

REPUTATION NATION: LAW IN AN ERA OF UBIQUITOUS PERSONAL INFORMATION

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INTRODUCTION

It is a June evening in the City of Light, and the sun is setting on the Rue du Faubourg Saint-Honoré. As the last remaining customers in a posh boutique finish their browsing and stride toward the cashiers, a beleaguered saleswoman places a “closed” sign in the window. Meanwhile, other employees begin readying the facilities for a private shopping event that is to occur momentarily. Just then, a small group of American tourists approaches the front door, seeking admittance. The saleswoman refuses to let them in, insisting that the store is closed, notwithstanding the presence of customers inside. Harsh words are spoken, pleas for admittance are ignored, and the humiliated Americans eventually retreat to their hotel rooms clutching unspent Euros.

This episode, or something like it, surely occurs each day in Paris. It’s hardly news. But on the evening in question, the episode generated international headlines, and for good reason. The rebuffed tourists included Oprah Winfrey, one of America’s most famous, beloved, and wealthy women.¹ Pundits debated whether race and national origin played a part in the saleswoman’s behavior and argued over whether it was reasonable for Oprah and her entourage to request admittance after normal business hours. But lost in all the analysis was an important point: Nothing like this could have happened on Madison Avenue or Rodeo Drive.

In a few decades, the story of Oprah and the subsequently disciplined Parisian saleswoman will seem quaint. Reputation is becoming increasingly portable, and there is every reason to think that accurate assessments of our reputations and attributes will follow us from New York to Paris to Katmandu, such that Oprah will get the A-list treatment wherever she may go. Our cities and suburbs are increasingly going to resemble the small towns of lore, for better and worse. People who behave rudely in the presence of others will have a hard time hiding behind their anonymity or practical obscurity, and the fear of reputational sanctions will help keep us in line more often than not. Mistaken identity, judging books by their covers, con-jobs—all the pathologies resulting from asymmetric information will become increasingly rare,² though the availability of personalized reputation information will generate new problems and challenges. This Article asks what the law should look like in a world of increasingly ubiquitous personal information. It examines how a fundamental change in information economics should alter the way we think about landlord-tenant law, antidiscrimination law, jury selection, prescription drug abuse, insurance, immigration law, and consumer protection law. More provocatively, it advocates something that few academics and no privacy advocates presently

¹ Alessandra Stanley, *The TV Watch: Oprah, No Diva She, Accepts Hermès Apology on the Air*, N.Y. TIMES, Sept. 20, 2005, at B2.

² See Hassan Masum & Yi-Cheng Zhang, *Manifesto for the Reputation Society*, FIRST MONDAY, July 5, 2004, http://www.firstmonday.org/issues/issue9_7/masum/index.html.

favor: Adopting government policies that will hasten the widespread availability of previously private consumer information in certain contexts.

This Article completes a trilogy of projects theorizing the relationship between information and exclusion. In the first, I argued that in settings where real estate developers sought to exclude subpopulations from a community but were prohibited from doing so explicitly by law, they might achieve their exclusionary objective by bundling community membership with a costly collective amenity that would be unpalatable to most members of the targeted subpopulation.³ In the second, I developed a broader hypothesis about why a resource owner would opt for one exclusionary strategy over another: owners will exclude through mechanisms based on trespass law when they have sufficient information about which prospective applicants are undesirable and will use nontrespass-based mechanisms, such as exclusionary language or bundling, when significant information asymmetries exist.⁴ In this Article, I examine a brave new world of radically diminishing information asymmetries and explain how it will unsettle existing assumptions about law and public policy.⁵

Part I of this Article identifies a number of contexts in which the widespread availability of information about individuals can transform commercial and social interactions. It then suggests that in some—though not all—of these settings, it will be appropriate for the government to reduce the costs that decisionmakers face in obtaining relevant information about individuals so that decisionmakers can rely more heavily on that relevant information and decrease their reliance on less relevant but more easily observable proxies, such as racial or ethnic status, gender, or age.

Part II identifies a number of pragmatic concerns that can help determine when government should facilitate greater information flow. It suggests that, *ceteris paribus*, it is desirable for the government to promote the publication of information about individuals when rational discrimination is common but irrational discrimination is uncommon. The Part then briefly explores the challenges posed by false feedback or other forms of misinformation and differentiates between those settings where the government should itself publish previously private information and those in which it should facilitate the aggregation or standardization of data that other parties have acquired or published.

Part III tackles a number of normative objections to the use of government information policy as a tool for tackling unlawful discrimination and other social ills. It notes that in some contexts, statistical discrimination

³ Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006).

⁴ Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006).

⁵ Predictably, the three papers are in the process of being integrated into a book, forthcoming with Yale University Press, tentatively titled *A Theory of Information and Exclusion*.

must be tolerated because society has determined that the information that would enable the decisionmaker to dispense with statistical discrimination is not information to which he ought to have access. It then discusses some of the distributive justice consequences of the information policy regime discussed herein and explores whether information-based strategies should be used for combating other social ills. Finally, the Part examines the desirability of living in a society where citizens' conduct is frequently evaluated and those evaluations are made widely available, with a brief discussion of the emerging pertinent empirical literature. A brief conclusion follows.

I. THE REPUTATION REVOLUTION AND THE LAW

One of the most significant developments in the industrialized world during the last decade has been the increased availability of information about individuals. Personal information that was once obscure can be revealed almost instantaneously via a Google search. The flea market transaction, in which a consumer had to hope that a vendor was trustworthy, has been largely displaced by the eBay auction, where a prospective bidder can review information about hundreds of the seller's prior transactions in an effort to ensure that the seller is trustworthy, prompt, courteous, and the like. Anxious parents thinking about purchasing in an unfamiliar neighborhood can acquire information about all the registered sex offenders living nearby, complete with comprehensive information about their crimes, via a few keystrokes. Sizing up a potential blind date to get a sense of his peer group—a task that was once arduous and blatant—has now become easy and discreet thanks to Facebook, MySpace, and similar social networking sites. A car seller can comfortably show a consumer a new car and let her drive it home, having paid for the vehicle with little or no money down, thanks to the comprehensive and nearly instantaneous credit checks that now take place on the dealer's lot. And we can even assess the credibility of people we have no expectation of ever meeting—the amateur movie critic on Netflix, the amateur book reviewer on Amazon, or the amateur commentator on Slashdot. I can look up their respective histories of movie, book, and article reviews to see how seriously I should take their recent review of *Ratatouille*, *A Thousand Splendid Suns*, or a blog post reviewing the new iPod nano. Reputation tracking technologies log customer's preferences and quirks too. For example, *Open Table*, the popular online reservations system for restaurants, tracks dining patrons' tendencies: If I repeatedly show up late for reservations, *Open Table* will alert restaurateurs so that they know to expect me fifteen minutes *after* my stated reservation time.⁶ In short, the anonymity and pseudonymity that once characterized

⁶ Katie Hafner, *Service at Restaurants Changing Subtly with Online Information*, N.Y. TIMES, June 18, 2007, at C1.

our interactions with strangers is fading. I will refer to this change as the “reputation revolution.”

In the years ahead, it seems likely that existing imperfections in the reputation market will dissipate.⁷ For example, it is presently difficult for an individual to translate a strong offline reputation into a strong online reputation. eBay does not let users take their existing brick-and-mortar reputations into the online auction world. Thus, a well-established merchant in a small town with lots of satisfied customers providing her repeat business gets zero feedback points upon opening a new eBay account, just like everyone else. Because a strong feedback score permits a seller to obtain higher prices for her goods,⁸ the new entrant on eBay thus may have to sell goods with a discounted reserve price in order to build up the positive reputation that will allow her to compete effectively with established online sellers. This is a significant market inefficiency, and it will be surprising if the market does not address it as identity verification technologies improve. More precisely, we might expect to see meta-ranking sites that make reputation more readily transferable from one online forum to another and between online and offline marketplaces. More radically, we might expect to see the emergence of services that track the reputations of individuals in comprehensive ways. Just as each American has a credit score that banks, lenders, landlords, and others can access before determining whether and on what terms to do business with us, we can envision the emergence of “social credit scores,” where individuals’ personality traits are assessed and translated into a profile that gauges trustworthiness, sociability, cooperativeness, and popularity based on data from a variety of online and offline resources. Cruder versions of such profiling already occur in the online advertising realm.⁹

As technologies improve, the reputation revolution has the potential to alter not only considered judgments with obvious economic and social consequences, such as the decision to purchase a car, buy a home, go on a date, or acquire a pair of Nikes. In these settings we would hope that the decisionmaker will conduct some research before electing a course of action. In the near future, it is plausible that information about individuals will seep into interactions where it is presently unavailable. Such interactions require split-second decisions, but technologies being developed for the mass mar-

⁷ See generally Nolan Miller et al., *Eliciting Informative Feedback: The Peer-Prediction Model*, 51 MGMT. SCI. 1359 (2005) (developing “methods to elicit feedback effectively when independent, objective outcomes are not available”).

⁸ See, e.g., Paul Resnick et al., *The Value of Reputation on eBay: A Controlled Experiment*, 9 EXPERIMENTAL ECON. 79, 80–81, 96 (2006).

⁹ See, e.g., Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1550–57 (2006); Lee Kovarsky, Note, *Tolls on the Information Superhighway: Entitlement Defaults for Clickstream Data*, 89 VA. L. REV. 1037, 1042–47 (2003); Brad Stone, *MySpace Mining Members’ Data to Tailor Ads Expressly for Them*, N.Y. TIMES, Sept. 18, 2007, at C1.

ket will nevertheless enable us to take advantage of the reputation revolution in making those decisions. A concrete example is useful here.

It is late at night, and an unaccompanied adult is walking home. There are no other pedestrians or moving vehicles immediately visible, but a twenty-four-hour pharmacy stands across the street. The adult suddenly sees a group of five male teenagers turn the corner. The teens are now walking directly toward the adult. Will the pedestrian cross the street, perhaps entering the pharmacy for a moment? The answer probably will depend on a series of proxies: What race are the teenagers? How are they dressed? How are they interacting with one another? In a split second, and with potentially high stakes, the first question may prove decisive in guiding the adult's response to this situation. The adult may well cross the street out of caution and then feel ashamed after receiving quizzical or bemused looks from the probably harmless teenagers.

Given presently available technology, we have a hard time understanding the application of a strategy to give the pedestrian more relevant information so he can rely less on race or wardrobe information. But wearable computers that are already being tested and rolled out permit precisely those types of calculations. In the past few years, our old-school cell phones have seen the addition of camera, text messaging, email, global positioning system, and mp3 player functionalities. In a few more years, they are likely to integrate impressive social networking and data storage capabilities as well.¹⁰ Computer scientists have now spent a decade researching, implementing, and writing about "wearable communities," which employ ubiquitous computing resources to help provide individuals with information about the people and products around them.¹¹ These technologies have numerous functionalities, but among the most promising is an application of social networking sites like MySpace and Facebook into real space. In November of 2007, Google announced that it was spearheading an effort to bring next-generation social networking software applications to smart-

¹⁰ On the latter, see Dana Cuff et al., *Urban Sensing: Out of the Woods*, COMM. ACM, Mar. 2008, at 24, 27–28.

¹¹ See, e.g., ADAM GREENFIELD, EVERYWARE: THE DAWNING AGE OF UBIQUITOUS COMPUTING (2006); Marije Kanis et al., *Toward Wearable Social Networking with iBand*, in CHI '05 EXTENDED ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 1521 (Wendy Kellogg et al. eds., 2005), available at <http://portal.acm.org/citation.cfm?id=1056956>; Gerd Kortuem & Zary Segall, *Wearable Communities: Augmenting Social Networks with Wearable Computers*, PERSVASIVE COMPUTING, Jan.–Mar. 2003, at 71, available at http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=1186728; Steve Mann et al., *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC'Y 331 (2003), [http://www.surveillance-and-society.org/articles1\(3\)/sousveillance.pdf](http://www.surveillance-and-society.org/articles1(3)/sousveillance.pdf); Michael Terry et al., *Social Net: Using Patterns of Physical Proximity over Time to Infer Shared Interests*, in CHI '02 EXTENDED ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 816 (Loren Torvee et al. eds., 2002). For a technical overview about various wearable community projects, see Roy L. Ashok & Dharma P. Agrawal, *Next-Generation Wearable Networks*, COMPUTER, Nov. 2003, at 31. The primary legal treatment of this subject is Jerry Kang & Dana Cuff, *Pervasive Computing: Embedding the Public Sphere*, 62 WASH. & LEE L. REV. 93 (2005).

phones and that thirty-three other technology firms, including Motorola, Samsung, Sprint, T-Mobile, eBay, and Intel, had pledged to cooperate in that effort.¹²

If everyone is carrying around a wearable computer that can talk to everyone else's wearable computer, then at a moment's notice I might be able to discern whether anyone else in a café has seen the movie I just saw.¹³ While waiting in line at the grocery store or box office, I might be alerted to the presence of a friend-of-a-friend just behind me. That functionality is something that existing services like Dodgeball.com already enable.¹⁴ Given those existing technologies, it is a short leap to a world in which having told my wearable computer that I am looking for an electrician, I might learn that there is an available electrician in aisle six at Home Depot, that a trusted colleague employed the electrician recently and rated his performance nine out of ten, and that the electrician has experience doing the sorts of lighting rewiring jobs that I need done.

These sorts of technologies can help us navigate the everyday snap judgments about how to interact with strangers on a mostly deserted block. My computer might tell me that the five youths approaching late at night are honors students or dropouts with long rap sheets.¹⁵ And if my computer can tell me that, a police officer's wearable computer can tell him just as much, diminishing the likelihood of racial profiling and tragic mistakes.¹⁶ In the years ahead, my computer could tell me whether the individual who just cut me off on the freeway has a history of violence and vehicular collisions, or is a surgeon likely racing to the hospital. Summary statistics, much like eBay's reputation scores or Slashdot's karma points, could flash on my screen to tell me that the teens are trusted by people I trust but the driver is someone with a violent temper who is best avoided.

Of course, if it is late at night and I am being approached by teenagers with suspicious intentions, do I really want to be pulling out a portable computer and scanning an eBay profile? If a taxi driver has to decide

¹² Miguel Helft & John Markoff, *Google Is Pursuing Plans to Put a PC into Every Pocket*, N.Y. TIMES, Nov. 6, 2007, at C1.

¹³ Kang & Cuff, *supra* note 11, at 131.

¹⁴ See Dodgeball.com: Mobile Social Software, <http://www.dodgeball.com> (last visited Apr. 5, 2008).

¹⁵ See Kang & Cuff, *supra* note 11, at 133–34; see also Mark A. Blythe et al., *Little Brother: Could and Should Wearable Computing Technologies Be Applied to Reducing Older People's Fear of Crime?*, 8 PERS. & UBIQUITOUS COMPUTING 402, 407–12 (2004) (describing the potential for wearable computing technologies to address the information problems that underlie urban crime).

¹⁶ The People's Republic of China is beginning to use wearable computers and identity management systems to help the police keep track of the government's contacts with its civilian population, as well as the citizenry's movements through public spaces. See Keith Bradsher, *China Enacting High-Tech Plan to Track People*, N.Y. TIMES, Aug. 12, 2007, at A1. Less disconcertingly, Maryland is developing the capacity for police officers to conduct criminal background checks via squad car-based terminals, as well as enabling biometric identification. See Philip J. Weiser, *Communicating During Emergencies: Toward Interoperability and Effective Information Management*, 59 FED. COMM. L.J. 547, 564 (2007).

whether to pick up an African American pedestrian late at night, won't the driver always prefer statistical discrimination to spending ten seconds evaluating the pedestrian's reputation score?¹⁷

These are fair questions, but they are ones with good answers—the problems raised by these examples have already been addressed in e-commerce. In e-commerce, automated negotiation protocols allow users who own devices that can communicate with other users' devices to set the parameters for such communication. For example, these protocols have been implemented in digital rights management, p3p systems,¹⁸ and wearable communities. In such environments, automated negotiation lets users specify what levels of trust are necessary before their digital media device will download content from another device or website. They permit users to identify in advance what privacy-protection characteristics a website offers and only show users items for sale from websites that meet the specified criteria. Or they allow someone participating in a wearable community to request notification whenever someone else approaches whose wearable computer indicates specified attributes (unmarried, fellow Hoosier, Decem-berists fan, etc.). Our hypothetical taxi driver might program his computer to notify him whenever a university student, nurse, or airline pilot seeking a cab is in the vicinity, but he might also assign lower priority to taxi requests from those who are currently unemployed and have the computer provide an audible warning beep whenever a proximate convicted felon tries to hail a cab. Alternatively, the taxi driver might identify fifty cab drivers whom he trusts and pick up any passenger who had received positive feedback from any of those cab drivers.¹⁹

Under the law, of course, a taxi company is a common carrier, with an obligation to provide service to everyone.²⁰ But we should not kid ourselves. Cab drivers routinely avoid picking up African Americans, often avoid serving African American neighborhoods entirely, and resist efforts to enforce antidiscrimination laws.²¹ As we will see shortly, information asymmetries currently cause taxi drivers to sort on the basis of race and gender when picking up rides, penalizing both the African American male gang member and the African American male clergyman. A technology that allows sorting between gang members and clergymen, from this perspective, makes the world a better place than the one in which we live,

¹⁷ See *infra* text accompanying note 21 (discussing the issue of discrimination in taxi cab pickups).

¹⁸ The term "p3p" stands for "platform for privacy preferences."

¹⁹ He might well decide to extend the circle of trust by one degree—trusting favorable feedback from any of his fifty cabbie friends or any of his fifty cabbie friends' friends—a community of interest that could well include many of the cab drivers in town.

²⁰ Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1624 (2005).

²¹ See Danita L. Davis, Note, *Taxi! Why Hailing a New Idea About Public Accommodation Laws May Be Easier than Hailing a Taxi*, 37 VAL. U. L. REV. 929 (2003).

where the only decisionmaking factors available to the cab driver are the information revealed by quick visual inspection (race, gender, dress, etc.).

To be sure, there are technological and consumer preference impediments to the implementation of these technologies. Networking capabilities will have to improve somewhat, kinks will have to be worked out of the existing wearable computing software, and consumers will have to decide that the socialization gains from these technologies warrant the associated loss of privacy. No significant hypothesis in this Article depends on the successful implementation of these technologies. But the preceding discussion is designed to open the reader's eyes to the dramatic nature of the reputation revolution that has already occurred in the past decade and the nonfanciful possibility that equally dramatic changes lie ahead in the next ten years.

A. Existing Scholarship on Consumer Information and Discrimination

The rise of social networking websites, consumer information databases, blogs, and online feedback systems have not made scholars who write about privacy law happy. In a host of books and articles, these scholars have bemoaned the disappearance of anonymity, the loss of autonomy, and the dangers of shame sanctions that have accompanied these trends.²² One influential and important part of that critique began in 1993 with Oscar Gandy's book *The Panoptic Sort*,²³ and the issue remains vibrant and visible today thanks to work by David Lyon and other surveillance studies scholars.²⁴ According to Gandy and Lyon, the growth of technology-aided surveillance, consumer information databases, and other mechanisms for accessing increased information about individuals facilitates pernicious forms of discrimination—what Gandy calls “the panoptic sort” and Lyon calls “social sorting.” It prevents governments from treating citizens alike and similarly prevents firms from treating consumers as an undifferentiated

²² See, e.g., DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004); DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007); Julie E. Cohen, *Examined Lives: Information Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000); Oscar H. Gandy, Jr., *Quixotics Unite! Engaging the Pragmatists on Rational Discrimination*, in *THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND* 318 (David Lyon ed., 2006); Stan Karas, *Privacy, Identity, Databases*, 52 AM. U. L. REV. 393 (2002); Matthew J. Hodge, Comment, *The Fourth Amendment and Privacy Issues on the “New” Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95 (2006).

²³ OSCAR H. GANDY, JR., *THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION* (1993).

²⁴ See, e.g., *SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK, AND DIGITAL DISCRIMINATION* (David Lyon ed., 2003); *THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND* (David Lyon ed., 2006).

mass. As a result, people are categorized, grouped, divided, and treated in disturbingly differential ways.²⁵

This Article argues that Gandy and Lyon misapprehend the relationship between discrimination and the availability of personal information. The increased availability of information about individuals will prompt some decisionmakers to shift from not sorting to sorting, as Gandy and Lyon argue. But it will prompt other decisionmakers to shift from sorting via problematic group-based stereotypes to less problematic, more individuated judgments. The key questions, as I explain below, are the magnitudes and social welfare consequences of the two relevant shifts.

Before the developed world made heavy investments in its “reputational infrastructure,”²⁶ citizens and consumers were not treated equally. Then, as now, governments sorted citizens and firms sorted consumers. The difference between our present age and prior epochs was not the temptation to sort, but the basis for sorting. Lacking comprehensive consumer information databases, criminal history databases, Google searches, MySpace profiles, and the like, institutions interested in sorting used easily available criteria like race, gender, and age to sort Americans. When Gandy, Lyon, and other scholars writing in the surveillance-studies tradition advocate greater privacy protections as a mechanism for decreasing discrimination, they (unwittingly) propose policies that will shift sorting techniques away from less problematic criteria, like purchasing patterns, social affiliations, criminal histories, insolvency records, and Internet browsing behavior, back toward the old sorting standbys—race, gender, and age. Often, the choice is not between sorting and not sorting; the economic and social gains from sorting are simply too great, while banning sorting in many contexts will be simultaneously costly and not terribly effective. Rather, the real choice is between sorting on the basis of uncomfortable criteria and sorting on the basis of obnoxious and distasteful criteria.

The remainder of this Part takes stock of the enormous changes that industrialized democracies have seen in the past couple of decades and asks, in a systematic and sustained way, what the law should do to respond to those changes. It explores how the widespread availability of information about individuals has already transformed the landlord-tenant market and then analyzes the law’s initial responses to this revolution in the context of employment discrimination, jury selection, medical treatment decisions, immigration law, consumer protection law, and the law of defamation. In all these settings, courts and policymakers are beginning to confront the new informational environment, but they have not fully thought through its implications for legal doctrine and policy. The discussion illustrates that

²⁵ See GANDY, *supra* note 23, at 71–93; David Lyon, *Surveillance as Social Sorting: Computer Codes and Mobile Bodies*, in SURVEILLANCE AS SOCIAL SORTING, *supra* note 24, at 13, 13–28.

²⁶ Reputational infrastructure consists of the technologies that enable information about individuals’ actions and reputations to circulate efficiently among members of society.

context matters, such that the law's optimal response in one racial discrimination context—hiring—should differ from its response in another racial discrimination context—jury selection. More information is not always better. Nor is it always worse. The discussion that follows begins to develop principles that help us identify settings in which the state should facilitate the proliferation of personal information.

B. Landlord-Tenant Law

Before looking forward, it is always wise to look back. The reputation revolution transformed the landlord-tenant market long before it altered many other aspects of economic life. A brief case study will illustrate the basic trend that this Article describes: reliance on poor sorting proxies when accurate proxies are costly to obtain, a shift to reliance on those accurate proxies when the cost of obtaining high quality information drops, and a myopic reaction by policymakers who failed to anticipate the consequences of the reputation revolution. Reforms designed to protect down-on-their-luck tenants from landlord abuses in the 1960s have, ironically, relegated some current tenants to a reputational underclass, whose members have a hard time renting decent units even after achieving some measure of financial stability. Before examining such results, however, let us begin with an anecdote that underscores how freely circulating personal information affects the rental market.

During the 1970s and 1980s, it was not unusual for landlords in New York City to refuse to rent apartments to lawyers.²⁷ At first blush, this seems like an odd trend. We lawyers may be loathed by the public, but we typically bring home a nice paycheck. A New York City landlord who refused to rent to lawyers would be depriving himself of many prospective, well-heeled tenants. The explanation for this seemingly irrational landlord conduct was a proxy story. As one landlord explained to a New York court, his refusal to rent an apartment to a qualified attorney applicant was based on his preference for “a person who was likely to be less informed and more passive” rather than someone “attuned to her legal rights.”²⁸ That court noted that lawyers were not a protected class under fair housing laws and thus ruled in the landlord's favor.²⁹ It took nine years, but New York City eventually prohibited discrimination in the housing market on the basis of profession, at the urging of lawyers who had similar troubles finding rental units in the city.³⁰

The 1986 enactment of New York City's profession-based fair housing protections did not prompt the city's landlords to wave the white flag on tenant screening. Landlords still wanted to screen out those tenants who

²⁷ See JESSE DUKEMINIER ET AL., PROPERTY 382 (6th ed. 2006) and sources cited therein.

²⁸ See, e.g., *Kramarsky v. Stahl Mgmt.*, 401 N.Y.S.2d 943, 944–45 (N.Y. Sup. Ct. 1977).

²⁹ *Id.* at 945.

³⁰ DUKEMINIER ET AL., *supra* note 27, at 382–83.

seemed likely to invoke their rights under New York's landlord-tenant laws. Some landlords responded by continuing to avoid renting to lawyers but offering instead some pretext—new or old.³¹ But other landlords stopped relying on profession as a proxy and started relying on involvement in prior litigation as a proxy for litigiousness. Information brokers began data-mining state and municipal court records, hoping to identify tenants who had been involved in landlord-tenant litigation of any sort.³² Those landlords essentially blacklisted tenants who had been involved in such litigation.³³ In such a world, even tenants who had won suits against their landlords faced a difficult time obtaining housing. As the founder of a tenant screening company told the *New York Times*, “It is the policy of 99 percent of our customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is, because if their dispute has escalated to going to court, an owner will view them as a pain.”³⁴ In New York, at least, even sex offenders seem to have an easier time finding a place to live than tenants who had previously litigated against their landlords.³⁵

On one account, tenant screening services are popular in New York precisely because landlord-tenant regulations in that city slant so heavily in the direction of tenants.³⁶ Faced with high eviction and litigation costs, landlords devote more resources to trying to screen out prospective tenants who pose heightened risks of future legal entanglements. This screening presents a social problem because society has an interest in ensuring that the landlord-tenant laws are enforced and the common law system requires the help of plaintiffs who generate appellate cases, the resolution of which will clarify the law.³⁷ Landlord-tenant law, as it exists in ordinances and case law, bears little resemblance to the set of rules that govern everyday relations between landlords and tenants. The reputational consequences of involvement in litigation are so severe that a rational tenant should often elect not to seek enforcement of the substantive entitlements provided by formal law. In this environment, it is safe to wonder whether landlord-tenant clinics should even exist in their current form. Shouldn't a legal aid attorney advise an indigent client that involvement in landlord-tenant litiga-

³¹ A 2006 *New York Times* article mentions continuing discrimination in New York City against “lawyers (too litigious) and musicians (too loud).” Teri Karush Rogers, *Only the Strongest Survive*, N.Y. TIMES, Nov. 26, 2006, § 11, at 1.

³² ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 277 (1991); Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 181–82 (2000).

³³ Rogers, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1363–64 (2007).

tion is likely to be counterproductive in the long run? Pro-tenant regulations, in short, might not make tenants better off, though they do seem to improve the lot of tenant screening firms.

This dynamic explains why some of the landlord-tenant reforms of the 1960s and 1970s, which were supported by well-meaning tenants' rights advocates, may have ultimately backfired. One such reform is the prohibition on self-help evictions by landlords and tenants. At common law, landlords were able to evict tenants who had violated the terms of their lease, provided that the landlords did not use excessive or unreasonable force.³⁸ Beginning in the 1960s, tenants began legal reform efforts, arguing that legal process should be the exclusive means of ousting a tenant in possession.³⁹ This reform movement was premised on the view that self-help evictions tend to spark violence between the landlord and tenant, and that unless checked by the courts, some landlords would evict tenants who had a legal right to remain on the premises.⁴⁰ Although some states still permit self-help by landlords, their ranks have been shrinking, and even the jurisdictions that permit landlords to use reasonable force in self-help evictions have defined "reasonable force" so narrowly that self-help has become a "theoretical but not a practical alternative."⁴¹

The movement to prohibit self-help evictions by landlords has long had a few critics, with the most prominent ones suggesting that landlords would pass the high costs of judicially evicting deadbeat tenants onto the tenants who paid their bills on time.⁴² Some passing on of these costs undoubtedly occurs, but the reputation revolution suggests a deeper criticism of the prohibitions on landlord self-help. Eviction via self-help typically creates no public records. Courts are not involved in a self-help eviction, and a landlord has no economic incentive to report such a dispossession to a credit bureau or any other information broker.⁴³ Evictions via summary proceedings, on the other hand, necessarily generate public records, and it is those public records that will prove so damaging to tenants the next time they try to rent an apartment. From the perspective of facilitating tenant rehabilitation and

³⁸ DUKEMINIER ET AL., *supra* note 27, at 408; Kara B. Schissler, Note, *Come and Knock on Our Door: The Fair Debt Collection Practices Act's Intrusion into New York's Summary Proceedings Law*, 22 CARDOZO L. REV. 315, 328–29 (2000).

³⁹ See, e.g., Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85, 104 (2002).

⁴⁰ See, e.g., *Berg v. Wiley*, 264 N.W.2d 145, 149–50 (Minn. 1978).

⁴¹ DUKEMINIER ET AL., *supra* note 27, at 408.

⁴² See, e.g., James J. White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 522–24 (making this argument in the context of chattel property); cf. *Chi. Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741 (7th Cir. 1987) (Posner, J.) (suggesting that legal reforms designed to help tenants are often counterproductive for this reason).

⁴³ Indeed, assuming the absence of repeat-player interactions among landlords, the landlord may have an incentive to suppress information about a self-help eviction in order to inflict an undesirable tenant on competitors.

second chances, a law prohibiting self-help by landlords will prove counterproductive. Many tenants who have trouble making rent payments will fail to appreciate the reputational repercussions of involvement in summary proceedings. For these tenants, the law's prohibition on self-help can be a particularly raw deal. This is a point overlooked by defenders of the prohibition on self-help.⁴⁴

Tenants' rights advocates who appreciate the ways in which earlier reforms have produced unintended consequences are not powerless to address this situation. If society believes that second chances are important in the landlord-tenant context, then it might require that information about involvement in landlord-tenant litigation be purged from consumers' credit reports after a relatively brief period of time. Currently, the Fair Credit Reporting Act requires that information about someone's involvement in landlord-tenant litigation be removed from his credit report after seven years.⁴⁵ But a seven-year cloud on one's suitability as a tenant will still impose substantial harms on tenants who become involved in litigation. During the 1990s, California tried to address this broader concern legislatively, prohibiting credit reporting agencies from including information about a tenant's involvement in landlord-tenant litigation where the tenant was the prevailing party. Alas, this legislation was invalidated on First Amendment grounds.⁴⁶ In short, legislators cannot easily prevent landlords from receiving information about tenants' prior involvement in litigation. They can try to ban landlords from acting on that information, but the enforcement of such prohibitions, like the enforcement of other antidiscrimination provisions that regulate decisionmakers' behavior, will be spotty, expensive, and prone to false positives.

Let us survey landlord-tenant law in the twenty-first century. Tenant background checks have gotten so cheap that for many tenants, involvement in litigation of any sort will place meaningful constraints on their future ability to obtain rental housing. These tenants' apartment search costs will be very high because landlords do not advertise their unwillingness to rent to people who have previously been involved in litigation. Assuming non-trivial vacancy levels, some landlords will be willing to rent to those who have been evicted in summary proceedings or sought to vindicate their legal rights, but only after extracting higher rents and security deposits. In such a

⁴⁴ See, e.g., Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 381-83 (2006).

⁴⁵ 15 U.S.C. §§ 1681c(a)(2)-(5) (2006).

⁴⁶ See *U.D. Registry, Inc. v. State of California*, 40 Cal. Rptr. 2d 228, 233 (Cal. Ct. App. 1995), *reaff'd*, *U.D. Registry, Inc. v. State of California*, 50 Cal. Rptr. 3d 647, 667 (Cal. Ct. App. 2006). The latter *U.D. Registry* court nevertheless held that California's similar "security freeze" legislation was not unconstitutional on its face. One basis for distinguishing the two cases was entirely unconvincing—the idea that preventing identity theft is a compelling government interest but that ensuring that tenants can exercise their rights under the law without fear of subsequent discrimination in the housing market is not a compelling interest. 50 Cal. Rptr. 3d at 666-67.

world, the only tenants who should be willing to defend their rights in court are those who have previously litigated and those with the ability to purchase housing. It seems like a hopeless world for a tenants' rights advocate. But such an advocate should not lose all hope.

There are two sides to every reputational coin, and that is equally true of this particular doubloon. Just as a substantial market has developed for tenant screening services, the market has also produced clearinghouses for information about landlords' reputations. In a prior era, these were confined mainly to university housing offices, where students could swap stories about the good, bad, and ugly landlords.⁴⁷ Today, in markets where prospective tenants often hire brokers to assist in their searches, brokers who depend on repeat business and positive word of mouth will have an incentive to learn which landlords behave inappropriately. Not surprisingly, the Internet has given rise to far more sophisticated resources for tenants. The best developed among them is ApartmentRatings.com, a website that contains tens of thousands of landlord ratings written by current and former tenants. This and some similar websites provide a wealth of information that would not easily be discerned in their absence, and their existence gives tenants some recourse in dealing with recalcitrant or bullying landlords.⁴⁸ To the extent that websites like these are used by prospective tenants, landlords should fear developing a reputation for unfair or overly aggressive behavior. The best check on landlord misbehavior is probably not the threat of a lawsuit by the tenant, but the threat of a series of complaints by aggrieved and eloquent tenants.

At present, an information asymmetry exists. ApartmentRatings.com is not as extensive or reliable as websites that monitor hotels and restaurants, like TripAdvisor.com. Impressionistic evidence suggests that it is underutilized and that the website devotes less attention to eliminating bogus or suspect ratings than TripAdvisor.com does. But as landlord-tenant law recedes into the background, we can expect that the demand for services like ApartmentRatings.com will expand, and this added demand will induce the site to provide a better service or be driven out by competitors offering a superior product.

Summarizing the landlord-tenant market, then, we see themes playing out that will become familiar refrains as you proceed through this Article. Where information costs are high, landlords use rough proxies, like occupation, to sort out litigious or otherwise undesirable prospective tenants. As reputational information becomes far more widely available through commercial data brokers, landlords reduce their reliance on these proxies and begin blacklisting those prospective tenants with previous involvement in

⁴⁷ ELLICKSON, *supra* note 32, at 277.

⁴⁸ Similar websites that deal with the purchase of real estate, like Curbed's New York, San Francisco, and Los Angeles sites, are transforming the market for homes. See Brad Reagan, *The Dirt on the Neighbors*, SMARTMONEY, Oct. 2007, at 110, 110-13.

litigation. As a result of this transformation, landlord-tenant reforms designed to help marginal tenants and constrain landlords may have had the opposite effect, creating far more extensive public records of litigation that have tarred some tenants with undesirable status. In the short term, the result is tenant litigants being caught unaware by the reputational implications of trying to vindicate their rights through legal process. In the long run, the effect will be a substantial deterrent to litigation in the landlord-tenant arena. This de-emphasis on litigation may be tolerable, however, if existing resources designed to track and monitor landlords' reputations become more reliable and widely used.

C. Antidiscrimination Law

There are two basic forms of discrimination: animus-based discrimination and statistical discrimination. Animus-based discrimination occurs when an individual treats members of a group differently because of (conscious or unconscious) antipathy toward that group. Statistical discrimination occurs when an individual treats members of a group differently because he believes that group membership correlates with some attribute that is both relevant and more difficult to observe than group membership.⁴⁹ Someone engaged in statistical discrimination would not harbor any ill will toward members of the group against which he is discriminating beyond the belief that membership in that group correlates with some undesirable characteristic. To continue with our first example, a landlord who refuses to rent to lawyers because he fears litigious tenants and thinks lawyers are more likely to be litigious is engaging in statistical discrimination. A landlord who will not rent to lawyers because he hates lawyers is an animus-based discriminator.

Statistical discrimination is often a likely explanation for instances in which decisionmakers who themselves belong to a minority group nevertheless make decisions that favor majority group members over minority group members. For example, recent newspaper accounts suggest that nannies generally prefer to work for Caucasian clients over African American clients. African American clients were widely seen as being too demanding, living in unsafe neighborhoods, or unable to pay as much as white couples.⁵⁰ These stereotypes were shared by nannies of all races, including African Americans and Caribbeans.⁵¹ Similar phenomena have been ob-

⁴⁹ See Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228 (1986); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1622-24, 1626-30, 1639-43 (1991). Richard Epstein analyzes statistical discrimination as a predictable response to information asymmetries in the labor market. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 32-40 (1992).

⁵⁰ Jodi Kantor, *Nanny Hunt Can Be a 'Slap in the Face' for Blacks*, N.Y. TIMES, Dec. 26, 2006, at A1.

⁵¹ *Id.*

served in explaining the difficulties that African American professionals have hailing cabs successfully—African American riders are viewed as less safe passengers and poorer tippers.⁵² Waiters similarly perceive African Americans as poor tippers, an expectation that becomes a self-fulfilling prophecy if African Americans receive less attentive service as a result.⁵³ Even doctors seem to rely on race-based statistical discrimination in diagnosing various ailments.⁵⁴

There will be some contexts in which animus-based discrimination predominates and others in which statistical discrimination predominates. In 2008, overt racial animus persists but is probably waning as a result of generational replacement. A younger generation of Americans has embraced Martin Luther King and feels embarrassed by slavery, Jim Crow, and massive resistance to integration. To them, racial animus seems distasteful and passé. That said, implicit bias, an unconscious form of animus-based discrimination, is alive and well.⁵⁵ Painting with broad brushstrokes, it appears that implicit bias and statistical discrimination are more prevalent today than they were in prior eras and that overt animus-based discrimination is less prevalent.⁵⁶

To illustrate how statistical discrimination plays out in contemporary society, suppose a person charged with hiring a sales clerk wants to avoid employing someone with a criminal background. Assuming the decision-maker lacks reliable access to information about applicants' criminal records, he might choose to hire a Caucasian female over an equally qualified African American male based on the relatively high percentage of African American males and the relatively low percentage of Caucasian females who are involved in the criminal justice system.⁵⁷ This decisionmaking process will impose a distasteful form of collective punishment on African American males who have had no run-ins with the law, penalizing them for

⁵² On taxi tipping, see Ayres et al., *supra* note 20, at 1648–53.

⁵³ Michael Lynn, *Ethnic Differences in Tipping: A Matter of Familiarity with Tipping Norms*, 45 CORNELL HOTEL & RESTAURANT ADMIN. Q. 12 (2004).

⁵⁴ See Ana I. Balsa et al., *Testing for Statistical Discrimination in Health Care*, 40 HEALTH SERV. RES. 227, 247 (2005) (finding evidence consistent with statistical discrimination in diagnosing hypertension and diabetes).

⁵⁵ My characterization of implicit bias as a form of animus-based discrimination is contested. For a useful overview, see Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007).

⁵⁶ See Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, in 3 NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW: BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION 69, 69–70 (Mitu Gulati & Michael J. Yelnosky eds., 2007). For a discussion of the decline of overt discrimination and the rise of statistical discrimination and implicit bias, see generally Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN'S L. REV. 899 (2005).

⁵⁷ See Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 CRIME & JUST. 201, 201–03 (1997); see also Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 156 (2004) (noting that African American males face a lifetime risk of incarceration of 28.5% versus 4.4% for Caucasian males).

crimes that others have committed. Because many decisionmakers may exercise the same decisionmaking criteria, a law-abiding African American male may face repeated rejection and economic marginalization.⁵⁸ For these reasons, antidiscrimination law prohibits the use of these race or gender proxies even where race or gender might correlate with some relevant qualification.⁵⁹

Policing statistical discrimination through traditional antidiscrimination measures has proven difficult: many victims of statistical discrimination never bring suit, many nonvictims bring unmeritorious suits that prompt defendants to settle so as to avoid the costs of litigation, and enforcement of the laws by the Justice Department and state attorneys general has been sporadic.⁶⁰ Concerned about the courts being flooded with frivolous claims, judges have imposed substantial burdens on plaintiffs seeking to enforce antidiscrimination laws, often hamstringing discovery, interpreting statutes of limitations aggressively, or hastening resolution of claims on summary judgment.⁶¹

A fascinating recent paper in the *Journal of Law and Economics* by Holzer, Raphael, and Stoll illustrates the prevalence of statistical discrimination and the failure of antidiscrimination laws to curtail it.⁶² The paper began by noting that 28% of African American males, 16% of Hispanic males, and 4% of white males would be incarcerated at some point in their lives and that the median prison sentence was less than two years.⁶³ As a result, Holzer and his associates observed that a sizable minority of the male labor pool in the United States consists of people with criminal records.⁶⁴ The study then surveyed employers about their most recent hire for

⁵⁸ Strauss, *supra* note 49, at 1626–29.

⁵⁹ See *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1085 n.15 (1983) (“For some jobs, however, there may be relevant skills that cannot be identified by testing. Yet Title VII clearly would not permit use of race, national origin, sex, or religion as a proxy for such an employment qualification, regardless of whether a statistical correlation could be established.”); Strauss, *supra* note 49, at 1623.

⁶⁰ See, e.g., Robert A. Kearney, *The Coming Rise of Disparate Impact Theory*, 110 PENN ST. L. REV. 69, 86 (2005); Stephen L. Ross & John Yinger, *Uncovering Discrimination: A Comparison of the Methods Used by Scholars and Civil Rights Enforcement Officials*, 8 AM. L. & ECON. REV. 562 (2006); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998).

⁶¹ See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (construing the time limit for filing employment discrimination claims with the EEOC narrowly); *Brown v. City of Oneonta*, 221 F.3d 329, 338–39 (2d Cir. 2000) (holding that despite a potential disparate impact, law enforcement stopping suspects on the basis of gender and race did not violate the Equal Protection Clause absent evidence of a discriminatory racial animus); Matt Graves, Note, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159, 185 (2001).

⁶² Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006).

⁶³ *Id.* at 451.

⁶⁴ *Id.*; see also Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 938 (2003) (noting that approximately 8% of the working-aged population of the United States are ex-felons).

a position that did not require a college degree. The authors collected demographic information about each firm's most recent hire and information about the firm's willingness to hire employees with criminal records generally.⁶⁵

The findings of the study suggested that statistical discrimination against African American males is widespread and that employers were using race as a proxy for involvement in the criminal justice system. Employers who conducted criminal background checks on applicants were 8.4% more likely to hire African Americans than employers who did not. Consistent with the statistical discrimination hypothesis, the effect was highly significant for employers who expressed an unwillingness to hire ex-offenders (10.7% greater likelihood) and only marginally significant for employers who stated their willingness to hire ex-offenders (4.8% greater likelihood).⁶⁶ The effects for African American males were far greater than the effects for African American females,⁶⁷ which is consistent with the statistical discrimination hypothesis and harder to square with a racial animus hypothesis. Further, the study found the same effects even after controlling for differences in the racial composition of the applicant pool.⁶⁸ The study also found evidence that surveyed employers who do not conduct criminal background checks used other proxies for criminal convictions as well, including spotty work histories and periods of unemployment lasting over a year, and that those employers who expressed an unwillingness to hire ex-offenders were significantly less likely to hire members of these stigmatized groups.⁶⁹

Surveying their results, the study authors reached the following conclusion about the effects of statistical discrimination on African American job applicants:

[T]he empirical estimates indicate that employers who perform criminal background checks are more likely to hire black applicants than employers that do not. . . . [T]his positive net effect indicates that the adverse consequence of employer-initiated background checks on the likelihood of hiring African Americans is more than offset by the positive effect of eliminating statistical discrimination. . . .

In addition, we find that the positive effect of criminal background checks on the likelihood that an employer hires a black applicant is larger among firms that are unwilling to hire ex-offenders. This pattern is consistent with the proposition that employers with a particularly strong aversion to ex-offenders may be more likely to overestimate the relationship between criminality and race and hence hire too few African Americans as a result. . . .

⁶⁵ Holzer et al., *supra* note 62, at 464.

⁶⁶ *Id.* at 464–65.

⁶⁷ *Id.* at 465–66, 470–71.

⁶⁸ *Id.* at 474.

⁶⁹ *Id.* at 472.

The results of this study suggest that curtailing access to criminal history records may actually harm more people than it helps and aggravate racial differences in labor market outcomes.⁷⁰

A new working paper by Keith Finlay reaches broadly similar conclusions on the basis of a different methodology.⁷¹ Finlay looked at variation among the states in the accessibility of criminal history information. He found that in states with highly accessible criminal history databases, ex-offenders faced worse employment prospects⁷² but members of high-offending-rate groups faced marginally better employment prospects.⁷³ The implications of these studies and of similar studies on the employment market that presented data consistent with statistical discrimination on the basis of race to weed out applicants with criminal histories⁷⁴ are chilling, but they should not be surprising. Employers in a variety of sectors admit their heavy reliance on proxies, especially in sorting between “good” and “bad” African American workers.⁷⁵ Many employers wish to avoid hiring ex-offenders because they consider them untrustworthy, they are worried about vicarious liability, or other reasons.⁷⁶ Employers who expend resources on criminal background checks will be able to sort effectively among those African Americans who have had run-ins with law enforcement and those who have not, but other employers will rely on race as a proxy for criminality, imposing a distasteful sanction on law-abiding African American males.⁷⁷

⁷⁰ *Id.* at 473. One of the authors of this study recently hedged this conclusion somewhat, noting that the desirability of promoting access to criminal records would depend on the amount of time for which a prior conviction would act as a reliable proxy for future conduct and the degree of nuance in employer reactions to prior convictions. Steven Raphael, *Should Criminal History Records Be Universally Available?*, 5 CRIMINOLOGY & PUB. POL’Y 515, 516–17, 519–20 (2006).

⁷¹ Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders* (Nat’l Bureau of Econ. Research, Working Paper No. 13935, 2008), available at <http://ssrn.com/abstract=1121727>.

⁷² *Id.* at 19.

⁷³ *Id.* at 25. This latter finding is not statistically significant, though the coefficients are all consistent with a finding of statistical discrimination against high-offending groups in jurisdictions that lack ready access to criminal history information. *Id.*; see also *id.* at 27 (“There is weaker evidence that labor market outcomes of non-offenders from highly offending groups are improved by greater access to criminal history data. In general, the estimates from the non-offender regressions are not estimated precisely enough to draw strong conclusions about whether employers statistically discriminate to avoid hiring non-offenders.”).

⁷⁴ See, e.g., David H. Autor & David Scarborough, *Does Job Testing Harm Minority Workers? Evidence from Retail Establishments*, 123 Q.J. ECON. 219 (2008); Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276 (2004); Pager, *supra* note 64, at 937–38.

⁷⁵ Joleen Kirschenman & Kathryn M. Neckerman, “*We’d Love to Hire Them, but . . .*”: *The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203, 231 (Christopher Jencks & Paul E. Peterson eds., 1991).

⁷⁶ Holzer et al., *supra* note 62, at 453.

⁷⁷ The pathology described in the text is not the only rational but socially undesirable employer reaction to asymmetric information. Faced with unreliable information about criminal history, an em-

Given the deleterious consequences of this predictable behavior, it is worth examining the possible avenues, other than ex post litigation, for the state to prevent statistical discrimination. One way to protect African Americans and other disadvantaged groups would be to make them appear indistinguishable from whites. Indeed, some efforts to reform antidiscrimination law have suggested that statistical discrimination can be mitigated if the relevant decisionmakers are deprived of information about a candidate's race, religion, or gender.⁷⁸ With less information, decisionmakers presumably will focus more on the black and white of a job applicant's resume and less on the black or white of the applicant's skin. Related efforts, such as the Racial Privacy Initiative that was defeated at the polls in California in 2003, ostensibly sought to decrease racial discrimination by prohibiting the government from collecting information about individuals' race so that the government could not disseminate that information or act upon it at a later date.⁷⁹

In an era of ubiquitous personal information, we should consider approaching the statistical discrimination problem from the opposite direction: using the government to help provide decisionmakers with something that approximates complete information about each applicant. Thus, readily discernable facts like race or gender will not be overemphasized and more obscure but relevant facts, like past job performance or social capital, will loom larger. For instance, government subsidies could promote the creation of employment evaluation clearinghouses where individuals' employment reviews from all prior jobs would be aggregated in a single source that would be accessible to human resources personnel. The government might further improve the quality of the data in these clearinghouses by providing tax subsidies to encourage the collection of "360 degree" feedback within firms, a policy that is likely to decrease the weight associated with any particular evaluation and minimize the likelihood that race or gender dynamics

ployer may lean more heavily on word of mouth from existing social networks in its efforts to hire trustworthy employees. Cf. George J. Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623, 632–33 (1980) ("The more costly the acquisition of knowledge, the more expensive it becomes to enter into transactions with new parties. We should expect less mobility of laborers, creditors, etc. . . ."). Because the social networks used for job search purposes tend to be racially segregated, see Antoni Calvó-Armengol & Matthew O. Jackson, *The Effects of Social Networks on Employment and Inequality*, 94 AM. ECON. REV. 426 (2004), increased reliance on word of mouth by firms that presently employ few minorities will increase the likelihood that minorities will continue to be underrepresented in that workplace in the future.

⁷⁸ See, e.g., Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 14–16 (2000) (discussing orchestral auditions, in which a screen separates the judges from the auditioning musician); cf. Kleysteuber, *supra* note 37, at 1350–52 (proposing that the government try to limit landlords' access to information regarding tenants' prior involvement in landlord-tenant litigation).

⁷⁹ For an interesting discussion and critique of this initiative, see Anita L. Allen, *Race, Face, and Rawls*, 72 FORDHAM L. REV. 1677, 1686–96 (2004).

will taint the accuracy of the employee evaluations.⁸⁰ Further, the state could publish information about all individuals' involvement (or lack thereof) in the criminal justice or bankruptcy systems; it might publish military records that document individuals' performance and conduct while in the service; or it might verify and vouch for applicants' educational credentials.⁸¹

On this theory, a major factor driving unlawful discrimination on the basis of race, ethnic status, gender, or religion is a lack of verifiable information about the individual seeking a job, home, or service. By making the publication of criminal histories tortious⁸² or raising the media's costs of obtaining aggregated criminal history information that is already in the government's hands,⁸³ information privacy protections become the enemy of antidiscrimination law. The tradeoff makes privacy law and institutional arrangements that obscure information about individuals' reputations far more problematic than courts and theorists presently suppose.

D. Jury Selection

The same sorts of dynamics that confront decisionmakers in the hiring, leasing, and sales contexts play out within the criminal justice system as well. That said, the jury selection process shows the dangers of extrapolating arguments that arise in the context of necessities—like employment or shelter—to contexts where individual resentment of excessive data collection and dissemination may discourage socially productive behavior.

⁸⁰ See Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 117–18 (2002).

⁸¹ Richard Epstein notes in passing the desirability of such efforts and complains that antidiscrimination law sometimes thwarts them:

The strategy of the law should be to encourage employers to obtain as much individual information as possible about workers so that they can, *pro tanto*, place less reliance on broad statistical judgments. To the extent, therefore, that the present antidiscrimination law imposes enormous restrictions on the use of testing, interviews, and indeed any information that does not *perfectly* individuate workers, then by indirection it encourages the very sorts of discrimination that the law seeks to oppose.

EPSTEIN, *supra* note 49, at 40. In addition to developing Epstein's insight in far more detail, my analysis differs from his in two important respects. First, I identify ways in which the government can now affirmatively gather and publish information about individuals as a means of combating statistical discrimination. Second, whereas Epstein favors the repeal of antidiscrimination laws, *see id.* at 3, I support their continued enforcement but view government information policy as a useful supplement to them. *See, e.g.*, Strahilevitz, *supra* note 4, at 1889–94; *cf.* Strauss, *supra* note 49, at 1641–42 (“[S]tatistical discrimination can be reduced if employers are provided with reliable information about employees. This should be a principal objective of any regulatory regime in this area. Ordinarily, one excellent way to learn about an employee's qualifications is to hire him or her.”).

⁸² *See, e.g.*, *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971); *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931).

⁸³ *See, e.g.*, *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (holding that criminal rap sheets are exempt from disclosure under FOIA because their dissemination would constitute an unwarranted invasion of personal privacy).

The relatively few high-stakes legal disputes that go to trial are often won or lost during the voir dire process, when attorneys seek to seat the jurors deemed most sympathetic to the sorts of arguments they will make and strike those deemed least sympathetic. Here, as in other contexts, the relevant decisionmakers appear to rely heavily on characteristics that they can discern at a relatively low cost—race, gender, age, and national origin.⁸⁴ They also rely on additional information that the jurors themselves provide, but there are significant problems with taking that information at face value. First, prospective jurors often knowingly provide inaccurate information.⁸⁵ Second, jurors may be poor at self-assessing. For example, they may overestimate their ability to be impartial in light of relevant life experiences. Third, there are lots of questions that attorneys would love to know the answers to but that they do not dare ask jurors. In some cases, lines of juror questioning are placed off limits by the law, as is usually the case with prospective jurors' voting records, medical conditions, or reading habits.⁸⁶ In other instances, attorneys fear antagonizing prospective jurors by asking them questions deemed overly intrusive.

Attorneys have imperfect information about prospective jurors, and what attorneys do not know about jurors may prove decisive in deliberations. Yet attorney folklore about the correlation of jurors' observable characteristics with their decisionmaking is often unreliable and unscientific.⁸⁷ In recent years, a large industry of jury consultants has sprung up, hoping to make jury selection less of an art and more of a science.⁸⁸ Jury consultants use information from jury questionnaires and voir dire to predict prospective jurors' behavior. Thus, jury consultants may try to read body language, analyze handwriting, suggest revealing voir dire questions, or provide lawyers with information about how members of various demo-

⁸⁴ Even after the Supreme Court's opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), made it clear that race could not provide a basis for the use of peremptory strikes, some attorneys continued to do so. Upon opposing counsel's raising of a *Batson* challenge, these attorneys would admit to having stricken prospective jurors on the basis of race, provide no explanation for their use of peremptory strikes, or claim to be striking jurors on the basis of a purportedly non-race-based criteria, like "membership in the NAACP" or "people likely to be offended by racist jokes contained in the evidence." Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 480–83 (1996).

⁸⁵ Herald P. Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 LAW & CONTEMP. PROBS. 116, 117–18 (1980).

⁸⁶ Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation on the Internet—Implications for the Trial Lawyer*, 2 SEDONA CONF. J. 211, 216 (2001).

⁸⁷ Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 229–38 (1990); Paul V. Olczak et al., *Attorneys' Lay Psychology and Its Effectiveness in Selecting Jurors: Three Empirical Studies*, 6 J. SOC. BEHAV. & PERSONALITY 431, 443–44, 447–48 (1991).

⁸⁸ See NEIL J. KRESSEL & DORIT F. KRESSEL, *STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING* (2002).

graphic groups behave as jurors.⁸⁹ To a jury consultant, the observable and trivial detail is often a proxy for the unobservable and critical characteristic.⁹⁰ But a large part of what modern jury consultants now provide to their clients is even more fine-grained. Jury consultants increasingly run background checks on the various prospective jurors in the pool, pulling credit reports, employing search engines, looking for rap sheets, and examining property tax records.⁹¹ In high-stakes cases, jury consultants work with private investigators who photograph prospective jurors' homes and vehicles, searching for any pertinent information like a political yard sign or a religious bumper sticker.⁹² Litigants who cannot afford a jury consultant may turn to jury-selection software like JuryQuest, which identifies jurors who should be stricken on the basis of demographics and a large database of prior juror survey responses and verdicts.⁹³ What's more, jury surveillance is beginning to resemble a two-way street. Empanelled jurors are Googling the attorneys who are making arguments before them with increasing regularity, and trial lawyers are trying to make their web profiles as appealing as possible to these curious jurors.⁹⁴

In what may be the beginning of an emerging trend, courts are examining the backgrounds of jurors on their own initiative rather than relying on the parties to do the digging. Interest in this practice is particularly strong in Illinois, where the high-profile corruption conviction of former Governor George Ryan was thought vulnerable on appeal thanks to the dismissal of two jurors eight days into the deliberations.⁹⁵ The jurors were dismissed after *Chicago Tribune* reporters discovered that they had each concealed arrest records during the jury selection process.⁹⁶ To help prevent a repetition of these problems, the chief judge of the Northern District of Illinois has in-

⁸⁹ Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, if Anything, to Do About It*, 1999 WIS. L. REV. 441, 466–67; see also Fahringer, *supra* note 85, at 127 (“Jurors usually stand out because of their apparent unfamiliarity with the courthouse. Watch what they do and try to remember their faces. Note what they say in the lobby of the courthouse, how they behave, what newspapers they buy; these activities will reveal in a small way what they are like. When the jury panel is brought into the courtroom, study them. Search for clues that may be helpful in making important choices. A *Wall Street Journal* tucked under an arm, a sexy paperback book protruding from a purse, or a best-seller in a juror’s hands can be meaningful.”).

⁹⁰ See, e.g., Fahringer, *supra* note 85, at 132–33.

⁹¹ Redgrave & Stover, *supra* note 86, at 219.

⁹² *Id.* at 213.

⁹³ See Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Impartiality and Jury Selection* 16 (Aug. 14, 2007) (unpublished manuscript, on file with author).

⁹⁴ Henry Gottlieb, *Should You Design Your Firm’s Web Site with Jurors in Mind?*, LAW.COM, Jan. 2, 2007, <http://www.law.com/jsp/article.jsp?id=1167386817011>.

⁹⁵ Matt O’Connor, *Jury Pools Can Face Probes in Sensitive Trials: Ryan Case Sparks Move to Avoid Bias, Scandal*, CHI. TRIB., Dec. 11, 2006, § 1, at 1. A divided panel of the Seventh Circuit recently affirmed the conviction. See *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007).

⁹⁶ O’Connor, *supra* note 95.

structed court personnel to conduct criminal background checks on all prospective jurors in high profile cases.⁹⁷ If the Illinois experience proves successful, then one can imagine its duplication and expansion in other jurisdictions.

What should we make of the Northern District's reforms? Although criminal and other background checks are increasingly relied upon by litigators in high-stakes trials, not all parties employ them, and the George Ryan trial suggests that prosecutors sometimes fail to do their homework on prospective jurors. In the case of criminal records, the state is in the best position to aggregate the information and use it to remove citizens with felony convictions from the jury pool *ex ante*. Alternatively, the state can provide the litigants with this information as a matter of course, so that they can do with it what they want. Indeed, the Ryan trial may be somewhat of an outlier in light of the many resources devoted to the former Governor's defense by a large Chicago law firm.⁹⁸ In the typical criminal case, prosecutors may have better access to criminal history databases than public or court-appointed defense counsel, and having the courts collect and disseminate this information will prevent troubling asymmetries from arising in the criminal justice system. Thus, on the whole, getting the courts more involved in collecting this information seems like a good thing.

That said, we cannot evaluate the Northern District's reforms without some recourse to first principles. We must decide whether the jury system is an effort to increase fairness in trials or merely another domain for lawyers to seek strategic and tactical advantages over their adversaries. The Supreme Court has developed numerous doctrines to police excesses in jury selection, most famously the *Batson* limitations on the use of peremptory challenges to strike racial minorities from juries.⁹⁹

What is *Batson*'s objective? Is it an attempt to make race a nonfactor in the selection of jurors? Is it about ensuring that juries resemble jury pools, which in turn reflect the demographics of the citizenry as a whole? Does it apply to demographic factors besides race?¹⁰⁰ Is it about ensuring that criminal defendants receive trials that are deemed legitimate and fair? Do *Batson* rights protect prosecutors and civil litigants as well?¹⁰¹ Or does *Batson* protect prospective jurors' rights against mistreatment on account of race? The answers to these questions are important because they can help us evaluate the growing reliance on external sources of information about

⁹⁷ *Id.*

⁹⁸ Greg Hinz & Steven R. Strahler, *Saving Client Ryan: A \$10-mil. Mission*, *CRAIN'S CHI. BUS.*, Nov. 14, 2005, at 1.

⁹⁹ See *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁰⁰ It does. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

¹⁰¹ They do. See *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that *Batson* prohibits the defendant from using race as a basis for peremptory challenges); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* to civil cases).

prospective jurors. In post-*Batson* cases, the Supreme Court has implied that all these interests are furthered by *Batson*.¹⁰² At the same time, by grounding its analysis in the Equal Protection Clause and focusing on the harm to prospective jurors, the Court has suggested that a constitutional violation may have occurred even if the ultimate jury verdict was not affected by the unlawful use of peremptory challenges.¹⁰³

If making race a nonfactor in jury selection is *Batson*'s primary objective—as a mechanism for protecting the rights of either litigants or prospective jurors—then *Batson* and its progeny have not achieved this goal.¹⁰⁴ *Batson* can be evaded by the lawyer who strikes some prospective jurors on the basis of race, so long as not “too many” prospective jurors are stricken on that basis and prosecutors articulate consistent rationales to explain their treatment of whites and blacks.¹⁰⁵ Alternatively, the lawyer might successfully articulate a nonracial rationale, such as a prospective juror's demeanor,¹⁰⁶ for striking a disproportionate number of racial group members. This is not difficult to do—recent experimental evidence suggests that college students and attorneys alike instinctively identify nonracial rationales for decisions that were driven by a prospective juror's race.¹⁰⁷ To make race a nonfactor, much stronger medicine than *Batson* would be required. Namely, attorneys should not be able to see prospective jurors during voir dire; rather, they would be limited to examining jurors behind an opaque screen (as in *The Dating Game* or an orchestral audition). Moreover, attorneys should be denied access to prospective jurors' names and addresses, which often indicate racial background with substantial reliability and enable snooping attorneys to obtain a wealth of information about the jurors from third parties. The court might have to disguise prospective jurors' voices and colloquialisms as well. This would be a plausible way of con-

¹⁰² See *J.E.B.*, 511 U.S. at 140 (“Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.”).

¹⁰³ See *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 224 n.45 (2005).

¹⁰⁴ Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285, 298 (1995); Melilli, *supra* note 84, at 503.

¹⁰⁵ *Snyder v. Louisiana*, 128 S. Ct. 1203, 1211–12 (2008), suggests that courts will scrutinize lawyers' reasoning more closely in the coming years.

¹⁰⁶ Melilli, *supra* note 84, at 483.

¹⁰⁷ Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007) (“College students, law students, and attorneys playing the role of a prosecutor trying a case with a Black defendant were more likely to challenge a prospective juror when he was Black as opposed to White When justifying these judgments, participants rarely cited race as influential, focusing instead on the race-neutral characteristics associated with the Black prospective juror. That is, when Juror #1 was Black, participants tended to justify their judgments by citing his familiarity with police misconduct as their reason for excluding him. When Juror #2 was Black, on the other hand, participants reported his skepticism about statistics to be more important than the police misconduct issue.”).

ducting jury selection, and it may be optimal as a means of curtailing troubling exclusionary practices, albeit at significant cost.¹⁰⁸

At the other extreme, the law might address the problem of racially exclusionary uses of peremptory strikes by providing more information, not less. If one adopts this view, the Northern District policy is merely a baby step in the right direction. The government could report to the parties jurors' credit scores, military service records, bankruptcy filings, and involvement in prior litigation. It could review mental health records in the state's possession to screen out those who might be unfit for service. It could scour public records and conduct LexisNexis searches to provide the parties with any relevant information.

If the government did all these things, essentially providing dossiers on all prospective jurors, one might expect to see less discrimination on the basis of race, national origin, religion, gender, and other immutable characteristics. Indeed, a regime of full and symmetrical disclosure of juror profile information to the litigants conceivably could do more to combat the improper use of race as a proxy than *Batson* ever has.

Alas, there is an important complication here, suggesting that such a regime may be more appealing in the employment context than in the jury context. The available empirical evidence suggests that race is itself a strong predictor of whether a juror will initially vote to impose the death penalty in a capital case, with whites twice as likely as blacks to vote for the death sentence.¹⁰⁹ Socioeconomic status, by contrast, had no predictive effect on initial votes by jurors.¹¹⁰ A capable defense lawyer thus might not be using race as a proxy for anything other than a juror's propensity to send his client to death row. Indeed, black and white jurors appear to behave differently in a number of respects, such as their certainty that a defendant is guilty, their perceptions of the defendant's remorse, and their assessments of the defendant's future dangerousness.¹¹¹ These behavioral tendencies evidently alter outcomes in capital jury sentences, with counties that have large African American populations imposing the death penalty at lower rates than counties with smaller African American populations.¹¹² Some less careful survey evidence suggests that race is an equally important pre-

¹⁰⁸ Another alternative would be to eliminate the use of peremptory challenges altogether. See *Miller-El v. Dretke*, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring) (concluding that the *Batson* framework cannot stamp out discrimination in jury selection and that peremptory challenges therefore should be abolished).

¹⁰⁹ Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 285–87 (2001). Race likely functions as a proxy here too for an omitted variable like differential life experiences or interactions with law enforcement.

¹¹⁰ *Id.* at 285.

¹¹¹ William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 241–44 (2001).

¹¹² Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347, 367–68 (2005).

dictive factor in civil trials, swamping the effects of income, gender, and political inclinations.¹¹³ In civil cases, African Americans appear to be markedly more sympathetic to plaintiffs than Caucasians at both the liability and damages phases.¹¹⁴

In the jury context, race may be an unusually valuable proxy for propensity to convict or impose liability on a defendant. If African American and Caucasian jurors approach legal controversies in fundamentally different ways because of their radically divergent interactions with police officers,¹¹⁵ or large employers, banks, insurers, and other institutional defendants, then providing litigants with more information about all prospective jurors may do little to stem the reliance on race in voir dire by prosecutors and defense counsel. But if that is the case, it raises the question of whether the *Batson* doctrine is even a sensible one, or whether *Batson* ought to be replaced with affirmative rules mandating that each empanelled jury roughly reflect the racial diversity of the jury pool.

Another factor should temper our embrace of pervasive reputation information in the voir dire context. Jury duty is already viewed as an unappetizing prospect for many Americans, and the loss of privacy associated with comprehensive government background checks could prompt stiff resistance and exacerbate juror absenteeism. To be sure, a savvy juror appreciates the possibility that litigants will gather information about her already, but Americans often feel more dread about governmental possession of private information than they do upon realizing that such information has been obtained by nongovernmental actors.¹¹⁶ Even more importantly, the loss of privacy associated with submitting a job application or trying to find housing will not be sufficient to deter reasonable people from the enterprise. Employment and housing are necessities, so we can safely assume that the behavioral distortions associated with pervasive reputation information will be minimal. Not so for jury duty. Jury duty is compulsory, but the government cannot enforce its compulsory nature on the citizenry without incurring substantial costs and generating significant resentment. It may be the case that it is necessary for the government to forego gathering a great deal of pertinent information about prospective jurors to avoid diminishing the quality of the pool of willing jurors.¹¹⁷

¹¹³ Denove & Imwinkelried, *supra* note 104, at 293–95 (“Race emerges from the data as the single most important factor in predicting juror orientation. The impact of race is so strong that it often outweighs the impact of all other demographic factors combined.”).

¹¹⁴ *Id.* at 293–95, 305–06, 313.

¹¹⁵ *Cf.* Fahringer, *supra* note 85, at 119 (“[B]lacks who have seen the ravages of the drug trade in their community must be considered carefully in a narcotics prosecution . . .”).

¹¹⁶ See generally James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004).

¹¹⁷ This assumes, of course, that it is not only those with “something to hide” who value their privacy rights. See generally Daniel J. Solove, *“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy*, 44 *SAN DIEGO L. REV.* 745 (2007).

E. Medical Diagnosis and Treatment

Employers' use of statistical discrimination is troubling enough, as it endangers peoples' livelihoods. When doctors and other health professionals use the same strategies for coping with incomplete information, it risks patients' lives. Yet the literature on health disparities suggests that doctors behave in much the same way that employers, trial attorneys, and other decisionmakers do, with wrenching consequences for African American patients.

Why would doctors use statistical discrimination in treating patients? One possible explanation not well explored in the medical literature is that statistical discrimination may be a strategy for staying out of prison. In recent years, state and federal law enforcement officials have become more aggressive about tracking the prescription of opioids by pursuing physicians who prescribe medication that is subsequently diverted into the black market.¹¹⁸ Surveys of physicians show that many are very concerned about prescribing narcotics to patients suffering from pain because of a fear that such prescriptions will trigger drug enforcement agency investigations,¹¹⁹ with a sizable minority of physicians admitting that they "give patients a limited supply of pain medications to avoid being investigated" and a larger minority expressing concern that "prescribing narcotics for patients with chronic pain is likely to trigger a drug enforcement agency investigation."¹²⁰

Although one would hope that prosecutorial discretion will prevent prosecutions of doctors who prescribed in good faith subsequently diverted narcotics, this fear of law enforcement investigations is not misplaced. Surveys of prosecutors suggest that doctors face a genuine risk of being charged with serious crimes, even if their decisions to prescribe narcotics were medically defensible.¹²¹ Additionally, many jurisdictions track physicians' prescriptions of narcotics, forwarding copies of all filled prescriptions to law enforcement personnel.¹²² Successful prosecutions of physicians who were duped by their patients into dispensing narcotics have garnered substantial media attention of late.¹²³

¹¹⁸ See Dana A. Forgiione et al., *Diversion of Prescription Drugs to the Black Market: What the States Are Doing to Curb the Tide*, J. HEALTH CARE FIN., Summer 2001, at 65; Stephen J. Ziegler & Nicholas P. Lovrich, Jr., *Pain Relief, Prescription Drugs, and Prosecution: A Four-State Survey of Chief Prosecutors*, 31 J.L. MED. & ETHICS 75, 78 (2003).

¹¹⁹ Sharon M. Weinstein et al., *Physicians' Attitudes Toward Pain and the Use of Opioid Analgesics: Results of a Survey from the Texas Cancer Pain Initiative*, 93 S. MED. J. 479, 481 tbl.3, 482-83 (2000).

¹²⁰ *Id.* at 481 tbl.3.

¹²¹ Ziegler & Lovrich, *supra* note 118, at 91.

¹²² The Supreme Court upheld the constitutionality of this practice in *Whalen v. Roe*, 429 U.S. 589 (1977).

¹²³ See, e.g., Tina Rosenberg, *Doctor or Drug Pusher*, N.Y. TIMES MAG., June 17, 2007, at 48; John Tierney, *Juggling Figures, and Justice, in a Doctor's Trial*, N.Y. TIMES, July 3, 2007, at F1.

When a doctor risks incarceration if her patients divert prescribed medication to the black market or abuse their medication, then it seems likely that she will try to sort between those patients who are risky and those who are less risky. Race is a plausible proxy here, and there is evidence suggesting that doctors use it in prescribing narcotics. A survey of 397 patients being treated for chronic nonmalignant pain and their primary care physicians found that although African American patients reported experiencing more pain than Caucasian patients,¹²⁴ Caucasians were significantly more likely to be treated with stronger and longer acting opioids.¹²⁵ Even after the researchers controlled for socioeconomic and other factors, Caucasians were more than twice as likely as African Americans to be given opioids.¹²⁶ Notably, there was no correlation between race and the use of non-opioid pain drugs.¹²⁷ What explained the racial disparity? Not differential access to insurance or other payment options,¹²⁸ and not divergent preferences among African American and Caucasian patients.¹²⁹ The study authors concluded that the “more pronounced racial differences for strong and long-acting opioids suggest that systematic mistrust, bias, or stereotyping phenomena could be in play.”¹³⁰

As with statistical discrimination in employment, there is a large literature to suggest that doctors treat patients differently on the basis of race in a variety of settings. Although fear of prosecution is a plausible explanation for statistical discrimination in the opioid prescription context, African American patients appear to receive worse treatment in a variety of settings, even after controlling for socioeconomic factors.¹³¹ This inferior treatment can be explained by physicians’ attitudes. A well-designed study by van Ryn and Burke found that physicians view African Americans as more likely to abuse medication and less likely to comply with doctors’ orders.¹³²

¹²⁴ The researchers used the standard NRS-11 scale for assessing pain intensity. Ian Chen et al., *Racial Differences in Opioid Use for Chronic Nonmalignant Pain*, 20 J. GEN. INTERNAL MED. 593, 594 (2005).

¹²⁵ *Id.* at 595.

¹²⁶ *Id.*

¹²⁷ *Id.* at 596.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 597. The researchers note their inability to determine whether African Americans’ pain is being undertreated or Caucasians’ pain is being overtreated. *Id.* The medical literature suggests, however, that pain undertreatment, not overtreatment, is the cause for concern in the United States. See, e.g., David B. Resnik et al., *The Undertreatment of Pain: Scientific, Clinical, Cultural, and Philosophical Factors*, 4 MED. HEALTH CARE & PHIL. 277 (2001).

¹³¹ Ana I. Balsa & Thomas G. McGuire, *Prejudice, Clinical Uncertainty and Stereotyping as Sources of Health Disparities*, 22 J. HEALTH ECON. 89, 103–04 (2003); Darrell J. Gaskin et al., *Exploring Racial and Ethnic Disparities in Prescription Drug Spending and Use Among Medicare Beneficiaries*, 4 AM. J. GERIATRIC PHARMACOTHERAPY 96, 103 (2006).

¹³² Michelle van Ryn & Jane Burke, *The Effect of Patient Race and Socio-Economic Status on Physicians’ Perceptions of Patients*, 50 SOC. SCI. & MED. 813, 822–24 (2000).

These differences do not go unnoticed by African American patients.¹³³ Statistical discrimination on the basis of socioeconomic status also has been observed in some settings—for example, nephrologists are more likely to refer a child of higher socioeconomic status than one of lower socioeconomic status to a transplant doctor, with the likely explanation being the belief that wealthier parents are more likely to ensure compliance with a rigorous postoperative recovery regime.¹³⁴

It would be tempting to say that these disparities could be eliminated by imposing liability on physicians who engage in statistical discrimination or by embracing efforts to re-educate physicians to act in a colorblind manner. But scholars of health disparities understand the inadequacies and dangers of such approaches.¹³⁵ Just as litigation and employer diversity training are incomplete remedies for discriminatory hiring practices,¹³⁶ they would be incomplete remedies in the prescription context. Balsa, McGuire, and Meredith sensibly note that doctors' "[r]eliance on 'priors' related to age, gender, or race, when low-cost reliable tests are available, is difficult to justify."¹³⁷ In the treatment of pain, however, where existing diagnostic constraints often force doctors to rely on a patient's own statements and visible acts to discern the extent of his suffering, there are no reliable low-cost tests. But there are information-based strategies that can reduce the appeal of statistical discrimination.

When doctors encounter patients who they believe are abusing prescription medication, diverting medication to the black market, overstating symptoms, or failing to comply with protocols for taking medications or recuperating, they routinely include this information in the patient's medical records.¹³⁸ If the contents of these medical records were easily transferred from one physician to other physicians likely to encounter a particular patient, then doctors would not need to engage in statistical discrimination on the basis of race and other problematic proxies. The statistical discrimination problem, in short, helps make a compelling case for the computerization of medical records, a process that is proceeding at a snail's pace in

¹³³ Rachel L. Johnson et al., *Racial and Ethnic Differences in Patient Perceptions of Bias and Cultural Competence in Health Care*, 19 J. GEN. INTERN. MED. 101, 106–08 (2004).

¹³⁴ Susan L. Furth et al., *Effects of Patient Compliance, Parental Education and Race on Nephrologists' Recommendations for Kidney Transplantation in Children*, 3 AM. J. TRANSPLANTATION 28, 30–32 (2003).

¹³⁵ See, e.g., Balsa & McGuire, *supra* note 131, at 112 (“Rule-based policies, such as requiring doctors to act in a race-blind fashion, when race conveys information that can help the doctor decide what to do for the patient, can make matters worse for the patients the policy is designed to help.”).

¹³⁶ See *supra* text accompanying notes 60–61 (addressing the shortcomings of litigation as a remedy for discriminatory hiring practices).

¹³⁷ Balsa et al., *supra* note 54, at 247–48.

¹³⁸ See generally David W. Bates et al., *A Proposal for Electronic Medical Records in U.S. Primary Care*, 10 J. AM. MED. INFORMATICS ASS'N 1, 4 (2003).

many parts of the country.¹³⁹ A large literature documents the costs of continued reliance on antiquated medical recordkeeping.¹⁴⁰ Diagnosis becomes more difficult. Patient choices of doctors are effectively constrained. Tests and other procedures may be duplicated unnecessarily. This Article suggests that in addition to all these problems, our failure to bring medical recordkeeping into the twenty-first century may be contributing to distasteful discrimination and that African American patients are enduring unnecessary pain and inappropriate treatment as a consequence.

F. Insurance

Earlier in this Article, I identified statistical discrimination as a strategy that the law prohibits. However, it turns out that this is not always the case. Take insurance markets. Insurers are generally prohibited from charging differential rates for insurance on the basis of race.¹⁴¹ But some jurisdictions permit insurers to discriminate on the basis of gender, for example, in the automobile and life insurance contexts.¹⁴² And many jurisdictions permit insurers to use a customer's zip code as a basis for premium setting, which is particularly controversial in light of the higher premiums that residents of predominantly African American neighborhoods often pay.¹⁴³

An important reason why insurers must rely on these forms of statistical discrimination is the absence of reliable information about most drivers' behavior. There are a few terrible drivers who routinely get into accidents or incur speeding tickets, but outside of these extremes, insurers have little information to go on. Information about near misses, day-to-day aggressive driving, and other unsafe behavior is almost nonexistent. As a result, the good driver who is involved in a fluke accident in which he was not at fault will likely see his insurance premiums rise, a skilled and responsible teenage driver will pay extremely high premiums solely because of her age, and the generally safe driver who is caught in a speed trap can expect to incur a substantial insurance penalty.¹⁴⁴

¹³⁹ Thomas Bodenheimer & Kevin Grumbach, *Electronic Technology: A Spark to Revitalize Primary Care?*, 290 JAMA 259, 260 (2003).

¹⁴⁰ See, e.g., Bates et al., *supra* note 138, at 4; Bodenheimer & Grumbach, *supra* note 139, at 260–61; Ross D. Fletcher et al., *Computerized Medical Records in the Department of Veterans Affairs*, 91 CANCER 1603, 1606 (2001).

¹⁴¹ See Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1366–67 (2004).

¹⁴² See Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 225 n.208 (2003).

¹⁴³ See Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OHIO ST. L.J. 835, 849 (1986). In recent years, New York has pushed to curtail the use of zip codes in premium setting. See R. John Street & Brandon G. Hummel, *Recent Developments in Insurance Regulation*, 40 TORT TRIAL & INS. PRAC. L.J. 567, 592 (2005).

¹⁴⁴ Lior Jacob Strahilevitz, "How's My Driving?" for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1726–29 (2006).

It need not be this way. As I have argued elsewhere,¹⁴⁵ the government is capable of generating a much more reliable and rich set of information about individual drivers' observed behavior. All the government needs to do is mandate the participation of all motorists in a "How's My Driving?" program of the sort that have become nearly ubiquitous for bus and commercial fleets. Doing so would generate an enormous amount of additional information that would enable insurers to set premiums without having to collectively sanction motorists who have the misfortune of being young, being male, being unmarried, or living in predominantly African American neighborhoods.¹⁴⁶

In the automobile insurance market, social insurance concerns don't loom particularly large. By mandating automobile insurance coverage, legislators are primarily seeking to ensure that the victims of vehicular collisions will be compensated for their injuries and losses. When jurisdictions mandate health insurance, as Massachusetts has done, or provide health insurance, as the Medicare and Medicaid programs have done, they are acting on the basis of a somewhat different set of principles.¹⁴⁷ Those principles emphasize society's interest in helping those who develop health complications as a result of bad luck, bad genes, or even bad lifestyle choices. In short, insurance markets are not monolithic, and government information policy may be a more useful policy tool in those settings, like driving, where social insurance considerations do not loom particularly large. But this argument about the benefits of making motorist behavior information more widely available does not translate into an argument for widespread availability of individuals' genetic information.¹⁴⁸

G. Immigration Law

Throughout American history, policymakers have been using national origin proxies to try to shape the nation's workforce and polity. Most obviously, national origin is a proxy for race, so Americans who cared about the racial composition of the United States could use immigration policy as a tool for achieving their desired ends.¹⁴⁹ Employers might use proxies in much the same way, seeking out immigrants from particular nations be-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ To be sure, concerns about externalities do arise in the health insurance context. See Mark V. Pauly, *Universal Health Insurance in the Clinton Plan: Coverage as a Tax-Financed Public Good*, J. ECON. PERSP., Summer 1994, at 45. For example, concerns about excessive emergency room utilization and the danger of spreading communicable disease explain some of the impetus for universal health care. See, e.g., Ruth E. Malone, *Heavy Users of Emergency Services: Social Construction of a Policy Problem*, 40 SOC. SCI. & MED. 469, 473 (1995).

¹⁴⁸ See Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 36-41 (1997).

¹⁴⁹ See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 269, 281-82, 289-92 (1997).

cause that nation's inhabitants are believed to possess particular characteristics.¹⁵⁰

My colleagues Adam Cox and Eric Posner recently analyzed immigration design decisions as a response to asymmetric information in the international migration context.¹⁵¹ They suggested that the immigrant has private information about his own attributes, preferences, and intentions that United States customs and immigration officials lack. The government thus faces a decision between two sorts of strategies: it can invest in gathering more information about prospective entrants before they are admitted to the United States or it can admit entrants freely, gather information about them once they are here, and then deport those whose actions in the United States suggest that they will not be positive net contributors to society.¹⁵² Where the information gathering and processing costs of assessing individuals' likely contributions to society based on their behavior abroad are high, we can expect to see the government rely more on deportation. Where those costs are low, we can expect to see the government rely on exclusion.

The United States is not alone in having undergone a reputation revolution in the past decade or so. Other developed nations have also seen explosive growth in their data broker industries,¹⁵³ though the skeptical approach of European Union lawmakers toward these developments have helped apply the brakes to this development somewhat.¹⁵⁴ Of course, while immigration to the United States from developed nations like Canada, Japan, Germany, and Australia is not negligible, it pales in comparison to migration from developing nations in which accurate consumer information databases do not exist.¹⁵⁵ While it is no longer difficult to imagine the integration of cross-platform reputation scores with wearable computers in this country, the ubiquity of such devices and data in Ecuador or the Philippines seems a long way off.

Yet it is precisely the absence of reliable information about individuals that causes immigration officials to rely on proxies like national origin. In response to the events of September 11, 2001, the United States substantially curtailed the number of visas issued to residents of predominantly Is-

¹⁵⁰ See, e.g., Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 970–71 (2006) (arguing that some employers prefer to hire undocumented immigrants from Latin America because they are more likely to be subservient).

¹⁵¹ Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824–827 (2007).

¹⁵² *Id.* at 835–40.

¹⁵³ For a brief overview of the European Union regime, see Christopher Kuner, *Beyond Safe Harbor: European Data Protection Law and Electronic Commerce*, 35 INT'L LAW. 79 (2001).

¹⁵⁴ See Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717 (2001).

¹⁵⁵ See U.S. CENSUS BUREAU, *THE FOREIGN-BORN POPULATION: 2000*, at 5 tbl.2 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf>.

lamic nations and made it more difficult for foreigners to study in the American higher education system.¹⁵⁶ (One of the terrorists involved in the September 11 attacks was in the United States on a student visa).¹⁵⁷ There were some exceptions to this policy of national origin-based exclusion. In-demand specialists like doctors, nurses, engineers, and academics had a somewhat easier time obtaining visas,¹⁵⁸ in part because their skill sets were in particular demand, but also in part because their degrees in those fields suggested that it was unlikely that they would present a threat to American national security.¹⁵⁹ Wealthy foreigners with at least \$1 million to invest in new American businesses also have a much easier time gaining visas.¹⁶⁰ Although this program was justified as an engine of job creation in the United States,¹⁶¹ it might, alternatively, be characterized as another immigration proxy: foreigners with disposable investment capital and a commitment to investing it in U.S.-based startups might be particularly likely to be desirable migrants.¹⁶²

Notice what is going on here. Proxies are everywhere in immigration decisions: national origin, education, career path, age, gender, English fluency, family ties in the United States, wealth. All of these attributes wind up determining who is admitted to the United States and who is not. We rely on these proxies to indicate who might pose a security risk, who might fill a technically or physically demanding job, who might wind up on the welfare rolls, who might wind up starting a business, who is likely to commit ordinary crimes, who might have a hard time finding employment in the United States, who is likely to be assimilated, who is likely to return home when a visa expires, and who is likely to overstay a visa.

It would, of course, be far simpler if immigration authorities could rely on accurate information about individuals rather than using these group-

¹⁵⁶ Samuel G. Freedman, *Grad School's International Glow Is Dimmed by Security Concerns*, N.Y. TIMES, Oct. 27, 2004, at B10.

¹⁵⁷ Josh Meyer, *Al Qaeda Linked to Plot to Use Student Visas*, L.A. TIMES, Jan. 23, 2007, at A13.

¹⁵⁸ See, e.g., Brandon Ortiz, *Foreign Aid for Texas: Visa Waiver Program Is Just What the Doctor Ordered to Meet Medical Need*, SAN ANTONIO EXPRESS-NEWS, June 27, 2004, at 1A.

¹⁵⁹ The recent attacks on the Glasgow airport, apparently perpetrated by several foreign-born physicians working at United Kingdom hospitals, show the pitfalls of using occupation as a proxy for the security threat posed. See Janet Stobart & Sebastian Rotella, *British Manhunt Widens: Three Physicians Are Among Eight Suspects Now Held in Bomb Plots*, L.A. TIMES, July 3, 2007, at A1. This episode may have been an instance of the terrorists recognizing the profile and finding someone who didn't fit the profile to carry out the attacks. This danger was anticipated in BERNARD E HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 227–36 (2007). The normative dimensions of racial profiling in law enforcement are provocatively discussed further in PETER H. SCHUCK, *MEDITATIONS OF A MILITANT MODERATE* 142–44 (2006).

¹⁶⁰ See 8 U.S.C. § 1153(b)(5)(A) (2006).

¹⁶¹ See Beth MacDonald, Note, *The Immigrant Investor Program: Proposed Solutions to Particular Problems*, 31 LAW & POL'Y INT'L BUS. 403, 406–10 (2000).

¹⁶² *But cf.* Cox & Posner, *supra* note 151, at 855 (suggesting that auctioning off visas might be a poor mechanism for facilitating immigration by upwardly mobile migrants).

based proxies, but there are serious impediments to such an approach. With individually based information scarce in the developing world, there may be little to augment reliance on crude proxies like national origin or English fluency, and even as reputational information becomes more readily available in the developing world, there will be serious questions about its reliability. Given the possibilities for a group, acting in concert, to create a falsely positive reputation profile for one of their members, it would be an inappropriate leap of faith to rely heavily on such information in deciding that someone poses a small threat to national security.

This dichotomy suggests something counterintuitive, which is that the United States ought not to embrace a one-size-fits-all methodology for evaluating visa applicants. Rather, it should rely more heavily on individually based reputational information when assessing immigrants from those countries with well-developed reputational infrastructures and more heavily on proxies or postentry surveillance and deportation for visa seekers from nations where the reputational infrastructure is nonexistent or of unreliable quality. The Japanese immigrant can be assessed rather reliably prior to entry and then by and large ignored; the Mongolian immigrant might need to be judged via proxies or admitted provisionally and subjected to greater monitoring of his employment status and involvement in the criminal justice system by immigration officials.

The foregoing analysis also sheds light on one of the most frustrating aspects of U.S. immigration law. Political asylum appeals comprise a very significant percentage of the docket in the federal appellate courts.¹⁶³ In these cases, an applicant typically asserts persecution on the basis of religion, political beliefs, or some other factor. Almost invariably, the applicant comes from a nation where a distinct societal group is being persecuted—immigrants from France and New Zealand have the good sense not to seek asylum in the United States very often. Yet these asylum seekers also tend to come from nations with poor *private* reputational infrastructures. To the extent that any entity in these countries has a solid grasp of the attributes of individual citizens, it is the autocratic government, and these government databases are not accessible to American immigration officials. Genuine asylum seekers often flee without identification documents and other forms of corroboration, or they may have their documents stolen in transit.¹⁶⁴ As a result, asylum seekers typically have their own testimony and little else in

¹⁶³ See, e.g., Lenni B. Benson, *Introduction*, 51 N.Y.L. SCH. L. REV. 3, 5 (2006) (citing statistics from the Second Circuit that nearly 38% of all cases on the docket are asylum petitions from the Bureau of Immigration Affairs and that most of these are political asylum cases).

¹⁶⁴ See, e.g., *Sarr v. Gonzales*, 474 F.3d 783, 787 (10th Cir. 2007) (involving an applicant who alleged that government agents destroyed most of his identification papers).

the way of proof to support their applications.¹⁶⁵ U.S. law makes this testimony, standing alone, sufficient to establish asylum eligibility.¹⁶⁶

Yet there are many immigration judges who will be disinclined to grant asylum applications for ideological reasons and more immigration judges still who may skeptically sense that an asylum seeker is really just an economic immigrant or would be an undesirable resident.¹⁶⁷ With an absence of verified information about the asylum seeker's background and actions in his home country, immigration judges often deny asylum applications based on adverse credibility determinations. Because an immigration judge is in the best position to assess an applicant's credibility, appellate courts are reluctant to reverse adverse credibility findings.¹⁶⁸ The law does require, however, that the immigration judge identify clear and cogent justifications for deeming an applicant's testimony incredible.¹⁶⁹

As a result, asylum cases in the federal appellate courts often involve a particular pattern. First, an immigration judge rejects an application on the basis of an adverse credibility judgment. Second, the judge points to inconsistencies in the applicant's testimony as the basis for that rejection. Third, appellate courts examine whether the purported inconsistencies are illegitimate and warrant the adverse credibility judgment.¹⁷⁰ To illustrate how this pattern plays out, I examine illustrative appellate cases from the Ninth and Second Circuits.

In *Chebchoub v. INS*,¹⁷¹ the Ninth Circuit considered the appeal of a Moroccan who had been denied asylum in the United States. Chebchoub alleged that his brother Mustafa was a leader of Movement Forward, a socialist opposition group.¹⁷² The Moroccan government allegedly harassed, imprisoned, and tortured Chebchoub as a way of luring Mustafa out of hiding.¹⁷³ He alleged that this behavior continued even after Mustafa was expelled from Morocco and granted asylum in France, as the government began to believe that Chebchoub himself was part of Movement Forward.¹⁷⁴

¹⁶⁵ *Sidhu v. INS*, 220 F.3d 1085, 1091–92 (9th Cir. 2000).

¹⁶⁶ *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (“Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone.”); 8 C.F.R. § 208.13(a) (2008) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”).

¹⁶⁷ See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

¹⁶⁸ *Singh v. Gonzales*, 495 F.3d 553, 556–58 (8th Cir. 2007).

¹⁶⁹ See *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

¹⁷⁰ Minor inconsistencies not germane to the application usually will not form a sufficient basis for an adverse credibility determination. See *Cao He Lin v. U.S. Dep’t of Justice*, 428 F.3d 391, 394 (2d Cir. 2005).

¹⁷¹ 257 F.3d 1038 (9th Cir. 2001).

¹⁷² *Id.* at 1040.

¹⁷³ *Id.* at 1041.

¹⁷⁴ *Id.*

Yet inconsistencies in Chebchoub's testimony tripped him up in proceedings before the immigration judge, who cited "no less than 22 . . . inconsistencies."¹⁷⁵ The Board of Immigration Appeals agreed with the judge, dismissing Chebchoub's appeal and noting inconsistent testimony about "the events leading up to and surrounding his departure" and "discrepancies between his testimony and his affidavit regarding the number of times he was arrested in the period prior to his departure."¹⁷⁶ The appellate court found these inconsistencies to be a satisfactory basis for finding his testimony not credible.¹⁷⁷

Notably, the appellate court then noted an additional basis for affirming the immigration judge's adverse credibility judgment—Chebchoub had produced no affidavit from either Mustafa, who supposedly had been granted asylum in France, or anyone in the United States who was involved in Movement Forward and could corroborate Chebchoub's involvement in that group.¹⁷⁸ The court noted that it was too much to expect Chebchoub to produce corroborating documentation from Morocco, whose government would have no reason to cooperate with Chebchoub's request, but getting "an affidavit from a close relative living in Western Europe should have been a 'relatively uncomplicated task' that would 'not pose the type of particularized evidentiary burden that would excuse corroboration.'"¹⁷⁹ In *Chebchoub*, we see an appellate court sensibly recognizing how the very different information environments of France and Morocco ought to be reflected in varying burdens placed on asylum applicants seeking to extract corroborating evidence from those locations.

By contrast, the Second Circuit's opinion in *Li v. INS*¹⁸⁰ provides some indication of the difficulties that arise when an asylum seeker's corroborating information is largely located in a country with a relatively poor private information infrastructure. *Li*, like *Chebchoub*, involved an adverse credibility finding and a lack of corroborating evidence. The petitioner in that case, Li, a father of two, fled China because he feared forced sterilization for him or his wife under that country's one child policy.¹⁸¹ The immigration judge faulted Li for presenting two marriage certificates with the same photograph of himself and his wife—a curiosity because one marriage certificate was issued in 1989 and the other was issued nine years later.¹⁸² The judge further noted a discrepancy in the date of birth for Li's wife between

¹⁷⁵ *Id.* at 1042 (quoting the immigration judge) (internal quotation marks omitted).

¹⁷⁶ *Id.* at 1043.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1044.

¹⁷⁹ *Id.* at 1044–45 (quoting *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997)).

¹⁸⁰ 453 F.3d 129 (2d Cir. 2006).

¹⁸¹ *Id.* at 132–33.

¹⁸² *Id.* at 133.

her birth certificate and the x-ray of her tubal ligation.¹⁸³ The judge also faulted the petitioner “for not producing contemporaneous evidence of the births” of his children, and doubted the authenticity of a doctor’s report concerning his wife’s tubal ligation.¹⁸⁴ The judge then pointed to inconsistencies in Li’s testimony concerning how he met the doctor who had examined his wife.¹⁸⁵ Finally, the judge found Li’s testimony incredible on the basis of his demeanor, as the judge noted that Li was hesitant, defensive under questioning about inconsistencies, and requested “two or three water breaks during his testimony, which . . . appeared to [have] been used as an opportunity to formulate a response when confronted with a conflicting inconsistency.”¹⁸⁶

The Second Circuit granted Li’s petition for review, essentially reversing the immigration judge’s decision. In dealing with the evidentiary issues, the court admonished the immigration judge for assuming that Western assumptions about birth certificate and marriage certificate documentation would prevail in China, with the court insisting “that IJs’ standards for written corroboration must be calibrated to the norms and practices of the aliens’ home countries, and the circumstances of the aliens’ departure.”¹⁸⁷ But what of the demeanor evidence upon which the judge based his adverse credibility finding? Here, the court noted that Li had only requested water once during his testimony, not two or three times as the immigration judge stated.¹⁸⁸ The appellate court thought that this math error was sufficient to reverse the adverse credibility determination and did not comment on the immigration judge’s findings of the petitioner’s defensiveness and hesitancy under cross-examination.¹⁸⁹ The court explained the remand by noting its lack of confidence that the immigration judge would have reached the adverse credibility finding in the absence of this error.¹⁹⁰

The *Li* case illustrates the bizarre nature of asylum litigation in environments with poor information. Some immigration judges spend their time trying to find inconsistencies in the petitioner’s testimony and documentary evidence so that they can order the petitioners deported, and then appellate courts spend their time looking for inconsistencies between the immigration judges’ opinions and the trial transcripts to see whether they should reverse those deportation orders. Add into the mix significant cultural misunderstandings, inaccurately translated testimony, as well as poorly compensated and often inept immigration attorneys representing the

¹⁸³ *Id.* at 140 n.13.

¹⁸⁴ *Id.* at 134.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (quoting the immigration judge).

¹⁸⁷ *Id.* at 141.

¹⁸⁸ *Id.* at 140. Li requested water an additional time only after he was excused from the stand. *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 141.

petitioners, and it is little wonder that the immigration adjudication system is so widely regarded as broken.¹⁹¹ There is a fundamental problem at the core of this—the lack of accurate information about individuals—and in the coming decades as information infrastructures improve in the developing world, we can hope that asylum proceedings will be newly refocused on the relevant legal issues. In *Li*, for example, the immigration authorities needed to know how many children the asylum seeker had and whether his wife had undergone a particular medical procedure. In a modern, information-rich domestic environment, verifying such information is typically easy.

H. Consumer Protection Law

Imagine an ordinary dispute between a consumer and a service provider. Say a Citibank customer orders foreign currency to be delivered to his bank branch and Citibank promises to deliver the currency before the customer's departure date, but the currency does not arrive on time due to a bank error. As a result, the customer must incur \$100 in higher currency exchange fees abroad. The customer could demand a refund of the extra fees from his bank, but if the bank refuses to pay up, the customer's remedies will not be particularly attractive.

The customer could sue the bank for breach of contract, perhaps in small claims court or via an alternative dispute resolution mechanism that the customer may have consented to at the time he opened the account. But the opportunity cost of filing suit or pursuing arbitration will easily exceed any potential recovery. The customer could search for similarly situated individuals in the hopes of assembling a class action, but even a successful lawsuit is likely to leave the plaintiffs' lawyers as the primary beneficiaries. Or perhaps the customer could complain to the Federal Reserve, which regulates Citibank. An isolated complaint is likely to lead nowhere, but a flurry of similar complaints to the Fed could prompt it to take action. None of these avenues seem particularly promising methods of dealing with a garden-variety dispute.

Enter Epinions.com, the Better Business Bureau, and similar clearing-houses for information about the behavior of companies. The disgruntled customer can post a review of Citibank's services on Epinions.com, a website that presently includes 135 other reviews of Citibank's service—some favorable and some unfavorable. Adding a 136th review would contribute to a public good.¹⁹² Most Americans have multiple banking options, and

¹⁹¹ See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829–30, 833 (7th Cir. 2005).

¹⁹² The contribution will be larger if consumers routinely ask to see the most recent review first, a sorting function that Epinions enables. If consumers just employ the default sorting mechanism, which may privilege older reviews and reviews flagged by more previous users as helpful, then the 136th review is unlikely to be read by many consumers. Cf. Cliff Lampe & Paul Resnick, *Slash(dot) and Burn: Distributed Moderation in a Large Online Conversation Space*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 543, 546 (2004) ("Moderators may give

consumers who are trying to decide which bank to choose will now have the benefit of a richer range of views. Such a posting might have salutary effects on Citibank's future behavior as well. At least in theory, Citibank should try to improve its service so as to avoid further negative reviews that will scare away potential customers.¹⁹³ Epinions.com thus functions as a dispute discourager and potentially a dispute resolution device.¹⁹⁴ In a case like the one I just described, it is likely the best way of addressing a dispute.

We now encounter a puzzle. The state subsidizes the courts to a very significant degree. If I choose to pursue this case in small claims court, state court, or any other tribunal, the state will pay the salary of the judges, law clerks, and administrative personnel who will help resolve the matter. If, on the other hand, I choose the more efficient and sensible route in this case of lodging a complaint on Epinions, the state subsidy will disappear. On the margins, then, the state is shifting individuals from what will sometimes be the more efficient dispute resolution forum toward the least efficient dispute resolution forum.¹⁹⁵

There is an argument, of course, that the state achieves particular public goods whenever litigation occurs. Namely, litigation creates precedents, and precedents guide third parties in their efforts to understand what the law requires of them.¹⁹⁶ But litigation is not the only mechanism for achieving positive externalities arising out of dispute resolution. Consider our Citibank complaint. In articulating a grievance about Citibank, a customer has both encouraged that corporation to respond to the substance of his complaints and made the interested public aware of one data point that reflects on the company's customer service. This is not the same sort of public ex-

insufficient attention to . . . comments added later in the conversation. . . . [I]f moderators look through all the comments posted so far and some moderators read early in the conversation, the early posts will be looked at by more moderators than will later posts." Eric Goldman has helpfully suggested in correspondence that because most consumers find Epinions ratings via search engines, the default sorting mechanism is quite sticky.

¹⁹³ For a description of how TripAdvisor.com has played this role in the hotel industry, see Michelle Higgins, *The Web Gives Hotel Guests the Last Word*, N.Y. TIMES, Apr. 8, 2007, § 5, at 6.

¹⁹⁴ For an analysis of similar online dispute resolution mechanisms, see Pablo Cortes, *The Potential of Online Dispute Resolution as a Consumer Redress Mechanism* (July 6, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=998865>.

¹⁹⁵ This is a point made eloquently in a recent law review article, which argued that the government subsidy for courts weakens the private market for alternative dispute resolution. See Arthur B. Pearlstein, *The Justice Bazaar: Dispute Resolution Through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy*, 22 OHIO ST. J. ON DISP. RESOL. 739, 783–88 (2007). In a somewhat similar vein, Ric Simmons's recent article tracks the rise of private policing as an alternative to state criminal enforcement. See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 918–27 (2007).

¹⁹⁶ Most cases settle before any valuable precedent is created. If we subsidize courts because of the valuable precedents thereby generated, then it seems that we ought to subsidize resolution costs only for those cases that resolve genuinely novel issues. For example, we might bill the losing party or settling parties for court costs whenever a case is resolved with anything other than a published appellate opinion.

ternality as the value of precedent—because it lacks a resolution of the case by a neutral third party, it is more akin to the public benefits that would arise if all legal briefs were made public. Would it be more useful for the public to have at its disposal copies of all the complaints filed against a company and the company's responses to those complaints, or would it be more useful for the public to have one judicial opinion resolving one of those disputes? The answer is not clear.

Another potential positive externality resulting from litigation is the potential for the judgment to defuse a controversy that might otherwise escalate. When the courts resolve an issue, it reduces the probability that the parties will resort to violent self-help to settle a dispute, and that violence could harm both the parties to the dispute and innocent third parties who get caught in the crossfire. Here again, though, it is by no means clear that court adjudication or administrative action is superior to negative feedback as a mechanism for defusing heated disputes. There is a large psychological literature suggesting that aggrieved individuals feel much better after posting a complaint about another's misconduct, even if the source of the complaint takes no subsequent remedial action.¹⁹⁷ Written venting, simply put, has great psychological value. It provides a release for the frustrated consumer.¹⁹⁸ It enables a consumer to warn other customers about a merchant's misbehavior.¹⁹⁹ It also raises the likelihood that the merchant will take measures to try to improve the consumer's experience.²⁰⁰ The process of recalling, describing, and making sense of a negative experience seems to make it easier for consumers to forget those negative experiences and the accompanying angst.²⁰¹

Services like Epinions, the Better Business Bureau, Angie's List, and similar forums are far less expensive to use than administrative bureaucracies or courts. If the target of a complaint is a well-run business, it might well learn how to improve its service based on complaints lodged and, particularly if it wants to remain in good standing with the Better Business Bureau, remedy any wrongs it perpetrated.²⁰² Customers who have their problems addressed successfully are not quite as happy as customers who

¹⁹⁷ See, e.g., David L. Jones et al., *Consumer Complaint Behavior Manifestations for Table Service Restaurants: Identifying Sociodemographic Characteristics, Personality, and Behavioral Factors*, 26 J. HOSPITALITY & TOURISM RES. 105, 117–19 (2002); Anna S. Mattila & Jochen Wirtz, *Consumer Complaining to Firms: The Determinants of Channel Choice*, 18 J. SERVICES MARKETING 147, 149 (2004); Prashanth U. Nyer, *An Investigation into Whether Complaining Can Cause Increased Consumer Satisfaction*, 17 J. CONSUMER MARKETING 9, 15–16 (2000); James W. Pennebaker, *Telling Stories: The Health Benefits of Narrative*, 19 LITERATURE & MED. 3, 4–10, 13–15 (2000).

¹⁹⁸ Jones et al., *supra* note 197, at 117–19; Mattila & Wirtz, *supra* note 197, at 149.

¹⁹⁹ Nyer, *supra* note 197, at 10.

²⁰⁰ Mattila & Wirtz, *supra* note 197, at 152.

²⁰¹ Pennebaker, *supra* note 197, at 8–9, 13.

²⁰² See Jones et al., *supra* note 197, at 105–06.

never have any problems to begin with, but they are significantly happier than customers whose complaints went unheard.²⁰³

The more information becomes available about individuals, the more valuable resources like Epinions become to their users. Epinions attempts to capture this functionality by flagging the reviews of particularly prolific or helpful reviewers. Netflix recently rolled out an even better functionality. Netflix uses an algorithm to categorize its users based on their film ratings and generate similarity scores. If I want to decide whether I should rent, say *Genghis Blues*—a documentary that was recently at the top of my Netflix queue—I can click on that movie and see the written reviews of other Netflix users as well as a score revealing the similarity of their movie rankings to my own. Netflix user Jamie W didn't like the movie, giving it only two stars, and Netflix says Jamie's tastes are 63% similar to my own. User BW 57226 loved it, giving it five stars, but Netflix says that BW's tastes are only 41% similar to my own, so maybe I should be skeptical. If I want to explore this further, I can read the contents of Jamie W's review and BW 57226's review to see whose reasons for not liking or liking the film seem more pertinent. Netflix lets me see all their other movie reviews too, so that I can see their substantive comments about movies I have seen and decide whether I am likely to share their criticisms.²⁰⁴

These sorts of innovations have applications well beyond movie ratings. Imagine if every plumber, every manufactured product, every cell phone provider, every home builder, every tour guide, every hair stylist, every accountant, every attorney, every golf pro, every professor, and every taxi driver was rated in the same way, with both the detailed written reviews and summary statistics that Netflix currently provides. In such a world, there would be a diminished need for an FTC or deputy state attorneys general because consumers would police misconduct themselves. In such a world, fewer disputes would wind up in court because unscrupulous or inept merchants or service providers would have a much harder time finding customers.²⁰⁵ The technology for these resources already exists, and

²⁰³ Valarie A. Zeithaml et al., *The Behavioral Consequences of Service Quality*, J. MARKETING, Apr. 1996, at 31, 35.

²⁰⁴ There is, of course, a danger that individual feedback will become more strategic, as opposed to sincere, as it becomes more transparent and more closely tied to an individual. Cf. Cohen, *supra* note 22, at 1426 (“Pervasive monitoring of every first move or false start will, at the margins, incline choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines.”). At bottom, the question of how transparency will affect the quality of feedback and whether posturing will occur is an empirical one. It depends on the payoffs of conformism and nonconformism, the extent to which society values iconoclastic behavior, and the mix of preferences among individuals and groups. In some contexts, transparency may encourage conformism while it rewards outliers in others. Seemingly innocuous design decisions, such as what parameters to use in filtering feedback, might substantially alter the substance of the feedback provided.

²⁰⁵ Cf. Ian MacInnes et al., *Reputation and Dispute in eBay Transactions*, INT'L J. ELECTRONIC COM., Fall 2005, at 27, 49–50.

in some cases—Avvo.com for lawyers, RateMyProfessors.com for academics, or AngiesList.com for plumbers—those services have been launched. That said, these web services lack the large data sets that help keep Netflix ratings accurate. Though Netflix customers are quite willing to write reviews of movies, plumber customers are a bit more reluctant. And while RateMyProfessors.com sports a handful of student reviews of professors, universities and colleges do not import the much richer data collected from official end-of-the-semester evaluations into those databases. Because there is a dearth of reviews at these websites, there is an insufficient incentive for consumers to consult them before hiring a service provider or enrolling in a class.

These problems suggest the appeal of subsidizing consumer-oriented ratings websites and other low-cost mechanisms for dispute resolution and avoidance. Such subsidies could benefit such services on both the supply and demand sides—providing discounts for customers who provide detailed evaluations of merchants and service providers, and facilitating access to these databases by individuals whose access to the Internet is limited because of economic, educational, or linguistic impediments.

There is much that government can do in-kind to help these resources along as well. In many instances, the government will have information about a merchant or service provider's performance that members of the public might lack. For example, only the government and the inspected restaurateur know the contents of public health inspections in many jurisdictions.²⁰⁶ But there is no reason why this information should not be posted to restaurant-rating websites as soon as it becomes available. Similarly, the government may have information about criminal proceedings brought against accountants, state bar disciplinary proceedings brought against attorneys, or APA-generated public commentary generated by license renewal requests for radio frequency broadcasters. Again, it would be a relatively simple task to aggregate the information that is already in the government's hands and use it to supplement existing privately run rating resources. Yet in many circumstances, the information is actually suppressed by the government.²⁰⁷

II. WHEN TO USE INFORMATION POLICY?

The preceding discussion suggests that the widespread availability of information about individuals and firms ought to alter the way we think about law and public policy in a variety of domains. In some settings, such as the employment context, disclosing previously private information about

²⁰⁶ ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 50 (2007).

²⁰⁷ See, e.g., Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007) (noting that many state bars suppress information about lawyer discipline, which results in significant public distrust of the legal profession and other adverse consequences).

individuals may prove to be a desirable government intervention. In other settings, such as the juror selection process, there is a stronger argument for maintaining the privacy of information about individuals. This Part provides a new typology of government information policies and draws some general lessons from the tour through various legal subjects.

A. Of Carrots, Sticks, Curtains, and Search Lights

We lawyers are conditioned to think about using law to create private incentives through two well-known tools: carrots and sticks. The carrot approach rewards desirable private behavior (perhaps through tax incentives, subsidies, or positive recognition), and the stick approach punishes undesirable behavior (via criminal fines, civil liability, or the condemnatory use of the bully pulpit). Upon reflection, however, carrots and sticks are not all there is. We are also familiar with curtains. Government can try to make potentially observable characteristics obscure so as to make it more difficult for private decisionmakers to act on the basis of observable characteristics. This is what legislators do when they attempt to restrict genetic discrimination, and it is what progressive reformers attempted to do when they created nonpartisan elections, thereby preventing voters from electing judges or mayors on the basis of party affiliations. Various doctrines limiting the sorts of information that attorneys can collect about prospective jurors follow the same tack.

These curtain strategies have been advocated in the antidiscrimination context as well. Indeed, some efforts to reform antidiscrimination law have suggested that statistical discrimination can be mitigated if the relevant decisionmakers are deprived of information about a candidate's race, religion, or gender.²⁰⁸ With less information, decisionmakers presumably will focus more on a job applicant's qualifications and less on the applicant's skin pigment.

Search lights are less familiar than curtains, but this Article has suggested that they provide a fourth policy alternative, and an important one. The state can make private discrimination on the basis of illegitimate or misleading observable characteristics less appealing by making legitimate or informative characteristics more easily observable. This is what the government does when it mandates the placement of visible health inspection signs rating the hygiene of each Los Angeles restaurant outside that establishment's front door, a policy that has significantly reduced hospitalizations from food-related illnesses, increased revenues for restaurants sporting high hygiene grades, and reduced revenues for restaurants that must advertise their barely passing grades.²⁰⁹ This is what the government does when it publishes information about the identities of those with criminal histo-

²⁰⁸ See *supra* notes 78–79 and accompanying text.

²⁰⁹ FUNG ET AL., *supra* note 206, at 82–83.

ries.²¹⁰ And this is the basic strategy behind mandatory S.E.C. disclosures in corporate law.²¹¹

Note that the framework described here eschews any act-omission distinction. Just as we can equate the absence of a carrot with a stick, at least in the presence of many other carrots, we can understand the absence of a government search light as equivalent to a curtain. In some settings, the law will reduce the observability of individual attributes through affirmative acts (like privacy tort protections), and in other settings, it will reduce the observability of individual attributes via omissions (like antiquated and obsolete public information dissemination strategies).²¹² An information asymmetry might result just as easily from an affirmative government act as a failure to act. To the extent that there are relevant differences between these acts and omissions, they would stem from their differing social meanings.

This Article's most generalizable insight concerns the importance of search lights and their potential to address a large number of social ills. This search light strategy will not always be the optimal one, just as carrots, sticks, and curtains may fail us at times. But we can do more with four tools than we can with three, and this Part will identify those settings in which search light strategies are well suited or poorly suited to addressing these social ills.

B. Animus-Based Discriminators and Pretext

Where statistical discrimination is more prevalent than animus-based discrimination, policymakers should rely on search light strategies. Where animus-based discrimination is more prevalent, curtain strategies will be appropriate. The reason why is rather straightforward: It is easy for animus-based discriminators to identify a pretextual reason for rejecting an applicant when they have lots of information about the applicant and harder for the discriminator to point to a legitimate nondiscriminatory basis for an adverse decision when the decisionmaker lacks information about the candidate. For example, suppose that an employer dislikes African Americans and refuses to hire a well-qualified African American applicant on the basis of the applicant's race. If the employer has access to information about the applicant's credit history, social relations, academic record, prior employment evaluations, and the like, then it will be relatively easy for the employer to falsely claim that information contained in those resources explained the decision not to hire the applicant. No applicant is perfect, af-

²¹⁰ See Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 296–301 (2006).

²¹¹ See James D. Cox et al., *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 893–94 (2005).

²¹² On the latter, see Jerry Brito, *Hack, Mash, & Peer: Crowdsourcing Government Transparency*, 9 COLUM. SCI. & TECH. L. REV. 119, 122–29 (2008), <http://www.stlr.org/html/volume9/brito.pdf>.

ter all. By contrast, if all the employer knows about the applicant is his skin color, then it will be impossible for the employer to identify a neutral justification for the refusal to hire. In short, given imperfect information about decisionmakers' true motives, the search light strategy will backfire when it is used to provide an animus-based discriminator with additional information. For this reason, it is important that public opinion scholars explore the connection between perceived behavior and actual behavior. Without a reliable understanding of the relationship between those two variables, policymakers cannot determine which contexts lend themselves to particular information-based antidiscrimination strategies.

In the jury selection context, it is worth asking if parties' motivations matter when they seek to strike jurors of a particular race. If *Batson* is designed to address an injury to prospective jurors, it would seem as though the prosecutor who strikes African Americans from the panel because he hates African Americans is more dangerous than the prosecutor who strikes African Americans from the panel because he believes that doing so is more likely to result in the conviction of the African American defendant.²¹³ But while there are indications in the case law that *Batson* is designed to protect jurors,²¹⁴ the doctrine is invoked by litigants, and these litigants have no incentive to make the inflammatory argument that the other side is motivated by something other than a desire to maximize their odds of winning at trial. In any event, the analysis here suggests an inadequacy in *Batson*'s effective treatment of all litigants as statistical discriminators. The search light strategy will only reduce reliance on the prospective jurors' race if the litigant whose actions are challenged is engaged in rational, statistical discrimination.

C. False Information

Accurate information is a necessary ingredient of any effort to combat statistical discrimination via government information policy. Some of the information discussed herein—military records, records of criminal convictions, bankruptcy records, immigration and naturalization documents, and the like—will not pose insurmountable accuracy problems. To the extent that errors occur, they will often revolve around cases of mistaken identity, where someone sharing the same name as another person with an undesirable characteristic is thereby penalized.²¹⁵ These problems can be amelio-

²¹³ This assumes, of course, that the prosecutor genuinely believes that the defendant is guilty for reasons having nothing to do with the defendant's race.

²¹⁴ See *supra* text accompanying notes 102–103.

²¹⁵ This is a recurring problem with the Transportation Security Administration's no-fly and restricted lists. See Leslie Miller, *Thousands Wrongly Named to Terrorist List*, CHI. SUN-TIMES, Oct. 7, 2006, at 12; see also Kleysteuber, *supra* note 37, at 1358–59 (discussing this problem in the context of tenant information databases).

rated through the use of supplemental identifiers, such as birthdates, birthplaces, and partial Social Security Numbers.

A more serious challenge arises in the context of identity theft. If a bad actor successfully hijacks the identity of a good actor and then uses the good actor's identity to defraud unsuspecting consumers, significant damage can result. The consumers will be misled. The good actor's reputation will be trashed unfairly. And confidence in the reputation system as a whole will be eroded. But here is the rub: reliance on search light strategies might facilitate identity theft because private information is often used for identity authentication purposes.

The logical response is to discourage reliance on personal history information for authentication purposes. A regime that widely publicizes consumers' birthdates is a regime in which any bank or credit card company would be foolhardy using birthdates as a basis for authentication. The costs of transitioning away from biographical information toward password-based authentication and biometrics will not be significant. But nor will they be negligible. Because identity theft represents such a significant threat to reputation-reliant dispute avoidance and resolution strategies, minor tweaks to business practices need to be made.

The most daunting false information problems arise in the context of data that is not contained in existing public records, but rather would be the product of new government search light initiatives. Nobody believes that the inaccurate feedback problem can be solved entirely in reputation-tracking environments. For example, if the government does try to improve the efficiency of the labor market by subsidizing the collection of 360 degree feedback and making that feedback transportable across firms, then it will have to deal with deliberately or unintentionally false feedback that employee *A* provides about employee *B*. Critically, if an employer relies heavily on coworker evaluations in deciding not to hire a seemingly qualified applicant, but those evaluations are themselves the product of coworker animus or implicit bias, then the government strategy might be counterproductive.²¹⁶ But, as I have explained at length elsewhere, there are strong reasons to believe that the problems can be ameliorated significantly through the use of algorithms designed to locate outlier data points, along with spot-checks and audits relying on objective verification.²¹⁷ Given enough information, these algorithms can identify instances where an individual provides suspiciously high levels of negative feedback toward members of an identifiable racial or gender group. Once identified, the system can then adjust the weight assigned to such feedback, substantially offset-

²¹⁶ On implicit bias, see, for example, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063 (2006).

²¹⁷ See Strahilevitz, *supra* note 144, at 1733–34.

ting the harm done by feedback that is likely tainted by animus or implicit bias.

We can push this last point further. Recent psychological research has examined the ability of decisionmakers to act defensively to control implicit bias and stereotypes.²¹⁸ Yet one cannot control one's own implicit biases without being made aware of them and having some reason to want to control them.²¹⁹ Experimental evidence suggests that discerning a disturbing pattern in one's own feedback enables a person who has some motivation to ameliorate his own discrimination to take effective corrective measures.²²⁰ Feedback systems can both lower the costs of identifying such patterns and provide such motivation if it is understood that unbiased feedback will be accorded greater weight. Eventually, well-designed systems may even enable individuals to reduce their own biases at the subconscious level, permitting them to take antistereotyping measures without incurring much in the way of added cognitive load.²²¹ Hence, tracking feedback can educate not only the recipients of such feedback, but its providers as well.

The way in which reputational information is packaged for decisionmakers will also be critical. Cognitive psychologists are investigating ways in which information can be presented in a manner that minimizes the likelihood of stereotype-based responses.²²² Frames and cues matter. A well-designed search light strategy should employ cognitive psychologists to help ensure that information transmitted to decisionmakers enables them to analyze and act upon that information in a rational way.²²³ To reiterate a point made earlier, more information is not always superior to less information, but more information is usually better if it can help a decisionmaker identify his own biases, suppress those biases, or learn to make decisions in a way that marginalizes those biases.

It is sometimes tempting to use the imperfections in feedback systems as a basis for rejecting their use. But the appropriate contrast is not between a world of perfectly accurate information about individuals and the sometimes flawed information that an eBay-style reputation tracking mechanism can generate. There are daunting false feedback equivalents in the real

²¹⁸ See, e.g., Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 167–71 (2008); Laurie A. Rudman et al., "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001).

²¹⁹ See generally Gordon B. Moskowitz et al., *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. PERSONALITY & SOC. PSYCHOL. 167, 181–82 (1999) (discussing various strategies for combating stereotype-based subconscious practices).

²²⁰ Margo J. Monteith et al., *Putting the Brakes on Prejudice: On the Development and Operation of Cues for Control*, 83 J. PERSONALITY & SOC. PSYCHOL. 1029, 1045–46 (2002).

²²¹ Moskowitz et al., *supra* note 219, at 180.

²²² Monteith et al., *supra* note 220, at 1045–46.

²²³ This approach would be an example of libertarian paternalism. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

world. A poor man buys one expensive suit to appear prosperous. A debt-saddled person drives a very nice car or eats at nice restaurants to appear well off. A middle-aged person has plastic surgery to appear young. A person of average intelligence wears geek-chic glasses to appear smarter. An individual fakes an accent to appear worldly. A would-be adulterer removes a wedding ring to appear unmarried. Reputation tracking systems like eBay's, Slashdot's, TripAdvisor's, and Digg's introduce some false feedback. However, because most feedback providers are sincere, and algorithms can help the purveyors or users of these sites weigh more heavily the feedback provided by reviewers who have proven their reliability, their signal-to-noise ratios are often quite high.

There will be contexts in which disseminating feedback information from consumers may not be appropriate. Some aspects of the doctor-patient relationship seem to fall into this category. Patients are quite capable of assessing physicians' bedside manner, their ability to communicate, their promptness, and the like. But in many cases, patients will do a poor job assessing physicians' diagnostic skills, their surgical techniques, or the accuracy of their prognoses (at least in the short run). There will be selection effects that make such assessments more difficult to evaluate too, though feedback can be normalized statistically based on the vagaries of a physician's patient population. More troublingly, if patients are rating physicians and physicians are rating patients publicly, there may be a strong incentive for physicians and patients to trade unduly favorable feedback with each other. This "Pollyanna effect" dynamic has played out on eBay, with the result being that until a 2008 change to its feedback policy, eBay feedback was more favorable than it ought to have been.²²⁴ Given the strong interests identified above in having physicians provide accurate—albeit perhaps unflattering—assessments of their patients in their medical records, the appropriate regime might (a) make physician assessments of patients available only to other physicians in the absence of a court order, (b) prohibit patients from assessing certain physician characteristics, or (c) impose a time lag, whereby patients could only assess physician characteristics af-

²²⁴ Strahilevitz, *supra* note 144, at 1754–55. The Pollyanna effect prompted eBay to alter its rules so as to prevent sellers from leaving negative or neutral feedback about buyers. As eBay explained: "The previous system prevented buyers from leaving honest Feedback since they feared retaliation from the sellers if they left a negative. This made it harder for buyers to distinguish between sellers while making bidding or buying decisions." Ebay, *Upcoming Changes to Feedback*, <http://pages.ebay.com/services/forum/new.html> (last visited June 24, 2008). Shortly afterwards, individuals who opposed the feedback policy change launched their own non-eBay website, whereby sellers could leave negative feedback about their transaction partners. *See* eBuyer Feedback, <http://www.ebuyer-feedback.com/> (last visited Aug. 2, 2008) ("Since May 19th, eBay no longer gives its sellers the ability to leave negative or neutral feedback for their customers. Only positive feedback is allowed, 'at the seller's option'. Even though the majority of buyers are honest this new policy leaves sellers vulnerable to new scams, feedback extortion, unpaid items, etc. with no way to defend themselves or warn others. This is not acceptable. This site gives sellers the ability to leave their eBay buyers positive, negative, or neutral feedback.").

ter some period of time. Any of these interventions will decrease the likelihood that patients will provide strategic feedback instead of sincere feedback.

D. *Too Much Reputation*

A strong reputation merely correlates with desirable attributes; it is not a perfect proxy for those attributes. As a result, there is a lingering danger that increased reliance on individuals' reputations for sorting purposes will prompt individuals or firms to overinvest in actions that will improve their reputations.²²⁵ For example, a professor might pander to his students by providing them with free baked goods on the last day of class, which not coincidentally is the same day that the students will fill out teaching evaluations. Or worse yet, the professor may try to entertain the students at the expense of teaching them. Alternatively, a hotel might provide monetary incentives for its customers to provide favorable reviews, rather than lowering room rates, making capital expenditures that will improve the hotel's amenities, or devoting more money to salary so that better skilled workers will seek employment there.²²⁶

Though they may boost feedback ratings,²²⁷ these sorts of activities represent wasteful investments, and they also have the potential to degrade the quality of a reputation-rating resource. For the latter reason, ratings websites have devoted substantial resources to trying to sanction firms that employ these tactics.²²⁸ The teaching evaluation context is easier to monitor. While some students will reward a teacher who gives away cookies on the last day of class with stronger evaluations, other students are likely to resent the pandering and note their disapproval of the tactic on their anonymous student evaluation forms. If the professor's colleagues find out, then the significance of the professor's generally positive evaluations will be discounted, and the baked goods-dispensing professor will be subjected to negative peer pressure by colleagues who would prefer to avoid making wasteful expenditures and have an interest in preventing student evaluations from becoming a noisy indicator of teaching quality. In short, as long as there are sufficiently large numbers of raters, some heterogeneity in attitudes regarding the appropriateness of expenditures designed to enhance reputation but not service quality, and reluctance on the part of feedback

²²⁵ This is a concern identified in RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 284–85 (2003).

²²⁶ For a discussion of this problem from a false advertising perspective, see Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 701–05 (2007).

²²⁷ See Robert J. Youmans & Benjamin D. Jee, *Fudging the Numbers: Distributing Chocolate Influences Student Evaluations of an Undergraduate Course*, 34 TEACHING PSYCHOL. 245 (2007).

²²⁸ Christopher Elliott, *Hotel Reviews Online: In Bed with Hope, Half-Truths and Hype*, N.Y. TIMES, Feb. 7, 2006, at C1.

providers to lodge false accusations of pandering, there is an effective whistle blowing mechanism that will deter excessive investments in reputation.

More generally, it is useful to examine the ex ante effects of ubiquitous personal information. There are obvious upsides and downsides to such a regime. If we are dealing with everyday interactions among people, then it seems likely that the ex ante effects will be quite positive.²²⁹ That might be one takeaway point from Bob Ellickson's extended case study of Shasta County, California—where a well-functioning gossip network facilitated the formation and enforcement of a seemingly wealth-maximizing set of social norms.²³⁰ It is also a fair takeaway from my own analysis of motorist behavior, where the practical anonymity of drivers vis-à-vis one another seemed to encourage antisocial driving.²³¹ But in other contexts, the ex ante effects of reputation monitoring will be undesirable. For example, a ubiquitous feedback mechanism might discourage individuals from expressing unpopular opinions about political issues, lest they be given negative feedback by scores of median voters.²³² Alternatively, having every move watched and profiled might discourage socially beneficial forms of identity experimentation.²³³ Broadly speaking, then, the use of ubiquitous personal information and feedback will be most desirable when majoritarian norms are particularly unproblematic.

This discussion brings a related point to the forefront, which is that as mechanisms for tracking personal information improve, investments in some sorts of signaling can be expected to decline. Signaling occurs when an individual makes a costly expenditure or takes a costly action so as to increase the likelihood that others will trust her or want to pursue economic or social relationships with her.²³⁴ Classic examples of signaling behavior include conspicuous consumption of luxury items or branded goods, foregoing a prenuptial agreement as a means of signaling love prior to a marriage, nonanonymous contributions to cultural charities, or choosing to attend a university because of its selective admissions process.²³⁵ Although no one has tried to estimate the costs associated with signaling, it is plausibly one of the largest sources of waste in modern economies. People rely on signals when they lack more precise and reliable indicators of an individual's attributes. By making such information more readily available, the law could

²²⁹ See Stigler, *supra* note 77, at 627.

²³⁰ ELLICKSON, *supra* note 32.

²³¹ Strahilevitz, *supra* note 144, at 1705–08.

²³² *Id.* at 1760.

²³³ See Cohen, *supra* note 22, at 1373.

²³⁴ The classic work on signaling is Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973).

²³⁵ Many of these are discussed in ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

substantially decrease the incentives for individuals to devote significant resources to signaling.²³⁶

E. Kings in Disguise

King Abdullah of Jordan is famous for donning various disguises and mingling with his subjects to get a better sense of what life is like for ordinary Jordanians.²³⁷ The incognito king has waited in lines at government tax offices, observed traffic regulation from behind the wheel of a taxi, and posed as a television journalist to get a sense of life in Jordan's free trade zone. Media accounts of the King's disguised exploits are usually laudatory, suggesting that the experiences enable the monarch to avoid getting an unduly rosy account of life in his country.²³⁸

While the King of Jordan is not walking around the average American city, it is possible that disguised reputations help keep our government officials in line as well. Take instances of police brutality in major American cities. When scandals about rough treatment emerge, it is often because the police roughed up a prominent minister or elected official who is a member of a minority group.²³⁹ By seeing the way in which a prominent, powerful, and law-abiding African American is treated, the public may learn about how their less prominent and powerful but nevertheless law-abiding peers are routinely treated. Similarly, to some readers, the story of Oprah and her entourage in Paris was newsworthy because it suggested the persistence of racism in French society.²⁴⁰ On this account, Akerlof's famous "lemons problem" becomes a "lemons solution" of sorts.²⁴¹ It is therefore worth asking whether a world with ubiquitous reputation information is one in which disturbing instances of unequal treatment get swept under the rug.

Should we tolerate some extra brutality in the hopes that outrage over this brutality will raise public consternation and ultimately reduce the incidence of police brutality? That seems like a perilous strategy.²⁴² I do not

²³⁶ Signaling that is designed to secure favorable feedback might increase, however, for reasons identified above.

²³⁷ Douglas Jehl, *The King and the 'Cabby' Inspect Jordan Incognito*, N.Y. TIMES, Aug. 9, 1999, at A1.

²³⁸ See *id.*

²³⁹ See, e.g., Mary Mitchell, *Would Cop Have Pulled a Gun on a White Minister?*, CHI. SUN-TIMES, July 17, 2005, at 14 (discussing the controversy that erupted when a police officer shouted profanity and pointed a gun at James Meeks, a state senator and prominent Chicago religious leader).

²⁴⁰ Mary Mitchell, *In Paris, Not Even Oprah Can Escape Reality of Being Black*, CHI. SUN-TIMES, July 3, 2005, at 14.

²⁴¹ See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). For an application of the "lemons" model to race and job hiring, see Luojia Hu & Christopher Taber, *Layoffs, Lemons, Race and Gender* (Inst. for the Study of Labor (IZA), Discussion Paper No. 1702, 2005), available at <http://ssrn.com/abstract=779066>.

²⁴² The strategy is perilous because it might be that by making these mistakes by the police more rare, you create an even stronger public backlash when mistakes do happen.

doubt that the possibility that an African American motorist might be a well-known minister or city councilman constrains the behavior of police officers somewhat. But there are significant advantages to facilitating sorting that offset this loss. A police officer pulling over an African American motorist in an economically depressed community might feel few constraints on his behavior until he learns that the motorist is the nephew of a well-known minister, a receptionist who answers phones in a prominent city councilman's office, or the uncle of another officer on the same police force. Few citizens are celebrities, but a lot of people are connected to people with clout. If officers approach motorists or pedestrians in a depressed area thinking that anyone who isn't a celebrity is part of an undifferentiated mass, then the King Abdullah effect may do little to keep them honest. There is a tradeoff here, but it is probably one society ought to be willing to make. If, as seems plausible, police officers usually underestimate the likelihood that a profiled individual is connected to someone with clout, then less anonymity for citizens probably will be a net positive.

F. *Who Is the Appropriate Information Provider?*

In many instances, the government has the best access to information that decisionmakers will want to use. Criminal records, bankruptcy records, military service records, immigration and naturalization records, academic records from public schools or state-run universities, or records regarding membership in licensed professions are obvious examples.²⁴³ Private firms may be better than the government at aggregating this information and publishing it in a format that will be useful to producers or consumers.²⁴⁴ In other instances, valuable information will be generated by private parties, and the government might face political or agency constraints that prevent it from generating equally accurate information. For example, there is little reason to urge the government's involvement in the generation of consumer credit scores. Although Experian and the other credit scoring agencies sometimes make mistakes, their incentives are properly aligned, and they are insulated from interest group pressure regarding the formula used for

²⁴³ In many of these settings, government publication of the pertinent information is quite limited. Take criminal histories as an example. In some states, all registered sex offenders have their address information published, but other states only publish the information of those sex offenders who are deemed to present the highest risk of recidivism or who have committed the most serious crimes. Christina Locke & Bill F. Chamberlin, *Safe from Sex Offenders? Legislating Internet Publication of Sex Offender Registries*, 39 URB. LAW. 1, 15–16 (2007). Only a handful of state governments publish Megan's Law-style databases for individuals committed of nonsex crimes, see James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 399–400 (2006), and such criminal history information may be immune from Freedom of Information Act requests, see *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

²⁴⁴ The rise of these private databases containing information culled from government records has made the pursuit of a curtains strategy more difficult. When the government no longer controls the databases, and where the contents of databases are widely mirrored, it is quite difficult for the government to erase or redact previously released information from the public domain effectively.

credit scores. Similarly, the government should not get into the business of running social networking sites or developing auction websites as a mechanism for combating statistical discrimination. There are market actors with substantial comparative advantages over the government, and they are already doing a fine job of making new information available to the public.²⁴⁵ In these settings, the government's role should be confined to facilitating the adoption of uniform standards—for example, through subsidies—so that information can be aggregated easily from among a number of different social networking websites and reputations can be transported from one auction site to another.

In perhaps the majority of instances, the most appropriate role that the state can play in facilitating the development of a robust reputational market is to get out of the way. Take an illustrative example: In July of 2007, Avvo.com, a new website that rates lawyers, was launched. The website aspired to do for attorneys what Zagat did for restaurants—provide consumers with information that they could use to find a suitable lawyer and collect evaluations of lawyers from fellow attorneys and clients.²⁴⁶ Alas, within ten days of its launch, Avvo was sued in a class action lawsuit by attorneys alleging that Avvo had violated Washington State's Consumer Protection Act by disseminating unfair and deceptive information about lawyers who were rated by the site.²⁴⁷ More precisely, the complaint faulted Avvo's website for being subjective and unreliable; providing questionably low numerical ratings to U.S. Supreme Court Justices, law school deans, and other highly regarded lawyers; using a nontransparent methodology for developing lawyer ratings; and providing incomplete information.²⁴⁸ The suit's lead plaintiff, Browne, was an attorney who claimed to have lost two clients as a result of a low Avvo rating, a rating that was tied to a state bar disciplinary proceeding against him which had resulted in an admonition.²⁴⁹

Avvo moved for dismissal in short order, arguing that its services were protected by the First Amendment and that the plaintiffs had failed to state a claim under the state's Consumer Protection Act.²⁵⁰ The district court

²⁴⁵ This is a point made by Robert Berring in a context that is analogous in one respect—the controversy over whether the government should publish case law for free or rely on West and other proprietary reporters. See Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615, 622–29 (1995).

²⁴⁶ Adam Liptak, *On Second Thought, Let's Just Rate All the Lawyers*, N.Y. TIMES, July 2, 2007, at A9.

²⁴⁷ See Complaint, *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007) (No. CV7-920 RSL), available at http://blog.seattlepi.nwsource.com/venture/library/Avvo_Complaint_FINAL_secured1.pdf.

²⁴⁸ *Id.* at ¶¶ 46, 70–71.

²⁴⁹ John Cook, *Respected Lawyer Wants Rating Site Avvo Closed*, SEATTLE POST-INTELLIGENCER, June 12, 2007, at D1.

²⁵⁰ See Defendants' Motion to Dismiss Class Action Complaint Under Fed. R. Civ. P. 12(c), *Avvo*, 525 F. Supp. 2d 1249 (No. CV7-920 RSL).

granted the motion for dismissal on both grounds.²⁵¹ As the court surely understood, if Avvo were liable for its conduct, then it seems likely that Zagat may be liable to Pizza Hut if unfavorable restaurant reviews result in a poor rating, *U.S. News & World Report* may be liable to Florida Coastal School of Law for placing that law school in the fourth tier, and eBay may be liable to vendors who cannot make sales because they have poor feedback ratings.

Under these circumstances, there are superior alternatives. Namely, individuals like Browne who believe that false information has been disseminated about them ought to have a right of reply—an ability to explain why they believe they have received inappropriate ratings from a website or a complaining consumer.²⁵² In workplace settings, the available empirical evidence suggests that providing subordinates with a right to respond to feedback from managers enhances the effectiveness of feedback systems.²⁵³ This right of reply is something that is already built into eBay's and TripAdvisor's feedback systems, and eBay users or TripAdvisor vendors typically employ it when they believe they have unfairly received negative feedback. An attorney like Browne could make use of his right of reply to note that other lawyer-rating services, like Martindale Hubbell, rate him highly. He could assert that Avvo's methodology for calculating lawyer ratings is flawed, using the example of Ruth Bader Ginsburg's middling rating as a case in point. He could, in short, make many of the arguments that his lawyers made in his complaint to alert consumers to the deficiencies of the Avvo rating and entice potential clients back into the fold. Just as Congress has enacted section 230 of the Communications Decency Act²⁵⁴ to avoid chilling Internet discussion, it or the courts should provide services like Avvo with immunity against tort suits stemming from unflattering ratings, so long as the defendant offers the poorly rated individual or firm a right of reply similar to eBay's. Such a rule would permit a vendor to point out possible biases that formed the basis for an unfair rating.

Reputation ratings systems are an alternative to formal adjudication and criminal enforcement. In many cases, these systems will provide the most efficient mechanism for resolving and deterring disputes. Bringing the complex, slow, and costly legal system into run of the mill disputes over whether Tavern on the Green's décor rating should be a 24 or a 27, or whether Browne's attorney score should be a 5.1 or a 6.2 endangers an im-

²⁵¹ See *Avvo*, 525 F. Supp. 2d 1249.

²⁵² For a discussion of right of reply statutes in the defamation context, see Jerome A. Barron, *The Right of Reply to the Media in the United States—Resistance and Resurgence*, 15 HASTINGS COMM. & ENT. L.J. 1 (1992).

²⁵³ Alf Lizzio et al., *Managers' and Subordinates' Evaluations of Feedback Strategies: The Critical Contribution of Voice*, 38 J. APPLIED SOC. PSYCHOL. 919, 938–40 (2008).

²⁵⁴ 47 U.S.C. § 230 (2000); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (finding that America Online was entitled to absolute immunity against defamation liability under the Communications Decency Act).

portant and dynamic aspect of the nation's private reputational infrastructure. The result of legal liability here for reputation trackers like Avvo will be fewer ratings, less information for consumers, and greater reliance on more problematic bases for deciding upon an attorney, like race, limited word-of-mouth data, law school attended, media visibility, claims in attorney advertisements, and the like.

Of course, removing the possibility of liability in cases where inaccurate feedback is reported on a ratings website creates the potential for the quality of the published feedback to suffer, just as eliminating defamation liability might cause the quality of newspaper reporting to decline.²⁵⁵ That said, a decline in quality would by no means be inevitable. The question in both cases is whether market forces provide adequate incentives to keep the information on reputation rating sites generally accurate. With respect to this question, it is appropriate to give a provisional affirmative answer. Although there is always the potential for websites providing biased product reviews to receive heavy traffic, this has not happened. *Consumer Reports*, published by a nonprofit that accepts no advertising from the merchants whose products it reviews, easily outsells its ad-supported competitors.²⁵⁶ Search engines that auction off the top responses to search queries do not have nearly as many users as those that place more popular or more widely linked web pages at the top of their search results. *U.S. News & World Report's* rankings of graduate schools and undergraduate institutions—flawed though they may be—do not face serious competition from publications that sell off top rankings to high bidding universities.²⁵⁷ To the extent that there are variations in the extent to which websites are objective, websites that “rate the raters” can point out those websites that consumers should view with suspicion. There are, in short, rather robust mechanisms for promoting accuracy on reputation rating sites, and it seems far from clear that legal liability for potentially erroneous statements would enhance overall welfare.

III. A NORMATIVE FRAMEWORK

I hope that careful readers of the preceding Parts have not understood me to be a cheerleader for the changes that have resulted and will result from the reputation revolution. In some cases, the legal challenges posed by new technological capabilities are wrenching, and in a few instances those challenges are so severe that they warrant restricting the use of the technologies in question. Moreover, because the reputation revolution

²⁵⁵ For an exploration of related questions, see Chris Dent & Andrew T. Kenyon, *Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers*, 9 MEDIA & ARTS L. REV. 89 (2004).

²⁵⁶ See generally Alex Taylor III, *No Test Dummies*, FORTUNE, June 11, 2007, at 49 (noting that *Consumer Reports* has 4.3 million subscribers in print and another 2.7 million online).

²⁵⁷ JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 206 (2008).

seems poised to create a world that resembles the small towns of yore far more than they resemble the urban and suburban environments in which most of us live, readers should at least feel uneasy about the process by which we might achieve heightened trust, reduced fraud, and decreased statistical discrimination. This Part examines the normative questions that should be on the minds of policymakers when they consider whether to use carrots, sticks, curtains, or search lights in tackling a policy problem. It argues that determining who will bear the costs and benefits of a policy intervention ought to be a primary consideration, along with the obviously relevant magnitude of those costs and benefits. Finally, it tentatively explores the question of what it might be like to live in a society where individual reputation is increasingly transparent.

*A. Some Thoughts About the Desirability of an
Information Strategy*

I try to limit the normative analysis in my scholarship, and this Article is no exception. To be sure, there are places where normative analysis seems appropriate, and I apply a rough welfarist cost-benefit analysis in those instances. That said, my primary objective here is to identify the ways in which technological and social developments will alter the foundational assumptions upon which the law is based and then examine how the law might respond to those developments. I do so for several reasons, mostly having to do with my desire to engage as many readers as possible and to help readers with conflicting normative priors understand the stakes at issue in particular public policy domains. I am not a moral philosopher, let alone a good one, so I see little reason why the reader should care about my views on the propriety of various forms of discrimination.

At the same time, apparent normative judgments seem to manifest themselves throughout this Article. For example, I take the position here that some forms of discrimination (e.g., statistical discrimination on the basis of race) are particularly undesirable and other forms of discrimination (e.g., statistical discrimination manifested as an unwillingness to hire ex-offenders, based on the supposition that an ex-offender is probably less trustworthy than an individual with no criminal record) are tolerable. Although I do, in fact, believe that discrimination on the basis of race is worse than discrimination on the basis of criminal history, it is not those priors that guide my analysis here. Rather, my analysis is based on the premise that policymakers in all jurisdictions have decided that racial discrimination is unlawful and lawmakers in most jurisdictions have concluded that criminal history discrimination is not. I take these judgments as a given, noting that nearly a dozen states have limited or even prohibited the reliance on prior convictions as a basis for denying employment but that other jurisdic-

tions have prohibited ex-felons from working for the state government.²⁵⁸ Once we recognize the choice between discrimination on the basis of race and discrimination on the basis of criminal history, it is difficult to imagine anyone favoring the former over the latter. In our world of imperfect enforcement of antidiscrimination laws, treating all forms of discrimination as equally problematic ensures social welfare losses.

One useful way of getting at this legal hierarchy issue is through the lens of two attributes that are presently correlated and that plausibly will prompt less consensus among readers than the race versus criminal history distinction. What is worse, discrimination on the basis of sexual orientation or discrimination on the basis of HIV status? HIV-positive individuals are protected against discriminatory treatment by the Americans with Disabilities Act,²⁵⁹ yet some employers may still prefer to keep HIV-positive individuals out of their workplaces, for reasons rational (e.g., concerns about rising group health insurance premiums) or irrational (stubborn concerns about the possibility of HIV transmission via casual contact). In the United States, the HIV virus historically has been disproportionately prevalent among homosexual men, with male-to-male sexual contact remaining the predominant method by which HIV-positive Americans contracted the disease.²⁶⁰ On reasonable assumptions, homosexual men are sixteen times as likely to have or ultimately contract the HIV virus as are heterosexual men.²⁶¹

Given the substantial stigma associated with HIV and the relatively high costs of providing health insurance for HIV-positive employees, it is plausible that homosexual men are victimized by statistical discrimination designed to keep HIV-positive individuals out of the workplace.²⁶² One possible strategy for combating this anticipated statistical discrimination would be to publicize the HIV status of every American. That would be a bad idea. As demonstrated by the Americans with Disabilities Act and a host of common law decisions treating HIV status as a “private fact” whose

²⁵⁸ See Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1637 (2004).

²⁵⁹ See *Bragdon v. Abbott*, 524 U.S. 624, 641–42 (1998).

²⁶⁰ See CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., HIV/AIDS SURVEILLANCE REPORT: CASES OF HIV INFECTION AND AIDS IN THE UNITED STATES AND DEPENDENT AREAS, 2005, at 10 (2007), available at <http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2005report/pdf/2005SurveillanceReport.pdf>.

²⁶¹ See Bruce Elmslie & Edinaldo Tebaldi, *Sexual Orientation and Labor Market Discrimination*, 28 J. LAB. RES. 436, 442 (2007).

²⁶² See *id.* at 442–43 (reviewing the literature). The authors' regression analysis casts some doubt on the statistical discrimination hypothesis, thanks to a finding of greater discrimination against gay men in blue-collar industries than in service jobs. *Id.* at 449–50. They wonder—quite provocatively—what would lead blue-collar employers but not white-collar employers to engage in statistical discrimination, and see employer-based animus as a more likely explanation for the diminished prospects of homosexual men in blue-collar jobs.

disclosure is highly offensive to a reasonable person,²⁶³ Americans have decided that HIV status itself ought to be a protected classification. By inference, decisions classifying individuals on the basis of HIV status may be nearly as bad as decisions classifying them on the basis of race. Indeed, the current absence of antidiscrimination protections for homosexuals (at least under federal law) suggests that disclosing HIV status to prevent statistical discrimination against gays would be undesirable.

But suppose a reader believes that the law has it wrong. Perhaps in this reader's view, discrimination on the basis of sexual orientation is worse than discrimination against those with HIV on the grounds of voluntariness, the centrality of a particular status to identity, historic animosity, comparative threats of violence faced, public health considerations, or some other basis. As long as the two forms of discrimination are not equally offensive, and the other considerations discussed in Part II are satisfied, it would be appropriate, under this framework, to publish individuals' HIV status as a means of alleviating the statistical discrimination that HIV-negative, openly gay men currently endure. So in a world where the law's present hierarchy of antidiscrimination interests is flipped, publishing individuals' HIV status would make sense.

Things would get more complicated if the law decided that all discrimination is equally bad. Formally, the law holds that discrimination on the basis of race is unlawful regardless of whether the victims are white males or African American females. When one looks more closely at the allocation of government and private resources, popular attitudes, and the like, a more nuanced structure emerges. Discrimination on the basis of race against African Americans is plainly regarded as worse than discrimination on the basis of race against Caucasians. African Americans and Native Americans are given particularly strong protection because of the prevalence and intensity of the historic disadvantages they have faced. Discrimination on the basis of religion is bad, but it has not exercised lawmakers or the public nearly to the same extent as discrimination on the basis of race. To equate two forms of discrimination is, as this Article shows, to remove an important antidiscrimination tool from the law's quiver.

B. Incidence

The discussion so far has been premised on the idea that it is desirable to help law-abiding African American males at the expense of African American males with criminal records. To defend that proposition, it is worth exploring the counterarguments—why someone might want to make it more difficult for private decisionmakers to sort among those with criminal records and those without criminal records. There are several possible

²⁶³ See, e.g., *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994); *Hillman v. Columbia County*, 474 N.W.2d 913, 922 (Wis. Ct. App. 1991).

justifications for this approach. First, we might expect that those with criminal records will be harmed more than those without criminal records will be helped. Accordingly, facilitating effective private sorting will make the group of job applicants as a whole worse off. Second, we might believe that there are powerful policy justifications for preventing sorting, perhaps because we believe that criminals who have served their time deserve a clean slate. Third, we might believe that the criminal justice system is essentially corrupt, in which case facilitating sorting merely enhances the unjust penalties meted out by an arbitrary government apparatus. Of these three arguments, only the last one has significant force. I will consider them in turn.

First, the available empirical evidence suggests that African American males are more likely to be hired by firms that conduct criminal background checks than by similarly situated firms that do not. Recall that Holzer and his co-authors found that those responsible for hiring appeared to overestimate the propensity of African American males to have criminal records and hired too few African Americans as a consequence.²⁶⁴ Publicizing accurate information about individuals' involvement in the criminal justice system should only adversely affect a group's available opportunities to the extent that decisionmakers (a) underestimate the prevalence of criminal records among members of a particular group or (b) are effectively prevented from engaging in statistical discrimination to sort out those with criminal records. The Holzer study undercuts both claims in the race-criminal history context. What's more, it is plausible that decisionmakers in employment settings are more risk averse with respect to erroneously hiring someone with a criminal background than they are about not hiring someone without a criminal background.²⁶⁵ If decisionmakers are risk averse in that way, but they are not particularly risk averse about the prospect of disparate impact antidiscrimination liability, then publicizing information about who has a criminal record may make the group that was previously the target of statistical discrimination better off as a whole. To the extent that we are concerned about the welfare of a group that is victimized by statistical discrimination, we should limit antisorting strategies to those settings in which employers are engaging in statistical discrimination while at the same time underestimating the correlation between a group classification and an undesirable characteristic.

Second, we might think that private sorting creates negative externalities, and justify keeping criminal histories obscure for that reason. For example, we might believe on policy grounds that the availability of employment opportunities for ex-convicts will discourage recidivism. Alternatively, we might have an abstract ideological commitment to the proposition that "everyone deserves a second chance" or, more narrowly,

²⁶⁴ Holzer et al., *supra* note 62, at 473.

²⁶⁵ Strauss, *supra* note 49, at 1641.

that “someone who has served his time has repaid his debt to society and should be able to start off with a clean slate.” These sorts of arguments sometimes find their way into the information privacy case law²⁶⁶ and academic literature.²⁶⁷ In this case, the appropriate question to ask is: What is the optimal strategy for preventing these negative externalities? The sensible way to answer this question is by drawing on the tools of optimal redistribution analysis.²⁶⁸

It would seem that a better way to facilitate the hiring of ex-convicts who deserve a second chance is through direct subsidies to employers who hire them. Such programs have been implemented, with the discontinued federal Targeted Jobs Tax Credit providing one example²⁶⁹ and the current federal tax code’s Work Opportunity Credit providing another.²⁷⁰ Because it is inexpensive for the government to identify ex-convicts, the government can efficiently ensure that only genuine ex-convicts benefit from the subsidized second chances.²⁷¹ Moreover, since the program is funded out of general tax revenues, the costs of promoting second chances is borne by taxpayers as a whole. Compare that regime to the status quo. We try to facilitate the hiring of ex-convicts by raising private decisionmakers’ costs of sorting between ex-convicts and those with no criminal records. As a result, many employers use statistical discrimination tools to penalize those without criminal records, and the ex-convicts who do get hired are likely to be members of groups whose baseline offending rates are low—white males and females of all races. Under the present system, only some of the beneficiaries of the existing “promote second chances through information obscurity” program are actually ex-convicts, and the costs of this program fall heavily on a group that includes other ex-convicts and innocent people who share demographic characteristics with ex-convicts. From an optimal

²⁶⁶ See, e.g., *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 41 (Cal. 1971); *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931).

²⁶⁷ See, e.g., Jacobs, *supra* note 243, at 406–12; Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *CRIMINOLOGY & PUB. POL’Y* 483, 498–99 (2006).

²⁶⁸ For an analysis of the distributive dimensions of antidiscrimination policy, see Mark Kelman, *Concepts of Discrimination in “General Ability” Job Testing*, 104 *HARV. L. REV.* 1157, 1182–98 (1991).

²⁶⁹ See George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit*, 11 *AM. J. TAX POL’Y* 225, 291–92 (1994).

²⁷⁰ 26 U.S.C. § 51(a), (d)(1)(C) (2000). For an overview of the history of tax credits and other subsidies, see TIMOTHY J. BARTICK, *JOBS FOR THE POOR: CAN LABOR DEMAND POLICIES HELP?* 207–16 (2001).

²⁷¹ It is more difficult to identify those ex-convicts who would have been hired despite the absence of a subsidy, however, which creates some inefficiency in tax programs. Recent economic scholarship suggests that the resulting inefficiency is manageable and that employment subsidies do result in many people obtaining employment who would not otherwise have gotten hired. See Aki Kangasharju, *Do Wage Subsidies Increase Employment in Subsidized Firms?*, 74 *ECONOMICA* 51, 52, 63–64 (2007).

redistribution perspective, there is little reason²⁷² to prefer our present approach to a tax credit.²⁷³

There is also an important role for private organizations to play in tackling this social ill. For instance, the San Francisco-based Delancey Street Foundation is a successful nonprofit whose mission is to reintegrate ex-felons into society²⁷⁴ by putting them to work in restaurants, moving companies, landscaping, and a host of other ventures.²⁷⁵ Delancey Street publicizes the nature of its workforce, and some customers patronize the foundation's businesses because they are attracted to its social objectives, whereas others just seem to like the food or service provided.²⁷⁶ Its workforce is "not just polite, but energetically polite, and there is a complete lack of foul language."²⁷⁷ The foundation perhaps benefits from the precariousness of its reputation in light of the attributes commonly associated with ex-convicts. It recognizes that it has more to lose than competitors do from unhappy customers, and it responds to consumer complaints accordingly. Its reputational vulnerability becomes a strength, a sort of bonding mechanism with its customers. Transparency for criminal histories need not create a caste system. But it might require ex-felons to bond themselves to entities like Delancey that use screening mechanisms, bonding mechanisms, training programs, and other strategies for regaining the trust of ordinary citizens and consumers.²⁷⁸

The final justification for obscuring information about criminal offenses is connected to disturbing inequalities within the criminal justice system. More precisely, if the criminal justice system is systematically biased against African Americans, Latinos, and men, then a system whereby the government publicizes the crimes of African Americans, Latinos, and men will worsen existing inequalities. This argument comes the closest to providing a compelling reason for suppressing criminal history information about individuals. If criminal punishments are indeed meted out arbitrarily to members of minority groups, then a Rawlsian should reject the proposal that I have advanced,²⁷⁹ though a welfarist should not.²⁸⁰ To a Rawlsian,

²⁷² For further discussion, see *infra* text accompanying notes 286–289.

²⁷³ Notably, this sort of analysis is absent from Steven Raphael's recent essay on the subject. See Raphael, *supra* note 70.

²⁷⁴ See Delancey Street Foundation, Our Story, <http://www.delanceystreetfoundation.org/ourstory.php> (last visited Aug. 3, 2008).

²⁷⁵ See Delancey Street Foundation, Our Enterprises, <http://www.delanceystreetfoundation.org/enterprises.php> (last visited Aug. 3, 2008).

²⁷⁶ For a profile, see Andrew Friedman, *The Prison that Thinks It's a Kibbutz*, JERUSALEM REP., Jan. 14, 2002, at 32, available at http://www.delanceystreetfoundation.org/pdf/2002/jeru_011402.pdf.

²⁷⁷ *Id.*

²⁷⁸ I thank Paul Schwartz for suggesting that I incorporate a discussion of Delancey Street into my analysis.

²⁷⁹ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 100–02 (1971) (discussing the difference principle).

some form of reputational affirmative action would be necessary to render a search light strategy desirable in the context of the employment of those with criminal records.²⁸¹

If we accept a weaker version of the “arbitrary criminal justice system” thesis, then a welfarist certainly need not reject the search light approach to criminal history information. More precisely, even in a nation whose criminal justice system discriminates systematically against African American males, there may be important, merit-related differences between those African American males who have criminal records and those who do not. Some of the former will be innocent, but surely virtually all of the latter will be innocent. Indeed, because the criminal justice system is biased against African American males, those African American males who nevertheless avoid run-ins with the law should be particularly desirable employees in the market for jobs where trustworthiness is important and the applicant pool contains a large number of untrustworthy job seekers. Why shouldn’t we help decisionmakers identify these particularly desirable individuals with greater ease?

C. *Social Meaning*

It is possible to critique the optimal redistribution analysis put forth above while staying within a welfarist framework. The analysis would proceed as follows: Outright prohibitions on discriminatory conduct are preferable to subsidies for nondiscriminatory conduct because the former will instill or strengthen antidiscrimination norms and the latter will not. By this logic, the implementation of prohibitive discrimination policies will eventually change the preferences of the populace, making the discriminatory impulse rarer in the long run.²⁸² A policy that permits discrimination but subsidizes employment of the group discriminated against, on the other hand, might signal tacit approval of the discriminatory conduct at issue, perhaps making discrimination more socially acceptable—and hence more prevalent—in the long run.²⁸³

²⁸⁰ This discussion also brings to mind a broader question, which is the relationship between the growth of reputational infrastructure and resource inequality. I discuss that question in Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 *YALE L.J.* 1472, 1506–09 (2007).

²⁸¹ The question of whether there ought to be reputational affirmative action is a fascinating one that I do not take up here. Jonathan Zittrain’s new book contains a provocative but brief discussion of reputational bankruptcy. See ZITTRAIN, *supra* note 257, at 216–17. Both reputational affirmative action and reputational bankruptcy have a downside, which is that by decreasing the reliability of the personal information available to people, they encourage reliance on other strategies for sorting, such as statistical discrimination.

²⁸² See Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 965–67 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2026–29 (1996).

²⁸³ It is worth considering Christine Jolls’s creative account of how antidiscrimination law might undermine implicit bias by increasing the number of minorities in leadership positions, which experi-

The story has intuitive appeal and the hypothesized effect is plausible, but there are equally plausible stories we can tell that will point us in the opposite direction. In essence, the social meaning argument for prohibitions on discriminatory conduct is analogous to the social meaning argument for command-and-control environmental regulation rather than market-based approaches like pollution taxes and tradable emissions permits. In that context, Michael Sandel has hypothesized that trying to regulate greenhouse gasses through any strategy other than command-and-control will weaken environmental norms.²⁸⁴ In response, I have argued that the available empirical evidence suggests precisely the opposite—putting a price tag on something like pollution causes individuals to value previously undervalued environmental resources, weakens the impetus to flout laws that are perceived to be draconian, and can actually strengthen environmental norms.²⁸⁵

The question of whether tax subsidies for firms that employ ex-convicts are desirable is an empirical one on which there is conflicting evidence. A widely cited 1985 study by Gary Burtless suggests that welfare-recipient job seekers whose employment was subsidized fared poorly in the labor market because the presence of the vouchers signaled to employers that the applicants were on welfare and employers otherwise would have had difficulty discerning who was a welfare recipient.²⁸⁶ As a result of this research and important subsequent legal scholarship by Anne Alstott, some legal scholars have taken a dim view of targeted tax credits.²⁸⁷ Yet more recent work suggests that the program Burtless studied was designed so as to maximize the welfare stigma²⁸⁸ and that well-designed tax incentives to employ disadvantaged workers can be effective at increasing their employment.²⁸⁹ And perhaps more to the point, Burtless, Alstott, and other

mentally seems to reduce implicit bias among those who come into contact with diverse leaders. See Jolls, *supra* note 56, at 82–85.

²⁸⁴ Michael Sandel, Op-Ed., *It's Immoral to Buy the Right to Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

²⁸⁵ Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1284–91 (2000).

²⁸⁶ Gary Burtless, *Are Targeted Wage Subsidies Harmful? Evidence from a Wage Voucher Experiment*, 39 INDUS. & LAB. REL. REV. 105, 112 (1985); see also John H. Bishop & Suk Kang, *Applying for Entitlements: Employers and the Targeted Jobs Tax Credit*, 10 J. POL'Y ANALYSIS & MGMT. 24, 41 (1991) (noting the stigma problem and concluding that the Targeted Jobs Tax Credit is inefficient because most of the employees who are hired and whose employers receive a subsidy would have been hired anyway).

²⁸⁷ See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 1033–45 (1999).

²⁸⁸ BARTICK, *supra* note 270, at 220–24.

²⁸⁹ See *id.* at 226–48; Michael Gerfin et al., *Does Subsidised Temporary Employment Get the Unemployed Back to Work? An Econometric Analysis of Two Different Schemes*, 12 LABOUR ECON. 807, 820–23 (2005); Lawrence F. Katz, *Wage Subsidies for the Disadvantaged*, in GENERATING JOBS: HOW TO INCREASE DEMAND FOR LESS-SKILLED WORKERS 21, 40–42, 46–49 (Richard B. Freeman & Peter Gottschalk eds., 1998); Harry J. Holzer et al., *Can Employers Play a More Positive Role in Prisoner Re-*

contributors to this field have not explored the troubling possibility that in the absence of a tax subsidy program that helps employers sort between the disadvantaged and the nondisadvantaged, employers will instead sort between white and black.

A final and related question concerns the social meaning of government information policy. When the government chooses to publish information about attribute *A* but not attribute *B*, the populace may understand this policy as an indication that attribute *A* is relevant or salient but attribute *B* is not.²⁹⁰ This is part of a plausible critique of Megan's Laws, which disclose information about sex offenders' criminal histories and whereabouts without disclosing the same information about murderers who have completed their sentences, causing communities to overreact to the presence of some ex-offenders and underreact to the presence of others.²⁹¹ The theoretically attractive solution to this problem is to release as much information as possible, relying on private actors to distill this information into a format that consumers can readily use. But if individuals respond irrationally to such information or use it in ways that further their self-interest at the expense of collective welfare, then dissemination should be carefully structured.²⁹² If disclosure cannot be structured so as to ameliorate these dynamics, publication may prove undesirable altogether.²⁹³

D. Price Discrimination

The greater availability of consumers' personal information enables forms of price discrimination that would not have been feasible prior to the reputation revolution. Price discrimination can take multiple forms, but the classic example is of "a firm charging multiple prices for the same good where the difference in price is not attributable to a corresponding difference in cost."²⁹⁴ To take a short-lived but notorious example, Amazon.com began using information from Internet cookies to engage in dynamic pricing. Loyal customers who frequently bought from Amazon were charged higher prices and customers who were directed to Amazon from compari-

entry? 9–10 (Mar. 20, 2002) (unpublished manuscript), available at <http://www.urban.org/publications/410803.html>; cf. Kangasharju, *supra* note 271, at 51.

²⁹⁰ Cf. Stephen Morris & Hyun Song Shin, *Social Value of Public Information*, 92 AM. ECON. REV. 1521, 1522, 1529–32 (2002) (suggesting that under certain circumstances, revealing public information may be undesirable because it causes people to underweight private information they already possess).

²⁹¹ See Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 380 (2008).

²⁹² See *supra* text accompanying notes 222–223.

²⁹³ See Cuff et al., *supra* note 10, at 33.

²⁹⁴ Kathleen Carroll & Dennis Coates, *Teaching Price Discrimination: Some Clarification*, 66 S. ECON. J. 466, 467–68 (1999). Carroll and Coates also note that price discrimination includes "the practice of a firm charging the same price for all units of the same good when there are cost variations in supply." *Id.* at 468.

son-shopping websites were charged less.²⁹⁵ Amazon dropped the practice in the face of significant customer complaints.²⁹⁶ Amazon's reliance on proxies like repeat purchases or use of bargain-hunting websites necessarily entailed lumping together groups of consumers—a practice that the economics literature refers to as third-degree price discrimination.²⁹⁷ Amazon could extract much more consumer surplus if it was able to charge prices that perfectly reflected each consumer's willingness to pay for a product—what economists call first-degree price discrimination.²⁹⁸ Put another way, in the absence of perfect information about every individual, price-discriminating firms are required to statistically discriminate in their pricing policies.

The widespread availability of personal information about individuals' behaviors, preferences, and reputations enables firms to shift toward behavior that more closely approximates first-degree price discrimination.²⁹⁹ Provided that selling firms have some market power, can limit arbitrage, and are marketing to consumers possessing varied price elasticities of demand, price discrimination will enable those firms to capture what would otherwise be consumer surplus under a fixed pricing model.³⁰⁰

Price discrimination is prohibited by law only where it adversely affects consumer welfare.³⁰¹ This is as it should be. The effects of price discrimination, unlike the effects of racial discrimination, are ambiguous. Perfect first-degree price discrimination will enable a firm to increase output, improving social welfare, but at the cost of a diversion of surplus from consumers to producers.³⁰² By contrast, the welfare effects of third-degree price discrimination are quite context-dependent.³⁰³ Moreover, even the distributional consequences of price discrimination are indeterminate. While price discrimination necessarily shifts surplus away from consumers, it also enables poor consumers who would otherwise be unable to afford a product the opportunity to obtain it at a reduced price. For that reason, price discrimination often entails a progressive redistribution of resources.³⁰⁴ In short, the desirability of price discrimination is ultimately an empirical

²⁹⁵ Anita Ramasastry, *Web Sites Change Prices Based on Customers' Habits*, CNN.COM, June 24, 2005, <http://www.cnn.com/2005/LAW/06/24/ramasastry.website.prices/>.

²⁹⁶ See William W. Fisher III, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1, 11–12 (2007).

²⁹⁷ Carroll & Coates, *supra* note 294, at 469–70.

²⁹⁸ *Id.* at 468–69.

²⁹⁹ Andrew Odlyzko, *Privacy, Economics, and Price Discrimination on the Internet*, in ECONOMICS OF INFORMATION SECURITY 187, 189–93, 207–08 (L. Jean Camp & Stephen Lewis eds., 2004).

³⁰⁰ Carroll & Coates, *supra* note 294, at 470–471.

³⁰¹ See Matthew A. Edwards, *Price and Prejudice: The Case Against Consumer Equality in the Information Age*, 10 LEWIS & CLARK L. REV. 559, 575–83 (2006).

³⁰² Carroll & Coates, *supra* note 294, at 472.

³⁰³ *Id.*; Fisher, *supra* note 296, at 22.

³⁰⁴ Fisher, *supra* note 296, at 25.

question with varied answers in different contexts. Sometimes, the existing empirical work suggests that the benefits of price discrimination outweigh the harms.³⁰⁵ We simply do not know the welfare or distributional consequences of facilitating price discrimination in e-commerce generally, in landlord-tenant markets, in immigration decisionmaking, or in most of the other settings discussed herein. But we do know that price discrimination considerations should be an essential part of the calculus in determining when search lights or curtains are desirable.

E. The “Am I Hot or Not?” Society

In October of 2000, James Hong launched a strange new website called AmIHotorNot.com.³⁰⁶ In the site’s first month of operation, more than 20,000 individuals submitted photographs (of themselves, typically) to the site so that other users could rate their physical attractiveness on a scale of 1 to 10.³⁰⁷ Although many Americans scratched their heads about the website’s success, it was a viral hit with teenagers and young adults, and remains online and popular today, though it has morphed into some combination of a beauty rating site and an Internet dating site.³⁰⁸

In the intervening years, cultural trends have suggested at least a limited embrace of the “rate me” mentality exemplified by AmIHotorNot. Millions of Americans have begun blogging about their personal thoughts, sharing their homemade videos on YouTube, and dreaming about competing on American Idol, which is in the midst of a strong run as the most popular television show in the United States.³⁰⁹ Not long before a scandal involving a referee’s alleged involvement in game-fixing, N.B.A. Commissioner David Stern bragged that professional basketball referees were the “most ranked, rated, reviewed, statistically analyzed and mentored group of employees of any company in any place in the world.”³¹⁰ Those of us in the academy can relate to these referees, as we have come to expect that our teaching will be evaluated by students at the end of a course and perhaps via websites like RateMyProfessor.com. In addition, of course, our writing will be evaluated by tenure committees, lateral search committees at competitor schools, and, inevitably, workshop attendees. Being evaluated unfavorably always stings, but one premise of this Article is that being evaluated unfavorably on the basis of individuated criteria stings less and is less socially

³⁰⁵ *Id.* at 27.

³⁰⁶ Matt Richtel, ‘Face Time,’ with a Twist, N.Y. TIMES, Oct. 26, 2000, at G7.

³⁰⁷ *Id.*

³⁰⁸ See Hot or Not, <http://www.hotornot.com> (last visited Aug. 3, 2008).

³⁰⁹ See Melanie McFarland, ‘American Idol’ Juggernaut Is No Better—and No Less Popular, SEATTLE POST-INTELLIGENCER, Jan. 15, 2008, at C1.

³¹⁰ Alan Schwarz & William K. Rashbaum, Referee Is the Focus of a Federal Inquiry, N.Y. TIMES, July 21, 2007, at D1.

harmful than being evaluated unfavorably on the basis of membership in a protected group.

What are the effects of this observation on people? There is a slowly growing empirical literature that addresses this question. Employees in many industries face constant evaluation by coworkers, customers, and supervisors. By way of example, sociologists have explored the effects of being a call center employee whose actions are constantly under surveillance. Insofar as business-related calls were being monitored and recorded, they prompted little employee resistance.³¹¹ Similarly, when researchers at Stanford began studying the effects of publishing feedback generated by speed-dating encounters between opposite-sex experiment subjects, they found some surprising results.³¹² The researchers matched up pairs of people and asked them to provide feedback about their fellow research subject's behavior in the speed-dating exercise. In some variations, the feedback was kept private, and in other circumstances, each partner's feedback about the other partner was publicized. Moreover, in some variations, the feedback included substantive comments, whereas in other variations it consisted entirely of numerical scoring.³¹³ Participants were asked to assess the extent to which they felt monitored, conformist, and self-conscious in the various experimental set-ups. They reported that having numerical feedback about them made public, but without any basis for the feedback, felt most invasive and conformist, and made them most self-conscious.³¹⁴ Feedback that was shared with both parties was preferred, and numerical feedback accompanied by substantive explanations for the scores was viewed as far more acceptable than numerical feedback alone.³¹⁵ If this result is broadly generalizable—and some research in very different contexts suggests at least parts of it may be³¹⁶—then it suggests that ordinary people may be willing to embrace ubiquitous feedback systems, provided they are sufficiently transparent and universal.

There is, of course, an important difference between the AmIHotorNot submitters, small-town residents, call center employees, speed daters, referees, and professors whose activities are evaluated frequently and those whose activities are rarely, if ever, subject to evaluations. The difference is consent. For the reasons identified above, the option of removing oneself from the reputation nation will be more of a theoretical possibility than a

³¹¹ Employees were more concerned about management unintentionally listening to personal calls. See Gloria Lankshear et al., *Call Center Employees' Responses to Electronic Monitoring: Some Research Findings*, 15 WORK EMP. & SOC'Y 595, 601–04 (2001).

³¹² Erica Ann Robles et al., *Being Watched or Being Special: How I Learned to Stop Worrying and Love Being Monitored, Surveilled, and Assessed*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 831, 833–35 (Rebecca Grinter et al. eds., 2006).

³¹³ *Id.* at 833–34.

³¹⁴ *Id.* at 836–37.

³¹⁵ *Id.* at 837.

³¹⁶ See, e.g., Steve Mann et al., *supra* note 11, at 346–47.

practical one. If an individual chooses to opt out of using reputation-tracking technologies, then many people understandably will assume the worst about that individual.³¹⁷ Privacy theorists have long argued that protecting privacy is essential so that individuals can relax,³¹⁸ experiment with different personalities to figure out who they truly are,³¹⁹ or develop the insights that will make them more productive citizens.³²⁰ True enough, the private sphere of the home will remain a respite largely free of rating, and there will be market demand for zones of privacy where everyone will agree to suspend the use of rating technologies—it is easy to imagine the proprietors of the Las Vegas strip going this route, though it seems likely that they would first establish minimum reputational requirements for entry into the reputation-free zone. The question, though, is whether those zones of privacy are sufficient to prevent the societal harms to which privacy theorists have pointed. In line with the peculiarities of Americans' attitudes toward privacy generally,³²¹ and the well-recognized dangers of surveillance in one-party states,³²² the answer may well hinge on the extent to which the state can be prevented from utilizing widely available personal information to identify, intimidate, or otherwise disfavor members and supporters of the political opposition.

CONCLUSION

The technological tools that can curtail anonymity and obscurity in the public sphere already exist or will soon exist. During the next decade, the collectivity of consumers will get to decide whether and to what extent to accept these technologies. The analysis in this Article is premised on the intuition that such technologies will be embraced by consumers to a substantial degree, but there is another way to read this Article. My argument here can also be read as an exploration of some of the unrecognized costs and benefits that will flow from enhanced reputational infrastructure. The reputation revolution envisioned here ought to cause us to revise our thinking about much of the law, and this Article identifies some of the challenges that it will pose for property law, antidiscrimination law, health law, insurance law, immigration law, and consumer protection law. This list is by no means meant to be exhaustive, and one ambition of this Article is to en-

³¹⁷ This account helps explain why even people with poorer than average reputations would continue to opt-in to the system. Participation would provide a means for such an individual to separate himself from those with horrendous reputations. Even people whose reputational profiles include horrendous past acts might still have some incentive to improve their reputation in the future, so as to separate themselves from the unredeemable sociopaths at the very bottom of the reputation hierarchy.

³¹⁸ See, e.g., ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967).

³¹⁹ See, e.g., Cohen, *supra* note 22, at 1373.

³²⁰ See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 38–78 (1958).

³²¹ See generally Whitman, *supra* note 116.

³²² See, e.g., *THE LIVES OF OTHERS* (Sony Pictures 2006).

courage readers to assess how other bodies of law might need to be revised and reassessed in light of possibly looming technological developments.

Readers might take any number of points away from the preceding discussion, but let me conclude by underscoring the ones that strike me as the most important. First and foremost, information policy is an underutilized and undertheorized tool for the state to influence the behavior of private parties. This Article suggests that there will be settings in which the government can reduce the prevalence of unlawful discrimination by publicizing previously private information about individuals. For example, the best available empirical evidence suggests that publicizing criminal history information could reduce racial discrimination in the employment of blue-collar and service workers. Pushing the point further, the Article wonders whether a similar strategy might reduce the prevalence of statistical discrimination in the prescription of narcotics and the pricing of automobile insurance premiums. At the same time, the Article reminds us of the pitfalls of this strategy in instances where government research into individuals' backgrounds and subsequent dissemination of the information gleaned might prompt segments of the populace to rely on undesirable self-help strategies. Jury duty may well be one such context. Government information policy also may be a poor strategy in those settings where irrational discrimination is more prevalent than rational discrimination, where traditional law enforcement deters discrimination quite well, or where there are significant social benefits that arise when the poor treatment of secretly privileged people sparks a useful debate on matters of distributive justice.

Second, optimal public policy design must take account of the availability of a private market for reputation information. In regulating the landlord-tenant market, protenant reformers failed to anticipate the reputational repercussions of insisting on summary proceedings as the sole avenue for evicting tenants. In the immigration context, a comparative analysis of reputational infrastructure in the developed and developing world demonstrates the possible appeal of a bifurcated immigration policy—one that focuses on preentry screening for residents of developed nations and postentry surveillance for residents of nations with poor reputation infrastructures. And in the consumer protection sector, blindness to the benefits of reputation monitoring services might render the law too quick to encourage private litigation and—more ominously—too eager to impose liability on valuable services that provide cheaper, more efficient, and maybe even more satisfying mechanisms for resolving and deterring garden-variety disputes. The law must not impose defamation liability on reputation rating sites without first exploring the powerful social and technological correctives that may be better suited to the reputation rating world than they have been to the traditional print and broadcast media.

Third, and finally, the reputation revolution presents a number of thorny tradeoffs that legal scholars and policymakers should begin to discuss. Should society create a hierarchy of unlawful discrimination, so that

it tolerates government actions that reduce race discrimination by facilitating, say, criminal history status discrimination? What effects will information-based government antidiscrimination policies have on related social norms? Can a society obtain the benefits of substantial surveillance (private citizens watching each other and disclosing what they see) without encountering the threats that arise from excessive surveillance (the state watching its citizens)?³²³ These are pressing questions without obvious answers, though this Article has sketched out some initial responses.

While many readers will recoil instinctively at some of the scenarios described herein, this Article has tried to add texture to the imminent debate over these issues by asking whether we might also want to recoil at some of the pathologies generated by environments in which individual reputation information is in short supply. Most of us live in such an environment, though that is changing quickly, and as a consequence we seem to have more unlawful employment discrimination than is necessary, more distrust between doctors and patients than is appropriate, immigration policies that are less sensible than they should be, and dispute resolution procedures for garden-variety disagreements that are more cumbersome and frustrating than they ought to be. Policymakers cannot catch up with the dramatic changes in the information environment of developed countries unless they fully appreciate all the strategies they have at their disposal. A world of increasingly ubiquitous personal information presents daunting new challenges across our economic and social environments, but it offers up a strikingly useful set of policy tools as well.

³²³ For a discussion, see Mann et al., *supra* note 11, at 338, 346–48.