her recent talks in psychology departments have illustrated how the reasoning processes in forensic science are similar to those in appellate decisionmaking. And she is looking forward to teaching another class with both law students and psychology graduate students on the psychology of wrongful convictions. She remains convinced that psychology and law have a lot more to say to each other.

EXCERPTS

ON THE SUPPOSED EXPERTISE OF JUDGES IN EVALUATING EVIDENCE

IN RESPONSE TO FREDERICK SCHAUER, ON THE SUPPOSED JURY-DEPENDENCE OF EVIDENCE LAW


From way down in the dirty depths, where those of us who collect empirical data dwell unobserved and largely ignored by most legal academics, it is refreshing to hear a call for “more data” from legal scholars such as Fred Schauer. In asking whether it makes sense to follow the existing trend of discarding much of evidence law when judges—rather than juries—are the fact-finders at trial, he notes that the empirical literature involving judges’ reasoning is sparse and the literature comparing judges with jurors is even sparser. In order to determine whether judges are better than jurors at weighting evidence and fact-finding, as many appear to believe, he wishes for more and more focused research.

However, before I drag my computer, my research assistants, and my cognitive psychologist’s bag of “heuristic and bias tricks” and “memory illusions” to the next judges’ conference, I would want to ask myself several important questions that are all subsets of this one: Why would anyone expect judges to be different from jurors at evaluating evidence? Considering possible answers to this question is critical before beginning research because there are an infinite number of experiments that one might run comparing judges and jurors, but there is neither an infinite amount of time nor of judges’ goodwill. Developing hypotheses will guide the selection of the experiments and, later, the generalization of the experimental results to situations broader than the specific experimental stimuli.

One subset of questions has to do with the task: What is it that people are asked to do mentally with evidence presented in the courtroom? The second subset has to do with comparing judges and jurors (or juries): How do they differ? It is only after considering those two types of questions—about the tasks and the reasoners—that we can offer testable hypotheses.

Footnote citations are not included in excerpts.
about whether judges and jurors are likely to differ on the tasks and, if so, when, why, and how. And it is only then that we should design our studies to investigate those hypotheses. This Response specifically focuses on whether judges have any expertise that might suggest that they should, in fact, be better at weighting evidence and, ultimately, at fact-finding, than jurors.

III. THE QUESTION OF JUDICIAL EXPERTISE

What is an expert? An expert is someone who performs consistently and reliably better on representative tasks than the overwhelming majority of other people. What makes an expert? There are two types of answers to this question. One has to do with the qualities, training, and experience needed to develop expertise. The other has to do with the range of competences and abilities that we expect experts to demonstrate.

There is no good reason to conclude that, by virtue of qualities, training, or experience, trial judges should be considered experts at weighting evidence or at fact-finding. Experts are not just “smarter” than non-experts. Nor are large amounts of experience alone—such as thousands of hands of bridge or hundreds of rounds of golf—sufficient for developing expertise. Rather, expertise develops out of “many thousands of hours of specific types of practice and training”—a process called “deliberate practice.” Deliberate practice requires focused programmatic study. It includes appropriate feedback about performance. It includes identifying errors and working on procedures to eliminate them. One might consider that law school training involves these qualities and so all lawyers (and even more so lawyers and judges working in the appellate system) would develop expertise in analyzing cases. That may be true, but analyzing cases—reading (truncated) text, considering an already-digested fact pattern, evaluating the justifications for a holding, looking for the real justification behind the stated ones, and evaluating a rule or principle in light of possible implications or future applications—is quite different from weighting evidence and finding facts. For the latter two tasks there is no prolonged training with feedback in law school; law students do not listen to trials as they unfold and learn to integrate—or not integrate—admissible and inadmissible evidence. And trial judges can sit through hundreds of cases and never do the focused study or have the fast reliable feedback necessary for developing expertise. With the exception of bench trials, it is not the trial judge’s job to weight and evaluate evidence; that is, they need not “practice.” Further, reliable feedback as to the appropriate weighting of evidence does not exist—the ground truth of cases is never known.

In the various lists comparing and contrasting the strengths and weakness of judges, jurors, and juries, one important factor is often forgotten: all are human. From earliest infancy, the human cognitive system is a sophisticated tool for detecting patterns, seeing relations, imagining causes, and creating coherent stories (even if sometimes they do not exist). In that we all could be called “experts.” It is difficult to envision how a mere desire, or an admonition, to stop thinking like a human being could be effective. For anyone.

JUDGES, EXPERTISE, AND ANALOGY


INTRODUCTION

One appellate case, three courts—and seven disparate opinions. Clearly, different judges reach different decisions based on the same facts and same legal doctrine. Why? Political scientists have shown that one can anticipate how a judge will decide a case more often than chance, or a reading of the facts, might allow. Using various predictors—party affiliation, party of appointment, the judge’s own decisions on earlier similar cases—regression analyses can demonstrate that judges are behaving in a manner consistent with their explicit prior beliefs (e.g., Segal & Spaeth, 1993, 2002). The simplest explanation for such behavior is that judges first decide what they want the outcome of the case to be, then go back to find the precedents that justify their opinions. The more complicated claim that I want to make is this: people (and judges) may choose relevant analogies (or precedents) as better or worse, applicable or inapplicable, not because of any particular desired outcome but rather because of their own pre-existing knowledge. The influence of such knowledge on the decision process may be entirely unconscious; therefore, judges may, in fact, be following the idealized decision-making process to the letter, and be unmotivated toward finding a particular result, yet may usually still reach the predicted result.
To understand this argument, I first present an overview of the analogical reasoning research done by cognitive psychologists. Next I address whether judges are experts at analogical reasoning and show why the answer is relevant to how they may be using analogy. Then I turn to other research—including some from other areas relevant to analogy like similarity and categorization—to show how pre-existing knowledge can (unconsciously) affect analogy use. Finally, I link these arguments back to the initial question: whether judges, or anyone, can be making “predictable” decisions while still following an idealized analogical reasoning process.

C. ARE JUDGES EXPERTS AT ANALOGICAL REASONING?

Elsewhere others and I have argued that judges are not experts in several tasks that might be viewed as components of judging. For example, it could be argued that judges are neither expert fact-finders (Robinson & Spellman, 2005) nor expert at appropriately weighting evidence (Spellman, 2007). One reason is that although (some) judges may often do those tasks, they are not trained to do them the way law students are trained to analyze cases in law school. In law school we had the pleasure of years of reading cases, abstracting rules and similarities, drawing analogies to other cases or hypotheticals, and being given corrective feedback about our analyses. In a sense, when lawyers write briefs, and when judges read and rule on them, they are engaged in a similar activity. Thus, it seems as though the conditions for developing expertise at analogical reasoning might be met.

1. LAW SCHOOL TECHNIQUES AND THE POSSIBILITIES OF IMPROVING ANALOGICAL REASONING.

Although the psychology literature is fairly glum about people’s ability to take what they have learned in one domain and use analogy to transfer that knowledge to another domain (see Barnett & Ceci, 2002, for a review), there are, in fact, ways to improve people’s performance on analogical reasoning tasks.

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however, do not have any measures that demonstrate that law school improves general analogical reasoning. In a study of the effects of graduate training on reasoning, law students, medical students, and graduate students in psychology and chemistry took tests involving statistical, methodological, conditional, and verbal reasoning during the first and third years in the programs (Lehman, Lempert, & Nisbett, 1988). The verbal reasoning test included verbal analogical reasoning (as on the GRE or LSAT). The first-year law students had higher initial verbal reasoning scores than the other groups—suggesting self- (or law school) selection. However, after three years of schooling, the law students improved only about 5 percent on average (a statistically non-significant difference) in verbal reasoning; all of the other groups’ average scores improved more.

Granted, these data showing no improvement in analogical reasoning are not the best—among other flaws they only include law students (at the University of Michigan) after three years of training rather than experienced judges and, of course, the verbal reasoning tasks are not the same as the type of full-blown analogical reasoning done when reasoning about cases. However, these data are consistent with a wide variety of other data showing limitations on both the transfer of training and the boundaries of expertise.

3. EXPERTISE AND THE PROCESS/CONTENT INTERACTION.

The best way to think of what judges may have developed is that it depends on both process and content: it is using analogy in a domain in which they have specialized knowledge—knowledge that enables them to quickly understand which features of a case are the relevant ones for analogical mapping. Thus, within the legal context (or, more likely, within a subset of that context), judges are experts at using analogy; however, when reasoning outside their knowledge base, although they may be more fond of using analogy than most people (because of practice or precocity), they will not be any better than equally intelligent and informed others.

To return to the cruise ship example, probably no one who was legally trained would think that the sex of the victim, the nature of the trip, or the items that were stolen would matter in that case; even if those features bring to mind similar cases, those that do not have an underlying structural similarity (e.g., the women being hit by the handbag on the cruise ship) would be easily rejected as irrelevant. And those who are legally trained should be less flustered by the surface similarity that boats and trains move whereas hotels do not. Rather, those who know that the law protects those who are justified in expecting privacy and security—whether passengers or hotel guests—would be more likely to recall, recognize, and use the analogy between the obligation of a ship to a passenger in a private cabin and the obligation of a hotel to a guest in a private room.

IV. JUDGES AND ANALOGY

What can we conclude? Judges have had lots of practice using analogy; yet, they might not actually be “experts” because just as there is no real generalized expertise in “problem solving” it is not clear that there can be a generalized expertise in analogy use. More important, however, judges (like laypeople) know that when using analogies it is important to look for relational similarities and—because of their specialized training in legal content—they know which relational similarities matter within their domains of expertise.

Many of the limitations on using analogies described above have to do with “finding” or retrieving the proper analogs to use. Judges don’t have to try to retrieve from memory—they have briefs and law clerks to find the relevant sources. Yet, as the WWII/Vietnam study shows, unconscious remindings of analogs that are not present can affect judgments even though, when made explicit, the analogs are not viewed any better or worse than other ones. In addition to this automatic retrieval of analogies, judges’ knowledge, beliefs, and goals, may influence how they mentally represent different analogs and how they use them. When judges know more about some issues than others, or, in the past, have drawn analogies to one kind of outcome, or go into an argument asking more questions about similarities as opposed to differences, they might be more likely to unintentionally find in a direction consistent with past judgments—in part because of what they see as more (or less) similar, in part because of the level of abstraction (i.e., how deep the relations) they use, and in part because of an effort to maintain coherence in their beliefs.

Thus, although judges might decide consistently with predictions, it is possible that they do so not for any of the intentional (and sometimes seemingly “nefarious”) reasons suggested by legal realism. Regression analyses can reveal that it happens but understanding how analogical reasoning works, and how judges might use it, is necessary for understanding why it might happen.
THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW
(with Michael J. Saks) (New York University Press, 2016)

INTRODUCTION:
THE CROSSROADS OF PSYCHOLOGY AND EVIDENCE LAW

...  

Conclusion

The rules of evidence are designed to facilitate trial factfinding by controlling what evidence may or may not be presented to the factfinder. Those rules came into existence, and evolved over time, as a result of changes in trial process and structure—most notably by the rise of adversarial procedure in the trial system, whereby the power to control the marshaling and presentation of case facts shifted from judges to lawyers. Today, various refinements and reforms are undertaken to try to improve the job that the rules do. Trial judges must not only apply the rules, but in many instances they have the discretion to make rulings in light of their expectations of the impact they think the evidence will have on jurors. This is a dicey metacognitive task: one human trying to estimate the thought processes of other humans.

In all of this, evidence rulemakers have been and are, in effect, acting as applied psychologists. The rules of evidence reflect their understanding—right or wrong—of the psychological processes affecting witnesses, key participants in the legal transaction at issue, and the capabilities and limitations of lawyers and factfinders. If the rulemakers had different beliefs about those things, the rules would be other than what they are. Psychological research and methods provide an additional source of insight and assistance in that endeavor. Several rules—the excited utterance exception to the rule against hearsay (Rule 803(2)), the rules concerning character evidence (Rule 404(a)), and the rules governing privileged communications (Rule 501)—illustrate how principles of cognitive and social psychology underlie evidence doctrine more generally.

Psychologists and other social and behavioral scientists typically employ some version of the scientific method—empirically testing assumptions, theories, and hypotheses in an effort to evaluate which are the valid understandings of how people perceive, store, and retrieve information, and how information is transformed during those processes. To assess evidence rules, one could conduct experiments directly on a given rule, or borrow from existing knowledge developed in basic psychological research and see how well that knowledge supports existing or proposed evidence rules.

Fashioning evidence rules that “work”—that succeed in what the law hopes to accomplish—requires understanding the psychology of evidence law. And to understand the psychology of evidence law, we need to learn more about jurors—their role in trials and how they reason about the information they receive.

Overview of What Is to Come

For an overview of core concepts relating to evidence law discussed in this book and which chapters contain discussions of them, please see Appendix A.

In Chapter 1, “Judges versus Juries,” we compare the factfinding abilities of judges and juries, and try to understand their similarities and differences in light of psychological principles such as the two-systems theory. Interestingly, judges and juries tend to reach very similar decisions and, perhaps not surprisingly, they are susceptible to the same systematic cognitive errors.

Chapter 2, “Balancing Acts,” looks at the general rule for balancing the probative value of evidence against its prejudicial effects, as well as a number of categorical rules in which rulemakers have decided that the problem of the jury being misled is so great that judges must exclude all evidence that is defined as fitting within the rule’s ambit. The great psychological challenge for rulemakers and judges is that of metacognition: trying to conceive of what others (jurors) are thinking and feeling and how they will respond to evidence if it is presented to them.

Chapter 3, “Instructions to Disregard and to Limit Use,” deals with two different problems: that of undoing the damage of evidence that should not have reached the jury but did, and that of getting jurors to confine their consideration of evidence to permitted uses while at the same time refraining from employing evidence in forbidden uses. We examine psychological research on motivation, memory, and reasoning that might affect people’s desire and ability to perform such feats of cognitive skill when instructed to by judges, and ways the law could be more successful in achieving the aforementioned goals.

Chapter 4, “Witness the Witness,” examines the psychology of various tools the law uses to try to ensure that the information provided to the
jury by witnesses can be correctly assessed as true, false, or somewhere in between. Among these tools are the oath, exposure of witness demeanor (so jurors can assess witnesses’ nonverbal and noncontent verbal behavior), and cross-examination (so jurors can evaluate statements as they are tested by the opponent’s challenges to the testimony). We also describe the evolution of rules about who may testify and who may assert a privilege not to testify.

In Chapter 5, “Character Evidence,” we consider the psychological reasoning behind the complex of rules that govern when evidence of a person’s “character” may be admitted and when it must be excluded. This body of law has been said to be “archaic, paradoxical, and full of compromises and compensations…. But somehow it has proved a workable, even if clumsy, system.” In addition, psychological findings suggest that the rulemakers had latched onto some notions that are even more sound than they ever realized.

Chapter 6, “Hearsay and Exceptions,” focuses on the rationale for excluding some kinds of second-hand statements while allowing many others. A slowly growing body of psychological research suggests that jurors are better at assessing the weaknesses of out-of-court statements not subject to cross-examination than centuries of rulemakers have supposed. Most important, perhaps, psychology can help identify situations that are better or worse for reliability, for finding the truth, and for jurors’ understanding of the dangers of different types of hearsay evidence.

In Chapter 7, “Scientific and Other Expert Evidence,” we look at the steadily growing problem the law has in managing expert testimony. Expert evidence is potentially one of the most helpful sources of information factfinders might receive; yet, at the very same time, it presents a great risk of being incomprehensible, confusing, or misleading to both judges and juries. Rules of admission or exclusion have been of little help. When junky science is passed through to jurors, they are in a very weak position to separate the good from the bad. Cognitive psychology might guide the way to new and more helpful tools. But it is also possible that the problems presented by expert evidence cannot be solved without making radical—and unacceptable—changes to our system of trials.


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