

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

2005

Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories

Kimberly Krawiec

Kathryn Zeiler

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Litigation Commons](#), and the [Torts Commons](#)

Recommended Citation

Kimberly Krawiec & Kathryn Zeiler, *Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 *Virginia Law Review* 1795 (2005).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/683

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



UNIVERSITY OF NORTH CAROLINA LAW SCHOOL

Legal Studies Research Paper Series

Research Paper No. 04-4

GEORGETOWN UNIVERSITY LAW CENTER

Business, Economics & Regulatory Policy

Research Paper No. 614501

Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-theories

Kimberly D. Krawiec

Kathryn Zeiler

November 2004

This paper can be downloaded without charge from the
Social Science Research. Network Paper Collection at

<http://ssrn.com/abstract=614501>

Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-theories

Kimberly D. Krawiec* & Kathryn Zeiler**

One of the most hotly debated questions under the common law is under what circumstances an individual has a duty to disclose relevant information unknown to the person with whom she bargains. Dozens of law review articles and treatises and over 1000 cases explore this vexing question of when and what a contracting party must disclose to her counterparty, even in the absence of explicit misleading statements. Although one frequently encounters statements that, absent a fiduciary or confidential relationship, an individual need never disclose all that she knows to her bargaining partner, this is best construed as mere rhetoric by courts, rather than an accurate statement of law.¹ Even a cursory examination of the cases reveals, instead, that courts require full disclosure in some circumstances, but not in others.

Determining what circumstances will lead courts to intervene to correct disparities in knowledge between bargaining parties, however, has proved problematic. Courts

* Visiting Professor of Law, Georgetown University Law Center. Professor of Law, University of North Carolina. Email: krawiec@email.unc.edu. We thank workshop participants at the University of Virginia, Georgetown University, the University of Southern California, and Lewis & Clark law schools, audience members and fellow panelists at the 2004 Law and Society Association Annual Meeting, Scott Baker, Jeff Bauman, Bill Bratton, Caroline Brown, Steve Choi, Heidi Li Feldman, Matthew Gerke, Steve Goldberg, Michael Gottesman, David Grether, Mitu Gulati, Michael Heise, Vicki Jackson, Melissa Jacoby, Ed Kitch, Don Langevoort, David Luban, Paul Mahoney, Anup Malani, Geoff Manne, Carrie Menkel-Meadow, John Mikhail, John Orth, Mitt Regan, Bob Scott, Warren Schwartz, Gerry Spann, and Dan Tarullo for helpful comments on early drafts of this Article. We are also grateful to Rob Bartilucci, Joshua Ellis, Bill Forstner, Kevin Pooler, and Mark Siler for outstanding research assistance.

** Associate Professor of Law, Georgetown University Law Center. Email: kmz3@law.georgetown.edu. Web: <http://www.georgetown.edu/faculty/kmz3/>.

¹ See, e.g., Arthur Linton Corbin, 3 Corbin on Contracts §597 (1960) (explaining that, “[s]tatements are exceedingly common, both in texts and in court opinions, that relief will not be given on the ground of mistake unless the mistake is ‘mutual.’ Such a broad generalization is untrue.”); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Leg. Studies 1, 6 (1978) (stating that, “[i]n the past, it was often asserted that, absent fraud or misrepresentation, a unilateral mistake never justifies excusing the mistaken party from his duty to perform or pay damages. This is certainly no longer the law, and Corbin has demonstrated that in all probability it never was.”); *French v. Vining*, 102 Mass. 132, *3 (1869) (stating that “[i]t is sometimes rather loosely said that mere silence, on the part of the vendor, as to a known defect, does not amount to a fraud. But this is far from being universally true.”); *Heritage Ins. Co. of America v. First Nat. Bank of Cicero*, 629 F.Supp. 1412, 1415 (N.D. Ill. 1986) (stating that “no duty of disclosure exists absent a fiduciary duty or public trust between parties to a transaction”).

repeatedly reach divergent results in similar, or even seemingly identical, cases, and have failed to articulate a coherent or generally accepted rule as to when a duty of candor will be imposed on parties to an arm's-length transaction.

As a result, numerous legal commentators have analyzed the law of fraudulent silence (also referred to as actionable nondisclosure or actionable silence) in an attempt to identify some guiding principle that will rationalize the cases and lend some predictability to the question of under what circumstances a person legally is permitted to exploit her superior knowledge to the detriment of those with whom she transacts. Although some commentators point to various specific factors (such as, for example, whether the withheld information related to a latent defect or whether the litigating parties were in a confidential or fiduciary relationship) that courts look to either alone or in some combination in deciding cases, others conclude that no useful rule of law can be found in the cases.² Still other legal scholars, most notably Anthony Kronman and Kim Lane Scheppele, reject the notion that narrow doctrinal rules motivate fraudulent silence decisions and instead advance meta-theories (based, respectively, on whether courts seek primarily to further economic efficiency or fairness) in an attempt to untangle the cases and illuminate the law of fraudulent silence.³

² Deborah A. DeMott, *Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions*, 19 Del J. Corp. L. 65, 66 (1994) (stating that “[m]y thesis is that legal doctrine does not resolve these scenarios in a symmetrical fashion”); George Spencer Bower, *The Law Relating to Actionable Nondisclosure and Other Breaches of Duty in Relations of Confidence and Influence*, v-vi (1915) (arguing that the law of actionable nondisclosure cannot be “fit . . . into the rigid framework of a code.”) (quoted in Kim LANE SCHEPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 112 (1988)); Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 Am. J. Legal Hist. 405, 407 (1995) (discussing the law of fraud, including the law of fraudulent silence, and noting that, “there does not seem to be any factor which accurately predicts which policy a particular court will find determinative in a particular case, other than the merits of the case”).

³ See, e.g., Scheppele, *supra* note 2 at 119-124 (advocating an equality of access approach to explain the law of actionable nondisclosure); Kim Lane Scheppele, *It's Just Not Right: The Ethics of Insider Trading*, 56 Law & Contemp. Probs. 125 (1993) (same); Kronman, *supra* note 1 at 13-15 (arguing that the law of actionable nondisclosure is best explained by the law's desire to reward those who have expended time and effort to acquire the undisclosed information); Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. Rev. 337 (1997) (arguing that the law of actionable nondisclosure as applied to buyers is best explained through a deontological philosophy); Alan Strudler & Eric W. Orts, *Moral*

It is these meta-theories – along with the famous Supreme Court Case of *Laidlaw v. Organ*⁴ – that inspired this project. In *Laidlaw*, Organ had been bargaining over the price of 111 hogsheads of tobacco with Laidlaw’s agent, Francis Girault, on the evening of February 18, 1815, but did not reach an agreement on price before departing. During the night, three gentlemen who had been with the British fleet came ashore with news that the Treaty of Ghent had been signed, ending the war of 1812 and lifting the blockade of the port of New Orleans. One of these men was the brother of Organ’s business partner (who had a one-third interest in the profits of the tobacco) and informed Organ of the news during the night.

Although the news of the war’s end was to be published in a handbill at eight a.m. the next morning, shortly after sunrise on the morning of the 19th, Organ returned to Girault and purchased the tobacco without disclosing the news.⁵ A few hours later, the news was released and the price of tobacco rose by thirty to fifty percent.

In a short – but famous -- opinion, Justice Marshall ruled that Organ had no duty to disclose his knowledge of the end of the war to Girault.⁶ Due to the cryptic nature of Marshall’s opinion, however, commentators have struggled to identify the principle underlying the decision. In the process, several theories have emerged that purport to explain not only the Court’s decision in *Laidlaw*, but the large and seemingly inconsistent body of other fraudulent silence cases as well.

Unfortunately, many of these authors discuss a limited number of cases that they believe support their asserted theory, without providing evidence that the chosen cases

Principal in the Law of Insider Trading, 78 Tex. L. Rev. 375 (1999) (justifying insider trading regulation on a deontological theory of “equitable disclosure”).

⁴ 15 U.S. 178 (1817).

⁵ 15 U.S. at 182-83. Apparently, Girault asked Organ “whether there was any news which was calculated to enhance the price or value of the article about to be purchased.” *Id.* at 183. The lower court determined that there was no evidence that Organ’s reply “suggested anything to the said Girault, calculated to impose upon him with respect to said news,” and directed the jury to find for Organ. *Id.* at 183-84.

⁶ 15 U.S. at 194. Marshall did, however, remand to the lower court for a jury determination regarding Organ’s response to Girault’s inquiry. *Id.*

are representative, and without distinguishing cases that do not support their theory.⁷

This Article represents the first attempt to study empirically the factors that cause courts to impose disclosure duties on bargaining parties in some circumstances, but not in others.⁸

We use data coded from 466 decisions spanning over a wide array of jurisdictions and covering over 200 years. The results are mixed. In some cases our data support the conventional wisdom relating to common law disclosure duties. For example, our data support the claim that courts are more likely to require the disclosure of latent, as opposed to patent, defects. In addition, courts are more likely to require full disclosure between parties in a fiduciary or confidential relationship.

On the other hand, our results cast doubt on much of the conventional wisdom regarding the law of fraudulent silence. Indeed, our results challenge ten of the most prominent theories that have been asserted to explain when courts will require disclosure. We find that courts are no more likely to impose disclosure duties when the information is casually acquired as opposed to deliberately acquired, and that unequal access to information by the contracting parties is not a significant factor that drives courts to find a duty to disclose. We do find, however, that when these two factors are present simultaneously courts are significantly more likely to force disclosure. Perhaps most interestingly, although it is generally understood that courts have become more likely to impose disclosure duties over time, we find that courts actually have become *less* likely over time to find that the informed party owed the uninformed party a duty to disclose.

⁷ See generally, Lee Epstein & Gary King, *The Rules of Inference*, 69 U. Chi. L. Rev. 1 (2002) (criticizing the methodology of much legal empirical research).

I. MOTIVATION BEHIND OUR SYSTEMATIC APPROACH

As previously discussed, court rulings seem to conflict in a large number of fraudulent silence cases, causing commentators to struggle for an underlying principle to explain the disparate outcomes of seemingly identical cases. Some of the variation in the cases may arise from the fact that several distinct bodies of common law often bear on the same transaction, including contract, tort, equity, and restitution.⁹ Even accounting for this, however, courts seem to decide fraudulent silence cases in an unusually inconsistent and fact-specific manner.

Story's observations notwithstanding, the question of when and what a contracting party must disclose to her partner has confounded legal theorists since ancient times. For example, in *De Officiis*, Cicero attempts to tackle the problem by constructing a series of hypotheticals in which one party to a transaction has information that the other does not.¹⁰ He then creates an imaginary dialogue in which the Stoic philosophers Anipater and Diogenes debate whether morality mandates disclosure by the knowledgeable party.¹¹

⁸ One prior attempt to systematically study the cases is Dalley, *supra* note 2. Although Professor Dalley's study is not a statistical analysis of the cases, her article is an important contribution to the literature and her findings are discussed throughout this Article.

⁹ DeMott, *supra* note 2 at 66. In particular, the intersection of tort and contract law in these cases raises some interesting questions. Typically, plaintiffs successfully alleging that they were induced to enter a transaction through their counterparty's fraudulent silence on a material point might either proceed under contract law and rescind the transaction, or sue under tort and recover damages. *See, e.g.*, Justice v. Anderson County, 955 S.W.2d 613 (1997) (stating that, "[a]n individual induced by fraud to enter into a contract might elect between two remedies. He might treat the contract as voidable and sue for the equitable remedy of rescission or he might treat the contract as existing and sue for damages at law under the theory of deceit."). *See also*, DeMott, *supra* note 2 at 67.

On the other hand, some courts hold that a tort claim cannot be based on the same facts serving as the basis for a breach of contract claim. Accordingly, plaintiffs alleging actionable nondisclosures in the formation of a contract must sue under contract law, and are prohibited from suing in tort. *See, e.g.*, Heidtman Steel Products, Inc. v. Compuware Corp., 164 F.Supp.2d 931, 939 (N.D. Ohio 2001).

Today, this problem is further exacerbated by the various state and federal statutes that also govern the required disclosures in some transactions, such as the federal securities acts, state commercial codes, and state laws mandating disclosures in particular transactions, such as real estate and automobile sales, and health care delivery.

¹⁰ Cicero, On Moral Obligation (*De Officiis*), ¶51 (John Higginbotham, tr., 1967).

¹¹ *Id.* at ¶¶51-60. Cicero argues that morality requires a duty of full candor in all instances.

In the thirteenth century, the subject received the attention of such eminent figures as Saint Thomas Aquinas, who argued for a surprisingly restrictive view of disclosure duties.¹² Writing in the mid-1700s, the French legal theorist and Roman law expert R.J. Pothier gave extended treatment to the subject of fraudulent silence in his *Treatise on the Contract of Sale*.¹³ Finally, disclosure duties – and the doctrine of fraudulent silence, in particular -- seemed to enjoy special attention from both civil and common law scholars during the nineteenth century, perhaps due to the great economic changes taking place during that time (and the accompanying legal changes that might be expected).¹⁴

Even the numerous sections of the various restatements of the law dealing with the issue lend little guidance. For example, Section 153 of the Restatement (Second) of Contracts states that “[w]here a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if . . . the other party had reason to know of the mistake.”¹⁵ Although the restaters provide several illustrations in an attempt to clarify this statement, they provide little guidance as to what constitutes a “basic assumption” or a “material effect,” leaving courts wide latitude to apply the rule on a case-by-case basis.¹⁶

Although Section 161 of the Restatement (Second) of Contracts seems to provide the most concrete guidance as to which factors lead courts to impose a duty on bargaining

¹² R.J. Pothier, *Treatise on the Contract of Sale*, Art. I, No. 238 (L.S. Cushing, tr., 1839) (stating that Saint Thomas would permit “the seller to conceal the defects of the thing, except in two cases, namely; 1, when the defect is of such a nature that it might cause some damage to the buyer; and, 2, when the seller takes advantage of such concealment to sell the thing for more than it is worth.”) Pothier at Art. I, Nos. 237-38. See also, Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, 179-180 (1977) (discussing the movement away from the sound price rule).

¹³ Horwitz, *supra* note 12.

¹⁴ See, e.g., Edward H. Wilson, *Concealment or Silence as a Form of Fraud, and the Relief or Redress Afforded Therefor, Both in Law and in Equity*, *The Counselor* 230 (1895); Horwitz, *supra* note 12 at 173-201 (discussing the response of contract law to changing market and economic conditions); GULIAN C. VERPLANCK, *AN ESSAY ON THE DOCTRINE OF CONTRACTS* (1825); JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* (1877); JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (1828).

¹⁵ Restatement of Contracts (2d) §153.

parties to disclose material information, it too falls short of clearly specifying all of the circumstances under which one party owes another a duty to disclose. For example, Section 161 lists some cases in which the court will impose a duty to disclose: when the information would update or correct previous assertions, when the parties are in a confidential or fiduciary relationship, and when the information relates to a latent defect.¹⁷ However, the section also specifies that disclosure is required when one contracting party knows that the other is operating under a mistake as to a “basic assumption.” Although the illustrations provide several examples of what constitutes a basic assumption, section 161 suffers from the same lack of clarity that characterizes the other Restatement sections dealing with the issue of fraudulent silence, leaving courts with wide latitude when applying the rule.

In summary, the law of fraudulent silence has confounded scholars and practitioners for many years. Given this historical lack of guidance that persists to this day, using a large sample of randomly selected cases we set out in the following Section to investigate systematically whether particular factors significantly influence courts when they decide whether informed parties have duties to disclose information to uninformed parties.

¹⁶ *Id.* Other Restatement treatments of the duty to disclose at common law include: Restatement of Restitution §12; Restatement of Torts (2d) §551; and Restatement of Contracts (1st) §472(1)(b).

¹⁷ In particular, Section 161 states that a person’s nondisclosure is equivalent to an assertion (and therefore actionable) only:

- “(a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
- (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
- (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
- (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Restatement of Contracts (2d) §161. Furthermore, the Comments and Illustrations detail several other instances when disclosure will be required, including when the undisclosed information relates to a latent defect. *Id.* At Illustration 3.d (stating that, under certain circumstances, “[a] seller of real or personal property is, for example, ordinarily expected to disclose a known latent defect. . . .”)

II. COLLECTION OF HYPOTHESES AND CONSTRUCTED INDEPENDENT VARIABLES

This study examines a number of independent variables and their relationship, if any, to courts' decisions to impose liability for fraudulent silence. The variables, all of which are detailed in this section, include twenty variables related to case characteristics, which can be divided into five general classes: the type of information that was undisclosed, the type of transaction in which the parties were engaged, how the undisclosed information was acquired, the characteristics of the uninformed party, and the behavior of the informed party. The case decision year and the geographic region and jurisdiction of the court deciding the case are also included as independent variables.

A. The Type of Information

Commentators frequently assert that the imposition of disclosure duties is dependent on the type of information in question. In particular, it has been claimed that courts give special treatment to intrinsic information, information relating to personal intentions or opinions, information relating to latent defects, information concerning a defect likely to cause bodily injury or property damage, and information that would have updated or corrected previously disclosed information.

1. The information was intrinsic, as opposed to extrinsic or market, information

It has been argued by some commentators that courts distinguish between intrinsic facts, which relate directly to the subject matter of the transaction, and extrinsic facts, which relate to the market conditions or environment affecting the subject matter of the transaction, and require the disclosure of intrinsic facts only.¹⁸ Joseph Story explained the distinction as follows:

¹⁸ Joseph Story, 1 Commentaries on Equity Jurisprudence §210 (12th ed. 1877); 2 James Kent, Commentaries on American Law, 377 (1827) (noting that, “[t]here may be some difference in the facility

Intrinsic circumstances are properly those which belong to the nature, character, condition, title, safety, use, or enjoyment, &c., of the subject-matter of the contract; such as natural or artificial defects in the subject-matter. Extrinsic circumstances are properly those which are accidentally connected with it, or rather bear upon it, at the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract; such as facts respecting the occurrence of peace or war, the rise or fall of markets, the character of the neighborhood, the increase or diminution of duties, or the like circumstances.¹⁹

To illustrate, in the previously discussed case of *Laidlaw v. Organ*,²⁰ Justice Marshall ruled that “the intelligence of *extrinsic circumstances*, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee,” need not be disclosed to the vendor.²¹ In *Laidlaw*, the information concerning the end of the war of 1812 and the consequent lifting of the blockade of the port of New Orleans was extrinsic information, because it did not pertain to conditions solely affecting the tobacco exchanged between Organ and Laidlaw, but instead pertained to conditions affecting the market for and price of all tobacco being shipped from New Orleans. Accordingly, it could be argued that Justice Marshall permitted nondisclosure in that case because the undisclosed information was an extrinsic fact. If it had been an intrinsic fact, according to this theory, disclosure would have been required.

Other commentators, however, argue that the intrinsic/extrinsic distinction provides, at best, only a partial explanation. It thus has been argued that, although disclosure has been required more often with respect to intrinsic, rather than extrinsic, facts, the better explanation for such rulings is that intrinsic facts may not be readily

with which the rule [of disclosure] applies between facts and circumstances that are intrinsic, and form material ingredients of the contract, and those that are extrinsic, and form no component part of it, though they create inducements to enter into the contract, or affect the price of the article.”); Pothier, *supra* note 12 at Art. III, No. 242 (noting that, “there is no doubt, that . . . a buyer is not entitled to complain, that the seller has not informed him of circumstances extrinsic to the thing sold, however much he may be interested in knowing them”).

¹⁹ Story, *supra* note 18 at § 210.

²⁰ 15 U.S. 178 (1817). See *supra* notes 4 - 6 and accompanying text.

²¹ 15 U.S. at 194 (*emphasis added*).

discoverable by the uninformed party, whereas extrinsic facts are,²² or that extrinsic facts are normally the result of a deliberate search, whereas intrinsic facts are often casually acquired.²³ In addition, it has been argued that the intrinsic/extrinsic distinction cannot adequately explain the results in all of the cases, particularly those where the uninformed party is the purchaser, as opposed to the seller.²⁴ Finally, it has been argued by some observers that the intrinsic/extrinsic distinction has been replaced in modern jurisprudence with other theories of disclosure duties and is no longer relevant to court decisions concerning the degree of candor required of contracting parties.²⁵ We thus predicted that in earlier years courts were more likely to rule that a duty to disclose existed in cases involving intrinsic information, but that this effect narrowed in significance over time and finally disappeared altogether.

2. *The undisclosed information concerned personal intentions or opinions*

Although the distinction between opinion and fact is not always clear, commentators seem to agree that failures to disclose personal opinions or intentions are not actionable.²⁶ This rule is sometimes referred to as a distinction between personal and general information, or between individual and common facts.²⁷ As stated by Gulian Verplanck:

²² See W. Page Keeton, *Concealment and Nondisclosure*, 15 Tex. L. Rev. 1, 21 (1936); Scheppele *supra* note 2 at 128-29.

²³ Kronman, *supra* note 1 at 17-18 (arguing that market information is typically, though not always, acquired through deliberate search.)

²⁴ Keeton, *supra* note 22 at 21.

²⁵ Scheppele, *supra* note 2 at 128-29.

²⁶ See, e.g., Horwitz, *supra* note 12 at 263 (stating that misstatements of opinion were not actionable at common law, the rationale being to prevent judicial incursion into the private bargaining process.) See also, Dalley, *supra* note 2 at 409 (listing reasons for the rule that statements of opinion are not actionable, including difficulties of proof and the fact that such statements were too common to be reasonably relied on) and at 419 (arguing that statements of intention are not actionable). Two long-standing exceptions to this rule exist: first, disclosure of expert opinions is normally required, and second the doctrine of promissory fraud requires the disclosure of an intention to breach.

²⁷ See, e.g., Gulian C. Verplanck, *An Essay on the Doctrine of Contracts: Being An Inquiry How Contracts Are Affected in Law and Morals by Concealment, Error, or Inadequate Price* 119-20 (1825); Paula J. Dalley, *From Horse Trading To Insider Trading: The Historical Antecedents of the Insider Trading Debate*, 39 Wm. & Mary L. Rev. 1289, 1328 (1998).

My knowledge of my own interests, and my personal necessities, my sagacity, natural or acquired, in forming judgments of the state of the market; in brief, all that has been above summed up as constituting the facts and reasoning of a bargain, peculiar to each *individual*, can never be expected by the other party to be communicated²⁸

To illustrate, Verplanck hypothesizes a director of a large insurance company who believes, from his observations and knowledge of the insurance industry and his own institution, that the insurance business is “overdone” and that current premiums are an inadequate compensation for the risks assumed by insurers.²⁹ If he sells his insurance stock to a purchaser with less knowledge of the industry than he, the director is under no duty to disclose his opinion (with which other informed parties might reasonably disagree) that the stock is overpriced.³⁰ If, on the other hand, the undisclosed information concerns losses in the insurance company that have depleted half its capital (a verifiable fact), disclosure would be required.³¹

Although we predicted that courts are less likely to find that the informed party owed the uninformed party a duty to disclose when the withheld information related to a personal opinion or intention, we also predicted that such cases were relatively rare, given the widespread agreement among commentators that such information is not required to be disclosed. In addition, as regards allegations of a failure to disclose personal opinions, there is a second reason to predict that these sorts of cases are rare. Because most opinions are founded on underlying facts, we predicted that well-plead suits generally allege fraudulent nondisclosure of these facts, rather than of the opinion itself. In other words, because plaintiffs (or, more accurately, their counsel) should plead

²⁸ Verplanck, *supra* note 27 at 119.

²⁹ *Id.* at 121-22.

³⁰ *Id.*

³¹ *Id.* at 122. Verplanck’s hypothetical could also be explained on the grounds that courts distinguish between intrinsic and extrinsic facts, or that the parties lack equal access to information regarding the lost capital, whereas information regarding the general state of the insurance industry is theoretically available to everyone. Similarly, Professor Paula Dalley illustrates the common law rule regarding the disclosure of personal intentions through the example of a horse trade. Dalley, *supra* note 2 at 128. In her example, the

those claims that have some chance of success, we predicted that relatively few cases alleging a failure to disclose a personal opinion would be present in our dataset. Instead, plaintiffs intent on increasing their chances of success should plead a failure to disclose the underlying facts on which the opinion was based.³²

3. *The undisclosed information related to a latent defect*

One of the most common theories employed by commentators to explain the results in nondisclosure cases concerns the difference between latent and patent defects. As with so many of our variables, commentators seem to agree that there is a greater duty to disclose latent, as opposed to patent, defects, but disagree as to the rationale for the distinction.³³

In order to distinguish the concept of latent defect from that of unequal access to information, we employ the term “latent defect” narrowly in this article, as a term of art. Accordingly, as defined here, only property (including slaves) can be subject to a latent defect – the term does not apply to all undisclosed and difficult to access information.³⁴ For example, an undisclosed illness or injury affecting a person would not qualify as a latent defect in an application for insurance or employment, but would constitute a latent

fact that the horse seller shortly plans to leave town and is thus willing to accept any price for the horse is personal information that need not be disclosed. *Id.*

³² To illustrate, consider the case of Bob, whose brother is a member of the town counsel that has just approved a new highway through what was previously farm land. If Bob, aware of these plans, buys a tract of farm land in the area of the proposed highway from Sally without disclosing this information, Sally has several options. First, she could allege that Bob failed to disclose his opinion that prices of farm land would soon rise. Alternatively, she could allege that Bob failed to disclose his knowledge of the proposed highway gained from his brother. Due to the widespread agreement among commentators that a failure to disclose personal opinions is not actionable, we predicted relatively few cases of the first type, as plaintiffs have the option of pleading the latter type of case and, according to commentators, are more likely to meet with success in this manner.

³³ Compare, e.g., Kronman, *supra* note 1 at 25 (arguing that requiring sellers to disclose latent – but not patent -- defects is an economically efficient policy because sellers typically casually acquire information regarding latent defects and because requiring the disclosure of obvious defects increases transaction costs) with Scheppele, *supra* note 2 at 134-37 (arguing that the distinction between latent and patent defects is best justified on the grounds that latent defects are typically inaccessible to one of the parties – generally the buyer.)

³⁴ See *infra* notes 67-68 and accompanying text (discussing fraudulent silence in slave sales).

defect in the sale of a slave.³⁵ Similarly, in a stock transaction, the fact that the issuer is about to become the subject of a takeover bid, thus raising the stock price significantly, would not be considered a “defect,” although the information is certainly relevant to the transaction and would greatly affect the purchase price. Consistent with the assertions of legal scholars, we predicted that courts are more likely to impose disclosure duties when the withheld information relates to a latent defect.

4. *The information concerned a defect likely to cause bodily injury or property damage*

It has been argued that the law traditionally has taken a stricter view with regard to information that, if disclosed, could prevent the occurrence of bodily injury or property damage, as opposed to information that, if disclosed, would avoid mere economic loss.³⁶ The distinction seems defensible from an economic standpoint, as there may be circumstances when it would be inefficient for the law to correct an economic loss of one party (such as, for example, in some circumstances when the informed party has expended time and effort to acquire the information), whereas the same efficiency argument cannot generally be made with regard to the prevention of bodily injury or property damage.

For example, in older cases, courts may require the disclosure of information concerning the presence of small pox or other dangerous germs, which, if known by the uninformed party, could have prevented the contraction and spread of the disease.³⁷

³⁵ Compare *Huntington v. Brown*, 17 La. Ann. 48 (1865) (sale of diseased slave coded as latent defect); *Smith v. Rowzee*, 10 Ky. 527 (1821) (same) with *Leclerc v. Prudential Ins. Co. of America*, 93 N.H. 234, 39 A.2d 763 (1944) (illness in applicant for insurance not coded as latent defect). In both cases, however, information regarding the undisclosed injury or illness might be accessible to only one party, meaning that the parties had unequal access to the information.

³⁶ Keeton, *supra* note 22 at 14-17, 36. Apparently, this reasoning dates back at least to the time of St. Thomas Aquinas. Aquinas argued that vendors should be required to reveal defects in the good sold if “the vice be of a nature to cause the vendee some injury.” See Pothier, *supra* note 12 at Art. I, No. 238 (criticizing Aquinas’s restrictive view of disclosure duties).

³⁷ See, e.g., *Leech v. Husbands*, 152 A. 729, 733 (Del. Super. Ct. 1930) (failure of landlord to disclose that residence was “infested with vermin, bugs and disease germs” constituted fraud, although tenant waived right to relief by failing to sue within reasonable time after discovering defect); *Cowen v. Sunderland*, 145

Modern examples may include the duty of tobacco companies to disclose the health risks associated with cigarette smoking³⁸ and the duty of sellers of real property to disclose the presence of asbestos or lead paint.³⁹ Because this rule seems sensible from a policy perspective and can be traced back at least to the fourteenth century, we predicted that, when the failure to disclose information is likely to cause physical injury or property damage, courts are more likely to rule that a duty to disclose exists.

5. *The information would have updated or corrected previously disclosed information*⁴⁰

Mass. 363, 364, 14 N.E. 117, 118 (1887) (stating that “[i]t has thus been held that where one lets premises infected with the small-pox, and injury occurred thereby, he was liable if, knowing this danger, he omitted to inform the lessee”). See also, *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865, 865 (8th Cir. 1903) (stating that, “[a] manufacturer or vendor, who, without giving notice of its character or qualities, supplies or delivers to another a machine or article which, at the time of delivery, he knows to be imminently dangerous to the life or limbs of any one who may use it for the purpose for which it is intended, is liable to any one who sustains injury from its dangerous condition, whether he has any contractual relations with him or not.”)

³⁸ Congress probably pre-empted any state common law duties of cigarette manufacturers to disclose the health risks associated with smoking tobacco with the Federal Cigarette Labeling and Advertising Act of 1965, as amended by the Public Health Cigarette Smoking Act of 1969. Together, these statutes provide that, “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.” 15 U.S.C.A. § 1334 (1965). The Supreme Court has held that these statutes pre-empt state law claims based on a failure to disclose material health risks to consumers through advertising or promotion. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In theory, claims based on a failure to disclose through other channels the health risks associated with smoking are not preempted. *C.f. Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515, 1521 (D. Kan. 1995) (refusing to dismiss plaintiff’s fraud claim alleging that “the defendants knew that use of their products caused cancer and vasculatory disease, yet willfully chose to conceal those facts from the public,” and noting that “it is possible that plaintiff can assert viable claims” of fraud at trial.)

³⁹ *Kezer v. Mark Stimson Associates*, 742 A.2d 898, 903 (Me. 1999) (applying a Maine law that requires the disclosure of the existence of all hazardous material including asbestos and lead based paint); Stanley J. Levy, *Asbestos and the Real Estate Industry the Legacy of the Magic Mineral*, 339 Practising L. Inst. 7,30 (1989) (stating that because of its dangerous qualities a duty to disclose the known existence of asbestos may be found). *But see, Justice v. Anderson County*, 955 S.W.2d 613 (1997) (finding that the purchasers of a school building were not entitled to rescind the sales contract on the grounds that the property’s vendors -- the county and school district -- fraudulently concealed the presence of asbestos in the building, when the building was purchased “as is” at a public auction, the transaction was arm’s length, there was no fiduciary relationship between the parties, and the presence of asbestos was reasonably discoverable by purchasers).

⁴⁰ Although many courts and commentators discussing the common law of nondisclosure do not distinguish between the duty to update and the duty to correct, federal courts and commentators applying or discussing the federal securities laws consider the distinction important, particularly as not all courts recognize a duty to update under the federal securities laws. See, Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 Stan. L. Rev. 87, 118 (1999) (noting that the second and third circuits recognize a duty to update “forward looking” information under some circumstances.)

The court in *Oran v. Stafford* explained the distinction between the duty to update and the duty to correct well: “The duty to correct exists ‘when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually

A duty to correct may arise if a statement is false when made, although the speaker believes the information to be correct. If the speaker subsequently discovers that the information earlier disclosed was false, he may have a duty to correct that information.

By contrast, a duty to update may arise if a statement is correct when made, but later developments subsequently render the statement incorrect or misleading. A duty to update the previously correct statement might arise in some cases.⁴¹ Section 551 of the Restatement (Second) of Torts recognizes both a duty to correct and a duty to update, by stating that a party to a business transaction is under an obligation to disclose “subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so.”⁴² We predicted that cases involving information that would have updated or corrected previously disclosed information were more likely to result in a finding that the informed party owed the uninformed party a duty to disclose.

B. The Type of Transaction

Commentators have also asserted that the degree of required disclosure depends on the type of transaction in question. In particular, it has been asserted that courts require heightened disclosure in the case of transactions between parties in a confidential or fiduciary relationship, transactions concerning the acquisition of insurance, surety, or a release from liability, transactions in which the parties have unequal access to

was not.’ The duty to update, in contrast, ‘concerns statements that, although reasonable at the time made, become misleading when viewed in the context of subsequent events.’” *Oran v. Stafford*, 226 F.3d 275, 286 (2000) (citations omitted).

We coded the duty to update and the duty to correct together, rather than separately, due to the difficulty of distinguishing one from the other, particularly in cases where the court did not distinguish between the two, or confused the two issues.

⁴¹ Wilson, *supra* note 14 at 236 (stating that, “where one party has made a material misrepresentation which is true at the time, but which subsequently, to his knowledge, but not the knowledge of the other, becomes, through the alteration of circumstances, untrue, it is his imperative duty to communicate to the other information of the change in affairs.”)

information, transactions concerning the transfer of real property, and transactions concerning the sale or transfer of a slave.

1. A transaction between parties in a confidential or fiduciary relationship

The most commonly asserted basis for the imposition of a duty to disclose material information is the presence of a fiduciary or confidential relationship between the parties to the transaction.⁴³ Technically, confidential relationships (or “relationships of trust and confidence” as they are typically labeled) differ from fiduciary relationships in that a fiduciary relationship arises out of the position of the parties relative to each other, while a confidential relationship arises from the conduct of the parties or from the nature of the transaction that is the subject of the dispute.⁴⁴ For purposes of this article, however, the distinction is irrelevant. Our hypothesis is that both types of relationships lead to greater disclosure requirements than do arms-length relationships, and accordingly, we make no attempt to distinguish fiduciary relationships from those that are merely confidential.

Unfortunately, although the fiduciary character of some relationships is clear -- such as principal and agent, corporate officer or director and shareholder, or trustee and beneficiary -- the fiduciary or confidential nature of other relationships is not so clear, or

⁴² Rest. 2d Torts §551(2)(c).

⁴³ See, e.g., *Story*, *supra* note 18 at §218; *Bay Colony, Ltd. v. Trendmaker, Inc.* 121 F.3d 998 (5th Cir. 1997) (stating that Texas law recognizes a duty to disclose which supports action for fraud by nondisclosure only where fiduciary or confidential relationship exists); *Banque Arabe et Internationale D'Investissement v. Maryland Nat. Bank*, 57 F.3d 146 (2nd Cir. 1995) (holding that an affirmative duty to disclose arises from the need to complete a partial statement or from a fiduciary or confidential relationship between the parties).

⁴⁴ For example, the relationship between two family members may or may not be confidential depending on factors such as whether they typically entrust confidential information to one another or whether they enjoy a congenial relationship. In contrast, because of the status of a trust manager as a fiduciary to the trust beneficiary, the trust manager owes the trust beneficiary a fiduciary duty that cannot be diminished through daily interactions that suggest the relationship is not one of trust and confidence. See, George Gleeson Bogert, *Confidential Relations and Unenforceable Express Trusts*, 13 Cornell L. Q. 237, 248 (1928) (discussing the difference between confidential and fiduciary relationships); Richard W. Painter, Kimberly D. Krawiec, & Cynthia A. Williams, *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 Va. L. Rev. 153, 176-177, n.101-03 (1998) (same).

might vary from state to state or across the time frame of our study.⁴⁵ In fact, courts have purposely failed to provide an exhaustive list of fiduciary relationships, preferring instead loose standards that allow judges to consider the specific facts of each case.⁴⁶ In order to avoid the difficulties and subjective decisions that could lead to errors in coding such cases, we adopted bright-line rules that suit the purposes of our study, but might not technically conform to the law.

For example, the traditional common law rule was that corporate officers and directors owed fiduciary duties only to the corporation itself or to the shareholders as a unit, and not to the individual shareholders of the corporation.⁴⁷ Accordingly, courts often ruled that officers and directors could trade with shareholders based on material non-public information without disclosing such information.⁴⁸ On the other hand, some courts, often invoking the “special facts” doctrine, refused to permit such transactions by corporate officers and directors without full disclosure.⁴⁹ Because fiduciary obligations

⁴⁵ A common (but not exhaustive) list of recognized fiduciary relationships would include: executors, guardians, trustees, attorneys, and, to an extent, corporate directors and senior executives. See, John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 150 (1981).

⁴⁶ See, e.g., Coffee, *supra* note 45 (stating that, “[t]he common law has in fact, always defined the term [fiduciary] with deliberate imprecision”); Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 15 (2001) (“A clear characterization of fiduciary obligation is elusive and its exact nature is much debated.”); *Harper v. Adametz*, 113 A.2d 136, 225 (Conn. 1955) (stating that the court has purposefully refrained from defining a fiduciary relationship in precise detail that would exclude new situations).

⁴⁷ *Smith v. Hurd*, 53 Mass. 371 (1847) (stating that, “[t]here is no legal privity, relation, or immediate connection, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders.”); *Allen v. Curtis*, 26 Conn. 456 (1857) (holding that “the directors of the bank are the agents of the bank. The bank is the only principal, and there is no such trust for, or relation to, a stockholder as has been claimed by the plaintiff.”); *Board of Com’rs of Tippecanoe County v. Reynolds*, 15 Am. Rep. 245 (1873) (stating that directors owe the shareholders as a unit a fiduciary duty when dealing with the corporation’s business or property, but that no such duty is owed by an officer or director to an individual shareholder when transacting for the purchase or sale of stock in the corporation).

⁴⁸ *Freeman v. Decio*, 584 F.2d 186, 191 (7th Cir. 1979) (stating that, [a]bsent fraud, the traditional common law approach has been to permit officers and directors of corporations to trade in their corporation’s securities free from liability to other traders for failing to disclose inside information.”); *Adams v. Mid-West Chevrolet Corp.*, 179 P.2d 147, 156 (1946) (stating that, “[t]he general rule is that officers and directors . . . cannot deal with the property of the corporation for their own personal benefit or advantage. But this duty does not extend to the outstanding stock of the corporation for the reason that such stock is the individual property of the respective shareholders and not in any sense the corporation’s property”).

⁴⁹ *Freeman*, *supra* note 48 at 191 (stating that, [a] few jurisdictions now require disclosure where certain “special facts” exist, and some even impose a strict fiduciary duty on the insider vis-à-vis the selling

to individual shareholders were not recognized at this time, some commentators have used these cases as evidence that courts apply an equality of access doctrine to determine when disclosure will be required.⁵⁰

We believe, however, that such cases are better understood as a precursor to today's doctrine of officer and director fiduciary duties rather than as evidence of a broad insistence by courts that parties to transactions have equal access to information. We thus coded these cases as fiduciary duty cases (in addition, in most instances, as unequal access cases), despite the fact that the court might not have invoked this rationale, and might even have specifically rejected it.

Similarly, whether some relationships are confidential in nature vary from state to state or with the specific circumstances of the relationship. An examination of the law governing marital relations helps to illustrate the point. Some states consider marriage an inherently fiduciary relationship while others hold that marital relations might or might not be confidential, depending on the circumstances.⁵¹ Some states hold that a fiduciary or confidential relationship automatically begins with engagement, while others do not.⁵²

shareholder.”); *Strong v. Repide*, 213 U.S. 419 (1909) (stating, “[t]hat the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak”). Those other facts included that Repide owned 75% of the stock of the company, was administrator general of the company, was the chief negotiator for the company in talks that eventually led to the sale of all of the company's property, and was in reality acting as an agent for all of the other shareholders in such negotiations. *Id.*

⁵⁰ See, e.g., *Strong*, *supra* note 49 (holding that agents of Repide, the chief shareholder and director of the Philippine Sugar Estates Development Company, should have disclosed to prospective sellers of the company's shares that they were acting on behalf of Repide, who was also the company's chief negotiator for a U.S. government contract); *Scheppele*, *supra* note 2 at 113-114 (arguing that the Court's ruling in *Strong v. Repide* is explainable on equal access grounds, and not on fiduciary duty grounds, because the court explicitly rejected the proposition that corporate directors owe shareholders special disclosure obligations.)

⁵¹ Compare, e.g., *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991), cert. denied, 503 U.S. 1004 (1992) (finding that marriage is not per se a fiduciary relationship) with *DeLorean v. DeLorean*, 511 A.2d 1257, 1261-62 (N.J. Super. Ct. Ch. Div. 1986) (finding that marriage is a fiduciary relationship).

⁵² Compare, e.g., *In re Marriage of Sokolowski*, 597 N.E.2d 675, 680 (Ill. App. Ct. 1992) (finding that a confidential relationship begins at engagement under Illinois law), and *Lightman v Magid*, 54 Tenn. App. 701, 394 S.W.2d. 151 (1965) (finding that a confidential relationship ordinarily exists at engagement), with *Handley v Handley*, 113 Cal. App. 2d. 280, 248 P.2d. 59 (1952) (holding that confidential relationship could not exist prior to marriage)

And courts differ in the extent to which they treat married but separated persons as parties to a confidential or fiduciary relationship.⁵³

To avoid the daunting task of mastering the intricacies of the law of confidential relations in all fifty states, as well as the necessity of subjective judgment calls concerning whether the circumstances of a particular relationship make it confidential, we adopted bright-line rules that reflected the weight of authority and applied them across all jurisdictions. We thus, for example, treated engaged persons negotiating a prenuptial agreement as parties to a confidential relationship in all 50 states, despite the fact that this is not the law in all jurisdictions under all circumstances. This bright-line approach did not trouble us, given our hypothesis that, despite asserted differences across jurisdictions in the law of confidential relations, as a general matter, courts impose a heavier disclosure obligation in cases where the relation between the parties could be considered fiduciary or confidential, such as, for example, a familial or marital relationship, than they do when the parties share a merely arms-length relationship. We thus predicted a significant, positive relationship between the likelihood of the court imposing disclosure duties and the existence of a fiduciary or confidential relationship.

2. *The transaction concerned insurance, surety, or a release from liability*

Professor W. Page Keeton described this theory best: “In releases, in contracts of insurance, and in contracts of suretyship, practically all facts affecting the matter must be disclosed.”⁵⁴ The most commonly asserted rationale for this rule, particularly as regards

⁵³ Compare, e.g., Harroff v. Harroff, 398 S.E.2d 340, 343 (N.C. Ct. App. 1990) (holding that married persons owe each other fiduciary duties while negotiating a separation agreement) with In re Marriage of Auble, 866 P.2d 1239, 1244 (Or. Ct. App. 1993) (holding that married persons living apart do not owe each other fiduciary duties in the negotiation of a separation agreement).

⁵⁴ Keeton, *supra* note 22 at 36; Wilson, *supra* note 14 at 231. But see, Scheppele, *supra* note 2 at 148 (arguing that when the insurer and insured have equal access to information, disclosure is not required.)

insurance, is that the insured is likely to have knowledge affecting the contract that is unavailable to the insurance underwriter.⁵⁵

Some modern commentators have urged the abolition of the rule of full disclosure in insurance contracts on the grounds that the rule originated in the context of maritime insurance, when vessels were typically insured once they were already at sea and could not be inspected.⁵⁶ Accordingly, they argue that such rules have no place in modern insurance practice, in which the insurance company is typically able to and does conduct a thorough inspection of the insured property or person.⁵⁷ Nonetheless, we predicted that courts are more likely to find a duty to disclose when the transaction concerns the acquisition of insurance, surety, or a release from liability.

3. *The transaction was one in which the parties had unequal access to information*

One of the most lasting, if controversial, theories seeking to explain why courts require disclosure of all material facts in some transactions but not others is the theory that courts will require disclosure whenever the parties have unequal access to information (the “equality of access theory”).⁵⁸ Professor Kim Lane Scheppele has elegantly defined equal access in terms of both structural equality and equality of

⁵⁵ Scheppele, *supra* note 2 at 146-148; Verplanck, *supra* note 27 at 37-38 (stating that, “[t]he insured being the party from whom, in most cases, the underwriter obtains the special facts upon which the calculation of the risk is settled . . . [e]very fact within his knowledge, regarding which ignorance or mistake might possibly induce the underwriter to compute his risk upon an incorrect basis . . . is considered by the law as a material fact, and misrepresentation or suppression of it avoids the policy.”) *But see*, Kronman, *supra* note 1 at 27 (explaining the rule that health or life insurance applicants owe the insurer a duty of full candor on the grounds that information regarding the health of the applicant is nearly always casually acquired).

⁵⁶ *See, e.g.*, Bertram Harnett, *The Doctrine of Concealment: A Remnant of the Law of Insurance*, 15 L. & Contemp. Probs. 391-414 (1950).

⁵⁷ *Id.*

⁵⁸ Am. Jur. 2d §148 (asserting that, “[t]here is abundant authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak”); Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322 (1979) (defining equality of access as an informational advantage that cannot be overcome by the uninformed party, regardless of her diligence or monetary resources.); *Carter v. Boehm*, 3 Burr. (1905) (opinion of Lord Mansfield, stating that “either party may be innocently silent as to grounds open to both to exercise their judgment upon.”); Wilson, *supra* note 14 at 234 (stating that, “the common law imposes no duty of disclosure where the facts suppressed are equally accessible to both parties to the transaction.”)

aptitude. For example, she states that “[t]wo actors will be said to have equal access to information if they (1) have equal probabilities of finding the information if they put forth the same level of effort and (2) are capable of making this equivalent level of effort.”⁵⁹

People most often have different probabilities of information detection because of structural inequality – in other words, they “have structurally unequal access to knowledge.”⁶⁰ In contrast, when two people are unable to expend the same level of effort in information production, it is most often because one does not even realize that the information might exist, or is too lacking in intellectual capability or social knowledge to compete with more sophisticated parties.⁶¹

Relying on *Laidlaw* to underpin her theory, Scheppele points to Justice Marshall’s dictum that “[i]t would be difficult to circumscribe the contrary doctrine [i.e., the doctrine that the relative access of the parties to the information is legally relevant] within proper limits, where the means of intelligence are equally accessible to both parties” to develop an argument that the case outcome can be explained by the fact that the parties had equal access to information. This assumption might seem surprising, given the clear evidence that, due to Organ’s special connection to the only three people in New Orleans with knowledge of the end of the war, Laidlaw could not have discovered the information without expending considerably more effort than that exerted by Organ. However, Scheppele argues that Organ’s discovery of the information was purely fortuitous – Laidlaw was just as likely as Organ to have a partner with a brother aboard the British fleet who came ashore during the night with news that the war had ended.⁶²

Despite the admirable efforts of Professor Scheppele, the equality of access theory remains extraordinarily open-ended and subjective, a fact leading many critics,

⁵⁹ Scheppele, *supra* note 2 at 120.

⁶⁰ *Id.*

⁶¹ *Id.* at 121.

including one of the present authors, to dismiss the test as providing no meaningful guidance for courts.⁶³ Needless to say, reasonable minds can wildly differ on what constitutes equal access and coding for a factor so susceptible to personal interpretation was difficult.

Nonetheless, we attempted to address the problem by laying down bright-line rules. Most importantly, in contrast to Scheppele, we defined access as purely structural. Even gross differences in education or knowledge did not impact our determination of whether equality of access was lacking. Instead, we dealt with differences such as these by including a separate code for parties who are illiterate, elderly, severely ill, or extraordinarily mentally deficient in some way (although still competent to contract).⁶⁴

Furthermore, we did not, as some commentators might, automatically code purchasers and sellers of real or personal property as having unequal access to information. Instead, if a casual inspection of the property would have revealed the undisclosed information, then we concluded that the parties had equal access to the information in question, despite the fact that purchasers must have sellers' permission before inspecting the property. We felt that this definition was reasonable, given the ease with which the purchaser could request and execute such an inspection, and the suspicion that should arise in the purchaser's mind if the seller refuses the request. This equality of access theory leads us to predict that courts are more likely to impose disclosure duties when the parties have unequal access to the withheld information.

⁶² *Id.* at 122 (stating that, “[i]t seems that Organ got his information through a friend who had a brother in the know. Laidlaw’s agent, if he had had the same fortune, also could have got the information this way.”)

⁶³ For example, one of the present authors has argued previously that, because both individual aptitude and structural access vary across the population in relation to wealth and education, no two people are ever truly equal. Instead, access is a continuum on which cases of clear inequality or relative equality can be identified at the extremes, but that none of the definitions endorsed by the equality of access advocates gives meaningful guidance as to where to draw the line in the large majority of cases, which fall in the middle of the continuum. Kimberly D. Krawiec, *Fairness, Efficiency & Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 *Nw. U.L. Rev.* 443 (2001); Ian Ayres & Stephen Choi, *Internalizing Outsider Trading*, 101 *Mich. L. Rev.* 313 (2002) (raising a similar argument).

⁶⁴ See *infra* note 92 and accompanying text (discussing this variable).

4. *The transaction concerned the transfer of real property*

It has been argued by some commentators that courts impose a greater duty of disclosure with regard to the transfer of real property than in other types of transactions, a rule that apparently dates back to the Roman civil law.⁶⁵ At common law, this rule might have been the result of implied warranties of habitability and title.⁶⁶ In many states today, much of the common law in this area has been superceded by statutes that mandate high levels of disclosure in real estate transactions, particularly residential ones. We predicted that courts are more likely to impose a duty to disclose when the transaction concerns the transfer of real property.

5. *The Transaction Concerned the Transfer of a Slave*

Slavery cases of all kinds have understandably generated significant interest not only in the legal literature, but in history and economics as well.⁶⁷ Although one might expect that courts would formulate different disclosure rules in slave sale cases than in other sale of goods cases, in recognition of the fact that the property at issue is a human being, a review of the cases should quickly disabuse the reader of that notion.

For example, courts could have used the rule that bargaining parties have a duty to disclose defects likely to cause personal injury as a basis for imposing a duty to disclose any illness or injury in a slave, the rationale being that lack of disclosure prevents the purchaser from seeking medical attention for the slave. Instead, however, courts of the

⁶⁵ See, e.g., Cicero, *supra* note 10 at ¶65 (stating that, “[a]s far as estates are concerned, it is laid down in our civil law that all faults known to the seller be declared at the time of the sale.”) See generally, John V. Orth, *Sale of Defective Houses*, 6 Greenbag 163 (2003) (discussing the common law of disclosure in connection with the sale of real property).

⁶⁶ As to title, see Pothier at Art. II, No. 240 (declaring that the vendor must declare “that the thing does not belong to him; that it does not belong to him irrevocably; or that it is subject to certain charges, annuities (rentes), or special hypothecations.”)

⁶⁷ See, e.g., Jenny B. Wahl, *The Jurisprudence of American Slave Sales*, 56 (1) J. Econ. Hist. 143 (1996); Helen T. Catterall, *Judicial Cases Concerning American Slavery and the Negro* (1968); Andrew Fede, *Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor*, 31 (4) Am. J. Legal Hist. 322 (1987); Judith K. Shafer, *Guaranteed against the Vices and Maladies of Prescribed by Law: Consumer Protection, the Law of Slave Sales, and the Supreme Court in Antebellum Louisiana*, 31 (4) Am. J. Legal Hist. 306 (1987); Judith K. Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (1994); Mark Tushnet, *New Histories of the Private Law of Slavery*, 18 Cardozo L. Rev. 301 (1996).

era deciding disclosure issues seem to have treated slaves much like any other personal property.⁶⁸

This is not to say, however, that special disclosure rules did not arise in connection with slavery cases. In fact, economic and legal historians have argued that, although the southern states generally observed a rule of strict *caveat emptor* much more frequently than did the northeastern states, due to the importance of the slave trade to the southern economy, southern states attempted to regulate the slavery market, in part by imposing disclosure duties on parties to a slave sale.⁶⁹ Interestingly, this rule too dates back to Roman law.⁷⁰ We predicted that courts are more likely to find that the informed party has a duty to disclose when the transaction involves the sale of a slave.

C. How the Information Was Acquired

Many commentators have argued that the method by which the undisclosed information was acquired has an impact on whether courts require disclosure of the information. Specifically, it has been asserted that courts more frequently require the disclosure of casually acquired information, and information acquired through illegal or tortious means.

1. *The information was casually, as opposed to deliberately, acquired*

⁶⁸ In fact, the argument that illness or injury in a slave falls within the well-recognized exception for disclosures of defects likely to cause bodily injury was not raised in any of the cases in our dataset, presumably because of the deeply ingrained notion among many southerners of that era (including judges and counsel in the cases) that the southern legal system treats slaves as goods, rather than as individuals whose well-being should be protected by the legal system. *See also*, Wahl, *supra* note 67 at 146, n.7 (referring to livestock sales as slave sales’ “closest relative”).

⁶⁹ *See, e.g.*, Wahl, *supra* note 67 at 146-148 (arguing that southern courts imposed higher disclosure obligations in slave sales than in other sales transactions); Fede, *supra* note 67 at 322-58 (arguing that slave sales were more heavily policed by the courts, who imposed protections such as warranties of titles and soundness, foreshadowing the development of the UCC). *But see*, Dalley, *supra* note 2 at 430 (finding less protection of buyers against fraud in slave cases than in some other types of cases, such as those involving land, horses, and corporate securities.)

⁷⁰ Cicero, *supra* note 10 at ¶71 (stating that “[i]t is not only in the sale of real estate that civil law, which is based on the natural law, condemns trickery and fraud, but also in the case of slave-purchase the buyer is protected by law against deception. Indeed, an edict of the aediles lays down that if the seller knows that the slave is a weakling, a runaway or a thief, he must (except in the case of an inherited slave) declare it”).

Although the notion that the law should reward those who expend time and effort to acquire information by permitting them to reap the benefits of bargaining with others without revealing that information was propounded perhaps most eloquently (and certainly most famously) by Anthony Kronman, this economic justification for the differing results in fraudulent silence cases is, in fact, one of the earliest theories offered by legal commentators attempting to explain the law of fraudulent silence. For example, in *De Officiis*, Cicero constructs a hypothetical in which a merchant sails to Rhodes from Alexandria with a shipment of corn during a time of great famine in Rhodes.⁷¹ The merchant knows that other ships have set sail from Alexandria to Rhodes with enough corn to alleviate the famine and will arrive shortly. In an imaginary dialogue, the Stoic philosophers Antipater and Diogenes debate whether or not the merchant should be required to reveal all that he knows.⁷²

Discussing the hypothetical in his 1761 *Treatise on Obligations*, the French legal theorist R.J. Pothier agrees with Cicero's conclusion that the merchant should disclose his secret information. He acknowledges, however, that the majority of other writers on the subject have considered the merchant's profits to be made by nondisclosure, "not an unjust profit; but a just reward for the diligence which enabled him to arrive the first, and the risk which he ran of losing his merchandise, if any of the accidents, to which he was exposed, should have prevented his arrival on time."⁷³ Similarly, writing in 1936, Professor W. Page Keeton argued that the manner in which the informed party acquired her information is relevant to courts' determinations of disclosure duties, noting that, "[t]he information might have been acquired as a result of his bringing to bear superior

⁷¹ Cicero, *supra* note 10 at ¶ 50.

⁷² Cicero, *supra* note 10 at ¶¶ 51-53. In the hypothetical, Antipater argues that, "he should tell everything, so that the buyer can be just as much in possession of the facts as the seller." *Id.* at ¶51. Diogenes responds that, "these bonds [of social unity] are not such that a man may not have anything to call his own. If that is so, there is not even any selling to be done, only giving." *Id.* at ¶ 53.

knowledge, intelligence, skill, or technical judgment,” or “it might have been acquired by mere chance.”⁷⁴

Kronman elaborated on this theory by arguing that the seemingly inconsistent results in similar cases involving the nondisclosure of relevant facts could be reconciled by noting that when nondisclosure is permitted, the knowledge involved is typically the result of a deliberate search.⁷⁵ Although Kronman conceded that Organ’s information appeared to be acquired fortuitously, rather than deliberately (recall that Organ’s business partner’s brother had been at sea with the British fleet and arrived in New Orleans during the middle of the night, tipping Organ about the soon-to-be-disclosed news of the war’s end), he believed that this did not undermine his theory. Instead, Kronman argued that Marshall’s decision resulted from an attempt to lay down a blanket rule concerning the disclosure of market information, which is typically, though not always, deliberately acquired.

Kronman argued that a rule permitting silence in such instances was a sensible economic policy, as it represented the only effective means of providing incentives for the production of costly information that would not normally be discovered, absent a deliberate search.⁷⁶ Requiring the disclosure of casually acquired information, by

⁷³ Pothier, *supra* note 12 at Art. III., No. 242. Pothier, although agreeing with Cicero’s conclusions, also notes that, “[t]he decision of Cicero meets with much difficulty even in the forum of conscience. The greater number of those who have written upon natural law have regarded it as going too far.” *Id.*

⁷⁴ Keeton, *supra* note 22 at 25. *See also*, Wilson, *supra* note 14 at 231 (stating that, “the common law . . . declares that men should as a general rule take care of themselves, and that some incentive to diligence and discretion in their affairs should be afforded, by giving them, in ordinary transactions, the benefit of their industry and discernment.”); *Hays v. Meyers*, 107 S.W. 287, 288 (1908) (stating that a party has no duty to disclose “the superior knowledge of property he desires to purchase that has been acquired by skill, energy, vigilance, and other legitimate means” and stating further that “[i]f any other rule were adopted, it would have a depressing tendency on trade and commerce by removing the incentive to speculation and profit that lies at the foundation of almost every business venture”).

⁷⁵ Kronman, *supra* note 1 at 9. Although Kronman limited his theory to “socially productive information,” we find this distinction unnecessary to test his hypothesis. In practice, it is difficult to conceive of examples of failures to disclose socially unproductive information that would result in demonstrable damages to the plaintiff, thus resulting in litigation and written judicial opinions.

⁷⁶ *Id.*

contrast, should not alter the informed party's discovery of information, because he expended no resources to find it.

Like Kronman, we define "deliberately acquired information" as "information whose acquisition entails costs which would not have been incurred but for the likelihood, however great, that the information in question would actually be produced."⁷⁷ The costs of acquiring such information might include not only direct search costs, but also the costs of developing any needed expertise, such as, for example, the costs of attending business school or studying the values of art or antiques.⁷⁸

Casually acquired information, by contrast, is information the acquisition of which entails costs that would have been incurred even if the information were not forthcoming.⁷⁹ To illustrate, a businessman who overhears information while riding on a bus has acquired the information casually, except in the unlikely event that he rides buses specifically for that purpose.⁸⁰

Kronman recognized that, although theoretically interesting, the determination as to whether or not any given piece of information was deliberately or casually acquired in any instance was a difficult one for courts to make in the real world.⁸¹ Accordingly, he argued that, rather than making case by case determinations as to the manner of information acquisition, it would be more efficient for courts to adopt blanket rules regarding whether the kind of information involved in a particular class of case (say, real estate purchases, or the sale of a good with a latent defect) was more likely to be generated deliberately or casually.⁸²

⁷⁷ *Id.* at 13.

⁷⁸ *Id.* at 13.

⁷⁹ *Id.* at 13.

⁸⁰ *Id.* at 13, n.38 and accompanying text.

⁸¹ Kronman, *supra* note 1 at 13-14.

⁸² Kronman, *supra* note 1 at 17-18.

In contrast, we judged whether information was casually or deliberately acquired based on the facts of each case, as opposed to the class of case in question. We did this for several reasons. First, although Kronman does discuss general rules as to the likely means of information acquisition in certain classes of cases (for example, market information, the knowledge of purchasers and sellers of real property, and information relating to the health of an applicant for health or life insurance), he did not lay down general classifications for every possible range of facts. Accordingly, any attempt to apply blanket rules would have required significant fact-specific inquiry on our part in order to create such rules for all classes of cases contained in our sample set.

Second, coding individual cases on their own facts enabled us to test not only the robustness of the deliberately/casually acquired distinction, but also allowed us to test Kronman's empirical claims as to the likely mode of information acquisition in those classes of cases for which he did, in fact, suggest blanket rules. In other words, coding in this manner permitted us to judge, for example, whether extrinsic information is really typically deliberately acquired, as contended by Kronman.

Other commentators disagree that the deliberately/casually acquired information distinction is a meaningful predictor of the outcomes of fraudulent silence cases.⁸³ Our own view embarking on this project was that, regardless of whether Kronman's theory was sound from an economic policy perspective, it was difficult to apply in practice and had not been embraced by courts outside the Seventh Circuit.⁸⁴ As a result, we predicted no significant relationship between whether the information was casually acquired and the likelihood that a court would impose disclosure duties.

⁸³ See, e.g., DeMott, *supra* note 2 at 68-69, 85; Scheppele, *supra* note 2 at 124-26.

⁸⁴ The influence of Judges Easterbrook and Posner in the Seventh Circuit, their embrace of law and economics principles, and their familiarity with academic theory led us to this hypothesis. See, e.g., *Federal Deposit Insurance Corp. v. W.R. Grace & Co.*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) (Judge Posner, opining that a seller had a duty to disclose material information obtained

2. *The information was acquired through illegal or tortious means*

Courts and commentators often take the position that information acquired by illegal or tortious means must be disclosed to a contracting counterparty.⁸⁵ A standard example is that if A trespasses upon B's land and while there conducts a test and determines that oil is located on the land, if A subsequently purchases the land from B without disclosing to B the presence of oil on his land, B might have a right to rescind the contract.⁸⁶ We predicted that courts are significantly more likely to find a duty to disclose when the information is acquired by illegal or tortious means.

D. Characteristics of the Uninformed Party

Commentators frequently assert that court rulings are influenced by certain characteristics of the uninformed party. Specifically, we hypothesized that courts require disclosure more frequently when the uninformed party is a buyer or lessee, when the uninformed party is female, and when the uninformed party is sick, disabled, illiterate, elderly, or otherwise severely disadvantaged in the bargaining relationship, although still competent to contract.

1. *The uninformed party was the buyer or lessee*

Commentators seem to agree that sellers have a higher obligation to disclose information affecting the value of the transaction than do purchasers, although they disagree as to why courts make this distinction.⁸⁷ Professor Keeton explained the rule as follows:

“without substantial investment . . . which the buyer would find either impossible or very costly to discover himself”).

⁸⁵ See, e.g., Keeton, *supra* note 22 at 25-26; George Spencer Bower & Sir Alexander Kingcome Turner, *The Law of Actionable Misrepresentation* 107 (3rd ed. 1974); Donna M. Nagy, *Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O'Hagan Suggestion*, 59 Ohio St. L. J. 1223, 1291-92 (1998); *Mallon Oil v. Brown/Edwards Associates*, 965 P.2d 105, 111-112 (Colo. 1998) (holding that information acquired illegally must be disclosed).

⁸⁶ Keeton, *supra* note 22 at 26; § 161 Restatement of Contracts (2d), Illustration d.11 (stating that information acquired through trespass must be disclosed).

⁸⁷ See, e.g., Kronman, *supra* note 1 at 22-23 (buyers have lesser disclosure obligations than sellers because buyers are likely to acquire their information deliberately, whereas sellers are more likely to acquire their

The buyer is not ordinarily expected to disclose information greatly affecting the value of the property which is the subject-matter of the sale, whereas the seller is expected to disclose defects in the property sold which greatly decrease the value of the property.⁸⁸

We predicted that courts are significantly more likely to impose disclosure duties when the uninformed party is the buyer.

2. *The uninformed party was female*

Historically, courts and legislatures have used a variety of theories to limit the rights of women to freely contract. For example, in the early twentieth century, courts upheld laws designed to improve working conditions for women and children against challenges based on interference with the freedom of contract – challenges that had been used successfully to invalidate similar laws that applied to men.⁸⁹

Sometimes, the limitations on women’s freedom of contract were explicit, as under the doctrine of coverture, which treated the family as a unit and the husband as the

information casually); Scheppele, *supra* note 2 at 130-33 (sellers have greater disclosure duties than do purchasers because sellers are more likely to have access to the information in question, whereas purchasers are not); William B. Goldfarb, *Fraud & Nondisclosure in the Vendor-Purchaser Relation*, 8 Western Reserve L. Rev. 5, 26 (1956) (arguing that sellers have disclosure duties that exceed those of buyers because buyers rarely have material information unavailable to sellers); DeMott, *supra* note 2 at 76 (stating that “buyers in many settings are able to withhold with impunity information comparable to information that a seller is obliged to disclose.”); Pothier, *supra* note 12 at Nos. 294-98 (stating that vendees have lesser disclosure obligations than vendors, because the vendor ought to be aware of the value of what he sells.); Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 Wash. U. L.Q. 57, 62 and n.7 (1992) (arguing that sellers are more often found to have a duty to disclose material information unknown to the buyer, because sellers are subject to implied warranties, whereas buyers are not).

⁸⁸ Keeton, *supra* note 22 at 35-36.

⁸⁹ Compare, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a state law regulating working hours) with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding a Washington state statute setting minimum wages for women only); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon statute establishing maximum working hours for women, but not for men); *Commonwealth v. Hamilton Manufacturing Company*, 120 Mass. 383 (1876) (upholding a Massachusetts statute prohibiting the employment of women and persons under the age of eighteen in any manufacturing establishment for more than sixty hours per week); *Wenham v. State*, 91 N.W. 421 (Neb. 1902) (upholding a Nebraska law regulating and limiting the employment of women in certain industries); *State v. Buchanan*, 70 P. 52 (Wash. 1902) (upholding a Washington state law prohibiting the employment of females in certain business establishments for more than 10 hours per day); *Com. v. Beatty*, 15 Pa. Super. Ct. 5 (1900) (upholding a Pennsylvania law criminalizing the employment of women in manufacturing establishments, mercantile industries, and certain other venues for more than 12 hours per day or 60 hours per week). *But see*, *Childrens Hosp. V. Adkins*, 284 F. 613, 618 (D.C. Cir. 1922) (invalidating, as inconsistent with *Lochner*, a Washington, D.C., law setting minimum wages for women, but not for men.); *Ritchie v. People*, 40 N.E. 454 (Ill. 1895) (invalidating an Illinois law limiting the working hours of women).

head of that unit. Accordingly, married women were not permitted to enter into contracts or sue or be sued in court.⁹⁰

Other limitations on women's freedom of contract might be more subtle, as when women, due to their "delicate" nature or a perceived need to protect them from their own bad bargains, are permitted to rescind their contracts based on protective doctrines such as, for example, fraud, duress, or unconscionability, when the same contract would have been enforced against a man.⁹¹ Accordingly, we hypothesized that these gendered notions might have found their way into the law of fraudulent silence, especially in older cases. We thus predicted that a duty to disclose secret information is more likely to be found when the uninformed party is female than when the uninformed party is male.

3. *The uninformed party was sick, disabled, illiterate, or elderly, though competent to contract*

It has been argued that, in the law of fraudulent silence, as elsewhere, courts often rule in favor of sympathetic plaintiffs.⁹² Accordingly, courts might more readily impose disclosure duties when the uninformed party is competent to contract, but is sick,

⁹⁰ See generally, Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, And The Globe*, 111 Yale L.J. 619, 636 (2001) (discussing the law of coverture); Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, And The Family*, 115 Harv. L. Rev. 947, 982-83 (2002) (same). In theory at least, restrictions on women's rights to contract under the doctrine of coverture were abolished during the nineteenth century, with the widespread passage of married women's property acts. Siegel, *supra* this note at 983 (stating that "[i]t is often said that the married women's property acts abolished the common law of coverture in the nineteenth century--a legal fiction if ever there was one. Even the briefest look at antisuffrage discourse reveals that core concepts of coverture were a vibrant part of American legal culture well into the twentieth century and shaped public as well as private law").

⁹¹ See, e.g., Mary Jo Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U. L. Rev. 1065, 1085-86 (1985) (arguing that, in *Jackson v. Seymour*, the court allows Lucy Jackson to rescind a contract for the sale of land to her brother because of "gendered ideas" about the vulnerability and financial dependence of widows, rather than because of the confidential nature of their relationship); Debora L. Thredy, *Feminists & Contract Doctrine*, 32 Ind. L. Rev. 1247, 1262 (1999) (stating that, "[m]any contract doctrines are paternalistic in the sense of protecting the 'weaker' or disadvantaged party: concealment, misrepresentation, unilateral mistake, undue influence, duress, unconscionability, minority, and lack of capacity all could be said to have a protectionist cast," and noting further that, "[f]eminists have just begun to question whether paternalistic doctrines like unconscionability help or harm women"). But see Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 Harv. Women's L.J. 79 (1998) (finding that courts treated gender as an important aspect in assessing standards of care giving women fair treatment in torts).

⁹² *C.f.* DeMott, *supra* note 2 at 97 (stating that, "[t]o an unusual degree, judicial opinions in [these] cases . . . personalize the parties."); Strudler, *supra* note 3 at 340 (arguing that nondisclosure law should pay

disabled, illiterate, elderly, or extraordinarily mentally deficient in some way. In other words, our goal was to identify contracting parties who even the most conservative courts might readily consider easy targets in need of protection from unscrupulous predators. Accordingly, we predicted that courts are significantly more likely to impose a duty to disclose when the uninformed party is sick, disabled, elderly, or illiterate. .

E. Behavior of the Informed Party

Just as the characteristics of the uninformed party might impact court rulings, the informed party's behavior might influence court decisions regarding the need for disclosure in any given transaction. Specifically, when the informed party has "behaved badly," courts might be more likely to punish or discourage such behavior through the imposition of disclosure duties that deprive the informed party of the opportunity to legally profit from her secret information. Accordingly, we examined two types of bad behavior by the informed party: affirmative misrepresentations or half-truths that accompany the undisclosed information, and active concealment of the undisclosed information.

1. The informed party made affirmative misrepresentations or half-truths

Often fraudulent silence claims form one part of a larger claim in which other wrongs are alleged, such as affirmative misrepresentations or half-truths. Although technically courts should rule on each count of the complaint separately and a finding that the informed party intentionally misrepresented one fact should not impact the court's finding on liability for a different, undisclosed fact,⁹³ we believe that courts are often swayed by a general pattern of bad conduct on the part of the informed party.⁹⁴

attention to the moral drama that occurs in bargaining and to the sources of individual negotiators' grievances about exploitation, deception, and betrayal.").

⁹³ Unless, of course, the informed party's lies somehow prevented the uninformed party from learning the truth.

⁹⁴ Wilson, *supra* note 14 at 234 (stating that, "[I]f a single word be dropped which tends to mislead the vendor' it will vitiate the contract. Thus it is, that in the mass of cases in which concealment or fraudulent

Accordingly, we would expect to see disclosure required more often when the informed party also made affirmative misrepresentations or half-truths, than when the informed party was truly silent.

A half-truth is a statement that, although technically accurate, is nonetheless misleading in some way.⁹⁵ As stated in section 529 of the Restatement (Second) of Torts, “[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.”⁹⁶

Similarly, the Restatement (Second) of Contracts states that “[a] statement might be true with respect to the facts stated, but might fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts.”⁹⁷ To illustrate, the Restatement notes that a true statement that an event has recently occurred might nonetheless mislead, if it creates the false impression that matters have not changed subsequently.⁹⁸

Donald Langevoort has correctly noted that there is no bright line between affirmative misrepresentations and half-truths, or between half-truths and nondisclosure.⁹⁹ Instead, all three arise in transactional settings in which the parties typically trade large amounts of information and, thus, represent a continuum, making

silence appears, there is also present this misrepresentation.”) (quoting *Turner v. Harvey*, 1 Jacob 178 (1821)).

⁹⁵ See Langevoort, *supra* note 40 at 88-89 (discussing the half-truth); Goldfarb, *supra* note 87 at 24 (stating that, [w]hile silence alone may not be actionable, if the vendor undertakes to speak, he must not conceal anything which would tend to qualify or contradict the facts which he had stated. In other words, to tell half of the truth is to make a half-false representation.”)

⁹⁶ Rest. 2d Torts §529. The Restatement goes on to elaborate, “[t]hus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.” Rest. 2d Torts §529, comment a. Although half-truths are actionable under both tort and contract law, See Rest. 2d Torts §529, Rest. 2d Contracts §159, they form an especially important part of securities litigation. See, Langevoort, *supra* note 40 at 90-91 (noting that half-truths are actionable under sections 17(a)(2), 11, and 12(a)(2) of the Securities Act of 1933, and under Rule 10b-5 under the Securities Exchange Act of 1934.)

⁹⁷ Rest. 2d Contracts §159, comment b.

⁹⁸ Rest. 2d Contracts §159, comment b.

⁹⁹ Langevoort, *supra* note 40 at 95-96.

coding at the margins sometimes difficult.¹⁰⁰ We predicted that courts are more likely to impose a duty to disclose when the informed party lied or told a half-truth in the same transaction in which she failed to disclose material information, than when the informed party's silence is unaccompanied by lies or half-truths.

2. The informed party actively concealed information

It frequently has been asserted that, if the informed party takes some affirmative steps to prevent detection of the truth by the uninformed party, then disclosure is more likely to be required. As stated by one commentator: "Concealment involves some positive action on the part of one to prevent the other from ascertaining some material fact, which without the interference he would probably have discovered."¹⁰¹

For example, the seller of land might cover a landfill, ditch, or other defect on the property with dirt and then fail to disclose this information to prospective purchasers.¹⁰² Similarly, if the uninformed party inquires about certain facts, the informed party might lead him (through words or actions) in a direction where the facts cannot be found.¹⁰³ We predicted that courts are more likely to require disclosure in such instances than in a case where the seller had merely remained silent about some information, but took no steps to prevent discovery by the purchaser.

¹⁰⁰ *Id.* at 96; Goldfarb, *supra* note 87 at 25 (noting that "a business transaction is never entirely without conversation, and verbal exchanges nearly always involve, expressly or by implication, representations of fact.")

¹⁰¹ Wilson, *supra* note 14 at 233. See also, Goldfarb, *supra* note 87 at 10 (distinguishing between "active concealment and mere nondisclosure")

¹⁰² See, *Merchant's Bank v. Campbell*, 75 Va. 455 (1881) (fraud found where defendants stopped up the entrance to a valuable cavern and told plaintiffs that it was "nothing but a mud-hole."); *Schneider v. Heath*, 3 Campb. 506 (1813) (opinion of Lord Mansfield, finding fraud where defendants had removed a ship from the ways, where it had been sitting dry, and docked it in the water so that the plaintiffs could not observe defects on the bottom of the boat).

¹⁰³ See, e.g., *Chrisholm v. Gadsden*, 32 S.C.L. 220 (1847) (in response to uninformed party's inquiries, informed party sent him to inspect area of property where he knew the defect could not be discovered.); *Stewart v. Wyoming Ranch Co.*, 128 U.S. 383, 386 (1888) (fraud found where defendant prevented plaintiff's agent from making inquiries which would have revealed material negative information).

F. Case Date

One of the goals of this study was to identify any historical patterns in the data. Specifically, the aim was to test the frequently repeated but never empirically tested hypothesis that the doctrine of *caveat emptor* had faded in importance over time and that, correspondingly, common law disclosure duties had increased during the time period of our study (approximately 1789 to May 15, 2002).¹⁰⁴ It has been asserted, in particular, that the law governing latent defects became more pro-disclosure in recent years.¹⁰⁵

The most commonly asserted rationale for this perceived trend is an economic one: as America was transformed from an agrarian economy in which people typically transacted primarily with persons whom they knew to a commercial economy in which people regularly transacted with complete strangers, the law became more protective of the rights of uninformed parties, in order to encourage commerce.¹⁰⁶ In other words, legal changes occurred in response to economic changes.

We thus predicted that the more recently a case was decided, the more likely a court would be to find that the informed party owed the uninformed party a duty to disclose. In addition, given Kronman's claim regarding the trend over time for cases involving latent defects, we predicted that, for cases in which the withheld information

¹⁰⁴ See, e.g., Keeton, *supra* note 22 at 31 (stating that, “[I]t is of course apparent that the content of the maxim ‘caveat emptor’, used in its broader meaning of imposing risks on both parties to a transaction, has been greatly limited since its origin.”); Kronman, *supra* note 1 at 24; Saul Levmore, *Securities & Secrets: Insider Trading and the Law of Contracts*, 68 Va. L. Rev. 117, 133-34 (1982) (stating that, “[m]odern cases, however, can be read as signaling a trend toward increased disclosure requirements.”) *But see*, Dalley, *supra* note 2 at 441 (finding that the law of deceit did not become more protective of the rights of uninformed parties from 1790-1860.); William B. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 Western Res. L. Rev. 5, 9 (1956) (stating that, “[w]riters who believe that [*caveat emptor*] has lost much of its content seem to be misreading the bulk of the decisions”).

¹⁰⁵ Kronman, *supra* note 1 at 24 (arguing that, in “the last twenty-five years,” disclosure duties regarding latent defects have increased dramatically).

¹⁰⁶ Horwitz, *supra* note 14 at 198-201 (arguing that, as markets and commerce became depersonalized, courts shifted their focus toward requiring disclosure of information not available to both parties, in contrast to the either strict *caveat emptor* or the fair price doctrine that had preceded it). See also, J. Econ. History (1996) (stating that, “the doctrine of *caveat emptor* for sales replaced the sound price rule (which presumed that any item sold at full price was sound) by the early 1800's and remained strong throughout the early 20th century.”)

related to a latent defect, courts would be more likely to find a duty to disclose during the period 1958 through 1983, as compared to the years before 1958.

G. Court

1. Geographic Patterns

We also wanted to determine whether any geographical patterns emerged in the cases. In particular, we wanted to test the assertion by some legal and economic historians that southern states were historically much less likely to impose disclosure duties on bargaining parties than were states in other regions.¹⁰⁷

We predicted that courts in the south would be less likely to impose disclosure duties as compared to other regions during two early periods: 1793-1860 and 1861-1940.¹⁰⁸ In addition, we examined regional trends in a recent period: 1940-2002.

2. Differences Between Federal and State Courts

Although we are not aware of assertions by commentators of differences among the cases according to jurisdiction, we wanted to test for such differences. In particular, we were interested in whether state courts impose disclosure duties more frequently than federal courts, and whether there are detectable differences among the federal circuits. Because commentators have not asserted that such differences exist, we predicted no significant influence of either the deciding court's circuit or of whether the deciding court was state or federal on the probability that a court would find a duty to disclose.

H. Summary of Hypotheses

Table 1 summarizes the hypotheses discussed throughout this section. In addition, the table presents a summary of the basic results obtained from our regression analyses, the details of which appear *infra* in Section IV.

¹⁰⁷ See Dalley, *supra* note 2 at 431-32 (studying cases decided between 1790 and 1860 and claiming that cases in the South resulted in more pro-seller decisions than other regions).

¹⁰⁸ We chose these dates because they correspond roughly with the end of the Civil War and the beginning of World War II, two events that were highly significant for the south.

TABLE 1
SUMMARY OF HYPOTHESES AND BASIC REGRESSION RESULTS
DEPENDENT VARIABLE: LOG ODDS OF COURT FINDING A DUTY TO DISCLOSE

INDEPENDENT VARIABLE	PREDICTED SIGN OF COEFFICIENT	REGRESSION RESULTS
<i>Type of Information:</i>		
Information was intrinsic	+ / NO EFFECT	NO EFFECT
Undisclosed information concerned personal intentions or opinions	—	— / NO EFFECT
Undisclosed information related to a latent defect	+	+
Information concerned a defect likely to cause bodily injury	+	NO EFFECT
Information concerned a defect likely to cause property damage	+	NO EFFECT
Information would have updated or corrected previously disclosed information	+	+
<i>Type of Transaction:</i>		
Parties to transaction in a confidential or fiduciary relationship	+	+
Transaction concerned acquisition of insurance	+	NO EFFECT
Transaction concerned release from liability	+	NO EFFECT
Parties had unequal access to information	+	+
Transaction concerned the transfer of real property	+	+ / NO EFFECT
Transaction concerned the transfer of a slave	+	Perfect predictor**
<i>Type of Acquisition:</i>		
Information was casually acquired	NO EFFECT	+ / NO EFFECT
Information was acquired through illegal or tortious means	+	NO EFFECT
<i>Uninformed Party Characteristics:</i>		
Uninformed party was the buyer or lessee	+	+
Uninformed party was female	+	NO EFFECT
Uninformed party was sick, disabled, illiterate or elderly	+	+
<i>Informed Party Characteristics:</i>		
Informed party made affirmative misrepresentations	+	+
Informed party concealed information	+	+
Informed party told a half-truth	+	+
<i>Time Trends:</i>		
Year case was decided	+	—
<i>Geographic Trends*:</i>		
Decision made by state court	NO EFFECT	+ / NO EFFECT
Decision made by federal circuit court	NO EFFECT	3rd Cir: — / NO EFFECT 6th Cir: — 7th Cir: —

TABLE 1: This table provides a summary of the hypotheses derived from the literature regarding the factors influencing courts to find a duty to disclose and results from basic regressions used to test these hypotheses. The results section also includes results of hypotheses that are not tested using basic regressions. Note that the table reports the results from all specifications. Indeterminate results indicate that the results are not robust to various specifications.

* The predictions and results pertaining to the effects of the regional location of the court are provided in detail *infra* in Section IV.

** This variable is dropped from all regressions because, in each of the three cases involving slaves, the court found a duty to disclose.

III. DATA COLLECTION

A. The Collection Process

We ran our search on May 15, 2002, and retrieved cases in the “Allcases-old” and “Allcases” databases on Westlaw.¹⁰⁹ The search retrieved 217 cases in the Allcases-old database, resulting in 152 observations.¹¹⁰ The search retrieved 1086 cases in the Allcases database, from which a random sample resulting in 314 observations was drawn, for a combined total of 466 observations. Courts found a duty to disclose in 51% of the cases in our sample.¹¹¹

1. The Search Terms

The search terms that we employed are: duty /3 disclos! /p fraud /p (contract tort) % securities /3 act. The search was purposely designed to exclude cases that were decided under the federal securities laws and, as a result, also excluded cases that might have referenced the securities laws in reaching a decision. As a result, only one case involving fraudulent silence in connection with the purchase or sale of a security was present in our dataset.

2. Case Coding

Case coding was done by research assistants, with the supervision of one of the authors.¹¹² Steps were taken to enhance the consistency of coding by the different research assistants. These steps include the adoption of bright-line rules, where

¹⁰⁹ See the immediately following section for more detail regarding how the search for cases was conducted.

¹¹⁰ Some cases are not usable, either because the court failed to reach a decision on the merits with respect to the element of duty, because the search terms identified a case that does not actually address the question being studied, or because the court’s decision did not reflect the common law because it was based on a statute or was impacted by a warranty or waiver. As a result, the number of observations is less than the number of cases retrieved. See *infra* notes 114-116 and accompanying text (further explaining this).

¹¹¹ Although this statistic is consistent with the predictions of the Priest-Klein model, for reasons discussed *infra* notes 179-184 and accompanying text, we believe this statistic is anomalous and unrelated to the Priest-Klein model. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. of Legal Studies 1, 6 (1984).

¹¹² Weekly meetings were held as a group in order to assess progress, discuss the cases, and answer questions.

possible,¹¹³ and several weeks of individually coding the same set of cases and discussing them as a group. Once the group was able to consistently reach the same coding results, coding on the project began. In addition, once the initial case coding was complete, all of the coding was double-checked by a research assistant who had not been involved in the initial coding project.

As previously noted, not all cases retrieved by the search terms were includable in the study.¹¹⁴ For example, a small percentage of cases contained all of the specified search terms, yet did not address the question being studied. In addition, we were unable to code some cases, either because the court did not reach a decision on the merits of the case, or because the opinion did not contain sufficient information to allow for complete coding of all the independent variables.¹¹⁵ Finally, cases in which the common law had been altered due to a waiver, warranty, or statute were excluded.¹¹⁶

Cases decided under a statute were especially problematic. Many states have attempted to codify or expand the law governing fraudulent nondisclosure in particular areas, especially real estate sales, consumer financing transactions, car sales, and health care delivery. As a result, some cases in these areas (especially more recent cases) might be decided under a statute. We did not automatically exclude such cases from our dataset. Instead, when the statute (or, where relevant, the legislative history) simply prohibited “fraud” without defining it (thus forcing courts to return to the common law for a definition) or merely codified the common law, we coded the case as if it had been

¹¹³ These rules are discussed in connection with the individual variables in Part II of this Article.

¹¹⁴ See *supra* note 110 (discussing the difference between the number of cases retrieved and the number of usable cases).

¹¹⁵ When the case included in our sample was an appeal from a lower court decision and that lower decision was available on Westlaw, the research assistants sometimes referred to the lower court decision to attain the complete facts necessary to code the case. In rare cases where a court did not reach a decision on the merits of the case, the court nonetheless clearly indicated how it would have ruled if forced to decide the case. Such cases were included in our dataset, despite the lack of a formal resolution to the dispute.

¹¹⁶ For example, a waiver might alter the common law by waiving the uninformed party’s rights to sue for nondisclosure under common law. This would include items sold “as is.” Similarly, a warranty might

decided under the common law. However, where the statute attempted to change or expand the common law, or where the statute specifically imposed liability for a failure to disclose (as is typical, for example, in some statutes governing real estate sales), the case was excluded.¹¹⁷

Finally, the research assistants checked all the cases in our dataset for negative direct history. If a lower court fraudulent silence decision was reversed and remanded specifically on the element of the existence of a duty to disclose, then the lower court case was excluded from our dataset. The appellate decision also was excluded unless the appellate court reached a decision on the merits of the duty element. If, however, a lower court case was overturned for procedural reasons or on a point of law unrelated to the duty to disclose issue, then the lower court case was included in our dataset, despite the fact that the holding technically no longer stands.

B. The Available Cases

The Allcases-old database includes documents from the U.S. Supreme Court, the U.S. Courts of Appeals, the U.S. District Courts, the former Circuit Courts, the former Court of Claims, “related federal courts” (such as the tax and customs courts), and state and local courts.¹¹⁸ The federal documents included in the database are those opinions “released for publication” between 1789 and 1944.¹¹⁹ State and local coverage begins on various dates and extends through 1944.¹²⁰

enhance the uninformed party’s status under the common law, by guaranteeing the value or suitability of the item in question.

¹¹⁷ A surprisingly large number of such cases, especially cases concerning real estate sales, remain in our dataset, however. This is because many state statutes imposing liability for a failure to disclose also permit an informed waiver of the statute’s protection. In many of the real estate cases in our dataset, such a waiver was procured, leaving the parties to rely on common law remedies.

¹¹⁸ See, Westlaw, Allcases-Old, Scope, p. 1.

¹¹⁹ Id. It is unclear from West’s website whether “released for publication” refers only to documents officially released for publication or whether it also includes unpublished opinions that might have become available. Neither West’s reference attorneys nor any other company representative was able to clarify this point. Phone interview with West reference attorney, August 4, 2002. Because the practice (at least within the federal appellate courts) of disposing of cases through unpublished opinions is assumed by most commentators to have begun in 1964, however, the issue of unpublished opinions is likely to be a greater

The Allcases database includes decisions dated after 1944 from the United States Supreme Court, the United States Courts of Appeals, the United States District Courts, the Bankruptcy Courts, the Court of Federal Claims, the U.S. Tax Court, U.S. Military Courts, and the state and local courts of all the states and the District of Columbia.¹²¹

The Allcases database includes published as well as unpublished opinions.¹²²

Like many other studies attempting to empirically examine case law or judicial developments, this study is limited to the Westlaw database, which does not include all decided cases.¹²³ Instead, Westlaw excludes some unpublished cases, thus biasing the results to the extent that there is some systematic difference between available and unavailable cases.¹²⁴ For example, because the unpublished federal appellate decisions seem more likely to be included on Lexis and Westlaw than are unpublished state court decisions, if there is some systematic difference between federal appellate court decisions

problem in the Allcases database than in the Allcases-old database. See, *infra* note 128 and accompanying text (discussing the origination of the federal appellate non-publication and no-citation policies.)

¹²⁰ Westlaw, Allcases-Old, Scope, at 2-4.

¹²¹ See, Westlaw, Allcases Scope, p. 1.

¹²² *Id.* at 1. An “unpublished” opinion is one which the court has determined should be excluded from the official reporter, ostensibly because the case contains no precedential value. Cf. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, J. of Appellate Practice and Process 251 (2001) (outlining the guidelines for opinion publication and citation in each federal and state court of appeal).

¹²³ A study seeking to examine the case law of a particular jurisdiction for a short (and relatively modern) timeframe could examine all decided cases in some courts by attaining unpublished opinions either through Westlaw or Lexis, the individual court’s website, the court clerk, or some other collection service. This step is impractical in a study, such as ours, that attempts to analyze a sample of the entire set of federal and state cases. Furthermore, as discussed *infra* notes 129-134 and accompanying text, early American cases were often unreported, making any historical study of the common law incomplete.

¹²⁴ According to a Westlaw representative, West gathers unpublished opinions for inclusion in the Allcases database from three sources: (1) the Federal Appendix, a West publication; (2) opinions submitted to Westlaw for posting in the database directly by the deciding court; and (3) opinions submitted to Westlaw by attorneys. Phone interview with West reference attorney, Aug. 4, 2002.

The federal appendix does not contain all unpublished opinions. For example, the Third, Fifth and Eleventh Circuits do not permit publication of their unpublished opinions in the Appendix. Brian P. Brooks, *Publishing Unpublished Opinions*, 5 Greenbag 259, 260 (2002). In addition, the Fifth and Eleventh Circuits do not release their unpublished opinions for inclusion in the Westlaw or Lexis databases. See, David Greenwald & Frederick A. O. Schwartz, *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1174 n. 64 (2002).

Finally, West does not include in the Allcases database all unpublished opinions submitted for inclusion by attorneys. Instead, West reviews the submitted cases and selects “some” for inclusion. No Westlaw representative was able to provide further information on the selection process, what criteria were used to determine inclusion, or indicate what percentage of cases submitted for inclusion by attorneys was ultimately included in the database. Interview with West reference attorney, Aug. 4, 2002.

and state court decisions, this differential inclusion in the Westlaw database could affect the results of this or any other study relying on the Westlaw database. Similarly, because the Fifth and Eleventh Circuits do not release their unpublished opinions for inclusion on Westlaw or Lexis, if there is some systematic difference between the Fifth and Eleventh circuits on the one hand, and the other eleven circuits on the other hand, this difference might bias the results of this and any other study that employs the Westlaw database.

Given that, in the federal appeals courts alone, over 80% of the caseload is disposed of through unpublished opinions, this is a potentially glaring omission.¹²⁵ As a matter of black letter law, federal unpublished opinions have no precedential value.¹²⁶ However, many commentators have disputed the notion that unpublished opinions are really of no consequence.¹²⁷ Accordingly, readers should at least be aware of the potential limits of this or any other study based on the on-line databases.

Although the problem of officially unpublished cases does not likely affect the Allcases-old database – the practice is generally assumed to have begun with the 1964 Federal Judicial Conference¹²⁸ – surveys of older American case law suffer from an even greater problem: the lack of case reporting during the early years of American independence. In the early years of the history of the American courts, lack of reporting of decided cases was a serious problem.¹²⁹ Lawyers had to make do with reports of

¹²⁵ See, Table S-3, *U.S. Courts of Appeals – Types of Orders Filed in Cases Terminated on the Merits after Oral Hearings or Submission on Briefs During the 12-month period Ending September 30, 2001*. Available at <http://www.uscourts.gov/judbus2001/tables/s03sep01.pdf>.

¹²⁶ cite

¹²⁷ See, Suzanne O. Snowden, "That's My Holding and I'm Not Sticking to It!" *Court Rules That Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 Wash. U. L.Q. 1253 (2001) (arguing that unpublished opinions often would have had important future precedential value if they had been published).

¹²⁸ See, e.g., Greenwald & Schwartz, *supra* note 124 at 1141; Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 75-76 (2001).

¹²⁹ See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291 (1985) (discussing the problem of nonreporting of cases in the early years of the American court system). See also, 5 U.S. (1 Cranch) iii-v (1804) (stating that, "[m]uch of that uncertainty of the law, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports.") (quoted in Joyce, *supra* this note at 1308).

English cases, which were still widely used even after American independence, and notebooks of decisions that lawyers maintained for their own use and the use of their colleagues and friends.¹³⁰

Even opinions of the United States Supreme Court were difficult to come by in the early years. The Court often failed to reduce even its most important decisions to writing;¹³¹ the reporters did not include all decisions in their reports, perhaps excluding, in some cases, as many as half;¹³² reports were often unavailable for periods of up to eight years after the end of the Supreme Court term;¹³³ and the reports of some reporters, at least, were heavily criticized, even by their contemporaries and the justices themselves, as being inaccurate.¹³⁴ One can only assume that reports of state and lower federal cases suffered from similar problems.

Readers should thus bear in mind that our only historical record of early court decisions might be substantially inaccurate. Again, this is an unavoidable failing of all studies of early case law, and we do not feel that it renders our results any less important or robust.

Finally, as with all analyses of decided cases, this study does not account for the impact of settlement on the type of case that ultimately proceeds to the litigation stage or

¹³⁰ Joyce, *supra* note 129 at 1295, See also, Surrency, *Law Reports in the United States*, 25 Am J. Legal Hist. 48, 49 (1981) (discussing the prevalence of English law reports in 18th century estates). [cite]

¹³¹ Joyce, *supra* note 129 at 1391, n. 46 and at n. 77 (quoting from a telephone conversation with Maeva Marcus, Coeditor, Documentary History Project as stating that “[I]t seems odd that if opinions were written not a single one in the hand of a justice survives. So it is likely that few, if any, ever existed.”)

¹³² *Id.* at 1303 (discussing the incompleteness of the reports of Alexander James Dallas, the Court’s first – though unofficial – reporter) and at 1329-1330 (discussing the omission of cases by Henry Wheaton, the Court’s third – and first official – reporter).

¹³³ *Id.* at 1327-28 (noting that Cranch and Dallas had allowed Supreme Court cases to go unreported for 8 and 6 years, respectively). These delays were corrected by Wheaton, who generally published the reports of the prior term in time for the start of the next. *Id.* at 1327-28.

¹³⁴ *Id.* at 1304-1305 (discussing the inaccuracy of Dallas’s reports); 1309-10 (discussing inaccuracies in the reports of Williams Cranch, the Court’s second – though unofficial – reporter); and at 1361 (discussing criticisms of the reports of Richard Peters, Jr., the Court’s fourth reporter). The problem of inaccuracy probably stemmed from many causes, including commercial considerations and the fact that some reporters (notably, Dallas) included reports of cases that they did not have first hand knowledge of, but instead reconstructed from notes of attorneys in attendance. *Id.* at 1305. One exception to these criticisms of inaccuracy appears to be Wheaton, who apparently was “fanatical” on this point. *Id.* at 1329-30.

the impact of judicial statements of case facts on our assumptions regarding what occurred in any given transaction. As argued by some commentators, judges may selectively repeat only the information that they consider relevant, or may allow their own biases to shape their interpretation and description of the facts of the case.¹³⁵ As noted, however, this is typical of all legal analyses based on decided cases, including traditional doctrinal legal scholarship.

C. Summary Statistics

Table 2 provides a short description of the variables related to case characteristics and summary statistics for the entire sample, for the sub-sample of cases requiring disclosure, and for the sub-sample of cases not requiring disclosure. Table 3 provides the same information for variables related to decision date, geographic region, and jurisdiction.

¹³⁵ See, e.g., Anthony D’Amato, *The Ultimate Injustice: When a Court Misstates the Facts* 11 Cardozo L. Rev. 1313, 1325-31 (1990) (arguing that Judge Easterbrook misstates the facts of the case in *Branion v. Gramly*); Robert P. Burns, *The Lawfulness of the American Trial*, 38 Am. Crim. L. Rev. 205, 219 (2001) (stating that “lawyers . . . often believe that the account of the facts provided by appellate courts is deeply unfair”).

TABLE 2
VARIABLE DESCRIPTIONS AND SUMMARY STATISTICS
CASE CHARACTERISTICS

VARIABLE	MEAN FOR FULL SAMPLE (N = 466)	MEAN FOR CASES FINDING DISCLOSURE DUTY (N = 237)	MEAN FOR CASES FINDING NO DISCLOSURE DUTY (N = 229)	DEFINITION
Dependent Variable:				
DISCL	0.51 (238)			1 = court imposed liability for fraudulent silence
Independent Variables:				
<i>Type of Information:</i>				
INTRINSIC	0.97 (452)	0.97 (230)	0.97 (222)	1 = information related to subject matter of transaction
PERSONAL	0.09 (42)	0.05 (12)	0.13 (30)	1 = undisclosed information concerned personal intentions or opinions
LATENT	0.13 (60)	0.20 (48)	0.05 (12)	1 = undisclosed information related to a latent defect
INJURE	0.03 (12)	0.03 (8)	0.02 (4)	1 = information concerned a defect likely to cause bodily injury
DAMAGE	0.08 (36)	0.10 (23)	0.06 (13)	1 = information concerned a defect likely to cause property damage
UP_CORR	0.13 (62)	0.17 (41)	0.09 (21)	1 = information would have updated or corrected previously disclosed information
<i>Type of Transaction:</i>				
CONFID	0.28 (131)	0.43 (102)	0.13 (29)	1 = parties to transaction in a confidential or fiduciary relationship
INSURE	0.07 (32)	0.08 (20)	0.05 (12)	1 = transaction concerned acquisition of insurance
RELEASE	0.03 (15)	0.04 (9)	0.03 (6)	1 = transaction concerned release from liability
ACCESS	0.58 (268)	0.70 (165)	0.45 (103)	1 = parties had unequal access to information
PROPERTY	0.34 (157)	0.41 (96)	0.27 (61)	1 = transaction concerned the transfer of real property
SLAVE	0.01 (3)	0.01 (3)	0.00 (0)	1 = transaction concerned the transfer of a slave
<i>Type of Acquisition:</i>				
CASUAL	0.80 (371)	0.80 (190)	0.79 (181)	1 = information was casually acquired
ILLEGAL	0.01 (4)	0.01 (3)	0.004 (1)	1 = information was acquired through illegal or tortious means
<i>Uninformed Party Characteristics:</i>				
BUYER	0.40 (186)	0.46 (109)	0.34 (77)	1 = uninformed party was the buyer or lessee
FEMALE	0.12 (55)	0.14 (33)	0.10 (22)	1 = uninformed party was female
SICK	0.06 (27)	0.08 (19)	0.03 (8)	1 = uninformed party was sick, disabled, illiterate or elderly
<i>Informed Party Characteristics:</i>				
LIED	0.20 (91)	0.35 (83)	0.03 (8)	1 = informed party made affirmative misrepresentations
CONCEAL	0.08 (36)	0.14 (33)	0.01 (3)	1 = informed party concealed information
HALF_TRUTH	0.23 (106)	0.37 (87)	0.08 (19)	1 = informed party told a half-truth

TABLE 2: This table provides a summary of the variables representing case characteristics employed in the empirical analysis along with the mean and description of each variable. The entire sample consists of 466 cases. The mean for each variable for the full sample can be interpreted as the percentage of cases characterized by the variable. For example, a mean of 51% for DISCLOSURE indicates that 51% of the cases held the informed party liable. The numbers in the parentheses indicate the number of cases (i.e., mean times total number of cases in the sample).

TABLE 3
VARIABLE DESCRIPTIONS AND SUMMARY STATISTICS
CASE DATE, GEOGRAPHIC REGION AND JURISDICTION

VARIABLE	MEAN FOR FULL SAMPLE (N = 466)	MEAN FOR CASES FINDING DISCLOSURE DUTY (N = 237)	MEAN FOR CASES FINDING NO DISCLOSURE DUTY (N = 229)	DEFINITION
<i>Additional Independent Variables:</i>				
YEAR	1961	1949	1973	year case was decided (range = [1793 , 2002])
STATE	0.75 (348)	0.83 (197)	0.66 (151)	1 = case was decided by a state court
FEDERAL CIRCUIT COURTS				
CIR1	0.02 (8)	0.01 (3)	0.02 (5)	1 = case was decided by the first circuit
CIR2	0.05 (21)	0.02 (4)	0.07 (17)	1 = case was decided by the second circuit
CIR3	0.02 (10)	0.01 (2)	0.03 (8)	1 = case was decided by the third circuit
CIR4	0.02 (7)	0.02 (4)	0.01 (3)	1 = case was decided by the fourth circuit
CIR5	0.02 (7)	0.01 (2)	0.02 (5)	1 = case was decided by the fifth circuit
CIR6	0.02 (7)	0.004 (1)	0.03 (6)	1 = case was decided by the sixth circuit
CIR7	0.02 (7)	0.01 (2)	0.02 (5)	1 = case was decided by the seventh circuit
CIR8	0.03 (12)	0.02 (5)	0.03 (7)	1 = case was decided by the eighth circuit
CIR9	0.03 (14)	0.03 (8)	0.03 (6)	1 = case was decided by the ninth circuit
CIR10	0.02 (10)	0.02 (4)	0.03 (6)	1 = case was decided by the tenth circuit
CIR11	0.01 (6)	0.00 (0)	0.03 (6)	1 = case was decided by the eleventh circuit
FEDCIR	0.002 (1)	0.004 (1)	0.000 (0)	1 = case was decided by the federal circuit
DCCIR	0.01 (3)	0.01 (2)	0.004 (1)	1 = case was decided by the D.C. circuit
GEOGRAPHIC REGIONS				
WEST	0.14 (66)	0.16 (38)	0.12 (28)	1 = case was decided by a court located in the west
SOUTH	0.25 (117)	0.23 (55)	0.27 (61)	1 = case was decided by a court located in the south
MIDATLANTIC	0.23 (106)	0.24 (58)	0.21 (48)	1 = case was decided by a court located in a midatlantic state
SOUTHWEST	0.08 (36)	0.08 (18)	0.08 (18)	1 = case was decided by a court located in the southwest
NEWENGLAND	0.07 (32)	0.06 (15)	0.07 (17)	1 = case was decided by a court located in New England
MIDWEST	0.24 (110)	0.22 (53)	0.25 (57)	1 = case was decided by a court located in the midwest

TABLE 3: This table provides a summary of the variables representing case date, geographic region and jurisdiction employed in the empirical analysis along with the mean and description of each variable. The entire sample consists of 466 cases. The numbers in the parentheses indicate the number of cases (i.e., mean times total number of cases in the sample).

IV. RESULTS

The claims presented *supra* in Section II predict that the probability that a court will find a duty to disclose depends, in part, on five groups of factors: the type of information withheld by the informed party, the type of transaction in which the parties engaged, the way in which the information was acquired by the informed party, the characteristics of the uninformed party, and the behavior of the informed party. In addition to these factors, we also investigate trends related to the decision date, geographic location of the court, and jurisdiction.

Our dependent variable—DISCLOSURE—is dichotomous; therefore, linear regression models such as Ordinary Least Squares (“OLS”) are not appropriate to perform estimations.¹³⁶ Instead, we employ logistic regressions to estimate the effects of our independent variables on the predicted log odds that a court will require disclosure.¹³⁷ Using regression analysis to measure the effects of the independent variables on the predicted log odds that a court will require disclosure allows us to draw inferences about which factors significantly influence court decisions when other factors are taken into account.

¹³⁶ A dichotomous variable is one that can take on only one of two possible values. The variable DISCLOSURE is coded either as a “0” or a “1” for each observation in our sample.

¹³⁷ The dependent variable is the predicted log odds that the event will occur rather than probability that the event will occur because the log odds form satisfies the assumptions required to obtain valid regression results. The coefficients generated when using this form as the dependent variable lack an intuitively meaningful scale of interpretation. When interpreting the results in the text that follows, we interpret a coefficient that is statistically significant and positive as indicating that the presence of the associated independent variable leads to an increase in the likelihood that the court will require disclosure.

See Gregory C. Sisk, Michael Heise and Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 NYU L. Rev. 1377, 1431-32 n. 230 (1998) (explaining the technical differences between OLS models and logit models). For an introduction to logistic regression methodology, see generally Fred C. Pampel, *Logistic Regression: A Primer* (2000).

Throughout this section, it is important to note that all reported results are aggregate results and therefore do not reflect differences across jurisdictions. In other words, a reported result that a particular variable (for example, PROPERTY) is insignificant could mean that the variable is truly an insignificant predictor of case outcomes in all jurisdictions. At the same time, it is possible that the variable's effect on decisions is significant and positive in the 1st circuit, canceling out the fact that it is significant and negative in the 2nd Circuit. Similarly, a reported result that a particular variable (for example, ACCESS) is positive and significant could mean that the variable is a significant predictor of case outcomes in all jurisdictions or only a few. Indeed, it is possible that the variable's effect is negative and slightly significant in only one or a few jurisdictions, but is counteracted by the variable's highly significant positive impact in other jurisdictions. In other words, this project is designed to study overall general trends in decisions that correspond to claims made by legal scholars and economic historians regarding general trends and patterns in the law governing fraudulent nondisclosure. We do not attempt to describe the law for any particular jurisdiction.

Table 4 presents basic results for several logistic regression analyses that test the influence of various sets of independent variables on the likelihood that a court will find that the informed party owed a duty of disclosure to the uninformed party.¹³⁸ Various specifications were analyzed to test the robustness of the results given the large number of independent variables included in the model.¹³⁹ The following sections provide a

¹³⁸ We also analyzed the data using probit analysis and obtained results that were nearly identical to the results we obtained using logistic regression analysis. For an explanation of how probit analysis differs from logistic regression analysis, *see* Pampel, *supra* note 137 at 54-68.

¹³⁹ By "specification" we mean the construction of the empirical equation that we estimate to generate results regarding how the independent variables affect the dependent variable. The process of specifying the model includes determining (1) which variables should be included in the model, (2) the functional form of the model and (3) the probabilistic assumptions made about the dependent variable, the independent variables and the error term. A result is "robust" if it does not vary significantly with the specification of the model.

TABLE 4
MAXIMUM-LIKELIHOOD LOGIT ESTIMATION RESULTS
DEPENDENT VARIABLE: PREDICTED LOG ODDS OF COURT FINDING A DUTY TO DISCLOSE

VARIABLE	COEFFICIENT (P VALUE)					
<i>Type of Information:</i>						
INTRINSIC	0.32 (0.57)					0.16 (0.86)
PERSONAL	- 0.93** (0.01)					- 0.32 (0.56)
LATENT	1.77*** (0.00)					2.24*** (0.00)
INJURE	0.07 (0.92)					1.05 (0.20)
DAMAGE	- 0.63 (0.18)					- 0.23 (0.72)
UP_CORR	0.90*** (0.00)					1.06** (0.01)
<i>Type of Transaction:</i>						
CONFID		1.82*** (0.00)				2.65*** (0.00)
INSURE		0.14 (0.77)				- 0.13 (0.84)
RELEASE		0.53 (0.39)				0.51 (0.55)
ACCESS		1.19*** (0.00)				1.03*** (0.00)
PROPERTY		1.27*** (0.00)				0.29 (0.45)
<i>Type of Acquisition:</i>						
CASUAL			0.09 (0.71)			0.76* (0.06)
ILLEGAL			1.10 (0.34)			1.26 (0.46)
<i>Uninformed Party Characteristics:</i>						
BUYER				0.54** (0.01)		1.18*** (0.00)
FEMALE				0.28 (0.36)		0.04 (0.93)
SICK				0.85* (0.06)		1.58** (0.03)
<i>Informed Party Characteristics:</i>						
LIED					2.93*** (0.00)	3.17*** (0.00)
CONCEAL					2.82*** (0.00)	3.15*** (0.00)
HALF_TRUTH					2.18*** (0.00)	2.81*** (0.00)
Constant	-0.47 (0.40)	-1.60*** (0.00)	-0.04 (0.84)	-0.26** (0.04)	-1.01*** (0.00)	-4.41*** (0.00)
LR X ²	42.22 (0.00)	109.37 (0.00)	1.12 (0.57)	13.50 (0.00)	178.01 (0.00)	310.58 (0.00)
Pseudo R ²	0.07	0.17	0.00	0.02	0.28	0.48
N	466	463	466	466	466	463

TABLE 4: This table provides the maximum-likelihood logit estimation results for the effects of case characteristics on whether the court found a duty to disclose. These results do not include the effects of the decision date or the geographic location and jurisdiction of the court. See Table 6 for results taking these characteristics into account.

Note: LR X² indicates the result from testing the null hypothesis that all coefficients in the model, except the constant, equal zero. In addition, it should be noted that, although pseudo R² statistics provide a quick way to compare the fit of different models for the same dependent variable, they lack the straightforward explained-variance interpretation of true R² in OLS regressions.

* p < .10, ** p < .05, *** p < .01

variable-by-variable analysis of the results derived from the regression analysis and various statistical tests.

A. The Type of Information

Recall that commentators have suggested that particular characteristics of the withheld information influence courts' decisions in fraudulent silence cases. These characteristics include whether the information was intrinsic or extrinsic in nature, related to personal intentions or opinions versus facts, related to latent or patent defects, concerned a defect likely to cause bodily injury or property damage, and would have updated or corrected previously disclosed information.

1. Whether the information was intrinsic, as opposed to extrinsic or market, information does not explain the variation in outcomes because 97% of the cases in the sample involve intrinsic information.

a. General Results

We hypothesized that cases involving intrinsic information are more likely to result in a finding that the informed party owed a disclosure duty to the uninformed party in early years, but that the importance of the intrinsic/extrinsic distinction disappears over time.¹⁴⁰ As the results displayed in Table 4 indicate, the coefficient on INTRINSIC is insignificant ($p > 0.10$), indicating that the intrinsic nature of the information is not a factor that helps to explain the variation in case outcomes.¹⁴¹ It should be noted, however, that this result is driven by the fact that 97% of the cases in the full sample involve intrinsic, rather than extrinsic, information.

Nonetheless, other statistical tests allow us to cast some doubt on the conventional wisdom regarding the relative likelihood that courts will require the disclosure of intrinsic information. Specifically, tests for the equality of proportions cast doubt on claims that

¹⁴⁰ See *supra* notes 18-21 and accompanying text (discussing assertions by courts and commentators regarding extrinsic information).

¹⁴¹ In other words, the coefficient on INTRINSIC is not statistically significantly different from zero.

courts are more likely to require the disclosure of intrinsic information than extrinsic information. Of the 14 cases in our data set involving extrinsic information, the court found the existence of a duty to disclose in 8 of the cases (or 43%). On the other hand, 51% of the cases (or 231 of 452) involving intrinsic information resulted in a finding that the informed party owed the uninformed party a duty to disclose. Our analysis thus reveals that courts are not statistically more likely to require the disclosure of intrinsic information as opposed to extrinsic information ($p = 0.28$).

Moreover, an interesting question here is why so few cases involving extrinsic information result in judicial decisions. Apparently, cases involving extrinsic information are more likely to settle, or are less likely to be brought by plaintiffs.

The first possibility is that cases involving extrinsic information are more likely to settle. This might be true if, for example, courts are much more likely to rule in favor of uninformed parties when the case involves extrinsic information. Informed parties, knowing they have a low probability of winning in court, are encouraged to settle. We find this theory unpersuasive, however, for two reasons. First, the notion that informed parties have a lower probability of winning in court when the withheld information is extrinsic in nature is contrary to conventional wisdom, which asserts that courts are less likely to require the disclosure of extrinsic information than of intrinsic information. In addition, this theory is contrary to the results in those extrinsic information cases that do make it into court. As discussed *supra*, informed parties are no more likely to prevail in cases involving extrinsic information than in cases involving intrinsic information. Informed parties thus have no reason to fear outcomes in cases involving extrinsic information more than in other types of fraudulent silence cases.

A second, and we believe more plausible, explanation for why so few extrinsic information cases are found in our dataset is that plaintiffs are less likely to bring claims

for fraudulent silence when the withheld information is extrinsic, rather than intrinsic. There are at least three possible reasons for this phenomenon. First, it is possible that individuals are less likely to possess extrinsic information unknown to their bargaining partners as compared to intrinsic information. Second, if the common law clearly states that informed parties are not required to disclose extrinsic information, rational plaintiffs may choose to forgo litigating such cases. Again, however, the (limited) data do not support this conjecture. Courts found a duty to disclose in about 43% of the cases in our dataset involving extrinsic information. The third, and perhaps most plausible, explanation for the small number of cases involving extrinsic information is that the uninformed party is unlikely to discover that the informed party knew of extrinsic information. For example, it is unlikely that a home buyer would discover that the seller had access to nonpublic information regarding the fact that a highway was going to be built across an adjacent lot. By contrast, the uninformed party may be able to easily surmise that someone selling a car that she has owned for many years was aware that the engine fails to start in cold weather.

b. Interaction Effects

Recall from Section II *supra* that commentators have asserted that some other factor, rather than the intrinsic nature of the information, actually explains the variation in fraudulent silence cases. For example, W. Page Keeton has argued that, although courts require the disclosure of intrinsic information more frequently than extrinsic information, it is really the lack of equal access to intrinsic information relative to extrinsic information that is driving case outcomes.¹⁴² Similarly, Keeton argued that the intrinsic/extrinsic distinction fails to explain case outcomes when the uninformed party is the purchaser, as opposed to the seller. Finally, Anthony Kronman has asserted that it is

¹⁴² See *supra* note 22 and accompanying text.

really the fact that extrinsic information is typically deliberately acquired that drives case outcomes, rather than the mere fact that the information is extrinsic.

To test these claims, we ran three separate regressions to determine if interaction effects are present between INTRINSIC and the three variables ACCESS, CASUAL, and BUYER.¹⁴³ The results suggest that there are no significant interaction effects between INTRINSIC and these three variables. This result, however, is most likely due to the lack of variation in the INTRINSIC variable and the resulting collinearity¹⁴⁴ between the interaction term and the variables ACCESS, CASUAL, and BUYER.¹⁴⁵

c. Time Trends

Recall that some commentators claim that courts, over time, put less weight on whether the information was intrinsic or extrinsic, and instead focus on other factors.¹⁴⁶ To test claims about the influence of intrinsic information over time, we tabulated the number of cases that involved intrinsic information and in which the court found a duty to disclose during three periods: 1793-1899, 1900-1949 and 1950-2002.¹⁴⁷ Table 5 presents the results from this tabulation.

¹⁴³ By including interaction effects in the analysis, we are able to measure the amount of change in the slope of the regression of the dependent variable, say Y, on an independent variable, say X, when a second independent variable, say Z, changes by one unit. A positive and significant coefficient on an interaction term, X * Z, implies that the higher is X, the greater the effect of Z on Y. Similarly, the higher is Z, the greater the effect of X on Y.

¹⁴⁴ Two variables are collinear if they are highly correlated. When two independent variables are highly correlated, they both introduce essentially the same information into the regression. This violates one of the necessary assumptions of the logit model. In addition, collinearity in this case implies that the interaction term has very little variation and, therefore, is not likely to be a significant factor in explaining the variation in outcomes.

¹⁴⁵ We ran these regressions using only the 20 variables relating to case characteristics. We did not run the complete specification due to the insignificant results from the initial regression.

¹⁴⁶ See *supra* note 22 and accompanying text.

¹⁴⁷ These periods were chosen arbitrarily. The results do not vary if different periods are used to test the hypothesis..

TABLE 5
TABULATIONS FOR CASES INVOLVING
INTRINSIC INFORMATION

PERIOD	COURT FOUND DUTY TO DISCLOSE	COURT FOUND NO DUTY TO DISCLOSE
1793-1899	33 (77%)	10 (23%)
1900-1949	72 (70%)	31 (30%)
1950-2002	126 (41%)	180 (59%)

TABLE 5: This table presents the results of tabulations of the number of cases involving intrinsic information by outcome for three periods: 1793-1899, 1900-1949 and 1950-2002.

Tests for the equality of proportions were performed to investigate the claim that over time courts place less emphasis on whether the information was intrinsic or extrinsic.¹⁴⁸ First, we tested whether courts impose disclosure duties in a statistically significantly lower proportion of cases involving intrinsic information during the period 1793-1899 than in the period 1900-1949. The result indicates that no statistically significant difference exists between the percentages ($p = 0.20$).¹⁴⁹ On the other hand, the proportion of cases involving intrinsic information in which the court found a duty to disclose during the period 1900-1949 was statistically significantly higher than the proportion of such cases during the period 1950-2002 ($p = 0.00$). Therefore, the data do show some support for the claim that factors other than whether the information was intrinsic or extrinsic became more important to courts over time. This alone, however,

¹⁴⁸ In particular, we ran two-sample, one-sided tests on the equality of proportions (calculated using the data from two distinct samples). These tests pit the null hypothesis of equal proportions against an alternative hypothesis that one proportion is statistically significantly greater than the other, controlling for sample size. If the null hypothesis is accepted over the alternative hypothesis, then one may conclude that the difference in proportions is due to chance.

¹⁴⁹ The p value of a hypothesis test is the probability, calculated assuming the null hypothesis is true (e.g., the proportions are equal), of observing any outcome as extreme or more extreme than the observed outcome. “Extreme” means in the direction of the alternative hypothesis. In this case, there is a 20% chance of observing these proportions given that they are equal to one another. This is fairly high; so, we cannot reject the null hypothesis that the proportions are equal. Customarily, in social science research, a null

does not allow us to determine whether this trend is due to the relative emphasis courts place on whether the information is intrinsic or the general decrease over time in the likelihood that courts will find the existence of a duty to disclose.¹⁵⁰

d. Section Summary

In sum, although the lack of variation in the INTRINSIC variable did not allow the use of regression analysis to determine the variable's impact, if any, on case outcomes, several lessons emerge from this exercise. First, claims by commentators as to the impact of the intrinsic/extrinsic distinction on case outcomes should be viewed with caution. The same lack of variation that confounds our attempts at regression analysis makes drawing inferences about the variable's impact on case outcomes from reading a select number of non-randomly chosen cases problematic. Second, tests for the equality of proportions cast doubt on claims that courts are more likely to require the disclosure of intrinsic information than extrinsic information.

2. Whether the information involves personal intentions or opinions, as opposed to facts, does not explain the variation in case outcomes because the number of cases involving such information is too small to obtain useful results from regression analysis. Outcome counts, however, cast doubt on the conventional wisdom relating to personal intentions.

Recall that there is almost universal agreement among commentators that the disclosure of personal intentions or opinions is not required by the common law.¹⁵¹ The results presented in Table 4 indicate that the coefficient on PERSONAL is significant and

hypothesis is rejected in favor of an alternative hypothesis if the p value is less than 5% (in some cases, a 10% cutoff is used). In all cases, we report the exact p values derived from the statistical tests.

¹⁵⁰ In theory, it is possible to control for the general trend over time and other influences on court decisions, by estimating the influence of intrinsic information over time using a logistic regression that includes the 20 variables representing case characteristics and YEAR, together with a term to capture the interaction of year and intrinsic information (INTRINSIC * YEAR). The coefficient on the interaction term would allow us to determine whether courts were more or less likely to require disclosure in cases involving intrinsic information in later years relative to earlier years. The coefficient on the interaction term was not statistically significantly different from zero (p = 0.67). However, due to the lack of variation in the INSTRINSIC variable, this regression result does not provide us with any useful information. See *supra* notes 140-141 and accompanying text (discussing problems arising from the fact that 97% of the cases involve intrinsic information.)

¹⁵¹ See *supra* notes 26-30 and accompanying text.

negative ($p = 0.01$) when we control only for variables relating to the type of information. When we control for all case characteristics, however, the coefficient loses significance. When all variables are included in the model the coefficient on PERSONAL is insignificant ($p > 0.10$), indicating that whether the information is a personal opinion or intention versus a fact is not a factor that helps to explain the variation in case outcomes. It should be noted, however, that this result most likely is driven by the fact that only 9% of the cases in the full sample involve personal intentions or opinions. The number of these sorts of cases might be too small to accurately identify the effect of this variable on the likelihood of mandated disclosure.

Nonetheless, simple outcome counts cast doubt on the conventional wisdom relating to the disclosure of personal intentions or opinions. Recall that consensus on the theory that the common law does not require the disclosure of personal intentions or opinions is so widespread that we hypothesized, first, that very few such cases are actually brought and, second, that when such cases do result in a decision the court nearly always permits such information to be withheld. The results of the outcome count do not support either prediction regarding personal intentions or opinions.¹⁵² Of the 466 cases in the sample, 41 (or 9%) involve information that was personal in nature.¹⁵³ In a substantial portion of these cases (12 of the 41), the court ruled that the informed party had a duty to disclose the withheld opinion or intention.

3. Courts are significantly more likely to require disclosure when the withheld information relates to a latent defect.

¹⁵² It is important to note that simple counts do not control for the effects of other variables of interest. Results obtained from simple counts must be viewed with this limitation in mind.

¹⁵³ We can rule out the fact that the lack of cases is attributable to courts' reluctance to impose liability for failure to disclose personal intentions or opinions in early cases, causing plaintiffs to eventually abandon such claims. Cases involving personal intentions or opinions appeared in the data set uniformly over time. The first case of this sort was decided in 1852, five others were decided prior to 1950, and the remaining cases were decided after 1950.

We hypothesized that courts would be more likely to require disclosure when the informed party withholds information relating to a latent defect. The results presented in Table 4 support this claim. The coefficient on LATENT is positive and highly significant ($p = 0.00$), even when we control for all variables relating to case characteristics. In this case it appears that the commentators have correctly argued that this factor significantly influences courts' decisions in fraudulent silence cases.

4. Whether the undisclosed information would likely cause bodily injury or property damage does not explain the variation in the case outcomes, most likely because the number of cases involving such information is too small to obtain useful results from regression analysis. Outcome counts, however, suggest that our hypotheses regarding information of this sort are not supported strongly by the data.

We hypothesized that the withholding of information likely to cause physical injury or property damage increases the likelihood of court-mandated disclosure. We coded cases separately for information concerning a defect likely to cause bodily injury (INJURE) and information concerning a defect likely to cause property damage (DAMAGE). The results presented in Table 4 indicate that the coefficients on INJURE and DAMAGE are insignificant ($p > 0.10$ in all cases). We note, however, that very few cases involving information of this sort were present in our dataset. Only 3% of the cases included in the full sample involve information likely to cause bodily injury and 8% of the cases involve information likely to lead to property damage. Therefore, the number of these sorts of cases might be too small to accurately identify the effect of these variables on the likelihood of mandated disclosure.

Again we performed simple counts, the results of which shed light on whether courts are more likely to require disclosure of information regarding defects likely to cause physical injury or property damage. The results do not support our hypothesis that courts are more likely to require disclosure of this sort of information. Of the 12 cases involving information likely to result in physical injury, 8 (or 67%) resulted in a finding

that the informed party had a duty to disclose. Likewise, in 64% of cases (or 23 of 36) involving information likely to result in property damage, the court found a duty to disclose. Therefore, while courts tend to rule for the uninformed party slightly more often when bodily injury or property damage is at stake (courts require disclosure in about 50% of cases not involving such information), these case outcomes are not nearly as uniform as one might expect, given the statements of legal commentators.

As with the INTRINSIC variable, an interesting question here is why there are so few decisions involving information that could prevent bodily injury or property damage.¹⁵⁴ One possibility is that these cases settle, because the plaintiff (who, by definition, has suffered bodily injury or property damage) seems sympathetic and the defendant's behavior appears more egregious in comparison. In addition, it might be that cases of this sort give rise to other claims, such as negligence, and lawyers representing injured parties simply might not include additional claims for fraudulent silence. Finally, it is possible that failures to disclose information regarding defects likely to lead to injuries or property damage simply occur with lower frequency than nondisclosures of other types of information. Obviously, we cannot test this conjecture using our data.

5. Courts are significantly more likely to require disclosure when the withheld information would have updated or corrected previously disclosed information.

We hypothesized that courts would be more likely to require disclosure when the undisclosed information would have updated or corrected previously disclosed information. The results presented in Table 4 support this claim. The coefficient on UP_CORR is positive and highly significant ($p = 0.01$) when we control for all variables relating to case characteristics. In this case it appears that the commentators have correctly argued that this factor significantly influences courts' decisions in fraudulent silence cases.

B. The Type of Transaction

Recall that commentators have argued that the type of transaction in question influences courts' decisions in fraudulent silence cases. In particular, claims have been made that courts are more likely to require disclosure in transactions between parties in a confidential or fiduciary relationship; transactions concerning the acquisition of insurance, surety, or a release from liability; transactions in which the parties have unequal access to information; transactions concerning the transfer of real property; and transactions concerning the sale or transfer of a slave.¹⁵⁵

1. Courts are significantly more likely to require disclosure when the contracting parties are in a confidential or fiduciary relationship.

We hypothesized that courts would be more likely to require disclosure when the contracting parties are in a confidential or fiduciary relationship. The results presented in Table 4 support this claim. The coefficient on CONFID is positive and highly significant ($p = 0.00$), even when we control for all variables relating to case characteristics. In this case it appears that the commentators have correctly argued that, when the parties are in a confidential or fiduciary relationship, courts are more likely to require disclosure.

2. Whether the transaction concerned insurance or a release from liability does not explain the variation in case outcomes, most likely because the number of cases involving such a transaction is too small to obtain useful results from regression analysis. Outcome counts, however, suggest that our hypotheses regarding information of this sort are not supported strongly by the data.

We hypothesized that decisions involving transactions related to insurance, surety, or a release from liability were more likely to result in the imposition of liability for nondisclosure of information. We coded INSURANCE and RELEASE separately. However, only one case in our sample involved surety. Therefore, we coded the single surety case as an insurance case. The independent variable INSURE thus represents cases

¹⁵⁴ See *supra* notes 36-39 and accompanying text.

¹⁵⁵ See *supra* notes 43-70 and accompanying text.

related to insurance and one case related to surety. RELEASE represents cases related to releases from liability.

The results presented in Table 4 indicate that the coefficients on INSURE and RELEASE are insignificant ($p > 0.10$ in all cases). We note again, however, that there are very few decisions involving information of this sort. Only 7% of the cases included in the full sample involve insurance transactions and only 3% of the cases involve releases from liability. Therefore, the number of these sorts of cases might be too small to accurately identify the effect of these variables on the likelihood of mandated disclosure.

Again, we used simple outcome counts to determine whether courts are more likely to require disclosure of information when the transaction involves insurance or a release from liability. The results do not support our hypothesis that courts are more likely to require disclosure of this sort of information. Of the 32 cases involving insurance contracts, the court found a duty to disclose in 20 (or 63%). Likewise, courts found a duty to disclose in 60% of cases (or 9 of 15) involving releases from liability. Therefore, while courts tend to find a duty to disclose in a somewhat slight majority of cases involving insurance or releases from liability, courts do not force disclosure in an overwhelming number of such cases.

3. Courts are significantly more likely to require disclosure when the transaction was one in which the parties had unequal access to information. However, our analysis indicates that the presence of unequal access in combination with the casual acquisition of information is the actual driver of case outcomes.

Recall from Section II that one of the liveliest debates in this literature is whether unequal access to information has a significant influence on the probability that courts will require the disclosure of material information. Of particular interest has been the debate between proponents of the equal access theory and proponents of the deliberately

acquired information theory.¹⁵⁶ The results reveal that if the parties had unequal access to the undisclosed information, courts are more likely to find that the informed party had a duty to disclose. The coefficient on ACCESS is positive and highly significant ($p = 0.00$), even when we control for all variables relating to case characteristics.

To ensure fair testing of the equal access theory we ran two additional regressions. First, Scheppele's assertions about the state of the law were published in 1988. Accordingly, if changes in the law caused courts to decide fraudulent silence cases differently after 1988, a regression on our full dataset might fail to support the equal access theory, even if Scheppele's assertions were correct when made. To test this possibility, we ran a second regression using only cases decided from 1793 to 1987. Under this specification, the coefficient on ACCESS remains positive and highly significant ($p = 0.008$; $n = 264$)

Second, it is possible that Scheppele was actually reporting a perceived trend in the law based on a reading of several recent, important cases that she believed signaled a development in existing law. If this is the case, then a regression on cases decided up to the date of her statements would not pick up that trend, as the small number of recent, important cases would be outweighed by the larger number of older cases decided under the prior rule of law. To test this possibility we ran a third regression using only cases decided from 1989 to 2002. Under this specification, the coefficient on ACCESS is insignificant ($p = 0.17$; $n = 190$), indicating that, in later cases, unequal access to information is not a driving force behind decisions on the duty element. Therefore, our data do not support the claim that Scheppele was reporting a perceived trend or change in the law.

¹⁵⁶ Compare Scheppele, *supra* note 2 (arguing that outcomes in fraudulent silence cases are best explained by the equal access theory) with Kronman, *supra* note 1 (arguing that outcomes in fraudulent silence cases are best explained by the fact that some information is casually acquired and some information is deliberately acquired).

Our results thus shed light on this long-standing debate and, at least initially, lend some support to the proponents of the equal access theory. Particularly when viewed in light of the results on cases involving casually acquired information,¹⁵⁷ our analysis seems to support the equal access proponents as opposed to those who claim that judges primarily consider economic efficiency in deciding case outcomes.

Because Scheppele relied on many of the same cases employed by Kronman to develop her theory, we thought it probable that both unequal access and casually acquired information were present in those cases requiring disclosure that the two authors examined. In other words, we surmised that both Kronman and Scheppele may have looked at a particular set of cases in which disclosure was required, the information was casually acquired, and the parties had unequal access. However, whereas Kronman concluded that the casually acquired nature of the information drove case outcomes, Scheppele concluded that it was the unequal access of the parties that affected case outcomes. In contrast, we hypothesized that perhaps it is the presence of unequal access and casually acquired information together, rather than either factor separately, that actually drives case outcomes.

To test this claim, we used a logistic regression and included all 20 variables representing case characteristics and an interaction term, CASUAL * ACCESS.¹⁵⁸ When we include this interaction term, we find that the coefficient on the interaction term is statistically significant and positive ($p = 0.04$). At the same time, the coefficients on CASUAL and ACCESS both become insignificant ($p = 0.86$ and $p = 0.72$, respectively).

¹⁵⁷ See *infra* Section IV.C.

¹⁵⁸ The variable ACCESS and the interaction term (CASUAL * ACCESS) are strongly positively correlated ($r = 0.80$). Therefore, we checked for problems related to multicollinearity. When we regress ACCESS on all the other independent variables and CASUAL * ACCESS, the tolerance is equal to 0.19. This means that 19% of the variation in the ACCESS variable is *not* explained by the other independent variables. We get a similar measure of tolerance when we regress the interaction term on all the independent variables. Tolerances of 5% or less are cause for concern. Thus, we are confident that our results are not significantly affected by multicollinearity.

These results suggest that courts are more likely to find a duty to disclose when both of these factors are present, but not when either is present alone. Accordingly, our analysis indicates that each side of this heated debate is both right and wrong at the same time. Although whether or not the parties to the transaction had equal access to information and whether the informed party casually acquired the information both impact the probability that a court will mandate disclosure, as suggested by participants in the debate, it is only the presence of both factors together that significantly impacts case outcomes.

4. Whether the transaction involved the transfer of real property does not explain the variation in case outcomes when we control for all case characteristics.

As we discussed in Section II, some commentators claim that courts are more likely to require disclosure when the contract involves the transfer of real property.¹⁵⁹ The results presented in Table 4 indicate that the coefficient on PROPERTY is highly significant and positive ($p = 0.00$) when we control only for variables relating to the type of transaction. When we control for all case characteristics, however, the coefficient loses significance. When all variables related to case characteristics are included in the model the coefficient on PROPERTY becomes insignificant ($p > 0.10$), indicating that courts' decisions in cases involving the transfer of real property are actually driven by other variables that are present in these sorts of cases.¹⁶⁰

5. Three cases involving the sale or transfer of a slave appear in the dataset, and in each case the court found that the informed party had a duty to disclose. We were forced to drop the variable SLAVE from the regression analysis because it is a perfect predictor of case outcome.

Although we predicted in Section II that courts are more likely to impose disclosure duties in cases involving the sale or transfer of a slave, we were not able to test

¹⁵⁹ See *supra* notes 65-66 and accompanying text.

¹⁶⁰ To test the most obvious potential variables driving the real property cases, we ran two logistic regressions that included all 20 variables related to case characteristics and an interaction term for either

this claim using regression analysis to control for the effects of other case characteristics because SLAVE is a perfect predictor of whether the court required disclosure. In all three cases involving the sale or transfer of a slave, the court held that the informed party had a duty to disclose. Therefore, although only three cases in our sample involve the sale or transfer of a slave, the fact that all three require disclosure is at least consistent with claims by some commentators that courts vigilantly police such transactions.

C. How the Information Was Acquired

As discussed in Section II, commentators also have argued that the method the informed party used to acquire the undisclosed information influences the likelihood that courts will impose a duty to disclose on parties to a transaction. In particular, commentators have argued that courts more frequently require the disclosure of casually acquired information and information acquired through illegal or tortious means.

1. The results provide very weak support, if any, for the claim that courts are more likely to require the disclosure of casually, as opposed to deliberately, acquired information. However, our analysis indicates that, if the parties lacked equal access to the information and the information was acquired casually, courts are more likely to require disclosure.¹⁶¹

a. General Results

Recall from Section II that Kronman contends that courts hesitate to require the disclosure of information deliberately acquired by the informed party.¹⁶² We suggest, however, that because distinguishing between deliberately acquired and casually acquired information is difficult in practice, this factor has not strongly influenced decisions by courts in fraudulent silence cases.

PROPERTY * LATENT or PROPERTY * BUYER. In both cases, the interaction term was insignificant, meaning that neither LATENT nor BUYER drives the outcomes in property cases.

¹⁶¹ See *supra* notes 74-84 and accompanying text (discussing the interaction of ACCESS with CASUAL).

¹⁶² See *supra* notes __ and accompanying text (discussing the Kronman theory). As previously noted, Kronman limits his claims to socially productive information, a distinction that we find irrelevant for the purposes of this study. See *supra* note __ (discussing this fact).

The results presented in Table 4 are mixed on this factor. When we control only for factors relating to how the information was acquired, the coefficient on CASUAL is insignificant ($p = 0.71$). When we control for all case characteristics, however, the coefficient becomes positive and weakly significant ($p = 0.06$), suggesting that courts might be more likely to require disclosure when the information is casually acquired as opposed to deliberately acquired.

It is important to note here that the result related to this variable is not robust to other specifications that include variables for the year in which the case was decided, the geographic region in which the court sits, and the jurisdiction of the court.¹⁶³ As presented in Table 6, when we control for the case characteristics and (1) the decision year, or (2) the geographic region, or (3) whether the court is a state or federal court, the coefficient on CASUAL remains positive and weakly significant ($0.10 > p > 0.05$). On the other hand, when we control for (1) the case characteristics together with the circuit in which the court sits, or (2) all independent variables that we coded, the coefficient on CASUAL becomes insignificant ($p > 0.10$).

To ensure a fair test of Kronman's claims, we ran two additional regressions. First, Kronman developed his theory based on an examination of the law in 1978. As a result, if a change in the law of fraudulent silence caused courts to decide cases differently after 1978, then a regression on the full dataset could unfairly reject Kronman's hypothesis. Accordingly, we ran a second regression using only cases decided from 1793 to 1977. In this specification, which controls only for the case characteristics and not year of decision, jurisdiction, or geographic region, the coefficient on CASUAL remains positive and weakly significant ($p = 0.08$; $n = 204$).

¹⁶³ General results for specifications including these additional variables are presented *infra* in Sections IV.F and IV.G.

Second, Kronman may actually have been reporting a perceived trend or change in the law based on the outcomes of a few recently decided, important cases that he believed signaled a change in existing law. If this is true, then a regression on cases decided up to the time Kronman made his statements would not pick up this trend, because the many older cases following the prior rule of law would obscure the impact of the more recent, important cases asserting a new rule of law. To test this possibility, we ran a regression using only cases decided from 1979 to 2002. In this specification, again controlling only for case characteristics, the coefficient on CASUAL becomes insignificant ($p = 0.22$; $n = 255$), indicating that whether the information was casually, rather than deliberately, acquired has no significant influence on whether the court finds a duty to disclose in the later cases. Therefore, our data do not support the claim that Kronman was reporting a perceived trend or change in the law.

b. Assumptions Regarding the Means of Information Acquisition

Recall that Kronman contends that, because it is inefficient for courts to make case-by-case determinations of whether information is casually or deliberately acquired, courts instead lay down blanket rules about what class of case is most likely to involve deliberately or causally acquired information. In contrast, we coded cases on an individual basis, by analyzing the specific facts of each case. Accordingly, our study was not designed to test precisely the Kronman hypothesis.

Nonetheless, coding in this manner allows us to test whether or not Kronman was correct in his assumptions about how certain types of information are normally acquired. Recall for example that Kronman asserts that whether or not information is extrinsic or intrinsic appears to be relevant to court decisions only because extrinsic information is typically deliberately acquired, and courts are concerned with protecting parties who have

deliberately acquired their information.¹⁶⁴ To test the claim that extrinsic information is typically deliberately acquired we performed simple counts. Of the 14 cases in our data set that involve extrinsic information, eight (or 57%) involve information that was causally acquired. This result does not lend much support to Kronman's characterization of the typical method of acquiring extrinsic information.

Similarly, Kronman asserts that whether or not the transaction concerned the transfer of real property appears to be relevant to courts only because information relevant to the transfer of real property is typically casually acquired, and courts are more likely to require the disclosure of casually acquired information. To test the claim that information relevant to the transfer of real property is typically casually acquired, we performed simple counts. Of the 157 cases in our data set that involve information concerning the transfer of real property, 124 (or 79%) involve casually acquired information. In this instance, at least, Kronman's hypothesis about the manner of information acquisition appears largely correct.

Finally, Kronman argues that whether or not a defect is latent or patent appears to drive case outcomes only because information concerning a latent defect is typically casually acquired, and courts require the disclosure of casually acquired information. To test the claim that information concerning a latent defect is typically casually acquired we performed simple counts. Of the 60 cases in our data set that involve information concerning a latent defect, 54 (or 90%) involved casually acquired information. In this instance, again, Kronman's prediction about the method by which such information is acquired seems accurate.

Of course these results do not take into account cases that are not ultimately decided by the court, and there is reason to believe that claims that settle or are never

¹⁶⁴ See *supra* Section II.

filed are different in important ways from claims that result in decisions. Without access to this information, we are not able to adequately evaluate Kronman's claims about the likely means of information acquisition in all cases.

c. Section Summary

In sum, although some of Kronman's theories about the typical method of information acquisition are supported by the data, his theories are ultimately based on an assumption that case outcomes depend on whether the information was casually or deliberately acquired. Although the coefficient on CASUAL is weakly significant in some specifications, the p value is never below 5% and in many specifications, including the full specification, the coefficient is insignificant. Given these results, conjectures as to the interaction of the CASUAL variable with other variables (such as whether the information was extrinsic, whether it related to the transfer of real property, and whether it related to a latent defect) are misplaced. We do find, however, that, if the information was acquired casually and the parties lacked equal access to the information, courts are more likely to require disclosure.¹⁶⁵

2. Whether the information was acquired through illegal or tortious means does not explain the variation in case outcomes because the number of cases involving such information is too small to obtain useful results from regression analysis. Outcome counts provide limited support for the hypothesis that courts are more likely to impose disclosure duties on contracting parties when the information is acquired through illegal or tortious means.

We hypothesized that if the informed party acquires information using illegal or tortious means courts are more likely to hold that the informed party owed the uninformed party a duty to disclose. The results presented in Table 4 demonstrate that the coefficient on ILLEGAL is insignificant ($p > 0.10$), indicating that this factor does not help to explain the variation in case outcomes. It should be noted, however, that this result most likely is driven by the fact that only 1% of the cases in the full sample involve

information of this sort. The number of these sorts of cases might be too small to accurately identify the effect of this variable on the likelihood of mandated disclosure.

Nonetheless, simple outcome counts provide some support for our hypothesis relating to the disclosure of illegally acquired information. Of the four cases in the sample involving information acquired illegally or tortiously, three cases (or 75%) resulted in the imposition of liability for fraudulent silence. The results of the outcome count thus provide some support for the claim that courts are more likely to impose a duty to disclose on the informed party when the withheld information is acquired illegally or tortiously, although the support is weak given that our sample includes a very small number of such cases.

As with cases involving extrinsic information, information likely to cause bodily injury or property damage, information relating to personal intentions or opinions, information relating to the acquisition of insurance or a release from liability, and information relating to the sale of a slave, a relevant question is why so few cases involving information acquired by illegal or tortious means result in decisions. One possibility is that such cases settle early because the defendant is unsympathetic (having violated the law or committed a tort). Accordingly, such defendants might fear that courts will treat them more harshly, and would prefer to avoid the costs and potential bad publicity associated with litigation. If true, this fear regarding the impact of the informed party's behavior on the case outcome is consistent with our findings regarding court decisions when the informed party has engaged in other types of bad behavior, such as concealing information, lying, or telling a half-truth.¹⁶⁶

¹⁶⁵ See *supra* note 152 and accompanying text.

¹⁶⁶ See *infra* section IV.E. (discussing the impact of the informed party's behavior on case outcomes).

D. Characteristics of the Uninformed Party

As discussed in Section II, we hypothesized that court decisions are influenced by particular characteristics of the uninformed party, including whether the uninformed party is a buyer or lessee, is female, or is sick, disabled, illiterate, elderly, or otherwise severely disadvantaged in the bargaining relationship, although still competent to contract.

1. Courts are significantly more likely to require disclosure when the uninformed party is a buyer or lessee.

We hypothesized that courts would be more likely to require disclosure when the uninformed party is the buyer or lessee, as opposed to the seller. The results presented in Table 4 support this claim. The coefficient on BUYER is positive and highly significant ($p \leq 0.01$), even when we control for all variables relating to case characteristics. In this case, it appears that the commentators have correctly argued that courts impose higher disclosure duties on sellers than on purchasers.

2. Whether the uninformed party was female does not seem to be a factor that influences courts' decisions regarding fraudulent silence. However, the percentage of cases in which the uninformed party is female and disclosure is required decreased significantly from the period 1793-1950 to the period 1951-2002¹⁶⁷.

As discussed in Section II, we hypothesized that a duty to disclose information is more likely to be found when the uninformed party is female, especially in older cases. The results presented in Table 4, however, indicate that the coefficient on FEMALE is insignificant ($p > 0.10$) in all specifications. These results suggest that courts are not significantly influenced by the gender of the uninformed party when determining the disclosure duties of bargaining parties.

¹⁶⁷ We chose to divide the data set into these time periods for specific reasons, including: that the split resulted in roughly equal sample sizes of cases involving uninformed females, and that public perceptions regarding the competence of women involved in commercial and business transactions may have begun to change around this time.

To test whether courts' positions with respect to the level of disclosure required by the informed party when the uninformed party is female changed over time, we performed simple counts. Prior to 1950, 24 cases involved an uninformed party who was female, and 20 cases (or 83%) required disclosure. In contrast, in the period from 1950 to May 15, 2002, 31 cases involved an uninformed party who was female and 13 cases (or 42%) required disclosure. A test of the equality of proportions indicates that this difference is statistically significant ($p = 0.001$). Although, when we control for all other variables relating to case characteristics, FEMALE does not seem to influence court decisions, we do find that in cases in which the uninformed party is female courts were much more likely to require disclosure in cases decided prior to 1950 than in post-1950 cases.

3. Courts are statistically significantly more likely to require disclosure when the uninformed party was sick, disabled, illiterate, or elderly, though competent to contract, although the statistical significance of the influence of this variable varies with the specification of the statistical model.

As discussed in Section II, we hypothesized that courts express sympathy for uninformed parties who are sick, disabled, illiterate or elderly, though still competent to contract, by being more likely to rule in their favor because of these factors. The results presented in Table 4 support this claim. The coefficient on SICK is positive and significant ($p \leq 0.10$) in all specifications. Note, however, that the significance of the coefficient varies with the specification; in some cases the coefficient is statistically significant at only the 10% level (e.g., Table 6 indicates a p value of 0.06 when we control for all case characteristics, case decision year, geographic region and jurisdiction). Although the evidence is weak for some specifications of the empirical model, our intuition that when the uninformed party is sympathetic in these particular ways courts are more likely to require disclosure appears to have been correct.

E. Behavior of the Informed Party

As discussed in Section II, we hypothesized that courts consider the general behavior of the informed party when deciding the extent to which secret information must be disclosed to the uninformed party. Specifically, we predicted that when the informed party made affirmative misrepresentations or told half-truths in the same transaction in which the alleged omission occurred and when the informed party actively concealed information, courts are more likely to find a duty to disclose.

1. Courts are more likely to require disclosure if the court finds that the informed party made affirmative misrepresentations or told half-truths in the same transaction in which the alleged omission occurred.

In Section II, we predicted that courts' decisions regarding whether material information must be revealed to the uninformed party are influenced by the general behavior of the informed party. Specifically, if the informed party was found to have made an affirmative misrepresentation or told a half-truth to the uninformed party in the same transaction in which the alleged omission occurred, we hypothesized that the court would be more likely to rule against the informed party in the separate fraudulent silence claim. The results presented in Table 4 support both of these claims. The coefficients on LIED and HALF-TRUTH are positive and highly significant ($p = 0.00$). When we control for the case decision year and the geographic region and jurisdiction of the court, the coefficients remain positive and highly significant ($p = 0.00$). Therefore, the data provide strong support for the prediction that courts are influenced by the general bad behavior of the informed party.

2. A court is more likely to find a duty to disclose if it finds that the informed party actively concealed the withheld information.

As discussed in Section II, we also hypothesized that another form of bad behavior on the part of the defendant – the active concealment of information – increases the probability that the court will require disclosure. The results presented in Table 4 support this claim. The coefficient on CONCEAL is positive and highly significant ($p =$

0.00). When we control for the case decision year and the geographic region and jurisdiction of the court, the coefficient remains positive and highly significant ($p = 0.00$). Therefore, the data provide strong support for the claim that actions taken by the informed party to conceal information influence courts' decisions regarding the imposition of disclosure duties. When taken together with the findings on LIED and HALF-TRUTH discussed in Part IV. E.1. *supra*, the data strongly support the theory that courts account for the informed party's behavior in determining whether a duty to disclose existed.

F. Case Date

Recall from section II that many commentators argue that courts have become more pro-disclosure during the time period over which our data span. In addition, some commentators have made more specific claims about changes in the doctrine or application of the doctrine over time. In this section we investigate these claims about trends over time and discuss some interesting patterns in the data revealed by our study.

1. Basic regression analyses do not support the claim that courts have become more likely to require the disclosure of material information over time.

Table 6 presents results from tests of the influences of case decision date on the likelihood that the court will rule that the informed party had a duty to disclose the withheld information to the uninformed party.¹⁶⁸

The results related to the general trend over time are quite striking. First, while most commentators claim that courts are *more* likely to require disclosure in more recent cases, results generated by logistic regression analysis reported in Table 6 suggest that courts are *less* likely to mandate disclosure in recently decided cases. When we control for all 20 case characteristics and the case decision year, the coefficient on YEAR is negative and statistically significant ($p = 0.01$). When we add controls for geographic

region and jurisdiction of the court, although the coefficient loses some of its significance, it remains negative and weakly statistically significant ($p = 0.08$).

Although these results provide support for the claim that courts have become less likely over time to require the disclosure of material information, testing the claim using regression analysis does not allow us to determine whether this development progresses in a linear fashion, or is more complicated, with spikes and valleys during particular time periods. To investigate this possibility we employed more nuanced statistical tests and constructed time series graphs.

¹⁶⁸ We also analyzed the data using probit analysis and obtained results that were nearly identical to the results we obtained using logistic regression analysis.

TABLE 6
 MAXIMUM-LIKELIHOOD LOGIT ESTIMATION RESULTS INCLUDING YEAR, REGION AND JURISDICTION
 DEPENDENT VARIABLE: PREDICTED LOG ODDS OF COURT FINDING DUTY TO DISCLOSE

VARIABLE	COEFFICIENT (P VALUE)					
<i>Type of Information:</i>						
INTRINSIC	0.16 (0.86)	0.49 (0.60)	- 0.04 (0.96)	0.12 (0.90)	- 0.23 (0.82)	0.13 (0.99)
PERSONAL	- 0.32 (0.56)	- 0.22 (0.69)	- 0.30 (0.60)	- 0.18 (0.76)	- 0.35 (0.56)	- 0.29 (0.63)
LATENT	2.24*** (0.00)	2.09*** (0.00)	2.37*** (0.00)	2.23*** (0.00)	2.34*** (0.00)	2.27*** (0.00)
INJURE	1.05 (0.20)	0.93 (0.27)	1.16 (0.17)	1.28 (0.13)	1.41 (0.13)	1.27 (0.19)
DAMAGE	- 0.23 (0.72)	0.03 (0.97)	- 0.27 (0.69)	- 0.16 (0.81)	- 0.29 (0.68)	- 0.14 (0.84)
UP_CORR	1.06** (0.01)	1.12** (0.01)	1.13** (0.01)	1.14** (0.01)	1.26** (0.01)	1.29** (0.01)
<i>Type of Transaction:</i>						
CONFID	2.65*** (0.00)	2.42*** (0.00)	2.84*** (0.00)	2.50*** (0.00)	2.68*** (0.00)	2.70*** (0.00)
INSURE	- 0.13 (0.84)	- 0.24 (0.71)	- 0.01 (0.99)	- 0.11 (0.86)	- 0.21 (0.76)	- 0.23 (0.75)
RELEASE	0.51 (0.55)	0.47 (0.57)	0.51 (0.58)	0.38 (0.65)	0.36 (0.68)	0.35 (0.70)
ACCESS	1.03*** (0.00)	1.05*** (0.00)	1.03*** (0.00)	1.11*** (0.00)	1.24*** (0.00)	1.20*** (0.00)
PROPERTY	0.29 (0.45)	0.26 (0.50)	0.33 (0.40)	0.12 (0.77)	- 0.13 (0.76)	- 0.04 (0.92)
<i>Type of Acquisition:</i>						
CASUAL	0.76* (0.06)	0.72* (0.07)	0.81* (0.05)	0.67* (0.09)	0.53 (0.21)	0.52 (0.23)
ILLEGAL	1.26 (0.46)	0.99 (0.55)	0.75 (0.66)	1.26 (0.44)	0.84 (0.66)	0.16 (0.93)
<i>Uninformed Party Characteristics:</i>						
BUYER	1.18*** (0.00)	1.25*** (0.00)	1.33*** (0.00)	1.20*** (0.00)	1.53*** (0.00)	1.72*** (0.00)
FEMALE	0.04 (0.93)	0.03 (0.94)	0.20 (0.67)	- 0.04 (0.93)	- 0.02 (0.97)	0.17 (0.74)
SICK	1.58** (0.03)	1.42* (0.05)	1.66** (0.03)	1.58** (0.03)	1.72** (0.03)	1.56* (0.06)
<i>Informed Party Characteristics:</i>						
LIED	3.17*** (0.00)	3.17*** (0.00)	3.22*** (0.00)	3.23*** (0.00)	3.49*** (0.00)	3.52*** (0.00)
CONCEAL	3.15*** (0.00)	3.32*** (0.00)	3.31*** (0.00)	3.27*** (0.00)	3.44*** (0.00)	3.65*** (0.00)
HALF_TRUTH	2.81*** (0.00)	2.69*** (0.00)	2.87*** (0.00)	2.73*** (0.00)	2.91*** (0.00)	2.88*** (0.00)
YEAR		- 0.01** (0.01)				- 0.01* (0.08)
<i>Geographic Region:</i>						
WEST			0.68 (0.17)			0.45 (0.42)
SOUTH			0.19 (0.67)			0.20 (0.69)
MIDATLANTIC			1.13** (0.01)			0.97* (0.07)
SOUTHWEST			1.35** (0.03)			1.22* (0.07)
NEW ENGLAND			0.67 (0.26)			0.58 (0.37)
<i>Jurisdiction:</i>						
STATE				0.75** (0.04)		- 1.39 (0.28)
3RD CIRCUIT					- 1.20 (0.26)	- 2.86* (0.08)
6TH CIRCUIT					- 3.20** (0.02)	- 4.70** (0.02)
7TH CIRCUIT					- 2.90** (0.02)	- 3.74** (0.05)
Controls for all circuits included [†]					YES	YES
Constant	-4.41*** (0.00)	13.55* (0.06)	-5.03*** (0.00)	-4.84*** (0.00)	-3.86*** (0.00)	11.09 (0.19)
LR X2	310.58 (0.00)	317.23 (0.00)	321.20 (0.00)	314.91 (0.00)	325.54 (0.00)	337.22 (0.00)
Pseudo R2	0.48	0.49	0.50	0.49	0.52	0.53
N	463	463	463	463	456	456

TABLE 6: This table provides the maximum-likelihood logit estimation results for the effects of case characteristics, including the decision date, geographic location of the court (Midwest used as base) and jurisdiction of the court, on whether the court found a duty to disclose.

Note: LR X² indicates the result from testing the null hypothesis that all coefficients in the model, except the constant, equal zero. In addition, it should be noted that, although pseudo R2 statistics provide a quick way to compare the fit of different models for the same dependent variable, they lack the straightforward explained-variance interpretation of true R² in OLS regression.

* p < .10, ** p < .05, *** p < .01

[†] Only those circuits for which results are statistically significant appear in the table.

2. *Analyses using simple tabulations do not support the claim that courts have been more likely to require disclosure in cases decided in later years.*

We employed simple tabulations, the results of which are reported in Table 7, to check for differences between particular time periods using the entire sample.

TABLE 7
TABULATIONS FOR CASES OVER VARIOUS PERIODS

PERIOD	COURT FOUND DUTY TO DISCLOSE	COURT FOUND NO DUTY TO DISCLOSE
1793-1860	10 (67%)	5 (33%)
1861-1940	89 (71%)	37 (29%)
1941-2002	138 (42%)	187 (58%)

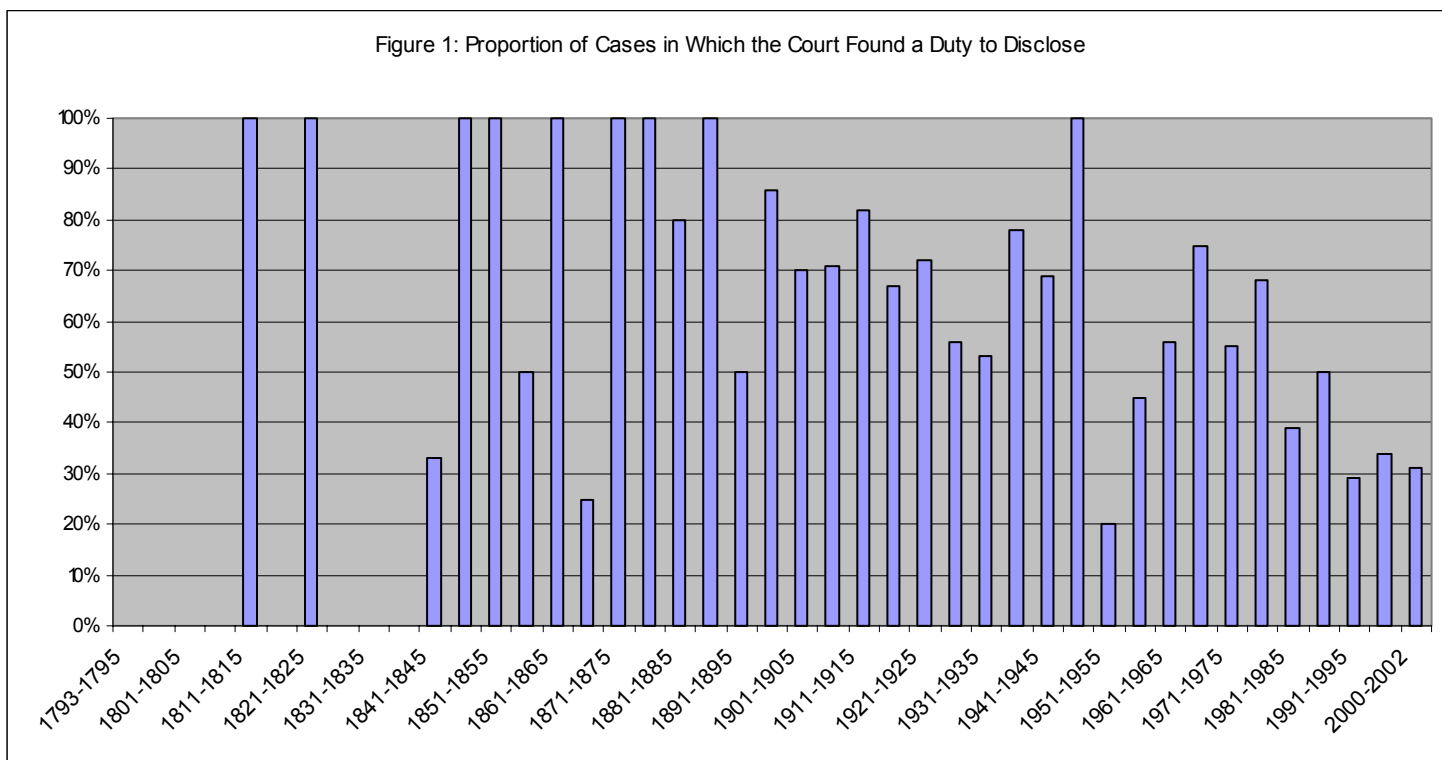
TABLE 7: This table presents the results of tabulations of the number of cases by outcome for three periods: 1793-1860, 1861-1940 and 1941-2002.

We found that, prior to 1860, courts found a duty to disclose in 67% of cases (or 10 of 15). Between 1861 and 1940, the years roughly between the Civil War and the start of World War II, courts found a duty to disclose in 71% of cases (or 89 of 126). Finally, in 42% of cases (or 138 of 325) decided between 1941 and 2002, the court ruled that the informed party had a duty to disclose. A test for the equality of proportions calculated for the first two periods indicates that no statistically significant difference exists between the proportions ($p = 0.62$). On the other hand, the difference between the proportions calculated for the period 1861-1940 and 1941-2002 is statistically significant ($p = 0.00$). These results do not support claims about an increase in the likelihood that courts will require disclosure due to the shift from an agrarian to a commercial economy. In fact, the

data indicates the opposite – courts have been less likely to require the disclosure of material information from World War II to the present than they were during the period from the Civil War until World War II.

3. A time series graph of the dependent variable does not support the claim that courts have been more likely over time to require informed parties to disclose information to uninformed parties, but the graphs reveal an interesting pattern when compared to a time series graph of the number of fraudulent silence decisions across time.

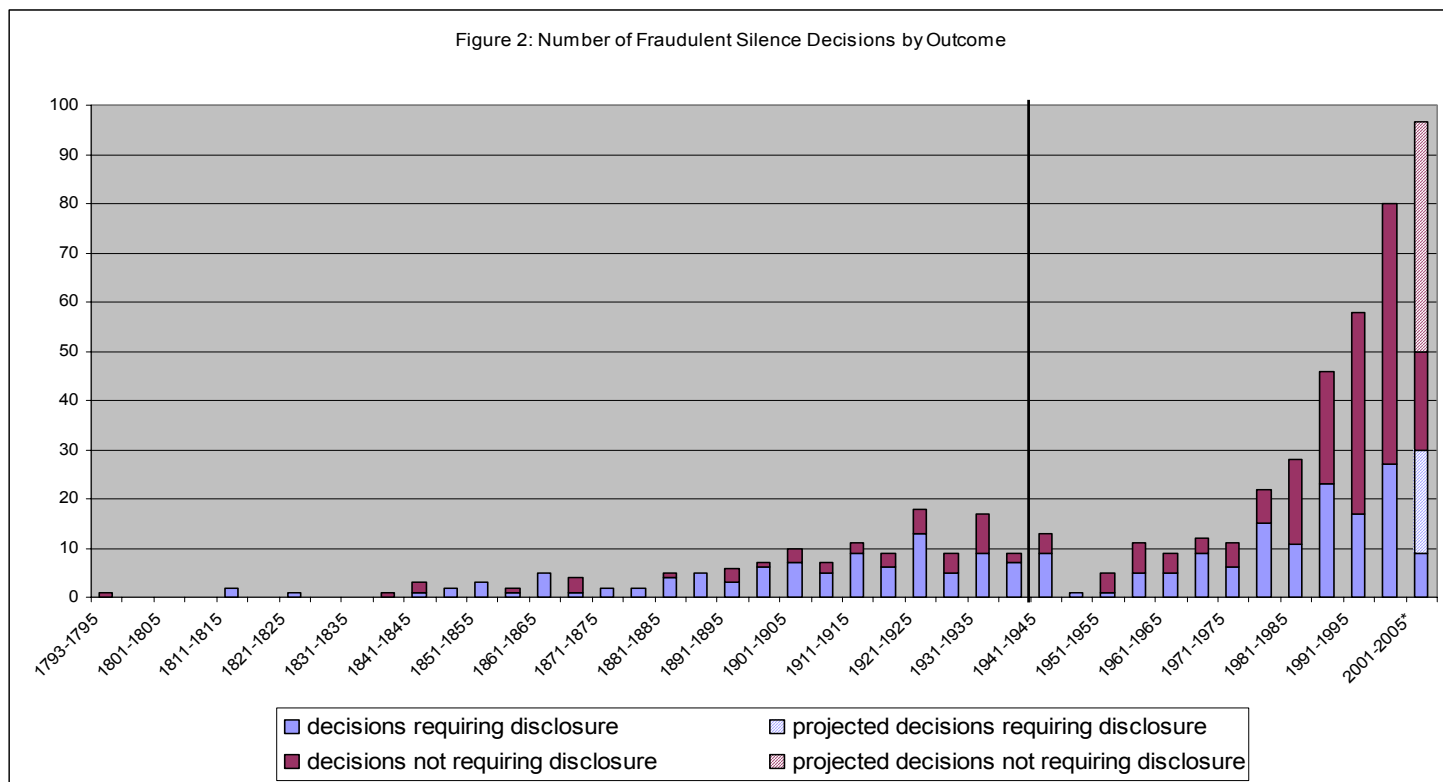
To get a better sense of the pattern of court decisions over time, we graphed the proportion of fraudulent silence cases in which the court found that the informed party owed the uninformed party a duty to disclose (see Figure 1).



The graph clearly reveals that the probability of the court imposing a disclosure duty on the informed party decreases almost linearly over time, especially in the years after 1970—the years in which most of the cases in our data set were decided. This observation further supports the findings obtained from the regression analyses. The

likelihood of the existence of a non-linear relationship between time and the probability of the court requiring disclosure seems remote given the pattern in the dependent variable over time revealed in Figure 1.

It is also interesting to note that the number of decisions involving the issue of whether the informed party owed a duty of disclosure significantly increased over time, again especially in the years after 1970. Figure 2 presents a graph of the number of fraudulent silence decisions by five-year periods.¹⁶⁹ There are a small number of decisions during the five-year periods prior to 1900; therefore, we focus mainly on two trends in the data relating to the 20th Century.



Note: Recall that our data set includes cases decided through May 15, 2002. The striped bars represent projections for the period May 15, 2002 though 2005. The vertical line separates cases decided prior to 1944, all of which are included in our data set, from cases decided during or after 1944, a random sample of which is included in our data set.

¹⁶⁹ Recall that for the years prior to 1944, all relevant cases were included in the data set; whereas, for 1944 and subsequent years, a random sample of the cases was included in the data set. The vertical line drawn in Figure 2 divides these periods. For this reason, the increase in the number of decided cases is actually understated in the Figure.

By examining Figures 1 and 2 simultaneously, we find that, especially in the years subsequent to 1970, the courts become less likely to require disclosure, while, during the same period, a significantly increasing number of decisions appear in our dataset. On its face, this result seems counter-intuitive. One might predict that, as the probability of winning at trial decreases, fewer uninformed parties will bring claims and more will settle prior to resolution by the court.¹⁷⁰

To explain this seemingly odd result, one would need information on filing behavior, settlement rates, whether statutes impact the types of cases decided under common law, whether the issues on which judges choose to write opinions change over time, and how disclosure rules affect individual decisions about whether to disclose information. Accordingly, any conjectures made here about what is driving these patterns are simply that -- conjectures.

Nonetheless, one possibility is worth mentioning. Recall that the existence of a duty to disclose is only one element of a fraudulent silence case in which the plaintiff must prove other elements, such as scienter, reliance, and materiality, in order to prevail. If the increase in the number of fraudulent silence decisions actually reflects an increase in the number of such claims that are brought and survive to litigation at the same time that the plaintiff's probability of winning on the duty to disclose element is decreasing,¹⁷¹ then this could possibly reflect the fact that the plaintiff's probability of winning on one or more of the other elements of a fraudulent silence case (materiality, for example) is

¹⁷⁰ We recognize the possibility that fewer cases are being filed and more cases make it to the decision stage as time goes on. Our data, however, do not allow us to investigate the relationship between the probability of the court imposing a duty to disclose on the informed party and the number of cases decided per year.

increasing at an even faster rate. Naturally, we are unable to test this conjecture using our data. However, our study raises the possibility that a similar study focused on one or more of the other elements of a fraudulent silence case would reveal interesting time trends as well.

4. The time trend on the number of fraudulent silence decisions is in marked contrast to time trends on the number of decisions in contract cases generally.

In a 2001 study of contract litigation, Marc Galanter found that the volume of trials in contract cases increased until 1990, followed by a substantial decline by about one-third, culminating in a period of little change from year to year.¹⁷² Our data on fraudulent silence decisions follow a markedly different pattern. Rather than decreasing during the period after 1990, Figure 2 indicates that fraudulent silence decisions, although fluctuating somewhat, generally increased after 1990.

Of course, several variables affect the number of decisions in contract cases, including decisions by informed parties regarding whether to disclose information during the contracting process, filing behavior, settlement behavior, and statutory developments. Because we lack information relating to those factors, we do not theorize about why fraudulent silence decisions do not follow general trends of contract cases. Once again, however, these findings point to areas of potential research for those interested in patterns in contract and tort litigation.

5. The data do not support specific claims made by commentators about trends over time.

Some commentators have made more specific claims about trends over time relating to the probability that courts will require the disclosure of material information.

¹⁷¹ As noted, an increase in the number of fraudulent silence decisions need not reflect an increase in the number of fraudulent silence filings.

¹⁷² Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. Rev. 577 (2001) (reporting, for example, that 2,507 contract trials were held in federal district court in 1988 while 1,517 trials were held in 1992, 1,081 in 1996 and 902 in 1999).

For example, recall from Section II that Horwitz claims that, as the United States transitioned from an agrarian to a commercial economy, courts became more likely to require the disclosure of information not available to both parties.¹⁷³ To test this claim, we ran a logistic regression controlling for the 20 case characteristics, the year the case was decided, and an interaction term (ACCESS * YEAR), to pick up the trend over time in cases involving unequal access. The coefficient on the interaction term is insignificant ($p = 0.72$), indicating no significant trend over time exists. Our data thus does not support the Horwitz claim regarding changes in this area of the law due to changes in the economy.

In addition, in a paper published in 1984, Kronman claimed that disclosure duties relating to latent defects increased dramatically during the 25-year period between approximately 1958 and 1983.¹⁷⁴ To test this claim, we attempted to employ a logistic regression using the 20 variables related to case characteristics. This regression, however, failed because many of the variables are perfect predictors of disclosure and several of the variables are collinear. Therefore, we employed simple tabulations to test the claim. We found that, prior to 1958, courts found a duty to disclose in 15 of the 16 cases (or 94%) involving latent defects. In the 25-year period between 1958 and 1983, 12 cases involved latent defects and, of those 12 cases, the court found a duty to disclose in 11 (or 92%). A test for the equality of proportions finds no statistically significant difference between the percentages ($p = 0.58$). Therefore, our data do not support Kronman's claim about the development of the law relating to latent defects.

G. Court

1. Courts located in the mid-atlantic states and the southwest are more likely to require disclosure than are courts located in other geographic regions. In addition, in contrast to the statements of some commentators, courts located in the south are not more likely to require disclosure, either during the period over which our data span or

¹⁷³ See *infra* note 105 and accompanying text.

¹⁷⁴ See *infra* note 104 and accompanying text.

historically.

We coded the cases for the geographic region in which the court sits to determine whether any geographic patterns emerged with respect to case outcomes.¹⁷⁵ The basic regression results presented in Table 6 indicate that courts located in the south, west, and northeast are no more likely to impose liability for fraudulent silence than are courts located in other regions.¹⁷⁶ The results, however, do indicate that courts located in the mid-atlantic states and the southwest are more likely to require disclosure than are courts located in other regions.

As discussed in Section II, some commentators have claimed that southern states historically were much less likely to impose disclosure duties on bargaining parties than were states in other regions. To test this claim, we employed two strategies. First, we ran a logistic regression controlling for the 20 case characteristics, the year the case was decided, and geographic regions (represented by SOUTH, WEST, MIDATLANTIC, SOUTHWEST, and NEWENGLAND with MIDWEST as the base) to test for regional differences over particular periods. The first regression, using data only from cases decided between 1793 and 1860, failed because several independent variables were perfect predictors of the likelihood that the court would mandate disclosure. The second regression used data only from cases decided between 1861 and 1940. The coefficient on the variable SOUTH is insignificant ($p = 0.94$), indicating no significant difference between cases decided in the south and other regions during this period of time.¹⁷⁷

Our second strategy involved calculating the proportion of cases in each region that imposed liability for two early periods: 1793-1860 and 1860-1940. We also

¹⁷⁵ States were assigned to geographic regions using the classification employed by the U.S. Embassy. The classification is available at <http://www.usembassy.de/usa/travel-regions.htm>.

¹⁷⁶ We used the variable MIDWEST as the base to run the regressions. When we include MIDWEST in the model and use another region as the base, we find that the coefficient on MIDWEST is not significantly different from zero. Therefore, courts in the midwest are not more or less likely to impose liability for fraudulent silence than courts in other regions.

performed similar calculations for the period 1941-2002 for purposes of comparison. The tabulations by outcome and by region for these three periods are presented in Table 8.

For the period 1793-1860, only 15 cases are contained in the total sample, and only four of those were decided in the south. In three of the four cases, disclosure was required. This proportion is equivalent to the proportion of cases decided in the mid-atlantic states in which the court required disclosure. All other regions require disclosure in a smaller percentage of cases. While the number of observations is very small, certainly the claim that the south was less likely to require disclosure is not supported by the data for this period.

For the periods 1861-1940 and 1941-2002, tests for the equality of proportions were performed to compare the proportion of cases requiring disclosure and decided in the south to the proportion of cases requiring disclosure and decided in each of the other regions. Five separate tests (one for each region) were performed for each period.¹⁷⁷ For each test, the hypothesis of equal proportions was tested against an alternative hypothesis that the proportion of cases requiring disclosure and decided in the south is significantly less than the proportion of cases requiring disclosure and decided in the region of comparison.

¹⁷⁷ For the sake of completeness, we ran the same regression using only cases decided between 1941 and 2002. Again, the coefficient on SOUTH was not statistically significant ($p = 0.92$).

¹⁷⁸ In other words, five tests were performed comparing the south with each of the southwest, the west, the mid-atlantic states, New England, and the Midwest.

TABLE 8
TABULATIONS FOR DECISIONS BY OUTCOME AND BY REGION

	1793-1860					
	<u>SOUTH</u>	<u>WEST</u>	<u>MIDATLANTIC</u>	<u>SOUTHWEST</u>	<u>NEW ENGLAND</u>	<u>MIDWEST</u>
Disclosure Duty Found	3 (75%)	0	6 (75%)	0	0 (0%)	1 (50%)
Disclosure Duty Not Found	1 (25%)	0	2 (25%)	0	1 (100%)	1 (50%)
	1861-1940					
	<u>SOUTH</u>	<u>WEST</u>	<u>MIDATLANTIC</u>	<u>SOUTHWEST</u>	<u>NEW ENGLAND</u>	<u>MIDWEST</u>
Disclosure Duty Found	19 (61%)	4 (40%)	29 (91%)*	4 (67%)	5 (56%)	28 (74%)
Disclosure Duty Not Found	12 (39%)	6 (60%)	3 (9%)	2 (33%)	4 (44%)	10 (26%)
	1941-2002					
	<u>SOUTH</u>	<u>WEST</u>	<u>MIDATLANTIC</u>	<u>SOUTHWEST</u>	<u>NEW ENGLAND</u>	<u>MIDWEST</u>
Disclosure Duty Found	33 (41%)	34 (61%)*	23 (35%)	14 (47%)	10 (46%)	24 (34%)
Disclosure Duty Not Found	48 (59%)	22 (39%)	43 (65%)	16 (53%)	12 (54%)	46 (66%)

TABLE 8: This table presents the results of tabulations of the number of decisions by outcome and by region for three periods: 1793-1860, 1861-1940 and 1941-2002. Two-sample, one-sided tests for the equality of proportions were performed to compare the proportion of decisions finding a duty to disclose and decided in the south to the proportion of decisions finding a duty to disclose and decided in another region. For each test, the null hypothesis of equal proportions was tested against the alternative hypothesis that the proportion of decisions finding a disclosure duty and decided in the south is significantly less than the proportion of decisions finding a disclosure duty and decided another region.

* Significantly lower proportion of cases decided in the south as compared to this region, at the 10% significance level ($p < 0.10$).

** Significantly lower proportion of cases decided in the south as compared to this region, at the 5% significance level ($p < 0.05$).

*** Significantly lower proportion of cases decided in the south as compared to this region, at the 1% significance level ($p < 0.01$).

Only two of the ten tests indicate that the south is significantly less likely to require disclosure as compared to other geographic regions. First, during the period 1861-1940 courts in the south were less likely to require disclosure than were courts in the mid-atlantic states. Second, during the period 1941-2002, courts in the south were less likely to require disclosure than were courts in the west. Otherwise, no statistically significant difference exists between the proportion of cases decided in the south and finding a duty to disclose and the proportion of similarly decided cases in courts located in other regions. Therefore, the data do not provide strong support for the claim that southern

states historically were less likely to require disclosure as compared to other regions of the country.

2. State courts are no more or less likely than federal courts to require the informed party to reveal information to the uninformed party. In addition, the 3rd Circuit, 6th Circuit, and 7th Circuit are more likely than any other circuit to require disclosure.

As indicated in Section II, we were interested in determining whether courts differ by jurisdiction in terms of how likely they are to require disclosure. Specifically, we were interested in whether any differences existed between federal and state courts, or among the federal appellate circuits.

The results presented in Table 6 indicate that the coefficient on STATE is significant and positive ($p = 0.04$) when we control only for variables relating to the 20 case characteristics. When we add controls for the case decision year, geographic regions, and federal appellate circuit, however, the coefficient loses significance. When all independent variables are included in the model the coefficient on STATE is insignificant ($p = 0.28$), indicating that state courts are no more or less likely to require disclosure than are federal courts.

In addition, the results obtained from the regression analysis (see Table 6) indicate that three federal appellate jurisdictions are less likely to require disclosure than any other federal appellate jurisdiction: the 3rd Circuit ($p = 0.08$), the 6th Circuit ($p = 0.02$), and the 7th Circuit ($p = 0.05$).

H. A Note on Priest-Klein

Courts found a duty to disclose in approximately 51% of the cases in the sample. This statistic is consistent with the Priest-Klein litigation model, which implies that, because only close cases are likely to proceed to litigation (with clear cases being settled or never brought at all), “the formal structure of the law [will] appear indeterminate to any

scientific, empirical method of observing judicial decisions.”¹⁷⁹ In other words, the model suggests that it is impossible to identify factors that significantly influence outcomes given that all litigated cases are perched on the knife-edge. In roughly half of the cases, they theorize, the outcome randomly falls to one side of the knife; in the other half, it randomly falls to the other side.

For this reason, under the Priest-Klein model, our analysis is futile: if the model is truly predictive, then our analysis should fail to discover any significant drivers of outcomes. As the following Section reveals, however, nearly half of our independent variables significantly influence court decisions regarding whether the informed party had a duty to disclose information to the uninformed party.¹⁸⁰ Therefore, we are left to explain these seemingly contradictory results (i.e., the finding of statistically significant factors that seem to drive outcomes (contrary to the Priest-Klein predictions) despite the fact that the outcomes are nearly evenly divided (consistent with the Priest-Klein predictions)).

One could claim that our results are simply spurious. Given the pattern of our results, however, we do not believe this is the case. For example, the factors found to significantly influence outcomes do not appear to be random. Instead, we find that many of the factors that significantly increase the probability that a court will impose a duty to disclose are also the most widely-accepted, such as the factors listed in the Restatements (i.e., whether the parties are in a fiduciary or confidential relationship, whether the information is related to a latent defect and whether the information would have updated or corrected previously disclosed information).¹⁸¹

¹⁷⁹ See Priest & Klein, *supra* note 111.

¹⁸⁰ See *infra* Section VI (describing results from the statistical analysis).

¹⁸¹ See Restatement of Contracts (2d) §161.

In addition, as a matter of theory, there are reasons to doubt that the Priest-Klein model holds when studying outcomes on the element of the duty to disclose in fraudulent silence claims. In a fraudulent silence case, the imposition of a duty to disclose is only one element of a multi-element cause of action in which the plaintiff must also prove elements such as scienter, reliance, and materiality. As a result, even when the plaintiff can easily show that the defendant had a duty to disclose, the case nonetheless might proceed to the litigation and opinion stage due to the parties' uncertainty about another element. As a result, cases in which the element of duty is on the knife-edge are but a subset of the cases in our sample; and, therefore, our regression analysis is able to identify factors that significantly influence outcomes on the duty element.

Given that our analysis focuses on just one element -- duty -- of a multi-element cause of action -- fraudulent silence -- one might question why we don't observe a larger majority of outcomes on the duty element favoring the plaintiff.¹⁸² It must be remembered, however, that plaintiffs may sometimes raise claims that they have a small probability of winning. This is true, for example, of suits in which plaintiffs have one or more relatively strong claims, but can allege other, weaker, claims based on the same fact pattern. Under such circumstances, the marginal cost of adding an additional weak claim to the suit is essentially zero.¹⁸³ Under these circumstances, the plaintiffs' success rate on the duty element could be less than 50%. For these reasons, that fact that we observe 50% of the outcomes on the duty element favoring the plaintiff might very well be anomalous and unrelated to the predictions of the Priest/Klein model.¹⁸⁴

¹⁸² One could argue that, if the duty element is not an element that is balanced on the knife-edge, then it must be an element on which the plaintiff is more likely to win. Otherwise, one might speculate that rational plaintiffs would not bring the case.

¹⁸³ For example, consider cases in which the plaintiff's strongest claim is that the defendant affirmatively misrepresented a material fact. In cases such as these, the plaintiff might find that the marginal cost of adding even a weak claim to the suit alleging affirmative misrepresentation is essentially zero. In other words, if the facts giving rise to an affirmative misrepresentation claim also give rise to an albeit weak fraudulent silence claim, then the plaintiff might tack on the weak fraudulent silence claim.

¹⁸⁴ See Shavell (demonstrating that any distribution of outcomes is supportable). [finish cite]

V. CONCLUSION

The question of when an individual in possession of valuable information unknown to her contracting partner has the right to remain silent and profit from her secret knowledge has fascinated scholars in philosophy, law, and history since ancient times. Many have developed specific and general theories (what we term “meta-theories”) to explain the variation in case outcomes. Few, however, have attempted to systematically analyze the cases and none has employed regression analysis to isolate the effect of particular factors on case outcomes.

Our analysis casts doubt on much of the conventional wisdom regarding the law of fraudulent silence. In fact, our results challenge *ten* of the most prominent theories that have been asserted to explain when courts will require full disclosure between contracting parties. Specifically, our data do not support the contentions that courts more frequently require the disclosure of intrinsic information than extrinsic information; that courts insist on the disclosure of information that could prevent bodily injury or property damage; that informed parties are able to freely withhold information regarding personal intentions or opinions; that those seeking insurance, surety, or a release from liability must disclose all relevant information; that courts more frequently require disclosure in transactions relating to the sale or transfer of real property; that courts tend not to require the disclosure of deliberately acquired information; that courts have become more likely to require disclosure over time; or that southern states are less likely to require disclosure than are states in other regions of the country.

However, in some cases, at least, it appears that the conventional wisdom is correct. Our data support the hypotheses that courts are more likely to require the disclosure of

latent, as opposed to patent, defects; that courts are more likely to require the disclosure of information that would update or correct previously disclosed information, that courts are more likely to require full disclosure between parties in a fiduciary or confidential relationship; that courts are more likely to require the disclosure of illegally or tortiously acquired information; and that courts are more likely to require disclosure when the uninformed party is a buyer or lessee.

In addition, our own intuition that courts are swayed by the sympathetic nature of the uninformed party and the bad behavior of the informed party are supported by the data. Courts are significantly more likely to require disclosure when the uninformed party is sick, disabled, illiterate, or elderly, though still competent to contract. Also, courts are more likely to require disclosure when the informed party lied or told half-truths in the same transaction in which the omission occurred, or when the informed party took affirmative steps to conceal the withheld information. However, our suspicion that courts are more likely to require disclosure when the uninformed party is female is not supported by the data, although our data did reveal a time trend in fraudulent silence decisions when the uninformed party is female. The percentage of cases in which the uninformed party is female and the court required disclosure decreased significantly from the period 1793-1950 to the period 1951-2002.

Perhaps most importantly, our analysis suggests that the long-standing and heated debate between those who argue that courts attempt primarily to enhance fairness by placing contracting parties on a more even playing field and those who argue that courts primarily attempt to enhance economic efficiency by allowing informed parties to reap the benefit of knowledge that is deliberately acquired is largely misplaced. Our data provide little, if any, support for the contention that courts are more likely to require the disclosure of casually, as compared to deliberately, acquired information. Regression

results do indicate that courts are more likely to require the disclosure of information when the parties lack equal access. Our analysis, however, reveals that it is the presence of unequal access in combination with casually acquired information that drives case outcomes. Therefore, it is the existence of these two factors together, rather than either one alone, that is a significant predictor of case outcomes.

In the end, however, we view this study merely as a first step toward unraveling a difficult and controversial area of law, rather than a definitive answer to the question of what drives outcomes in fraudulent silence cases. Although this study provides some answers, it raises many questions as well.

For example, although our data show that, contrary to conventional wisdom, courts have become less likely over time to require the disclosure of material information unknown to one's bargaining partner, does this mean that courts have become more pro-defendant over time? Or have other factors, such as the codification of certain areas of fraudulent silence law through statutes that mandate particular disclosures, altered the type of case that survives to litigation under the common law?¹⁸⁵

In addition, regression analyses on data spanning a two hundred year period do not permit us to capture the law at any particular point in time. However, alternative strategies (such as, for example, using regression analysis over moving windows of smaller time periods) allow such an analysis. Not only would this strategy more fully highlight any time trends in the data, but also it would permit testing for whether particular events or developments of note, such as, for example, the publication of the

¹⁸⁵ Common examples are statutes mandating certain disclosures in residential real estate transactions and car sales. Because such statutes are generally pro-plaintiff, if these statutes merely codify changes that were already occurring under the common law, then the cases remaining to be decided under the common law could conceivably be those in areas of the law in which courts were not expanding disclosure duties. As a result, these cases would appear to reflect a pro-defendant trend that does not really exist.

Second Restatement of Contracts, actually produced changes in the law (as has been asserted by some commentators¹⁸⁶), rather than simply restated the law.

¹⁸⁶ cite