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Licensing: Permission Slips in Corporate and Fourth Amendment Law

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I. INTRODUCTION

This Article suggests the beginning of a general theory of licensing systems. I use the word license to refer to legally meaningful approval offered or required relatively early in a system of social control or private agreement. The presence of a licensing apparatus has implications for other, related tools so that the presence of a certification requirement or permission component will draw attention to the larger system of controls or incentives in which it is embedded. Generally speaking, a control, or regulatory, system can focus on inputs or outputs, and inputs can be examined from an ex ante—"upfront"—or ex post—"outcome-oriented"—vantage point. Thus, a negligence rule can normally be thought of as focusing on inputs from an ex post perspective, because it awaits an accident, or loss measured from some baseline, before asking about the character of the activity that caused this loss and the untaken precautions that might have averted the loss. Some strict liability systems can be thought of as geared to outputs and from an ex post perspective, because actors pay according to the injuries they actually cause. In turn, most (of what I will call) licensing systems pay considerable attention to inputs from an ex ante perspective. For example, one might need a license to operate a motor vehicle, market a drug, or search private premises.

A general theory of licensing needs to grapple with (at least) three questions that reappear in disparate contexts: When are licensing techniques likely to be superior, in either functional or evolutionary terms? When should—or will—licensing requirements squeeze out seemingly duplicative, alternative means of social control? When should—or might—licensing be privatized as, for example, by the simple requirement that an actor be bonded by a private insurer who, in turn, would be free, with some enforcement help from the state, to set requirements for insurability? Market forces can be liberated in other ways as well. Thus, many licensing schemes raise the question of whether improvement is possible by simply

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permitting private parties to pay for speedier regulatory service. My intuition is that these questions benefit from a substantial dose of public choice theory, combined with considerations usually associated with work on deterrence and transaction costs.¹

My focus in this Article, however, is not on these general questions about licensing, but rather on the disclosure element in licensing, or permission, schemes. The present Article does deal with the familiar problem of the consequences of a failure to comply with licensing requirements. The examples I use raise questions about information and disclosure, and are selected in part to encourage an expansive conception of licensing. In addition to emphasizing this conception, or variety of licensing, I suggest that less information can sometimes be better than more. More specifically, I develop two ideas: first, in some settings the withholding of information might generate superior, unbiased licensing judgments and, second, the law might reflect some sensitivity to the likelihood that revelations are socially harmful. Lurking in the background of this examination is the hope that analysis of these specific points can begin to illuminate the grander questions regarding licensing schemes.

Part II begins with some rules governing corporate fiduciaries. Although the discussion might stand on its own, as a kind of old-fashioned case commentary or collection of ideas for classroom lectures on the subjects of corporate opportunities and self-interested transactions on the part of fiduciaries, I hope to show a number of interesting connections to licensing problems more generally. There is often an opportunity for fiduciaries to obtain consent, or a license, before investing or transacting in a way that is likely to lead to later conflict. The comparison between this private, or contractual sort of permission, or even ex ante regulation of an agent, and a more conventional licensing system, organized by a regulatory authority and often bounded by legislatively drawn categories and requirements, may seem far-fetched at the outset, but it offers a useful way to get at some of the complexities associated with licensing.² As is often the case, there is but a thin line between the private and public, and the former can inform the latter.

¹ There are, of course, familiar reasons for preferring various regulatory systems. Outcome-oriented systems are sometimes attractive because they create a convenient class of plaintiffs, reduce the number of claims, and more directly achieve a compensatory or redistributive goal. In turn, upfront systems may be superior in providing reader deterrence, dealing with judgment-proof actors, and avoiding problems associated with a causation (which is to say outcome) requirement. None of these considerations plays a role in this Article and, indeed, I even set aside public choice considerations, though I regard these as most important in explaining or structuring licensing systems. The focus here is on disclosure, and the idea that less may be more.

² A fuller discussion of licensing would require discussion of legislatively drawn rules, such as minimum age requirements, alongside administrative judgments, as through on-the-road driving tests. The text also hints at the need for comparing public and private licensing if only because such a comparison may be a useful way to think about the duplication or exclusivity ex ante licensing might offer a regulatory scheme.
In Part III, the analysis is narrowed again to one area of law, search warrants. It is one where the regulatory scheme comes closer to conventional licensing because permission is sought from third parties—legal authorities empowered to issue warrants—rather than from contractual partners. I try again to develop some freestanding arguments while beginning to identify some common threads among licensing regimes. This identification process strengthens the conclusion that there is more variety to licensing than is normally recognized. On the other hand, the arguments about the occasional desirability of less information rather than more, while quite provocative with regard to search warrants, turn out to be of little predictive value.

II. THE REAL RULE FOR CORPORATE FIDUCIARIES

A. Disclosure and its Complexities

The rules governing corporate fiduciaries can, at least conventionally, be described as focusing on inputs from an ex post perspective. Unlike the classical trustee who must not “wear two hats” but rather must follow what I have called elsewhere a separation strategy, the corporate fiduciary may divide loyalties so long as the conflicted fiduciary is prepared to bear the burden of proving that the transaction was fair, which is to say met the standard of an arm’s length bargain. Students of corporate law know that this law has gone through a number of stages. There was a time when self-interested contracts were simply voidable at the option of the corporation or its shareholders, but the conventional and enlightened modern view is that the law (and the parties) recognizes the potential gains from trade with (even) well-positioned, conflicted parties. In closely held firms, opportunities for such gains might arise especially frequently, so that a corporate officer who sells private property to the corporation is now said to bear the burden of showing that the price was no greater than that which would likely have emerged in a hypothetical bargain between unrelated parties.

3 With these examples drawn from corporate law and search warrant law I try to accomplish the first goal of this Article, which is to suggest that we might see much of law through the lens of licensing. In defining licensing as I have, there is the danger, or temptation, that we will think of virtually every legal rule as a licensing requirement because most rules generate consequences, or secondary rules, upon violation. The danger is that we are unlikely to learn much from common threads if these threads are seen as forming a seamless web connecting all of law. On the other hand, the benefits of a new perspective are likely to be enjoyed only if the perspective incorporates phenomena not previously linked to one another. The examples offered here are therefore selected because they are somewhat different—but not too different—from conventional examples of licensing schemes.

4 I am indebted to Hideki Kanda, with whom I long ago enjoyed conversations regarding the possibility that disclosure was the essence of the “real,” unstated rule in much of corporate law.


As a practical matter, the seller might solicit several appraisals at the time of the sale because this evidence, developed from an ex ante perspective, might be useful later if the transaction is challenged in a court forced to think about the exchange from an ex post perspective, when the deal is likely to have turned out to be an unattractive one for the corporation. Perhaps the most obvious thing to say about the array of fiduciary rules is that where monitoring is likely to be very poor, as with minors or other beneficiaries of a classical trust, the law offers a simple relationship where opportunities for profitable churning or other self-dealing by the fiduciary are quite limited. Relatively able investors are, however, more eager to gain from potential trades and they can monitor and occasionally object if they feel disadvantaged by their agent’s conflict of interest. Potential coventurers who are still more inclined toward freewheeling relationships, unconstrained by background rules that encourage the reconstruction of bargains or (as we will see) disclosure, might try to structure their arrangements so as to trigger the rules conventionally attached to contract law rather than those associated with ongoing, “fiduciary” relationships.

Observers of corporate law will also know of some immediate, if obscure, connections to considerations of licensing, or advance permission. In the first place, there was a period in the early 1900s when the rule was said to be that “a contract between a director and his corporation was valid if it was approved by a disinterested majority of his fellow directors and was not found to be unfair or fraudulent by the court if challenged.” The approval process can be seen as a licensing requirement or option. Second, there is a respectable view—and explicit state statutes to the effect—that the modern rule is to permit self-dealing if fair (viewing and reconstructing the terms of the bargain from an ex post perspective) or if approved by a majority of properly informed shareholders or disinterested board members. There is

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7 See id. at 160 (discussing Harold Marsh Jr., Are Directors Trustees? Conflict of Interest and Corporate Morality, 22 BUS. LAW. 35 (1966)).

8 To the extent that the contract could be valid even if there were no approval by disinterested directors, there was something less than a licensing requirement. If the approval amounted to a safe harbor, then the analogy is to licensing as an alternative to regulation through ex post review or lawsuits. In practice, of course, most licensing systems are at least partially duplicative; licensing schemes for motor vehicle operators or nuclear power plants, for instance, do not take the place of tort systems, and expanded tort law in such areas as professional malpractice has not generated deregulation of entry or continuing education requirements in the same professions. Most licensing schemes are thus duplicative rather than alternative.

9 See, e.g., CAL. CORP. CODE § 310 (1997); DEL. CODE ANN. tit. 8, § 144 (West 1997); ILL. ANN. STAT. ch. 805, § 5/8.60 (West 1998); N.Y. BUS. CORP. LAW § 713 (McKinney 1997). According to the Committee on Corporate Laws, by January 1, 1998 36 jurisdictions had adopted statutes that provide that conflict of interest transactions are not automatically void or voidable if they are either (1) found fair, (2) approved by a disinterested majority of the board of directors, or (3) approved by informed shareholders. See MODEL BUS. CORP. ACT ANN. § 8.61 note on statutory comparison (Supp. 1997) (listing and discussing statutes); see also Robert A. Wachler, Inc. v. Florafax Int’l, Inc., 778 F.2d 347 (10th Cir. 1985) (holding invalid a contract entered into with a corporation owned by one of the directors because the contract had been neither (1) formally ratified by the shareholders or disinterested di-
therefore the possibility that an interested party can obtain permission to engage in a conflicted transaction and that this permission will serve to protect the fiduciary against the dangers of an ex post review. Moreover, this hornbook law\textsuperscript{10} description of what I have called a licensing option, with licensing playing an alternative rather than duplicative regulatory role, leaves but a modest gap for fitting connections to the more general questions about licensing systems. In the corporate context, "private" law can be seen as improving on an outcome-oriented system by offering parties a kind of safe harbor, or optional, alternative license.

The rules just implicated have a sufficiently familiar feel and textbook quality that the decided cases themselves can come to seem wrongly decided almost without exception.\textsuperscript{11} Consider, for example, \textit{Hawaiian International Finances, Inc. v. Pablo},\textsuperscript{12} a fairly representative case. Pablo, the corporation's president, had been traveling to California at his own expense and in connection with his own real estate business. After returning to Hawaii and encouraging the corporation to invest in California real estate, he and several other representatives of the corporation were sent back to California where they decided to purchase two parcels of land on behalf of the corporation. Eventually, other shareholders and officers of the firm learned that the California real estate brokers who had represented the sellers of these properties split their commissions with Pablo; as a licensed real estate agent himself, Pablo had expected some income of this sort but there was no formal agreement between Pablo and these sellers' agents. Pablo's defense was that the corporation was unharmed because it could not have shared in the commissions inasmuch as it was not a licensed real estate agent. The court confuses things a bit by referring to the law governing a classical trustee rather than a business partner or insider, but it sensibly concludes that had Pablo disclosed his anticipated commissions, others might have seen room to bargain for a better price. The decision is against Pablo, who is required to disgorge the commissions he received.

One of the noteworthy things about the decision is that it contains no discussion of the fairness, or arm's length character, of the bargain. Indeed,
the corporation's failure to ask for damages, and the court's disinclination to contemplate anything more than disgorgement of the commissions, suggests satisfaction with the terms of the transaction. I think it fair to say that the case reflects the "real" if unstated rule applicable to corporate fiduciaries; where disclosure is socially harmless, a fiduciary who fails to disclose in advance of a conflicted transaction will be penalized, especially where the plaintiff has entirely clean hands.13 As we will see, the fiduciary's loss may be modest, depending on the behavior involved as well as the court's ability, however ex post, to locate some damages or enrichment.14

This real rule for corporate fiduciaries can be translated into the language of licensing, and comes with details worth examining, but it is useful first to capture the flavor of this common law, albeit unarticulated, development. There is some chance that Pablo and his associates might indeed have bargained more aggressively or successfully if Pablo's own gain had not depended on the goodwill of the sellers' agents. There is the more obvious possibility that he would have proved a better bargainer if his likely commission had not been positively related to the sale price. There is also the possibility that he would not have recommended California real estate, or these particular properties, if he had not expected personal income to follow. All of these dangers might cause other shareholders to investigate or delegate differently—and Pablo is obviously in the position to inform them, and thereby warn them of these conflict-generated dangers, at extremely low cost. I suppose that an observer with great faith in ex post fact finding might simply say that there is no gain from disclosure so long as the corporation (or some set of beneficiaries who can overcome the obvious collective action problem) is absolutely certain eventually to learn of Pablo's commissions and, therefore, of its ability to sue and shift the burden to Pablo to show that the transaction itself was fair.15 "Fair" might be taken to mean that Pablo must show that the price paid by the corporation would not have been lower in the absence of his presence as a conflicted intermediary. But I suspect that most observers think such an insistence on the ability of an ex post system to match or improve upon an ex ante warning system is misguided. Pablo's fellow travelers might have relied on him less had they known of his expectations regarding commissions. They might have put more pressure on the sellers' agents to share commissions with

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13 See infra note 22 and accompanying text (considering strategic delay).
14 In turn, even where there is no ready remedy, the prospect of damages in the event of price changes and the like should serve to encourage disclosure by the fiduciary earlier in time. A skeptic might say that this disclosure would be more likely if courts would articulate the "real" rule applicable to corporate fiduciaries.
15 If the corporation might never learn of the conflict, then the fiduciary's liability can too easily be understood as providing a kind of deterrence. Disclosure is needed because ex post monitoring or assessment will sometimes fail to materialize and the fiduciary who knows of this possibility will be tempted to encourage undesirable transactions (or, what is almost the same thing, corporations and other principals will decline to delegate authority to agents and will therefore sacrifice gains from delegation).
them, for instance by contributing to a deal at a lower sale price, if they had known that these agents were so willing to split commissions with Pablo. Moreover, I have assumed the inevitability of eventual disclosure or discovery, but there is virtually always some uncertainty about that and, therefore, some gain associated with a rule that encourages ex ante disclosure.

What if Pablo had disclosed the fact that he expected a commission?\(^{16}\) Licensing is much more than a disclosure requirement because license may be denied; in corporate opportunity cases, for example, it is plain that a fiduciary who discloses an intention to pursue an opportunity that belongs to the corporation is hardly protected from suit. Here, if Pablo discloses and his principals consent and perhaps take steps to monitor or to replace him as their negotiator, there remains an opportunity for ex post review so that the license, which is to say the ex ante consent, is more a requirement or a means of creating a rebuttable presumption than it is a safe harbor, or alternative means of regulation. But if the agent’s disclosure yields not consent but objection by the principal, then new difficulties arise. I can find virtually no litigation or ruminations regarding these matters, perhaps because agents tend to retreat in the face of sure litigation of this kind. Moreover, retreat is no panacea.

Imagine first that the disclosure, objection, and retreat all occur before the deal is completely done and the agent, Pablo, collects his commissions. The fact of disclosure makes it very difficult for a court to award damages—and this may well suggest Pablo’s best strategy—but the corporation might fear that it has already suffered from its inability to send different negotiators or perceive correctly the available pie. And if the corporation objects and demands that Pablo forfeit any commissions should the negotiated deal be consummated, it is not as if Pablo is likely to go back and renegotiate a better deal for the corporation, because to do so would be to come close to conceding an earlier bias. Pablo could be excluded from renegotiation, but this raises the interesting question of whether the corporation is entitled to Pablo’s unbiased services—which are now lost. Disclosure is thus better when it is earlier, although it may be useful to point out that this particular line of analysis has little to do with licensing more generally because most regulators gain little from earlier licensing applications. Some regulators may resemble market participants, but most do not gain from trade in the manner of most contractual partners and, if anything, they seem more likely to benefit from last-minute rather than early, and more informative, licensing applications.

Early disclosure by Pablo followed by objection and retreat is perhaps the least troublesome pattern. There may be some psychological wounds

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\(^{16}\) I am slipping over the question of whether this disclosure is with respect to the likelihood of commissions or extends to the details of the precise amount of the commission. See infra text accompanying note 31 (noting that precise disclosure can convey too much information and that a call for “full disclosure” leaves the discloser at some risk).
that will need to heal or perhaps fester and affect future behavior, but the situation is not much different from that of an agent whose responsibilities are expanded and who uses the occasion to ask for increased compensation but is then disappointed by her principal's response. There is the possibility that the agent will shirk or that the principal will now try affirmatively to reduce the agent's compensation (now that the principal sees that the agent does not depart)—all of which might affect inclinations to disclose, object, and retreat in the first place—but the ongoing struggle surrounding the pooling of capital and skills and the value of uncovering reservation prices should hardly be regarded either as a problem for law to resolve or as one that law has caused. An interesting but remote possibility is that the retreating agent be able to sue the firm for damages. The idea is that the employer's objection may have been without legal basis but the reality is that the employee can not collect for damages suffered as a result of his or her own risk aversion. This is not a situation where the law is forced to rely on suits for lost opportunities.

Disclosure followed by objection and then the failure of the agent or the principal to retreat is perhaps the most interesting pattern in strategic terms. It is not obvious that Pablo's employer can force him to negotiate for the corporation and to forswear all commissions. Put more generally, there are many cases where a fiduciary withdraws in order to avoid a conflict of interest, and there is then sometimes litigation about the fairness of contracts such a fiduciary silently permitted to develop, but the fiduciary's very withdrawal could be regarded as an actionable breach. As a practical matter, this sort of conflict must often be resolved out of court if the parties are to continue in their relationship, yet these resolutions are surely influenced by perceptions of the background rule that the law would impose if the matter were fully litigated. By way of illustration, imagine that an associate or partner at a law firm has asked the firm for permission to work in a weekend clinic in pro bono fashion. What if the firm objects, noting that the clinic's location raises the remote possibility that a walk-in client will have a dispute with a landlord who might be a future client of the firm, and the lawyer proceeds—with full disclosure—to work in the clinic despite the firm's objection? It is hard to imagine that the lawyer would ever be held liable for the firm's losses if a conflict were to develop or if there were evidence that a client was indeed lost because of a conflict between the clinic and the firm. In a sense this may be because the firm has the option of seeking to sever its relationship with the obstinate lawyer, but it is plain that an inability to sue for damages shifts some power to the lawyer in bargaining with the firm. The lawyer can of course also choose to sever the employment or partnership relationship, but the likelihood of such withdrawal

17 Without belaboring the point, it is possible that if courts recognized this subtle shift in bargaining power, they might be less inclined to deny declaratory relief or more inclined to find that the attorney had wronged the firm even if the attorney had disclosed.
is greater if liability looms ahead. Nor is this apparent disinclination of the law to entertain an ex post suit accompanied by a preference for an ex ante suit, or legally infused licensing arrangement. It is possible and perhaps desirable for the parties to have access to ex ante, injunctive specification of their responsibilities. The lawyer and firm might both like to know whether it is reasonable for the firm to demand that the lawyer avoid the clinic experience. Correspondingly, Pablo and his principals might all be happy to proceed one way or the other if a court would tell them in advance whether Pablo could retain the commissions that might come at no explicit cost to the firm.

The sometime attraction of declaratory judgments is familiar and yet usefully recalled. There are advantages to the certainty associated with early-in-time determination of legal rights, but there are of course many benefits associated with the usual preference for ex post adjudication. This is probably not the place to theorize either about the optimal degree of declaratory relief or the extent to which the parties themselves should have the option of determining when courts decide things early or late in time, although it should be plain that these matters form a large part of the analysis needed to answer the larger questions about licensing schemes. A simple and optimistic perspective is that our system’s preference for ex post reviews is sensible. A more complex view is that there are so many settings and ways in which parties—especially if they agree—can extract declaratory interventions from courts,18 that it is difficult to say whether there is really much of an uncertainty problem for Pablo and his principals should they find themselves confronting one another at an early stage. In any event, it is plain that there is an important link between some kinds of licensing and arguments for declaratory adjudication. If declaratory relief is sometimes attractive because it offers certainty, then licensing that protects successful applicants against ex post second-guessing can do much the same. And if declaratory relief is attractive in some settings because of the importance of fresh facts or the elimination of ex post biases, then the value of a licensing scheme is also likely to rise. But the corporate fiduciary context is not the best place to pursue these general questions, if only because the contractual nature of the arrangement, with a relatively small public interest component, distracts from the licensing analogue. Consent between parties may resemble some licensing by the state, but there is no need to take the extra leap this analogy requires at the present time. For now, it is enough to see the “real” rule of disclosure applicable to corporate fiduciaries as well as the problems solved and created by such disclosure.

18 Alternatively, the parties may be able to extract declaratory and preemptive determinations from legislatures or agencies.
B. Costly Disclosure

There are many cases like *Pablo*, by which I mean cases where the disclosure that is implicitly required would have been, at best, privately and socially useful and, at worst, harmless though confrontational, and hardly guaranteed to resolve all difficulties. But there are also cases where disclosure is more costly. Consider, for example, the well-worn *Lincoln Stores v. Grant*. Grant, a director and manager at Lincoln Stores, was offered the opportunity to take over nearby retail space that had been run by a competitor of Lincoln Stores. He accepted this opportunity, but after Lincoln Stores learned the identity of its new competitor it objected and claimed that this corporate opportunity should have been its to enjoy. There are many interesting things to set aside here, including Lincoln Stores’ disinclination to expand some years earlier and Grant’s continuing on their payroll while secretly working on his new venture; the court decided that he should disgorge the salary received during this “two-timing” period.

I also set aside a theme that I have developed elsewhere, that the outcome of the case might have been determined by the probability that Lincoln Stores seems to have strategically delayed in bringing its claim only after it became clear that Grant’s competing venture was profitable. Another perspective on this case is not so much set aside here as it is lightly folded into the analysis. Apparently the triggering event in the story of Grant’s departure from Lincoln Stores was a call from a real estate broker who approached Grant about the availability of the capital stock and location of Lincoln Stores’ competitor. But this intermediary could easily have approached Lincoln Stores instead, or perhaps both Grant and Lincoln Stores with the hope of stimulating a bidding contest between them. Evidently, the broker thought either that Lincoln Stores itself was unlikely to be interested in this opportunity or that it would value such an opportunity much less than would Grant. The significance of this feature of the case is

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19 I do not mean to minimize the private and social harm that confrontation can cause, but in order to spare the reader additional categories, I adopt fairly conventional jargon.

20 34 N.E.2d 704 (Mass. 1941).

21 I have simplified the facts. Grant was joined in the endeavor by others whose presence might have made things worse for Grant, because the harm to Lincoln Stores might be seen as more serious given that a significant number of their key people in one location turn out to have been distracted by their new venture.


23 As will become clear in the text, I am overstating the case somewhat, because the broker may simply have thought that Grant would be more interested than would Lincoln Stores. Still, the basic idea in the text is that the broker provides a kind of market check on the fiduciary and the principal. This market check idea may play a role in a fair number of cases. Thus, in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), perhaps the best-known fiduciary case of all, it is interesting that Cardozo is careful to point out that the outsider, Gerry, did not know of Meinhard’s existence. The idea, I think, is that an informed outsider might have approached Meinhard instead of, or in addition to, making his overture to Salmon. Conversely, had the outsider known of the partner, which is to say of Meinhard’s existence,
that the fiduciary has not wrongfully usurped if the corporation—with no knowledge of the fiduciary’s success or even of the fiduciary’s desire to embark on this adventure—would not have invested in the opportunity in question. And even if the corporation would have pursued the opportunity but the fiduciary attaches much greater value to it, there is an argument to be made against allowing the corporation to block the fiduciary’s defection and against a decision that imposes a constructive trust on the usurped opportunity in favor of the corporation, whose true damages are after all relatively small. The fact that the outsider and its broker—who had almost everything to gain from approaching Lincoln Stores—did not approach Lincoln Stores thus bolsters Grant’s implicit or best claim that Lincoln Stores is only complaining now that it sees Grant’s success in the competing venture or, more interestingly but less dramatically, now that it knows that only by taking the opportunity could it hope to retain Grant and his fellow adventurers as valued employees.

Lincoln Stores fails in its bid to have the court impose a constructive trust with respect to Grant’s venture and yet it would seem that the “real” rule, as I have claimed it for corporate fiduciaries, requires disclosure by Grant. In the absence of such upfront disclosure, trusting readers had reason to expect a decision against Grant on the constructive trust claim. But the difference between Pablo and Lincoln Stores is that in the latter case disclosure is not just the tip of a problematic iceberg, as it appeared to be in Pablo, especially when it is followed by objection and a refusal of the agent to retreat. In contrast, in Lincoln Stores disclosure is affirmatively costly or harmful. Unfortunately, this conclusion or intuition is not straightforward. One way to think about it is to identify the legal system’s default rule regarding behavior in the absence of an explicit noncompetition agreement. A related method may be to tinker with the chronology of disclosure and confrontation. The critical assumption, I think, is that Lincoln Stores may have a claim on an opportunity it would have pursued (within its line of business) but it has no such claim on Grant’s future services; Grant can depart as he likes, absent some specific and enforceable agreement to the contrary.

Imagine first that Grant discloses the approach of the outside broker and signals his intention to seize the moment and to depart. If his employer, Lincoln Stores, throws a friendly farewell party, then the firm is regarded as consenting to the fiduciary’s departure, declining the opportunity

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24 I leave this suggestion about “mild usurpations” for another day.

25 I am assuming—with no explicit legal authority—that a corporation can not claim an opportunity in order not to lose the valuable services of a fiduciary. Where the fiduciary has the right to depart and compete, the right does not evaporate simply because the employer wishes to defeat that right.
itself, or simply conceding that the opportunity is not the firm’s to exploit. If instead Lincoln Stores reacts to Grant’s disclosure by objecting to his behavior and plans, and Grant chooses not to retreat, there is the threat of some social harm. Lincoln Stores may use its newly acquired information to try and buy the competitor’s stock or site, or it may even attempt to tarnish Grant’s reputation with suppliers. These kinds of obstacles may discourage Grant. In the long run employees such as Grant may be less inclined to venture out on their own or even be discouraged from entering this kind of industry or work for a large employer. The legal system makes this kind of judgment about competition and mobility in many small ways, and I think there can be no doubt but that the inclination of our legal system is to make it fairly easy for employees to depart and compete. Alternative judgments are possible. One might for example tip the balance more than we do toward encouraging employers to invest in their employees’ human capital. And, of course, employers can to some degree enter into specific contractual arrangements with employees or potential employees before investing in them. A rule that penalizes nondisclosure by Grant—even where it is plausible or likely that a court would eventually find that the opportunity was not one which the employer could prevent the employee or fiduciary from pursuing—would be at least mildly surprising because the affect it would have on employees seems in conflict with other pieces of our legal system. Indeed, it is plausible that it is the overreaching employer, such as Lincoln Stores (hypothetically), that needs to be concerned about confrontation. Imagine, for example, that Grant discloses his plans to his employer but indicates that this disclosure is confidential. He

26 If Grant discloses, his employer objects, and Grant then chooses to retreat, the social harm is much like that presently described in the text. Grant’s retreat may reflect fear as to the costs of litigation, reputational losses, and other matters, but these considerations are quite similar to those we must take into account in thinking about the situation where he chooses not to retreat, and Lincoln Stores then presses a claim.

27 An employee’s ability to leave a firm and compete with that firm often becomes a legal issue when the safety of trade secrets are at issue. See generally Restatement (Third) of Unfair Competition §§ 39-45 (1993). Although the competing interests of the firm and the employee are both legitimate, courts will give substantial weight to the rights of an employee to leave and pursue her livelihood, free from the restrictions of prior employment. See SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1264 (3d Cir. 1985) (quoting Wexler v. Greenberg, 160 A.2d 430, 433 (Pa. 1960)); American Can Co. v. Mansukhani, 742 F.2d 314, 329 (7th Cir. 1984); Wexler, 160 A.2d at 433; Restatement (Third) of Unfair Competition § 42 Reporter’s Note cmt. b. For a view of the skepticism of the courts regarding these employment contracts, see Edmund W. Kitch, The Expansion of Trade Secrecy Protection and the Mobility of Management Employees: A New Problem For the Law, 47 S.C. L. Rev. 659, 664-72 (1996) (noting that courts are generally skeptical of employment contracts that reduce an employee’s mobility and will impose a reasonableness test on such contracts); see also AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1201-03 (7th Cir. 1987) (finding trade secrecy restriction against a managerial employee unenforceable, in part, because the agreement was both unlimited in duration and geography and was therefore unreasonable); DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990) (finding employer’s agreement not to compete unreasonable and therefore unenforceable because it was not necessary to protect business interests).
might say that his aim is to make things as easy as possible for this employer, who will need to find new employees, adjust its advertising, and so forth. Alternatively, he might say that his disclosure is meant to offer them the opportunity to litigate (or turn to some form of dispute resolution) as early as possible if they disagree that this opportunity is one which Grant ought to be able to pursue on his own. Either way, if Lincoln Stores now places any hurdles in Grant’s way, as for example by bidding on the competitor’s stock or property which Grant plans to acquire, then it is possible that Grant would have a claim against Lincoln Stores. The claim is a bit difficult to categorize. It might stand as a kind of fiduciary claim itself, although we do not normally conceive of fiduciary relationships as bilateral in this manner. Alternatively, the claim might amount to an allegation of unfair competition, or perhaps as one which gives new life to the doctrinal category of tortious interference with contract.

Unfortunately, I can hardly claim that Lincoln Stores stands as an example of this idea that the rule I have suggested, requiring disclosure by fiduciaries even where conventional doctrine announces that they are simply subject to ex post judgments about the fairness of bargains, is in fact a refined rule which imposes a disclosure requirement—but only where the disclosure itself is socially harmless. After all, I also suggested that strategic delay may play an important role in the case, and there is no reason to think that disclosure considerations need to trump strategic delay. There are simply too few cases to control for this variable and thus not enough evidence for me to insist on the positive value of this distinction between harmless and potentially harmful disclosure. For the present, I aim only to encourage the idea that the conventional rule may have fooled us, and potential litigants, into looking in the wrong place. Once we focus on disclosure and the problems it solves—but also (or especially) those confrontations and consequences it generates—we may find many more cases which permit a fair assessment of the possible exception for costly disclosure. Moreover, a refined rule may be quite likely to develop, even if there is none at present, once parties know to argue that their cases can be distinguished from precedents because of the likely harm generated by a rule that penalizes all nondisclosure.

C. Intermediate Disclosure

Returning to the Pablo case, what if Pablo had disclosed the likelihood of a kickback, or shared commission, but not its magnitude? More information seems better than less, although it does create more opportunities to

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28 I would, however, expect disclosure to trump the idea that alleged usurpers or their opponents, for that matter, are more likely to win if they can show some market evidence of their claim. See supra notes 23-25 and accompanying text. This is because the market check idea goes directly to the question of whether there is likely to be a wrongfully taken opportunity and that is the question that disclosure might have avoided or accelerated.
litigate over the accuracy and precision of disclosure. In other cases, however, more precise disclosure is at least distorting and possibly harmful. In *Robinson v. Brier*,\(^2\) a director of a company that manufactured luggage had a more substantial interest in another company that manufactured frames. The second company was able to produce and sell these frames to the first firm at a lower price than had a previous supplier. The conflicted director was open about his interest in this inter-firm transaction and the court rejected the claim that he should have disclosed the second company's costs of production. The case may turn on plaintiff's delay in bringing a claim, but the issue of disclosing costs or even profits arises in many other cases and even forms the stuff of a category in the American Law Institute's Corporate Governance project, where some jurisdictions are said to require disclosure of material facts, others to require no disclosure (but rather fairness), and then others to require disclosure of profit.\(^3\)

There are settings where precise disclosure, including information about costs and profits, seems important if only because startling profit data may signal a principal that additional monitoring or inquiry is wise. But in other settings the requirement that a supplier reveal cost data or its equivalent may deter that supplier from contracting with the firm, to the long-run detriment of the "protected" firm, because the information may become known to other firms,\(^3\) may distort the firm's decision as to whether to deal with this firm or another (unrelated) firm, and may present opportunities for undue mischief associated with litigation over the details of what has been disclosed. A court that seeks to explain a decision against a fiduciary might (nearly) always be able to find some detail that was not disclosed and that might have affected another party's behavior. Moreover, in some cases disclosure of the details might well provide the firm with more information than it could expect from a non-conflicted competing supplier—but such disclosure might simply balance the information that the conflicted party has about both firms. In *Brier*, for instance, other suppliers surely need not convey information about their production costs so that if Brier's frame-making firm needed to do so, the luggage manufacturer would enjoy a bargaining advantage. On the other hand, Brier himself was privy to information about the luggage manufacturer and was therefore advantaged compared to his competitors in the frame-making business. Seemingly excessive disclosure might therefore level the playing field. There is obviously a great deal that could be said here, but in the interest of persevering with questions more closely related to licensing schemes quite generally it

\(^2\) 194 A.2d 204 (Pa. 1963).

\(^3\) See *PRINCIPLES OF CORP. GOVERNANCE* §§ 1.14 (Disclosure), 1.25 (Material Facts), 5.02 (Transactions With The Corporation) (1994) (collecting state statutes and cases and indicating that only a minority of states find the profit earned in transactions with a corporation to be a material fact that a reasonable person would consider important under the circumstances).

\(^3\) If the information could be kept confidential, then at least in theory the supplier should be willing to contract at its reservation price where it earns a tiny profit.
should be sufficient to note that we might expect some variety in these decisions. It is as least possible to describe “full” disclosure as likely often to be socially harmful. I am tempted to suggest that in a case like Pablo full disclosure will be required, in one like Brier partial disclosure will be the rule, and in cases like Lincoln Stores no disclosure will be encouraged (because any disclosure might lead the employer to behave in a way that generated more social harm than good). There is enough evidence to make something of a run at this theory, but because it suffers—as do many optimistic positive theories—from the problem of determining the optimum degree of complexity, or number of categories and refinements, in the law, it is perhaps best left for more eager readers.

I hesitate, however, to depart from this area of law without reinforcing some of the doctrinal conjectures. As we have seen, it may be accurate to describe the law as requiring disclosure, and sometimes partial disclosure, because (or where) such disclosure is often useful and not socially harmful. Doctrinal claims regarding the exclusive importance of fairness, or arm’s length pricing, seem much less accurate than this one based on disclosure. Moreover, doctrinal claims about disclosure rules across jurisdictions seem unsubstantiated and less promising than the conjecture offered here, that disclosure requirements vary depending on the social utility of disclosure, including assessments of the gains and losses from full disclosure of such things as costs and profits. It may even be that there is little gained from the conventional assignment, or bifurcation, of cases into doctrinal categories associated with the labels of self-dealing and corporate opportunity. Pablo can be seen as a corporate opportunity case, although it is normally described as of the self dealing, two-hatted kind, Lincoln Stores has more than an element of self-dealing to it, although it is displayed as a corporate opportunity case, and so forth. We may see these stories in the law more clearly if we think of them all in terms of the degree of disclosure that is usefully required. To be sure, in some instances the remedies that are sought will differ depending on whether the fiduciary invested in competing property, but it is noteworthy that in these two cases the remedies that are sought are virtually identical, and can be described as in the disgorgement, or constructive trust, family. The difference in outcomes would seem to have everything to do with the desirability of disclosure.

D. Disclosure Requirements and Licensing More Generally

It is tempting to draw additional and immediate conclusions about corporate law, and even to generalize about the advantages of encouraging or forcing early disclosure—even if it be partial disclosure or mere signaling—in other settings as well. I have already implied that at least in some parts of corporate law, courts can be seen as having imposed a kind of licensing requirement on fiduciaries. Granted, this requirement admits of some exceptions, leaves room for other variables, and assesses noncompliance penalties that are often lower than the damages that would be due in an
ex post system. As we will see, such modest penalties for nondisclosure, or for the failure to be properly licensed, are attractive. However, they tend to ensure that the upfront system will not replace an ex post system, but will accompany it and generate additional administrative and compliance costs. But all these matters need to be revisited with more comparative information in hand.

For the present, my aim in this Part has been to revisit this (seemingly) self-contained area of corporate law and to show that there is more here than first meets the eye. The conventional statement of the law focuses on ex post determination of arm’s length bargains but the real rule may have much more to do with disclosure. And the disclosure "rule" itself may be sensitive both to the question of whether disclosure threatens to undo the system’s judgment about employee mobility and to the question of whether in the particular case disclosure might cause other harms. Finally, disclosure seems to create as many interesting problems as it solves. Hornbook and case law seem to anticipate that disclosure brings about a response that puts an end to the matter. But, as we have seen, if disclosure is followed by confrontation, a variety of complexities may follow. In this sense a disclosure requirement is something much less than—and perhaps more troublesome than—a conventional licensing requirement because in a public licensing system there is a kind of adjudication rather than mere confrontation. To be sure, a disclosure scheme of the kind described here could be developed into something very similar to a licensing regime by allowing parties to head for adjudication as soon as they perceive some uncertainty in the application of a legal rule or their own contractual formulations. One obvious path to pursue here is the analogy to, or utility of, fast-track licensing options, but I will let the present analysis stand on its own.

III. DISCLOSURE AND UNBIASED DECISIONMAKING IN THE LAW OF SEARCH WARRANTS

A. Murray and Beyond

Murray v. United States is a Fourth Amendment case about the independent source doctrine. The case involves the warrantless search of a

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32 Indeed, in some cases this judicially constructed licensing scheme flies in the face of fairly explicit legislative instructions as to safe harbors and the like. See infra note 11.

33 I refer here to another difference between conventional licensing and that found in corporate law, namely that the parties may find it much easier to contract out of the requirements attached by judges to "private" arrangements than out of legislated, or "public," licensing schemes.


35 The Court in Murray observed:

Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the independent source doctrine . . . [that] the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the
warehouse that had been under surveillance. The illicit search revealed a large store of contraband; the police exited and sought a warrant—without disclosing to the magistrate that they had already entered the premises and seen the evidence they now sought. Armed with the warrant, the police re-entered the warehouse and seized the evidence that the defendant then sought to have excluded. The government's argument was that the police were on their way to seeking a search warrant prior to the first search, and that given the quality of the information they had at that time, a warrant would have been granted. Citizens who are unfamiliar with modern Fourth Amendment law are often astonished to learn that the Murray Court held that the evidence was admissible.

My present interest in Fourth Amendment law is obviously premised on a characterization of a search warrant as a license. Most licensing schemes call upon private parties to ask the government for permission to engage in some activity. I have already suggested that in thinking about the wisdom and consequences of the failure to obtain such consent, we might benefit from exploring the relationship to disclosure rules and consent practices in settings that are more private, or contractual, where private parties might ask one another for permissions. In the search warrant setting, the government is involved—but now it is the government that is in search of a license, from an affected private party or from another branch of the government. I will not bother to characterize this as a third kind of licensing scheme, in which case the law of waivers might form a fourth, because my aim here is to show common elements of licensing schemes, defined broadly, rather than available distinctions.

In many ways search warrants are conventional licenses. Here, as in other licensing settings, one who proceeds without a license is sometimes bound for legal trouble, sometimes merely inconvenienced, and sometimes under no disadvantage at all—as when no license is required by the courts. Similarly, while it is easy to complain about the courts' deference to police, even where it is easy for the police to make false claims about the behavior

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487 U.S. at 537 (citing Nix v. Williams, 467 U.S. 431, 443 (1984)).

36 In these settings, licensing is normally between private parties even though background rights and enforcement strategies are set by legislatures and courts.

37 If our law were more like German law, imposing stricter requirements on private parties who "search" or invade other private premises than it does on government agents, then the comparison between warrants and licenses would be quite direct, with the government regulating private transactions upfront rather than simply enabling these parties to sue one another in tort or some comparable outcome-based system that sought to control the extent and character of searches. See Craig M. Bradley, The Exclusionary Rule In Germany, 96 HARV. L. REV. 1032, 1048 (1983) (comparing the German exclusionary rule to the American rule); see also Craig M. Bradley, The Emerging International Consensus As To Criminal Procedure Rule, 14 MICH. J. INT'L L. 171, 206-17 (1993) (discussing the German exclusionary rule).
they observed before proceeding to search without warrants and without supervision, the licensing label reminds us that such deference is quite common. We expect deference to health inspectors and most examiners even where we have little more than an examiner's word pitted against that of a complaining citizen, and even though the examiner might gain personally from occasional dishonesty.\footnote{It goes almost without saying that it would be impossible to manage a policing and criminal justice system that did not rely on the honesty of field officers. Most licensing systems will find it much easier to review the work of line officers.}

Taken as much out of context as seems reasonable, Murray might be described as a case in which the failure to obtain a license in timely fashion did not preclude the applicant from applying later for the license—with no disclosure of the earlier failure to obtain the license—just in time to elude the system's enforcement tool. One is tempted to imagine an unlicensed driver pulling over to the side of a highway in sight of an upcoming police checkpoint, running across the road to a state office building in order to obtain or validate a driver's license, and then proceeding through the checkpoint.\footnote{Note that in both the search warrant and driver's license settings, the system could provide—as many life insurance and university applications do—that the applicant must disclose any previous applications or rejections. Affirmative responses might trigger increased review or might virtually preclude the grant of what is requested. In some settings there may be an undesirable spirit of self-incrimination, and more generally there is the question of what to do or to expect when an applicant misdiscloses or refuses to disclose but otherwise seems qualified.}

My present, more specific interest in Murray begins with what might be a disadvantage of disclosure, namely the possibility that the magistrate's decision is superior if it is unbiased either against the police, by knowledge of the prior unlicensed search, or in their favor, perhaps by knowledge of what the police have already seen in the targeted warehouse. In Murray, it is tempting to think of the government as having done its best to re-create the original licensing application that it wishes it had completed. And there is something to be said for this strategy of making the best of an earlier permission “slip” by disclosing less rather than more when trying to undo the earlier harm or start over again with the original request. The idea that less information can generate better, unbiased decisionmaking is not startling. An artist who wants an honest assessment of a piece he or she has created may dissemble as to the identity of the creator or may engage a third party to bring the piece to a professional appraiser.\footnote{A professional appraiser is less likely than a friend to be offended by the prospect of denigrating a piece that turned out to have been created by the person who submits the piece for inspection.} Anonymity is a familiar tool in contests.\footnote{I am not suggesting that the application for a search warrant be anonymous. Rather, anonymity is but one example of the withholding of information in order to elicit an unbiased judgment. Another familiar reason why less information may be better than more is that decisionmakers may have difficulty processing the information. This comes closer to the possibility claimed in the text.}

In short, Murray could have been about one very particular aspect of licensing, namely the best strategy for ex post, or at

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least late in time, re-creation of the licensing process. An applicant who se-
cures permission late in time can sometimes argue that no harm was done
by the failure to obtain a license at an earlier moment. Note, in passing,
that although there may sometimes be social gain associated with the failure
to obtain the original warrant, or license, as was arguably the case in some
of the corporate cases discussed earlier, the question about remedying the
failure to obtain a license at the first and best opportunity is one worth pur-
suing even where early disclosure is harmless or beneficial.

Unfortunately, Murray is provocative but not terribly supportive of the
view encouraged here regarding the re-creation of a licensing application
with purposeful nondisclosure. Such support might, for example, have
come in the form of a statement by the Court, or decisions to this effect by
later courts, that critical to the decision in the government’s favor was the
withholding of information from the magistrate. If instead the magistrate
had issued the warrant after being told the truth about the earlier search, it
would be nice to know that the Court would have suppressed the evidence,
or at least insisted that the likely biases accompanying information might
offset one another in the magistrate’s mind. But most of this is fantasy;
there is every reason to think that the Court would have allowed the evi-
dence in Murray even, or especially, if the magistrate had been told the
truth about the earlier search. In any event, subsequent case law develop-
ments give not a hint of the idea that—as a predictive or positive matter—
less information is ever regarded as better than more in the magistrate’s
hands.

Murray offers an opportunity to see the potential returns from thinking
about diverse licensing questions as of one piece. In many licensing
schemes, a specific penalty attaches to a failure to secure a license. We
might think of this as an approach utilizing dual or bifurcated remedies, al-
though there is the recurring question of whether the second remedy will be
independent of the presence or imposition of the first. The presence of dual
remedies or incentives buttresses arguments against increasing the second
penalty simply because there was unlicensed activity. If, for example,
someone drives a motor vehicle without a license and is involved in an ac-

The majority in Murray says that its decision does not encourage illegal first searches because the
gains from going without a warrant application are overcome by the cost to the police of having to con-
vince the trial court later on that no information gained from the illegal entry affected either the decision
to seek a warrant or the magistrate’s decision to grant it. I think the decision could have relied on the
stronger position that the evidence is admissible even if it completely affected the decision to seek a
warrant (whereas in Murray the police claim that they went in to see if there were criminals inside and
to protect against evidence destruction). The argument would then be that Murray re-creates an ubi-
ased decision and that “search first, warrant later” is still discouraged either by the fact that the police
know that they are repeat players who must worry about being distrusted or by the possibility that the
trial court will lean toward harsh rulings because of its suspicions that the police did not unintentionally
“slip.” In any event, we have before us the easier case where the government asks only for the rule that
where the police honestly slipped in thinking that the first entry was acceptable, they gain something by
retreating and securing a warrant before marching in to seize the evidence.
incident in a manner which suggests that the failure to secure the license was not a proximate cause of the accident, then the argument against liability for the unlicensed driver is not parried by the claim that exoneration in the tort suit will encourage unlicensed driving. After all, by hypothesis, the "duplicative" regulatory scheme comes with its own penalty, which attaches when unlicensed drivers are stopped either because of accidents or for other reasons. There seems to be more of an argument for increasing the outcome-driven remedy when there is no separate remedy for failure at the input stage. This is especially, or perhaps only, true when the point of the licensing scheme is something more than the prevention of accidents.43

The coexistence of single and dual systems can be revealing. Consider, for example, that in the case of driving, commonly deployed upfront penalties may help monitor and record activities. Driving without a license, failing a driving or vision exam, and driving in a manner that violates a "licensing" or regulatory scheme, are all more likely to be recorded if the state has an incentive, in the form of a fine it can collect, to monitor vehicles and cite drivers for these violations. In turn, private insurers can use this information in setting rates and in excluding drivers or vehicles from the road. Put differently, if this is not the point of the dual system, then it is hard to see why we do not simply require insurance, as most jurisdictions already do, and then allow the insurance market to decide everything that is now set or ignored by statute and regulation.44

By way of comparison, there is rarely a penalty for unwarranted house searches other than that provided at the outcome stage by the exclusionary rule. Unlicensed searches of the innocent generally yield no remedy.45 But what is the connection between the absence of insurance for an unwarranted and unwanted search, not to mention the unavailability of liability insurance for illicit searchers, and the absence of a specific and separate penalty for the failure to obtain a license to search? It seems that there is less benefit from duplication where there is no insurance because now there is no user who seeks information in order to differentiate among applicants for insurance. And this intuition seems useful in explaining why driving is regulated by a dual system, while searches are regulated by a single, outcome-driven remedy when there is no separate remedy for failure at the input stage. This is especially, or perhaps only, true when the point of the licensing scheme is something more than the prevention of accidents.43

43 If the idea is simply to prevent accidents, there may be no need to pile on to the conventional outcome system. But if the upfront, licensing scheme aims also to control congestion or to educate citizens about other matters, such as child safety seats, for example, then the dual remedies are not simply duplicative.

44 But this sort of privatization of licensing is a subject best left for another effort.

45 There are of course very occasional and much publicized cases where there is some remedy or settlement value, but by and large even the innocent do not collect for unwarranted searches. See William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 VA. L. REV. 881, 899-906 (1990) (discussing the difficulties of measuring actual damages caused by illegal searches, in particular the difficulties with measurement of intangible damages, and noting that tangible damages will often be less than $100 even if measurable). An illustrative case is Ruggiero v. Kzeminski, 928 F.2d 558, 563 (2d Cir. 1991) (awarding victims of an illegal search $1 in nominal damages because victims failed to prove consequential damages).
oriented system. I will not go so far as to claim that insurance will or should always accompany a dual system, if only because most insurance markets will not need such strong-form assistance from the government in monitoring and recording behavior patterns after the fact. But where there is no insurance we might be especially wary of dual systems, which may serve the needs of interest groups in a manner that is not socially efficient.46

*Murray* is as good a vehicle as any for thinking about a benefit of near-duplication. The awkwardness—or political difficulty or unfairness—of the exclusionary rule has something to do with the distance, whether described chronologically or morally, between the wrong that is addressed and the remedy that is eventually imposed. Of equal relevance is the fact that the remedy advantages a set of persons that does not include those innocents whom we might think of as most deserving of protection from illicit searches. One way to remove these thorns is to develop a separate, lesser remedy for illegal searches. Indeed, a large number of problems in this and other licensing areas can be avoided, if that it a fair word, by adding a remedy. Additional tools often enable a coherent incentive system to appeal to conceptions of fairness and refinement. The idea is that observers may be more comfortable with a range of penalties so that all wrongdoers face some palpable sanction. In *Murray* itself, if the wrongful first search had triggered a fine or other remedy, the admissibility of the evidence that was eventually seized would seem less jarring if only because every observer would then recognize that illicit searches are discouraged by the extant legal rules. Economists tend to appreciate remedies based on their expected values, but other observers and many courts appear to abide by the intuition that, where feasible, wrongful behavior should be penalized each time it occurs—and according to some conception of proportionality. This observation hardly explains the presence of licensing systems; we could for example require no warrants but exclude evidence later on when it is determined ex post that an earlier search was wrongful.47 But once a licensing requirement is taken as a given, the observation does illuminate the practice of imposing separate penalties for violations of that requirement even though it would be possible to calibrate the single, later remedy alone.

46 And, no doubt, some will argue that this is the case for privatization quite generally. I plan to return to the question of interest group influences and private "regulation" in a future article.

47 And as for the problem of encouraging wrongful searches, see *supra* note 42 and observe that even in a single case like *Murray*, the police may not want to "search first, ask later" because they may fear that if they search without a warrant, then a court will be too strict in its application of the independent source doctrine and will "overestimate" the degree to which the first search is what really gave the police the information that generated the later warrant request. Alternatively, and following the narrower doctrine of the case, a court may insist that the police would not have asked for a warrant if they had not seen contraband the first time. The Court's claim in this regard is stronger when it really believes—or limits the case's applicability to situations where—the police are already on their way to get a warrant when they go have a peek.
In the search warrant setting, there is no shortage of explanations for the licensing requirement. Thus, the warrant process serves a role in forcing police to specify in advance what it is they are looking for and where it is that they plan to search. These substantive constraints might control undesirable searches because in the absence of a warrant process it might be too easy for the police to “specify” after the search what it was they were looking for and where they planned to search. The outcome in Murray might be explained in large part by the fact that in that particular case there was little danger of manufacturing such ex post specification because the evidence was in plain view once the police were inside the warehouse. Hypothetically, if the police had been drug investigators and had they claimed to have been looking all along for some stolen art that was actually found in a warehouse they entered with no warrant, prior to requesting a warrant with no disclosure of the earlier entry, the courts might have developed a rule more sensitive to the problem of ex post specification.

In the search warrant setting, it is also possible to identify costs associated with more disclosure or licensing. Some of these costs are so obvious that no license is required, as when the police are chasing a dangerous criminal who runs into a private house. Taking up the point developed in Section II-B, that law might reflect sensitivity to the possibility of socially harmful disclosure, there is even a claim to be made that the evolution of the law of search warrants can be understood in these terms. The licensing requirement has been systematically relaxed through deference to law enforcement personnel and the development of good-faith exceptions. This might be associated with some recognition that a public licensing requirement often generates costs, if only because the licensing process can inform targets of upcoming searches, allowing them to take evasive steps. More generally, the trends in search warrant law might be seen as one of many concurrent examples of deregulation, which can itself be seen as the product of either the rise and fall of various political interest groups or the growing recognition of the costs of regulation.

In any event, this particular explanation for licensing in Fourth Amendment law, relating as it does to the advantage of requiring ex ante specification, has nothing to do with the one, relating to insurance markets, advanced with respect to drivers’ licenses. In both cases numerous other explanations are available. In these and many other cases, whatever the reasons for the dual regulatory system, dual remedies may be something of a luxury from an economist’s point of view. If this is correct, the presence of a separate, severable, lesser remedy for an upfront violation may be hard

48 Another interesting cost is that targets may have their reputations damaged because of the publicity surrounding a search or even the request for a warrant. But this cost might suggest either a more or less stringent warrant requirement; more in order to reduce the number of such events but less in order to avoid the publicity associated with the warrant request. In any event, it is likely that the optimal licensing requirement is different in different contexts because of the predictable but varying private and social costs associated with warrants.
to predict. I can imagine the appearance of new, modest remedies for illegal searches, but I can also imagine jurisdictions not bound by our Constitution with no warrant requirement and with purely ex post remedies for illegal searches. Similarly, we can imagine severe penalties for unlicensed driving, virtually unrelated to the question of whether any accidents occurred, but we can also imagine a variety of deregulation, nearly total reliance on a tort system, and perhaps a rule of mandatory insurance, with insurers then “licensing” drivers.  

B. Small Puzzles in a Slightly New Light

Imagine that someone grabs a candy bar from a store, is nabbed by a police officer upon exiting the premises, and then returns to the store where he reveals nothing of his earlier act and sweetly asks the owner if he can have the candy bar without charge inasmuch as he is hungry and without money in hand. Setting aside the practical problem of prosecuting without the owner’s cooperation, we would hardly allow the perpetrator to claim that if the owner now consents then the spirit of Murray calls for exoneration.  

One way to think about this is to see a resemblance to the case of an unlicensed driver stopped at a roadblock who offers to apply for a license at this late time. Another is that in the shoplifting case, unlike Murray, the availability of ex post permission would almost surely encourage illicit earlier behavior, recognizing that the label “illicit” presumes a willingness to abide by the legislative or other decision to require the license in the first place. This perspective, in turn, points to the thin line between wrongful,

49 I am coming too close to the “uniformity and variety” theme I have tried to advance in comparative law.

50 An alternative version of the hypothetical in the text has the shop owner informed of the earlier wrong before giving ex post permission. I begin, however, with a version that tracks Murray as closely as possible.

51 A similar and perhaps familiar case is that of a student who uses an unauthorized extra hour to complete a self-scheduled examination—but then obtains ex post permission without revealing that he has already finished the exam. The student’s behavior seems worse than the shoplifter’s, and I think it is because the student plans to say nothing if permission is denied; the instructor will normally have no way of knowing that the misdeed has already occurred. If the student voluntarily approaches an administrator, confesses the use of extra time, and suggests that he seek ex post permission, agreeing that if it is denied a substantial penalty is in order but that if permission is given the misdeed should be excused, then I think the student looks better than the shoplifter who has not voluntarily come forward.

52 If the licensing requirement is seen as inappropriate, then many observers will want to forgive the failure to obtain a license. Even if the requirement is sensible, but thought to serve little purpose of its own other than as a proxy for some other screening device or guarantee about outcomes, many observers will quickly forgive earlier failures. Thus, a school that “requires” a standardized exam as part of its admissions process may not only choose to accept an applicant whose fabulous record does not include sitting for that exam but also may choose not to rusticate a student who turns out to have received a good score in error (or perhaps even by fraud) but who subsequently performs extremely well in the school itself. The example is interesting only if a similar student whose post-admission performance were mediocre would be excluded because of the earlier “failure.” Somewhat similarly, I will avoid examples
antisocial behavior and the failure to obtain a license. A large number of wrongs can be characterized as the failure to obtain permission; theft is the unauthorized use of another’s property, assault is a nonconsensual touching, and so forth. But I think the line can be thickened by recognizing that where we guess that permission would have been most unlikely to have been granted if requested, we are especially disinclined to accept ex-post recreations of licensing applications because we fear the costs. If we then add in the idea that it is difficult to set the optimal level of separate, upfront penalties for the failure to obtain a license, we have something of a theory as to when and where ex post permission can play some role. By way of illustration, we do not think shop owners would often give away free goods and we do not imagine most people consenting to being touched by strangers and, therefore, we do not accept or encourage ex post recreations of the permission process. We may be unable to penalize the unlicensed actor as we like, because testimony of another party is required, but our moral and legal intuitions are to stick to the plan reflected in the licensing requirement. If we were confident about our ability to set fines or other penalties for the failure to seek consent alone, we might structure the system in a different fashion. Indeed, we might feel free to deploy a single remedy that was either upfront—licensing based—or after the fact—outcome-based. In contrast, we are quite certain that permission for a search in Murray would have been granted. A slightly different perspective on this point is that in a case like Murray the availability of ex post permission is unlikely to encourage warrantless searches both because it is easy for the police to obtain advance permission and because they might fear that if they become repeat offenders with regard to the warrant requirement, courts will often deny them ex post and ex ante permission. In the case of the shoplifted candy bar, there is a danger that the strategic criminal will take and then later ask permission—and if permission is denied he will say nothing about the theft. If this plan works, which is to say in settings where the request for permission does not draw attention to the theft, the availability of ex post permission may well encourage theft.

This approach, which can be associated with conventional wisdom about constructing optimal default rules where parties could bargain at some cost, is also revealing in the identification of hard cases. There is the familiar case of the insured who files a claim and is then discovered to have erred or misrepresented some fact on the original application for coverage. The more we are uncertain whether insurance would have been offered or whether at a higher premium most applicants would have gone ahead with

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53 Here the outcome system would penalize the actor who offended the victim, but it would exonerate a perpetrator who obtained permission from the other party after the fact. The upfront system would impose (presumably) a slightly lesser penalty on all who proceeded without license.
the purchase of the insurance, the harder the case. An overdetermined but relevant set of examples is where one has "caused" harm after practicing a profession, such as medicine, or even operating a motor vehicle, without a license. If the practitioner could not have obtained a license or would likely have emerged from the licensing process with improved skills, then we are tempted to expect the failure to obtain a license to play a larger role in the imposition of liability than where the practitioner simply allowed a license to lapse.

I may be making too much of this point about reconstruction. Students of tort law might say that all this is nothing more than the question of causation, as addressed earlier; we would like to know whether the injury suffered by a patient would have occurred anyway had the doctor applied for a license or had the particular patient gone to see a substitute (I would say average rather than marginal) doctor. In turn, the point about the degree of certainty may simply correspond to our need to find out whether causation was more likely than not. But there seems to be something more going on here. One way to express this sensation is to repeat the idea that where we think permission would have been unlikely, we are unimpressed by actual evidence that a particular unlicensed actor would have been granted permission. Thus, one who is apprehended after engaging in what other witnesses describe as a theft or assault or kidnapping is neither excused nor even offered the opportunity to try and re-create either an original or ex post permission. Such permission might tell us something about causation, and its availability as a tool for the defense would improve rather worsen the precision of the underlying deterrence system. Presumably, there is some concern about error costs and some asymmetry in our assessment of these errors. Better a little chilling of desirable taking and touching, we say, rather than excess encouraging of theft and assault. These are some of the very things that lead to a licensing scheme in the first place.

54 The discussion is limited to cases where it is fairly certain that when a claim is filed the insurer will discover the shortcoming of the application. An example is an error or misrepresentation as to age in a life insurance application, or about the presence of a sprinkler system in a fire insurance application. Most states hold that any material misrepresentation in an insurance contract will allow the insurer to void the policy, whether or not the insured intentionally made the misrepresentation. See generally 7 COUCH ON INSURANCE §§ 35:108-130 (2d ed. 1996); 12A APPLEMAN, INSURANCE LAW AND PRACTICE §§ 7271-7305 (1992). On the other hand, materiality turns on a demonstration of reliance. The misrepresentation must have caused the insurance company to issue a policy that it would otherwise have refused or, in some but not all courts, issued at a different premium. Compare Mutual Benefit Life Ins. Co. v. JMR Elecs. Corp., 848 F.2d 30 (2d Cir. 1988) (allowing insurance company to avoid contract where insured misrepresented his history of cigarette smoking in order to obtain the policy at a lower premium rate) and Metropolitan Life Ins. Co. v. Lodzinski, 194 A. 79, 81 (N.J. Eq. 1937) (allowing insurance company to avoid contract when insured lied about her health in order to obtain life insurance, where insured was in her last stages of tuberculosis and must have known that no insurance company would have offered her coverage) with Farmers & Bankers Life Ins. Co. v. Allingham, 457 F.2d 21 (10th Cir. 1972) (enforcing insurance contract despite insured's misrepresentations because none of the alleged misrepresentations was material to the insurer's evaluation of the overall risk).
It may also be the case that we are uncertain of our ability to re-create the licensing application especially where decisionmaking is in the hands of a party who does not represent the society at large and who has some biases that may go against the social interest. Consider, for example, the recent story of a judge whose permanent clerk failed to obtain the judge’s permission, as required by the rules of his court, before moonlighting in the practice of law. As detection became certain, the clerk confessed the matter to his judge, who was then willing to say falsely that he had granted permission ex ante as required by the rules. We can be fairly certain that this judge would have been willing to say that his permission had not been requested at the correct time but that had he been asked he would have given ex ante permission. The attempted, assisted recovery from the permission slip did not save the clerk—and it led to disciplinary action against the judge as well. The alternative avenue open to the helpful judge, of insisting that he would have granted ex ante approval, would of course have saved the judge but almost surely not the clerk. The strategy that was deployed involved greater risk, because of the fear of detection, and greater return, at least to the clerk.

The result is unsurprising, but why? An attractive explanation begins with the idea that the judge regards the penalty that would be imposed on the unauthorized clerk as too great. He is willing to dissemble—and perhaps to fool himself—because he thinks he has superior information about what justice requires. We fear, however, that the judge fails to internalize the social interest in encouraging ex ante permission (and honesty). This idea can be put to the test if a case arises in which the clerk practices law without the judge’s permission, but other clerks seek permission as required, and the judge invariably has responded with his blessing, or even with comments to the effect that he thinks such moonlighting is good.

Similarly, if the rule had called for approval by a disinterested and perhaps even uninterested third party, an interim period of unauthorized practice by the clerk might not be viewed as terribly troubling.


The example in the text suggests the familiar difference between public and private enforcement.

Small doubts will remain. If the unauthorized clerk began practicing earlier than the others, then there is the possibility that in those earlier days the judge had a different attitude toward the matter. And if the unauthorized practice followed the licensing of the other clerks, then we might simply say that the judge had in fact implicitly consented—or might begin to object when too many requests come his way. The situation is not terribly different from that presented by one who copies published work without authorization based on previous, successful requests to use copyrighted materials.

In any event, I do not think it terribly useful to understand either Murray or the judge-clerk case as reflecting nothing more than a distrust of ex post decisionmaking. In the case of the judge who is consulted late in the game, there is surely the potential for bias in both directions; the judge might be harsh because he was misled or he might be generous because the clerk turned out to do a good job even while moonlighting, and so forth. But this sort of potential is found virtually everywhere, and our legal system often chooses to use more information ex post rather than less biased decisionmaking ex ante.
This is especially so if the clerk had every reason to anticipate that detection was inevitable, because this expectation removes the need for a penalty simply to ensure that the licensing requirement is not ignored.  

A related question is what to expect or wish for where the clerk will anticipate that detection is very likely but nevertheless proceeds for an interim period without permission in order to create on his own “test period.” He will then point to the “test period” as a means of convincing his employer that his moonlighting did not interfere with his primary employment responsibilities. In most cases this is an easy question because there is no reason why the employee cannot ask the employer’s permission for a trial period. The judge is at least as able as the clerk, and perhaps less biased rather than more, to consider the costs and benefits of provisional licensing. Indeed, in some cases the test period is better if the judge knows to monitor the employee’s performance more carefully than before. The situation is much like that encountered in the corporate area where disclosure often produces benefits (including information about the need to monitor) and no serious social costs.

But what if a blind test would make for better judging? In some settings the judge can be told that a test is in progress, so that he or she knows to monitor more carefully, but can also be kept unbiased. This is how taste tests for wines, coffees, and toothpastes are normally constructed. In the judge-clerk case this might be feasible if the judge has a number of clerks and could be told that, with his consent, one of them will engage in moonlighting for a test period. But where the judge has but one clerk, where monitoring is more beneficial than distorting, or where consensual blind testing is otherwise problematic, something different is required. One possibility is for the clerk to ask another judge for permission to engage in the blind test of his own judge. This test would proceed alongside, or confused by, the self-aware test of the clerk’s own performance while moonlighting. After some period, the second judge might inquire of the first as to...

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59 Correspondingly in Murray there is a need to ensure that the rule does not lead the government to “search now, ask later.”

60 The discussion in Section II.B emphasized those cases where disclosure is costly, but this idea must not detract from more run-of-the-mill cases, discussed in Section II.A, where disclosure is surely efficient.

61 An advantage of a precommitment to a known third party, such as a human experimentation committee set up for this purpose, is that where the actor can choose a third party of his own (such as the second judge in the text’s illustration) there is not only the danger of his choosing someone he suspects will be favorable to his cause but also the danger that he will continue to poll “third” parties until one consents. The problem is acute where it will be difficult to learn later of the several attempts to secure permission and where there is a range of probability of “error” such that repeat requests are likely to lead eventually to a judge who consents if only because he is responding at one end of the distribution of his assessments. We might think of this as the problem of “consenter’s curse” where the one who seeks consent can keep sampling potential consenters, to the detriment of a party who relies on (observable) consent. Both of these factors (and others as well) are at issue in the familiar situation where parents chide a child who has failed to receive a desired response from one parent and then consults the other on...
the performance of his clerks, and then reveal the ongoing test. In some settings, the probability of receiving future requests from employees is sufficiently great that potential "judges" might give some blanket consent to the interventions of another judge. Thus, human experimentation committees associated with medical experiments oversee the use of nondisclosure between experimenters and their subjects, but sometimes these subjects have, upon entering a hospital for example, consented to being used in experiments in some very general way.

There is thus a case to be made for nondisclosure, or permission slips, in some settings. Murray is in part about doing the best we can where there was a slip but where it might be possible to get back on track and reconstitute the licensing system in decent fashion. Most of the interesting corporate opportunity cases, as well as the cases discussed in the present Part, involve circumstances where the original failure to obtain permission may itself be desirable. In all these cases, of course, the point is that less disclosure may be better than more. Human experimentation committees and the judge-clerk case suggest that perhaps we give more thought to the possibility of tolerating unlicensed activity, in the private and public spheres, where the unlicensed actor secures permission to proceed in an unlicensed manner. It goes almost without saying that this kind of a license to engage in activity without another license may be a decent way to develop data about the efficacy of some licensing systems. The search warrant and corporate fiduciary settings are not, however, the best examples for further exploration because these are not areas where overachieving or lazy interest groups benefit from licensing systems and are therefore unlikely to test the same matter without revealing the earlier result. Other examples include a repeat applicant for a job or place in a university, one who takes a standardized exam multiple times, and a defendant who wishes to introduce evidence of a polygraph test. Extra information of unambiguous value may be provided with repeat testing so long as the observer knows of the earlier tests. The bias, or curse, then disappears if one is able to process all the information correctly. If the curse is not so easily avoided, then a better approach might be to attach some cost to each appeal, but this is a subject far beyond the reach of the present Article, for it brings us to the question of legal appeals quite generally.

In the search warrant context the problem arises if the police secure a search warrant even after a warrant was denied by another magistrate on similar facts. See United States v. Pace, 898 F. 2d 1218, 1233 (7th Cir. 1987), aff'd United States v. Savides, 658 F. Supp. 1399 (N.D. Ill. 1987) (holding that the important questions for determining the validity of a search warrant are whether there was probable cause and whether the magistrate who issued the warrant was neutral, not whether a different magistrate had failed to issue a warrant based on the same application). But see United States v. Davis, 346 F. Supp. 435, 442 (S.D. Ill. 1972) (holding a search illegal because the search warrant authorizing the search was denied by the first magistrate to whom it was presented and only granted by the second magistrate), discussed in Charles L. Cantrell, Search Warrants: A View of the Process, 14 OKLA. CITY U. L. REV. 1, 17-18 (1989) (discussing the practice of "magistrate shopping"). The question is also close to that presented by repeated requests to legislatures or voters. If the cost of asking is low, then we might wish for there to be some limit on requests. This may be the case even where the licensing authority knows of the earlier requests.

62 The advantage of nondisclosure is obvious in the case of such testers as restaurant critics or investigators who test for housing discrimination.
these systems in order to evaluate their continuing, or even original, social utility. This sort of connection, between interest groups and questions about licensing systems, awaits further sustained inquiry.

IV. CONCLUSION

This Article has advanced a framework and a claim. The framework is, of course, built on familiar conceptions of licensing regimes, and my construction project has aimed to show that we can think of many legal rules as part of such schemes. Licensing schemes, especially of the duplicative kind, are all around us. We are likely to do better when confronted with questions regarding noncompliance, penalties, and safe harbors if we recognize that these are recurring problems for a legal system. In turn, the claim here has been that less is sometimes better than more. In particular, unbiased decisionmaking might be advanced by withholding information from the decisionmaker. At first blush, this sort of strategy seems incompatible with the rules expressed in so many areas of law, including that of corporate opportunities and fiduciary duties, because these rules call for full disclosure in a variety of explicit and implicit ways. But closer analysis reveals that law is often sensitive to the occasional costs of disclosure, and it may not be too much of a stretch to argue that law can be understood as supporting unbiased decisionmaking even where it means that information is intentionally withheld. In any event, there is room for future litigants, in cases ranging across private and public law, to draw attention to cases where less is better than more.