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Table of Contents

Save the Law of Supply and Demand <i>M. Northrup Buechner</i>	3
What Policy Mix to Bring Down the Natural Rate of Unemployment? <i>Robert J. Derrell</i>	12
An Economic Cost Analysis of Management of Lateral Epicondylitis: A Contrast of Perspectives <i>Anthony Fillmore, Kyongsei Sohn, Thomas F. Breen, and Edward Calkins</i>	19
Monsters, Misogyny, and the Market: The Political Economy of Violence Against Women in Nineteenth Century Fiction <i>Johanna Mitchell, Katherine Hadden, and Jeannette Mitchell</i>	32
Economic Consequences Stemming from the Doctrine of Judicial Immunity <i>Anthony Pappas</i>	41
Employed or Exploited? Financial and Legal Implications of the Uber Case <i>Gwen Seaquist, Alka Bramhandkar, and Marlene Barken</i>	48

Save the Law of Supply and Demand

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ABSTRACT

Graduate economics departments have largely abandoned the law of supply and demand (henceforth, The Law). Indeed, it does not appear in most graduate microeconomics textbooks. (See, e.g., Jehle and Reny 2011; Kreps 2013; Mas-Colell, Whinston, and Green 1995; Riley 2012. Nevertheless, The Law continues to be taught in undergraduate economics programs, and it is accepted as the fundamental law of price throughout the world. This paper explains why The Law has vanished from graduate economics, and suggests a reinterpretation of The Law as a basis for bringing it back into the corpus of economic theory.

I. THE LAW OF SUPPLY AND DEMAND IN MODERN ECONOMIC'S THEORY OF PRICE

A. MARKET STRUCTURE

The theory of price in modern economics revolves around the division of the economy into four types of market or industry, each with its own theory of price. The distinguishing feature of these markets is the *structure* of the industry. "Market structure" is the concept at the root of modern economics' theory of price.

There are two aspects to market structure, as it is understood in modern economics: (1) the number and relative size of the firms producing a product, and (2) the difference in the products produced by the firms in the industry. On this basis, modern economics identifies four types of market or industry: (1) pure or perfect competition, (2) monopolistic competition (3) oligopoly, and (4) pure monopoly. I will consider only the first three, which constitute more that 99% of the economy.

B. PURE COMPETITION

Pure competition consists of many, many firms, all of them producing an identical product. In the standard interpretation, the distinguishing feature of pure competition is *powerlessness*. This powerlessness consists of the inability of any individual firm to control the price for its product. No firm sets its price. Instead, the price is given to the firm by the impersonal forces of the market; that is, by the conditions of supply and demand.

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Modern economists hold that The Law determines price only in purely competitive markets. This is because a supply schedule and a supply curve make sense only in pure competition where the price is given to sellers by some outside source. Consequently, a schedule can be drawn up of the quantity the firm would choose to sell at each of a series of prices that might be given to it. When a firm sets its own price, a supply schedule is meaningless because the firm does not decide what quantity to produce and sell at a given price. Rather, in the standard interpretation, the firm must choose the profit maximizing price and quantity simultaneously.

In pure competition, nobody on the demand side has any control over the price either. Each buyer is like a customer in a retail store; the price is given to him and his choice is only whether or not to pay it.

The difficulty with this interpretation of The Law is that, in a purely competitive market, there is no way to explain how the price comes to be the equilibrium price. If neither the buyer nor the seller has any control over the price, if neither of them can set a price or give a price or select a price or make a price, there is no way to explain how the price comes into existence. If there is no way to explain how the equilibrium price comes to be, there is no basis for believing that the price that does come to be will be the equilibrium price.

Nevertheless, undergraduate economics' professors (and texts) still teach The Law to their students. The standard argument is this: Suppose the market price exceeds the equilibrium price. Then the quantity supplied exceeds the quantity demanded, firms are producing more goods than they can sell, inventories are accumulating, and every firm has a motive to cut its price in order to increase sales. Consequently, it is said, firms will bid down the price to the equilibrium price where they are able to sell all they want to sell. A similar argument is made for below equilibrium prices, though in such cases, it is often said that consumers will bid up the price in the face of a shortage.

This argument ignores the defining condition of pure competition, that neither the firm nor its customers have any control over price. A firm bids its price down by setting a lower price. This requires that the firm has the *power* to lower its price, which means that the price is *not* given to the firm. Similarly, consumers can bid up a price by offering a higher price, but this requires that consumers have the power to offer a higher price, that they do not take the price as given and outside their control. In applying The Law, the only way to explain how the equilibrium price is established is to ignore the basic premise of pure competition, and assume that firms have control over price.

If instead, we adhere to the actual meaning of pure competition, the meaning that makes it possible to define a supply curve, then in principle, there is no way to explain how or where the price is set, because no one sets it. This difficulty has been recognized by a number of economists, some of them prominent, e.g., Arrow 1959, 41-43; Fisher 1983, 12, 21, 47, 49; Fisher 1987, 26-7; Guerrien 2002; Hahn 1987, 137; High 2001, xxxviii; Janssen 1993, 111; Mas-Colell 1980, 121; Scitovsky 1971, 15. Of these, only Fisher and Guerrien see this problem as fundamental. "[I]t is not too strong to say that the entire theory of value is at stake," Fisher says (1987, 27).

The modern interpretation of The Law is built on a logical contradiction. In order to derive a supply curve, the firm can have no control over the price it receives for its product. But if no firm has any control over its price, there is no way to explain the origin of the price. The implications of this contradiction are not trivial.

Economists say that at the market price, the quantity demanded will equal the quantity supplied, but they cannot say how or why such a price will come to be established in the market. Nor can they say how or why the price will change when either demand or supply changes. In modern economics, The Law is the basis for holding that there will be neither shortages nor surpluses at market prices, but The Law gives no *theoretical* basis for holding that prices have that attribute.

It is absurd, but The Law is the closest thing modern economics has to a general theory of price. It is absurd because The Law is restricted to pure competition, which, if it could be said to exist at all, would be limited to agricultural markets, which account for something like one percent of aggregate output. A general theory of price that explains (actually, that does not explain) the price of one percent of the economy's output is not a general theory.

C. MONOPOLISTIC COMPETITION AND OLIGOPOLY

Economists think of monopolistic competition as consisting of many, many firms producing slightly different products. Monopolistic competition has as many firms as pure competition, but the product of each firm is a little different from the product of every other firm. Retail stores are often given as examples of monopolistically competitive markets.

According to the theory of monopolistic competition, each firm sets its own price, but the firms are *independent*, that is, neither the price nor any other competitive action taken by one firm can affect the quantity sold by other firms. The reason for this, it is alleged, is that there are so many firms in the market that a change in price by any one of them will not have any noticeable effect on any of the others.

In contrast, an oligopoly has just a few firms producing the same product or different products. The defining characteristic of oligopoly is a small enough number of firms so that the competitive actions taken by one firm (e.g., cutting price, improving quality, improving service) may affect the quantity sold by other firms and cause them to undertake similar actions in response. Economists call this characteristic *interdependence*. Its consequence is a condition of rivalry among the firms in an oligopoly. By tradition, this market condition usually is ascribed to national markets dominated by a few large firms, such as the automobile, steel and aluminum industries.

Modern economics' conception of market structure, as reflected in the preceding paragraphs, is invalid. It is not true that retail firms are independent of one another. The relevant market for such firms is local, not national, and within their local markets, dry-cleaners, drugstores, groceries, and shoe stores are

interdependent. (This point is touched on by Silberston 1970, 557.) Each dry-cleaner knows approximately what prices its competitors are charging, and the quality of their work. Each firm can and does respond when its competitors change those conditions. Each firm is likely to give some thought to how its competitors will respond if it initiates a change in quality or price. *There are no price-setting firms whose choice of price is independent of the price charged by their competitors.* There is nothing in reality that corresponds to the economic model of monopolistic competition. (See Cohen and Cyert 1965, 225-6, for exactly this point. Also see Hall and Hitch 1939, 21 and Blaug 1978, 415.)

The markets that traditionally are called monopolistically competitive are actually oligopolistic. Local retail firms are just as interdependent as the giant firms that traditionally are designated oligopolies. Probably 95 per cent of markets in reality are oligopolistic in the sense that a change in price by one firm can affect the sales receipts of other firms and cause them to change their prices too. Logically, the theory of price for monopolistic competition and oligopoly must be the same theory. What is that theory?

D. MODERN ECONOMICS' THEORY OF PRICE FOR OLIGOPOLY

Economists generally recognize that modern economics has no theory of price for oligopoly. Given the ubiquity of oligopoly in the real world, the significance of this hiatus in price theory can hardly be overstated. The cause, it is alleged, is the interdependence of oligopolistic firms. Because oligopolies set their prices, no supply curve can be defined, and interdependence makes it impossible to define a demand curve as well.

Let us elaborate this problem of the demand curve. A firm's demand curve gives the schedule of quantities the firm can sell at each of a series of prices. It tells us what quantity the firm's customers will buy (demand) at each price the firm might charge. The problem is that in an oligopoly, the quantity a firm can sell at each price is dependent on what prices its competitors charge at that price.

For example, if Ford Motors lowers the price of its cars, General Motors, Chrysler, Toyota, Nissan, etc. may match its reduced price, or they may ignore it, or they may undercut the lowered price, or they may even raise price instead. (In a research paper, a student reported a dry cleaner who raised his price in response to a price reduction by a competitor.) Since there are several competitors, they may all do something different, for example, GM matching the price reduction, Chrysler ignoring it, Toyota undercutting it, Nissan raising price. And they may do each of these things in different degrees. This means that there are an unlimited number of alternative quantities that Ford Motors could sell at a given price, depending on the prices its competitors charge at the same time. In principle, there is no way to know in advance how competitors will respond to a change in price. Thus, there is no way to predict with any degree of certainty what quantity the firm will be able to sell at any price other than the current price.

The current price/quantity combination could be taken as one point on the firm's demand curve. But it is impossible to identify another price/quantity combination without a change in price. In fact, for all intents and purposes, oligopolistic firms do not have demand curves. Since they do not have supply curves either, neither demand nor supply apply to oligopolistic firms and The Law is moot.

This is the issue on which the theory of oligopoly has foundered. For the preceding reasons, modern economists believe that we are helpless to derive a price theory for oligopoly. All we can do, and all that has been done, is to derive specific, narrow theories on the basis of either (1) restrictive assumptions about the response of competitors (e.g., the kinked demand curve), or (2) assumptions that are true only in narrowly defined sub-markets and time periods.

Economists responded to this dead end by adopting game theory, and game theory has dominated graduate economics for about the last forty years. By now, most of the value of game theory for understanding price has been drained out of it, but no general theory of prices in oligopolies has appeared.

It is totally unrecognized by modern economists, but the foregoing represents a catastrophe for the profession. Economists cannot use The Law to explain the functioning of oligopolistic firms, and such firms constitute 95 percent of the economy. Ideas have consequences. The pillar supporting market prices has been pulverized in theory, and it is only a matter of time before it is pulverized in the public mind as well.

II. THE LAW OF SUPPLY AND DEMAND REFORMULATED

The conception of supply as a schedule is coherent only in pure competition—where the theory of price in which it participates is incoherent. Demand as a schedule has been ejected from the theory of price in oligopoly because oligopolistic firms do not have demand schedules.

To rescue the law of supply and demand from oblivion, the concepts of supply and demand as schedules have to be abandoned. Both supply and demand have to be thought of the way the classical economists thought of them (see Adam Smith's theory of price), and the way businessmen think of them: as simple concrete quantities—as the quantity demanded and the quantity supplied per time period. In other words, any distinction between quantity demanded and demand has to be given up, and likewise for quantity supplied and supply.

Defined as the quantity demanded, demand can be applied to any real world firm or industry, including oligopolies. An increase in demand should be defined as an increase in the quantity demanded, and a decrease in demand as a decrease in the quantity demanded. Such changes can be caused by a change in the price of the product, or changes in the prices of competing products, or changes in the prices of complementary goods, or changes in income of the customers, or changes in tastes, or changes in any number of other things. The important point is that, when demand is understood this way, there is no difference in the effect on demand of changes in price and changes in other factors.

Defined as quantity supplied, supply also is meaningful and applicable across the economy. Its restriction to pure competition is ended. An increase in supply is defined as an increase in the quantity supplied and a decrease in supply is defined as a decrease in the quantity supplied. Like changes in demand, changes in supply can be caused by changes in price, but also by all the factors that traditionally are interpreted as shifting the supply curve.

A. THE LAW OF DEMAND

The law of demand says that an increase in price will reduce the quantity that people want to buy and a decrease in price will raise the quantity people want to buy. This law is true and important. It has virtually universal applicability across the economy. The few alleged exceptions are inconsequential. But the law of demand does *not* say that every firm has a schedule of quantities it can sell at various prices, and the proposition that firms rely on such schedules cannot be supported.

Contrary to modern economics, there is no necessity to conceive of the law of demand as a schedule or a curve or a mathematical formula. More important, conceiving of the law in that way nullifies its value. The law of demand is entirely intelligible as it stands, as expressed in the first sentence of this section, and as the classical economists understood it. In that form, it is invaluable in understanding and explaining many economic phenomena (see Alchian and Allen 1972).

B. THE LAW OF SUPPLY

The law of supply says that at higher prices, firms want to produce and/or sell larger quantities and at lower prices, firms want to produce and/or sell smaller quantities. *There is no such law.* In the economy that exists, the only way a price can rise is if the firm raises it. If a firm raises its price, the law of demand says the firm can sell less and consequently, the firm will want to produce less, not more. Blinder et al (1998) found that 89% of the firms in the economy have constant or falling unit costs as they increase output. What keeps them from increasing output is not a higher price.

To apply The Law to the real economy, we have to abandon the law of supply, in addition to the distinction between supply and quantity supplied.

C. THE LAW OF SUPPLY AND DEMAND

What is The Law that follows from the preceding? Now that we have concepts of supply and demand that are meaningful for firms, markets, and industries across the economy, what do we have?

The fundamental meaning of The Law is this: In a free economy, every market price reflects the facts of demand and supply that are relevant to that product. The critical conclusion is that prices are determined by facts, prices reflect facts, and therefore, prices are objective. Prices are not the result of whims or wishes or arbitrary choice. They are the result of and reflect the facts of supply and demand. The proof of that conclusion is that everyone who sets or negotiates a price must consider the conditions of supply and demand if his price-setting is to be successful.

The primary corollary of the law of supply and demand is that at every market price, the quantity demanded will equal the quantity supplied, that free markets will tend to have neither shortages nor surpluses. This is the standard interpretation of the law. Its proof is that it is always unprofitable for firms to produce more than they can sell and that it is *usually* unprofitable for firms to produce less than they can sell. (See Haddock and McChesney 1994 for cases where firms found it profitable to keep price unchanged when they could not produce all they could sell.)

Secondary corollaries of the law of supply and demand consist of what happens to price when demand and supply change. An increase in supply (that is, the quantity supplied) reduces price because larger quantities can only be sold at lower prices (the law of demand). This conclusion coincides with the orthodox theory.

Under this reformulation of The Law, however, the effect of a decrease in supply differs from the orthodox theory. When supply decreases, firms may raise their prices, particularly if their profits have been deficient at the old price. But, if the quantity supplied has declined because a competitor has gone out of business, the remaining firms may choose to increase output instead of raising price.

Neither do changes in demand lead to the standard results in this reformulation. Firms normally respond to an increase in demand by increasing their output and to a decrease in demand by decreasing their output. Increases in demand usually raise price only when the firms' unit costs are rising. This tends to occur primarily when firms' outputs approach capacity.

This reformulation of The Law has a drawback: it does not lend itself to graphical representation or to mathematical modeling—it cannot be conceived as crossing lines on a graph. The equilibrium price cannot be solved for by simultaneous equations. Consequently, it will be of no interest to current economists for whom mathematical modeling is the standard of economic significance.

Properly understood, The Law is not a theory of price determination. It is a theory of the characteristics of prices established in a market economy. That is not an insignificant contribution. But The Law does not and cannot tell how the market price comes into existence. This means that the concept of The Law as constituting impersonal market forces determining prices independently of individual human beings also should be abandoned. That concept stands in the way of a genuine understanding of how markets function. *There are no impersonal market forces setting prices anywhere in the economy.* Every price originates in

the mind or minds of individual human beings and comes into existence only by their choice. Any theory of price must start with that fundamental fact.

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What Policy Mix to Bring Down the Natural Rate of Unemployment?

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ABSTRACT

The paper finds evidence that macroeconomic stabilization policies, in contrast to standard theory, have an association with large changes in the natural rate of unemployment. Moderate real interest rates and moderate budget deficits are consistent with a falling natural rate, while higher real interest rates and larger budget deficits are associated with a rising natural rate.

INTRODUCTION

The natural rate of unemployment, according to standard macroeconomic theory, is determined on the supply side by factors such as demographics and labor market frictions. The natural rate is not supposed to be sensitive to aggregate demand. Macroeconomic stabilization policies, policies that work on the demand side of the economy, should not matter, either.

Yet there is evidence that aggregate demand, and macroeconomic stabilization policies, do have effects on the natural rate. Ball (1999) studies the 1980s experience with disinflation. Central banks tightened monetary policy in order to bring inflation down. The subsequent decline in aggregate demand produced recessions and caused the unemployment rate to rise. In those countries where the central bank reversed course and relaxed monetary policy, the unemployment rate fell back to its natural rate. In those countries that maintained tight monetary policy for longer, the rise in unemployment was permanent. Allowing the unemployment rate to remain above the natural rate seems to have caused the natural rate to rise. This evidence is supportive of the hysteresis hypothesis, the idea that the natural rate is influenced by the short run behavior of the unemployment rate. If the hysteresis hypothesis is correct, macroeconomic stabilization policies can influence the natural rate through their ability to influence aggregate demand and unemployment in the short run.

This paper searches for the effects of both monetary and fiscal policies on the natural rate. The paper uses the real interest rate as a measure of monetary policy. The paper estimates the real interest rate that would prevail if the economy was at full employment. The paper then asks if changes in the natural rate are associated with the level of the real interest rate at full employment. If the central bank holds the real interest rate too high, the unemployment rate would be expected to rise. And if the hysteresis process takes effect,

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the natural rate will rise as well. The procedure is repeated using the budget surplus as a measure of fiscal policy. The paper estimates the budget surplus that would prevail if the economy was at full employment. The paper then asks if changes in the natural rate are associated with the level of the budget surplus at full employment. Following the Keynesian paradigm, if the budget surplus is too large, aggregate demand will be too weak and the unemployment rate will rise. And if the hysteresis process takes effect, the natural rate will rise.

The empirical methodology also allows measurement of the cyclical nature of the real interest rate and budget surplus with respect to the output gap. The paper asks if changes in the natural rate are associated with the cyclical nature of monetary and fiscal policies. Countercyclical policies help to stabilize aggregate demand. Such policies would prevent the hysteresis process from working, since the unemployment rate would be brought back to its natural level too quickly. Therefore, countercyclical policies should be associated with a more stable natural rate. The effects of procyclical policies on the natural rate depend on the nature of the output gap. If the output gap is positive, procyclical policies strengthen aggregate demand and push the unemployment rate down. The hysteresis hypothesis then predicts that the natural rate will fall. But if the output gap is negative, procyclical policies weaken aggregate demand and push the unemployment rate up. The hysteresis hypothesis in this case predicts that the natural rate will rise.

METHODOLOGY

In order to test the effects of macroeconomic stabilization policies on the natural rate, it would be helpful if we could estimate it. Estimates of natural rate estimates are known to have a large margin of error. (Staiger, Stock, and Watson, 1997) Because of this problem, small changes over time are uncertain. Not only is the magnitude of change uncertain but the direction of change as well. Ball (2009) finds a way around this problem by focusing on cases of large changes in the natural rate. He identifies cases in which a country has experienced a change in its natural rate of at least 3 percentage points within a 10 year period. Such large changes are unlikely to be the result of estimation problems. The paper uses the same cases as identified by Ball, 8 cases of a falling natural rate (hereafter natural rate fallers) and 7 cases of a rising natural rate (hereafter natural rate risers). For each case, the paper regresses the real interest rate (R) and the budget surplus ($SURPLUS$) on the output gap (GAP):

1.
$$R_t = \alpha_0 + \alpha_1 GAP_t + \varepsilon_t$$

2.
$$SURPLUS_t = \beta_0 + \beta_1 GAP_t + \nu_t$$

In equation one, the constant term estimates the level of the real interest rate when the economy is at full employment; when the output gap is zero. In equation two, the constant term estimates the level of the

budget surplus when the economy is at full employment. The constant terms are the most important estimates in the paper since they represent the fiscal and monetary policy stances at full employment. The slope coefficients are the measures of cyclical with respect to the output gap. The paper compares the estimated coefficients between the cases of falling and rising natural rates. If the hysteresis hypothesis is at work, then α_0 will be higher among the natural rate risers. This would indicate that the natural rate tends to rise when the real interest rate is too high. And β_0 would also be higher among the natural rate risers. This would indicate that the natural rate tends to rise when the budget surplus is too large. The slope coefficients are not expected to differ much between natural rate risers and fallers. Cases of countercyclicality are expected to result in more stable natural rates and so would not contribute to these cases of large changes in the natural rate. Only in cases of procyclicality would we expect an effect on the natural rate, and then the direction of the effect would depend on the nature of the output gap. Since all the cases contain periods of both positive and negative output gaps, the effects of procyclicality would be muddled and difficult to detect.

Ordinary least squares is used to estimate the coefficients. Since these are time series regressions, serial correlation is a concern. Newey-West corrected standard errors are used to determine the significance of the coefficients.

DATA

The budget surplus is found by subtracting general government total expenditure from general government revenue, both measured as a percentage of GDP. These variables and the output gap, also as a percentage of GDP, are taken from the IMF's World Economic Outlook database. The short term interest rate, a nominal rate, is taken from the OECD.Stat database. This is a three-month interest rate, usually a bank offer rate or Treasury bill rate. The real interest rate is found by subtracting the consumer price inflation rate, taken from the IMF's World Economic Outlook database, from the short term interest rate.

Not all of Ball's (2009) cases are included, and for some of the cases the time period had to be shortened. The data sets used in the paper did not have data for all variables for all the needed time periods. Other data sets could have been used as substitutes, but this would have made comparisons across countries less reliable. All cases for which there are at least 9 annual observations are included.

RESULTS

Table 1 shows the results for the real interest rate regressions. On average, the constant term for the natural rate risers is more than twice that of the natural rate fallers. This is consistent with the hypothesis that holding the real interest rate too high not only raises the actual unemployment rate but also raises the natural rate. This is the hysteresis process in action. The average for the natural rate risers is nearly 5.3

percent, a figure considerably higher than any reasonable estimate of a neutral real interest rate – the real interest rate that would hold the economy at full employment. For example, in its most recent forecast, the members of the Federal Open Market Committee place the long run nominal federal funds rate in a range between 3 and 4 percent. (Federal Reserve, 2015) With a long run inflation target of 2 percent, the long run real federal funds rate would be between 1 and 2 percent. The long run real federal funds rate target is not quite comparable to the data presented in the paper. The paper is using a 3-month interest rate series, not an overnight interest rate like the federal funds rate. Yet 3-month money does not cost so much more than overnight money that 5.3 percent is a reasonable neutral real interest rate. The real interest rate at full employment for the natural rate fallers is, on average, 2.5 percent. An exceptionally stimulative monetary policy does not appear to be necessary to bring down the natural rate. In these tables, *** indicates significance at 1%, ** significance at 5%, and * significance at 10%.

Table 1: The Real Interest Rate and the Output Gap

Natural Rate Falling	Time Period	Constant	GAP
Australia	1994 - 2007	3.052***	0.123
Finland	1996 - 2007	1.737***	0.046
Ireland	1989 - 2007	2.886**	-0.464**
Italy	1996 - 2007	1.500**	-0.441
Netherlands	1995 - 2007	1.276***	0.161
New Zealand	1994 - 2007	4.549***	0.530
Spain	1995 - 2007	0.695	-0.664**
United Kingdom	1987 - 2007	4.384***	0.044
Average		2.510	-0.083
Natural Rate Rising	Time Period	Constant	GAP
Finland	1987 - 1996	6.242***	0.026
France	1980 - 1996	4.182***	-0.446
Germany	1991 - 2007	2.476***	0.562*
Italy	1988 - 1996	5.719***	0.228*
New Zealand	1985 - 1994	6.682***	0.099
Spain	1980 - 1995	7.065***	0.561***
Sweden	1983 - 1999	4.530***	-0.144
Average		5.271	0.126

Table 2 shows the results of the budget surplus regressions. For both natural rate risers and fallers, the average budget balance at full employment is in deficit. But among the natural rate fallers, the average deficit is smaller at roughly 0.5 percent of GDP, while among the risers the deficit is 3.0 percent. This runs contrary to the expectation that a larger deficit (smaller surplus) would stimulate aggregate demand and help the natural rate to fall. There are several possible reasons for this result. If a larger deficit crowds out

private spending, a larger deficit does not stimulate aggregate demand. It may be that a small deficit, like that exhibited by the natural rate fallers, adds to aggregate demand. But if the deficit is too large, the effect changes and demand is depressed. This finding does not contradict the Keynesian prescription of countercyclical fiscal policy during a downturn. But it does suggest that when the economy is at full employment, the deficit should not be allowed to grow too large. In fact, a smaller deficit at full employment means more fiscal space from which the government can deploy an expansionary fiscal policy during a downturn. Fiscal space would be particularly important to governments constrained by fiscal rules such as those in the Stability and Growth Pact of the European Union and in small open economies that might face credit constraints if their deficit grows too large.

Table 2: The Budget Surplus and the Output Gap

Natural Rate Falling	Time Period	Constant	GAP
Australia	1994 - 2007	-0.067	1.523**
Finland	1996 - 2007	0.899	1.021**
Ireland	1989 - 2007	0.091	0.279***
Italy	1996 - 2007	-3.061***	0.250
Netherlands	1995 - 2007	-0.259	1.155**
New Zealand	1994 - 2007	1.990**	0.777**
Spain	1995 - 2007	-0.429	1.140***
United Kingdom	1987 - 2007	-2.967***	0.725**
Average		-0.475	0.859
Natural Rate Rising	Time Period	Constant	GAP
Finland	1987 - 1996	-0.936	1.118***
France	1980 - 1996	-2.826***	0.762***
Germany	1991 - 2007	-2.635***	0.743***
Italy	1988 - 1996	-8.645***	-0.580***
New Zealand	1985 - 1994	-2.999**	0.643**
Spain	1980 - 1995	-3.718***	0.223**
Sweden	1983 - 1999	0.529	1.933**
Average		-3.033	0.692

As expected, the cyclicity measures do not differ much between natural rate risers and fallers. The budget surplus is slightly more countercyclical among the fallers while the real interest rate is slightly more countercyclical among the risers. But there is a great deal of variation within each group, so generalizations cannot be reached about the effects of cyclicity on the natural rate.

The constant terms and cyclicity measures can be used to calculate predicted values for the real interest rate and the budget surplus for a range of output gaps. Tables 3 and 4 display predicted values using the averages of the coefficients found in the regressions. Table 3 shows that the real interest rate is

higher among the natural rate risers regardless of the size of the output gap. This is due to the minimal degree of cyclicality found for both groups. Table 4 shows that the budget surplus is larger among the natural rate fallers for any output gap. And this is due to the similarly countercyclical nature of the budget surplus in both groups. Both groups run larger budget deficits as the output gap falls. The natural rate risers run budget deficits even when the output gap is strongly positive. The natural rate fallers, while having a modest budget deficit at full employment, run budget surpluses when the output gap turns positive.

Table 3: Predicted Values for the Real Interest Rate

	Output Gap, % of GDP				
	-2	-1	0	1	2
Natural Rate Falling	2.676	2.593	2.510	2.427	2.344
Natural Rate Rising	5.019	5.145	5.271	5.397	5.523

Table 4: Predicted Values for the Budget Surplus

	Output Gap, % of GDP				
	-2	-1	0	1	2
Natural Rate Falling	-2.193	-1.334	-0.475	0.384	1.243
Natural Rate Rising	-4.417	-3.725	-3.033	-2.341	-1.649

CONCLUSIONS

The paper finds evidence in support of the hysteresis hypothesis. Standard macroeconomic theory suggests that there is no association between the macroeconomic stabilization policies and changes in the natural rate. But this is not what the paper finds. A higher real interest rate is found among the natural rate risers. And a larger budget surplus is found among the natural rate fallers.

Bringing the natural rate of unemployment down is an important policy goal. A low natural rate means that the actual rate of unemployment can be held at a lower rate for the long run, without pushing up inflation. A lower unemployment rate would spur growth in wages and hours, leading to rising incomes for workers. Bernstein (2014) shows that the largest effects of unemployment on income are felt by those who fall lower in the income distribution. Therefore, bringing down the natural rate would have its strongest positive effects on the incomes of the working poor.

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An Economic Cost Analysis of Management of Lateral Epicondylitis: A Contrast of Perspectives

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ABSTRACT

Healthcare economics presents many complexities, not the least of which is the difference in perspectives between healthcare providers and economists. Economics viewpoint is contrasted with a medical research perspective on treatment options for lateral epicondylitis. Within the working age population, lateral epicondylitis affects in 2 to 4 percent of people annually. The direct and indirect medical treatment costs of such diseases occupy an important portion of US healthcare cost. The medical researchers' study evaluates the direct medical costs of management of lateral epicondylitis in patients. Direct medical care costs for 246 were calculated. Two alternative treatments had average direct average medical care cost of \$421 or \$4,769. They extrapolated the estimated national direct medical care cost for the treatment of lateral epicondylitis. A sample economics viewpoint is presented along with a future research agenda.

BACKGROUND

Economists' perspectives on healthcare will not match completely healthcare providers' viewpoints. Using a specific case, lateral epicondylitis, the views are contrasted. Direct healthcare cost for this disease appears to be in the billions of dollars in the US. The medical study below demonstrates that the existence of multiple treatment options that are essentially equivalent in long-term outcomes. In addition, it shows the likely direct cost to the medical delivery system.

An economic perspective might well include multiple additional factors. An exploration of these factors follows the medical research presented below. From a consumer demand perspective, an interesting economic consideration emerges from the medical discussion.

The next sections are presented as produced by a medical research team including the current authors. The style of the presentation is representative of physicians communicating to other physicians. It is presented in style in order to convey their view points and concerns.

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INTRODUCTION

In 2013, two leading types of injuries or illnesses among full-time workers for both men and women were sprains, strains, and soreness (BLS, 2014). In the BLS report, 42.5 cases per 10,000 male and 37.2 female suffered from the injuries or illnesses averaging 40.2 cases per 10,000 full-time workers in the US. Also incidence rate of days away from work that are associated with the soreness, pain is 18.3 per 10,000 full-time workers in 2014 (BLS, 2015). Although, it is not life threatening, one of such diseases that working individuals suffers from is lateral epicondylitis or also known as tennis elbow. Economic costs on the disease including lower productivity associated with pain, potential workdays and salary lost also have been discussed in literature (i.e., Gaskin & Richard, 2012; Coyte et al., 1998; Chang & Wang, 1995). In this paper, the authors examine direct medical cost of lateral epicondylitis to shed light on the management of the disease.

Lateral epicondylitis, a painful tendinosis of the elbow, occurs most commonly in working age men and women (Hadler, 2003a; Ring et al., 2006; Szabo, 2009). Physicians manage it without any intervention, with physical therapy, with cortisone injections or with surgical procedures. No treatment paradigm demonstrates outcomes superior to no treatment, and most patients resolve their symptoms within a year (Dunn et al., 2008; Smidt et al., 2005; Szabo, 2009). However, while awaiting symptom resolution, some patients report severe pain, leading to loss work and recreation days.

Studies show no lasting benefit from corticosteroid injections and suggest a damaging impact (Barr et al., 2009; Bisset et al., 2006; Hay et al., 1999; Korthals-de Bos et al., 2004; Lindenhovius et al., 2008; Martin et al., 2012; Newcomer et al., 2001; Smidt et al., 2002). Most patients recover well after surgery for lateral epicondylitis (Dunn et al., 2008). However, systematic reviews report no evidence of hastened pain relief after surgery (Buchbinder et al., 2008; Lo and Safran, 2007). Weakness of design and execution exasperate most studies of lateral elbow pain, including randomized prospective investigations (Cowan et al., 2007; Hudak et al., 1996). Little science guides efforts to interrupt its course. Left laboring without science, some surgeons advocate on public websites surgical treatment after three to six months of lateral elbow pain (American Society for Surgery of the Hand, 2012; Martin et al., 2012).

This is a retrospective analysis of direct medical costs for treating lateral epicondylitis in patients with symptoms for 12 months or less. We assess whether the cost justifies a prospective cost-effectiveness analysis. Since lateral epicondylitis is usually self-limiting, treatment costs should be analyzed to optimize resource use. Indirect health care costs are not measured, as we did not have sufficient documentation of work absence. Also, we could not assess intangible costs, such as restricted leisure activities. This study focuses on direct medical costs and then calculates an estimated national expenditure for lateral epicondylitis. Without proven treatment to speed relief, costly, unproven, or ineffective interventions are

often undertaken. We propose prospective investigation of outcomes and cost-effectiveness of operative treatment of lateral epicondylitis.

MATERIALS AND METHODS

The research was approved by UMass institutional review board. A search of billing and coding data for all patient encounters at our hand and upper extremity clinic between January 1, 2009 and December 31, 2010 yielded 332 patients with a diagnostic code of lateral epicondylitis (ICD-9 726.32). Two senior upper extremity surgeons with differing paradigms relative to the use of corticosteroid injections and to the role and timing of surgical intervention treated all of the patients. One surgeon usually recommends corticosteroid injection at initial consultation and may recommend early surgery according to patient reported pain severity or for the patient who reports initial instantaneous onset of lateral elbow pain. He also recommends surgery when symptoms persist after cortisone injection and therapy. The other surgeon never recommends corticosteroid injections and recommends surgery for some patients with occupations requiring repetitive high-force activities which the employer cannot or will not adjust and when the symptoms continue unimproved beyond at least six months. Both surgeons recommend physiotherapy protocols including elbow stretching, isometric and eccentric exercises and shoulder strengthening.

The patients' electronic medical records (EMR) were reviewed and abstracted. Patients who had begun treatment by our service prior to January 1, 2009 were excluded (47 patients), as were patients whose symptom duration exceeded 12 months at presentation (29 patients). Patients having undergone a prior ipsilateral operation for lateral epicondylitis were excluded (7 patients). Finally, three charts were incorrectly coded. The remaining 246 patients met the principal inclusion criteria with a diagnosis of lateral epicondylitis and symptoms of less than 12 months duration. Notably, 15 patients ranged between 65 and 83 years old. The demographic characteristics of the study groups are summarized in Table 1.

All clinical encounters of the eligible patients available within the EMR were abstracted. The national payment rates for each CPT code were obtained from the 2011 Medicare Physician Fee Schedule and the 2011 Medicare National Ambulatory Surgery Center Fee Schedule. Dispensed outpatient prescription drug costs were not captured into our data. Direct medical care costs for each patient were calculated from these data. The CPT codes abstracted are listed in Table 2. Professional, facility and operating room bundle charges were abstracted. Total cost and mean cost per patient for each group was calculated. The mean cost per patient in each group was compared with the Student's t-test.

Estimates for national expenditures for lateral epicondylitis were calculated based on an assumed annual incidence of 2 or 4 percent in the age range between 35 and 64 years, and then adjusted to allow for only 50 percent of patients seeking medical treatment. The 2010 United States Census reported 122,560,051 individuals between 35 and 64. Prevalence and incidence data for lateral epicondylitis are

extremely variable, dependent especially on the denominator of the source study. Cohort age-range, gender distribution, socioeconomic mix, and occupation may all influence reported prevalence and incidence rates (Hamilton, 1986; Shiri and Viikari-Juntura, 2011; Urwin et al., 1998). Reported one-year incidence rates in working populations vary between 2.1 to 4.1 percent (Leclerc et al., 2001; Roquelaure et al., 2002; Shiri and Viikari-Juntura, 2011). It has been estimated that about 50 percent of those afflicted with lateral elbow pain seek medical attention (Verharr, 1994). Primary care physicians in our community readily refer most patients with lateral elbow pain to the specialist and many other patients obtain a specialty appointment directly.

RESULTS

Institutional Costs

One hundred eighty-nine patients (189) were treated non-operatively and 57 patients were treated surgically within the first year of symptoms. Though we excluded them from this study, at least 8.7 percent of the patients seen in consultation for lateral epicondylitis had greater than 12 months of symptoms. The total direct medical care cost for the population under study was \$351,500. The total direct medical care cost for the 189 patients treated non-operatively was \$79,664. The mean cost per patient treated non-operatively was \$421. The 57 patients treated surgically required a total of 60 operations. The total direct medical care cost for the patients treated surgically was \$271,836. The mean cost per patient treated surgically was \$4,769. There was no overlap in the cost distributions of the two cohorts and the difference was statistically significant ($P < 0.0001$).

Our center performs all operations for lateral epicondylitis in an ambulatory surgical center setting under a supraclavicular block and with monitored anesthesia care. Table 4 summarizes the individual components used for calculating operating room expenses. The operating room cost for surgical debridement alone (CPT 24358) was \$3,486 and the operating room cost for surgical debridement with tendon repair or reattachment (CPT 24359) was \$3,626. Three patients required a second procedure. The mean operating room cost per patient was \$3,765. Operating room costs represented the largest component of direct medical care costs in either group, accounting for 79% of the costs for the surgically-treated group and 61% of all costs for the entire cohort.

When calculating only those direct medical care costs that occurred outside of the operating room, the surgical patients continued to utilize more health care resources than the non-operatively treated patients on a per patient basis by a factor of 2.4 to 1 (\$1,004 to \$421 per patient). Additionally, the surgically treated patients required 169 office visits (CPT 99024) during the post-operative global period.

Extrapolated National Costs and Sensitivity Analysis

National costs for the United States were estimated based on 2010 census data, an incidence of 2 to 4 percent in the principally at risk population between ages 35 and 64 inclusive, and an assumption that 50

percent of afflicted persons never seek medical care for lateral elbow pain. A simple sensitivity analysis demonstrates costs differences driven by the rate of surgical intervention. Using midrange incidence and surgery rates of 3 percent and 20 percent respectively, an estimated \$1.75 billion is expended for treatment of lateral epicondylitis patients treated with surgery over the study period and another \$620 million is expended treating the 80 percent of patients not receiving surgery in this specific scenario. The total national expenditure approaches \$2.4 billion. With a 3 percent incidence rate held constant but surgical intervention either dropped to 10 percent or increased to 30 percent the lower and upper bounds of total expenditure ranges between approximately \$1.6 billion to \$3.2 billion over a 2-year period.

To refine the surgical cost from the extrapolation, the total cost if all the patients were treated without surgery is calculated then subtracted from the total costs in each scenario. With an incidence of 3 percent and a surgery rate of 20 percent, the costs attributable specifically to surgery are \$1.6 billion with a lower bound at \$800 million for 10 percent surgery rate and an upper bound at \$2.4 billion for a 30 percent surgery rate over a 2-year period. The mean patient cost utilized does not capture all direct medical costs, and these estimates are incomplete. Alternative sensitivity analysis scenarios are presented in Figures 1, 2 and 3.

DISCUSSION

Many persons with lateral elbow pain never seek medical care, but some seek immediate relief. Advice that the pain usually resolves in time brings no solace to some. Denied immediate relief, some patients despair. So, despite contrary evidence, clinicians often inject cortisone, perhaps bringing the patient temporary relief. The first act serializes further action when the patient returns with persistent pain. Commonly, the surgeon turns then to surgical intervention (Szabo, 2009). Unfortunately, no evidence supports that surgery speeds recovery. Yet, in addition to added risk, it is very expensive.

Cost, however, should not be the sole factor determining the availability of surgical treatment for lateral epicondylitis. And, though lateral epicondylitis is mostly self-limiting, physicians will endeavor to bring early relief when risk and cost are scrupulously balanced. Moreover, while the condition is largely self-limiting, this study buttresses others demonstrating that a substantial portion of patients continue fettered with pain after a year (Haahr and Anderson, 2003a; Thompson et al., 1951; Viikari-Juntura, 1984). Some afflicted patients take extended leaves from employment (Walker-Bone et al., 2012). Moreover, 8 percent of the patients are elderly, undercutting the notion that lateral epicondylitis is a transient disease restricted to middle age.

Physicians treat all manner of ailments of aging, overindulgence, carelessness and vanity, many of them self-limiting or self-limitable. It is incongruous, at least to afflicted patients, that physicians cannot bring them relief of their lateral elbow pain. Explaining the symptoms away as “a harmless rite of passage through middle age” (Lindenhovius et al., 2008; Szabo, 2009) may elicit incredulity as often as it engenders succor.

Yet, the physicians suggesting the “harmless rite” explanation mean to offer the patient hope of self-resolution of the symptoms. And that honest hope is superior to the false hope of interventions unproven or already proven ineffective. The issue is not that lateral epicondylitis frequently goes away. It is that physicians do not know how to make it go away faster, and cannot predict which patient will have a prolonged course.

An absence of evidence supporting improved outcomes after surgery encumbers the surgeon contemplating surgery for lateral epicondylitis. Even if one presumes benefit from surgery, no evidence guides the timing of surgery or the selection of patients most likely to benefit from surgery. Efforts to reify the clinical evidence with an MRI fail, as MRI findings do not correlate with reported symptom severity (Walton et al., 2011), though an MRI examination might confirm the presence of lateral epicondylitis or identify possible alternative sources of the symptoms.

The potential contributions of the patient’s relative psychosocial stamina to the perceived symptoms further obscure patient selection decisions for intervention, even if an improved outcome could be achieved in some circumstances (Bongers et al., 2002; Fan et al., 2009; Haahr and Andersen, 2003b; Hadler, 2003b; Lindenhovius et al., 2008; Ring et al., 2006). Recent studies demonstrate that a relative deficiency in coping skills and an excess of depression correlate with increased pain perception (Lindenhovius et al., 2008; Ring et al., 2006). Passive coping skills and poor social support in patients with elbow pain predict poor recovery after twelve months of care according to one observational study (Bot et al., 2005). These studies help us understand affected patients better (Hudak et al., 1996) and why physicians provide ineffective “something is better than nothing” interventions. Various enervated people are part of the human spectrum, and they disproportionately seek medical care. The patient rendered hopeless and helpless by lateral elbow pain may be the most likely to remain so after operation, though current knowledge does not permit an estimate of the probability that a physical intervention might help. But, irrespective of the patient’s psychosocial composition, lateral epicondylitis emanates from a verifiable pathologic lesion, even if the symptoms are rendered through the variables of human nature.

This study assesses the direct medical costs consequent to the treatment of lateral epicondylitis. The United States spent \$2.6 trillion on health care in 2010. That expenditure averages \$8,402 per person and consumes 17.9 percent of the nation’s Gross Domestic Product (Martin et al., 2012). While the estimated national expenditure for lateral elbow pain is comparatively minute, though shocking in the absolute, the cumulative daily decisions of physicians and surgeons power some of the soaring health care costs. Certainly, containment of epidemics of conditions such as diabetes and obesity are colossal unaddressed emergencies threatening the population’s pursuit of healthful happiness and pushing the nation closer to the economic brink. Resolution of such problems demands social contracts and societal changes well beyond the sphere of individual practitioners.

But treatment decisions for lateral epicondylitis lie well within each surgeon's sphere. Best practices come from evidence-based medicine, analyzing the effectiveness of interventions and assessing the cost of the intervention. The extrapolated estimate based on mid-range parameters of \$1.2 billion annually is a great deal to spend treating lateral elbow pain with either ineffective or unproven interventions.

The study is limited by its retrospective design. The design compromises the capacity to reliably estimate indirect costs and intangible costs, and so those costs are excluded. Direct medical costs generated outside our institution before the patient was referred to us are missed. We would not have captured the costs of care for any patient who obtained their treatment elsewhere after initiating care with us. The study follows a specific cohort of patients longitudinally for a specific episode of lateral elbow pain. It excludes patients with symptoms exceeding one year at presentation and it excludes those already receiving treatment at the start date of the study. Thus, the study does not capture the full institutionally generated expenditures for the condition. The excluded patients might impact the mean expenditure and thus alter the national extrapolations as well.

The study design also limits the collection of specific patient data. Patients received various non-operative therapies. The two surgeons perform different operations and recommend surgery at different rates. We could not assess outcomes. Aside from general demographics, we could not tabulate characteristics of the cohorts.

A substantial portion of working age people endures lateral epicondylitis. Half of them seek relief from physicians. We cannot offer any proven treatment for their condition. But we spend a lot treating the condition. Surgical treatment mainly drives the spending. We need to clarify whether surgery speeds relief and how to select the patients who would most likely achieve relief. Given the paucity of outcomes data, the large direct medical expenditures, and the absence of proven alternative therapies, we advocate further prospective outcomes and cost-effectiveness studies of therapies for patients with lateral epicondylitis.

ECONOMIC VIEWPOINT AND FUTURE RESEARCH

The above analysis offers simple justification for the rough equivalence of surgical and non-surgical treatments as well as the overall direct system costs. From economics perspective, there are number of obvious additional areas of interest. One concern is that the researchers assume away all costs beyond delivery system since that was their focus. For example, from the macroeconomics view lost productivity due to more invasive treatment would be relevant. Lost wages have both micro- and macro-economic impacts. Also other economic costs including out of pocket over the counter drug costs and cost of pain and suffering may be explored in economic settings. Consumers/patients must have expectations of future pain as influenced by assessment of medical professionals. The individual must integrate their expectations for present and future pain to choose a treatment option. In the future, economists need to look at what is

the individual's willingness to pay for immediate pain relief or discounted value of the prospective pain and pain relief. How consumers integrate these expectations and how their decisions drive healthcare purchasing must be carefully examined.

ENDNOTES

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TABLES

Table 1: Patient Demographic Data

	Number of patients	Mean age/range (years)	Female:Male	Months symptomatic prior to consultation
Nonoperative cohort	189	49 (21-81)	96:91	4.4
Operative cohort	57	49 (34-79)	28:29	6.4

Table 2: CPT Codes Surveyed for Billing Data

CPT Code	Described Service
CPT 99202-99204	New office visit
CPT 99211-99213	Established office visit
CPT 99024	Postoperative office visit
CPT 20551	Steroid injection
CPT 97003	Initial hand therapy evaluation
CPT 97110	Hand therapy follow-up visit
CPT 73080	Radiograph of elbow
CPT 73221	MRI of elbow
CPT 64415 and 76942	Ultrasound –guided supraclavicular block
CPT 01712	Monitored anesthesia care for upper extremity surgery
CPT 24358 or 24359	Surgery for lateral epicondylitis

FIGURES

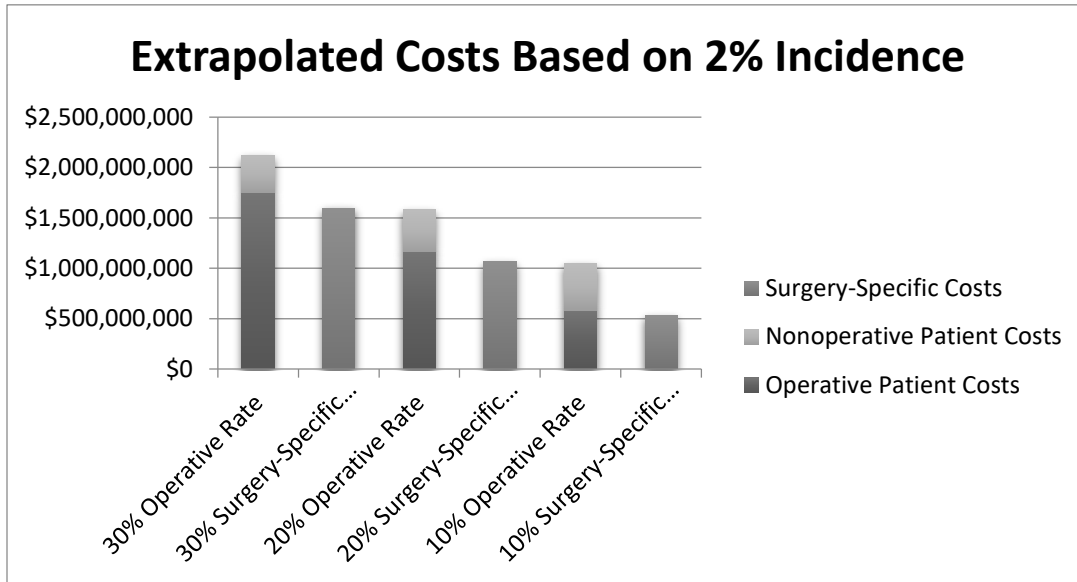


Figure 1 Sensitivity analysis demonstrated estimated extrapolated costs based on a 2-percent incidence. The surgery-specific costs are calculated by subtracting the mean nonoperative treatment costs from the total costs of the operative treatment group.

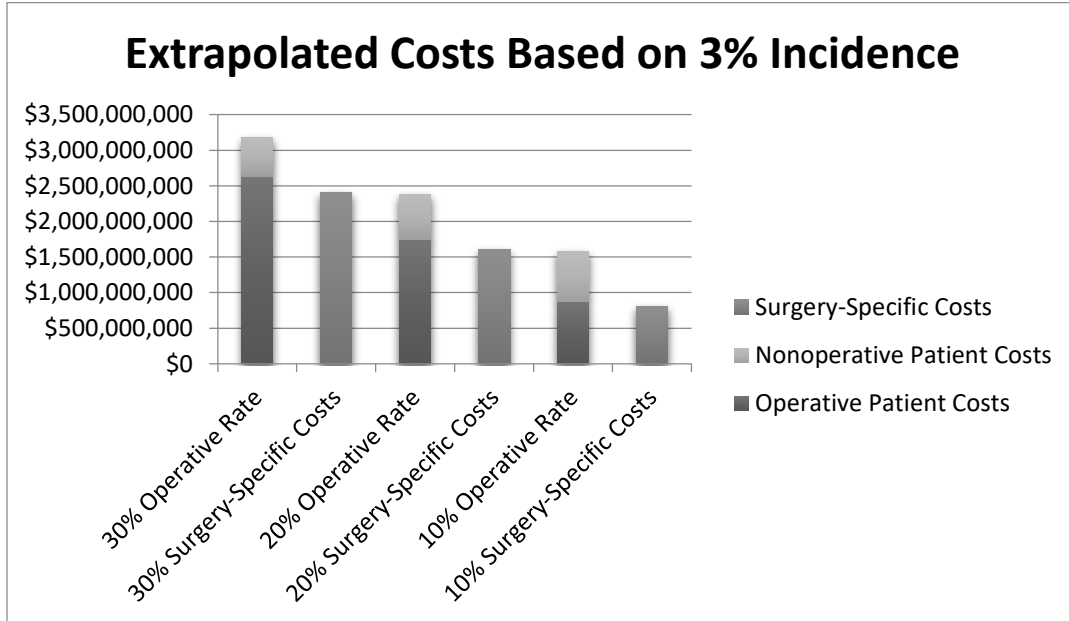


Figure 2 Sensitivity analysis demonstrated estimated extrapolated costs based on a 3-percent incidence. The surgery-specific costs are calculated by subtracting the mean nonoperative treatment costs from the total costs of the operative treatment group.

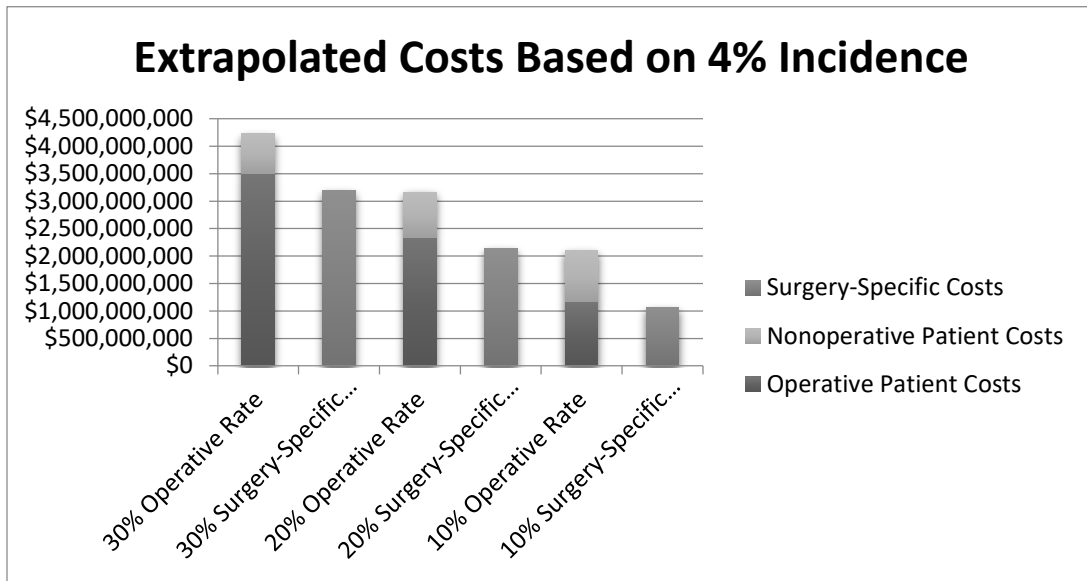


Figure 3 Sensitivity analysis demonstrated estimated extrapolated costs based on a 4-percent incidence. The surgery-specific costs are calculated by subtracting the mean nonoperative treatment costs from the total costs of the operative treatment group.

Monsters, Misogyny, and the Market: The Political Economy of Violence against Women in Nineteenth Century Fiction

Johanna Mitchell, Katherine Hadden, and Jeannette Mitchell*

ABSTRACT

At the dawn and during the course of the Industrial Revolution, as Europe and North America were experiencing rapid changes in technology, culture, and the commercial sphere, a concomitant surge of interest in the macabre, stemming from peasant superstitions and folk beliefs in monsters, also arose. This was especially true in the field of publishing. Many explanations have been offered for increasing literary attention paid to monsters who were frequently misogynistic nocturnal demons who preyed on women. This paper explores some of those explanations, focusing on theories that explain the phenomenon as a correlation with shifts in capitalism.

CONNECTING MONSTERS AND MISOGYNY

The fear of monsters may have been with us since before the beginnings of *homo sapiens* as a distinct human species. Folk tales and legends of demon-like creatures that prey on the helpless seem to be a part of every culture. Sometimes the same monster arises from the gloom to frighten us and then retreats into the darkness only to arise again in another time. The study of monsters in myth and legend and why the same demons often appear and disappear with such regularity has been of interest for decades in the various disciplines of anthropology, psychology, history, sociology, and philosophy. Indeed, literature studies of monster myths frequently contain titles that are easily familiar to most of us who have read them during our years in school: “The Rime of the Ancient Mariner” by Samuel Taylor Coleridge was originally published in 1798 at the beginning of the nineteenth century; *Frankenstein* by Mary Wollstonecraft Shelley was published in 1818; *The Strange Case of Dr. Jekyll and Mr. Hyde* by Robert Louis Stevenson was published in 1886; and *Dracula* by Bram Stoker first reached book store shelves in 1897. These titles are but a few of those that entertained and frightened the nineteenth century reading public. For us today, they still bring to mind vivid images of the macabre. Hollywood and book publishers continue to make billions of dollars on some of the same stories of monsters over and over again.

Yet, understanding why monsters come and go from our daily consciousness and then come back again during particular periods of time has escaped a general consensus among researchers. Agreement

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on the reasons behind the popularity of specific monsters that tend to prey on women also eludes the social science and humanities disciplines. This is especially the case with respect to vampires. Vampires tend to be demons of the night who suck the life blood from mostly women, the innocent and the not-so-innocent. The history of interest in and fear of vampires in literature tends to be punctuated with their return from the dead time and time again.

During the nineteenth century, the English-speaking world witnessed the rise of vampires from the myths and legends of Eastern European peasants where vampires were originally thought to live in filthy garbage heaps and feed on dead flesh,¹ more like contemporary zombies rather than Bella Lugosi or Robert Pattinson.² Then, with the help of the great Romantics, of whom Lord Byron and Mary Wollstonecraft Shelley were a part, vampires entered the middle and upper class Victorian English drawing rooms and parlors. They are now aristocratic, dashing and debonair, with a flair for the dramatic, who in fine misogynistic fashion, feed on helpless women.

Increasing sales of books and the growing market for magazine and short stories during the 1800s found a hungry reading public demanding stories of the macabre. Romanticism and Gothic tales, and the fears these tales reflected, found their way into the daily lives of an English population which was now being exposed to the most unpredictable vagaries of industrial capitalism. This shift in the defining characteristics of capitalism had its effect on working class men and women who became the new growing labor force. The shift was, in turn, reinforced by an increasingly active feminist movement for middle and upper class white women in England and America.

Explanations for the reemergence of vampires at this time range from Freudian biological determinism and its accompanying sexual repression and fear of a female work force through controversy over Darwinian evolution theory. Included are speculations about the true crimes of Jack the Ripper who murdered loose women and the rise of serial killers who are mostly male. Women entering the workforce in record numbers caused many to fear the future of the family; and, changes in the publishing market helped to make all of this non-fiction along with fiction more accessible. Although researchers in a variety of fields of study have posited more or less discipline-specific explanations for the cyclical rise of vampires and the connection to misogyny, analysis of the shifts in the character of capitalism in England and America during the industrial revolution provides an economic dimension that is critical to understanding this connection.

Women, both innocent and evil, make their way into vampire literature during the Victorian Era. Jack Holland explains this as part of the world's oldest prejudice; a pattern of misogyny that has been a piece of human history and has "thrived on many different levels, from the loftiest philosophical plane in the works of Greek thinkers...to the back streets of nineteenth century London and the highways of modern Los Angeles" (2006, 4). Holland explains misogyny in Victorian England as a response to the spread of

diseases, prostitution, and religious fears. He does, however, acknowledge the role of proletarianization of the work force, especially the female work force, in the increasing rates of crimes against women.

The privileging of friendship over family has also been blamed for contributing to the rise of interest in vampires during the Victorian Era.³ The Romantics certainly did see friendship as a primary focus for their contemporary efforts. The famous friendship of Lord Byron and Percy Bysshe Shelley has been credited with the publication of works that took as their foundation the folk stories and legends of Eastern European vampires. As the story goes, the friends traveled extensively in Europe in 1816 and were, according to Mary Shelley, confined by an unusually rainy summer to a house in the Swiss countryside. After reading aloud several German ghost stories, Lord Byron challenged the members of the group to write his or her own ghost story for presentation to the others. Out of this competition, came Polidori's *The Vampyre*, Byron's "Augustus Darvell," and Mary Shelley's *Frankenstein*. It is Polidori's vampire, however, that changed the class standing of the creature from lower class slathering and opportunistic frequenter of the garbage heap to upper class rake.

The American and English reading public, already accustomed to novels, quickly came to be interested in short stories resulting in a boom for magazine publishers. When John Polidori published "The Vampyre" in 1819, it was in this growing magazine market. Polidori had been Lord Byron's physician for a time before they had a serious falling-out. He was part of the Byron-Shelley group, infamous for its sexual deviancy. Polidori's vampire seems to reflect some of Byron's own personality. Indeed, of Polidori's story, it has been said that "it is above all middle-class resentment of the sexual allure of the noble *roue* that sustains the modern vampire myth, at the same time absorbing it effortlessly into the conventions of melodrama" (Morrison & Baldick, 1997, xiii).

A plethora of monster literature was published during the nineteenth century; the Byron-Shelley competition is only one part of the story. Poetry, novels, short stories, true crime stories reported in newspapers, all seemed to indicate profound cultural changes. Thus it is that much of the literary world views the rise of interest in vampires during the nineteenth century as part and parcel of a rise in fears about evil creatures and the changing role of women, the taking advantage of significant cultural changes, and the concomitant spread of literary Romantic genius in the publishing world.

Some members of the literary community see the rise of vampirism as a response to changes in the publishing market. Stephen King has written that current interest in monsters may be partially attributed to Hollywood and its own fascination with "evil personified" (1978, viii). He writes, however, that the "distrust of technology that the romantics of all ages seem to feel" and the "clash of science and superstition, of the ultramodern and the incredibly ancient," have been a part of the genre since its inception into popular culture (ix). Yet, in writing about *Dracula*, King also points out that what fascinates the public is "the dreadful appearance of the three hungry female vampires who vie for the right to 'kiss' Harker." King writes that especially gripping are "the explosive entry of the wolf into Lucy's bedroom...the...undead spirit of a beautiful

woman who now molests small children in her terrible insatiable hunger” and the “aristocratic” Count himself (ix).

Freudian psychology which gained in popularity at the end of the nineteenth century would see the rise of interest in vampires as a reflection of the fears that accompany extreme sexual repression, especially with the Victorian cultural mores and emphasis on heterosexuality. The biological determinism of the time, especially in the works of Sigmund Freud and, some would say, even Darwin, contributed to misogynistic vampire lore. According to Jack Holland, “If psychology has a theory of misogyny, it is one that traces its origins to the primal relationship between mother and son” (2006, 150). However, Holland also points out that during this time a new model of the family developed among members of a rising middle class; the novel which was largely a woman’s form of literature came into prominence with the expansion of the reading public; and, extreme class differences emerging with the industrial revolution and merging with conservative religious fervor were only a few of the cultural and economic changes that enhanced misogynistic tendencies of the century. Tracing the interest in the macabre with changes in the defining features of capitalism, specifically during the Industrial Revolution, reveals definite connections in the perception of vampires and capitalists.

CONNECTING MONSTERS AND CAPITALISM

Vampirism, broadly defined as a social system or an individual that preys on others, changes with historical context. Generally speaking, vampires in one form or another have been an expression of contemporary evils. For dozens of authors writing in the past two hundred years, vampires have existed and evolved into a variety of creatures. Ranging in character from a corrupt political economy that drains the citizens of their life force to a creature of the night who elicits every emotion from terror or disgust to sympathy and sensuality, vampirism follows on the heels of social circumstances. As a social phenomenon, vampirism can be viewed in some cases as a rational response to rapid change. The creation of an anthropomorphic figure on which to focus fear and anger may be a very human response to economic and political crises. Vampirism tends to emerge in popular culture during these times. It tends to deepen during cultural upheavals and take on an added significance in times of political turmoil. Indeed, the ebb and flow of vampirism can be anticipated, even predicted to some extent, based on the development of social circumstances.

Theorizing the correlational rise of interest in vampirism with shifts in the characteristics of capitalism, may seem to be a strictly Marxist project. It is possible, in this perspective, to identify some major ideological and economic changes that appear connected. For instance, not only were there significant changes in the world of publishing during the nineteenth century, bringing the book to the working classes, but the nature of capitalism itself was undergoing its own important changes. The proletarianization of a workforce that

now included females in the mills and factories, moving away from the farms and family, contributed to the growing fears about women and their demands for equality. The perception of the time was that the world was experiencing profound political, cultural, and especially economic chaos. Indeed, the cyclical return of vampires in literature and other media can be directly correlated to changes in the political economy. The Marxist interpretation explains the return of vampires, not only in nineteenth century literature, but in popular culture at any time during profound economic crisis.

For Karl Marx writing in the mid 1800s, vampirism was not a blood-sucking individual but a broader social system that alienated, and therefore bled individuals from what he called the species being. Marx believed that humans possessed a creativity or desire to change the world through work, not in the sense of a job but rather the creation of something new, useful, or beautiful. Work in this context has been redefined. For Marx, industrial capitalism alienated individuals from their species being by forcing them to sell their labor power in a commodity-producing market where the thing itself becomes the goal not the process or the individuals expending their creativity in order to produce it.

This is different from work in the Marxian sense which implies something created by using imagination, passion, and commitment to the artistry or usefulness. For Marx, work should be an expression of self. If there was anything an individual loved to do or felt passionate about, that they could pour their heart and soul into that would be appreciated by others and useful to others, that was what their work would be. The ideal society for Marx would be one that controlled and regulated production so that it would be “possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd or critic” (1978a, 160). Marx claimed that the “consolidation of what we ourselves produce into an objective power above us, growing out of our control, thwarting our expectations, bringing to naught our calculations” was chief among factors that characterized capitalism at that point in time (160).

In an industrial capitalist system like that in which Marx was writing, work does not entail personal expression or flexibility of action. Work entailed an individual standing on the assembly line for 10 to 14 hours a day in hazardous conditions, or crawling on their stomachs in the mine. Individuals were forced to forfeit their creativity and the control of their selves and their daily lives in order to survive. With the advent of industrial capitalism the human spirit or species being was distanced from itself and from others through the process of accumulation. Stephen Shapiro writes: “As human energy becomes invested in commodities made for surplus value, rather than the satisfaction of living needs, a particularly occult transformation arises with the commodity fetish” (2008, 30). Individuals in a capitalist economy lose their sense of self and are alienated from others. Indeed, such individuals are severed from their humanity. As such, capitalism is a disease that infects the individual, much like vampirism.

Using Marxian terminology, Shapiro explains that as workers labored during industrial capitalism to produce profit for others, respect for the “thing” replaced the respect for self, each other, and the creative

process. This fetishism replaces pride in the creation of a socially useful product that is part of the worker herself. Social circumstances changed and forced work to change. Indeed, Shapiro points out that “Gothic’s greatest density” takes place “during the passage between two phases of long-wave capitalist accumulation” (2008, 31). Changes in culture, economy, and politics precede literary expressions of fear for the transformations that workers are helpless to prevent, much like the seduction of a vampire. In addition, Shapiro points out that “Gothic narratives often seem prophetic about oncoming crises” (33). The fear of changes is felt before the changes actually occur, in some cases, and humans seem to be “uncannily prescient”(33). They are certainly alienated from the process, product, producers, humanity, and self.

“Alienation” from the “species being” manifests as “*self-estrangement*,” according to Marx; and, the vampire in Gothic literature is estranged from him or herself and humanity because he or she is the walking undead. In the *Economic and Philosophic Manuscripts of 1844*, Marx describes the relation of the worker to activity under industrial capitalism as “an alien activity not belonging to him; it is activity as suffering, strength as weakness, begetting as emasculating” (1978b, 74). Although Marx describes a corrupt system that reduces workers to machinery, the contradictions of capitalism can be compared with those of the vampire. Vampires have sometimes elicited sympathy for their loss of humanity; they are often exceedingly physically strong at the same time they are morally weak; and, they repeatedly suffer at the same time they cause suffering for others.

Vampires are alien beings, and in post *Dracula* literature, often forced to feed on others to survive. The similarities between the developing economic system and vampirism are evident in much of Marx’s descriptions of the results of the cultural transformations under industrial capitalism. Under capitalism, Marx sees “the worker’s *own* physical and mental energy, his personal life or what is life other than activity---as an activity which is turned against him, neither depends on nor belongs to him” (1978b, 75). The growth of the capitalist state and the industrial capitalist economic system cause emotional, psychological, physical, and moral degeneration. Work which should be rewarding and regenerating becomes draining much like the vampire’s sucking of blood and bringing of death for others while demoralizing self.

Stephen Shapiro writes that Bram Stoker’s *Dracula* “responds to tensions between England and Germany over South Africa as the contested site of profiteering in the moment between two long cycles” of capitalism and that Gothic literature has a propensity toward appearing in such moments in history (2008, 36). Shapiro’s perspective explains the rising fear during historical upheavals as resulting in phenomena such as vampires, zombies, or other walking dead.

Nina Auerbach makes a similar argument in her 1995 treatise, *Our Vampires, Ourselves*. In a detailed analysis of vampire literature and cinematography throughout the nineteenth and twentieth centuries, Auerbach contends that vampires will always be around in literature and popular society; however, it is what those vampires represent that changes with each generation. She claims that in nineteenth century literature vampires are a metaphor for both suppressed homoerotic desires and male-male friendships. She

argues that “Vampires were not demon lovers or snarling aliens in the early nineteenth century, but singular friends” (1995, 13). The character of Lord Ruthven in Polidori’s novel *The Vampyre* is a male vampire who provides a deep intimacy and friendship to his male companion. He is a vampire who embodies a nineteenth century male yearning toward meaningful male friendship. Sheridan Le Fanu’s *Carmilla* “penetrates her [victim’s] household – through dreams and tricks as well as bites – she presents herself as [her victim’s] only available source of intimacy” (Auerbach, 1995, 38). *Carmilla* is a metaphor for hidden female homosexual desire that could only be expressed in a vampire-victim relationship.

The European political and economic situation in the late nineteenth century, at the time of Le Fanu’s *Carmilla*, was such that vampires in literature would seem to be an inevitable outcome. Europe during the mid-1800s saw a second wave of rapid industrialization. “Technological advances and mechanized factory production transformed the way millions of people worked and lived. Electric lights turned night into day in cities and towns” (Merriman, 2010, 743). Advances in medical knowledge, improved drugs, sanitation, and water, as well as better nutrition led to a decline in rates of infant death and a longer life span for adults. European population soared. Literacy rates climbed as many families had more leisure time and slightly higher wages, allowing them the flexibility to pull their children out of work and send them to school.

The formation of an urban middle class was accompanied by a new sense of economic freedom or independence. Although the financial situation was slightly improved for some, many still languished in poverty, worked in horrible conditions, and died young. The situation improved slightly for some middle class urban dwellers, however, the urban working poor experienced vastly worsening conditions. As such, the reemergence of literary vampires in the latter half of the nineteenth century can be attributed to this new sense of freedom, as expressed in *Carmilla*. Nina Auerbach’s argument, pushed to its ultimate Marxian application, suggests that vampires were used in the nineteenth century to express the forbidden desire of social and economic freedom. Sexual repression is a symptom of a larger social issue in which every individual is repressed by capitalism, every individual is drained of their species being, which includes sexuality. In fact, *Carmilla* and *Christabel* were lesbian vampires.

Marx believed that under capitalism, even the capitalist is alienated. Eventually the entire economic system will act as its own destroyer. According to Rob Latham, “Marx is implying that capital’s uncontrollable lust for endless accumulation will be its undoing, that the vampiric hunger of capital will culminate in a paroxysm of self-consuming destruction” (1997, 129). Indeed, for most vampires, the inevitable result of their lust for blood is a stake through the heart or a similar demise. Latham goes on to say that the reason capitalism has not yet consumed itself is that it has made accomplices of its laborers. Like the vampire who infects its victim with vampirism, thereby turning them into blood-sucking monsters; capitalism infects its labor pool with the lust for acquisition and laborers become victims. “[T]he capitalist-vampire made willing accomplices of its labor-victims by soliciting their desire with seductive promises – for example, perpetual youth – and profitably attaching it to an ever-expanding realm of commodities” (130).

It is important to emphasize that vampires, zombies, or the walking dead may have arisen again, possibly as a fearful response to changing social circumstances. The proliferation of vampire movies and television dramas stand as evidence of the phenomenon. Although this paper does not go into details about the contemporary economic situation, Middle-Eastern political upheavals, world-wide cultural transformations, or unusual climatic events that are drawing increasing concern, these events do signal profound alterations in the perception of the times. Vampirism is one literary device that is likely to capture the imagination of the population that perceives these events as significant. It may be that humans tend to create vampiric creatures in order to explain the changes they see occurring in their fellow human beings. We want to understand why we can be cruel to each other, why we prey on each other. Perhaps vampirism is a rational response to circumstances beyond our control...changes in the ebb and flow of a capitalist economy.

ENDNOTES

1. Robert Morrison and Chris Baldick write in their introduction to *The Vampyre and Other Tales of the Macabre* (Oxford: Oxford University Press, 2008) that Eastern European villagers believed vampires to be “bloated, shaggy, foul-smelling corpses....composed entirely of peasants” (xii).
2. The reference is to some of the actors who have portrayed aristocratic vampires in contemporary culture.
3. See especially, *Blood Read: The Vampire as Metaphor in Contemporary Culture* (Philadelphia: University of Pennsylvania Press, 1997) and Nina Auerbach, *Our Vampires, Ourselves* (Chicago: University of Chicago Press, 1995).

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Economic Consequences Stemming from the Doctrine of Judicial Immunity

Anthony Pappas*

ABSTRACT

Judicial Immunity is one of the legal doctrines that hamper effective accountability over the judiciary. In addition to preventing oversight and the exercise of civil rights by litigants, the doctrine also has serious economic consequences that impose costs on individuals and society.

The paper examines a range of these consequences and their relation to judicial immunity and other preclusion doctrines. The costs range from increased suicide rates across the nation; increased rates of incarceration for minor offenses and their life altering consequences; detrimental impacts on family life and children ranging from juvenile delinquency, teenage pregnancy, parental alienation, and increased foster parenting. The doctrine also results in increased litigation costs for those impacted by the doctrine and consequences. The historical origins of the doctrine are discussed as well as the prospects for reforms and remedial measures in the contemporary environment.

DISCUSSION

In the current, modern, global economy, doing business necessarily entails interacting with various legal systems. I wish to speak about a peculiarity of the legal system of the United States of America and the economic harm of this legal idea. While in the introduction I speak of the global economy, the effects of this peculiarity are more strongly felt on the microeconomic, local level.

The specific peculiarity I am speaking about is the current incarnation of judicial immunity. One cannot speak of current laws regarding judicial immunity because there are no formal laws that establish judicial immunity. In fact if one must make a connection between judicial immunity and legislation, the only connection one can make is that judicial immunity is in direct contradiction to due process as established in the Fifth and Fourteenth Amendments of the United States Constitution.

While I will make a summary history of judicial immunity and how it has been reified in its current form, the overriding takeaway from this history is that there are no legislative actions that have produced today's understanding of judicial immunity in the United States; it is entirely a creation of the justices of various Supreme Court terms.

An ahistorical or "common sense" explanation for judicial immunity would be that it affords judges freedom to execute their deliberative function without the threat of numerous, baseless lawsuits by the at least one (sometimes two) dissatisfied party of a court case. This ahistorical or "common sense" version is

the one that the forgers of today's judicial immunity framework held up as a valid protection of the "noble" independence of the judiciary.

Historically, the idea of judicial immunity in the U.S. does not have roots in preserving a judiciary from the ominous Sword of Damocles of baseless lawsuits. An erroneous study of history would hold that judicial immunity stems from an English decision by the Star Chamber called *Floyd v. Barker*. In this decision the only concern of the Star Chamber was to protect a judge from the caprices of the monarch and his officials; nothing more. *Floyd v. Barker* protected judges from the "executive branch"; it did not grant them "judicial immunity" in any expansive interpretation that some readers of history find.

The current "misinterpretation" of judicial immunity stems from the Reconstructive Era following the divisive U.S. Civil War.

In the ante bellum milieu during the birth of the U.S. republic, all the noble sentiments enshrined in the Constitution were restricted to being applicable to the Federal Government. Thus, it was not unexceptional for a state court to enact rulings that directly contravened The Bill of Rights! Following the Civil War, this state of affairs could not hold and in 1868, with the adoption of the Fourteenth Amendment, such happenstance was hoped to be stamped out as Section One of the Fourteenth Amendment says:

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

Thus, in one fell swoop the judicial landscape was changed and the judicial systems of the States had to respect the minimum standards adopted by the Federal judiciary.

Note that the Fourteenth Amendment does not carve out an exception for judges. The 1866 Civil Rights Act that was passed before the Fourteenth Amendment had as one of its intentions the establishment of liability for government officials, including judges, for depriving citizens of their Civil Rights. Because of this language, President Andrew Johnson vetoed the 1866 Civil Rights Act, which was then subsequently overridden by Congress. Addressing this issue during the vote to override President Johnson, one representative responded to the worries about judicial liability by stating:

I answer it is better to invade the judicial power of the States than permit it to invade, strike down, and destroy the civil rights of citizens. A judicial power perverted to such uses should be speedily invaded. . . And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of a willful wrong which deserves punishment. (Waters, 1987, pp. 467)

Given all this legislation protecting the civil rights of U.S citizens, how did it come about that judicial immunity even exists? During Reconstruction and all the various bills supporting the civil rights of all, the Supreme Court, in the 1871 case of *Bradley v. Fisher* asserted:

Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. (80 U.S. 335)

How could such an interpretation have been imagined given a complete lack of any precedent

Laura T. Kessler smartly opines that:

Thus, although not explicit in the *Bradley* decision, its coincidental timing with the passage of the Civil Rights Act of 1871, break with prior precedent, and fit within a line of cases evincing Supreme Court hostility to Reconstruction suggest that the judicial immunity doctrine has a complex, if not suspect, pedigree related to substantive objections to federal civil rights law, rather than simply the value of 'judicial independence' invoked by the Court. (Kessler, 2015, pp. 850)

Unfortunately, the Supreme Court enshrined this specious invention of judicial immunity further within the fabric of the legal landscape when in the 1978 case of *Stump v. Sparkman*, the court overturned a Seventh Circuit Appellate decision holding a judge liable for ordering the sterilization of a teenage girl on the basis of the mother's petition; the judge, Stump, ordered the procedure the same day based on nothing other than the mother's petition; the girl in this case was not even told that she was being sterilized, she was told that she was having an appendectomy. In overturning the Appellate decision the majority wrote:

A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. (435 U.S. 349)

The *Stump* case is indeed disturbing because of the nature of the details. Ordering the tubal ligation of a fifteen year old girl is an irreversible act and as the dissent in *Stump* rightly (and sadly) points out:

There was no "case," controversial or otherwise. There were no litigants. There was and could be no appeal. And there was not even the pretext of principled decision making. The total absence of any of these normal attributes of a judicial proceeding convinces me that the conduct complained of in this case was not a judicial act. (435 U.S. 349)

Another dissenting justice also stressed the Court's wrong judgment:

But where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the *Bradley* doctrine is inoperative. (435 U.S. 439)

It is the irreversible damage that was done to the girl that is so concerning and pertinent today. *Stump* has not been overturned. Judicial immunity is a concept that was simply created by judicial fiat without any basis in precedent or legislation. Generally, even the dissent agrees that if a case was so structured such that an appeal could be made that would in essence serve as a check on the original decision, a judge should then be immune. But is the appeals process sufficient remedy? Is there not damage done while a wrong decision stands and the appeal is pending? Cannot a degree of carelessness in protecting litigants'

rights emerge from judges cloaked in judicial immunity, safe in the knowledge that no matter how outrageous, their behavior will have minimal consequences compared to the damage done?

One can only guess at this point as more data is needed concerning judicial disciplinary actions and outcomes. However, an interesting paper in the Harvard Law Review by Bert I. Huang offers a glimpse of what increased scrutiny of judicial decisions might reveal. Regarding case overloads Huang states in his abstract:

I present here empirical evidence suggesting a causal link between judicial burdens and the outcomes of appeals. Starting in 2002, a surge of cases from a single federal agency flooded into the circuit courts. Two circuits bore the brunt, with their caseloads jumping more than forty percent. The other circuits were barely touched, by comparison. To sort cause from effect, I focus on outcomes not in the surging agency cases, but instead in a separate category: civil appeals. The two circuits flooded with agency cases began to overrule district court decisions less often—in the civil cases. This evidence of evolving deference raises the possibility of “silent splits”: divergences among the circuits in their levels of appellate scrutiny, due not to articulated disagreements but to variation in caseloads. (Huang, 2011)

While I am not concerned in this paper with judicial workloads, the possibility that overworked judges might be negligent in protecting litigants’ civil rights, safe from consequences due to judicial immunity, does concern me. I do have sympathy for overworked judges, but the answer to overworked judges is not cursory justice with some rights violations on the side.

The economic consequences of a single civil case may not be huge in the grand scheme of life, but they could be devastating for the litigants of the case. For example, in a divorce case the issue is specifically the division of economic assets in accord with the law. If one party wrongly has judgment against them depriving them of economic means to effectively provide for themselves or their families by a judge biased against them for whatever reason (which is not an exceptional hypothesis), and their case is then just given cursory attention by the appellate courts, it is possible that rights may be violated and there is no recourse available. Further preventing any recourse is judicial rule called the domestic relations exception that holds that divorce or other domestic relations cases do not fall within the jurisdiction of federal courts. Thus, if a state law in a divorce situation has the consequence of impinging one’s civil rights, the only recourse is simply just to change the state law because it cannot be remedied by a federal appeal. If only litigants of divorces and domestic relations cases had such power and the time required to effect such change without the damage already having been done. Indeed, even a mere appeal consumes valuable time and money. Economic harm would definitely have been done in a divorce case because the case is concerned with assets, but the example allows itself to be modified for other circumstances where assets are at stake and not just in cases where judicial workload is an issue.

In truth, every instance where judicial immunity prevents restitution for damages done by a biased judge, an overworked judge, a malicious judge, etc., is at its core nature an economic issue. The resource at stake may be money or it may be the person's time; economic resources are not solely dollars and cents.

The *Younger* abstention is a unique barrier to protecting one's precious few years on this Earth by barring a person from suing in a federal court for a violation of their civil rights if the person is currently being prosecuted for a case arising from that violation in until the case is concluded. Thus, if you are held by a judge in detention for a crime that was discovered as a result of an illegal search, you cannot ask the federal courts for relief of this violation until after you are convicted of the crime. For younger people, this is especially important as they are repeatedly denied civil rights accorded to adults for various reasons like being on school grounds. A case stemming from the illegal intrusion of a young persons rights as a result of erroneous assertions of authority or jurisdiction, or even just the intrusion itself, can have significant later effects on such person's development.

But who can deny that the pattern of civil rights violations that the Justice Department found committed by the Ferguson Police Department have an economic dimension? Where do the courts come in? Well, in the Justice Department press release summarizing the findings of its civil rights investigations it specifically says:

The department found that Ferguson Municipal Court has a pattern or practice of: Focusing on revenue over public safety, leading to court practices that violate the 14th Amendment's due process and equal protection requirements; Court practices exacerbating the harm of Ferguson's unconstitutional police practices and imposing particular hardship upon Ferguson's most vulnerable residents, especially upon those living in or near poverty. Minor offenses can generate crippling debts, result in jail time because of an inability to pay and result in the loss of a driver's license, employment, or housing.

The department found a pattern or practice of racial bias in both the FPD and municipal court: The harms of Ferguson's police and court practices are borne disproportionately by African Americans and that this disproportionate impact is avoidable; Ferguson's harmful court and police practices are due, at least in part, to intentional discrimination, as demonstrated by direct evidence of racial bias and stereotyping about African Americans by certain Ferguson police and municipal court officials. (U.S. Department of Justice, March 4, 2015)

This press release could have been pointed to by the Reconstructionist representative mentioned above in his speech to override President Johnson's veto 178 years ago! If only we had the Fourteenth Amendment and Civil Rights Acts! But we do, thanks to the Reconstructionists' hard work! If only Ferguson's wronged community could sue the Municipal Court for the "crippling debts, . . . jail time because of an inability to pay. . . loss of a driver's license, employment, or housing"! One can also see that in this case, one can argue macroeconomics came into play as the trampling of the rights of Ferguson's citizens was a

systemic intrusion committed against the whole community. One can imagine how the effects can become even larger when the systemic infection occurs on a statewide or countrywide level.

Indeed, with the Supreme Court having recently struck down parts of the Voting Rights Act of 1965, which was renewed as recently as 2006 by the United States Congress, it is shown that even a small cabal of judges placed in the right position can have huge consequences. In this case, the five justices of Supreme Court, who enjoy an immunity enshrined in the Constitution different than the immunity of this article, relied on completely erroneous reasoning (the subject of various articles). This definitively had a macroeconomic effect since what is more macroeconomic than voting? The President and the Congress determine fiscal policy. If a portion of U.S. citizens cannot have their say in who should make such decisions, so much the greater the harm done. And, yet, though these justices enjoy a certain Constitutional immunity, their very predecessors are the ones who invented the judicial immunity this article is concerned with!

More to the point, perhaps the goals of Reconstruction have yet to be realized? Perhaps the kind of liability that they fought hard to place in the Constitution and entwine in the fabric of our legal system is needed to finish their goals?

The remedies to the problems of judicial immunity are actually very simple.

First, the very people who are supposed to guard civil rights and due process should not be the same people who can trample upon them in error or with malice with impunity! This defies logic. Any judge who approve an act that precludes any remedy once the ordered act is carried out should be prepared to face liability for his actions should the act he ordered prove to have been in error or malicious.

Most simply, follow the Fourteenth Amendment, which makes ALL persons subject to prosecution for denying a person's civil rights. Indeed, those who voted for the Fourteenth Amendment, as well as the Fifth Amendment and Civil Rights Acts intended it to be that way. This judicial exception that was invented by the Supreme Court should be recognized as it is: an unlawful invention that contradicts the Constitution and that unlawfully nullifies aspects of the Civil Rights Act passed during Reconstruction.

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Employed or Exploited? Financial and Legal Implications of the Uber Case

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ABSTRACT

How does the classification of one's workers have an impact on profits? This paper will discuss the various types of employment relationships that businesses have with their work force. One of the most important classifications in employment law is that which defines the employer-employee relationship. Significant financial implications result from this classification. When the relationship is classified as that of an employer-independent contractor, however, a different set of financial outcomes result.

This paper examines the underlying legal history of dissimilar employment relationships. Then it discusses how court decisions such as that in the recent Uber case, in which independent contractors were re-classified by the court to be employees have a substantial financial impact upon the individual workers, management and shareholders. Among other implications, the re-classification changes the company's obligations with regard to social security, withholding taxes, Federal Insurance Contributions Act (FICA) and workers' compensation. The company's new obligations have the potential to result in lower profits and perhaps revenue losses simply due to the employee re-classification.

INTRODUCTION

The Internet has had a far-reaching impact on all sectors of our society. Some of these impacts have been relatively predictable, such as the ability to communicate with millions of people at lightning speed; others, however, perhaps less so. In the latter category has been the meteoric rise of the so-called "on-demand economy." This is a business "created by a technology company that fulfills consumer demand via the immediate provisioning of goods and services." (Jaconi, 2014) The wide-spread utilization of smart phones has created a marketplace characterized by ease of use, convenience and speed. Take the business Grub Hub, for example. All one has to do is go to its website and there, in large bold letters you will find three words: "SEARCH. ORDER. EAT." The simplicity of that command cannot be overstated. GrubHub "currently processes about 1.6 million orders a week." (Visser, 2015) The growth of this sector seems inevitable. A key reason for on-demand businesses is the use of inexpensive, some would say cheap, labor. And one reason they are so cheap is because employers classify these workers as independent contractors, as opposed to employees. Numerous disputes are now arising around how employees should be categorized and the impact this will have on business.

EVOLUTION OF THE MASTER-SERVANT DOCTRINE

The law has long differentiated different types of workers. Traditionally, the relationship between an employer and an employee was called a master-servant relationship.¹ A hallmark of that relationship is that

the employer had control over the employee. For example, the employer dictated when to come to work; how to do the job; and when to go home. Due to having this control, the employer incurred legal liability under the doctrine of *respondeat superior*.² *Respondeat superior* means that the master responds for the torts of the servant. The theory is that if the master is responsible for hiring the employee and controls how he or she goes about doing their work, then the employer should be liable if the employee erred by committing a tort or breaching a contract while going about the employer's business. A FedEx employee, for example, will drive trucks all over the world in order to deliver packages. If the driver of the truck gets into an accident, then FedEx as the master will be liable in money damages for the torts of that employee. This theory of liability is based on the master's control over the employee.

Another theory of liability is based more on a social contract. During the twentieth century, as more social programs were developed by the government, the view evolved that employers have, if not a legal duty, then a social one to take care of their employees. State government-based programs such as workers' compensation pay workers or their families for injuries or death on the job. It also pays hospital and doctor bills, pharmaceuticals, and physical therapy. Employer disability is limited by applicable insurance tables and workers are guaranteed at least some coverage for injuries incurred within the scope of employment.

Similarly, federal programs also grew beginning with the Roosevelt administration's creation of the National Labor Relations Board. As more and more protections were created for employees, the classification of a worker as an employee began to take on more meaning than just money. It also meant protection in the form of the Social Security Act and the federal employment discrimination statutes. These apply to employees, not independent contractors; visitors or invitees. Thus the classification of one as an employee takes on economic, social and legal significance.

So what is the problem? Many businesses intentionally categorize their workers incorrectly to save money. A 2005 Cornell study found that "roughly ten per cent of workers in New York State were miscategorized." (Surowiecki, 2015) The on-demand sector is no exception. By classifying its workers as independent contractors, these businesses avoid the payment of hefty costs incurred by employers, such as overtime, medical insurance, retirement, worker's compensation and income taxes. This paper examines the traditional classifications of employee versus independent contractor, the inherent responsibilities attendant to each and the financial implications of these classifications. Then recent cases are analyzed to demonstrate that a change in the law to incorporate non-traditional approaches to employment will have both financial and legal implications.

INDEPENDENT CONTRACTORS V. EMPLOYEES—3 TESTS

Generally, there are three different tests that the courts use when analyzing the workplace to determine the status of a worker. As discussed previously, the "right to control test" is based on the common law master-servant relationship. In such a relationship, the master, or employer tells the employee how to do

his or her job. In exchange, the employer then becomes liable for the conduct of the employee because “[t]he extent to which the employer had a right to control [the details of the service] activities was ... highly relevant to the question [of] whether the employer ought to be legally liable” for the worker's actions.³ The control factor has to do with issues such as what time to show up at work; what to wear; what tools to use; what time to leave; how to go about the job so that it is satisfactory to the employer.

The Third Circuit enunciated these factors as follows: 1. The authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours. 2. The day-to-day supervision of employees, including employee discipline; and 3. The control of employee records, including payroll, insurance, and taxes.⁴ Courts stress that it is the employer's right to control and supervise the work of an employee, “and the right to direct the manner in which the work is performed”⁵, as well as the result which is to be accomplished significant determinant. “The existence of the right or authority to interfere or control by the employer, not the actual interference or exercise of control, renders one an employee rather than an independent contractor.”⁶ The totality of these characteristics lends to concluding that the worker is an employee rather than an independent contractor.

Another test that the courts use is called the economic realities test. The Supreme Court developed this test in the case *United States v. Silk*.⁷ In this case, it was trying to determine whether the Social Security Act applied to particular workers. Some of the factors considered included: the permanence of the working relationship between the parties; the degree of skill the work entails; the extent of the worker's investment in equipment or materials; the worker's opportunity for profit or loss; the degree of the alleged employer's control over the worker; whether the service rendered by the worker is an integral part of the alleged employer's business.⁸

The case *Brock v Superior Care, Inc.*⁹ illustrates the application of these factors. Here the court was assessing whether nurses were employees or independent contractors. Because the nurses “had no opportunity for profit or loss and that their investment in the business was negligible” under the economic realities test, they were deemed employees. Interestingly, the court also looked at the control issue in the context of the economic realities test. The court concluded that, “The totality of the circumstances reveals that as a matter of economic reality the nurses are employees. Superior Care exercises substantial control over the manner and conditions of their work. Their services are the most integral part of Superior Care's operation. Under these circumstances, it cannot be said that the nurses are in business for themselves.”¹⁰

The third test, called the hybrid test, is a combination of the control test and the economic realities test. This test considers factors including supervision, method of payment, whether annual leave is afforded, and whether the work is an integral part of the employer's business.¹¹ When Microsoft was first expanding its operations in the late 1980's, it hired a group of core employees complemented by independent contractors. Core employees were given benefits including health insurance. Despite the fact that they worked side-by-side with the independent contractors, the employees were paid more, received benefits

and were paid overtime. The jobs each sector performed, however, were indistinguishable. Both “worked as software testers, production editors, proofreaders, formatters and indexers.”¹² It didn’t take long for the Internal Revenue Service (IRS), Department of Labor and The Employee Retirement Income Security Act of 1974 (ERISA) to challenge the categorization. Microsoft’s defense was its requirement that freelancers/independent contractors signed waivers as a condition of employment. In these waivers, the workers essentially gave up any claim to be treated as employees. Despite the waiver, courts almost uniformly hold that if you meet the test of an employee, then you are an employee, no matter what the employer calls you.

In the first round, called “Microsoft I”, the company admitted that it misclassified the workers and that the IRS was correct in its analysis that they were in fact employees. This resulted in Microsoft issuing W-2’s for the past two years of the workers’ earnings and paying all of the employer’s shares of Federal Insurance Contributions Act (FICA). Microsoft then basically hired some of those workers as employees and fired the rest. The employees who were fired brought a lawsuit claiming that they were entitled to contributions to the company’s retirement plan as well as participation in the stock purchase plan—benefits that they should have had as employees. Misclassifying employees as independent contractors proved expensive when Microsoft ended up settling the case for close to \$93 million and paying the government the overdue employer taxes it owed and the freelancers their share of FICA taxes that should have been paid by Microsoft. While the Microsoft case is not an “on-demand business” the decision is important for three reasons: first, it demonstrates that the government, and particularly the IRS is watching how employers classify workers; second, it shows the willingness of the government to take on industrial giants to recover monies it believes it is owed; and third, treating independent contractors like employees and assigning them the same jobs as employees will make them look, smell and ultimately cost the same as employees.

THE FEDEX CASES

The right-to-control law was on full display in what are called “The FedEx cases.” Here, employees of Federal Express challenged the company’s classification of them as independent contractors. The court looked specifically at how the workers went about performing their jobs. For example, FedEx did not expressly dictate working hours, but it did structure its driver’s workloads such that they would work between 9 and 11 hours each day. If the manager decided that these hours were too much for any particular driver, then the manager could reassign that driver’s hours to another worker. Additionally, managers rode in the trucks with their workers to observe them. By so doing, the manager would notice such details as whether a driver used a particular dolly or cart and if they placed their keys on their pinky fingers.

The drivers brought a class action suit against FedEx claiming that they were misclassified as independent contractors and as a result, were owed employment expenses and unpaid wages under the

California Labor Code, as well as coverage by the Family and Medical Leave Act (FMLA). Because more than 40 cases were filed by drivers throughout the United States, the cases were consolidated through the Judicial Panel on Multidistrict Litigation. (MDL) The MDL held that the workers were independent contractors under an economic analysis and the drivers appealed. On appeal, the decision was essentially reversed with the court using the control test to find that the employees were in fact employees because of the amount of control that FedEx exercised over their work.

THE UBER CASES

The Uber cases demonstrate the confluence of the factors mentioned at the beginning of this paper: the social and economic factors for providing workers with benefits, the legal determinants of employment and the advent of on-demand businesses. Uber is a demand business for rides in larger cities that takes the place of taxis or other forms of transportation. One simply uses the Uber App to call a car and the driver arrives, usually within a few minutes. The cars are neat and clean, the drivers exceedingly polite and the service much often better than a standard taxi cab. Questions about the status of Uber drivers first emerged from numerous state agencies hearing claims for benefits such as unemployment. The decisions of these agencies have been mixed with some holding that the individuals were employees while others holding that they were independent contractors. (Isaac, 2015)

In March, 2015, Uber drivers won a victory of sorts in federal court in California when a judge ordered the case to go to trial as many factors indicated that the workers were in fact employees. On September 2, 2015, the court certified the case as a class action. Denying Uber's motion to dismiss the case, the court found that the strongest evidence of Uber's right to control its employees was the fact that it could fire its transportation providers at will. 'At will' employees are those without a contract for a length of time. They can be fired without a hearing, without a reason and without notice.

The court was also very interested in evidence from Uber and the workers about who controlled the terms and conditions of their employment, such as choosing what hours they worked and how much they worked. Two opposing views were presented with Uber arguing that the workers chose their hours. The workers, however, introduced evidence from the Uber Driver Handbook that states:

We expect on-duty drivers to accept all [ride] requests;[w]e consider a dispatch that is not accepted to be a rejection, and we will follow-up with all drivers that are rejecting trips; we consider [r]ejecting too many trips to be a performance issue that could lead to possible termination from the Uber platform.

In addition, the drivers introduced evidence about Uber's desire to control *how* they went about their business including rules about professional attire and sending clients a text message when they were 1-2 minutes from pick up. Drivers were told to put the radio on soft jazz or NPR and to make sure to open the door for clients. Even the manner of how to pick up clients was illustrated for the drivers. Finally, all Uber

drivers may be evaluated by all riders as soon as a trip is completed. The company receives these ratings based on a five star scale. Drivers who fall below the company standard are terminated. In summary, the micro-management of the workers reflected a relationship more akin to employment than independence. Oversight of every aspect of the drivers' work day resulted in the court's conclusion that the workers were in fact employees.

Other cases against Uber are also being tried simultaneously including one in New York alleging that Uber is misclassifying workers in order to avoid paying its drivers reimbursement for costs incurred in their jobs including gasoline; mileage and tips. (Penton, 2015) Regulatory agencies, whose decisions are not binding on the courts, are also holding hearings and reaching the same conclusion. For example, the California Unemployment Insurance Appeals Board last month granted unemployment benefits to a former Uber driver, joining the state's Labor Commission and a Florida regulatory agency in finding that Uber had enough control over working conditions to be considered an employer.

THE FUTURE OF ON DEMAND BUSINESSES AND INDEPENDENT CONTRACTORS

What is the future of the on demand business in light of the inevitable conclusion that their workers are about to be re-classified? Certainly the application of the law to these businesses is going to result in significant monetary losses for the employers. From worker's compensation coverage to liability for torts by their employees, estimates are that Uber will take a hit. Additionally, these decisions make the expansion of on demand businesses questionable. Estimates for the increased cost to companies like Uber run at about 20-30% more for expenses such as payroll taxes, worker's compensation and health insurance benefits. Switching from independent contractor status to employees is also very expensive in terms of the paperwork involved and attorney fees. (Kosoff, 2015)

Specifically, estimates are that per employee, the break-down of added costs would be \$3,662 for paid leave; \$1,197 for supplemental pay such as overtime; \$5, 845 for insurance; \$3,099 for retirement and savings and \$6,620 for legally required benefits like social security for a total cost per employee per year of \$20,423 in annual benefits. (Brown, 2015) Given that Uber is valued at \$50 billion, the widespread belief is that the company will survive added costs, which may be eventually passed on to the consumers. Other fallout is predicted to be fewer drivers, higher charges for rides and of course, more control over drivers. (Levine, 2015) The result might be that Uber will become much less competitive against the cab companies it is currently surpassing in business.

Uber is just one company impacted by these court rulings. Others are already converting the status of their workers. For example, a new startup named Alfred provides helpers who run errands and other home oriented chores. Because of the Uber decisions, they along with others anticipated the need to convert their freelancers to employees.

While some companies are relabeling their independent contractors to employees, others are watching what is happening all over the country in the courts. The U.S. Department of Labor (DOL) is aggressively pursuing companies that have misclassified employees. National Consolidated Couriers Inc., located in the San Francisco Bay area agreed to a \$5 million “consent judgment that consisted of \$2.5 million for unpaid minimum wage and overtime compensation and an additional \$2.5 million as statutorily authorized liquidated damages payable to 600 drivers nationwide.¹³ DOL also won a judgment against Stanford Yellow Taxi Cab for \$3 million in back wages and damages to drivers. Twenty five states have entered into a Memoranda of Understanding with the U.S. Department of Labor to protect the rights of employees by preventing their misclassification as independent contractors or other non-employee classifications.

While the trend in the courts is definitely toward classifying workers as employees, it appears that the National Labor Relations Board (NLRB) might also be heading in the same direction. In *NLRB v. United Insurance Co. of American*,¹⁴ the Supreme Court used the control test to determine whether or not workers were employees or independent contractors. In 1998, the NLRB decided two companion cases: *Roadway Packaging Systems*¹⁵ and *Dial-A-Mattress Operating Corp.*¹⁶ and came to a different conclusion in each. In *Roadway*, the NLRB was looking at the driver’s status and concluded they were employees because of the usual factors but mainly the company’s control over how they went about doing their jobs. In *Dial-A-Mattress*, delivery drivers were independent contractors, because of a lack of control over their vehicles, sub-employees, etc. In the *St. Joseph News-Press* case in which newspaper carriers and haulers were deemed to be independent contractors because they provided their own tools, vehicles, supplies, and could subcontract out their routes. (Shaw, 2015) In that case however, there was a strong dissent by NLRB Member Wilma Liebman. She argued that the newspaper carriers should be classified as employees because of their economic dependence. This dissent has since been frequently quoted and the make-up of the NLRB has changed, leading many people to think that the Wilma Liebman’s dissent might become the majority view and that economic dependence will be given much greater weight. If this occurs, it is much easier to find that workers are employees.

In addition to the court cases and the leanings of the NLRB, some researchers are suggesting that the time has come to provide an alternative between independent contractors and employees. They propose a third classification named dependent contractors. These are workers with more than one “boss” or job but who have a primary allegiance, much like Uber drivers to their employer. These workers are dependent as they rely on the income from their primary allegiance but they are independent because they have many jobs. “Dependent contractors would be characterized by their financial dependence on the employer combined with project-based work and little bargaining leverage or power in work assignments. (Weiss, 2015)

In Canada and other countries, this other category already exists. “If a company has relied on a person consistently over the years, if that person derives all or most of her income from that job—then she could

be a dependent contractor.” (Shashani, 2015) “In essence, a dependent contractor, like an independent contractor, should have several employers, but, like an employee, maintains a primary employer that they depend on for payment and work-flow stability. A dependent contractor would then be entitled to certain severance packages and possibly termination notices.” (Workplace Legal Blog, 2015) In addition, the dependent contractor would be able to have more benefits and the protection of laws normally reserved for employees.

Currently, the status of the classifications is in flux. The emerging trend toward awarding employee status, however, is flourishing. With strong sentiment in favor of protecting employees both financially and socially, it seems that the law will have no choice but to adapt to the new demands placed on it by the on-demand businesses.

ENDNOTES

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2. *Farragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct 2275 (1998)
3. *Anfinson v Fedex Ground Package System, Inc.*, 159 Wash.App. 35, [244 P.3d 32](#) (2010).
4. *Butler v Drive Automotive Industries of America, Inc.*, 793 F.3d 404, 127 Fair Empl.Prac.Cas. (BNA) 1049 citing *Butterbaugh v. Chertoff*, [479 F.Supp.2d 485, 491 \(W.D.Pa.2007\)](#) (quoting *Cella v. Villanova Univ.*, No. CIV.A.01–7181, 2003 WL 329147, at *7 (E.D.Pa. Feb. 12, 2003)); see also *Plaso v. JJKG, LLC*, [553 Fed.Appx. 199, 205 \(3d Cir.2014\)](#).
5. *In re FedEx Ground Package System, Inc.*, 734 F. Supp 2d 557 (N.D. Ind. 2010)
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7. 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947)
8. U.S. v. Silk, citing: *Brock*, [840 F.2d at 1058–59](#); *DialAmerica Mktg.*, [757 F.2d at 1383](#); *Brandel*, [736 F.2d at 1117](#); *Lauritzen*, [835 F.2d at 1535](#); *Sureway Cleaners*, [656 F.2d at 1370](#); *Dole*, [875 F.2d at 805](#).
9. 840 F.2d 1054 (2nd Cir. 1988)
10. *Id.*
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12. *Vizcaino v. Microsoft Corp.*, [97 F.3d 1187 \(9th Cir.1996\)](#) (“*Microsoft I*”), vacated by *Vizcaino v. Microsoft Corp.*, [120 F.3d 1006 \(9th Cir.1997\)](#) (en banc) (“*Microsoft II*”)
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