

The Empirical Double Standard: Opinion Surveys Across the Civil–Criminal Divide

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ABSTRACT: Across different legal domains, liability doctrines recognize the value of community input. But do courts truly listen to the community’s voice when deciding these sorts of cases? This study is the first to explore how courts treat community opinion survey evidence within both civil and criminal law. To that end, we comprehensively examine trademark, false advertising, patent, antitrust, obscenity, death penalty, and search cases.

Our research uncovers a significant asymmetry: Courts readily admit survey evidence in civil proceedings but systematically exclude it in criminal cases. This asymmetry does not appear to stem from structural differences between civil and criminal litigation systems, nor from differences in judicial bureaucracies. Instead, we argue, its source is judicial decision-making bias. We contend that in criminal cases, judges feel comfortable with and morally able to decide issues without outside input. But judges have fewer (if any) moral intuitions about the salient issues in civil cases, leading them to be more willing to accept community input. This asymmetry unfairly denies criminal defendants the opportunity to present empirical evidence that more accurately reflects the standards that are expressly part of these criminal doctrines.

By documenting this potential judicial bias, we challenge existing evidentiary practices that disadvantage criminal defendants and compromise legal fairness. Situated at the intersection of empirical legal studies, evidence law, and judicial process theory, this Article offers novel insights for legal scholars, practitioners, and judges who seek to improve judicial decision-making. We propose concrete recommendations, including encouraging judges to explicitly

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recognize survey evidence's relevance and urging all legal professionals to develop greater empirical literacy.

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INTRODUCTION

[J]udges come armed with only the attorneys' briefs, a few law clerks, and their own idiosyncratic experiences. They are hardly the representative group you'd expect (or want) to be making empirical judgments for hundreds of millions of people.¹

Judges, like all people, have personal beliefs and intuitions that influence their perspectives on the issues before them. Although in routine cases the

1. *Carpenter v. United States*, 585 U.S. 296, 392–93 (2018) (Gorsuch, J., dissenting).

influence of a judge's personal beliefs on the legal outcome may be expected,² some legal doctrines instruct that the community's views must be taken into account. In these sorts of cases, parties might ask the court to consider opinion surveys, which document what people in the community think or believe about some issue in dispute. If conducted properly, these surveys serve as a supplement or counterweight to the judge's personal views about an issue—but only if the judge admits them into evidence.

Therein lies the problem at the heart of this Article: Judges alone decide whether to open the courthouse doors to evidence from the community that might challenge their own intuitions about how cases ought to resolve. They are conflicted gatekeepers in this sense, because through their rulings on admissibility, judges choose between privileging their own intuitions or accepting the potential influence of community input on the cases before them.

In multiple civil litigation realms where doctrines incorporate community views, courts regularly admit opinion survey evidence. Courts recognize that evidence gathered directly from the community holds significant value when civil law doctrines explicitly incorporate community perspectives. Because “perfect evidence” is a rarity in trial settings,³ even when judges detect flaws in a survey's design or execution, they often do not regard those flaws as serious enough to defeat admissibility in fields such as trademark, false advertising, patent, and antitrust.

But in key areas of criminal law and procedure where doctrines likewise call for community input, surveys of community opinion rarely see the light of day. Courts handling obscenity, the death penalty, and Fourth Amendment search questions express hostility to or skepticism about the value of opinion surveys in general, declare that flaws in a particular survey's design or execution are fatal, or altogether ignore the existence of surveys in the relevant field. In contrast to judges' behavior in civil cases, courts handling criminal cases usually close the gates to opinion survey evidence, despite legal doctrines that expressly call for community input.

We argue that the courts' rejection of the community's voice in this manner is unwise and unwarranted. A court's decision to reject opinion survey evidence outright, rather than allowing it to be considered by a jury, is not just one of many evidentiary rulings in a case; it has the potential to significantly affect the case's outcome. Rejecting a proffered survey of community views can derail a litigant's ability to establish a narrative, or to challenge the opponent's narrative, about whatever community standards the litigant is alleged to have violated. Exclusion is warranted when serious flaws render a survey's findings invalid, but lesser problems suggest the survey should be

2. Diana Richards, *When Judges Have a Hunch: Intuition and Experience in Judicial Decision-Making*, 102 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 245, 254–55 (2016) (Ger.) (suggesting that judges should and do use intuitive expertise particularly in easy cases).

3. *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P'ship.*, 34 F.3d 410, 416 (7th Cir. 1994) (“Trials would be very short if only perfect evidence were admissible.”).

admitted but accorded less weight. A decision to altogether reject such a survey is hard to justify where a person's liberty (and sometimes life) may be at stake.

Moreover, disparities in judicial treatment of evidence are likely to exist across any field of law, but variation in courts' behavior across civil and criminal domains ought to rest on principled foundations. In the absence of such foundations, disparities lead us to question whether bias, rather than principle, is driving the legal outcomes we see. And when that bias appears to systematically handicap defendants in criminal cases—many of whom are already subject to multiple layers of disadvantage both inside and outside the legal system⁴—scholars ought to pay attention and suggest a new path forward.

This Article is the first to thoroughly examine the courts' asymmetrical treatment of opinion survey data in the civil and criminal dockets and to discuss the consequences for people charged with crime. To identify patterns in the civil and criminal law contexts, we consider six points on the litigation spectrum, as viewed through the lens of published trial and appellate opinions.⁵ In the civil docket, we address the use of opinion surveys in trademark and false advertising, patent, and antitrust cases. In the criminal docket, we assess the use of surveys in obscenity, death penalty, and Fourth Amendment search cases. In all six instances, the formal legal doctrine recognizes the value of community input to determine case outcomes. Yet despite formal doctrinal relevance and despite articulated standards (such as the *Daubert* framework)⁶ to guide the admission of expert testimony for both civil and criminal cases, we find a troubling inconsistency in how courts behave: They routinely offer a warm welcome to opinion surveys in civil cases but give a cold shoulder to the same sort of evidence in criminal cases.⁷

We acknowledge that the civil and criminal cases are not perfect comparators for each other and that all points on the spectrum do not arise from procedurally analogous settings even within the civil and criminal spheres we have identified. The criminal obscenity cases, for example, are mostly state appellate opinions arising from state criminal prosecutions, while the death

4. For a helpful summary of these disadvantages, see Russell M. Gold, *Power over Procedure*, 57 WAKE FOREST L. REV. 51, 63, 65–70 (2022).

5. Our study is necessarily under-inclusive, as we have no information about unpublished lower court decisions or unpublished appellate opinions. We also have no information about cases that were resolved short of trial, in the shadow of appellate doctrines.

6. See *infra* notes 26–28 and accompanying text.

7. The federal courts and just over half the states follow the rule of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–95 (1993). Other state approaches can be found in note 26, *infra*. Nearly all the cases we studied were decided before the December 1, 2023 amendment to Evidence Rule 702. This amendment was introduced to address concerns that courts had been applying the *Daubert* standard too leniently. See Memorandum from Daniel J. Capra & Liesa L. Richter to Advisory Comm. on Possible Amendment to Rule 702 (Apr. 1, 2022), uscourts.gov/site/s/default/files/evidence_agenda_book_may_6_2022.pdf [<https://perma.cc/935A-57AU>]. While this minor revision to the rule will likely exert some pressure on courts considering whether to admit expert evidence, it does not alter our central argument: Courts tend to adhere to these evidentiary rules in civil cases but not in criminal cases.

penalty opinions come from the U.S. Supreme Court and the state supreme courts. Our Fourth Amendment search discussion also spotlights Supreme Court decisions but notes that the lower federal courts appear to be operating nearly in lockstep with the Supreme Court. In the trademark and false advertising section we focus on opinions from the federal trial courts, and we present a mix of federal trial and appellate cases in the patent and antitrust discussion. The variety of cases we consult prevents us from drawing perfect comparisons between doctrinal areas, but the patterns we observed are too stark to ignore.

The Article's three contributions unfold over five parts. We begin in Part I by offering a brief sketch of opinion surveys as a form of evidence in American courtrooms. We first review the pertinent rules of evidence that govern the admission of survey evidence and then address the standards for scientific validity that have emerged over time. Readers who are familiar with these rules are invited to skip ahead to Part II.

Parts II and III offer the Article's first contribution, a detailed portrait of the opinion survey landscape as it currently exists in the United States. We discuss six points in this landscape for which opinion surveys could be, and sometimes have been, recognized as relevant evidence on the question of community standards. We pay particular attention to the variation between the civil and criminal sides of the docket, as well as to variation within each side. Bringing together under one roof doctrines and practices from the civil and criminal arenas can illuminate patterns that remain hidden when scholars examine just one area at a time.⁸

We find that courts' acceptance of opinion survey evidence appears to be the most developed in trademark and false advertising litigation. In fact, surveys are so commonly used to identify the likelihood of consumer confusion and deceptive practices that books exist to teach lawyers how to best conduct and use opinion surveys,⁹ and scholars have conducted studies on when surveys have the most impact on case outcomes.¹⁰ In patent and antitrust cases, surveys appear but with less frequency. Courts in those matters assess the underlying methodology and either admit or exclude the evidence by applying the

8. For noteworthy examples of works in this tradition, see generally Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401 (2024) (arguing that the Supreme Court refuses to recognize unconstitutional conditions in criminal procedure issues while embracing the doctrine in First Amendment and Takings cases, thereby disadvantaging criminal litigants whose rights have been abrogated by government statutes and regulations under the guise of consent); and Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501 (2019) (comparing bail proceedings and standards to those used for injunctive relief in civil court, to highlight how criminal defendants receive less favorable treatment than civil litigants at the pretrial stage of the case).

9. See generally TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN (Shari Seidman Diamond & Jerre B. Swann eds., 2d ed. 2022).

10. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1584–87 (2006).

Daubert standard. Judges in some civil cases admit survey evidence even when they identify noticeable defects, inviting the jury to determine how much weight the survey ought to be given. Courts may be applying a relaxed evidentiary standard to compensate for the scarcity of other good evidence of feature valuation.

This kind of openness to community input rarely appears on the criminal side of the docket. Instead, courts handling criminal matters mostly display extreme reluctance (or even hostility) when asked to admit opinion surveys into evidence. In obscenity cases, some courts express an abstract willingness to consider opinion surveys as bearing on contemporary community standards, but far fewer seem willing to actually admit such surveys. Judges instead tend to emphasize flaws in the survey methodology that, in their view, render the findings irrelevant. In death penalty jurisprudence, the U.S. Supreme Court considered opinion surveys relevant to discerning a national standard of decency only once; state supreme courts interpreting their own constitutional punishment provisions show a slightly greater willingness to recognize opinion surveys as bearing on the “standards of decency” question.¹¹ And in Fourth Amendment search questions, there is an unbroken line of Supreme Court jurisprudence that doesn’t even recognize the existence of such surveys,¹² an approach the lower federal courts have reflexively followed.

Part IV presents this Article’s second contribution, as we theorize about why this asymmetry exists. Our objective is to determine whether its source is benign or problematic. We consider a range of possible explanations, including whether there is something fundamentally different about civil and criminal cases when it comes to the legal questions they pose, the stakes they raise, the level of the court hearing the dispute, the point in the litigation at which surveys might be introduced, or the application of evidentiary rules governing expert witness testimony. After concluding that these explanations sit in considerable tension with the language of the opinions and with the features of our civil and criminal legal systems, we interrogate whether a kind of judicial decision-making bias could be the source of this disparity.

Judges appear to rely on their intuition in criminal cases but to slow down and deliberate in civil cases. They see themselves as well-equipped by their legal training and status to decide criminal case issues without outside input, because these issues feel familiar and accessible. Judges hearing civil cases have fewer (if any) moral intuitions about the right outcome, as the salient disputes tend to concern technical or commercial issues. As a result, they are more willing to allow community input to assist them in reaching the right outcome.

11. See *infra* Section III.B.

12. The only sign that opinion surveys exist can be found in Justice Gorsuch’s dissent in *Carpenter v. United States*, as documented in the epigraph. *Carpenter v. United States*, 585 U.S. 296, 393 (2018) (Gorsuch, J., dissenting). Following this quote Justice Gorsuch refers to a survey from 1993 but does not credit it as providing valid information that should guide the Court’s opinion; he uses it instead to support the claim that “judicial judgments often fail to reflect public views.” *Id.*

Put another way, where a judge's moral intuitions are strong, judicial resistance to the community's voice is likewise strong, crowding out deliberation. Where judicial intuitions are weak or absent, judicial reluctance to admit evidence from the community recedes, paving the way for listening and deliberation to advance.

Our recommendations to shore up the place of the community and to reduce the amount of arbitrariness in the criminal docket appear in Part V, serving as the Article's third contribution. We offer specific proposals to increase judicial acceptance of well-crafted opinion surveys in cases where the legal doctrine already calls for community input. In doing so, we situate our work within a larger movement urging courts to embrace the latest science and newly available data to improve the accuracy, fairness, and legitimacy of their decisions. Our recommendations draw specifically on the experimental jurisprudence literature, which emphasizes the value of bringing legal standards and approaches into alignment with those used and understood by the community. We also urge judges and attorneys to develop fluency in empirical methods so that all courtroom actors will feel more comfortable offering and discussing empirical evidence (such as opinion surveys) in the cases they handle.

If adopted, these proposals should encourage and empower judges to embrace the value of objective, carefully collected evidence from the community when it relates to the issues before them. In death penalty and obscenity cases, this change in judicial behavior should increase the frequency and amount of admitted evidence that reflects the community's values, reducing the risk of arbitrary decisions based on a single judge's views. In the Fourth Amendment context, judicial acceptance of empirical studies that highlight the gap between judicial and community perspectives should lead to a broader recognition of certain police actions as searches, which in turn could lead to more frequent suppression of evidence obtained outside the warrant process.

I. OPINION SURVEYS AS EVIDENCE

Many legal issues in both civil and criminal law require the perspectives of ordinary people to resolve. For example, when the legal test asks if a defendant used its mark in a manner that is likely to cause confusion among consumers, the factfinder needs to know how the real people who are potential consumers perceive the mark. When the application of Fourth Amendment search rules hinges on whether police action violated an expectation of privacy that society is prepared to recognize as reasonable, we should consider how society thinks about expectations of privacy. In these and many other instances, legal doctrines expressly rely on the opinions of regular people.

For this reason, some litigants present to the court opinion surveys, conducted by experts, to establish societal or community views on relevant

legal questions.¹³ Opinion surveys are important for two reasons. First, while attorneys can argue to the court what ordinary people think about a question, arguments alone are not evidence. Attorneys must present to the tribunal evidence of the pertinent community standards before they can argue that those standards were either obeyed or violated by a certain person's actions. Second, allowing the judge or jury to assess and report the community's views without evidence introduces unwarranted idiosyncrasy into the litigation process. As stated by one commentator:

If the community standard is truly national in scope, . . . then it is foolish to assume that a single judge or even a panel of twelve jurors drawn from one locality, and limited in their range of exposure, could adequately represent or assess that standard, even assuming that they could rid themselves of their emotional reactions and ingrained personal biases¹⁴

Properly conducted surveys—those that ask careful questions of a large, representative sample of community residents—are thus necessary to capture community views effectively and without bias.¹⁵

Because they offer an efficient and accurate measure of relevant community standards, properly conducted surveys have “flourish[ed] in number and influence”¹⁶ across a range of doctrinal fields. Of course, surveys are simply a form of evidence, and a court should allow or disallow survey evidence based on the same evidentiary rules it uses to assess other types of expert evidence.

13. Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 OR. L. REV. 463, 463 (1991) (“Once scorned as inadmissible hearsay, survey evidence is now not only routinely admitted in many cases, but assigned such high probative value as to be largely determinative of key issues in litigation.”).

14. John M. H. Lamont, *Public Opinion Polls and Survey Evidence in Obscenity Cases*, 15 CRIM. L.Q. 135, 141 (1973). Lamont notes that the California Supreme Court has declared that “[w]e cannot assume that jurors in themselves necessarily express or reflect community standards.” *Id.* (quoting *In re Giannini*, 446 P.2d 535, 543 (Cal. 1968)).

15. Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359, 379 (3d ed. 2011).

16. Becker, *supra* note 13, at 466 (quoting HOWARD SCHUMAN & STANLEY PRESSER, QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS: EXPERIMENTS ON QUESTION FORM, WORDING, AND CONTEXT 1 (1981) (noting that the expansion in the use of survey evidence stems from surveys’ “extremely efficient method of obtaining information from people by asking questions; and modern random sampling procedures that allow a relatively small number of such people to represent a much larger population”)).

A. SALIENT EVIDENTIARY RULES

Surveys must overcome two sets of hurdles before they are admitted into evidence in federal (or state) court.¹⁷ First, the survey must satisfy the evidentiary standards common to all types of evidence: relevance and probative value.¹⁸ Federal Rule of Evidence 401 requires that the survey be *relevant* to an issue in dispute, which means it is more likely to make (even if only slightly) a fact at issue true or false.¹⁹ But Rule 403 allows a judge to “exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusion of the issues, or misleading the jury.”²⁰

Second, survey evidence must satisfy tests specific to expert witness evidence. Federal Rule of Evidence 702 governs the use of expert testimony.²¹ Much like Rule 401, Rule 702 has a relevance requirement: It requires that the expert’s knowledge “help the trier of fact to understand the evidence or to determine a fact in issue.”²² More importantly, Rule 702 contains a rigor requirement, which presumably filters out “junk science.”²³ The expert testimony must be “the product of reliable principles and methods” and must also reflect “a reliable application of the principles and methods to the facts of the case.”²⁴

The modern rigor requirement can be traced to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁵ In that case, the Supreme Court interpreted an earlier version of Rule 702 to require that the methodology underlying any expert testimony must be “scientifically valid.”²⁶ Although the Court did not provide a definitive test, it discussed several factors that inform this inquiry: (1) whether a given approach “can be (and has been) tested”; (2) “whether it has been subjected to peer review and publication”; (3) what the potential error rate

17. Although surveys are introduced in both federal and state courts, for simplicity’s sake this Section discusses only the Federal Rules of Evidence. States have their own evidence codes to govern litigation in state courts, but many states have adopted at least some of the Federal Rules of Evidence’s provisions as their own state-based evidentiary rules. See, e.g., Paul S. Milich, *Georgia’s New Evidence Code – An Overview*, 28 GA. ST. U. L. REV. 379, 384 (2012) (explaining that Georgia’s new evidence “rules are based on the Federal Rules of Evidence”).

18. See FED. R. EVID. 401; FED. R. EVID. 403.

19. FED. R. EVID. 401.

20. FED. R. EVID. 403.

21. FED. R. EVID. 702.

22. FED. R. EVID. 702(a).

23. Maneka Sinha, *Radically Reimagining Forensic Evidence*, 73 ALA. L. REV. 879, 910 (2022).

24. FED. R. EVID. 702(c), (d) (as amended in 2023).

25. FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

26. *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 591–93 (1993). *Daubert* governs the admissibility of expert witness testimony in twenty-seven states as well as in the federal courts. Five states use the rule adopted in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Four use a hybrid of *Daubert* and *Frye* or a modified kind of *Daubert* test. The remaining fifteen use some other approach specific to their state. An Appendix showing the standard adopted by each state is available upon request.

might be; and (4) whether the method has “general acceptance.”²⁷ In short, under Rule 702, the trial judge must “ensure[] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”²⁸

As a procedural matter, attorneys often present survey evidence that was specifically prepared by an expert for litigation. That is, litigants hire experts to collect and analyze community opinions about the particular matter pending before the court and then offer the survey results as evidence in support of their claim. We think of these as “bespoke” surveys. In other cases, attorneys may offer pre-existing surveys—those prepared apart from any specific litigation, usually by academics for academic publications. These kinds of “third-party surveys”²⁹ can be introduced by experts or simply be included in a party’s (or amicus) briefs.

B. SCIENTIFICALLY VALID SURVEYS

Attorneys must take care to present high-quality surveys to the court, because only valid surveys provide useful evidence in litigation. A large and growing literature examines survey validity, including books and articles that explain how to create a survey that will survive judicial scrutiny.³⁰ Professor Shari Seidman Diamond’s *Reference Guide on Survey Research* is one notable example; it is part of a book on scientific evidence that was sponsored by the Federal Judicial Center, for which federal judges (not just attorneys) are the intended audience.³¹

According to these standards, a survey researcher must first identify the appropriate population (the “universe”) and target a sample that approximates that universe.³² If the objective of a survey is to learn about consumer preferences for certain products or certain product features,³³ for example, the universe consists of consumers who might be in the market for the relevant products. People who would never or only rarely shop for the relevant products fall

27. *Daubert*, 509 U.S. at 593–94.

28. *Id.* at 597.

29. See Hana Dai, Peter Hess & Jacob Judd, *The Use of Third-Party Surveys in Litigation*, IP WATCHDOG (July 3, 2023, 7:15 AM), <https://ipwatchdog.com/2023/07/03/use-third-party-surveys-litigation> [<https://perma.cc/SG29-7WM3>].

30. See generally TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN, *supra* note 9; Adriana Z. Robertson & Albert H. Yoon, *You Get What You Pay for: An Empirical Examination of the Use of MTurk in Legal Scholarship*, 72 VAND. L. REV. 1633 (2019) (examining best practices for online surveys); JACOB JACOBY, TRADEMARK SURVEYS: DESIGNING, IMPLEMENTING, AND EVALUATING SURVEYS (2013); Irina D. Manta, *In Search of Validity: A New Model for the Content and Procedural Treatment of Trademark Infringement Surveys*, 24 CARDOZO ARTS & ENT. L.J. 1027 (2007).

31. Diamond, *supra* note 15, at 359.

32. *Id.* at 376.

33. See discussion of surveys in patent and antitrust cases *infra* Sections II.B–C.

outside the universe and should not be included in the sample.³⁴ Moreover, the survey respondents need to form a representative sample of the universe³⁵—selecting respondents who all hail from one town or city might not generate a valid survey of statewide or nationwide opinion, for instance.³⁶ Once a representative sample is obtained, social scientists look for “the ‘average’ level of agreement or disagreement” with questions they ask of respondents.³⁷

Turning to the questions that form the core of the survey, the survey researcher should design a survey stimulus that is realistic and as accurate as possible.³⁸ In an obscenity case, for example, many courts have held that participants need to view the actual contested images in order to provide a relevant opinion about whether the community standard for sexual content has been transgressed by the defendant’s materials.³⁹ Surveys that merely describe the images through words, or that offer generic references to sex and nudity, have been found insufficient to document community standards.⁴⁰ Photographs have also been important to trademark infringement lawsuits, where the alleged infringement of the plaintiff’s mark occurs through a visual image created by the defendant, rather than through words.⁴¹

Next, the survey questions themselves must survive scrutiny. Survey questions must be clear and precise,⁴² free of unduly complex jargon, and expressed in language that the participants can understand. Surveys should allow respondents to indicate that they “don’t know” or have “no opinion” in response to each question.⁴³ Without this option, participants may be forced to guess, which decreases the reliability of the survey results. Questions also

34. See, e.g., *Kwan Software Eng’g, Inc. v. Foray Techs., LLC*, 110 U.S.P.Q.2d 1637, 1642 (N.D. Cal. 2014) (excluding a survey because the respondents were not properly representative).

35. See Daniel Linz et al., *Estimating Community Standards: The Use of Social Science Evidence in an Obscenity Prosecution*, 55 PUB. OP. Q. 80, 103 (1991); Kate Williams, *Representative Sample: Types, Methods and Best Practices*, SURVEYSPARROW (Sept. 19, 2025), <https://surveysparrow.com/blog/representative-sample> [<https://perma.cc/F2Z5-G6BZ>].

36. See, e.g., *Commonwealth v. Trainor*, 374 N.E.2d 1216, 1222 (Mass. 1978) (asserting that a survey of two hundred Boston residents is not an acceptable way to document statewide Massachusetts standards).

37. Linz et al., *supra* note 35, at 104.

38. See *Diamond*, *supra* note 15, at 378–79; *Manta*, *supra* note 30, at 1066–67.

39. See, e.g., *State v. Midwest Pride IV, Inc.*, 721 N.E.2d 458, 467 (Ohio Ct. App. 1998); *Flynt v. State*, 264 S.E.2d 669, 672 (Ga. Ct. App. 1980).

40. See, e.g., *United States v. Pryba*, 900 F.2d 748, 757 (4th Cir. 1990); *County of Kenosha v. C & S Mgmt., Inc.*, 588 N.W.2d 236, 254 (Wis. 1999).

41. See generally *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023) (holding that a dog toy in the shape of a Jack Daniel’s bottle infringed the Jack Daniel’s trademark).

42. *Manta*, *supra* note 30, at 1068–69.

43. *Diamond*, *supra* note 15, at 390.

should not be leading.⁴⁴ A question that includes a dollar value may cause participants to frame their answers with that value in mind, for instance.⁴⁵

Finally, researchers conducting surveys over the internet must be attuned to problems generated by (and best practices designed for) that format. For example, internet participants are known to speed through questions, clicking through answers at random—this generates unreliable results. Research has found that participants provide better answers when they are reasonably compensated⁴⁶ and that attention-check questions can help identify respondents who are not taking the survey seriously. In addition, researchers may want to use tracking cookies to avoid multiple submissions by the same person.⁴⁷ Because bots have become a significant problem for online surveys, researchers should adopt strategies such as CAPTCHA to combat them.⁴⁸ A CAPTCHA is a test designed to distinguish human users from automated bots by requiring tasks that are easy for people but difficult for machines.

These quality control issues apply to bespoke surveys as well as to third-party surveys. In fact, most surveys found in peer-reviewed academic journals should easily satisfy these standards, as the peer-review process is considered an indication of rigor. Under *Daubert*, a survey that was both published and subject to peer review should meet the test for scientific validity.⁴⁹

The preceding paragraphs have described a few of the ways courts can determine whether a survey has been conducted in a scientifically valid manner. The literature on surveys discusses additional problems and solutions, but space constraints prevent us from examining them here. Our larger point is that surveys are a generally well-accepted part of social science, and the criteria for assessing whether a given survey should be admissible are well known. Nonetheless, as Parts II and III below demonstrate, courts do not apply these well-known standards in a consistent manner. Puzzlingly, courts across the United States are much more accepting of opinion survey evidence in the civil docket than in the criminal docket, despite legal doctrines that point

44. David T. Neal, *Psychological Considerations in Designing Trademark and False Advertising Survey Questionnaires*, in TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS, *supra* note 9, at 273, 287.

45. Victor Champonnois, Olivier Chanel & Khaled Makhoulfi, *Reducing the Anchoring Bias in Multiple Question CV Surveys*, 28 J. CHOICE MODELLING 1, 8 (2018).

46. See Robertson & Yoon, *supra* note 30, at 1646, 1654–59 (comparing how respondents performed when paid below or above the Amazon Mechanical Turk rate of six dollars per hour).

47. See Reg Baker et al., *Research Synthesis: AAPOR Report on Online Panels*, 74 PUB. OP. Q. 711, 756 (2010).

48. See, e.g., Yanfeng Xu et al., *Threats to Online Surveys: Recognizing, Detecting, and Preventing Survey Bots*, 46 SOC. WORK RSCH. 343, 345 (2022).

49. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993) (noting peer review “increases the likelihood that substantive flaws in methodology will be detected”); *id.* at 594 (“The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration . . .”).

to the relevance of survey evidence in many different areas of law. We take up that puzzle in Part IV.

II. OPINION SURVEYS IN THE CIVIL DOCKET

We examine three types of cases in the civil docket to gauge courts' acceptance of opinion surveys: trademark and false advertising cases, patent cases, and antitrust cases. In each of these doctrinal areas, consumer opinions about trade practices are potentially relevant to help establish liability or damages, and surveys are a useful tool to capture those opinions.

Surveys are commonly accepted in trademark and false advertising cases brought under the Lanham Act;⁵⁰ their commonplace usage has even given rise to numerous studies about how they are used and with what impact.⁵¹ Although surveys are less commonly found in patent and antitrust litigation, experts in patent and antitrust matters sometimes use survey evidence when other types of evidence are unavailable. Because surveys in patent and antitrust law look at consumer decisions, they bear some resemblance to the surveys used in trademark and false advertising cases. But unlike their Lanham Act counterparts, patent and antitrust surveys are not seeking to test consumer confusion; instead, they ask consumers what purchasing decisions they would have made if the market had different options or if the defendant's product had different features.

A. TRADEMARK AND FALSE ADVERTISING LAW

Section 43 of the Lanham Act covers both trademark infringement and false advertising claims.⁵² The statute authorizes three types of lawsuits. First, trademark owners can bring lawsuits against those who falsely portray the origin of a product or service, which is the primary basis of trademark infringement.⁵³ For example, McDonald's might argue that McDowell's hamburger restaurant, which sells the Big Mick sandwich, is infringing on McDonald's Big Mac trademark.⁵⁴

Second, the statute allows for lawsuits based on a lesser-known part of trademark law: dilution.⁵⁵ Dilution occurs when someone damages a famous trademark either by making it less distinctive (blurring) or by harming the

50. See Lanham Act, 15 U.S.C. §§ 1051–1127 (2018).

51. The field does not specifically call these surveys “opinion surveys,” but they do capture consumer opinions and preferences about certain products. Given the field's usage of the unmodified term “survey,” in this Section of the Article we simply use the word “survey” to describe the evidence under consideration.

52. 15 U.S.C. § 1125(a)(1). There are also overlapping state laws that this Article does not address.

53. *Id.*

54. This example is taken from the Eddie Murphy movie, *COMING TO AMERICA* (Paramount Pictures 1988).

55. 15 U.S.C. § 1125(c).

mark's reputation (tarnishment).⁵⁶ Tarnishment occurred when Victor's Little Secret sold lingerie, adult novelties, and gifts from a store in Fort Knox, Kentucky.⁵⁷ Although there was little risk of consumer confusion, the national lingerie retailer Victoria's Secret successfully sued for dilution by arguing that the defendant was harming its good name.⁵⁸

Third, a person can bring a lawsuit against an entity that makes false or misleading descriptions of a product or service (false advertising).⁵⁹ Although opinion surveys of consumers are usually not necessary for undeniably false descriptions, surveys can be useful when the focus is on allegedly misleading statements. For example, Kellogg's was sued for falsely labeling certain cereal products as "heart healthy" or "lightly sweetened"⁶⁰ when their ingredients arguably did not match those descriptions.

Although the various Lanham Act claims have slightly different elements, they all require the plaintiff to prove how consumers are likely to react (or do react) to the accused's conduct. To make this proof, attorneys often use opinion surveys to help determine: (1) likelihood of confusion; (2) secondary meaning; (3) genericness; and (4) the deceptive nature of advertisements.

In a survey about surveys, Professors David Franklyn and Shari Diamond asked trademark and false advertising attorneys to identify what topics were addressed by the survey they most recently used in a case.⁶¹ Attorneys could identify more than one topic. The results showed that attorneys used opinion survey evidence to get information about five primary topics. First, 81.25 percent of attorneys identified the likelihood of confusion as a topic of their most recent survey.⁶² Second, 33.3 percent of attorneys used surveys to gauge secondary meaning.⁶³ A trademark has secondary meaning when it is identified with a particular product or service; trademarks that are not inherently distinctive need secondary meaning to be valid.⁶⁴ Third, 19.8 percent of attorneys identified dilution issues, including fame and association, as covered by their most recent survey.⁶⁵ Fourth, 18.7 percent of attorneys asked survey questions about genericism.⁶⁶ A generic mark is one that identifies an entire

56. *Id.*

57. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 434 (2003).

58. Meaghan Annett, *When Trademark Law Met Constitutional Law: How a Commercial Speech Theory Can Save the Lanham Act*, 61 B.C. L. REV. 253, 270 n.112 (2020).

59. 15 U.S.C. § 1125.

60. *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1097-98 (N.D. Cal. 2018). The plaintiff's lawyers used a conjoint analysis survey to establish damages. *Id.* at 1103-06.

61. Shari Seidman Diamond & David J. Franklyn, *Trademark Surveys: An Undulating Path*, 92 TEX. L. REV. 2029, 2056 (2014).

62. *Id.*

63. *Id.* at 2057.

64. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992).

65. Diamond & Franklyn, *supra* note 61, at 2057.

66. *Id.*

category of goods as opposed to the goods from one source (*e.g.*, Aspirin);⁶⁷ if a mark is generic, it cannot serve as a trademark. Finally, 15.6 percent of attorneys indicated they used surveys to identify deceptive advertising.⁶⁸ These findings underscore that surveys play a central evidentiary role across a broad spectrum of trademark and false advertising issues.

Opinion surveys are so common in this field that entire books are devoted to the use of this tool by trademark and false advertising lawyers,⁶⁹ and researchers have studied the use and impact of surveys on litigation. These studies document a surprisingly large variation in the frequency of use. Professor Graeme Austin looked at trademark infringement cases from May 1993 to May 2003 that went to final judgment (including those that sought interim injunctions) and found that opinion survey evidence was involved in 57.4 percent of these cases.⁷⁰ Professor Barton Beebe found far less frequent discussion of surveys in trademark cases⁷¹: In his study of 331 reported district court trademark opinions between 2000 and 2004 that made “substantial use” of the multifactor test to gauge the likelihood of confusion,⁷² only twenty percent discussed survey evidence.⁷³ A later study by Professors Dan Sarel and Howard Marmorstein landed somewhere between Austin and Beebe.⁷⁴ Sarel and Marmorstein looked at U.S. District Court cases that were tried and resolved between 2001 and 2006,⁷⁵ where the plaintiff possessed an undisputedly valid trademark and likelihood of confusion was the central issue. The study found that the plaintiff introduced a survey in 34.1 percent of these cases.⁷⁶ Finally, Professors Robert Bird and Joel Steckel extended Beebe’s study by adding 202 cases from 2005 to 2006 to the Beebe dataset.⁷⁷ The new study found survey evidence discussed in only 16.6 percent of decisions.⁷⁸

The large range of results may be explained, in part, by the different criteria the researchers used to define their respective samples. Moreover, all of these studies examined court decisions where a specific ruling about the

67. U.S. Pat. & Trademark Off. v. Booking.com B.V., 591 U.S. 549, 566–68 (2020) (Breyer, J., dissenting).

68. Diamond & Franklyn, *supra* note 61, at 2057.

69. See generally TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN, *supra* note 9; JACOBY, *supra* note 30.

70. Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 867 (2004).

71. Beebe, *supra* note 10, at 1584–85.

72. *Id.* at 1584.

73. *Id.* at 1641.

74. See Dan Sarel & Howard Marmorstein, *The Effect of Consumer Surveys and Actual Confusion Evidence in Trademark Litigation: An Empirical Assessment*, 99 TRADEMARK REP. 1416, 1418–22 (2009).

75. *Id.* at 1417.

76. *Id.* at 1431. The authors did not determine how often defendants introduced surveys.

77. Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013, 1029–30 (2012).

78. *Id.* at 1035.

survey was included and thus overlooked cases where surveys were used but not mentioned in the opinion, as well as cases that settled or were dismissed before any written opinion was issued. Even so, the use of surveys was not as frequent as one might expect. This might be because surveys tend to be employed only in closely contested cases⁷⁹: When the issues are clear-cut, parties may not want to expend the money to conduct a survey.

Although the data discussed above gives some insight into how frequently parties attempt to use opinion surveys in Lanham Act litigation, other studies shed light on how courts perceive this evidence when the parties introduce it. Professor Kenneth Plevan examined reported decisions between 1997 and 2004 in which a party sought to exclude opinion survey evidence.⁸⁰ The study found that surveys were admitted in just over two-thirds of the cases.⁸¹ But admissibility did not automatically signal influence; when survey evidence was admitted, the court either “discounted or accorded little weight” to the survey in twenty-two percent of the cases, Austin found.⁸² Beebe likewise found that survey evidence, even when admitted, didn’t always have a significant impact: only thirty-four opinions that discussed survey evidence (ten percent of his sample) “credited” that evidence.⁸³ Because Beebe was primarily interested in what types of evidence affected the likelihood of confusion determinations, Beebe used the term “credited” to suggest that the court explicitly considered the survey in its analysis.⁸⁴ The rough consensus appears to be that courts will both admit and credit survey evidence in a majority of the trademark cases in which it is offered, but this trend is not universal.

In short, courts hearing Lanham Act cases often accept and sometimes give weight to opinion survey evidence, but they do not always require parties to produce it. This conclusion is supported by the language the courts use when describing survey evidence. Some courts clearly expect survey evidence on a range of different issues. A few decisions even suggest that when the plaintiff has the financial means to conduct a survey and does not, it creates an adverse inference that the results would have been unfavorable.⁸⁵ For example, the

79. *Diamond & Franklyn*, *supra* note 61, at 2045.

80. Kenneth A. Plevan, *Daubert’s Impact on Survey Experts in Lanham Act Litigation*, 95 TRADEMARK REP. 596, 596 (2005).

81. *See id.*

82. Austin, *supra* note 70, at 867 (“[S]urvey evidence (S.E.) is before the court around 57.4 percent of the time. Of that 57.4 percent, however, survey evidence is discounted or accorded little weight in around 22.2 percent of cases.”).

83. Beebe, *supra* note 10, at 1641.

84. *See id.* at 1640–41.

85. *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 475 (3d Cir. 1990) (“Similarly, a plaintiff’s failure to conduct such a survey where it has the financial resources to do so, could lead a jury to infer that the plaintiff believes the results of the survey will be unfavorable.”); *Eagle Snacks, Inc. v. Nabisco Brands, Inc.*, 625 F. Supp. 571, 583 (D.N.J. 1985) (“Failure of a trademark owner to run a survey to support its claims of brand significance and/or likelihood of confusion, where it has the financial means of doing so, may give rise to the

Second Circuit once said that “the lack of survey evidence counts against finding actual confusion.”⁸⁶ At the same time, many opinions have said that surveys are not necessary.⁸⁷

Although surveys are not ubiquitous, courts in trademark and false advertising cases welcome survey evidence and treat it seriously. Surveys are admitted as evidence on a variety of topics. As should be the case for all types of scientific evidence, courts allow survey evidence when sound methods are used and the results are relevant to a disputed issue.

B. PATENT LAW

Attorneys use surveys to illuminate various issues in patent law. Basic surveys can help to establish the extent of infringement, for example. In cases involving multicomponent products, parties have employed consumer surveys to isolate the value of an infringing feature and apportion damages. In both situations, federal courts have allowed experts to introduce the results of the survey so long as they satisfy the standards of reliability set forth in Federal Rule of Evidence 702 as interpreted by *Daubert*.⁸⁸ We focus here on the consumer surveys, as they are the closest analog to the opinion surveys discussed in the other sections.

Surveys of consumers are used in patent litigation to help apportion damages in multicomponent patent cases. When a court calculates reasonable royalties, it will award a patentee only those royalties attributable to the infringing feature.⁸⁹ To make this determination, parties must identify the value that a single infringing feature contributes to a product (e.g., how much value does FaceTime add to the value of Apple iOS products?).⁹⁰ This is a particularly difficult problem with modern technology products that contain thousands of distinct features, as smartphones do.⁹¹ In the real world, a defendant typically only sells products with the infringing feature and cannot isolate it. Therefore, factfinders cannot compare the price or profitability of

inference that the contents of the survey would be unfavorable”); *see also* M & G Elecs. Sales Corp. v. Sony Kabushiki Kaisha, 250 F. Supp. 2d 91, 104 (E.D.N.Y. 2003) (affirming the Magistrate’s decision to draw an adverse inference based on lack of both survey evidence and customer testimony).

86. Merriam-Webster, Inc. v. Random House, Inc., 35 F.3d 65, 72 (2d Cir. 1994).

87. *E.g.*, Swagway, LLC v. Int’l Trade Comm’n, 923 F.3d 1349, 1356 (Fed. Cir.) (“Consumer survey evidence is not required to show a likelihood of confusion.”), *opinion modified and superseded on reh’g*, 934 F.3d 1332 (Fed. Cir.), *and reh’g granted, opinion withdrawn*, 775 F. App’x 698 (Fed. Cir. 2019); Tools USA & Equip. Co. v. Champ Frame Straightening Equip. Inc., 87 F.3d 654, 661 (4th Cir. 1996) (same); Woodsmith Pub. Co. v. Meredith Corp., 904 F.2d 1244, 1249 (8th Cir. 1990) (same); Bos. Athletic Ass’n v. Sullivan, 867 F.2d 22, 31 n.9 (1st Cir. 1989) (same); Int’l Kennel Club of Chi., Inc. v. Mighty Star, Inc., 846 F.2d 1079, 1086 (7th Cir. 1988) (same).

88. *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589–94 (1993).

89. *See* Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1226–27 (Fed. Cir. 2014).

90. *See, e.g.*, Virtnetx, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1325–26 (Fed. Cir. 2014).

91. PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARD A GLOBAL CONSENSUS 1 (C. Bradford Biddle, Jorge L. Contreras, Brian J. Love & Norman V. Siebrasse, eds. 2019).

a product with and without the feature in question. Moreover, most businesses have little practical reason to value a single feature. Even if they were motivated to answer that question, the task is challenging.

A survey can take the direct route, asking consumers how much they value a particular feature in order to provide a gauge for damages. The patentee conducted this type of survey in *Droplets, Inc. v. Yahoo!*.⁹² Its expert relied on a survey that asked respondents who used the infringing features “how much they valued them and whether they would search or spend ‘more,’ ‘the same amount,’ or ‘less’ without the feature.”⁹³ The defendants objected to the survey on numerous grounds, including that the survey: (1) “did not include controls”; (2) “did not include an ‘I don’t know option’”; and (3) “used 2020 survey responses” to respond to issues that arose in 2005.⁹⁴ Despite these concerns, the court allowed the survey, saying that the objections went “to survey methodology, not overall compliance with accepted principles.”⁹⁵ The court also suggested that the deficiencies could be addressed in cross-examination and then evaluated by the jury.⁹⁶

Even though the *Droplets* survey overcame the defendants’ objections, asking respondents direct questions about an infringing feature can be problematic. For a variety of psychological reasons, respondents tend to inflate their valuations when their attention is directed to a single feature.⁹⁷ To address these concerns, experts have turned to conjoint analysis, a sophisticated survey technique that seeks to reveal consumer preferences indirectly. Conjoint analysis has been widely used in marketing research for years but is relatively new to the law.⁹⁸ In a typical conjoint analysis survey, a combination of features together with a product’s price are systematically varied.⁹⁹ One of the features included in the survey is the infringing feature. Respondents identify which

92. *Droplets, Inc. v. Yahoo! Inc.*, No. 12-cv-03733, 2021 WL 9038355, at *1–2 (N.D. Cal. Aug. 9, 2021).

93. *Id.* at *2.

94. *Id.* at *10.

95. *Id.*

96. *Id.*

97. Kaat de Corte, John Cairns & Richard Grieve, *Stated Versus Revealed Preferences: An Approach to Reduce Bias*, 30 HEALTH ECON. 1095, 1096 (2021) (“The general literature comparing stated and revealed preferences (RP) has found that individuals tend to overstate their valuation of a particular good, service or outcome, which can lead to misleading estimates of relative value.” (citation omitted)).

98. BRYAN K. ORME, GETTING STARTED WITH CONJOINT ANALYSIS: STRATEGIES FOR PRODUCT DESIGN AND PRICING RESEARCH 5 (4th ed. 2019) (“Today, thousands of conjoint studies are conducted each year over the Internet, via hand-held and mobile technologies, or using person-to-person interviews.”).

99. See Bernard Chao & Sydney Donovan, *Does Conjoint Analysis Reliably Value Patents?*, 58 AM. BUS. L.J. 225, 233, 239 (2021) (describing how a conjoint analysis survey isolates the value of patented feature); Suneal Bedi & David Reibstein, *Damaged Damages: Errors in Patent and False Advertising Litigation*, 73 ALA. L. REV. 385, 405–09 (2021).

product profiles they would prefer. With enough data, a statistician can calculate values for each of the separate features based on these responses.

Although conjoint analysis surveys in patent law are still relatively uncommon, they are occasionally used in high-value multicomponent cases. For example, in *Estech Systems IP, LLC v. Mitel Networks, Inc.*, the patentee introduced a conjoint analysis survey to establish how much consumers valued five different patented features of a Voiceover IP service.¹⁰⁰ The defendant raised two objections. First, Mitel argued that the survey failed to question appropriate respondents, namely the service providers who purchased the kinds of products at issue.¹⁰¹ The survey instead asked questions of the customers of the service providers.¹⁰² Second, Mitel argued that the survey did not sufficiently relate to any issues of fact the jury would be asked to resolve.¹⁰³ The first objection seemed particularly problematic. Experts and courts have warned that a survey of respondents who do not substantially reflect the characteristics of the relevant population warrants exclusion.¹⁰⁴ Nonetheless, the court allowed the survey to be admitted, saying that “[t]here may be questions regarding the correctness of [the expert’s] methodology and the results from his conjoint study, but assessments as to credibility and correctness are for the factfinder, not the Court.”¹⁰⁵

This relatively lenient application of *Daubert* appears to be a recurrent pattern when it comes to conjoint analysis surveys in patent law. Numerous judges have allowed conjoint surveys to be introduced as evidence in patent cases,¹⁰⁶ despite acknowledged problems with the survey methodology. In these instances, the judge allowed the jury to determine how much weight to give the evidence.¹⁰⁷ According to William Lee and Professor Mark Lemley,

100. *Estech Sys. IP, LLC v. Mitel Networks, Inc.*, No. 21-cv-00473, 2023 WL 4588813, at *2 (E.D. Tex. July 18, 2023) (order denying Plaintiff’s motion to exclude); *see also* *Microsoft Corp. v. Motorola, Inc.*, 904 F. Supp. 2d 1109, 1119 (W.D. Wash. 2012) (order denying motion to exclude) (admitted for “the purpose of understanding usage and valuation of certain features offered in [the] Xbox 360 console”).

101. *Estech Sys. IP, LLC*, 2023 WL 4588813, at *2.

102. *Id.*

103. *Id.*

104. *Kwan Software Eng’g, Inc. v. Foray Techs., LLC*, No. 12-03762, 2014 WL 572290, at *4–5 (N.D. Cal. Feb. 11, 2014).

105. *Estech Sys. IP, LLC*, 2023 WL 4588813, at *3.

106. *See, e.g., Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 12-cv-00630, 2014 WL 794328, at *23 (N.D. Cal. Feb. 25, 2014) (order granting in part and denying in part motions to exclude certain expert opinions).

107. *See* *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1026 (N.D. Cal. 2013) (allowing conjoint analysis survey and suggesting that the dispute over admissibility was “a classic example of the ‘battle of the experts’ for the jury to decide”); *Odyssey Wireless, Inc. v. Apple Inc.*, No. 15-cv-01735, 2016 WL 7644790, at *9 (S.D. Cal. Sept. 14, 2016) (order denying without prejudice Defendants’ *Daubert* motion to exclude) (“[C]hallenges to the reliability, methodology, or design of a survey ‘go to the weight of the survey rather than its admissibility.’” (quoting *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001))). We can observe a similar pattern in trademark, where courts admit imperfect surveys that still add value. *See* *Indianapolis*

courts acting in this fashion are not fulfilling their “gatekeeping function.”¹⁰⁸ Whatever the merits of this critique, courts may be taking a particularly lenient approach to surveys in patent litigation because sound alternative evidence on patent valuation is not available.¹⁰⁹ To be sure, some courts have gone the other way, excluding surveys that lack methodological rigor.¹¹⁰ In sum, judges in patent cases allow well-crafted surveys to be admitted as evidence and sometimes even allow surveys with methodological weaknesses to be considered by the jury.

C. ANTITRUST LAW

Surveys are among the many econometric tools found in antitrust cases. At its core, antitrust law seeks to prevent companies from harming competition by abusing monopoly power.¹¹¹ These issues can arise in a variety of different contexts. For instance, the Federal Trade Commission and the Department of Justice can prevent mergers.¹¹² They can also prosecute companies for violating antitrust laws.¹¹³ Companies can sue other companies for engaging in anticompetitive conduct.¹¹⁴ Consumers can bring class action antitrust lawsuits.¹¹⁵ Numerous empirical questions arise in each of these contexts. For example, what is the relevant market? Does a company have market power? How has specific conduct affected prices or the availability of other products?

Colts, Inc. v. Metro. Balt. Football Club Ltd. P’ship, 34 F.3d 410, 416 (7th Cir. 1994) (holding that trial court did not commit error by admitting the imperfect survey, because “[t]rials would be very short if only perfect evidence were admissible”).

108. William F. Lee & Mark A. Lemley, *The Broken Balance: How “Built-In Apportionment” and the Failure to Apply Daubert Have Distorted Patent Infringement Damages*, 37 HARV. J.L. & TECH. 255, 264 (2024).

109. Chao & Donovan, *supra* note 99, at 226–27 (discussing the various crude methods currently used to value a single infringing feature in a complex device).

110. Visteon Glob. Techs., Inc. v. Garmin Int’l, Inc., No. 10-cv-10578, 2016 WL 5956325, at *17 (E.D. Mich. Oct. 14, 2016) (granting motion to exclude expert’s conjoint analysis survey); Oracle Am., Inc. v. Google, Inc., No. C 10-03561, 2012 WL 850705, at *9–11 (N.D. Cal. Mar. 13, 2012) (striking a conjoint analysis report that valued both patented and copyrighted features); Apple, Inc. v. Motorola, Inc., No. 11-cv-08540, 2012 WL 1959560, at *5 (N.D. Ill. May 22, 2012), *rev’d*, 757 F.3d 1286 (Fed. Cir. 2014), *overruled in part by* Williamson v. Citrix Online, LLC, 792 F.3d 1339 (Fed. Cir. 2015). Sitting by designation in the district court, Judge Posner excluded expert testimony that relied on consumer surveys. Much of Posner’s decision was later reversed, but this part of the decision was not appealed. *Id.*

111. United States v. Topco Assocs., 405 U.S. 596, 610 (1972) (stating that antitrust laws “guarantee[] each and every business . . . the freedom to compete”).

112. Clayton Act § 7, 15 U.S.C. § 18; *see also* U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES 1 (2023) [hereinafter MERGER GUIDELINES], <https://www.justice.gov/dg/2023-12/2023%20Merger%20Guidelines.pdf> [<https://perma.cc/M8CH-5PUD>] (explaining that the Department of Justice and Federal Trade Commission “enforce the federal antitrust laws”).

113. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 221–22 (2025) (discussing the overlapping jurisdiction of the Department of Justice and Federal Trade Commission).

114. Clayton Act § 4(a), 15 U.S.C. § 15(a).

115. *See, e.g., In re Asacol Antitrust Litig.*, 907 F.3d 42, 44–45 (1st Cir. 2018).

Although economists like to use market data to answer these questions, that data may not always exist. Consumer surveys can supply the missing information, especially when courts are tasked with answering hypothetical questions (e.g., what would have happened “but for” the accused’s conduct?). Experts rely on both simple surveys and conjoint analysis to inform their analyses in antitrust cases.

For example, “consumer-survey responses [can be used] to determine whether a hypothetical monopolist could profitably impose a Small, Significant, Non-transitory Increase in Price [(“SSNIP”)] above a competitive level.”¹¹⁶ The SSNIP test is frequently used to determine one of antitrust laws most critical issues, the relevant geographic or product market.¹¹⁷ The SSNIP test has been explained as follows:

[A]n economist proposes a narrow geographic and product market definition and then iteratively expands that definition until a hypothetical monopolist in the proposed market would be able to profitably make a small but significant non-transitory increase in price (“SSNIP”). At each step, if consumers would respond to a SSNIP by making purchases outside the proposed market definition, thereby rendering the SSNIP unprofitable, then the proposed market definition is too narrow. At the next step, the economist expands the proposed geographic or product market definition to include the substituted products or area. This process is repeated until a SSNIP in the proposed market is predicted to be profitable for the hypothetical monopolist.¹¹⁸

In some cases, survey data are used to help experts gather information for the SSNIP test.¹¹⁹

Antitrust litigants sometimes also introduce conjoint analysis.¹²⁰ Although conjoint analysis in patent law is typically employed to value individual features in products, the methodology has a larger range of uses in antitrust cases. Conjoint analysis can be used to “assess product substitution patterns or the competitive advantages conferred by particular product features, which may be relevant to analyzing the ultimate liability and damages issues in the

116. *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 975 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024) (mem.).

117. MERGER GUIDELINES, *supra* note 112, at 40–42.

118. *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 482 n.1 (9th Cir. 2021).

119. *Fed. Trade Comm’n v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 920 (N.D. Cal. 2023) (discussing how an expert used the results of a Qualtrics survey to determine that virtual reality fitness apps constituted a relevant market).

120. Daniel L. Rubinfeld, *Quantitative Methods in Antitrust*, in 1 ISSUES IN COMPETITION LAW AND POLICY 723, 735 (Wayne Dale Collins & Joseph England eds., 2008) (saying the use of conjoint analysis in antitrust cases remains rare).

case.”¹²¹ Consider *Discover Financial Services v. Visa USA*, where Discover Bank alleged that Visa and Mastercard violated various antitrust laws by not allowing member banks to issue Discover Cards.¹²² A conjoint analysis survey was conducted to help assess how consumers value products that banks would have offered but for the defendants’ restrictions.¹²³

It is not only private parties who rely on conjoint surveys in antitrust cases; the U.S. government has at times relied on this approach too. For example, the Antitrust Division of the Department of Justice used a conjoint analysis survey to help obtain a divestiture order against various Colorado ski resorts.¹²⁴ And in *United States v. Dentsply International*, the government tried to introduce a conjoint analysis survey against a manufacturer of prefabricated teeth.¹²⁵ The district court found numerous methodological problems with the survey, though, including low response rates, confusing questions, the failure to calculate standard errors, and arbitrarily changed parameters in the data analysis.¹²⁶ Troubled by these numerous shortcomings, the court ruled the survey inadmissible.¹²⁷

In sum, courts in a variety of civil litigation settings admit surveys to document consumer preferences and opinions. The use of surveys is most well-developed in litigation brought under the Lanham Act; in these cases, surveys provide accessible information about topics like consumer confusion and deceptive advertising. In patent law and antitrust litigation, courts admit surveys that help gauge consumer preferences and valuations. Courts assess the survey’s methodology by applying the *Daubert* standard and tend to admit surveys that meet the basic requirements for validity, allowing the jury to decide how much weight the survey deserves. We keep these examples in mind as we shift our gaze to the criminal docket, where surveys receive a much less favorable reception.

III. OPINION SURVEYS IN THE CRIMINAL DOCKET

The criminal litigation landscape features three areas of law where doctrinal standards formally incorporate the community’s opinion, thereby

121. Michael P. Akemann, Rebecca Reed-Arthurs & J. Douglas Zona, *Conjoint Analysis: Applications in Antitrust Litigation*, in HANDBOOK OF MARKETING ANALYTICS 590, 593 (Natalie Mizik & Dominique M. Hanssens eds., 2018).

122. First Amended Complaint and Jury Demand at 7, *Discover Fin. Servs., Inc. v. Visa U.S.A., Inc.*, 598 F. Supp. 2d 394 (S.D.N.Y. 2008) (No. 04-cv-7844).

123. Akemann et al., *supra* note 121, at 600.

124. Proposed Final Judgment and Competitive Impact Statement: United States of America and the State of Colorado v. Vail Resorts, Inc., Ralston Resorts, Inc., and Ralston Foods, Inc., 62 Fed. Reg. 5037, 5043-44, 1997 WL 36727 (D. Colo. Feb. 3, 1997) (No. 97-B-10); *see also* Rubinfeld, *supra* note 120, at 736 (characterizing the government’s case as using conjoint analysis).

125. *United States v. Dentsply Int’l, Inc.*, 277 F. Supp. 2d 387, 435-40 (D. Del. 2003), *rev’d*, 399 F.3d 181 (3d Cir. 2005).

126. *Id.* at 436-40.

127. *Id.* at 454.

making opinion surveys potentially relevant evidence. Those three areas are obscenity, the death penalty, and Fourth Amendment search jurisprudence.

In cases brought under criminal obscenity statutes, defendants are charged with possessing materials that, when considered in light of contemporary community views of sexually explicit materials, appeal to the prurient interest.¹²⁸ In death penalty jurisprudence, courts must decide if evolving national standards of decency have rendered capital punishment cruel and unusual for a certain population.¹²⁹ In search challenges raised under the Fourth Amendment, courts consider whether police officers, when collecting certain kinds of information pursuant to a criminal investigation, have violated an expectation of privacy that society is prepared to recognize as reasonable.¹³⁰ In all three instances, formal legal doctrine rests in some way on societal standards that govern citizen or state actor behavior.

Yet courts have not translated formal doctrinal recognition into incorporation-in-fact. Courts considering what makes material obscene, what makes a punishment cruel and unusual, or what sorts of privacy expectations are reasonable show at best minimal receptivity to survey evidence. Instead of keeping their “subjective predispositions . . . from entering into the adjudication and application of the law,”¹³¹ judges handling these matters most often rest their rulings on their own intuitions rather than on empirical evidence of community perspectives.

As we show in the pages that follow, courts handling obscenity cases have shown some willingness to consider opinion survey evidence, although this willingness often founders on the shoals of strict methodological requirements. In death penalty jurisprudence, opinion surveys worked their way into the Supreme Court’s analysis of national standards of decency only once, in *Atkins v. Virginia*,¹³² although state supreme courts have occasionally recognized the relevance of public opinion when considering punishment questions. In reasonable expectation of privacy opinions, opinion data is conspicuously absent despite a wealth of academic publications containing relevant surveys. Federal judges routinely decide questions about societal reasonableness based on their own viewpoints. Courts’ fluctuating acceptance, or flat rejection, of survey evidence in criminal cases contrasts sharply with their openness to this evidence in civil cases, as we documented in Part II.

128. See *infra* Section III.A.

129. See *infra* Section III.B.

130. See *infra* Section III.C.

131. Lamont, *supra* note 14, at 142.

132. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

A. OBSCENITY LAW

The Supreme Court has consistently declared that the First Amendment does not protect speech that is obscene.¹³³ As a result, the boundary separating obscene speech from protected speech has been a matter of some controversy in prosecutions for possession or sale of obscene materials and in requests for injunctions against the display and sale of such materials.¹³⁴ Under the current test for obscenity, materials are judged obscene by reference (in part) to “contemporary community standards.”¹³⁵ In this Section, we examine courts’ openness to admitting opinion surveys as evidence of contemporary community standards.

In *Miller v. California*, the Supreme Court held that material may be deemed obscene if a factfinder concludes that: (1) the average person applying contemporary community standards would find that the material, taken as a whole, appeals to the prurient interest; (2) the material depicts, “in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and (3) the material, “taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹³⁶ Two subsequent cases clarified the role of community standards in the latter two prongs of the *Miller* test. In *Smith v. United States*,¹³⁷ the Court held that “patent offensiveness” should be judged with regard to community standards. Ten years later, in *Pope v. Illinois*, specified that courts should use a “reasonable person” standard to gauge whether the work has any merit.¹³⁸

Putting these pieces together, the *Miller* test instructs that the sexually prurient nature and patent offensiveness of the materials possessed or sold by the defendant must be judged according to contemporary community standards.¹³⁹ Yet identifying a community’s standards for what is an acceptable portrayal of sexual expression is not a straightforward inquiry. As a primary matter, the Court has left it to individual states to determine “the scope of the

133. E.g., *Roth v. United States*, 354 U.S. 476, 485–90 (1957) (holding that obscene material is not protected by the First Amendment); *Miller v. California*, 413 U.S. 15, 23–25 (1973) (agreeing with *Roth* concerning First Amendment limits but setting forth a new test for determining what counts as obscene); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (finding that states have a legitimate interest in regulating commerce in obscene material, such as through the use of injunctions).

134. For ease of language, the remainder of this section will discuss the use of opinion surveys only in the criminal prosecution context.

135. *Miller*, 413 U.S. at 24.

136. *Id.*

137. *Smith v. United States*, 431 U.S. 291, 308 (1977).

138. *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

139. Tom W. Smith, *The Polls—A Review: The Use of Public Opinion Data by the Attorney General’s Commission on Pornography*, 51 PUB. OP. Q. 249, 249 (1987) (“The importance of assessing public opinion in regard to pornography was . . . made clear in reference to the formulation and implementation of the ‘contemporary community standards’ rule established in *Miller vs. California* (1973) . . .”).

relevant ‘community’ by which the questioned material [is] to be judged.”¹⁴⁰ There is, in other words, no “national” community when it comes to identifying community standards for obscenity purposes. Secondly, gauging the views of the local community at the moment of the prosecution requires effort. In *Smith*, the Supreme Court rejected the notion that legislation enacted by the state could declare such standards in advance, as legislative enactments would inappropriately “freeze” judgments at a moment in time.¹⁴¹ Some criminal court litigants¹⁴² have thus asked local area residents to share their perspectives about community standards on this issue during the time period the prosecution is proceeding.

To assist in this regard, obscenity defendants sometimes hire experts¹⁴³ to conduct surveys of people living in their respective communities. They then offer those opinion surveys as evidence through expert witness testimony. Although the Supreme Court has noted that an obscenity defendant should be free to introduce “appropriate” expert testimony at trial,¹⁴⁴ trial courts’ willingness to admit opinion surveys into evidence is far from certain.

We reviewed dozens of federal and state appellate court opinions (and one trial court opinion) in obscenity cases to get a sense of how post-*Miller* courts have addressed this issue.¹⁴⁵ We identified these cases through multiple channels. We began with cases discussed in an American Law Reports (“ALR”) article concerning the use of surveys in obscenity cases.¹⁴⁶ We then conducted multiple searches on Lexis and Westlaw.¹⁴⁷ The database searches identified

140. Linz et al., *supra* note 35, at 82.

141. *Smith*, 431 U.S. at 302–03.

142. The majority of the cases we found discuss defendants’ attempts to introduce opinion surveys as evidence in their trials. But prosecutors can and do offer this kind of evidence too. See Note, *Opinion Polls and the Law of Evidence*, 62 VA. L. REV. 1101, 1102 n.7 (1976) (reporting that a prosecutor in Fairfax, VA, introduced opinion survey evidence in an obscenity trial, as reported by the Washington Post on March 3, 1976).

143. These experts often have training in sociology and/or criminology, such as Dr. Joseph Scott, the expert who testified in *State v. Anderson*, 366 S.E.2d 459, 462 (N.C. 1988), *State v. Williams*, 598 N.E.2d 1250, 1256–57 (Ohio Ct. App. 1991), and *County of Kenosha v. C & S Management, Inc.*, 588 N.W.2d 236, 252, 255 (Wis. 1999). An example of an expert study prepared for a defendant facing charges in Mecklenburg County, North Carolina, is the subject of analysis in Linz et al., *supra* note 35.

144. *Kaplan v. California*, 413 U.S. 115, 121 (1973) (citing Justice Frankfurter’s concurring opinion in *Smith v. California*, 361 U.S. 147, 164–65 (1959) (identifying the “right of one charged with obscenity . . . to enlighten the judgment of the tribunal, be it the jury or . . . the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts”)).

145. In the cases we found, the trial court’s ruling on the survey’s admissibility was one basis for appeal of the conviction. Defendants who were not convicted or who did not appeal their convictions fall outside of our review. Our assessment of the jurisprudence also does not include appellate opinions that were not published.

146. Arleen Jacobius, Annotation, *Admissibility of Evidence of Public-Opinion Polls or Surveys in Obscenity Prosecutions on Issue Whether Materials in Question Are Obscene*, 59 A.L.R.5th 749 (1998).

147. Search details are available upon request.

only one case that the ALR authors had not previously located. All told, we found fewer than thirty cases in the state and federal courts discussing the use of opinion surveys to establish contemporary community standards in obscenity prosecutions. The small numbers indicate that a qualitative, rather than quantitative, analysis of trends is appropriate in this area.

To begin, we found a small number of appellate opinions that explicitly recognize the opinion survey as important, useful evidence of contemporary community standards. Two cases from Illinois stand out in this regard. In *People v. Nelson*, the defense presented a survey based on interviews with 770 adult Illinois residents, a majority of whom found the depictions of sex and nudity acceptable.¹⁴⁸ The court found the survey to be “strong evidence that the community standards would accept or at least would not reject the portrayal of sexually explicit material in movies when the access to the movies is limited to adult viewers.”¹⁴⁹ “In fact,” the court said, “survey evidence may be the only way to prove degrees of acceptability of a product or material, as distinct from its availability.”¹⁵⁰ The *Nelson* court suggested that a survey in which a majority of respondents agreed about a position would increase the relevance of the survey.¹⁵¹

In *People v. Family Video Movie Club, Inc.*, the court pointed to opinion survey evidence as perhaps the best evidence of community standards.¹⁵² A law clerk for the defense had surveyed stores in nine cities in Illinois and found that all nine sold or rented videos that were substantially similar to the videos in question; the surveys also included demographic (gender) information about the stores’ customers.¹⁵³ The appellate court overturned the trial court’s refusal to admit the evidence, declaring that while the state need not introduce evidence of the community standard, a court cannot deny a defendant “the

148. *People v. Nelson*, 410 N.E.2d 476, 477-78 (Ill. App. Ct. 1980).

149. *Id.* at 479.

150. *Id.* Without such survey evidence, the court believed there was a “great danger that the jurors may [apply] a personal standard rather than a state-wide community standard.” *Id.* See also *People v. Page Books, Inc.*, 601 N.E.2d 273, 275 (Ill. App. Ct. 1992), where the defendant appealed the trial court’s ruling rejecting the testimony of his expert. The expert had conducted a survey of five hundred adults concerning their views of sexually explicit material. *Id.* Although the appellate court rejected two of the questions in the survey as inappropriate, it found that the survey overall should have been admitted, and it granted the defendant a new trial on this basis. *Id.* at 278-81.

151. *Nelson*, 410 N.E.2d at 478-79.

152. *People v. Fam. Video Movie Club, Inc.*, 744 N.E.2d 322, 332 (Ill. App. Ct. 2001). In this case, the court upheld the trial court’s refusal to admit petitions signed by the defendant’s patrons as evidence of the community standard; while the jury should have been permitted to assess the weight of this evidence, the court declared that failure to send this material to the jury was a harmless error because they were “virtually worthless as an indicator of [the] community standard.” *Id.* at 331.

153. *Id.*

right to introduce the best evidence he can gather on this issue.”¹⁵⁴ In this case, evidence of “same or comparable materials in the area may indicate that the challenged materials ‘enjoy a “reasonable degree of community acceptance,’”” the court said.¹⁵⁵

Regard for the value of opinion survey evidence appeared in one opinion from the Indiana Court of Appeals as well. In *Saliba v. State*, the Indiana Court of Appeals emphasized that survey evidence might be needed to hedge against jurors making decisions on the basis of their unique but limited life experiences: “in the absence of expert testimony, the jury’s determination of contemporary community standards runs the risk of incorporating the individual juror’s ‘necessarily limited, hit-or-miss subjective view’ ‘on the basis of his personal upbringing or restricted reflection or particular experience of life.’”¹⁵⁶

Next, courts sometimes crafted specific guidelines to address when opinion surveys should be permitted in obscenity cases; these guidelines mostly follow the validity standards discussed in Part I. For example, the Indiana Court of Appeals instructed that, to be admissible, a survey must be both relevant and trustworthy.¹⁵⁷ Relevant surveys question respondents about community acceptance of sexually explicit materials, rather than about their personal views of how acceptable such materials are.¹⁵⁸ Trustworthiness, the court said, should be gauged by circumstantial evidence, including the use of generally accepted survey techniques and adherence to statistically correct methods of sampling and analysis.¹⁵⁹ The two-pronged “relevance and trustworthiness” test had particular salience in the Midwest, as we found

154. *Id.* at 330 (citing, among other cases, *Nelson*, 410 N.E.2d at 479, in its discussion of surveys as solid evidence).

155. *Id.* at 332 (quoting *United States v. Various Articles of Obscene Merch.*, Schedule No. 2102, 709 F.2d 132, 137 (2d Cir. 1983)).

156. *Saliba v. State*, 475 N.E.2d 1181, 1185 (Ind. Ct. App. 1985) (quoting *Smith v. California*, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring)).

157. *Id.* at 1185–87.

158. *Id.* at 1185–86.

159. *Id.* at 1187. The court held that the proponent of the poll must establish seven things: “1) the poll was conducted by an expert in the field of surveying; 2) the relevant universe was examined; 3) a representative sample was drawn from the relevant universe; 4) the mode of questioning was ‘correct’ . . . ; 5) the sample, questionnaire and interviews were designed in accordance with generally accepted standards; 6) the data gathered was accurately reported; and 7) the data was analyzed in a statistically correct manner.” *Id.* at 1187–88.

evidence of it in the state court opinions of Ohio¹⁶⁰ and Wisconsin,¹⁶¹ as well as in the Seventh Circuit.¹⁶²

Having considered these positive depictions of the value of opinion surveys, we turn now to the far more numerous negative expressions that appear in the case law about obscenity. Many courts declared that while survey evidence was not out-of-bounds as a legal matter, the survey presented by the defendant did not conform to appropriate methodological standards and therefore did not amount to relevant evidence (under Rule 401 or its state court equivalent). This stands in contrast to courts' treatment of methodological flaws in the civil cases we reviewed in Part II; judges there mostly held that survey flaws impacted the weight of the evidence but should not defeat admissibility.¹⁶³ And some judges expressed wholesale dislike for opinion surveys as a form of evidence in obscenity cases, separate and apart from any flaws they might detect in a particular survey. We highlight a subset of these cases below.

A decision from the Supreme Court of Massachusetts exemplifies the courts' heightened scrutiny of survey methodology in obscenity cases. In *Commonwealth v. Trainor*, the court acknowledged that "[a] properly conducted public opinion survey, offered through an expert in conducting such surveys, is admissible in an obscenity case if it tends to show relevant standards in the Commonwealth."¹⁶⁴ However, the telephone survey of two hundred Boston-area adults offered by the defendant did not measure up, for two reasons.¹⁶⁵ The court first criticized the limited pool of respondents, questioning whether the opinion of Boston residents "prove[s] the standards of the Commonwealth as a whole."¹⁶⁶ Second, the survey examined primarily whether the community sanctioned dissemination of sexually explicit material to willing adults, not

160. *State v. Caudill*, 599 N.E.2d 395, 399-400 (1991) (finding the trial court improperly struck the opinion poll as hearsay evidence; correct inquiry is whether such poll is relevant and trustworthy, but on the facts provided the poll did not appear to meet those standards because it "did not specifically reference the videotape in question, nor did the survey describe the material alleged to be obscene or ask questions based on the specific acts shown in the videotape").

161. *County of Kenosha v. C & S Mgmt., Inc.*, 588 N.W.2d 236, 253 (Wis. 1999) (explaining "evidence must be relevant," which in obscenity trials means the survey "must bear a strong relationship to the type of material that is charged in the case or to works that are 'clearly akin' to the charged material"). The court continued, "[The] survey must also address whether the material at issue depicts sexual acts in a patently offensive manner, and whether the material at issue appeals to the prurient interest." *Id.* at 255.

162. *United States v. Various Articles of Merch., Seizure No. 170*, 750 F.2d 596, 599 (7th Cir. 1984) (formulating the test as follows: "[I]f surveys are to be used, they must be taken in the relevant area; they must address material clearly akin to the material in dispute, and they must be good studies by the usual standards."). The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

163. See *supra* Sections II.B-C.

164. *Commonwealth v. Trainor*, 374 N.E.2d 1216, 1220 (Mass. 1978).

165. *Id.* at 1222.

166. *Id.* It also criticized the defendant for not establishing that the residents of Boston who were chosen to answer the survey amounted to "a representative sample of the citizens of Boston." *Id.*

whether the community regarded such material as obscene.¹⁶⁷ Citing these flaws, the court concluded that the survey did not contain evidence that was relevant to the contemporary community standards question.¹⁶⁸ In *St. John v. N.C. Parole Commission* (the only trial court decision in our pool), the U.S. District Court for the Western District of North Carolina faulted the sampling methodology of the survey researcher, asserting that asking customers of the defendant's store whether the materials he sold were obscene was akin "to asking the fox to guard the hen house."¹⁶⁹

A related point about methodology concerns *how* survey respondents are asked to share their views about community standards on nudity and sex. For instance, courts sometimes reject telephone surveys out of hand because they do not include visuals—in the court's view, both the survey respondents and the jury would need to see visual depictions of the materials the defendant was charged with possessing in order to evaluate their offensiveness.¹⁷⁰ The Supreme Court of Wisconsin expressed the concern like this:

[T]he inherent difficulty in using telephone surveys to assess the prevailing community standards on the issue of obscenity [is that] . . . [s]urvey questions . . . simply do not convey the degree of sexual explicitness that the video images of the film . . . do. . . . [T]ruth rings loudly in the oft-used phrase "a picture is worth a thousand words."¹⁷¹

What is more, appellate courts seem to struggle with which material needs to be publicly acceptable; most courts facing this issue insist that respondents needed to be asked about (or shown) the defendant's materials

167. *Id.* ("The offer of proof made no attempt to connect an acceptance of, or an indifference to, the showing or sale of that material with whether the particular sexual conduct involved in this case was depicted or described in a patently offensive way."). *Commonwealth v. Mascolo*, 386 N.E.2d 1311, 1314 (Mass. App. Ct. 1979), was in accord ("[T]he poll offered here[] examined primarily whether the community sanctioned the dissemination of sexually explicit material to willing adults, but not whether the community regarded such material as obscene in itself."). The Supreme Court of North Carolina upheld the exclusion of survey evidence where the researchers asked county residents about the "availability and accessibility" of sexually explicit materials, rather than about the acceptability of such materials. *State v. Anderson*, 366 S.E.2d 459, 464–67 (N.C. 1988).

168. *Trainor*, 374 N.E.2d at 1222.

169. *St. John v. N.C. Parole Comm'n*, 764 F. Supp. 403, 411 (W.D.N.C. 1991). "Common sense would lead any honest person to conclude that a customer of an adult book store is not going to reflect the values of the average person of the community," the court asserted. *Id.*

170. *See, e.g., United States v. Pryba*, 900 F.2d 748, 757 (4th Cir. 1990) ("Asking a person in a telephone interview as to whether one is offended by nudity, is a far cry from showing the materials previously described in this opinion, and then asking if they are offensive."); *St. John*, 764 F. Supp. at 410 ("[T]he survey questions from the random telephone survey questions were inadequate to convey the impact of the visual image of the materials."); *State v. Caudill*, 599 N.E.2d 395, 400 (Ohio Ct. App. 1991) ("Inasmuch as the survey was conducted by telephone, it goes without saying that none of those individuals polled saw the videotape as part of the survey.").

171. *County of Kenosha v. C & S Mgmt., Inc.*, 588 N.W.2d 236, 254 (Wis. 1999).

specifically.¹⁷² In *State v. Midwest Pride IV, Inc.*,¹⁷³ for instance, an appellate court in Ohio specified that the survey must ask respondents not about community acceptance of sexually explicit material generally, but about community acceptance of the particular work possessed or sold by the defendant.¹⁷⁴ A similar result emerged in the prosecution of Larry Flynt, a publisher of pornographic magazines, when the Georgia Court of Appeals considered the relevance of a survey in which seventy-six out of one hundred people said that “nudity and sex” standards have become more accepting over time.¹⁷⁵ In *Flynt v. State*, the court upheld the exclusion of the survey because “[t]here was no attempt in the survey itself to determine whether respondents were of the opinion that the contents of the eleven magazines [possessed by the defendant] would or would not exceed the limits of permissible candor in the depiction of ‘nudity and sex.’”¹⁷⁶

Lastly, some judges expressed deep skepticism about the value of opinion surveys in *any* obscenity litigation. Consider the comments of Chief Judge Deen, in his concurrence in *Flynt*; he warned that “personal polls or sexual surveys . . . may . . . perplex the jurors as do political polls confound and confuse the voters.”¹⁷⁷ Moreover, he suggested that surveys ought to be excluded for reasons of judicial economy, “or else cases involving allegedly sexually obscene materials may become inundated and saturated with conflicting sexual surveys.”¹⁷⁸ A federal judge in North Carolina echoed Chief Judge Deen’s position ten years later, offering a broadside repudiation of survey evidence in obscenity cases generally. Invoking the Supreme Court’s opinion in *Paris Adult Theatre I v. Slaton*, he declared that “obscenity is not a subject that lends itself to the traditional use of expert testimony,” and warned

172. *Id.* at 255 (stressing that the survey must ask respondents about “the material at issue”). *But see* *People v. Nelson*, 410 N.E.2d 476, 477–79 (Ill. App. 1980) (showing the court accepted a survey that did not specifically ask about the acceptability of the defendant’s materials and only showed survey respondents similar materials).

173. *State v. Midwest Pride IV, Inc.*, 721 N.E.2d 458, 467 (Ohio Ct. App. 1998).

174. *Id.* at 467. The trial court originally refused to admit the survey evidence because “it did not ‘believe that telephone or public opinion polls [were] correct ways to determine what is obscene material.’” *Id.* (alteration in original). The appellate court corrected the trial court in this matter but still voted to exclude the survey evidence for the reason mentioned in the text. *Id.*; *see also* *State v. Roland*, 362 S.E.2d 800, 804 (N.C. Ct. App. 1987) (finding no probative value where “[t]he questions dealt primarily with public tolerance of obscene materials in general, rather than with acceptance of the materials under scrutiny”).

175. *Flynt v. State*, 264 S.E.2d 669, 672 (Ga. Ct. App. 1980). The court said, “Whether or not 76 of . . . 100 persons would say that the change in ‘standards’ over recent years in the depiction of nudity and sexual activities is ‘more acceptable’ does not show that those same persons would find that the eleven magazines in question depicted sex and nudity in an ‘acceptable’ manner.” *Id.*

176. *Id.*

177. *Id.* at 680 (Deen, C.J., concurring).

178. *Id.*

that use of expert testimony in these cases often makes “a mockery out of the otherwise sound concept of expert testimony.”¹⁷⁹

Aside from the few defendant successes we noted up front, courts in obscenity cases tend to reject defendants’ proffered surveys on relevance grounds. None of these cases included a discussion of *Daubert* (or state-based expert witness standards), and none found that the probative value of the survey was outweighed by prejudice. The flaws identified by the courts kept these surveys from meeting even the lowest evidentiary threshold.

B. DEATH PENALTY LAW

The Eighth Amendment prohibits, inter alia, the imposition of cruel and unusual punishments.¹⁸⁰ But because cruelty and unusualness are time- and context-dependent descriptions of a practice, the Supreme Court has declared that “evolving standards of decency” must be consulted before finding a punishment either cruel or unusual (or both).¹⁸¹ In this Section, we examine how the Court ascertains standards of decency for Eighth Amendment purposes and the role of opinion surveys in shaping the Court’s conclusions. We also discuss a small handful of state supreme court decisions that invoke opinion poll data to determine whether capital punishment complies with their state constitutional punishment provisions.

In *Weems v. United States*, the Supreme Court interpreted the “cruel and unusual punishment” clause of the Eighth Amendment to encompass not only punishments that are barbaric but also those that are excessive.¹⁸² To reach this conclusion, the Court incorporated the Amendment’s excessiveness language that prohibits the use of excessive bail and the levying of excessive fines.¹⁸³ It also acknowledged that excessiveness can render a previously acceptable punishment “cruel” by modern standards, because public opinion can shift regarding the quantum of punishment necessary to achieve the state’s objectives.¹⁸⁴

For this reason, courts must be prepared to consider the humanity of certain punishments according to the norms of the era in which these punishments are challenged; they cannot rest on outdated notions of what is acceptable. The phrase “evolving standards of decency” has thus emerged as the touchstone of Eighth Amendment jurisprudence.¹⁸⁵ As Chief Justice Warren explained in *Trop v. Dulles*, “The words of the Amendment are not

179. *St. John v. N.C. Parole Comm’n*, 764 F. Supp. 403, 409 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973)).

180. U.S. CONST. amend. VIII.

181. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

182. *Weems v. United States*, 217 U.S. 349, 368, 377 (1910).

183. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (describing *Weems* and the Eighth Amendment as prohibiting excessive sanctions).

184. *See id.* at 311–12.

185. *Trop*, 356 U.S. at 101.

precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁸⁶

Where, then, are national standards of decency to be found? The Supreme Court has emphasized that proportionality review ought to be guided by “objective factors” wherever possible,¹⁸⁷ and that “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”¹⁸⁸ The Court considers not just the number of states taking action to outlaw a certain practice, but also “the consistency of the direction of change.”¹⁸⁹ Although legislative action and trends receive priority in the Court’s analysis, it also looks to a number of other proxies for community standards, such as jury verdicts with respect to a given practice¹⁹⁰ and legal trends in other nations.¹⁹¹

Using those indicators, the Court has found the death penalty to be cruel and unusual in several contexts. It has prohibited the use of the death penalty for juveniles who committed a crime while under the age of eighteen¹⁹² and for anyone convicted of any crime other than murder.¹⁹³ It has likewise concluded that to execute a person who is insane (meaning unable to understand their execution or the reasons for it) is unconstitutional,¹⁹⁴ although suffering from serious mental illness at the time of the crime is not similarly disqualifying.¹⁹⁵ Finally, the Court has declared unconstitutional the execution of persons with

186. *Id.* at 100–01.

187. *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980)).

188. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins*, 536 U.S. 304.

189. *Atkins*, 536 U.S. at 315–16 (declaring that the large number of states prohibiting the execution of people with intellectual disabilities—and the complete absence of states passing legislation to reinstate this practice—is “powerful evidence that today our society views [intellectually disabled] offenders as categorically less culpable than the average criminal”).

190. In *Coker v. Georgia*, 433 U.S. 584, 596–97 (1977), for example, the Court noted that juries are “a significant and reliable objective index of contemporary values,” and then observed that “at least 9 out of 10 . . . juries [in Georgia] have not imposed the death sentence [for rape].”

191. See *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (considering the views of “respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community”); *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

192. *Roper*, 543 U.S. at 575. Additionally, the Court has used the Eighth Amendment to limit courts’ ability to sentence juveniles to life without parole for both homicides and non-homicides. *Graham v. Florida*, 560 U.S. 48, 82 (2010); *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

193. See, e.g., *Coker*, 433 U.S. at 599–600 (holding it is unconstitutional to impose death sentence for rape of an adult); *Enmund v. Florida*, 458 U.S. 782, 800–01 (1982) (holding it is unconstitutional to impose the death sentence on a person who neither killed anyone nor intended to kill anyone); *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (holding it is unconstitutional to execute a person for committing rape of a child, where the child survives).

194. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

195. See, e.g., *Mental Illness*, DEATH PENALTY INFO. CTR. (2025), <https://deathpenaltyinfo.org/policy-issues/mental-illness> [https://perma.cc/A72B-FQYP].

intellectual disabilities, a cognitive impairment that substantially limits functioning and manifests before the age of eighteen.¹⁹⁶

The Court’s decision in *Atkins*, prohibiting the use of the death penalty for cognitively impaired adults, stands out from the rest of its death penalty jurisprudence in one significant respect.¹⁹⁷ In *Atkins*, the majority opinion considered a variety of sources, including opinion surveys, as relevant to its assessment of whether a national consensus had emerged.¹⁹⁸ In an important footnote,¹⁹⁹ the majority cited data from more than twenty polls and surveys, as well as policy statements from professional and religious organizations, as evidence of “a . . . broad[] social and professional consensus”²⁰⁰ that executing persons with limited cognitive functioning is wrong. Respondents in the surveys were asked in various ways how they felt about imposing the death penalty on a person with an intellectual disability. In each poll, a majority (fifty-six to eighty-three percent) of respondents expressed opposition to capital punishment for this population.²⁰¹ For the *Atkins* majority, these surveys and professional organizations’ policy statements buttressed the legislative trends that prohibited the execution of cognitively impaired people.

In a vigorous dissent, Chief Justice Rehnquist took issue with the *Atkins* majority’s use of polling data to assess standards of decency. He primarily argued that legislative judgments and jury verdicts were the only appropriate yardsticks by which to measure community judgments.²⁰² In his view, opinion surveys were a faulty gauge of community perspectives, as they do not represent official policy positions.²⁰³ Legislators and jurors, as the community’s chosen representatives, are the only ones positioned to speak on the community’s

196. *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (citing definition offered by the American Association on Mental Retardation). We have updated the language used by the Court to use disability-inclusive language.

197. *Id.* at 321.

198. *Id.*

199. *Id.* at 316 n.21.

200. *Id.* In addition to the polling data, the majority mentioned professional organizations, such as the American Psychological Association, that “have adopted official positions opposing the imposition of the death penalty” for intellectually disabled offenders and policy positions of various religious organizations who filed amicus briefs in the case. *Id.*

201. DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 586–87 (Vol. 1 2025).

202. *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting) (“In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents.”).

203. *Id.* at 326 (asserting that polls and policy statements that “have not [been] deemed . . . persuasive enough to prompt legislative action,” deserve zero weight in an Eighth Amendment analysis); see also *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (“[P]ublic sentiment expressed in these and other polls . . . may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”).

behalf about the acceptability of certain practices.²⁰⁴ The Chief Justice also strenuously objected to the particular surveys cited by the majority, finding fault with their methodology. He lambasted the lack of information provided about sample selection and data-collection techniques, and likewise expressed concern about how certain questions were worded.²⁰⁵

Atkins marked the first and only time the Court supplemented its thumbnail surveys of legislative trends with behind-the-scenes data about citizen perspectives on this issue—perspectives that might either shape or challenge the legislative trends. Although additional Eighth Amendment cases have come before the Court in the past twenty years, some of which have resulted in wins for the defendant, none of these opinions reference, let alone acknowledge,²⁰⁶ the validity of public opinion surveys as a basis for the Court’s conclusion about the constitutionality of the challenged punishment scheme.²⁰⁷

State supreme courts have shown greater receptivity to opinion poll data in their punishment jurisprudence, although even these decisions are few and far between. For example, before the U.S. Supreme Court held in *Atkins* that execution of people with intellectual disabilities violates the Eighth Amendment, the supreme courts of Tennessee²⁰⁸ and Georgia²⁰⁹ found opinion surveys to be relevant evidence that this practice violated their respective state constitutions. The Supreme Court of New Jersey likewise declared, in an opinion about the constitutionality of the death penalty, “While we do not regard public opinion polls as decisive . . . we cannot ignore their relevance to the largely empirical determination of the content of community standards.”²¹⁰ The polling data found in these opinions is not, of course, one-sided. The Supreme Court

204. *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist emphasized that “legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people,” *id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976)), and that “the actions of sentencing juries, though entitled to less weight than legislative judgments, ‘[are] a significant and reliable objective index of contemporary values’ because of the jury’s intimate involvement in the case and its function of ‘maintain[ing] a link between contemporary community values and the penal system.’” *Id.* (second alteration in original) (citations omitted) (first quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977); and then quoting *Gregg*, 428 U.S. at 181).

205. *Id.* at 327.

206. The dissent in *Miller v. Alabama* disparagingly referred to the *Atkins* majority opinion as “toy[ing] with the use of public opinion polls.” *Miller v. Alabama*, 567 U.S. 460, 511 (Alito, J., dissenting) (citing *Atkins*, 536 U.S. at 316 n.21.)

207. In the year after *Atkins*, the District of Massachusetts declared that it was “appropriate to consider . . . polling data . . . in determining contemporary standards of decency,” even though such data are “less meaningful,” than legislation or jury verdicts as indicators of a societal consensus. *United States v. Sampson*, 275 F. Supp. 2d 49, 66 (D. Mass. 2003).

208. *Van Tran v. State*, 66 S.W.3d 790, 803 (Tenn. 2001).

209. *Fleming v. Zant*, 386 S.E.2d 339, 341 (Ga. 1989) (“[Objective] evidence may include information gathered from polls or studies . . .”).

210. *State v. Ramseur*, 524 A.2d 188, 212 n.10 (N.J. 1987). Fifteen years later that same court cited opinion polls showing a twelve percent drop in public support for the death penalty as not “sufficiently significant” to establish an “evolving change[] in the community’s shared values.” *State v. Josephs*, 803 A.2d 1074, 1132 (N.J. 2002).

of Connecticut in 2015 used surveys to document the public's support for the death penalty,²¹¹ and a concurring opinion from the Supreme Court of Ohio included reference to a Gallup poll showing Americans' continuing strong support for the death penalty.²¹² The occasional reference to opinion surveys in state supreme court opinions highlights the Supreme Court's unwillingness to acknowledge this form of evidence when assessing societal standards of decency in Eighth Amendment cases.

C. FOURTH AMENDMENT SEARCH LAW

The Fourth Amendment protects citizens against unreasonable searches of their persons, houses, papers, or effects by agents of the state or federal government.²¹³ Searches must be supported by a valid search warrant or a search warrant exception to be constitutionally valid,²¹⁴ and any evidence derived from an invalid search will be presumptively excluded from a criminal case brought against the target of the search.²¹⁵ But not every police action is subject to these rules: Only actions that amount to "searches" are held to Fourth Amendment standards. In this Section, we examine how opinion surveys might be relevant to a federal court's assessment of when a search occurs and discuss the federal courts' steadfast refusal to consult them for this purpose.

The Supreme Court has developed two tests to identify which police actions constitute "searches" for Fourth Amendment purposes. First, a search occurs when a state actor trespasses on (physically intrudes on or occupies) a "constitutionally protected area" of the defendant (which includes the defendant's person, house, papers, or effects) for the purpose of acquiring information.²¹⁶ Using this test, the Supreme Court has found that a search took place where officers affixed a GPS device to the defendant's car and tracked his movements for a month,²¹⁷ brought a drug-sniffing dog onto the defendant's

211. *State v. Santiago*, 122 A.3d 1, 84 (Conn. 2015).

212. *State v. Ketterer*, 855 N.E.2d 48, 85 (Ohio 2006) (Lundberg Stratton, J., concurring) (noting that capital punishment "still enjoys wide public support among Americans," as shown by Gallup poll data from October 2003).

213. U.S. CONST. amend. IV.

214. *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.").

215. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

216. *United States v. Jones*, 565 U.S. 400, 407 (2012) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)). The trespass test was first developed in *Olmstead v. United States*, 277 U.S. 438, 467–68 (1928).

217. *Jones*, 565 U.S. at 404.

front porch to look for signs of marijuana growing inside,²¹⁸ and placed a GPS tracker on the defendant's ankle as part of a community-release plan.²¹⁹

Alternatively, a search occurs when a state actor, motivated by a desire to obtain information, invades or rummages through an area in which the defendant has a reasonable expectation of privacy.²²⁰ This test, also known as the *Katz* test for its original formulation by Justice Harlan in his concurrence in *Katz v. United States*,²²¹ has two prongs. First, a defendant has to prove that they had a subjective expectation of privacy in the place through which the officers rummaged—their phone, tool shed, car, and so forth.²²² Second, the defendant must prove “that society is prepared to recognize their privacy expectation as reasonable.”²²³ Unreasonable expectations cannot be harnessed to keep evidence of guilt away from juries; only reasonable expectations can serve this function. Using this search formula, the Justices have found that people have a reasonable expectation of privacy in conversations conducted inside a closed phone booth,²²⁴ in the heat emanating from their homes,²²⁵ and in opaque luggage that is placed in the overhead rack on a bus.²²⁶ However, the Court has held that society is not prepared to recognize as reasonable a person's claim to privacy in the garbage they leave at the curb,²²⁷ in the information voluntarily shared with other people,²²⁸ or in the aerial view of their backyard obtained from one thousand feet above the earth.²²⁹

The *Katz* line of jurisprudence has generated a significant amount of scholarly commentary and criticism, as the Court's declarations about what society is prepared to recognize as reasonable appear to rest on reed-thin foundations. How does the Court discern what society thinks about any of these issues? The Court's assertions of what society finds reasonable (or unreasonable) contain no empirical support, no discussion of authoritative sources for who “society” is, and no recitation of how society forms its views about acceptable law enforcement techniques.²³⁰ According to Professor Orin Kerr, these opinions demonstrate that the Court has not established a standard

218. *Florida v. Jardines*, 569 U.S. 1, 11–12 (2013).

219. *Grady v. North Carolina*, 575 U.S. 306, 310 (2015).

220. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

221. *Id.*

222. *Id.*

223. This became the official test for a search in *Smith v. Maryland*, 442 U.S. 735, 740 (1979), when the Court formally adopted Justice Harlan's *Katz* concurrence.

224. *Katz*, 389 U.S. at 358–59.

225. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

226. *Bond v. United States*, 529 U.S. 334, 338–39 (2000).

227. *California v. Greenwood*, 486 U.S. 35, 39–41 (1988).

228. *United States v. White*, 401 U.S. 745, 752–53 (1971); *Smith*, 442 U.S. at 743–44.

229. *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986).

230. Orin Kerr has argued that courts consider Fourth Amendment search questions without even trying to reflect what ordinary Americans believe or expect. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007).

for “what makes an expectation of privacy constitutionally ‘reasonable.’”²³¹ The Court also has not signaled which members of society merit inclusion in Fourth Amendment analysis²³²: Is the “society” referenced in these opinions local (as in obscenity cases) or national (as in death penalty cases)? How might we account for differing views of privacy held by people of different races, ages, genders, and experiences with the justice system? These questions—and more—are left unanswered.

Professors Matthew Kugler and Lior Strahilevitz have asserted that “[t]he most obvious approach would be . . . to ask a representative sample of Americans such questions directly.”²³³ They argue for one unitary test, based on empirical data, to guide assessments of searches in Fourth Amendment cases.²³⁴ But such a test has never been forthcoming. Given the black box of decision-making in these cases, empirical scholars have generated a body of evidence that courts might consult when considering expectation of privacy questions.²³⁵ Beginning with Professors Christopher Slobogin and Joseph Schumacher’s groundbreaking survey of 217 people in 1993,²³⁶ numerous scholars have interrogated what members of society think are reasonable privacy expectations.²³⁷ These studies use survey methodology, asking respondents to share their views about how much privacy they expect in certain situations or whether they think police should be allowed to take certain actions against people in this country. Scholars report their sampling strategies and often go to great lengths to achieve demographic diversity in their respondent population. Surveys are typically conducted in person or—in the most recent studies—using internet techniques like Mechanical Turk.²³⁸

231. *Id.*

232. *Carpenter v. United States*, 585 U.S. 296, 359 (Thomas, J., dissenting) (observing that “our precedents do not explain who is included in ‘society’”).

233. Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 6 SUP. CT. REV. 205, 228 (2015).

234. *Id.* at 227–28.

235. State court jurisprudence on search questions falls outside the scope of this Article.

236. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 732 (1993).

237. In addition to the surveys discussed in the text of the Article, we can recommend several other academic works documenting societal expectations of privacy. *See generally* Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRIM. L. 19 (2015); Alisa Smith, Sean Madden & Robert P. Barton, *An Empirical Examination of Societal Expectations of Privacy in the Digital Age of GPS, Cell Phone Towers, & Drones*, 26 ALB. L.J. SCI. & TECH. 111 (2016); James W. Hazel & Christopher Slobogin, “A World of Difference”? *Law Enforcement, Genetic Data, and the Fourth Amendment*, 70 DUKE L.J. 705 (2021); Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay “Expectations of Privacy,”* 11 U. PA. J. CONST. L. 331 (2009); Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 610 (2011).

238. Amazon Mechanical Turk and similar platforms are online crowdsourcing marketplaces where researchers can hire remote workers to perform small tasks such as surveys.

The goal of these surveys is to document the level of fit between respondents' privacy scores and the holdings of Supreme Court cases concerning reasonable expectations of privacy. The survey results comport with the Court's holdings in certain scenarios, but in significant areas they diverge, as Justice Gorsuch remarked in his *Carpenter v. United States* dissent.²³⁹ For example, in one study of twelve hundred people, Professor Bernard Chao and his co-authors asked respondents to identify their privacy expectations for eighteen different police practices.²⁴⁰ The study found significant disparity between judicial and public expectations in a number of areas, including GPS tracking, leading the authors to conclude that the Court may be drawing conclusions in certain Fourth Amendment cases that conflict with the views of ordinary citizens.²⁴¹ Professor Henry Fradella and his co-authors surveyed almost six hundred people and found that people's expectations of privacy concerning their property were in significant tension with Supreme Court holdings.²⁴² More recently, Professors Tonja Jacobi and Christopher Brett Jaeger²⁴³ surveyed 118 English-speaking residents of the United States; their work revealed significant gaps between people's privacy expectations and Supreme Court precedents in eight distinctive areas, including obtaining a voice print and perusing bank records.

Despite the wealth of survey evidence documenting community views about privacy, the Supreme Court has routinely and resoundingly rejected all invitations to consider such evidence when deciding what privacy expectations society is prepared to recognize as reasonable.²⁴⁴ Rejection of such evidence does not rest on stated concerns about methodology or generalizability; it is instead a flat refusal to even acknowledge the existence of such

239. *Carpenter v. United States*, 585 U.S. 296, 393 (2018) (Gorsuch, J., dissenting). He declared, "Unsurprisingly, . . . judicial judgments often fail to reflect public views" and then cited Slobogin and Schumacher, *supra* note 236, as support for that proposition. *Id.*

240. Bernard Chao, Catherine Durso, Ian Farrell & Christopher Robertson, *Why Courts Fail to Protect Privacy: Race, Age, Bias, and Technology*, 106 CALIF. L. REV. 263, 294 (2018). This article reviews the full range of empirical work conducted up to that time.

241. *Id.* at 319.

242. Henry F. Fradella, Weston J. Morrow, Ryan G. Fischer & Connie Ireland, *Quantifying Katz: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 372 (2011).

243. Tonja Jacobi & Christopher Brett Jaeger, *Katz's Imperfect Circle: An Empirical Study of Reasonable Expectations of Privacy*, 77 FLA. L. REV. 593, 627, 674-78 (2025).

244. Polling data did feature in the Court's opinion in *Riley v. California*, 573 U.S. 373, 395 (2014), but that was to decide a different question—whether automatic (suspicionless) container searches performed during a search incident to arrest should be permitted for cell phones as well as for physical containers. In an effort to distinguish cell phones from diaries and cigarette packs, Chief Justice Roberts cited polls addressing modern cell phone use: For example, nearly three-quarters of smart phone users report being within five feet of their phones at all times, twelve percent of people report keeping their phones with them in the shower, *id.*, and the average smart-phone user has thirty-three apps on their phone. *Id.* at 396.

evidence, even when it is presented in amicus briefs.²⁴⁵ This pattern has led one observer to conclude that when it comes to the Fourth Amendment, “[l]ike beauty and obscenity, intrusiveness is in the eye of the beholder.”²⁴⁶ We found only one instance of engagement with the surveys in Supreme Court opinions in Fourth Amendment search cases, and that was in Justice Gorsuch’s *Carpenter* dissent.²⁴⁷ But even this mention was not an endorsement of the survey as relevant evidence; Justice Gorsuch merely acknowledged that judicial opinions and public perspectives oftentimes part ways²⁴⁸ and argued that legislatures rather than courts ought to make these determinations.²⁴⁹

Lower federal courts too have avoided engagement with opinion surveys when deciding Fourth Amendment search questions. Even when lawyers cite such studies in their briefs (or when amicus bring opinion surveys to the court’s attention),²⁵⁰ the published majority opinions reveal almost no trace of the surveys’ impact—or even of their existence.

We conducted Westlaw and Lexis searches for federal court Fourth Amendment search cases that mention or cite any of the academic survey articles cited in Section III.C of this Article, starting with Slobogin and

245. See, e.g., Brief of Amici Curiae Empirical Fourth Amendment Scholars in Support of Petitioner at 1–2, *Carpenter v. United States*, 585 U.S. 296 (2018) (No. 16-402).

246. Reply Brief for Appellant at 3, *In re F.B.*, 726 A.2d 361 (Penn. 1999) (No. 0064), 1996 WL 33418115, at *2–3 (discussing intrusiveness in the context of administrative searches at schools).

247. *Carpenter v. United States*, 585 U.S. 296, 393 (2018) (Gorsuch, J., dissenting).

248. Justice Gorsuch discussed the divergence between the Court’s holdings in *Florida v. Riley*, 488 U.S. 445, 445 (1989) (overflights at four hundred feet), and *California v. Greenwood*, 486 U.S. 35, 37 (1988) (search of trash left at the curb), and clear public understandings of privacy—but he did not provide a source for those public understandings or explain why public understandings should be utterly ignored. *Carpenter*, 585 U.S. at 387–88.

249. *Carpenter*, 585 U.S. at 393. Scholars have criticized the use of positive law (like legislative enactments) as a device to set the outer bounds of privacy because “positive law is skewed in favor of the privileged.” CHRISTOPHER SLOBOGIN, *VIRTUAL SEARCHES: REGULATING THE COVERT WORLD OF TECHNOLOGICAL POLICING* 52 (2022). Moreover, statutes and common law that guide private party conduct ought not be automatically imported into contexts where government actors need to be regulated, because governments have “vast infrastructure and resources for conducting surveillance.” *Id.* (quoting Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 314 (2016)).

250. See, e.g., Brief as to 117 Motion to Suppress at 2–3, *United States v. Whipple*, No. 20-cr-31, 2021 U.S. Dist. LEXIS 742313 (E.D. Tenn. June 13, 2021) (citing to a survey that establishes a society expectation of privacy in personal account information); Appellant’s Opening Brief at 41, *United States v. Rosenow*, 50 F.4th 715 (9th Cir. 2022) (No. 20-50052) (using a study to establish that society reasonably expects privacy in Yahoo messenger and Facebook messages); Amended Motion to Suppress Evidence Resulting from use of Cell Cite Simulator at 11, *United States v. Harris*, No. 12-cr-205, 2016 WL 5389214 (M.D. Fla. July 19, 2016) (arguing that “[r]ecent studies show Americans expect privacy in the data stored on and generated by their cellphones, including location information”); Motion to Suppress Evidence at 24, *United States v. Soybel*, No. 1:17-cr-00796, 2018 WL 8732429 (N.D. Ill. Sept. 25, 2018) (using survey data to argue “that individuals overwhelmingly consider their Internet browsing habits to be private”). Search terms available upon request.

Schumacher's 1993 article.²⁵¹ We also searched more generally for "polls" and "surveys" with "privacy" or "reasonable expectations of privacy" (no term connector or date limits) to identify Fourth Amendment threshold search opinions that referenced this work.²⁵² Since 1993, the only federal appellate judge to engage with survey evidence was Justice Gorsuch, in his dissent in *Carpenter*. We did find engagement with survey data in one federal trial court opinion, authored by Judge Lucy Koh of the Northern District of California.²⁵³

This pattern of neglect has led commentators to accuse the federal courts of merely substituting their own judgments about what is reasonable for society's judgments about what is reasonable, a substitution that is both unjustified and doctrinally illegitimate.²⁵⁴ The Court has also been accused of generating a kind of circularity in this jurisprudence, because what the Court declares to be reasonable or legitimate becomes so for all future cases, despite demographic or cultural changes in the United States.²⁵⁵ Court decisions thus appear to freeze societal judgments about search techniques at a moment in time, for all time, rather than allowing them to evolve (as in the Eighth Amendment context).

* * *

To recap: Although courts handling obscenity, the death penalty, and Fourth Amendment search matters formally recognize the relevance of societal standards, they remain largely unreceptive to opinion surveys as tools to help illuminate those standards. Some courts in obscenity cases have

251. Christine Scott-Hayward and her co-authors recently conducted a similar search for Fourth Amendment cases and briefs citing academic surveys, with nearly identical results. Christine S. Scott-Hayward, Henry F. Fradella & Gerald Eastwood, *The Role of Empirical Scholarship in Fourth Amendment Privacy Jurisprudence*, 52 FLA. ST. U. L. REV. 149, 161–70 (2025). The authors found a total of fourteen citations to surveys' empirical findings in parties' briefs in federal and state cases (combined), *id.* at 164, but only four judicial case opinions, across both state and federal courts, engaged with the empirical findings of any of these studies. *Id.* at 167. The authors found only one federal case that did not turn up in our search: *Crawford v. U.S. Dep't of the Treasury*, No. 15-cv-250, 2015 WL 5697552 (S.D. Ohio Sept. 29, 2015). The court merely acknowledged in a footnote that "the Supreme Court's estimation of what a reasonable person might expect appears to be diverging from reality." *Id.* at *11 n.3. After an exhaustive review of their findings, the authors found "only [one] case in which empirical legal scholarship was cited to support the court's ruling." Scott-Hayward et al., *supra*, at 169–70. That case is *Love v. State*, 543 S.W.3d 835, 844 (Tex. Crim. App. 2016), *abrogated by* *Holder v. State*, 639 S.W.3d 704 (Tex. Crim. App. 2022).

252. Search terms available upon request.

253. *In re* Application for Tel. Info. Needed for a Crim. Investigation, 119 F. Supp. 3d 1011, 1024–25 (N.D. Cal. 2015) (using survey information as one basis to conclude that cell phone users have a reasonable expectation of privacy in historical cell site location information).

254. See Slobogin & Schumacher, *supra* note 236, at 731–32; Jacobi & Jaeger, *supra* note 243, at 674–75; Kugler & Strahilevitz, *supra* note 233, at 210.

255. Jacobi & Jaeger, *supra* note 243, at 602–05 (examining various types of circularity claims and empirically testing whether circularity is a problem). For an opposing view about the problems of circularity, see Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1748–50 (2017).

admitted surveys to gauge community standards, but strict methodological scrutiny or theoretical opposition often leads to their exclusion. In death penalty jurisprudence, opinion surveys made a brief appearance in *Atkins*, but they have since been sidelined, with state courts showing slightly more willingness to engage with such evidence. In the Fourth Amendment context, despite a significant body of empirical research that tracks societal expectations of privacy, federal courts have consistently disregarded these findings when addressing threshold search questions. This behavior stands in stark contrast not only to the way in which courts regard surveys in civil litigation but also to the way in which criminal courts treat other kinds of scientific evidence. Scholars such as Professor Brandon Garrett have noted that courts in criminal cases often accept evidence of questionable validity, such as fingerprint analysis and firearm toolmark analysis, despite concerns over their scientific reliability.²⁵⁶ Rejection of surveys in criminal cases thus raises concerns about whether criminal court decisions truly reflect community standards or simply perpetuate the judge's own subjective views.

IV. WHAT ACCOUNTS FOR THE DIVERGENT TREATMENT OF COMMUNITY OPINION SURVEYS?

Courts' receptivity to community input through opinion surveys is wildly inconsistent, depending on the type of case under consideration. Treatment of surveys runs from welcoming (in trademark and false advertising cases) to open (in patent and antitrust cases) to skeptical (in obscenity cases) to mostly or entirely dismissive (in death penalty and Fourth Amendment cases). In the pages below we consider some reasons the landscape might have developed this way. In Section IV.A, we examine—and ultimately reject—a range of explanations located in structural features of the cases or of the court system itself. In Section IV.B, we argue that judges' preference for relying on moral intuition in criminal cases more convincingly explains the disparity we observed.

A. STRUCTURAL FEATURES OF CASES AND COURTS

There might be some inherent procedural differences in civil and criminal cases that justify differential treatment of opinion surveys by the courts. If those formal differences are the source of the pattern we observed, this variance might not be cause for concern. But as we show below, none of these features of the legal system convincingly explains or justifies the disparity in courts' treatment of opinion surveys.

Let's start with legal doctrine. Perhaps the doctrinal relevance of opinion surveys varies according to whether a judge is hearing a civil or criminal case, and that explains courts' inconsistent receptivity to surveys when they are ruling on admissibility. That is, surveys might be naturally more likely to meet

²⁵⁶ BRANDON L. GARRETT, *AUTOPSY OF A CRIME LAB: EXPOSING THE FLAWS IN FORENSICS* 8 (2021).

the relevance threshold in civil cases (compared to criminal cases) because civil doctrines make them more obviously relevant.

Even a cursory examination of the doctrines at issue reveals the error of this claim. For the three points on the criminal side of the spectrum that we identify, community input is literally baked into the doctrine. Obscenity is defined by transgression of contemporary community standards for sexual expression; the death penalty requires consideration of evolving national standards of decency; and the Fourth Amendment's protections are triggered by police actions that infringe on expectations of privacy that society recognizes as reasonable. In contrast, for patent and antitrust cases, surveys appear to be just one way that litigants can address particular questions about value and preference by consumers. Direct community input is not actually required, but courts seem to accept surveys because other kinds of tools are not available or are not as reliable. In short, doctrinal variation—to the extent it exists—favors an opinion survey landscape that is the reverse of the one we have now.

Differing burdens of proof offer the second possibility: Civil cases rest liability on a preponderance of the evidence standard, while criminal cases require proof beyond a reasonable doubt. Given these different burdens, a survey showing what a simple majority of respondents think about an issue therefore might amount to valid evidence only if the quantum of proof required is preponderance of the evidence. It could never suffice for proof beyond a reasonable doubt.

We find this explanation unpersuasive, for two reasons. First, two of the points on the criminal side of the spectrum—the constitutionality of the death penalty and Fourth Amendment search questions—are not being decided as part of criminal trials. The death penalty issue is a matter of law for appellate courts at the post-conviction stage, not for trial factfinders. And what counts as a search is a matter of law for the trial court to resolve pre-trial, where the standard of proof is preponderance of the evidence (the same as for civil liability). Even in obscenity cases, which are being tried by a jury, the defendant is typically the party to offer the survey, and they do not have to prove anything beyond a reasonable doubt; merely poking holes in the prosecution's burden of proof is sufficient. In all three criminal law contexts, then, the beyond a reasonable doubt standard should not influence the admission of opinion survey evidence. Second, recall from Section I.A of this Article that surveys are considered by the court when a party offers them into evidence.²⁵⁷ The primary threshold for admissibility in both civil and criminal cases is relevance—the likelihood, however slight, that the survey will make a fact in dispute true or false.²⁵⁸ Relevance is a far lower standard than preponderance

257. See *supra* Section I.A.

258. FED. R. EVID. 401.

of the evidence, and it should be applied similarly whether the dispute is civil or criminal.

A third explanation might be found in the evidence rules regarding expert testimony: If courts apply different evidentiary standards when considering expert witness testimony in civil as opposed to criminal cases, that might explain why opinion surveys pass muster in the former but not in the latter. As a matter of formal law, the rules of evidence of a jurisdiction apply equally to civil and criminal cases, as do expert testimony standards. But studies of the law in action suggest something very different is happening below the surface: Scholars have observed that courts applying *Daubert* are much more willing to admit expert testimony in civil cases than in criminal cases.²⁵⁹ Moreover, in criminal cases, judges allow expert testimony presented by prosecution experts far more readily than similar evidence presented by the defense.²⁶⁰ So if the *Daubert* variance observed in these other settings can be found in the opinion survey context, that might explain the pattern we observed.

This explanation too falls short when we consider the procedural posture of the opinions. Obscenity defendants are not losing expert witness motions—their surveys are blocked on pure relevance grounds when judges find fault with the survey methodology. And surveys in death penalty and Fourth Amendment search settings are not being tossed after expert witness hearings. They are not considered *at all*. We thus cannot credit differential application of the expert witness standards as a reasonable explanation for the disparity between civil and criminal cases.

Fourth, maybe the different settings and stakes of civil and criminal cases are causing both attorneys and judges to operate differently when handling opinion surveys in these contexts.²⁶¹ Trademark, false advertising, patent, and antitrust cases typically involve large amounts of money and are litigated by well-financed private attorneys. These attorneys hire experts to conduct a survey tailored for the specific case (what we have called a bespoke survey), and judges are aware that bespoke surveys cost thousands—or tens of thousands—of dollars to produce. When that much money has been spent, judges might be inclined to consider the evidence that was generated, even if they have some concerns. In contrast, attorneys in criminal cases usually

259. Julie A. Seaman, *A Tale of Two Dauberts*, 47 GA. L. REV. 889, 903–08 (2013) (documenting variation in courts' treatment of expert witnesses in arson cases, depending on civil or criminal context); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 110 (2000) (explaining that after reviewing all federal and state cases that cited *Daubert* through 1999, civil defendants appear to win their *Daubert* motions most of the time while criminal defendants usually lose); Joseph Sanders, *Applying Daubert Inconsistently? Proof of Individual Causation in Toxic Tort and Forensic Cases*, 75 BROOK. L. REV. 1367, 1368 (2010) (accusing the courts of inconsistent gatekeeping across civil and criminal cases).

260. Seaman, *supra* note 259, at 897 (“[C]riminal defendants’ expert testimony, when offered, is less likely to be admitted than similar prosecution expert testimony.”).

261. See generally Gold, *supra* note 4 (suggesting that differences among the populations of criminal and civil cases can explain differences in the procedural robustness the parties receive).

operate with tighter budgets than their civil peers (some may even be public defenders).²⁶² As a result of these financial constraints, they typically have to rely on third-party surveys found in academic or trade publications; creating a bespoke survey is not a realistic option.²⁶³ Even though an academic survey contains indicia of reliability (such as publication in a peer-reviewed journal), a court may have an easier time ignoring or rejecting it, simply because no party to the litigation has invested resources in creating it.

The political economy nature of this claim gives it an aura of neutrality and inevitability, but it does not account for the pattern we observed. First, it does not explain the courts' rulings in obscenity cases, as they contain bespoke surveys. Defense attorneys in obscenity cases hire experts to design surveys to gauge the particular "community standards" at issue,²⁶⁴ much like their civil litigator counterparts do. When the case goes to trial, the expert testifies about the methods used to conduct the survey and the results of the survey, but courts still regularly rule that these surveys are irrelevant. If the cost spent by a litigant truly influenced judges' (even unconscious) willingness to admit bespoke surveys, judges in obscenity cases should act like judges in civil cases, but they do not. Second, preferring bespoke surveys to preexisting surveys conducted by third parties seems to violate a tenet of our evidentiary codes: that we should be more suspicious of documents created just for litigation purposes than of records produced in the regular course of business.²⁶⁵ In the Federal Rules of Evidence and in many states' evidentiary codes, for example, only records generated in the regular course of business qualify for an exception to the hearsay rule.²⁶⁶ Bespoke surveys created for litigants by hired experts should trigger more suspicion, rather than less, by courts concerned about their value to the litigation. For these reasons, the setting and stakes possibility ought to be rejected as inconsistent with the facts of the cases themselves.

A fifth possibility stems from features of our judicial bureaucracies: Judges at different court levels decide different types of cases, so the rulings

262. There are too few instances of government litigants in these cases for us to comment on the differential between surveys introduced by government agencies and surveys introduced by private actors. With the exception of the antitrust cases, the surveys we discuss in this Article were all introduced by private actors.

263. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to surveys that were conducted by outside organizations prior to the litigation). The surveys in the Fourth Amendment space discussed in Section III.C are all done by academics, apart from any specific litigation.

264. See *supra* note 143.

265. The business record exception to the hearsay rule can be found in FED. R. EVID. 803. See also Dai et al., *supra* note 29 ("[S]urveys conducted by third parties and/or in the ordinary course of business can be particularly persuasive, precisely because they were generated independent of the dispute at hand.").

266. Surveys do not count as inadmissible hearsay. *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 682 (S.D.N.Y. 1963) (declaring that surveys are not offered to prove the truth of what respondents said). This example was provided merely for illustration purposes.

might flow from the status of the judge who heard the case, rather than from anything about the case itself. More precisely, on the civil side, trademark, false advertising, patent, and antitrust litigants all assert federal claims heard by federal courts. (While there are state counterparts to the Lanham Act, we only looked at cases in federal court.) Moreover, disputes over survey evidence in these cases seem to be decided primarily at the trial court level. That is probably because appeals of evidentiary rulings are typically decided under an abuse of discretion standard, so appeals of these rulings are rare.²⁶⁷ In contrast, the criminal obscenity cases we studied are mostly state opinions, decided by judges in state supreme courts or state mid-level appellate courts, and the death penalty opinions we examined are U.S. Supreme Court (and secondarily, state supreme court) opinions. The Fourth Amendment cases all come from the U.S. Supreme Court, with the lower federal courts following in lockstep.²⁶⁸ Although we cannot rule out that the differences we observed may stem from the different courts that decided these different cases,²⁶⁹ we do not have a theory about why U.S. Supreme Court Justices and state appellate judges are more likely to reject survey evidence than federal district court judges hearing civil cases.

The method of selecting and retaining judges in our judicial bureaucracies is at best a partial explanation. On the state side, judges who are elected might be using their positions in criminal cases to campaign as tough-on-crime jurists (or at least take positions that keep them from being touted as soft on crime by their opponents).²⁷⁰ After *Citizens United v. Federal Election Commission* lifted prohibitions on corporate and union-funded campaign ads,²⁷¹ money poured into judicial campaigns to oust judges who appear too friendly to criminal defendants.²⁷² A state appellate judge concerned about reelection might

267. *United States v. Tsarnaev*, 595 U.S. 302, 322 n.3 (2022) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (“We have held that abuse of discretion is the proper standard of review of a district court’s evidentiary rulings.”)).

268. We found only one instance of a lower federal court directly considering survey evidence in Fourth Amendment cases. See *In re Application for Tel. Info. Needed for a Crim. Investigation*, 119 F. Supp. 3d 1011, 1024–25 (N.D. Cal. 2015). Scott-Hayward and her co-authors found one state case. Scott-Hayward et al., *supra* note 251, at 170.

269. We also used a variety of techniques to find these trends in survey usage, such as examining preexisting studies in the trademark and false advertising section and conducting our own review of available cases in the obscenity section and the death penalty section.

270. See, e.g., David Abrams, Roberto Galbiati, Emeric Henry & Arnaud Philippe, *Electoral Sentencing Cycles*, 39 J.L. ECON. & ORG. 350, 368 (2022) (finding that judges who approach reelection are more likely to give higher sentences to felons convicted in their courtrooms).

271. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318–19 (2010).

272. MICHAEL S. KANG & JOANNA M. SHEPHERD, *FREE TO JUDGE: THE POWER OF CAMPAIGN MONEY IN JUDICIAL ELECTIONS* 79 (2024) (“We found that the sudden likelihood of greater spending in [state] supreme court races made justices significantly more hostile to criminal defendants. By unleashing corporate and union electioneering in twenty-three states, *Citizens United* made campaigning in those states more competitive and expensive. Justices appeared to

therefore tailor their rulings in major criminal cases to avoid being targeted. But are obscenity cases really in the crosshairs? That seems doubtful. Ruling that opinion survey evidence is admissible in an obscenity prosecution is hardly the same as voting for a new trial in a murder case, whatever one's politics. On the federal side, life tenure insulates federal judges at all levels from campaign pressures, but that insulation does not suggest a clear position on the value of opinion surveys as evidence. If anything, job security increases a federal judge's sense of freedom to ignore such evidence because they do not feel accountable to the community. But if federal judges do feel such freedom, they do not appear to be acting on it in their civil dockets. Justices on the U.S. Supreme Court are a different matter, as our death penalty and Fourth Amendment cases show.

Sixth, perhaps variation can be explained by the breadth of cases that could be impacted by a court's ruling on the admissibility of opinion survey evidence. In civil cases, the dispute is limited to the two parties before the court, and the survey is specific to that dispute. The issue addressed by the survey thus amounts to what Professor Kenneth Culp Davis famously called an "adjudicative" fact.²⁷³ In criminal cases, especially in the death penalty and Fourth Amendment search settings, a court's ruling on the value of survey evidence could have significant ripple effects across the jurisdiction (or even across the country) and may well impact many future cases. The survey's contents thus resemble "legislative" facts, due to their broad reach.²⁷⁴ If courts' distinguishing between adjudicative and legislative facts is the motivating reason for the pattern we observed, courts are simply admitting opinion surveys in the most conservative fashion possible, which is consistent with courts' preference to do the smallest thing (rule on the narrowest basis) they can.²⁷⁵

Before crediting this as a valid justification, though, we have to ask—if judges are not admitting opinion surveys in the criminal cases because of concern about the ripple effect, on what grounds *are* they basing their decisions? All that remains is their own intuition.²⁷⁶ And therein lies the

adjust by adopting more conservative attitudes in criminal cases and becoming significantly more hostile to criminal defendants.”).

273. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

274. *See id.*

275. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1999) (explaining that when courts employ “decisional minimalism” they “say[] no more than necessary to justify an outcome, and leav[e] as much as possible undecided . . . [This approach] is likely to reduce the burdens of judicial decision . . . and more fundamentally . . . is likely to make judicial errors less frequent and (above all) less damaging”).

276. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 211 (2017) (describing empirical research suggesting that, like other people, judges “often rely excessively on intuitive strategies to make decisions, even in settings in which such strategies lead to mistakes”).

problem. It seems exactly backwards to validate judicial preference for one's own intuition in cases that have significant ripple effects but to expect actual evidence in more limited, civil settings.

B. JUDGES' MORAL INTUITION

This brings us to the heart of the matter: We suspect that in criminal cases, judges' reliance on moral intuition deters them from considering the community's voice as captured in opinion surveys, even when the relevant legal doctrines incorporate community input. In contrast, judges handling civil cases that present issues incorporating community input are not tethered to moral intuition; they are thus more willing to accept evidence from the community, such as surveys, before reaching a decision.

By using the phrase "moral intuition," we are referring to a combination of two distinct decision-making processes. The "intuitive" part of moral intuition refers to the process of making decisions or solving problems based on a sense of understanding that happens quickly and without deliberate thought.²⁷⁷ Intuition uses what behavioral economists have called "system 1" thinking.²⁷⁸ When people use system 1, they make unconscious and fast decisions informed by heuristics and biases. "System 2" thinking refers to people's slow thinking system; it is deliberative rather than reflexive and tends to produce higher quality decisions.²⁷⁹ The downside of system 2 is that it requires more mental energy and time than system 1 thinking.

Professor Chris Guthrie, Professor Jeff Rachlinski, and Judge Andrew Wistrich suggest that "judges generally make intuitive decisions but sometimes override their intuition with deliberation."²⁸⁰ To be clear, we do not dispute that there is a place for judges to rely on their intuition.²⁸¹ Judges must be efficient, and not all decisions can be the product of careful deliberation. Moreover, heuristics often draw upon expert knowledge and experience: When judges see familiar patterns, the use of intuition may simply reflect their expertise.²⁸²

277. See Marta Sinclair, *Misconceptions About Intuition*, 21 PSYCH. INQUIRY 378, 378 (2010) (characterizing the consensus understanding of intuition as "direct knowing that results from nonconscious holistic information processing").

278. Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, 23 BEHAV. & BRAIN SCIS. 645, 658 (2000); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2013).

279. KAHNEMAN, *supra* note 278, at 21.

280. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007) (labelling this the "intuitive-override" model of judicial decision-making); KAHNEMAN, *supra* note 278, at 3.

281. R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1384 (2006) (arguing that "intuition is invariably central—whether overtly so or not—to the process of arriving at a judicial outcome by any standard recognized means").

282. Richards, *supra* note 2, at 249.

Judges may be making intuitive decisions in the criminal contexts we identified because these issues seem familiar, and they feel comfortable addressing familiar issues using their intuition, without consulting any kind of outside source. Obscenity, cruel and unusual punishment, and reasonable expectations of privacy all raise issues that appear to fall directly into a judge's decision-making wheelhouse. In obscenity and Fourth Amendment cases, judges likely have instincts and intuitions about "decency" and "privacy" based on their life experiences.²⁸³ Furthermore, if judges think of themselves as legal philosophers or "disciples of Blackstone"²⁸⁴ based on their legal education, they are likely to place great value on intuition as a form of evidence in these kinds of cases and to be suspicious of social science as a valuable form of knowledge.²⁸⁵ A judge trained in the classical jurisprudential tradition may particularly question whether "the views of laypeople with no formal legal training are particularly helpful" to analyzing the issues presented before the court.²⁸⁶

Returning to some of the cases we examined in this Article, recall *St. John*, where the judge declared that "obscenity is not a subject that lends itself to the traditional use of expert testimony" and scorned the use of expert testimony in obscenity cases as "mak[ing] a mockery" of what expert testimony is for.²⁸⁷ And in *Flynt*, Chief Judge Deen of the Georgia Court of Appeals warned that "[p]ersonal polls or sexual surveys . . . may . . . perplex the jurors as do political polls confound and confuse the voters."²⁸⁸ For a judge who believes—and states openly in opinions—that surveys have no place in

283. Rachlinski & Wistrich, *supra* note 276, at 218–20 (describing research showing the influence of emotions on judicial decision-making); *see also* Levine et al., *supra* note 8, at 1465–67 (describing the role that social class likely plays in the Justices' approach to issues involving people charged with crime).

284. *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (referring to "those of us who have made a career of reading the disciples of Blackstone").

285. Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 740 (2022) ("Most legal philosophers value this kind of intuitive evidence. Many give intuition great significance."). Justice Scalia famously chastised Justice Kennedy for acting more like a disciple of Freud than a reader of Blackstone when he discussed the role of peer pressure in creating a First Amendment establishment problem. *Weisman*, 505 U.S. at 642 (Scalia, J., dissenting); *see also* Christopher Slobogin, *The Use of Statistics in Criminal Cases: An Introduction*, 37 BEHAV. SCI. & L. 127, 131 (2019) (observing that judges don't want to "get bogged down in mind-numbing debates about statistical significance, effect sizes, and power analysis, when, in their view, anecdotal evidence [and common sense] can provide the necessary information"). Henry Fradella likewise argues that many judges express an aversion to social science evidence in many cases, particularly where social issues are being tested. *See generally* Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts"*, 35 RUTGERS L.J. 103 (2003) (giving ten reasons to believe judges dislike and distrust social science evidence, including their concern that social scientists use "objective" evidence as a smokescreen to mask their normative agendas).

286. Tobia, *supra* note 285, at 743.

287. *St. John v. N.C. Parole Comm'n*, 764 F. Supp. 403, 409 (W.D.N.C. 1991) (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973)).

288. *Flynt v. State*, 264 S.E.2d 669, 680 (Ga. Ct. App. 1980) (Deen, C.J., concurring).

legal analysis *despite the formal role assigned to community standards in the doctrine*, it should come as no surprise when the surveys offered up by defendants like Mr. St. John or Mr. Flynt are declared irrelevant. For these judges, the issue under review is a purely conceptual matter that intuition can address and answer; no survey, no matter how carefully conducted, could provide useful information. The community’s voice adds nothing of value.

Moreover, once a judge goes outside the bounds of their intuition to consult outside sources, the result might be to lose control over the outcome the judge prefers. Numerous studies published in the Fourth Amendment area show that, in certain domains, community members disagree with judges about where they expect privacy from law enforcement.²⁸⁹ This variation suggests that if surveys were admitted, expectation of privacy analysis might produce an outcome that is at odds with judicial intuitions.²⁹⁰ The surveys discussed in the obscenity cases, while varying quite a bit in breadth and quality, point to a similar conclusion.²⁹¹ Who can forget Justice Potter Stewart’s famous quip with respect to obscenity: “I know it when I see it.”²⁹² Judges who want their personal views of “decency” and “privacy”—cloaked as common sense—to prevail thus cannot risk admitting an opinion survey into evidence, because those survey results might cast doubt on their own intuitions and tee up the possibility of a different outcome.

The death penalty cases tell a slightly different story when it comes to the role of intuition versus deliberation. The Supreme Court’s Eighth Amendment opinions require the Court to locate and address objective evidence of evolving standards of decency, suggesting that the Justices are willing to examine, rather than merely intuit, what society’s standards of decency are.²⁹³ But the forms of objective evidence they will consider have been carefully curated. The views of the general public are relevant only to the extent they are filtered through

289. See studies discussed *supra* notes 236–43 and accompanying text.

290. See *supra* notes 236–43; *Carpenter v. United States*, 585 U.S. 296, 387–406 (2018) (Gorsuch, J., dissenting).

291. See *supra* Section III.A. Courts’ frequent disregard of outside survey evidence in obscenity cases contrasts with the approach taken by U.S. Patent and Trademark Office examiners who were asked to screen potential trademarks for offensiveness in accordance with Section 2(a) of the Lanham Act; research demonstrates that the examiners regularly pointed to outside sources to support their conclusions. Megan M. Carpenter & Mary Garner, *NSFW: An Empirical Study of Scandalous Trademarks*, 33 *CARDOZO ARTS & ENT. L.J.* 321, 341 (“Google searches are a common contextual piece of evidence used to demonstrate that a mark is scandalous to the general public.”); Barton Beebe & Jeanne C. Fromer, *Immoral or Scandalous Marks: An Empirical Analysis*, 8 *N.Y.U. J. INTEL. PROP. & ENT. L.* 169, 190–91 (2019) (similarly describing examiners’ reference to outside data or urbandictionary.com to deny a mark for offensiveness reasons). The U.S. Supreme Court recently held that denying a trademark for offensiveness reasons violates the First Amendment. *Iancu v. Brunetti*, 588 U.S. 388, 2302 (2019).

292. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This case predates by almost a decade the Court’s decision in *Miller v. California*, 413 U.S. 15, 23–25 (1973), in which it adopted the three-part test for identifying obscene materials.

293. See *supra* Section III.B.

the legislature; the public does not have independent standing to contribute to courthouse discussions on the topic. The reversion to “legislative power” as a political first principle suggests deliberation, but it might be a convenient cloak to hide a Justice’s personal commitment to the death penalty. Professor John Stinneford contends that “the Supreme Court has effectively replaced [the evolving standards of decency] test with an unfettered reliance on its own ‘independent judgment,’ with no external constitutional standard to guide its decisions.”²⁹⁴ That critique, if true, suggests that deliberation based on legislative trends or other forms of objective evidence is not true deliberation but rather a smokescreen to justify the result the majority of Justices have already decided to reach.

Contrast the criminal cases with the civil cases in this regard. The issues raised in the civil cases, such as how people select products under various market conditions, do not seem familiar. They are technical and divorced from the everyday reality of a judge’s life experience. No amount of training in legal theory and jurisprudence would have enabled Justice Stewart to have declared that he knows the value of a patented feature or an SSNIP when he sees it. In civil cases, trial judges need (and are comfortable showing that they need) expert help in the form of opinion survey evidence to resolve these technical issues. Common sense (and judicial ego) simply will not get the job done, and resort to these “techniques” might even lead to embarrassment.

Reliance on intuition thus appears to be highly relevant to the pattern we observed. But the Lanham Act cases suggest that it is not the whole story. Although considering issues that lend themselves to quick intuitive decisions appears to be a necessary condition for judges to reject survey evidence, their ready acceptance of trademark and false advertising surveys demonstrates that it is not a sufficient condition. After all, judges hearing a trademark dispute probably can quickly intuit whether a particular name or mark would cause confusion; the same is true for false advertising claims. So why do they not rely on intuition in these instances? This is where the “moral” part of moral intuition comes into play. Consumer confusion and deception in advertising do not invoke morality in the way that criminal cases do. Decisions about obscenity rest on definitions (and transgressions) of community standards of *decency*; death penalty rulings require the Court to assess evolving notions of *cruelty* and *human dignity*; and rulings on police searches involve determining what level of privacy society considers *morally reasonable* in the face of law enforcement needs. The moral issues at stake in criminal cases distinguish them from the commercial issues at stake in Lanham Act litigation.

Judges likely believe that they are better equipped for moral reasoning than ordinary members of the public, and they may feel that their robes entitle them to weigh in on the sorts of legislative facts that criminal cases

²⁹⁴ John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT’G REP. 87, 87 (2010).

pose. As Professor Michael Moore has suggested, judges “have moral thought experiments presented to them everyday.”²⁹⁵ Judges also may have received training in moral reasoning as part of their legal education²⁹⁶ or believe that their institutional role is to stand firm against majoritarian views (that surveys seem to represent).²⁹⁷ Indeed, the statements disparaging survey evidence in Chief Justice Rehnquist’s dissent in *Atkins*²⁹⁸ and the majority opinion in *Paris Adult Theatre I*²⁹⁹ suggest that at least some Justices think their views on morality are superior to those of ordinary people. Instinctively privileging their own expertise and viewpoints on moral matters, Justices believe they are justified in rejecting the community’s voice on these issues.

Although moral intuition may be descriptively accurate as an explanation for the pattern we observed, we do not regard this as an acceptable justification for judges’ behavior, for various reasons. Our first concern stems from lack of representativeness: As a general matter, judges are older, wealthier, and less diverse than the public at large, suggesting that their views are likely to be outdated and unrepresentative.³⁰⁰ In contrast, a survey “provides a diverse sampling of [views], not just [views] held by the politically powerful.”³⁰¹ Our second concern relates to judges’ reference group: Judges’ decisions are often made on a solo basis or in consultation only with other judges, numbers too small to ensure that all points of view are aired.³⁰² Third, we are troubled by the lack of transparency: Judges’ reliance on intuition or reference to morality can be a “pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system.”³⁰³ Finally,

295. Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY 188, 230 (Robert P. George ed., 1992).

296. Tobia, *supra* note 285, at 743 (“Traditional jurisprudence occurs in the seminar room—or across the pages of law reviews—among professors and scholars . . .”).

297. See, e.g., Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 953–54 (2001).

298. *Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting) (asserting that polls and policy statements that “have not [been] deemed [] persuasive enough to prompt legislative action” deserve zero weight in an Eighth Amendment analysis).

299. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56 n.6 (1973) (asserting that surveys conducted by experts ought to have no role in determining community standards and make a mockery of what expert witness testimony is supposed to be about).

300. See Chao et al., *supra* note 240, at 290–91 (summarizing various studies on judicial demographics).

301. SLOBOGIN, *supra* note 249, at 55.

302. See Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT’L J. CONST. L. 2, 24 (2009) (suggesting a number of reasons why judges do not compare favorably to legislators and other people when it comes to moral reasoning).

303. Guthrie et al., *supra* note 280, at 31; see also Matthew DeMichele, Megan Comfort, Kelle Barrick & Peter Baumgartner, *The Intuitive-Override Model: Nudging Judges Toward Pretrial Risk Assessment Instruments*, 85 FED. PROB. 22, 24 (2021) (discussing how seasoned judges may rely on intuition in decision making). *But see* RICHARD A. POSNER, HOW JUDGES THINK 126 (2010) (“[T]he fact that judicial decisions are sometimes influenced by the race, religion, gender, or other personal characteristics of the judge need not be a consequence of disloyalty.”).

the criminal law and procedure doctrines we discuss herein specifically instruct courts to consider the views of the community. Consultation does not mean that lay views will or should be dispositive; it simply means that lay perceptions ought to be sought and heard in order to comply with doctrinal commands.

For all of these reasons, judges should not substitute their moral intuitions for empirical assessments of community standards,³⁰⁴ particularly on sensitive issues like what material is obscene or what constitutes a reasonable person's expectations of privacy.³⁰⁵ Any claim to expertise is likely to simply mask personal judgment.³⁰⁶ Judges instead should consider opinion survey evidence because it is more likely to provide an accurate gauge of the community's beliefs in all kinds of cases, but especially the sorts of criminal cases we discuss here.

V. RESTORING THE PLACE OF THE COMMUNITY IN "COMMUNITY STANDARDS"

Judges' preference for using moral intuition instead of survey evidence has sidelined the role of the community in criminal cases whose doctrines incorporate community standards. What can be done to reverse this trend? In the remainder of this Article, we offer recommendations for increasing the acceptability of opinion survey evidence in criminal cases and for equipping courts to thoughtfully assess emerging forms of data and scientific methods in their decision-making processes. By situating these recommendations within a larger effort to align judicial practices with modern empirical and scientific advancements, we aim to promote decisions that are more accurate and objective.³⁰⁷ In addition to calling for doctrinal changes to be made by the appellate courts, we urge judges and lawyers to seek out training in empirical methods—to improve their fluency in and comfort with this form of evidence. We also remind attorneys that, in order for courts to consider surveys as evidence, briefs must include reference to them; one cannot expect

304. Here we echo the call for judges to make "evidence-based law" rather than resting their holdings on suppositions or assumptions. See Fradella, *supra* note 285, at 105. See generally Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901 (2011) (discussing the rise of evidence-based law in legal academia).

305. Lamont, *supra* note 14, at 141 ("[I]t is foolish to assume that a single judge . . . could adequately represent or assess [the community] standard, even assuming that they could rid themselves of their emotional reactions and ingrained personal biases."); see also Levine et al., *supra* note 8, at 1465–67 (suggesting that the elite status of the Justices distinguishes them from, and makes them less sympathetic to, people who are poor or charged with crimes).

306. See Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 NW. U. L. REV. 1277, 1281 (2023) (noting "the social, institutional, and behavioral incentives at play in judges' recusal decisions"); see also Linz et al., *supra* note 35, at 107 (finding divergence between a person's stated view about whether material is offensive and that person's sense of whether the community would be offended by such material; many people erroneously believed that others in the community would find material offensive, which discouraged them from expressing tolerance for fear of being seen as deviant).

307. See Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 YALE L.J.F. 744, 782 (2021) (arguing for "sweeping reforms to legal training" in view of new scientific developments).

a court to rule on the admissibility of survey evidence that has not been properly presented.

A. BRINGING COURTS INTO ALIGNMENT WITH PUBLIC SENTIMENTS

As a first step, appellate courts should make plain that opinion surveys conducted by qualified experts are acceptable, relevant evidence in criminal cases where the doctrine incorporates community input or community standards. This shift would give attorneys a stronger basis on which to argue that trial courts should admit opinion surveys in criminal cases, encouraging them to adopt the weight-versus-admissibility approach that has taken root in the trademark, false advertising, patent, and antitrust cases for surveys that have some imperfections. Inviting lower courts to consider survey data in a wider set of cases, both civil and criminal, would bring legal rulings into closer alignment with the doctrinal commands for community input that are already in place.

Our recommendation builds on arguments made by the experimental jurisprudence movement.³⁰⁸ Scholars writing in this tradition start from the premise that there ought to be a correlation between how lay people think about and apply legal concepts and how judges think about and apply those same concepts. Without this correlation, we suffer a form of “judicial anarchy” where “[j]udges engage in outcome-driven reasoning, which they dress up, *post hoc*, in the language of [doctrine].”³⁰⁹

This movement does not simply call for correlation as a theoretical matter. It uses experiments (including surveys) to show how laypeople think about legal concepts such as reasonableness and causation³¹⁰ or even how they interpret disputed contract terms.³¹¹ In the criminal context, researchers have studied whether the public’s intuitive sense of justice is at odds with the law of felony murder,³¹² or whether consent to sex procured through fraud ought to be punished as a form of rape.³¹³

308. See Tobia, *supra* note 285, at 780–82 (arguing that experimental jurisprudence is a form of jurisprudence that is meant to complement theoretical jurisprudence but not replace it); Roseanna Sommers, *Experimental Jurisprudence: Psychologists Probe Lay Understandings of Legal Constructs*, 373 SCIENCE 394, 394 (2021).

309. Sommers, *supra* note 308, at 394 (emphasis added).

310. See, e.g., Christopher Brett Jaeger, *The Empirical Reasonable Person*, 72 ALA. L. REV. 887, 931–33 (2021); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 1006–12 (2019); Chao et al., *supra* note 240, at 315–16.

311. See Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753, 1809 (2017) (suggesting that surveys can help courts establish the plain ordinary meaning of a contract term).

312. See, e.g., Ian P. Farrell, *Abolishing Felony Murder: An Empirical Perspective*, 62 AM. CRIM. L. REV. 25, 65–68, 85–87 (2025) (showing that people do not think the punishments associated with felony murder rule are appropriate).

313. Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2237 (2020).

Although some might argue that law and legal theory cannot and should not be “crowdsourced”³¹⁴ or reduced to a kind of “folk intuition,”³¹⁵ experimental jurisprudence scholars emphasize the importance of bringing common people into our common law traditions. If the public’s approach to legal issues diverges greatly from the approach that judges take, it might signal that judges have become too far removed from the community they are meant to serve.³¹⁶ A judge who is so removed might not apply the law in a manner that serves community values. Moreover, gaps in understanding might lead people to behave in ways they think are protected but are in fact illegal.³¹⁷ Both patterns are particularly troublesome in areas of criminal law that explicitly stem from and doctrinally require the application of community values.

In essence, experimental jurisprudence scholars suggest that our legal system would stand on firmer ground and ensure greater fairness if legal rules more closely reflected and resembled societal values. Professor Paul Robinson has thus called for American courts to “democratiz[e] criminal law”³¹⁸ by shaping our legal “rules to track the justice judgments of ordinary people,”³¹⁹ and Professor Joshua Kleinfeld urges courts to structure the law such that “lay citizens take part in it and see their sense of justice at work in it.”³²⁰

With those insights in mind, we return to our case study of courts’ receptiveness to opinion surveys. The chief appellate court of the nation—the U.S. Supreme Court—is the predominant source of divergence from community views in two of the three criminal case categories we have identified here: death penalty and Fourth Amendment search cases. In both realms, new cases arise every year (if not every day), giving the Court numerous opportunities to revise its existing doctrinal approaches, if it were inclined to do so. For the third body of law—obscenity—the internet has made prosecutions more complex, because some people argue the internet has created a “national” community with values that supersede those of local communities.³²¹ But obscenity prosecutions have not gone away despite the

314. Sommers, *supra* note 308, at 395.

315. *Id.*

316. Certainly, laypersons’ intuitions might not be homogeneous, and even if consistent they might be shortsighted or infused with cruelty or vengeance. The point is that where doctrines already place some weight on community standards, judges should not be free to simply ignore them without good and transparent explanation.

317. Sommers, *supra* note 313, at 2304–05 (describing the importance of fair notice).

318. Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1566 (2017).

319. *Id.* at 1565, 1580.

320. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1457 (2017).

321. See, e.g., *United States v. Kilbride*, 584 F.3d 1240, 1250 (9th Cir. 2009) (holding that when obscene content is found on the internet, a national community standard—rather than a local community standard—must be used to judge culpability). *But see United States v. Little*, 365 F.

rise of the internet, meaning the issue of how to determine community standards is still ripe for lower federal courts and state courts.³²²

Because all three kinds of cases remain on the dockets of appellate courts nationwide, our first recommendation is court-focused: We urge appellate courts to rethink existing doctrinal approaches to establishing community standards. The Supreme Court should reverse course in its death penalty and Fourth Amendment search jurisprudence to acknowledge that opinion surveys can provide relevant evidence and instruct (or at least permit) lower courts to admit quality opinion surveys that the parties introduce. The lower federal courts and state appellate courts should do something similar in the obscenity realm. The expert witness standards (of *Daubert* or alternative approaches) should still guide admissibility in any given case; opinion surveys conducted by a qualified expert, according to appropriate methodology, should be admitted in criminal cases much as they are in civil cases, leaving jurors to determine the weight such surveys deserve.

One might challenge our proposal by insisting that constitutional law is purely a judicial domain, that majoritarian views (such as those captured in surveys) ought not to determine or influence the outcomes in these cases. Such is the legacy of *Marbury v. Madison*,³²³ which enabled courts to strike down legislative enactments that conflict with the Constitution.

Our response to that critique has two components. First, the areas of law on which we focus already embrace the role of community input. No recalibration of the separation of powers is required in order for the courts to receive evidence of majoritarian views held by the community in the contexts we describe here. Second, we do not suggest that community opinion ought to drive a legal outcome in a broad swath of cases (which might indeed usurp the judicial function)—we argue only that community input should be sought and recognized in disputes for which doctrine already makes community input relevant. In these fields of law, “[shared and mutual] aspects of social life”³²⁴ are meant to animate and inform legal doctrine. For that reason, judges ought to receive evidence on the relevant aspects of social life rather than permit their own (often untested and uncommunicated) intuitions to determine the outcome. Our goal, in other words, is to encourage courts to find facts about community views by taking evidence, leaving behind the

App’x 159, 164 (11th Cir. 2010) (using the community standard and “declin[ing] to follow the reasoning of *Kilbride*”).

322. Shannon Creasy, *Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller’s “Contemporary Community Standards,”* 26 GA. ST. U. L. REV. 1029, 1030–34 (2010).

323. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

324. Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2094 (2001).

tendency to engage in what Professor David Faigman has called “fact-finding by fiat.”³²⁵

One might also worry that social science, like all science, provides at best a kind of tentative truth. After all, new experiments and studies are always being performed, and sometimes new findings challenge or supplant old findings. Why should the law rest on such an unsteady foundation? Long-standing principles offer more certainty than the shifting terrain of survey data.

In our view, the ability of survey data to adapt over time is one of its advantages as a form of evidence.³²⁶ Obscenity, death penalty, and Fourth Amendment search tests all require courts to resolve disputes using *contemporary* standards. Baked into these doctrines is an understanding that standards will change as communities shift in demographic and moral composition. Survey data that is collected fairly close in time to the litigation thus is likely to be responsive to the question in dispute, rather than stale. And if community standards appear to have shifted since the last time a survey was taken, this is a topic about which the attorneys can argue. It should not cause a court to reject the survey out of hand.

What is more, a court’s acceptance of a survey at one point in time does not create a binding precedent as to that question for all future courts. If future surveys reveal shifts in the community’s perception of an issue (whether it be privacy, sexual expression, consumer confusion, or consumer valuation of iPhone features), future litigation can and should take account of more up-to-date evidence. The capacity for evolution thus does not “threaten the stability of the law;”³²⁷ it makes law responsive to the community it is intended to govern.

If the appellate courts were to encourage more openness to opinion surveys in the criminal docket, those changes might usher in more frequent wins for criminal defendants.³²⁸ Perhaps that is not a result the appellate courts desire, particularly in states where appellate judges face retention elections and fear being labelled soft on crime. But it is a result that courts must accept for the sake of fairness and consistency. Continuing to maintain a double standard that disadvantages criminal litigants is unsustainable in a legal system that espouses integrity and even-handedness. When courts consider community perspectives in civil cases but turn their backs on the community in criminal cases, the whole legal system is at risk of sinking under the weight of its own hypocrisy.

325. David L. Faigman, *Fact-Finding in Constitutional Cases*, in HOW LAW KNOWS 156, 158 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2005).

326. Perhaps the possibility of change in social norms “should [even] be considered a feature of the model, not a bug.” SLOBOGIN, *supra* note 249, at 57.

327. *Id.*

328. For instance, surveys documenting citizens’ views of privacy suggest that many more police actions should be declared searches than current law recognizes, and if those searches occurred without warrants, evidence suppression might result. *See supra* notes 233–43 and accompanying text.

We thus urge appellate courts to adopt a new approach to opinion survey data in the three areas of the criminal docket we have discussed here. But given the current make-up of the appellate courts, who hold all the cards, we need to consider strategies that might move the needle while we wait for those adjustments to occur.

B. ENHANCING JUDICIAL TRAINING IN EMPIRICAL METHODS

Whether or not appellate courts require or encourage trial courts to admit opinion surveys in criminal cases, we ought to help trial judges see more clearly the value of this data in the cases before them—much as they already do in the civil docket. As Justice Gorsuch presciently warned, judges do not have the skills “to be making empirical judgments [affecting] . . . millions of people.”³²⁹ They have the legal training, but many lack any training in empirical methods or statistical evidence,³³⁰ which is perhaps why they do not trust surveys in cases where they have some common-sense instincts about the right answer. Some judges might also feel overwhelmed or embarrassed when statistical evidence is presented,³³¹ leading them to ridicule or reject such evidence as unnecessary. This could be why, in *Gill v. Whitford*, Chief Justice Roberts pejoratively referred to the analysis designed to objectively measure the impact of gerrymandering as “sociological gobbledygook,” even though others saw it as “[s]imple arithmetic.”³³²

To address these concerns, we join the chorus of scholars who have suggested that judges in federal and state courts receive training on empirical data topics.³³³ Importantly, the training should be conducted by individuals

329. *Carpenter v. United States*, 585 U.S. 296, 393 (2018) (Gorsuch, J., dissenting).

330. See Slobogin, *supra* note 285, at 130 (“[L]awyers are leery of statistics [because] . . . they don’t understand them.”). Justice Powell apparently told his biographer that his “understanding of statistical analysis . . . ranges from limited to zero.” *Id.* (quoting JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 439 (1994)).

331. Judicial behavior research indicates that judges’ desires to be promoted influences their decision-making in the cases before them, suggesting that their fear of “getting it wrong” when it comes to evaluating statistical data might keep them from engaging with it. See generally LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* (2013) (observing that judges who seek to be promoted try to avoid appearing soft on crime); Rachlinski & Wistrich, *supra* note 276, at 11–12 (discussing how lower court judges “audition” for higher court positions).

332. Transcript of Oral Argument at 37–40, *Gill v. Whitford*, 585 U.S. 48 (2018) (No. 16-1161); *Does Math Have a Place in the Courtroom?*, SCI. FRIDAY (Nov. 3, 2017), <https://www.sciencEFRIDAY.com/segments/does-math-have-a-place-in-the-courtroom> [<https://perma.cc/SB2M-K3JV>]; see also *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring) (declaring that he distrusts statistical evidence and referring to it as “numerology”).

333. See Guthrie et al., *supra* note 280, at 38–40 (suggesting that judges should receive training to facilitate deliberate decision-making); Lisa R. Fournier, *The Daubert Guidelines: Usefulness, Utilization, and Suggestions for Improving Quality Control*, 5 J. APPLIED RSCH. MEMORY & COGNITION 308, 311 (2016) (noting that programs and conferences that could educate judges on various scientific topics have long been available, including a certification in “scientific method, tools and measures” offered by the National Courts and Science Institute).

with viewpoints that correspond to the judges they are teaching. Studies have shown that improved science literacy by itself does not change opinions; when it comes to reaching the audience, the messenger is almost more important than the message.³³⁴ Because the opinions of even scientifically literate individuals can be influenced by their peers, Professor Dan Kahan and his co-authors recommend using communicators whose affinity with the audience enhances their credibility.³³⁵ To teach judges effectively, the teachers should represent the same diversity of viewpoints that the judges have.

These sessions need not be taught at the level of a graduate seminar but rather run like a Masterclass, the web-based education format that became very popular during the pandemic.³³⁶ In these sessions judges could learn the basics of what makes a survey valid and why properly collected survey data can help to resolve a question in dispute in an effective and efficient way.³³⁷ Compared to calls by other scholars for judges to receive training in mathematical modeling and statistical inference to understand increasingly complex constitutional questions,³³⁸ this proposal urges a more basic type of empirical education.

Judges should also be encouraged to hire law clerks with training in statistics and empirical methods to assist them in making these judgments in real-world cases. Law clerks may be particularly effective facilitators because they often have the same viewpoints as their judges, and the judges' decision to hire them ought to afford a measure of credibility. With these tools in hand, judges might feel more confident admitting surveys in cases where they previously would have relied on their own intuition. As noted by Professor John Lamont, "Even if exact precision is not attained, any competently conducted survey would surely provide a better gauge of the standard than the faulty guesswork of a court."³³⁹

Aside from encouraging this kind of training in empirical analysis, we might consider aligning the normative standards that exist in law (such as "What is relevant?" or "What is probative?") with statistical standards. This alignment would allow judges to see more clearly the connection between opinion survey data and the questions before the court. In no situation would the opinion survey be dispositive. This point was made forcefully by Justice Frankfurter more than sixty years ago: "Of course the testimony of experts

334. Dan M. Kahan et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732, 734 (2012) (showing that increased science literacy did not reduce polarization on global warming).

335. *Id.*

336. See generally MASTERCLASS, <https://www.masterclass.com> [<https://perma.cc/QB5M-V9MW>].

337. See Rachlinski & Wistrich, *supra* note 276, at 14–18 (explaining how judges' use of intuition rather than deliberation, when faced with legal problems and actual cases leads them to misinterpret or misapply statistics).

338. See Duchin & Spencer, *supra* note 307, at 782.

339. Lamont, *supra* note 14, at 143.

would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.”³⁴⁰ The point is to help judges see the value of survey evidence as a tool to help factfinders understand community perspectives. Moreover, if this alignment were formalized in some way, it would reduce the existing disparities between the civil and criminal parts of the docket, because judges would have the tools and the incentive to address these questions consistently.

C. ENCOURAGING LITIGATORS TO OFFER OPINION SURVEYS AS EVIDENCE

To be fair to the courts, judges can only rule on the evidence that attorneys place before them. For that reason, attorneys should include opinion surveys in their briefs any time they are litigating cases whose doctrines incorporate community standards, such as obscenity, the death penalty, and Fourth Amendment search questions. We are not the first to suggest that attorneys need to have a better understanding of empirical methods or, even more fundamentally, to master basic math.³⁴¹ But our point is narrower. Attorneys operating in any specialty need to be familiar with the doctrine and tactics of that specialty. In certain criminal cases, survey results can map directly onto critical legal issues. Therefore, attorneys operating in these areas should learn about survey evidence and how to use it.

At present, attorneys litigating death penalty and Fourth Amendment search cases rarely present opinion survey evidence to the courts. When we searched Westlaw and Lexis for parties’ briefs citing privacy surveys in Fourth Amendment search cases, we found no more than a handful filed in the past forty years.³⁴² In the years since *Atkins*, the parties’ briefs in death penalty cases likewise regularly fail to bring opinion surveys to the Court’s attention. The number of state supreme court death penalty opinions that mention opinion poll data indicates that attorneys are more frequently presenting this evidence in that forum, even though their success has been uneven.

Attorneys should take up this fight, presenting lower courts with the opinion surveys that have been conducted by reputable researchers and polling organizations across the country. Attorneys need to secure rulings from trial judges about the relevance of that evidence in order to preserve the issue for

340. *Smith v. California*, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring). Courts ruling on evidence admissibility are and will remain gatekeepers, as commentators remind us in the patent context. Lee & Lemley, *supra* note 108, at 307.

341. See generally Peter A. Hook, *Developing Data Fluent Lawyers by Teaching Litigation Analytics*, 20 U. ST. THOMAS L.J. 295 (2024); Robin L. Juni, *When the Math Matters: Improving Statistical Advocacy in Gerrymandering Litigation*, 100 NEB. L. REV. 727 (2022).

342. See briefs cited *supra* note 248. Recent work by Professor Scott-Hayward and her colleagues confirms how infrequently parties cite to surveys in both federal and state court. See discussion *supra* note 249.

appeal and then argue it on appeal. There is virtually no chance the Supreme Court will reconsider the relevance of opinion survey data in Fourth Amendment search cases if the lower courts do not first begin to make rulings on this issue. In death penalty cases, attorneys should recover and build on the small set of cases from the state supreme courts to show the Supreme Court that thoughtful jurists find value in opinion surveys as evidence of community standards. And in obscenity cases, attorneys should reference judicial rulings from civil cases in which judges admitted survey evidence, even though flawed, when issues called for community input. Doing so would show criminal court judges that a quest for methodological perfection ought not to govern admission, particularly when the evidence is introduced by the defendant.

And like judges, attorneys operating in these specialties should receive training in statistics and the use of empirical evidence so that they feel more confident when making these arguments. Law schools today offer a small number of courses called, variously, Analytical/Empirical Methods or Statistics for Lawyers.³⁴³ Lawyers far removed from law school need to seek out continuing education opportunities that provide empirical training. Receiving such training would improve an attorney's ability to hire and communicate with an expert witness, as well as to explain to a skeptical judge why the expert's findings comport with the rules of evidence. Attorneys must develop these empirical chops to make the strongest case for their clients and to help shape the future of the legal landscape.

CONCLUSION

The community's voice might be successfully heard or silenced in litigation, depending on the type of case under review. But the pattern of success is not random. Our study of court opinions in six areas where legal doctrine makes community input relevant—trademark and false advertising, patent, antitrust, obscenity, death penalty, and Fourth Amendment search law—reveals a troubling pattern: Courts tend to welcome opinion surveys in the civil docket but reject them in the criminal docket. They exaggerate the significance of methodological flaws in surveys offered by criminal litigants but rule that similar flaws are not fatal in civil cases. In some instances, courts in criminal cases refuse even to acknowledge the existence of pertinent third-party surveys, despite references in parties' or amicus briefs.

Judges' heavy-handed approach to gatekeeping in the criminal contexts we've identified carries important ramifications for people charged with crimes in the United States. Because in criminal cases a community opinion survey is almost always offered by the defense rather than the prosecution,

343. Fournier, *supra* note 333, at 311 (citing Mara Merlino, James T. Richardson, Jared Chamberlain & Victoria Springer, *Science in the Law School Curriculum: A Snapshot of the Legal Education Landscape*, 58 J. LEGAL EDUC. 190 (2008)).

courts' skepticism about—or even hostility to—such evidence handicaps defendants, a population that already suffers under the weight of multiple kinds of disadvantage when trying to rebut the prosecution's charge. This reluctance is particularly concerning given that survey evidence could potentially provide valuable insights in other areas of criminal law, beyond those we discuss here. For example, surveys might help elucidate community views on what constitutes a “reasonable” use of force by a defendant alleging self-defense or by a suspect arguing that a police officer used unreasonable force while making an arrest.³⁴⁴ Broader acceptance of surveys in criminal cases might therefore help to create a fairer and more consistent judicial process for defendants facing a range of different charges.

We argue that courts' rejection of opinion surveys in criminal cases cannot be explained by any structural feature of the legal system but rather results from a form of judicial bias. Judges prefer to rely on their own intuition, rather than consulting evidence, when approaching doctrinal questions that feel familiar and that implicate moral values—as the criminal dockets do. Because judges tend to view themselves as superior moral decision-makers compared to the rest of the population, and because judges likely find the issues in the criminal cases familiar rather than technical, they reflexively revert to their moral intuitions to decide these cases. Outside evidence from the community—such as opinion survey data—is an unwelcome nuisance. When handling civil cases that involve technical questions of law, by contrast, judges rarely have intuitions, and when they do, those intuitions are not based in morality. As a result, judges in civil cases allow their intuitive radar to recede and welcome community perspectives, collected through surveys, to help resolve issues of liability or damages.

To shore up the role of the community and to reduce the amount of arbitrariness in cases whose doctrines incorporate community standards, changes will need to come from multiple directions. Appellate courts should signal to trial courts handling criminal matters that, whenever legal doctrine signals the importance of community input, direct evidence from the community in the form of opinion surveys ought to be admitted into evidence—much as it already is in the civil domain. Trial judges should seek out training in empirical methods and hire law clerks who are familiar with empirical tools so that when surveys are presented by the parties, they can distinguish quality evidence from problematic evidence. And finally, criminal defense attorneys should embrace new approaches to survey evidence to improve the likelihood that trial courts will listen. They should take every

344. On the correlation between community standards and reasonableness, see *Hamling v. United States*, 418 U.S. 87, 104–05 (1974). Some scholars urge courts to consider community views even when the doctrine does not explicitly command it. See, e.g., Roseanna Sommers & Kate Weisburd, “Legally Magic” Words: An Empirical Study of the Accessibility of Fifth Amendment Rights, 119 NW. U. L. REV. 637, 639–40 (2024) (arguing that *Miranda* invocation standards ought to account for lay understandings).

opportunity to put quality surveys before the courts when litigating obscenity, the death penalty, and Fourth Amendment search questions. And they should bring arguments from across the civil–criminal divide to support their claim that juries should be permitted to consider imperfect surveys. Without these changes, the community’s perspective will remain unseen and undervalued in the criminal docket, harming defendants’ chances to obtain justice and restricting the ability of community members to influence the courts that act in their name.