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Levels of Free Speech Scrutiny

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Criminogenic Risks of Interrogation

MARGARETH ETIENNE* & RICHARD MCADAMS**

In the United States, moral minimization is a pervasive police interrogation tactic in which the detective minimizes the moral seriousness and harm of the offense, suggesting that anyone would have done the same thing under the circumstances, and casting blame away from the offender and onto the victim or society. The goal of these minimizations is to reinforce the guilty suspect's own rationalizations or "neutralizations" of the crime. The official theory—posited in the police training manuals that recommend the tactic—is that minimizations encourage confessions by lowering the guilt or shame of associated with confessing to the crime. Yet the same logic suggests that minimization would also lower the internal, psychological costs of committing future crimes. We therefore argue that the tactic carries criminogenic risks. We draw strong support from numerous criminal law and social science theories – neutralization, moral disengagement, marginal offender, restorative justice, entrapment, social norms and legal legitimacy—and find each theory or doctrine consistent with our conclusion that minimization disinhibits criminality. In weighing the criminogenic risks of minimization against its unproven promise of securing confessions, we find minimization practices unjustifiable. We raise and respond to counterarguments and conclude that the use of moral minimization in interrogation should cease given the existence of alternative interrogation approaches and absent empirical evidence of its effectiveness. In the alternative, we suggest some avenues to curtail the practice.

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INTRODUCTION

American detectives frequently use an interrogation tactic that is unseemly or even repellant, but rarely discussed: they minimize the moral wrongfulness of the crime. Moral minimization involves the interrogator trivializing the crime or offering moral excuses and justifications for its commission, attempting to convince the suspect that even the police do not regard the suspected criminal conduct to be seriously wrong. As an example, consider this script from the most popular interrogation training manual for an employee theft suspect:

> Egads, man, how in the world can anybody with a family the size of yours get along on that kind of money in this day and age? . . . Anyone else confronted with a similar situation probably would have done the same thing, Joe. Your company is at fault . . . . I can tell you this—if you received a decent salary in the first place, you wouldn't be here . . . .[1]

Interrogators here minimize the theft by saying that "anyone" in the same situation would have done the same and blame the victim by suggesting that the employer was at fault for paying a miserly wage.

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1. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 223 (5th ed. 2013) (proposing the script for an employee theft interrogation).

As we show, victim blaming is a very common form of minimization, but there are several other techniques: diminishing the harm the suspect caused the victim; emphasizing how common the crime is; finding honorable motives for the crime; and shifting the blame to society or others, in addition to the victim. American interrogators are trained to focus much of their attention on developing the right *theme* of moral minimization, to present that theme in a monologue near the beginning of the interrogation, and to refer back to it regularly.

Why do interrogators work to minimize the seriousness of the crime? That question is our focus, and we find three possible answers. One possibility is that the tactic is simply misguided and does not contribute to the law enforcement interest in confessions. The world of interrogation is not the world of science and data. Interrogators learn from and follow a conventional wisdom that lacks a solid empirical grounding. So, it would not be very surprising if moral minimization contributed nothing to the causal efficacy of interrogation. If so, the tactic is an unfortunate waste of limited resources, consuming scarce time for training interrogators and scarce time for interrogating suspects.[2]

A second possibility is that moral minimization induces true confessions by conveying a promise or prediction of official leniency. If detectives do not take the crime seriously and sympathize with the offender's motive for offending, then the suspect may infer that the prosecutor and judge will also view the crime as less serious and worthy of less punishment. However plausible, no one defending the tactic would offer *this* understanding of its effects because the law of confessions disfavors police promises of leniency. The sound and long-standing judicial reasoning is that such promises may induce the innocent to confess, especially given that American interrogators are allowed to lie to the suspect about evidence of their guilt. A modern psychological literature on false confessions raises the concern that minimization promises leniency by implication, so this "defense" of the practice would actually condemn it.[3]

So, we reach the final explanation for moral minimization, which is the one advanced by the interrogation manuals that teach its use. The manuals claim that the tactic works to induce true confessions by lowering the psychological costs of confessing to the interrogators.[4] By making the crime seem less shameful, the guilty suspect will feel less shame in admitting guilt to the detectives in the interrogation room. Again, there is no empirical testing that validates this theory, and there is certainly room for skepticism. Nonetheless, we agree that this account is *plausible*. Officially endorsed rationalizations for criminality are likely to be powerful because they are surprising—coming from law enforcement officials the suspect expects to strongly disapprove of felonies—and are delivered persistently and sympathetically in the intimate setting of an interrogation room.

In this article, we assume that this psychological account is correct, i.e., that minimization is neither a mistake nor does it work by impliedly promising official leniency. We then demonstrate what unexpectedly follows if one takes the

2. *See infra* text accompanying notes 118–120.
3. *See infra* text accompanying notes 121–124.
4. INBAU ET AL., *supra* note 1, at 203–04.

psychological account seriously.[5] If moral minimization lowers the internal costs of *confessing* to crimes, it also lowers the internal costs of *committing* crimes. Thus, if moral minimization actually works as advertised, it does something worse than just wasting scarce resources; it risks promoting recidivism.

We identify several legal and psychological literatures that support our claim that moral minimization risks increasing recidivism. First and foremost, the interrogation manuals explain the tactic's effectiveness by pointing to a psychological theory—neutralization—that holds that people are more likely to offend if they can first *neutralize* the shame and guilt they would ordinarily experience from committing a crime.[6] In other words, many offenders have internalized the social norms against violent and fraudulent behavior that the criminal law enforces but will still offend if they can mentally diminish the norm's psychological power with some superficially plausible moral justification or excuse. The avowed aim of moral minimization is to "reinforce" this process of deflecting guilt and shame.[7] Ironically, then, the same theory that explains why moral minimization will disinhibit an individual's confession of crime predicts that minimization will disinhibit the individual's subsequent commission of crime.

Alongside neutralization, we explore six social science or legal theories that buttress our criminogenic claim: moral disengagement theory,[8] the concept of the marginal offender,[9] restorative justice research,[10] the entrapment defense,[11] the social norms literature,[12] and research on legal legitimacy.[13] Each discourse points in the same direction: moral minimization weakens internal and/or informal motivations for legal compliance. The tactic is likely to be criminogenic. No one has previously explored the social science that draws the connection between interrogation practices and their criminogenic risks.[14]

As we explain, moral minimization is most likely to encourage recidivism when certain conditions are met, including when (1) the offender's motivation to comply with criminal law is real but *marginal* (i.e., someone who may offend but still experiences guilt and shame for offending), and (2) the minimizations are *generalizable* (i.e., applicable to future criminal opportunities). These conditions

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5. There is legal and psychological literature discussing whether the accusatory style of interrogation, which includes minimization and other tactics, causes false confessions. *See infra* Section II.C. This article focuses only on moral minimization, and our contribution lies in identifying a novel adverse consequence of that tactic.

6. *See infra* Section II.B.1.

7. *See infra* notes 35 & 126 and accompanying text.

8. *See infra* Section II.B.2.

9. *See infra* Section II.B.3.

10. *See infra* Section II.B.4.

11. *See infra* Section II.B.5.

12. *See infra* Section II.B.6.a.

13. *See infra* Section II.B.6.b.

14. A partial exception is Anne Coughlin, who productively drew attention to the misogynistic tropes in rape interrogations and "speculat[ed]" about the effect on rapists. *See* Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1600 (2009). Coughlin's focus is different than ours in various ways, as her concern is limited to the crime of rape, she does not discuss the general tactic of "minimization," and her framework is narrative theory rather than neutralization or the other social science theories we employ.

apply frequently to crimes like theft, assault, and sexual assault.[15] These conditions are less likely to apply to certain other offenses, such as drug trafficking and homicide, for reasons we explore. But the fact that no one has ever considered these risks makes it certain that police currently use the tactic in some cases where the criminogenic costs substantially exceed the interrogation benefits.

We consider various objections to our claim, most prominently the possibility that the subsequent prosecution, conviction, and punishment of the offender will undo any criminogenic effects of moral minimization by sending a counter-message validating the moral seriousness of the offense and the offender's responsibility. As we explain, for a variety of reasons, this objection is not compelling.[16] We consider specific actors in the system—attorneys, judges, jurors, and victims—and conclude that none of them are likely to send an effective counter-message that offsets the detective's moral minimization and undoes its criminogenic damage, at least not when, as is currently the case, there is no awareness of the risks that minimization poses.

A final word of introduction: in a separate article, we argue that the specific moral minimization tactic of victim blaming risks a second negative consequence.[17] The interrogation training in and practice of victim blaming produces a cadre of detectives more inclined to blame victims, making them worse at the investigation of certain violent crimes, especially those against women. Accordingly, the instant Article focuses on the impact of minimization on the accused, and we reserve for the subsequent article a detailed exploration of the impact of minimization on the detective.

We proceed as follows. Part I describes the evidence that police detectives employ moral minimization extensively. From the case law, we show the exact wording of some real-world interrogations. Part II explores the tactic's criminogenic risks, based on neutralization theory and six other legal or social science literatures. We identify the factors that determine the magnitude of the risk and answer the objection that the criminal process undoes the damage of moral minimization. Part III addresses the normative implications—what should be done to limit the risks of moral minimization.

I. MORAL MINIMIZATION IN AMERICAN POLICE INTERROGATIONS

The United States and a few other nations predominantly employ a "confrontational" or "accusatory" method of interrogation, in contrast to the "information-gathering" methods favored by the United Kingdom and other nations.[18] The confrontational method prominently includes the tactics known as

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15. *See infra* Section II.C.

16. *See infra* Section II.C.

17. *See* Margareth Etienne & Richard H. McAdams, *Training Detectives to Blame Victims* (unpublished manuscript) (on file with authors).

18. *See* Christian A. Meissner, Christopher E. Kelly & Skye A. Woestehoff, *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 216 (2015) ("One primary distinction has been proposed between the use of accusatorial approaches in North America and the development of information-gathering approaches in the United Kingdom, Australia, and elsewhere.") (citations omitted).

maximization and *minimization*. For the former, interrogators maximize the apparent certainty they have of the suspect's guilt, suggesting that the evidence is decisive, cutting off and rejecting protestations of innocence, and, on some occasions, falsely describing evidence of guilt.[19] For *minimization*, interrogators suggest mitigating factors for the suspect's behavior, which make it appear less culpable or even fully justified.

Within the category of minimization, our focus is on *moral* minimizations. We define that subcategory in Part A. Part B explores the content of the tactic, relying on widely used interrogation manuals. Part C documents the extensive use of moral minimization in real-world interrogations based on surveys, observational studies, and case law. Part D roughly estimates how frequently American detectives morally minimize criminal offenses each year.

A. Moral Minimization Defined

Although the training manuals we survey below do not explicitly make the distinction, there are two principal types of minimization: legal and moral. *Legal* minimization suggests to suspects that the crime may not be as legally serious as they believe, or perhaps they have a legally valid defense. In a homicide investigation, for example, the detective may suggest that the suspect could have killed the victim accidentally or in self-defense, though the manuals advise caution when relying on a theme that implies official leniency, given the risk that courts may exclude confessions produced by false promises of prosecutorial leniency.[20] Nonetheless, where the strategy is used, investigators hope to get closer to confessions by inviting suspects to accept a version of the facts that appears to lessen their legal liability while nonetheless connecting them to the crime.

Moral minimization, however, is our focus. With moral minimization, the interrogator seeks to persuade the suspect that, whatever the law might say, her conduct is morally excused or justified, at least to some degree, so the crime is not a serious moral transgression. Decades ago, the Supreme Court in *Miranda v. Arizona* described this technique in its review of interrogation practices: "Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to *minimize* the moral seriousness of the offense, to cast blame on the victim or on society."[21] *Miranda* illustrated the technique with facts from the 1954 case of *Leyra v. Denno*,[22] where the interrogator, a psychiatrist, had said to the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do

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19. *See* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 135 (2012) (explaining maximization tactics as including, in the absence of "powerful incriminating evidence," that "interrogators often fabricate it and deceive the suspect into believing it exists").

20. *See* INBAU ET AL., *supra* note 1, at 203, 425. BRIAN JAYNE & JOSEPH BUCKLEY, A FIELD GUIDE TO THE REID TECHNIQUE 277–79 (2014) [hereinafter JAYNE & BUCKLEY, FIELD GUIDE]. "[T]he theme should not provide the suspect with a legal defense for his criminal behavior." *Id.* at 276.

21. 384 U.S. 436, 450 (1966) (emphasis added).

22. *See* 347 U.S. 556 (1954).

things we aren't really responsible for," and again, "We know that morally you were just in anger. Morally, you are not to be condemned."[23] These examples convey the essence of moral minimization.

The remainder of this Part demonstrates the nature and frequency of the practice.

B. The Reid Interrogation Manuals and Moral Minimization

To move beyond generalities, we explore the most influential interrogation manuals, those defining the "Reid" technique.[24] *Miranda* relied on, among other sources, the second edition of the police training guide by Fred E. Inbau and John E. Reid, titled *Criminal Interrogation and Confessions*.[25] Since *Miranda*, the Supreme Court has twice referenced Reid interrogation manuals, reflecting its dominant position in the field.[26] John E. Reid & Associates, Inc. remains the leading authority on police interrogations through its training manuals[27] and courses.[28] Reid states that "hundreds of thousands of investigators hav[e] received [its] training,"[29] a claim

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23. *Miranda*, 384 U.S. at 450 n.12.

24. *See* Dylan J. French, *The Cutting Edge of Confession Evidence: Redefining Coercion and Reforming Police Interrogation Techniques in the American Criminal Justice System*, 97 TEX. L. REV. 1031, 1034–35 (2019) ("While there are different styles of accusatory interrogation, all major tropes can be traced back to a man named John E. Reid and his original work . . . . [T]he Reid Manual, affectionately known as the Interrogator's Bible, has set the standard . . . .").

25. *Miranda*, 384 U.S. at 449 n.9 (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1962), and noting that the first edition of the Inbau & Reid manual was a revision and enlargement of an earlier text by the authors, LIE DETECTION AND CRIMINAL INTERROGATION (3d ed. 1953)). Chief Justice Warren noted that the three leading texts on interrogation—two of which were authored by Inbau, Reid, and associates—had total combined sales and circulation of over 44,000. *Id.*

26. *See* Missouri v. Seibert, 542 U.S. 600, 610 n.2 (2004) (citing two Reid manuals and one other to show what "[m]ost police manuals" advise about *Miranda* warnings); Stansbury v. California, 511 U.S. 318, 324 (1994) (citing the Reid manual as evidence that an aspect of *Miranda* doctrine was "well settled").

27. The primary manual is the newest edition of the one *Miranda* cited: INBAU ET AL., *supra* note 1. A separate abridged version is FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, ESSENTIALS OF THE REID TECHNIQUE: CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 2013) [hereinafter INBAU ET AL., ESSENTIALS]. There are at least four related texts published by John E. Reid and Associates, Inc., some in a second edition: BRIAN C. JAYNE & JOSEPH P. BUCKLEY, THE INVESTIGATOR ANTHOLOGY (2d ed. 2014) [hereinafter JAYNE & BUCKLEY, ANTHOLOGY] (described as "a compilation of articles and essays about The Reid Technique"); JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20; LOUIS C. SENESE, ANATOMY OF INTERROGATION THEMES: THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION (2d ed. 2020); and DAVID M. BUCKLEY, HOW TO IDENTIFY, INTERVIEW, AND MOTIVATE CHILD ABUSE OFFENDERS TO TELL THE TRUTH (2d ed. 2016).

28. *See* SIMON, *supra* note 19, at 121–22 ("[U]sed most widely by American law enforcement agencies . . . the Reid Technique of Interviewing and Interrogation has been taught to well over 100,000 law enforcement agents."). In addition to its books and DVDs, Reid offers training seminars and certificate training programs through its Institute. *Store*, REID, https://reid.com/store/products [https://perma.cc/P9AF-ADR2].

29. *See* INBAU ET AL., ESSENTIALS, *supra* note 27, at viii. Beyond law enforcement, the

substantiated by an independent survey of law enforcement personnel, which found that over half had received instruction on the Reid technique.[30] *Criminal Interrogation and Confession* is now in its fifth edition, published in 2013, and we refer to it as "the manual."

The Reid Technique has nine steps.[31] Step one is the direct, positive confrontation, in which the detective expresses confidence in the guilt of the suspect.[32] Step two—our subject—is "Theme Development."[33] The term "theme" refers only to what we call moral minimization; the manual explains that a "theme" is a "monologue presented by the interrogator in which reasons and excuses are offered that will serve to psychologically justify or minimize the moral seriousness of the suspect's criminal behavior."[34] The Reid manual explains that "it is natural for [the offender] to justify or rationalize the crime in some manner" and that "[m]ost interrogation themes *reinforce* the guilty suspect's own rationalizations and justifications for committing the crime."[35] "Psychologists refer to this internal process [of rationalization] as techniques of neutralization,"[36] a topic to which we will return. (Even the competitors of the Reid technique use this particular tactic).[37]

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method is popular with private security personnel employed to detect and prevent theft and fraud. *See Exclusive SDR Survey: How to Conduct Better Interviews & Interrogations*, IOMA'S SEC. DIR.'S REP., Dec. 2002, at 10, 11 ("When asked which vendors they rely on most for building their own skills and that of staff, a whopping 80% of security pros cited John E. Reid & Associates.").

30. *See* N. Dickon Reppucci, Jessica Meyer & Jessica Kostelnik, *Custodial Interrogation of Juveniles: Results of a National Survey of Police*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 67, 76 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (reporting that fifty-four percent of respondents had been trained in the Reid technique); *see also* Melissa B. Russano, Fadia M. Narchet, Steven M. Kleinman & Christian A. Meissner, *Structured Interviews of Experienced HUMINT Interrogators*, 28 APPLIED COGNITIVE PSYCH. 847, 848–50 (2014) (reporting on a survey of forty-two experienced federal interrogators, half from law enforcement and half from the military, in which fifty percent indicated they had received formal training in the Reid technique, the highest percentage of any source).

31. INBAU ET AL., *supra* note 1, at 187–90.

32. *Id.* at 192–98.

33. *Id.* at 202–55; INBAU ET AL., ESSENTIALS, *supra* note 27, at 115–35; *see also* SENESE, *supra* note 27 (presenting a 342-page supplemental manual devoted entirely to "interrogation themes").

34. INBAU ET AL., ESSENTIALS, *supra* note 27, at 115.

35. *Id.* (emphasis added); INBAU ET AL., *supra* note 1, at 210 ("The interrogation theme represents a persuasive effort on the part of the investigator to reinforce those existing excuses or rationalizations within the guilty suspect's mind."); JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 276 ("For a guilty suspect to relate to an interrogation theme, the justifications offered by the investigator must be similar to how the suspect himself justified the crime.").

36. JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 325–26 n.7 (citing MICHAEL J. LILLYQUIST, UNDERSTANDING AND CHANGING CRIMINAL BEHAVIOR 153–60 (1980) and Heith Copes, Lynne Vieraitis & Jennifer M. Jochum, *Bridging the Gap Between Research and Practice: How Neutralization Theory Can Inform Reid Interrogations of Identity Thieves*, 18 J. CRIM. JUST. EDUC. 444 (2007)).

37. For example, the Zulawski and Wicklander interrogation method differs in critical ways from the Reid Technique, but the former also devotes a chapter to "rationalizations,"

Developing this kind of minimizing theme takes time, which is why the manual describes it as a "monologue." "For a theme to be effective, the investigator must be able to maintain a continuous monologue of theme material."[38] During an interrogation that may last hours, "[t]he investigator must continue offering the suspect a theme."[39] To avoid a theme statement that "only lasts a few minutes," the manuals offer several ways to "draw out the length of a theme."[40] Thus, even though most of the examples below are short, it is important to remember that they are mere illustrations of a brief moment in what is supposed to be an extensive, repeated development of the theme.

The manuals offer specific minimization themes. First is "*Sympathize with the Suspect by Saying That Anyone Else Under Similar Conditions or Circumstances Might Have Done the Same Thing*."[41] Inbau and coauthors explain: "A criminal offender . . . derives considerable mental relief and comfort from the investigator's assurance that anyone else under similar conditions or circumstances might have done the same thing."[42] The manual cautions against promising legal leniency, but notes: "There is [of course] no legal objection to extending sympathy and understanding, [in order] to feed into the suspect's own justifications for his criminal behavior . . . ."[43]

The manual offers two illustrations. One concerns a hit-and-run suspect, and this script is said to be drawn from an actual case: "[Y]our car hit something. You were not sure what it was, but you had some doubts; so you got excited and drove away . . . . You are no different than anyone else and, under the same circumstances, *I probably would have done what you did*."[44] The second example concerns sexual assault, where the manual advises "indicat[ing] to the suspect that the investigator has a friend or relative who indulged in the same kind of conduct . . . [I]t may even

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which are essentially minimizations. *See* DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 305 (2d ed. 2002) (recommending a "one-sided discussion presented to the suspect by the interrogator, who offers excuses or reasons that minimize the seriousness of the crime"). The corporation, Wicklander-Zulawski & Associates, Inc., parted ways with the Reid method in 2017 over concerns that it leads to false confessions. *See* Liz Martinez, *Security, Law Enforcement React to Change in U.S. Interrogation Technique*, SECURITYINFOWATCH.COM (Mar. 10, 2017), https://www.securityinfowatch.com/security-executives/article/12314618/security-law-enforcement-react-to-change-in-us-interrogation-technique [https://perma.cc/LL77-A49L]. But the Wicklander-Zulawski shift does not abandon their focus on "rationalizations."

38. JAYNE & BUCKLEY, ANTHOLOGY, *supra* note 27, at 165.

39. JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 271 (offering to answer the question "How can a theme last 30, 60, or even 90 minutes?").

40. JAYNE & BUCKLEY, ANTHOLOGY, *supra* note 27, at 165 (section titled "Expanding the Duration of the Theme"). Part of the technique here is to present some themes as not being about the suspect (and his or her motivation), but about third parties or personal stories of the interrogator. *Id.*

41. INBAU ET AL., *supra* note 1, at 210.

42. *Id.*

43. *Id.* at 211.

44. *Id.* at 210 (emphasis added).

be appropriate for the investigator himself to acknowledge that *he has been tempted to indulge in the same behavior*."[45]

The Reid manual's second minimization theme is: "*Reduce the Suspect's Feeling of Guilt by Minimizing the Moral Seriousness of the Offense*."[46] The initial illustration is, again, sexual assault, where the manual offers the following script, which "has been found effective":

> In matters of sex, we're very close to most animals, so don't think you're the only human being—or that you're one of very few—who ever did anything like this. There are plenty of others, and these things happen every day and to many persons, and they will continue to happen for many, many years to come.[47]

The manual also refers to an actual spousal murder case in which "the deceased wife had treated her husband miserably over the years" and the interrogator's theme was as follows:

> Joe, as recently as just last week, my wife made me so angry with her nagging that I felt I couldn't stand it anymore, but just as she was at her worst, there was a ringing of the doorbell by friends from out of town. Was I glad they came! Otherwise, I don't know what I would have done. You were not so lucky as I was on that occasion.[48]

If this gendered script sounds like it comes from an earlier era, that is because it did; the example has been used without alteration since the first edition of the Reid manual in 1962.[49]

The final illustration of this second theme involves employee theft crimes, where the manual recommends using statistics on the ubiquity of such crimes. For example, to minimize the seriousness of stealing from an employer, the interrogator could invoke the claim noted in one Reid manual that "75% of employees steal from the workplace and that most do so repeatedly."[50]

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45. *Id.* at 211 (emphasis added); *see also* Coughlin, *supra* note 14, at 1650–51 (describing how the third edition of the Reid manual recounted a case in which the interrogator stated that he "himself, as a young man in high school, 'roughed it up' with a girl in an attempt to have intercourse with her").

46. INBAU ET AL., *supra* note 1; Coughlin, *supra* note 14. *See also* ZULAWSKI & WICKLANDER, *supra* note 37, at 317 ("[T]he interrogator also minimizes the seriousness of the crime from the suspect's perspective . . . . [The interrogator might] say[], '[a]nd sometimes it's really nothing more than an error in judgment, a mistake . . . .'"); *id.* at 331 ("Nobody is perfect. A lot of times, our mistakes seem a lot bigger than they probably are.").

47. INBAU ET AL., *supra* note 1, at 211–12. This script has been in the Reid manuals since the first edition. *See* FRED. E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 36 (1962) [hereinafter INBAU & REID, FIRST EDITION].

48. INBAU ET AL., *supra* note 1, at 212.

49. *See* INBAU & REID, FIRST EDITION, *supra* note 47, at 37.

50. *See* SENESE, *supra* note 27, at 141 (quoting U.S. Chamber of Commerce). The main manual includes a lower estimate of one-third of all employees. INBAU ET AL., *supra* note 1, at 213–14 (listing a number of bullet points about the high frequency of employee theft). One of

The third specific minimization theme is: "*Suggest a Less Revolting and More Morally Acceptable Motivation or Reason for the Offense than That Which is Known or Presumed*."[51] The manual offers several illustrations including that the suspect committed the crime only because alcohol or drugs had impaired his judgment, that a suspected embezzler only intended to borrow the money and would have replaced it if not for the discovery, and that a thief took "money . . . for the benefit of a spouse, child, or another person."[52] The manual offers a table listing self-serving motives that offenders have offered during confessions for each of eleven different crimes.[53]

The fourth specific theme merits special attention: "*Sympathize with the Suspect by Condemning Others*," a subpart of which is "*Condemning the Victim*."[54] "[T]he investigator should develop the theme that the primary blame, or at least some of the blame, for what the suspect did rests upon the victim."[55] Or, as the manual puts it at one point, the strategy is to "*degrad[e] the character of the victim*."[56]

There are suggestions here for blaming victims of assault and robbery.[57] Referencing again "the case of a man suspected of killing his wife," the manual says that the investigator portrayed the suspect's wife as an

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the non-Reid manuals notes how easy it is for employees to rationalize workplace theft. *See* ZULAWSKI & WICKLANDER, *supra* note 37, at 306.

51. INBAU ET AL., *supra* note 1, at 214.

52. *See id.* at 215; *see also* ZULAWSKI & WICKLANDER, *supra* note 37, at 339 (recommending that the interrogator "minimize[] the loss" by suggesting that the suspect "had intended to return the money or property" and was only borrowing it); *id.* at 332 ("Medical bills, family problems, and financial pressures are things that can push a person into doing something he never dreamed he could do. We all have our breaking points."). This family motive, when genuine, and especially in extreme cases, would actually mitigate the offense in a way that a judge should consider in sentencing. If the criminal system will actually reduce the sentence because of a mitigating factor, there is no harm to interrogation that incorporates that mitigation (or any other such genuine factor). We note, however, that few of the moral minimizations are relevant in this way. Efforts to trivialize the offense and blame the victim fall outside of a legitimate sentencing judgment.

53. INBAU ET AL., *supra* note 1, at 216–17; *see also* ZULAWSKI & WICKLANDER, *supra* note 37, at 325 ("First, the interrogator might use frustration at being unable to control the child's crying . . . . [Second, the interrogator might use] the strength of an adult and the fragility of a small child.").

54. INBAU ET AL., *supra* note 1, at 220. The other suggestions are "condemning the accomplice" and "condemning anyone else upon whom some degree of moral responsibility might conceivably be placed." *Id.* at 224, 227; *see also* ZULAWSKI & WICKLANDER, *supra* note 37, at 306 (advising "the interrogator to create the perception of transferring guilt to someone . . . other than the suspect . . . . [thereby] psychologically minimizing the seriousness of the suspect's offense.").

55. INBAU ET AL., *supra* note 1, at 220; *see also* ZULAWSKI & WICKLANDER, *supra* note 37, at 333–34 ("The victim can be blamed in almost any crime from a homicide to a sex crime to theft. The guilt is transferred to the victim by the interrogator, who portrays the suspect as a victim of circumstances.").

56. INBAU ET AL., *supra* note 1, at 222 (emphasis added).

57. *See id.* ("In assault cases, the victim may be referred to as someone who . . . finally got what was coming to him . . . . In a robbery case, the victim may be blamed for having previously cheated the suspect . . . [or] for 'flashing money' or putting the suspect down in front of friends . . . .").

> unbearable creature . . . who would either drive a man insane or else to the commission of an act such as the present one in which she herself was the victim. In this respect, however, the investigator stated that the suspect's wife was just like most other women. He [also said] that many married men avoid similar difficulties by becoming drunkards, cheats, and deserters, but unfortunately the suspect tried to do what was right by "sticking it out," and it got the better of him in the end.[58]

In making such appeals, the manual recommends empathy:

> [M]uch can be gained by the investigator's adoption of an emotional ("choked up") feeling about it all as he relates what is known about the victim's conduct toward her spouse. This demonstrable attitude of sympathy and understanding may be rather easily assumed by placing one's self "in the other fellow's shoes" and *pondering this question*: "*What might I have done under similar circumstances*?"[59]

Although there is no separate example for domestic battery (as opposed to domestic murder), the manual's logic of victim blaming endorses the same approach there as well.

Regarding sex offenses, the suggested blame-the-victim theme is: "The victim initially came on to the suspect and he acted the way *any man* would under the circumstance[s]."[60] The Reid manual offers specific scripts, such as this one:

> Joe, this girl was having a lot of fun for herself by letting you kiss her and feel her breasts. For her, that would have been sufficient. But men aren't built the same way. There's a limit to the teasing and excitement they can take; then something's got to give. A female ought to realize this, and if she's not willing to go all the way, she ought to stop way short of what this gal allowed you to do.[61]

The Reid manuals recommend similar themes when the sexual abuse victim is a child.[62]

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58. *Id.* at 227.
59. *Id.* at 221 (emphasis added).
60. *Id.* at 204 (emphasis added).
61. *Id.* at 222 (proposing the script for a rape interrogation).
62. *See id.* at 204 ("Suggested theme: Having sexual contact with a child the age of the victim (who was nine years old) is much more understandable than if the suspect had the same contact with a two-year-old girl."); *id.* at 221 (offering theme blaming rape on victim's revealing clothing); ZULAWSKI & WICKLANDER, *supra* note 37, at 334 ("The suspect became involved because the victim dressed or acted in a certain way . . . ."). In the supplemental Reid manual specific to child abuse, BUCKLEY, *supra* note 27, there are examples that seem to distinguish the suspect's "perception" from reality, *id.* at 220, but other recommended themes lack this nuance like "[b]lame the child's curiosity; they brought up the subject of sex," *id.* at 223, and "[p]resent the argument that children are more mature in today's society . . . due to television, movies, magazines, news reports, the internet and social media. They are exposed to sex at an early age and are curious to experiment with sex," *id.*; *see also* ZULAWSKI &

Given the recommendation of misogynistic insults of victims, one wonders whether racial or other stereotypes are also used as a minimization theme. The primary Reid manual does not address hate crimes, but the obvious logic of victim blaming in these cases is clear: if rape crimes require misogynistic themes, as the manuals claim, then hate crimes would seem to require racist, homophobic, or Islamophobic themes, or others of a similar nature, whatever might have motivated the suspect to commit the crime.[63] Moreover, this logic seems to apply not just to what are technically hate crimes but to any crime where the suspect and victim are of different races (or ethnicities, religions, etc.) because the suspect might have rationalized the offense with bigoted and stereotyped reasoning. If a simple theft crime is cross-racial, for example, a detective following the technique might experiment with a theme that members of the victim's racial (or other) group always have plenty of money to spare or have acquired their money by nefarious means.

Theft cases are another major opportunity for victim blaming. For employee theft cases, the primary manual states: "[T]he employer should be condemned for having paid inadequate and insufficient salaries or for some unethical or careless practice that may have created a temptation to steal."[64] We saw one such script in the Introduction.[65] Another suggests proposing to a maid accused of theft that she stole fur coats because the owner had so many and did not treat them well.[66]

Finally, the Reid manuals also recommend casting blame on targets other than the victim—accomplices, society, government, parents, or other relatives.[67] For example, when the suspect is a juvenile, blame the parents, suggesting that the suspect was "worse off than an orphan."[68] "When the offense is theft," blame "a spendthrift wife or the financial burden of a child."[69] Or the suspect's creditors may

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WICKLANDER, *supra* note 37, at 334 ("The interrogator can even blame a child victim of sexual abuse for appearing older and tempting the suspect.").

63. The logic is confirmed in a supplemental Reid manual that directly discusses hate crimes. *See* SENESE, *supra* note 27, at 169–72. Besides offering various ways to minimize the moral seriousness of a hate crime, this manual says that "the primary themes" should "address the specific motive – namely, the offender's bias or attitudes toward the specific person or group." *Id.* at 169. In context, "address[ing]" means reinforcing.

64. INBAU ET AL., *supra* note 1, at 222; *id.* at 223 ("[A]n employer may be blamed for some perceived unfair treatment of the suspect"); *see also id.* at 204 ("[B]lame the company for their poor security."); ZULAWSKI & WICKLANDER, *supra* note 37, at 312 (recommending "rationalizations that placed blame on financial problems" caused by medical problems); *id.* at 333 ("Bob, if this happened out of frustration because of the way your boss picked on you . . .").

65. *See supra* text accompanying note 1.

66. INBAU ET AL., *supra* note 1, at 223; ZULAWSKI & WICKLANDER, *supra* note 37, at 334 ("Cindy, I don't know how you can make it on just $7.00 per hour."); *id.* at 335 (recommending interrogators blame the victim's poor security as creating too great a temptation for theft); *see also* SENESE, *supra* note 27, at 141–47 (describing nineteen minimization themes for employee theft, many involving victim blaming).

67. *See* INBAU ET AL., *supra* note 1, at 224–30; *see also* ZULAWSKI & WICKLANDER, *supra* note 37, at 310 (recommending the blaming of parents for giving too much attention to the suspect's sibling).

68. INBAU ET AL., *supra* note 1, at 251.

69. *Id.* at 228.

be blamed for pressuring for repayment and "'forc[ing]' him to steal."[70] Bringing in politics, the suspected embezzler's behavior may be compared favorably to the national government's behavior in "squeez[ing] citizens with burdensome taxes to obtain money to waste on foreign countries."[71] In the actual wife-murder interrogation, the investigator blamed the wife's family for meddling, stating "[a]t one point" that "probably the relatives themselves deserved to be shot."[72]

Returning to sexual assault examples, the Reid manual offers a variety of other targets for blame: pornography, the internet, or "differing cultural beliefs."[73] "A person who has taken indecent sexual liberties with a young girl may be told that her parents are to blame for letting her roam around by herself as they did."[74] If the suspect is married, the interrogator can cast blame on the suspect's wife, as with this script: "If your wife had taken care of you sexually . . . you wouldn't be here now. You're a healthy male; you needed and *were entitled to* sexual *intercourse*. When a fellow like you doesn't get it at home, he seeks it elsewhere."[75]

This final strategy of blaming women, like the others, comes from the latest Reid manual published in 2013, though it also traces back to the first edition of 1962.[76]

C. Moral Minimization in Real World Interrogations

Do police follow the manuals that recommend moral minimization? A variety of evidence confirms that they do. David Simon, a journalistic observer of the first order, famously spent a year embedded with the homicide unit of the Baltimore Police Department.[77] He described their interrogation techniques, including moral minimization, in this passage:

> Kill your woman and a good detective will come close to real tears as he touches your shoulder and tells you how he knows that you must have loved her, that it wouldn't be so hard for you to talk about if you didn't. Beat your child to death and a police detective will wrap his arm around you in the interrogation room, telling you about how he beats his own

70. *Id.* at 229.

71. *Id.* at 230.

72. INBAU ET AL., *supra* note 1, at 227.

73. *See* SENESE, *supra* note 27, at 226.

74. INBAU ET AL., *supra* note 1, at 228; *see also* BUCKLEY, *supra* note 27, at 222 ("Blame the victim's parents for not showing any love or attention to the victim . . . . [or] allowing their child to spend the night, go on a camping trip, ski outing, etc."). This is in addition to blaming society and the media. *Id.* at 224.

75. INBAU ET AL., *supra* note 1, at 228 (emphasis added); *see also* BUCKLEY, *supra* note 27, at 222 ("This is exemplified by offender #3 who had an incestuous relationship with his teenage daughters after his wife refused to have sex with him . . . . In a case like this the investigator would suggest, 'If your wife would have taken care of you the way she was supposed to this would never have happened.").

76. *See* INBAU & REID, FIRST EDITION, *supra* note 47, at 51–52.

77. DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS (1991).

> children all the time, how it wasn't your fault if the kid up and died on you. [78]

Simon did not quantify the number of interrogations he observed, but in one study criminologist Richard Leo observed 182 felony interrogations.[79] Leo separately categorized two tactics that involve the type of minimization that concerns us: (1) to "[o]ffer moral justifications [or] psychological excuses" for the criminal conduct and (2) to "[m]inimize the moral seriousness of the offense."[80] Police offered moral justifications or excuses in thirty-four percent of the interrogations and minimized the crime's moral seriousness twenty-two percent of the time.[81] Detectives use multiple tactics in any interrogation, but we read these results to indicate that detectives minimized the crime's moral seriousness and/or offered moral justifications or excuses, such as blame-shifting, in one-third to one-half of interrogations.[82]

Second, consider a 2007 survey of law enforcement interrogators.[83] Over six hundred law enforcement officers (574 members of sixteen U.S. police departments plus fifty-seven customs officials from two Canadian provinces) answered questions on interrogation practices. The survey asked which of sixteen tactics they employed using a five-point scale ranging from "never" (1) to "always" (5).[84] Here are the results for the two tactics of moral minimization: [85]

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78. *Id.* at 212.

79. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) [hereinafter *Interrogation Room*] (reporting on sixty recorded interrogations from police departments in two small cities and 122 contemporaneously observed interrogations at a major urban police department).

80. *Id.* at 278 tbl.5.

81. *Id.*

82. Subsequent observations report significantly different numbers but confirm that minimization is a real-world tactic. In 2013, Barry Feld reported on his review of 307 delinquency files of sixteen- and seventeen-year-olds charged with felonies in Minnesota and found that minimization was present in only seventeen percent of interrogations. Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 16 tbl.4 (2013). Most recently, Christopher Kelly and co-authors reviewed twenty-nine interrogations (totaling forty-five hours) conducted by the Los Angeles Police Department in homicide, rape, and robbery cases, and found that interrogators offered moral rationalizations in eighty-three percent (twenty-four of twenty-nine) of the interrogations. Christopher E. Kelly, Melissa B. Russano, Jeaneé C. Miller & Allison D. Redlich, *On the Road (to Admission): Engaging Suspects with Minimization*, 25 PSYCH. PUB. POL'Y & L. 166, 170 tbl.1 (2019). These researchers also coded the frequency of different interrogation tactics by examining each interview in five-minute segments. They found that detectives offered rationalizations in 4.7% of the five-minute intervals, making it the sixth most frequently used tactic. *Id.*

83. Saul M. Kassin, Richard A. Leo, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy-May Leach & Dana La Fon, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 385 (2007).

84. The other options for answering were 2 – rarely, 3 – sometimes, and 4 – often. *Id.* at 387.

85. *Id.* at 388 tbl.2.

Table 1

Interrogation technique	Mean usage	% "Never"	% "Always"
Offer suspect sympathy, moral justifications, and excuses	3.38	6%	13%
Minimize the moral seriousness of the offense	3.02	11%	8%

Of the interrogation tactics that involve the substance of questions, these two were the fifth and eighth most frequently employed tactics (where investigators routinely employ multiple tactics in a given interrogation).[86] The mean responses for these two tactics—within a range of "sometimes" to "often"—are consistent with Leo's study showing that the strategies were employed in at least one-third of the cases.

A final source for confirming the use of minimization are the judicial opinions discussing interrogations. Appellate opinions cannot give us a reliable basis for estimating the *frequency* of station house minimization. Not only are there the usual concerns that litigated appeals may fail to represent cases not so litigated, but also note that courts rarely view moral minimization as making a difference to the lawfulness of interrogation, so defense lawyers have little reason to raise issues concerning its use.[87] Nonetheless, the opinions do confirm as a matter of sworn

86. Including all tactics, even those not involving the substance of questions, the two described in the text were still among the top ten of most frequently employed. *Id.*; *see also* Allison D. Redlich, Christopher E. Kelly & Jeaneé C. Miller, *The Who, What, and Why of Human Intelligence Gathering: Self-Reported Measures of Interrogation Methods*, 28 APPLIED COG. PSYCH. 817 (2014) (finding similar frequency results from a survey of 152 U.S. military and federal law enforcement interrogators about the use of "moral rationalizations" and "minimization") (Table 1A, not reported in publication but shared by author Allison Redlich and on file).

87. Even though there is a definite *risk* that explicit promises of leniency will invalidate a confession as involuntary, *see infra* notes 121–124, courts consider such promises as only one factor in the totality to be considered and tend not to find that merely implied promises are sufficient. *See, e.g.*, United States v. Jacques, 744 F.3d 804, 812 (1st Cir. 2014) (finding that "statements . . . minimizing the gravity of Jacques's offense . . . fall safely within the realm of the permissible 'chicanery'"); Sumpter v. Nix, 863 F.2d 563, 565 (8th Cir. 1988) (finding that even if interrogators "made implied promises of leniency and treatment for alcoholism if [Sumpter] were to confess," the confession was voluntary because the totality of evidence was insufficient to show that Sumpter's "will [was] overborne."). We have found only three state cases in which courts suppressing a confession recognized that minimization was one relevant factor in a totality of the circumstances test for voluntariness. *See* Commonwealth v. DiGiambattista, 813 N.E.2d 516, 525 (Mass. 2004); State v. Baker, 465 P.3d 860, 873 (Haw. 2020); State v. Stone, 237 P.3d 1229, 1241–42 (Kan. 2010), all discussed *infra* note 107 and accompanying text. But those cases involved many traditional circumstances supporting involuntariness and we find no similar cases elsewhere. Appellate courts typically avoid describing moral minimization even when it is present. *See, e.g.*, Schumaker v. Kirkpatrick, 808 F. App'x 47, 49 (2d Cir. 2020) (describing the defendant's

testimony that the minimization tactics are a "fairly common" practice and confirm the influence of the Reid technique.[88] Moreover, these cases offer a glimpse into the actual minimizing words the interrogators use.

Consider murder cases. In Minnesota, Kelly Ritt was accused of purposely starting a fire to kill her twenty-three-month-old, special needs daughter (but not her other three children, who survived).[89] The detective who interrogated Ritt energetically used the tactic when "he confided that he too had a disabled child whose care was very demanding, that often he wished he 'could throw' his son out the window, that sometimes he wanted to see the child die rather than suffer, and that his own wife 'could have intentionally done this' too."[90] In a Massachusetts case, the detectives offered to a murder suspect "reasons why he might have killed the victim [his mother] without being 'a bad guy,' including . . . the possibility that he had been provoked by mistreatment from his mother or his aunt."[91] "The officers acknowledged at trial that they had been trained in techniques known as . . . 'minimization.'"[92] In a recent Illinois case, "detectives used minimization tactics and attempted to diminish the legal seriousness and moral seriousness of" the defendant's killing by remarking "that they, too, would remember and seek vengeance on someone [like the victim, purportedly] who murdered their brother."[93] Several other judicial opinions in murder cases turn up examples of moral minimization.[94]

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claim that interrogators used "minimization" though without details). Even in a case finding that false promises of leniency rendered a confession involuntary and inadmissible, the court noted that the trial judge stated that the police interrogation techniques had "includ[ed] minimization of the crime," but "did not specifically describe the 'interrogation techniques' used." State v. Hunt, 151 A.3d 911, 915 & n.1 (Me. 2016).

88. In an Ohio case involving sexual misconduct with a minor, the detective agreed that his effort to "minimize the extent of the crime" is a "fairly common police tactic." State v. Fouts, 2016-Ohio-1104, 2016 WL 1071457, at *6 (Ohio Ct. App. Mar. 16, 2016); *see also* United States v. Woody, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *8 (D. Ariz. Apr. 6, 2015), *rev'd*, 652 F. App'x 519 (9th Cir. 2016) (noting that an FBI agent "has received training in the Reid technique" and the agent "acknowledged that he generally employs minimization").

89. State v. Ritt, 599 N.W.2d 802 (Minn. 1999).

90. *See* Coughlin, *supra* note 14, at 1649 (citing transcripts). Confirming that the appellate courts have no doctrinal reason to describe moral minimization when it occurs, the appellate opinion upholding Ritt's conviction for murder does not mention these astonishing facts, even though the interrogation was a major issue for the appeal. *See* Ritt, 599 N.W.2d 802; *see also* United States v. Hunter, 912 F. Supp. 2d 388, 393 (E.D. Va. 2012) (describing the detective in a child-murder case as telling suspect that "every parent had been in the defendant's position and that no one would 'fault' her").

91. Commonwealth v. Cartright, 84 N.E.3d 851, 857 (Mass. 2017).

92. *Id.*

93. People v. Jones, No. 1-17-1623, 2021 WL 1227837, at *13 (Ill. App. Ct. Mar. 31, 2021).

94. *See* Dassey v. Dittmann, 877 F.3d 297, 335 (7th Cir. 2017) (en banc) (Rovner, J., dissenting) ("The investigators in this case employed classic minimization techniques" by blaming confederate.); State v. Stone, 303 P.3d 636, 642 (Idaho Ct. App. 2013) (Interrogator stated "[t]his is not the crime of the century" and that being "a liar" is worse "by far."); Commonwealth v. Harris, 11 N.E.3d 95, 103 n.6 (Mass. 2014) (Interrogators stated "that people get passionate . . . and 'snap everyday of their lives.'"); Dock v. State, No. 02-18-

The police minimize the seriousness of sexual assault. In an Idaho case, police suspected the adult defendant of inappropriately touching a fifteen-year-old foster child at his residence, which would constitute a crime punishable by up to fifteen years in prison.[95] Yet the detective "repeatedly and substantially downplayed the seriousness of the allegations,"[96] saying: "So [the girl] has made a few statements about some pretty minor issues, in the big scheme of things . . . . This case is (inaudible) not even a blip on the radar hardly because it's not really major allegations . . . . [E]ven if those things are true, they are just minor issues," which might be handled that same day, as by an apology letter.[97] Later the detective said that the accusations were "not the end of the world," and that the greater crime would be lying to the police.[98] Several other reported sexual assault interrogations have used a similar approach,[99] especially when the suspect is a juvenile.[100]

Rhode Island state police used similar tactics in a child pornography case, where the detective stated that "downloading of child pornography was 'not the end of the world' . . . [and] that things can be thought of as 'a spectrum, with the monster at one side . . . good old American porn [on the other end] . . . [a]nd then right next to that, is like the stuff you're looking at, inappropriate CP, we call it, Child Porn.'"[101] The

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00462-CR, 2019 WL 6205248, at *4 (Tex. App. Nov. 21, 2019) ("The detectives' interrogation followed [the] approach" of interrogation manuals "to minimize the moral seriousness of the offense and to cast blame on the victim and society.").

95. State v. Valero, 285 P.3d 1014, 1015–16, 1018 (Idaho Ct. App. 2012).

96. *Id.* at 1017.

97. *Id.* at 1017–18 ("[These allegations] are not like some major issue that you and I can't get resolved today." (emphasis omitted)).

98. *Id.* at 1018–19.

99. *See* State v. Chavez-Meza, 456 P.3d 322, 326 (Or. Ct. App. 2019) (reporting that in a rape case involving a twelve-year-old victim, the detectives stated, "[l]ike, we can deal with mistakes. People make mistakes all the time, and you still live your life."); People v. Morales-Cuevas, No. 611075, 2018 WL 4501114, at *9–10 (Cal. Ct. App. Sept. 20, 2018) (Interrogator used "minimization" techniques regarding defendant's sexual assaults on stepdaughter beginning when she was nine years old.); State v. Stone, 237 P.3d 1229, 1241 (Kan. 2010) (Interrogators minimized crime with nine-year-old victim by stating, "I mean, she's not saying that you had sex with her but that you just had her, just basically just jack you off. And that's, you know, that's not a big deal.").

100. In a California case, *In re* Elias V, 188 Cal. Rptr. 3d. 202, 215–16 (Cal. Ct. App. 2015), the court described how the detective, interrogating a thirteen-year-old boy, employed "minimization" by offering him two "understandable" explanations for the sexual touching of a three-year old: "natural 'curiosity,'" or "that the act was one any normal person in his shoes would find 'exciting.'" *Id.* at 215; *see also* Commonwealth v. Bell, 365 S.W.3d 216, 219–20 (Ky. Ct. App. 2012) (interrogating detective said to the thirteen-year-old suspect of sexual assault of six-year old cousin that "thirteen-year-old boys 'have a lot of hormones,'" and that "you did it because you were horny, had a hard on, and you were curious."); *In re* A.W., No. FJ-20-1214-09, 2011 WL 386999, at *7 (N.J. Super. Ct. App. Div. Feb. 3, 2011), *aff'd sub nom.*; State *ex rel.* A.W., 51 A.3d 793 (N.J. 2012) (Interrogator provided juvenile suspect of the sexual assault of a child the excuse of "experimentation."); *In re* Welfare of J.M.B., No. C5–00–144, 2000 WL 890401, at *3 (Minn. Ct. App. July 3, 2000) (noting that the "detective told J.M.B. that if any sexual contact occurred, it was not a big deal, it was 'normal experience stuff'" during interrogation of juvenile for the sexual abuse of a three-year old).

101. United States v. Monroe, 264 F. Supp. 3d 376, 392 n.143 (D.R.I. 2017).

Court found these statements were "clearly based on the Reid Technique."[102]The sexual assault cases also illustrate the tactic of redirecting blame to other factors, such as alcohol and genetics, and of blaming the victim. From a recent sexual assault case from Hawaii, where the victims were minors, here is a sample of the detective's monologue:

> [Y]ou just made an error in judgment . . . . You were just not in the right frame of mind . . . . Alcohol is . . . where people get themselves into trouble, cause they lose their inhibitions[.] . . . Women are a lot more promiscuous, you know . . . . Everybody fucks up in life, okay . . . . [O]ur brains are programmed a certain way . . . . Guys are programmed to procreate . . . . We all get busted. This is how our brains are wired . . . . You just drank too much, dude. You drank too much. You smoked too much. Bad error in judgment.[103]

Minimization of statutory rape crimes includes the ideas that children can initiate and consent to sex and that some minors are particularly mature and attractive. In one California case, the adult male defendant was convicted of sexual assault crimes involving a girl, A.C., whom he began molesting when she was ten years old and with whom he had anal sex when she was thirteen years old.[104] The interrogating detectives suggested to Gomez that

> A.C. was mature for her age, was fully developed with large breasts, and probably "came on" to defendant . . . . [Detective] Skrinde said he and [Detective] Garcia were starting to wonder if it was more A.C. than defendant, suggesting A.C. was a beautiful, fully developed woman who may have been attracted to defendant . . . Skrinde said to defendant, "You're a man. And that I get. *It's happened to me*."[105]

Many other cases use the same minimizations along with alcohol consumption to rationalize underage sex crimes.[106]

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102. *Id.*

103. State v. Baker, 465 P.3d 860, 864 (Haw. 2020).

104. *See* Gomez v. California, No. 1:18-cv-00642-DAD-SAB-HC, 2019 WL 358631, at *1–2 (E.D. Cal. Jan. 29, 2019).

105. *Id.* at *11 (emphasis added). *See also* Coughlin, *supra* note 14 (explaining how later editions of INBAU ET AL. deleted the suggestion from earlier editions that the detective minimize a sex crime by claiming to have committed a similar one in his youth).

106. *See* People v. Aguirre, No. H041415, 2016 WL 3679901, at *2 (Cal. Ct. App. July 6, 2016) (Interrogator said victim under 14 was "very attractive" and "probably came on to" suspect.); People v. Cortez, No. H041081, 2016 WL 6962539, at *7, 8 (Cal. Ct. App. Nov. 29, 2016) (Interrogator "referenced" the "physical appearance and conduct" of the victim, under age fourteen, and "suggested she was also guilty."); State v. Chavez-Meza, 456 P.3d 322, 324, 327 (Or. Ct. App. 2019) (Interrogator said of twelve-year-old victim, "I believe that it was probably consensual, she wanted to have sex with you."); State v. Fernandez-Torres, 337 P.3d 691, 695 (Kan. Ct. App. 2014) (Interrogator excused inappropriately touching a seven-year-old girl because suspect "had too much to drink," and "it's ok because [he] didn't keep on touching her."); Commonwealth v. Gonzalez, No. 2009–00639, 2011 WL 649942, at *6

Consider further the Commonwealth of Massachusetts. No state holds that moral minimization alone can render a confession involuntary, but Massachusetts is one of the few American jurisdictions to recognize that minimization is a relevant factor within the "totality of circumstances" that determines the voluntariness, and thus admissibility, of a confession.[107] That legal stance explains why there are more cases from this state—defense lawyers have at least a weak reason to litigate moral minimizations. In one Massachusetts robbery case, detectives offered the defendant reasons for why he may have committed the alleged robberies, such as needing money to buy food for himself and his infant daughter.[108] A Massachusetts arson case describes a detective's minimization in "an hour-long near monologue," comparing "his view of the defendant's conduct to the sort of mischief, pranking and 'tomfoolery' that could take place on 'cabbage night,'" referring to "the night before Halloween," and also offering alcohol as an excuse.[109]

In another Massachusetts arson case, the court recognized the "standard interrogation tactic of 'minimization'" and its origin in the Inbau/Reid interrogation manual.[110] The defendant had a dispute with his landlord over the latter's failure to make repairs to the apartment, which presented an opportunity to blame the victim.[111] According to the court, the trooper "downplay[ed] the crime itself" "by pointing out that . . . in light of the deplorable condition of the premises, the trooper could 'relate to' and 'understand' his anger at the landlord and the desire to 'do something like that.'"[112]

In sum, law enforcement surveys, direct observations, and judicial opinions all make clear that American police frequently employ the interrogation tactic of moral minimization.

D. A Very Rough Estimate of the Frequency of Moral Minimizations

Consider a "back of the envelope" estimate for the number of moral minimizations in the United States in one year. In 2019, state and local law enforcement made over ten million arrests.[113] If we narrow our focus to likely

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(Mass. Super. Ct. Feb. 14, 2011) (offering the suspect in the sexual assault of two children the excuse: "[W]e know it's not you it's the booze.").

107. *See* Commonwealth v. DiGiambattista, 813 N.E.2d 516, 525 (Mass. 2004). The court has *not* found that moral minimization alone could render a confession involuntary. *See Baker*, 465 P.3d at 873 (finding that moral minimization statements and gender-based stereotypes were two of seven factors that made the defendant's confession involuntary); State v. Stone, 237 P.3d 1229, 1241–42 (Kan. 2010) (finding that minimizing sexual assault of a nine-year old as "not a big deal" and not really "sex" was one factor of many in finding confession involuntary).

108. Commonwealth v. Monroe, 35 N.E.3d 677, 686 (Mass. 2015); *see also* Commonwealth. v. Quint Q., 998 N.E.2d 363, 367 (Mass. App. Ct. 2013) (Interrogator of a 15-year-old suspected of breaking and entering said: "maybe what you did . . . [was] a momentary lapse of judgment; you made a mistake[.]").

109. Commonwealth v. Baye, 967 N.E.2d 1120, 1124 (Mass. 2012).

110. DiGiambattista, 813 N.E.2d at 527.

111. *Id.* at 519.

112. *Id.* at 520.

113. Criminal Justice Information Services Division, FBI, *2019 Crime in the United States*,

felonies of the sort discussed above, then the relevant subset contains 1.5 million arrests for violent and property crimes.[114] The violent crimes are murder, non-negligent homicide, rape, robbery, and aggravated assault; the property crimes are burglary, larceny-theft, motor vehicle theft, and arson.[115] FBI Uniform Crime Reports do not separate felony and misdemeanor arrests, but these crimes are nearly always classified as felonies. The number is a conservative estimate considering we are leaving out arrests for non-aggravated assaults and other relevant crimes that are sometimes felonies (and also because the police sometimes interrogate suspects they never arrest). The limited available evidence suggests that, post-*Miranda*, police manage to interrogate arrestees in about eighty percent of felonies.[116] This figure implies that police manage to deploy some interrogation tactics on about 1.2 million felony suspects per year.

Using the Leo observations from before, under which the conservative estimate is that police use the tactic in one-third of interrogations, we arrive at an estimated 400,000 times a year that police detectives minimize the moral seriousness of the suspected offense and/or shift moral blame away from the suspect. One could work to make the estimates better at each stage, but the exact number is not of great concern for our purposes. The phenomenon would be significant even if we were overestimating it by an order of magnitude.

We also note a final reason to think the number 400,000 understates the significance of the practice. There is no perfect acoustic separation[117] between the interrogation room and the rest of the world. Suspects no doubt recount what the police said to them to others. Although some of those who receive these reports from interrogated suspects might not believe them, others no doubt do. If interrogated suspects credibly conveyed the interrogator's statements to a little more than, on average, one close friend or relative, then our best guess is that more than a million Americans receive a message each year that law enforcement authorities regard some serious crime as trivial and/or that society or the victim is to blame. As indicated, this remains a very rough guess.

FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested (estimating 2019 arrests at 10,085,207) [https://perma.cc/XL9Q-MH6R].

114. *Id.* (estimating 495,871 violent crime arrests and 1,074,367 property crime arrests).

115. *Id.* at tbl.29, n.3.

116. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 854, 869 (1996) (reporting on a sample of 219 felony arrestees in Salt Lake City in which police failed to question twenty-one percent of felony suspects); FLOYD FEENEY, FORREST DILL & ADRIANNE WEIR, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 143 tbl.15-2 (1983) (reporting that police failed to question 18.5% of burglary arrestees in Jacksonville, Florida, and 20.1% of burglary arrestees in San Diego); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L & CRIMINOLOGY 621, 654 (1998) (finding that seventy-eight percent of suspects in a sample waive their *Miranda* rights).

117. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

II. THE CRIMINOGENIC RISKS OF MORAL MINIMIZATION

This Part develops our claim that the ubiquitous practice of moral minimization marginally increases crime. Section A identifies the one plausible theory by which moral minimization works, i.e., how it could increase true confessions (more than it increases false confessions). The Reid manual identifies the psychological theory as that of neutralization, as we explain. Section B then explores legal and/or social science literatures that reveal the criminogenic risks of moral minimization, beginning with neutralization and continuing with research on moral disengagement, the concept of the marginal offender, restorative justice, the doctrine of the entrapment defense, legal legitimacy, and the connection between informal social norms and the law's expressive effects. Section C synthesizes the argument by identifying particular crimes and particular defendants for which the criminogenic claim is most—and least—powerful. Section D defends the claim against an objection to our thesis, the idea that criminal prosecution, conviction, and punishment contain enough expressive condemnation of the perpetrator's crime to undo all the damage of moral minimization.

A. Why Might Moral Minimization Increase Confessions?

American police are committed to using moral minimization in interrogation. Is that because the tactic increases confessions, or more specifically, because the tactic increases true confessions more than it increases false confessions?

One possible answer is no, the widespread use of the tactic does not promote true confessions but is simply misguided. Interrogation is more art than science and, as with other discredited domains of intuition-based policing, sometimes the conventional wisdom is false.[118] There is no rigorous empirical testing that demonstrates the causal contribution of moral minimization to the success of interrogations. Part of the testing problem is general: there is no evidence that the overall style of accusatory interrogation, such as the Reid Technique, is better than the overall non-accusatory styles, such as the information gathering techniques used in the United Kingdom, Australia, and other places.[119] But even if we did know that

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118. *See, e.g.*, Erin Blakemore, *FBI Admits Pseudoscientific Hair Analysis Used in Hundreds of Cases*, SMITHSONIAN MAG., Apr. 22, 2015 (reporting on forensic scandal about the nature of hair analysis); Daniel T. O'Brien, Chelsea Farrell & Brandon C. Welsh, *Looking Through Broken Windows: The Impact of Neighborhood Disorder on Aggression and Fear of Crime Is an Artifact of Research Design*, 2 ANN. REV. CRIMINOLOGY 53 (2019) (reporting on meta-analysis finding no support for claim that disorder contributes to crime, the assumption of many policing strategies).

119. *See* Meissner et al., *supra* note 18, at 216. There is no rich field data to allow such a comparison between real world interrogators who use different methods, much less do we have a randomized trial comparing different methods. *See, e.g.*, Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 MIL. L. REV. 1 (2007). Experimental results tentatively suggest that the information-gathering method is superior to accusatory methods. *See* Christian A. Meissner, Allison D. Redlich, Stephen W. Michael, Jacqueline R. Evans, Catherine R. Camilletti, Sujeeta Bhatt & Susan Brandon, *Accusatorial and Information-*

accusatory methods were more effective overall than the alternatives at inducing true confessions and avoiding false ones, there is no social science evidence that the particular tactic of *moral minimization* is important to the success of the accusatory technique.[120] In short, perhaps the reality is that moral minimization does not work, and it is a mistaken tradition.

Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review, 10 J. EXPERIMENTAL CRIMINOLOGY 459, 460 (2014) (finding field studies lack the ability to measure false confessions, but twelve experiments suggest the superior diagnosticity of information-gathering over accusatory methods); *see also* Jacqueline R. Evans, Christian A. Meissner, Amy B. Ross, Kate A. Houston, Melissa B. Russano & Allyson J. Horgan, *Obtaining Guilty Knowledge in Human Intelligence Interrogations: Comparing Accusatorial and Information-Gathering Approaches with a Novel Experimental Paradigm*, 2 J. APPLIED RSCH. MEMORY & COGNITION 83, 86–87 (2013) (reporting experimental results showing the superiority of information-gathering over accusatory methods in an intelligence setting).

120. There are no randomized trials of different interrogation techniques, nor rich data allowing comparison of interrogators using the Reid techniques to those using all the techniques except moral minimization. Leo found higher confession rates in interrogations with certain moral minimizations than without. Leo, *Interrogation Room*, *supra* note 79, at 294 (reporting in Table 14 the success rate with the tactic of "moral justifications/psychological excuses"); *id.* at 295–96 (reporting in Table 15 the success of "offer[ing] moral rationalizations"). In each case, the chi-squared test showed significance at the level of $p < .05$. *Id.* Leo does not assert that this correlation shows the success of the technique, but one paper later cited Leo as evidence that the tactic is "highly effective." Copes et al., *supra* note 36, at 448, 450. But this is not a sound inference. Leo had no way to discern whether confessions were true or false, and therefore had no way to judge the tactic a net success. Nor did he compare the accusatory style of interrogation with a competitor, such as information-gathering or the improvisations of an untrained interrogator. Moreover, one cannot make reliable causal inferences from the data because Leo was not controlling for a host of relevant variables, such as the experience of the detective or length of the interrogation. Among possible confounds, Leo, *Interrogation Room*, *supra* note 79, at 297, reports that longer interrogations are more successful, and that police had longer interrogations when the victim was female, *id.*, which is precisely when we might expect police to be more likely to minimize by blaming the victim. If so, it could be that the tactic's correlation with confessions is due to interrogation length rather than the moral minimization that is merely correlated with length.

A recent interrogation study measures a variable Leo lacks—the frequency by which detectives use techniques in actual interrogations, as well as temporally connected self-incriminating statements. The results are mixed, finding that offering moral rationalizations was not significantly associated with admissions, but rationalizations do significantly increase crying by the suspect, which significantly increases the odds of a suspect admission. Kelly et al., *supra* note 82, at 173 (reporting on results from forty-five hours of twenty-nine felony interrogations by Los Angeles Police Department detectives). The experimenters had some reason to think that all the suspects were guilty, but could not be certain, which means the study offers no way to assess how the tactic affected the false confession rate.

Several experiments cast doubt on the net effectiveness of minimization. Their design involved the interrogation of participants who had actually violated some rules of the experiment. *See, e.g.*, Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCH. SCI. 481 (2005). The experiment allowed measurement of true and false confessions

If the tactic fails, then it would be far better for American police to abandon it. American governments currently spend money training detectives on interrogation methods. American detectives currently spend scarce interrogation time spinning out themes of minimization. Another cost occurs whenever the victim-blaming tactic leaks out into the world and victims suffer the anguish of learning that detectives told the offender that the victim was to blame for the crime. Whatever their magnitude, there is no reason to bear *any* of these costs if the tactic does not work.

We will nonetheless assume for the sake of argument the other possibility—that accusatory methods like the Reid technique are more effective than the alternatives at inducing true confessions and avoiding false ones, and that the tactic of moral minimization is an important contributor to their success. Although not empirically verified, there are two plausible mechanisms for success, two reasons it might increase true confessions.

One possible theory is that moral minimization convinces suspects that prosecutors and judges will treat them with lenience in charging and sentencing. But the manual disclaims this rationale because of the legal risks; indeed, the manual warns interrogators against making promises of leniency in exchange for a confession.[121] Obviously, prosecutors can and do negotiate with defense lawyers for guilty pleas, but state and federal courts have for more than a century viewed police promises of official leniency, made to unrepresented suspects in interrogation, as potentially undermining the voluntariness and reliability of a confession.[122] The

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and true and false non-confessions, in response to changes in interrogation tactics. Moral minimization increased confessions among the guilty but increased confessions by the innocent to a greater extent. Thus, minimization lowered the overall diagnosticity of the interrogation. *See id.* at 484 tbl.1. Reaching similar results, *see* Jessica R. Klaver, Zina Lee & V. Gordon Rose, *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCH. 71 (2008); Fadia M. Narchet, Christian A. Meissner & Melissa B. Russano, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 L. HUM. BEHAV. 452 (2011); Allyson J. Horgan, Melissa B. Russano, Christian A. Meissner & Jacqueline R. Evans, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCH. CRIME & L. 65 (2012). Experiments that do not involve actual criminality nor real detectives raise obvious external validity concerns. There is also the possibility that false confessions in the real world might be identified as such before trial, so they may matter less for assessing ultimate diagnosticity. *See* Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1163–64 (2017). Because of these uncertainties, our claim is merely that the effectiveness of moral minimization remains plausible but empirically unproven.

121. INBAU ET AL., *supra* note 1, at 203, 425; JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 276.

122. *See, e.g.*, Wilson v. United States, 162 U.S. 613, 622 (1896) (stating that confessions are "inadmissible if made under any . . . promise, or encouragement of any hope or favor"); Bram v. United States, 168 U.S. 532, 542–43 (1897) (quoting with approval from a treatise: "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight . . . ."); Shotwell Manufacturing Co. v. United States, 371 U.S. 341, 347 (1963) (noting that *Bram* states "the controlling test" that a confession "must be free and voluntary:

social science scholarship on false confessions supports the concern that American interrogation tactics cause false confessions[123] and specifically do so, in part, because minimization promises official leniency "by implication."[124] If this implication of official lenience were the very mechanism by which moral minimization increases confessions, then courts should insist that American police abandon the practice for the same reasons courts have rejected explicit promises of lenience in interrogation—they encourage false confessions.

Which leads us to the third and final possibility, the very mechanism the manuals offer for how moral minimization uniquely produces true confessions: by making it seem likely that people *other than* the prosecutor and judge will be sympathetic. When detectives minimize the moral wrongfulness of a crime, they make it appear, at a minimum, that *the detectives* will be more "sympathetic and forgiving" of the confessed perpetrator. As explored in the next section, the manual also contemplates that the detectives' forgiving attitude implies that the broader society will be less disapproving of the confessed perpetrator.[125] These implications reduce the expected shame or stigma from confessing, rendering a confession more likely. On this view, moral minimization does not imply official leniency in sentencing, but instead reduces the anxiety the suspect will experience from admitting the crime to the detectives and, later, to family, friends, and acquaintances.

Yet to understand this psychological mechanism precisely is to understand its danger. Expected psychological costs work to prevent future criminal behavior. The government's persistent effort to trivialize crime and cast blame away from the offender undermines multiple internal and informal mechanisms of legal

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that is . . . not . . . obtained by any direct or implied promises, however slight"). Modern courts consider whether a promise of leniency renders a confession involuntary and exclude involuntary confessions. *See, e.g.*, United States v. Lopez, 437 F.3d 1059, 1066 (10th Cir. 2006) (upholding exclusion of confession for involuntariness because of police promise of sentencing lenience); Squire v. State, 193 So. 3d 105, 108 (Fla. Dist. Ct. App. 2016) (agreeing "that the detective's comments created an implied promise of leniency," such that "the confession was induced by impermissible conduct"); State v. Rezk, 840 A.2d 758, 765 (N.H. 2004) (holding that "defendant's confessions were induced by specific promises of leniency and were involuntary"); *see also* Michael J.Z. Mannheimer, *Fraudulently Induced Confessions*, 96 NOTRE DAME L. REV. 799, 818 (2020) ("Another ploy courts regularly hold impermissible is making false promises of leniency, nonprosecution, immunity, or the like in exchange for a confession.").

123. *See, e.g.*, Saul M. Kassin, Allison D. Redlich, Fabiana Alceste & Timothy J. Luke, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 AMER. PSYCHOLOGIST 63 (2018) (reporting on survey of eighty-seven experts on the psychology of confessions to identify scientific consensus, including on the causes of false confessions); Brent Snook et al., *Urgent Issues and Prospects in Reforming Interrogation Practices in the United States and Canada*, 26 LEGAL & CRIMINOLOGICAL PSYCH. 1, 10–11 (2021) (discussing what each of eleven authors views as the critical research and reform issues in the psychology of interrogation).

124. *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 239 (1991); Snook et al., *supra* note 123, at 14–15.

125. *See* FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS 341 (3d ed. 1986) [hereinafter INBAU ET AL., THIRD EDITION].

compliance, as we explore in this Part. The risk is that moral minimization increases recidivism.

To be clear, these costs of moral minimization stand on similar empirical footing as the purported benefits of the tactic (their tendency to produce true confessions). *Neither* is empirically validated; both are merely plausible. But our thesis in this Article is that the criminogenic risks are *as plausible* as the claim that the interrogation tactic is effective at inducing true confessions. As we show, the same psychological processes—especially neutralization—that arguably lead to confessions also makes it more likely that the interrogated suspect will offend in the future. We also identify mechanisms other than neutralization—social norms and legal legitimacy—that link moral minimization to increased crime. In that sense, our criminogenic claim is more plausible than the effectiveness of moral minimization because the latter strictly depends on neutralization theory while the former does not.

B. The Risks of Minimizing Internal Motives for Compliance

1. Neutralization Theory

The manual emphasizes that the goal is to *reinforce* the same rationalizations that actually motivated the suspect to commit the crime.[126] To justify this odd tactic, the Reid manual points to the psychological theory of *neutralization*, initially proposed in the 1950s.[127] Neutralization is not an all-purpose theory of crime, but a resolution of a particular puzzle that arises for some people and some crimes. The puzzle is: How can people who have internalized a norm against certain criminal conduct, such as against stealing or violence, nonetheless engage in the conduct? Or, to put it differently, should we always disbelieve those who intentionally commit a crime when they subsequently claim to feel remorse and suffer guilt? On a simplistic account, those who have internalized the norm against the criminal act of violence or theft would not commit such crimes, so those who commit those crimes show themselves not to have internalized the norms. Their expressed remorse could not be genuine.

The better view, however, is that those who internalize the norm can still intentionally violate it, and then feel guilt and remorse. One possibility is that the internal motive for avoiding crime usually leads to legal compliance, but in some instances the expected benefit from the crime is so high as to overcome the expected

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126. *See* INBAU ET AL., *supra* note 1, at 210 (advocating "a persuasive effort on the part of the investigator to reinforce those existing excuses or rationalizations within the guilty suspect's mind"); *id.* at 207 ("If the investigator's suggested moral or psychological justifications are not already present in the suspect's mind, the suspect will often reject the implications of the theme."); *id.* at 202 (noting that the detective aims to "reinforce the guilty suspect's *own* rationalizations and justifications for committing the crime") (emphasis added); JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 276 (recommending that the interrogator "reinforce the defense mechanisms that already exist in the suspect's mind"). The main alternative to the Reid Technique suggests the same. *See* ZULAWSKI & WICKLANDER, *supra* note 37, at 308 ("The motive behind the incident will often lead the interrogator to the proper rationalization.").

127. *See* INBAU ET AL., *supra* note 1, at 325–26, nn.7 & 15. *See also infra* note 130.

feeling of guilt. Another explanation, complimentary to the first, is that the individuals managed to *neutralize* their internal commitments. Consider this recent description, which focuses on the delinquency of minors:

> When people are committed to a particular value system, they typically experience guilt or shame for violating, or even contemplating violating, its norms. This guilt, and its potential for producing a negative self-image, dissuades most people from engaging in crime or delinquency. Therefore, to participate in delinquent behavior under such conditions, youths must find ways to *neutralize* the guilt associated with their actions. They do this by relying on patterned thoughts and beliefs that blunt the moral force of the law and *neutralize* the guilt of criminal participation . . . . [This allows] individuals to engage freely in delinquency without serious damage to their self-image.[128]

Neutralization theory thus explains one necessary causal step for a certain group of people—those who have internalized social norms some criminal provisions enforce—to violate those particular criminal provisions.

Stated more briefly: The criminal "distorts what was done and the motives for doing it until the behavior is consistent with self-concept."[129] The primary Reid manual quotes this explanation of neutralization theory by psychologist Michael Lillyquist as part of its general effort to explain why moral minimization works to elicit confessions.[130] The idea is that the suspect expects to experience psychological costs, e.g., anxiety and shame, from confessing. Moral minimization lowers those costs. First, the tactic demonstrates that the detectives themselves will not make critical judgments of the suspect. As noted in a psychological appendix to the third edition of the primary manual: "The mere embarrassment of having to admit an act of wrongdoing can pose a formidable barrier to overcome during an interrogation."[131] Second, the suspect makes inferences from the detectives' minimizations. "[I]f the suspect who is concerned about avoiding personal consequences believes that the interrogator can understand and seem to forgive the offense or suspect, he may believe that others will also be sympathetic and forgiving."[132]

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128. Robert G. Morris & Heith Copes, *Exploring the Temporal Dynamics of the Neutralization/Delinquency Relationship*, 37 CRIM. JUST. REV. 442, 443 (2012) (emphasis added).

129. *See* INBAU ET AL., *supra* note 1, at 326, n.15 (quoting LILLYQUIST, *supra* note 36, at 152).

130. *See* INBAU ET AL., *supra* note 1, at 325–26, n.7 (citing LILLYQUIST, *supra* note 36, at 153–60 and Copes et al., *supra* note 36). The third edition of the manual, INBAU ET AL., THIRD EDITION, *supra* note 125, contained an appendix titled "The Psychological Principles of Criminal Interrogation," written by Brian C. Jayne. That appendix, *id.* at 340–41 nn.1 & 2, also explains how offenders rationalize their crimes by citing Lillyquist, as well as the seminal article on neutralization, Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIO. REV. 664, 667–69 (1957).

131. INBAU ET AL., THIRD EDITION, *supra* note 125, at 328 (from the appendix titled "The Psychological Principles of Criminal Interrogation," by Brian C. Jayne).

132. *Id.* at 341. By "personal consequences," the psychological appendix refers to effects

Yet the cited pages of the Lillyquist book are a clear warning to those who would minimize crimes or criminal responsibility. Neutralization theory implies that the easier it is for an individual to neutralize the moral objections to a crime, *the easier it is for the individual to commit the crime*. Although there are many causes of crime, Lillyquist states on the same page from which the Reid manual quotes: "It is often the case that the words which a person offers *after* an event, as a rationalization, were available to the person *before* the event, and, furthermore, that were they not available, the person may not have committed an action inconsistent with his or her self-concept."[133] Lillyquist also quotes the sociologist C. Wright Mills: "Often anticipation of acceptable justifications will control conduct. ('If I did this, what could I say? What would they say?') Decisions may be, wholly or in part, delimited by answers to such queries."[134] In other words, the claim being made on the very pages the Reid manual cites, is that, at the margin, *neutralizations cause crime*. The causal claim is made throughout the cited chapter.[135]

As should now be apparent, there is no difference between what the Reid manuals call "theme-development," what we call "moral minimization," and what this psychological literature calls "neutralization." On pages cited by the Reid manual, Lillyquist lists the classic "techniques of neutralization" (taken from the seminal article on the subject)[136]: "(1) denial of responsibility, (2) denial of injury, (3) denial of victim, (4) condemnation of the condemners, and (5) appeal to higher loyalties."[137] As the manual indicates, these five neutralization techniques supply the Reid themes of moral minimizations.

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on the "individual's self-concept," such as "loss of self-esteem, pride, or integrity." *Id.* at 328. *See also id.* at 343 ("The interrogator must be careful in his condemnations; the suspect should experience anxiety not because of the crime committed, but rather because he is lying about it.").

133. LILLYQUIST, *supra* note 36, at 153.

134. *Id.* (quoting C. WRIGHT MILLS, POWER, POLITICS, AND PEOPLE 443 (1963)).

135. *See* LILLYQUIST, *supra* note 36, at 160, where Lillyquist asks and answers the causal question: "Are the neutralizations 'mere' rationalizations or do they operate before the offense and facilitate it? . . . [T]he theorists who use the term neutralization intend it to be viewed as a pre-offense activity, not just an excuse mustered after being caught." He quotes a trio of sociologists for the proposition that neutralizations are "not merely ex post facto excuses or rationalizations invented for the authorities' ears, but rather phrases which actually facilitate or motivate the commission of deviant actions by neutralizing a preexisting normative constraint." *See id.* (citing IAN TAYLOR, PAUL WALTON & JOCK YOUNG, THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE 176 (1973)).

136. Sykes & Matza, *supra* note 130, at 667–69; *see also* W. William Minor, *Techniques of Neutralization: A Reconceptualization and Empirical Examination*, 18 J. RSCH. CRIME & DELINQ. 295 (1981).

137. LILLYQUIST, *supra* note 36, at 153 (citing Sykes & Matza, *supra* note 130); *see* Sykes & Matza, *supra* note 130, at 667 ("It is by learning these techniques [of neutralization] that the juvenile becomes delinquent."). Neutralization theory is "no longer confined to the study of juvenile delinquents," but is applied to a wide variety of adult criminal behaviors. *See* Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 223 (2005).

The first category, "Denial of responsibility" includes claims that one was "intoxicated with liquor or other drugs,"[138] which, as we saw, is a common interrogation tool.[139] It also includes "tak[ing] the approach of the extreme environmental attributionist who sees all actions as completely determined by situational factors."[140] Interrogators use this technique when they blame society or an emotional state.[141] "Denial of injury" involves adopting a narrow view of harm and describing some criminal acts as mere "mischief" or "pranks."[142] We saw this narrowing in child sexual abuse cases where detectives suggested that minors could and did consent to sex, and in a Massachusetts case comparing arson to "cabbage night" pranks.[143] "Denial of victim" includes the idea that "they had it coming."[144] We saw many such victim-blaming techniques.

The neutralization technique of "condemning the condemner" posits that everyone commits similar crimes or is corrupt, so the prosecution is hypocritical.[145] The Reid method specifically proposes to tell those suspected of stealing from their employer how surprisingly common such crime is, and to blame the government for "squeez[ing] citizens with burdensome taxes . . . to waste on foreign countries."[146] Finally, the "higher loyalties" technique justifies the crime as serving values more important than law, such as the protection and welfare of one's family or friends.[147] Several Reid minimization themes involve proposing that the suspect acted on behalf of his family.[148]

Given the overlap, our claim is simple. First, there is a theory that proposes that people who have internalized social norms against criminal acts are able to talk themselves into committing such acts only if they succeed at "neutralization." Second, there is an interrogation technique that explicitly seeks to *reinforce* the suspect's precise neutralizations. Thus, to secure a confession for a past crime, moral minimization endorses and encourages the very psychological processes that the referenced theory says will lead to criminality. The technique is not a fleeting moment of the interrogation but a persistent theme requiring an extended monologue. And the theme is effective and powerful because it is presented with apparent empathy by police officers from whom the suspect expected only disapproval.

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138. LILLYQUIST, *supra* note 36, at 153.

139. *See supra* notes 52, 63, 103, 111 and accompanying text.

140. LILLYQUIST, *supra* note 36, at 153; *see also* Sykes & Matza, *supra* note 130, at 667 ("In effect, the delinquent approaches a 'billiard ball' conception of himself in which he sees himself as helplessly propelled into new situations.").

141. *See supra* notes 21–23, 109, and accompanying text. Recall the sexual assault case in which the interrogator had offered that the suspect acted when he was "not in the right frame of mind." State v. Baker, 465 P.3d 860, 864 (Haw. 2020).

142. *See* Sykes & Matza, *supra* note 130, at 667–68. *See also* LILLYQUIST, *supra* note 36, at 154.

143. See *supra* notes 122–129, 134, and accompanying text.

144. LILLYQUIST, *supra* note 36, at 154; *see* Sykes & Matza, *supra* note 130, at 668 ("The injury . . . is a form of rightful retaliation or punishment.").

145. LILLYQUIST, *supra* note 36, at 156; Sykes & Matza, *supra* note 130, at 668.

146. INBAU ET AL., ESSENTIALS, *supra* note 27, at 230.

147. LILLYQUIST, *supra* note 36, at 156–57; Sykes & Matza, *supra* note 130, at 669.

148. *See* INBAU ET AL., *supra* note 1, at 60.

2. Moral Disengagement Theory

Bolstering neutralization theory is the related idea of *moral disengagement*. This social cognitive theory identifies the mechanisms by which ordinary people who want to continue thinking of themselves as decent and moral come to rationalize their bad conduct.[149] Moral disengagement is broader than neutralization because it focuses not only on crimes but also on legal but morally dubious activities. For example, how do manufacturers of deadly commodities like cigarettes come to terms with selling them, especially to minors, and with making agricultural and chemical changes to increase their addictive properties?[150] The psychological mechanisms of disengagement include some techniques familiar to neutralization theory: diffusion of responsibility to others, denial of the harm, appeal to honorable purposes, and dehumanization of the victim.[151] Another disengagement mechanism is the use of euphemistic language that diverts attention away from the moral wrong.[152]

As with neutralization, moral disengagement is incremental. The first instance of moral disengagement "will not instantly transform considerate individuals into cruel ones."[153] Instead, individuals initially "perform mildly harmful acts they can tolerate with some twinges of guilt[,]" and then "[a]fter their self-reproof has been diminished through repeated enactments, the level of ruthlessness increases until eventually acts they originally regarded as abhorrent can be performed with little anguish or self-censure."[154]

Legal scholars have started to pay attention to moral disengagement and related psychological ideas.[155] That people are internally motivated to maintain a positive self-image—including as being honest and moral—is potentially good news for legal compliance. But that people have the capacity for rationalization to avoid experiencing a loss of self-image, even when doing wrong, is bad news. Yuval Feldman's book on the subject is entitled *The Law of Good People*[156] to emphasize the problem that the law usually faces is *not* the need to constrain the Holmesian "bad man"[157] without moral scruples but to regulate "good" people who will obey the law unless they are able to succeed at rationalization.

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149. *See generally* ALBERT BANDURA, MORAL DISENGAGEMENT: HOW PEOPLE DO HARM AND LIVE WITH THEMSELVES (2016).

150. *Id.* at 239–51.

151. *Id.* at 62–64 (discussing diffusion of responsibility); *id.* at 64–69 (discussing distortion and denial of harmful effects); *id.* at 49–53 (discussing moral and social justifications); *id.* at 84–91 (discussing dehumanization and attribution of blame).

152. *Id.* at 53–56.

153. *Id.* at 97.

154. *Id.* at 97–98.

155. *See* Janice Nadler, *Ordinary People and the Rationalization of Wrongdoing*, 118 MICH. L. REV. 1205, 1206 (2020) ("[T]he emerging field of Behavioral Ethics . . . demonstrates . . . that wrongdoing is remarkably easy to provoke, in part because people fail to fully recognize the ethical implications of their actions.").

156. YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR (2018).

157. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

Much of Feldman's book aims to show how the law might be structured to *impede* the mechanisms of moral disengagement so as to improve legal compliance.[158] Some of the recommendations involve subtle changes in legal language.[159] In this article, we add one simple recommendation: do not have agents of the state endorse and reinforce the mechanisms of moral disengagement. If a major problem of legal compliance is that well-motivated people disengage from the moral wrongness of their acts by denying that they caused harm, diffusing their personal responsibility, and dehumanizing the victim, then it is risky to have detectives in interrogation insist that a suspect's theft or assault did no real harm, was justified by higher moral considerations, and is really the fault of others, including the victim. Because "[p]eople do not usually engage in harmful conduct until they have justified to themselves the morality of their actions[,]"[160] the interrogation practice of reinforcing disengagement mechanisms is making it easier for suspects to rationalize future harmful behavior.

3. The Marginal Offender

One might resist the analysis by arguing that the police cannot further corrupt guilty suspects who have already successfully neutralized the internalized aversion to committing criminal acts (and/or morally disengaged). This reply is flawed in two ways.

First, those guilty of offending often retain some internal motivation for complying with the law. Recall that the whole point of neutralization and moral disengagement theory is to explain that the offender may experience genuine remorse and feelings of guilt. Whether such an individual re-offends depends in part on whether that linkage—between offending and negative emotions—is weakened or strengthened by the experience of offending. Committing a long series of offenses is likely to "harden" the perpetrator, who thereby loses the capacity for feeling guilt or remorse for that type of offense (perhaps accompanied by entry into a subculture that esteems that criminality).[161] But a single successful neutralization will usually fail to eliminate the linkage, which is why the offender still struggles with guilt.

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158. *See* FELDMAN, *supra* note 156, at 24 (noting the danger of vague legal mandates because "[i]n the presence of vagueness . . . good people are more likely to find ways to justify their bad behavior"); *id.* at 200 (noting the importance of improving the certainty of punishment rather than its severity because good people are more likely to behave well when reminded to do so by the punishment of others).

159. *Id.* at 162–63 ("[T]his project suggests not only that minor language choices, which do not have any instrumental importance, affect behavior in unexpected directions but also have conflicting effects on people's behavior . . . ."); *see also* Alfred L. McAlister, Enomoyi Ama, Cristina Barroso, Ronald J. Peters & Steven Kelder, *Promoting Tolerance and Moral Engagement Through Peer Modeling*, 6 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 363 (2000).

160. BANDURA, *supra* note 149, at 49.

161. *See, e.g.*, Maruna & Copes, *supra* note 137, at 274 (suggesting that "in early stages of delinquency, youths may need to use neutralizations to relieve the cognitive dissonance that occurs when their actions are not in line with their values[,]" but "[b]y using these neutralizations, delinquents' commitment to those conventional values are eventually weakened to the point that there is no longer a need to neutralize"); *see* W. William Minor,

Indeed, the experience of being apprehended for an offense may instead produce "softening." Being apprehended may raise the salience of all the arguments against one's rationalizations. The perpetrator's experience of guilt or remorse may be greater than expected, perhaps accompanied by the realization that the supporting rationalizations are flimsy and unconvincing. Neutralization theory therefore applies as much to the decision to re-offend as it does to the decision to offend for the first time.[162]

Second, we should not forget that some of the suspects who listen to interrogators minimize the crime and blame the victim are *innocent*. The probable cause needed for an arrest is a low evidentiary bar, so police are sometimes wrong in their suspicions of those they interrogate.[163] In each case, a person erroneously suspected of a sexual assault or theft is told by detectives that the crimes are not serious and that the victim or society is really to blame. Aside from endorsing these neutralizations, the interrogation conveys the metarationalization: if the cops don't think this is a big deal, why should I? Those who have not previously found it possible to neutralize a sexual assault or theft may now do so.

The economic concept of marginality is helpful here.[164] Moral minimization works (if at all) on *marginal* offenders, those who are still capable of feeling guilt or shame from the offense. Away from the margin of criminality are (1) *inframarginal nonoffenders*, law-abiding citizens whose circumstances in life do not present them with sufficiently strong temptations to overcome their internalized commitment to obey the law, and (2) *inframarginal offenders*, the individuals who have not internalized the social norm and will readily offend when the opportunity arises, without guilt or shame.[165] The logic of using moral minimization in interrogation does not apply to either of these inframarginal types. Nonoffenders should not

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Neutralization as a Hardening Process: Considerations in the Modeling of Change, 62 SOC. FORCES 995, 1018 (1984) (arguing that "[o]ver time, either the desire or the moral disapproval should dissipate, leading one to either conformity or guilt-free deviance").

162. Thus, even if, contrary to the claim of LILLYQUIST, *supra* note 36, and those he cites, neutralizations were in the first instance after-the-fact rationalizations, they may still provide the "rationale or moral release mechanism facilitating future offending." Maruna & Copes, *supra* note 137, at 271 (citing TRAVIS HIRSCHI, CAUSES OF DELINQUENCY 208 (1969)); *see also id.* (citing RONALD L. AKERS, DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH 60 (3d ed. 1985)) (If "they successfully mitigate others' or self-punishment, they become discriminative for repetition of the deviant acts and, hence, precede the future commission of the acts."). On some accounts, neutralization "theory . . . is best understood as an explanation of persistence or desistance rather than of onset of offending." *Id.*; *see also* Jennifer G. McCarthy & Anna L. Stewart, *Neutralisation as a Process of Graduated Desensitisation: Moral Values of Offenders*, 42 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 278 (1998).

163. Recall our rough estimate that police use moral minimizations on 400,000 suspects per year, *see supra* text accompanying notes 113–117. If only twenty percent were innocent, that would translate into 80,000 suspects. This seems like a conservative estimate as detectives sometimes interrogate suspects they haven't even arrested.

164. *See, e.g.*, THOMAS J. MICELI, THE PARADOX OF PUNISHMENT: REFLECTIONS ON THE ECONOMICS OF CRIMINAL JUSTICE 121–48 (2019).

165. These distinctions could all be made more complex and realistic (as positions on a continuum) but the basic point would remain.

confess, and the inframarginal offenders experience no guilt or shame from which minimization offers relief.[166] The logic of minimization, therefore, applies only to the marginal offender. But these offenders are precisely the ones who might be moved to re-offend or not depending on whether their neutralizations for the crime are reinforced or diminished.

We call this last observation *the "goose/gander" point*. The Reid argument for using moral minimization in interrogations is plausible only in cases where neutralization theory is plausible. If a suspect possesses no internal motivation for complying with the law, there is no criminogenic risk to offering moral minimizations, *but there is also no plausible case for why the minimizations would elicit a confession* (other than the impermissible one, that it impliedly promises official leniency).

The goose/gander point is important for another objection. One might resist our criminogenic claim by noting that the police currently lack legitimacy for large parts of the American population[167] and/or that the legal estrangement of many Americans renders them immune to the influences we describe.[168] Although our argument would be strengthened for suspects who view police as legitimate authority figures representing an inclusive criminal justice system, it does not depend on that perception. Our claim only depends on suspects expecting police disapproval and instead being surprised by police endorsement of their neutralizations. From the surprising fact that *even the police* minimize the moral seriousness of the crime and blame others, one can confirm one's neutralizations. But what if suspects are so skeptical of the police that they do not believe anything the detective says, including the minimizing statements? Then the goose/gander point applies: if the suspect completely disbelieves the minimizations, there is certainly no criminogenic risk, but also no legitimate reason that the minimizing tactic will elicit a confession.[169] Either the tactic fails, or it encourages crime.

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166. For example, those whose identity comes from a subculture that values a certain kind of criminality will not be inclined to experience guilt or shame when committing those crimes and therefore have no need to rationalize their behavior with their values. *See, e.g.*, Volkan Topalli, *The Seductive Nature of Autotelic Crime: How Neutralization Theory Serves as a Boundary Condition for Understanding Hardcore Street Offending*, 76 SOCIO. INQUIRY 475 (2006).

167. *See infra* text accompanying notes 217–223.

168. *See, e.g.*, Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 L. & SOC'Y REV. 777, 778 (1998) (arguing that "legal cynicism" "is a concept distinct from subcultural tolerance of deviance" and is found especially "in levels of concentrated disadvantage, residential instability, and immigrant concentration[s]"); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2086–87 (2017) ("A person could simultaneously see the police as a legitimate authority . . . and feel estranged from the police (believing that the legal system and law enforcement . . . are fundamentally flawed and chaotic, and therefore send negative messages about the group's societal belonging).").

169. *See* Brian C. Jayne, *The Psychological Principles of Criminal Interrogation*, *in* INBAU ET AL., THIRD EDITION, *supra* note 125, app. at 334 (noting the importance of the interrogator's credibility with the suspect to the success of interrogation).

What do the Reid manuals offer in reply to the criminogenic claim we raise? Almost nothing. With one exception, there is no indication that the authors of the manuals realize that they could be helping suspects to neutralize future crimes.[170] The exception is a passage from (an early edition of) a supplemental Reid manual focused solely on child abuse interrogations, where David Buckley states:

> [I]n offering these themes the author is, in no way, suggesting that a child is to blame for the abuse or that emotions or alcohol decrease the legal consequences of abusing a child . . . . [T]he goal of theme development is to lower the offender's perception of the seriousness of the offense and to encourage him to tell the truth about his offensive behavior. Having the offender take psychological responsibility for his actions and acknowledge the trauma and harms he caused his victims is beyond the scope of this book and *will need to be addressed by other professionals* subsequent to the offender's acknowledgement of the abuse in the victim.[171]

Notably, this is the only occasion we have discovered in which a Reid manual explicitly acknowledges the falsity of its recommended victim-blaming tactics and the effect that such tactics could have on the offender in the future. The passage, however, is not reassuring. Buckley tacitly admits that minimization works against the offender's taking psychological responsibility for the harm he has caused the victim. As feelings of guilt and responsibility are correlated with lowering the risk

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170. In the psychological appendix that accompanied INBAU ET AL., THIRD EDITION, *supra* note 125, app. at 345, Jayne states that the interrogator's initial accusation—the statements of "direct positive confrontation"—will "abolish[]" the neutralizations the offender had used up to that point. But this confrontation occurs *before* the interrogator offers themes of moral minimization, which "reintroduc[es]" the neutralizations. *Id.* Outside of the Reid manuals, ZULAWSKI & WICKLANDER, *supra* note 37, at 341–42, has a section on "[c]orrecting the [r]ationalizations[,]" but it is concerned only with "correcting" the *legal* and not the moral minimizations the interrogators have used. The concern is that rationalization might cause problems for the prosecution where it "remove[s] the intent necessary to prove a violation of the law" (the only example given). *Id.* at 341. The manual does not suggest "correcting" the interrogator's efforts to minimize the moral seriousness of the offense by moral excuses and justifications.

171. DAVID M. BUCKLEY, HOW TO IDENTIFY, INTERVIEW & INTERROGATE CHILD ABUSE OFFENDERS 274 (1st ed. 2006) (emphasis added). The reference to "other professionals" does not appear in the substantially similar passage of the second edition, BUCKLEY, *supra* note 27. That edition instead says, "Expecting the offender to take psychological responsibility . . . at this stage of the process is unrealistic and beyond the scope of this book." *Id.* at 212.

of recidivism[172] and are part of rehabilitation therapy,[173] Buckley acknowledges the need for subsequent work "by other professionals" to convince the suspect not to believe the themes the detectives sympathetically endorsed. No doubt, even *more* work is necessary when detectives follow the Reid technique by reinforcing the offender's neutralizations.

Nor is there any reason to limit the concern to sex offenses against children. If moral minimization works to elicit confessions for any crime, it is because it works at lowering the guilt and shame the offender expected from committing that crime. Weakening internal incentives to comply undermines compliance. In short, if the tactic works as advertised, it is also criminogenic.

4. The Lessons of Restorative Justice

As another possible objection to our criminogenic claim, one might optimistically hope that the effects of moral minimization exist only in the very short term. Perhaps the effect is sufficient to induce a true confession, but then wears off within hours after the suspect signs a statement and leaves the influence of the interrogating detectives.

There is nothing to support this optimistic account. In the quotation above, Buckley does not suggest that the problem he identifies is solved by the passage of time. To the contrary, some criminal offenders manage to resist *forever* any feeling of personal responsibility for their crimes; they may never empathize with their victims. One might think that the critical moment for shattering the offender's neutralizations would be in a confrontation with police immediately after their apprehension, but when detectives instead use that moment to validate those neutralizations, they become all the more entrenched.

In any event, an important criminological literature examines the long-term effects of a brief intervention that is the mirror image of moral minimization—that of *restorative justice* (RJ).[174] According to RJ theorists, the ordinary process of criminal trials fails to meaningfully convey to the offender the serious wrongfulness

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172. *See, e.g.*, June P. Tangney, Jeffrey Stuewig & Andres G. Martinez, *Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism*, 25 PSYCH. SCI. 799, 801 (2014) ("Inmates' propensity to experience guilt, assessed shortly [upon] incarceration, negatively predicted criminal recidivism during the 1st year post-release."); *see also* United States v. Beserra, 967 F.2d 254, 256 (7th Cir. 1992) ("A person who is conscious of having done wrong, and who feels genuine remorse . . . is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are.").

173. *See, e.g.*, Elias Mpofu, James A. Athanasou, Christine Rafe & Scott H. Belshaw, *Cognitive-Behavioral Therapy Efficacy for Reducing Recidivism Rates of Moderate- and High-Risk Sexual Offenders: A Scoping Systemic Literature Review*, 62 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 170, 172 (2018) ("The efficacy of CBT to reduce recidivism is premised on the assumption that acceptance of responsibility for offense" or, failing that, to offenders "owning up to responsibility for their future actions.").

174. *See* RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE (Heather Strang & John Braithwaite eds., Routledge 2017) (2000); *see also* Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1 (2003).

of their actions and the harm to the victim.[175] RJ theory says that to persuade the offender to take responsibility requires face-to-face, emotional engagement during which others might critique the offender's neutralizations of the crime. This engagement occurs in RJ "conferences" that include victims, offenders, their families and friends, and sometimes a convener (often a police officer) trained in RJ techniques.[176] Governments in different parts of the world employ RJ conferences at different points in the criminal process: as a diversionary program that avoids prosecution entirely, as a step after a guilty plea and before formal sentencing, as a supplement to a sentence of probation, or as a preparation for release from prison.[177]

John Braithwaite explicitly links the need for RJ to the problem of neutralization, explaining: "Restorative justice conferences may prevent crime by facilitating a drift back to law-support[ing] identities from law-neutralizing ones."[178] Braithwaite explains how offenders find it difficult to sustain their neutralization techniques when confronted in a conference by their victims, community members, and even members of their own family.[179] The idea is that engagement will push offenders to appreciate the wrongfulness of their behavior and the flimsiness of their imagined excuses and justifications, which makes it more difficult to neutralize the same kind of crime in the future. If so, then efforts at RJ would decrease recidivism.

The evidence from randomized controlled trials—the gold standard in empirical testing—shows exactly this result. A recent metareview identified studies using a standard protocol for RJ conferences.[180] The review considered only those studies in which crime victims had consented to participate in a randomized trial—into RJ or the non-RJ control—before the random assignment occurred and which measured

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175. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 53 (1999) (noting that criminal defense lawyers "have a trained competence" in neutralization methods, such as "condemning condemners, denying victim, denying injury, and denying responsibility").

176. *See* Lawrence W. Sherman & Heather Strang, *Restorative Justice as Evidence-Based Sentencing*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 215, 216 (Joan Petersilia & Kevin R. Reitz eds., 2012) (noting that an RJ conference "brings together offenders, their victims, and their respective kin and communities").

177. Lawrence W. Sherman, Heather Strang, Evan Mayo-Wilson, Daniel J. Woods & Barak Ariel, *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANTITATIVE CRIMINOLOGY 1, 3 (2015); UNITED NATIONS OFF. ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 13–31 (2006).

178. Braithwaite, *supra* note 175, at 47.

179. *Id.* at 47–53. With the victim present, "it is hard to sustain denial of victim and denial of injury." *Id.* at 47. "[V]ictim supporters will often move offenders through the communicative power, the authenticity, that comes from their love of the victim." *Id.* Second, "[c]ondemnation of the condemners is also more difficult to sustain when one's condemners engage in a respectful dialogue about why the criminal behavior of concern to them is harmful." *Id.* "Conferences and healing circles are designed to make the condemners members of an in-group rather than an outgroup by two moves: inviting participants from all the in-groups that matter most to offenders; encouraging victims and victim supporters to be respectful . . . ." *Id.* at 48.

180. *See* Sherman et al., *supra* note 177, at 4–7.

recidivism rates for at least two subsequent years.[181] There were ten such studies involving a total of 1880 offenders who committed violent or property crimes over five jurisdictions (and three continents). Nine out of ten studies showed lowered recidivism for those selected for an RJ conference, and this pattern across the studies is statistically significant.[182] The "average effect size is .155 standard deviations less repeat offending among the offenders in cases randomly assigned to RJ[] [conferences] than among the offenders in cases assigned not to have an RJ[] [conference]."[183] Put differently, there were 7%-45% fewer repeat convictions (or, in one study, arrests) across the ten experiments.[184] Contrary to some expectations, the effects were higher in violent than property crimes and as high for adult offenders as juvenile offenders.[185]

In sum, the studies show that an RJ conference *lasting only a few hours* can have effects measured over the next two years.[186] If brief RJ conferences that undermine offender neutralizations can measurably decrease recidivism over a period of years, there is every reason to think that the opposite intervention—interrogations that reinforce the offender neutralizations—can have the opposite effect, *also over a period of years*. As RJ conferences decrease recidivism, the obvious risk of their negation is to increase recidivism. This seems especially true when there is no subsequent RJ conference, but one might also expect an RJ conference to achieve less if the detectives have first entrenched the offender's neutralizations.

While there is much discussion of RJ ideas in the United States,[187] and efforts persist to introduce or expand their use,[188] no one has previously noted that it is the common practice of American police interrogators to do precisely the opposite. RJ theory demonstrates that the first step in RJ reform would be to constrain the anti-restorative element of moral minimization.

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181. *Id.* at 1–3. In addition, the review only looked for studies published in English on or after 1994, when there was some standardization of RJ procedures. The review excluded victim-offender mediations, which operate on a very different model. *Id.* at 4–5.

182. *Id.* at 11.

183. *Id.*

184. *Id.* The benefits of RJ are substantially larger than the costs. *See id.* at 18 tbl.2 (reporting monetized benefits that exceed costs by ratios of 3.7-to-1 to 8.1-to-1).

185. *Id.* at 12–13.

186. RJ conferences last a few hours. LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 39 (2007) ("Robust discussions" in face-to-face RJ conferences "can last from one to three hours."); *see* Sherman et al., *supra* note 177, at 21 (referring to the studied RJ conferences as "2-3" hours). *Compare* Leo, *supra* note 79, at 279 tbl.6 (finding that 65% of interrogations lasted longer than thirty minutes and 28% lasted longer than an hour), *with* Kelly et al., *supra* note 82, at 170 (reporting on interrogations that average 1.5 hours).

187. *See, e.g.*, Lynn S. Branham, *"Stealing Conflicts" No More?: The Gaps and Anti-Restorative Elements in States' Restorative-Justice Laws*, 64 ST. LOUIS U. L.J. 145 (2020) (providing a comprehensive analysis of the gaps in American RJ practices).

188. *See, e.g.*, Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69 (2019–2020).

5. The Lessons of Entrapment Doctrine

Our claim is that the governmental reinforcement of crime neutralizations can increase crime. There is a legal doctrine that recognizes the ability of government actors to cause crime—the entrapment defense. There would be no need for the defense if it were not possible for undercover agents or informants to persuade individuals to commit crimes they would not otherwise commit outside of a sting operation. On close inspection, the entrapment doctrine recognizes the risk of persuading someone to commit a crime when government agents engage in neutralizations. Although the courts do not use these terms, they find entrapment in some instances because the undercover agent too effectively minimized the crime.

In *Sorrells v. United States*,[189] the first Supreme Court case on entrapment, one crucial fact was the undercover agent's appeal to a military bond with the defendant, based on shared service in World War I. The undercover crime was the sale of intoxicating liquor. As one witness said at trial, he believed "one former war buddy would get liquor for another."[190] The Court vacated the conviction and remanded so the jury could consider the entrapment defense.[191]

Something similar occurred in *Sherman v. United States*, in which the Court held that the defendant, convicted of selling narcotics, was entitled to an entrapment defense as a matter of law.[192] On several occasions, Sherman had acquired and shared narcotics with an undercover agent he met when they were both (he thought) undergoing medical treatment for addiction. The agent had befriended Sherman and told him that he was "not responding to treatment" and needed to find narcotics.[193] On each occasion, Sherman charged the agent only his expenses in acquiring the drugs, which the two shared. The Court noted this unconventional motive for distributing narcotics and held that the agent's "resort to sympathy" induced Sherman, as a fellow addict, to secure the drugs.[194]

Using the terminology of neutralization, the governmental strategies in *Sorrells* and *Sherman* involved the tactic of appealing to "higher loyalties" than law, like those based on bonds of military service or the alleviation of shared pain. Lower court cases show other uses of the higher-loyalties appeal, as when undercover operatives claim they need the defendant's help in committing a crime to make money needed for their children.[195] When considering entrapment in such a context, contemporary courts are wary precisely when government "tak[es] advantage of

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189. 287 U.S. 435 (1932).

190. *Id.* at 440.

191. *Id.* at 452.

192. 356 U.S. 369 (1958).

193. *Id.* at 371.

194. *Id.* at 373; *see also id.* at 383–84 (Frankfurter, J., concurring in the result) (stating that the government should not be allowed to exploit "appeals to sympathy based on mutual experiences with narcotics addiction" or "friendship").

195. United States v. Montanez, 105 F.3d 36, 38–39 (1st Cir. 1997); *see also* United States v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993); United States v. Sullivan, 919 F.2d 1403, 1419 & n.21 (10th Cir. 1990).

[such] an alternative, non-criminal type of motive,"[196] i.e., when they morally justify the crime.

The last Supreme Court case on the defense, *Jacobson v. United States*,[197] is more complicated but tells a similar story. The Court found the defendant Jacobson entrapped as a matter of law into the crime of ordering child pornography via the mail. Crucial to the Court's decision were various communications the government mailed to Jacobson. One was a letter ostensibly from an American Hedonist Society, which stated that members have a "right to read what we desire . . . [and] to seek pleasure without restrictions placed on us by outdated puritan morality."[198] A second letter from a different (fake) organization "founded to protect and promote sexual freedom and freedom of choice" claimed to be lobbying for the repeal of legislation defining an age of consent.[199] A third letter, purportedly from a private individual, engaged in "mirroring," i.e., "reflect[ing] whatever the interests are of the person" addressed, which, for Jacobson, meant stating a shared interest in images of young men; the fictional letter writer also expressed a preference for amateur pornography because "the actors enjoy it more."[200] Finally, the letter offering to sell child pornography, from a supposedly distinct source, decried the "hysterical nonsense" about pornography and asked "why is your government spending millions of dollars to exercise international censorship while tons of drugs, which makes yours the world's most crime ridden country are passed through easily"?[201]

In one sense, the facts of *Jacobson* are obviously distinguishable from a few hours of interrogation because the government's persuasion campaign there lasted for twenty-six months. Yet the longevity of the operation in *Jacobson* should not obscure the comparison. Many sting operations using the same tactics are quite brief, as in *Sorrells*. And the governmental actions in *Jacobson* were clearly the tactics of neutralization. There is denial of injury (the actors enjoy it), condemnation of the condemners (blaming the government for an "outdated puritan morality" and for not taking care of more serious crime), and appeals to higher authority (the importance of sexual freedom and freedom of expression). The overall effect of these ostensibly different sources of communication is to convey "that receiving this material was something that petitioner ought to be allowed to do," i.e., "that he had or should have the right to engage in the very behavior proscribed by law."[202] This is the message of the minimization tactics reviewed above, especially for sexual assault crimes.

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196. United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994) (Breyer, J.) (noting that the entrapment element of "'inducement' consists of an 'opportunity' [to offend] *plus* something else—typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive.") (emphasis in original). According to a Westlaw search on February 1, 2022, thirty-two of the federal cases and three of the state cases citing *Gendron* quote its language about the government's exploitation of a "noncriminal motive."

197. 503 U.S. 540 (1992).

198. *Id.* at 544.

199. *Id.*

200. *Id.* at 545.

201. *Id.* at 546.

202. *Id.* at 553.

In sum, criminal defendants are sometimes entrapped because the government agents, *using the tools of neutralization*, persuade an individual into a crime. Of course, the undercover agents intend to induce a crime, while police interrogators do not intend to induce the suspect to offend in the future. But the psychological mechanisms are the same, as are the intended and unintended risks. Where we recognize the criminogenic possibility for persuasion in undercover operations, it makes no sense to ignore the parallel risks of persuasion in interrogation.

6. Social Norms and Legal Legitimacy

One might object to our criminogenic claim by rejecting the theories of neutralization and moral disengagement. The two theories claim that the rationalizations precede and cause the rationalized misbehavior, but it is difficult to rigorously demonstrate the claim empirically, and powerful evidence does not exist.[203]

We have two responses. First, there is the goose/gander point previously explained. The case for using moral minimization is only plausible if neutralization theory is plausible.[204] If neutralization theory is false, *there is no reason to engage in moral minimization*. Our second reply is to note that other legal theories and literatures—besides RJ and entrapment doctrine—lead to the same conclusion: that moral minimization is criminogenic.

a. Social Norms and Expressive Theory

One of the law's expressive mechanisms for influencing behavior derives from its ability to signal and strengthen the informal sanctions that enforce social norms.[205] Social norms involve a pattern of disapproval for counter-normative behavior. The

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203. For longitudinal evidence of the causal effects of neutralization on crime, see, e.g., Ian W. Shields & Georga C. Whitehall, *Neutralization and Delinquency Among Teenagers*, 21 CRIM. JUST. & BEHAV. 223, 231–32 (1994) (finding among juvenile offenders a weak but positive correlation between high neutralization scores and subsequent recidivism); Robert Agnew, *The Techniques of Neutralization and Violence*, 32 CRIMINOLOGY 555, 572 (1994) ("[T]he longitudinal data suggest that neutralization may be a relatively important cause of subsequent violence."). An experimental paper demonstrates how an interlocutor can successfully influence subsequent behavior by arguing for or against the neutralizations. *See* Immo Fritsche, *Predicting Deviant Behavior by Neutralization: Myths and Findings*, 26 DEVIANT BEHAV. 483, 494–95 (2005) (finding experimental support). Yet other evidence fails to validate the theory. *See* Maruna & Copes, *supra* note 137, at 226–28 (concluding that "[T]he relationship between neutralizing and offending is probably not a causal one."); Morris & Copes, *supra* note 128. The bottom line is that empirical evidence on the causal effects of neutralization is ultimately mixed.

204. That is why the Reid manual emphasizes reinforcing the same neutralizations the suspect used to commit the crime. *See supra* note 136136 and accompanying text.

205. *See, e.g.*, RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 139–52 (2015) [hereinafter MCADAMS, EXPRESSIVE POWERS]; Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) [hereinafter McAdams, *Attitudinal Theory*]; Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002).

expectation of disapproval itself creates some incentive to follow the norm because people generally value the esteem of others.[206] Disapproval also predicts more serious informal sanctions ranging from a censorious look or comment, to gossip and social ostracism, or to violence.[207]

Where law and social norms overlap, these informal sanctions explain some legal compliance. People may presume that democratically enacted laws reveal underlying attitudes of disapproval for the behavior the law condemns, so that one needs to comply with the law to avoid disapproval, confrontation, and negative gossip. For example, local laws against public smoking and in favor of public breastfeeding of babies respectively signal disapproving attitudes about exposing others to one's cigarette smoke and approving attitudes about breastfeeding.[208] A large part of the compliance with underenforced laws may be due to the law's expressive effects.[209] But even if the expected criminal sanctions against, say, theft, are much more serious than the informal sanctions, the latter still add to the formal sanctions and generate higher levels of compliance.

Consistent with these ideas, the empirical evidence further demonstrates that some people comply with the law out of a sense of reciprocity with others.[210] For instance, people are more likely to pay their taxes if they believe others are paying their taxes but less likely if they believe cheating is rampant.[211] Dan Kahan explains the psychology: "The more strongly she anticipates being condemned by others should she be caught, the more likely an individual is to refrain from evading. By the

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206. Loss of esteem serves as a basic norms sanction. *See* MCADAMS, EXPRESSIVE POWERS, *supra* note 205, at 1141–43; McAdams, *Attitudinal Theory*, *supra* note 205, at 142–43; *see also* GEOFFREY BRENNAN & PHILIP PETTIT, THE ECONOMY OF ESTEEM: AN ESSAY ON CIVIL AND POLITICAL SOCIETY (2004).

207. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW 57–59 (1991); MCADAMS, EXPRESSIVE POWERS, *supra* note 205, at 83–84, 139–40.

208. *See* MCADAMS, EXPRESSIVE POWERS, *supra* note 205, at 143, 145.

209. *See, e.g.*, Cevat G. Aksoy et al., *Do Laws Shape Attitudes? Evidence from Same-Sex Relationship Recognition Policies in Europe*, 124 EUR. ECON. REV., Article 103399 (2020) (finding that legal changes recognizing same-sex unions increased tolerant attitudes toward sexual minorities); Roberto Galbiati et al., *How Laws Affect the Perception of Norms: Empirical Evidence from the Lockdown*, PLOS ONE (Sept. 24, 2021) (finding that lockdown orders significantly strengthened perception of the relevant social norm); Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007) (finding that mandatory voting laws increased voting for reasons not explained by expected sanctions); Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419 (2011) (finding evidence that mandatory seat belt laws increase belt usage for reasons not explained by sanctions).

210. *See, e.g.*, Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 74 nn.4–8 (2003).

211. *Id.* at 80–85, 81 n.21. More recent and more sophisticated empirical research reaches the same conclusions. *See* Cristina M. Bott et al., *You've Got Mail: A Randomized Field Experiment on Tax Evasion*, 66 MGMT. SCI. 2801, 2810–12 (2020) (informing taxpayers of high compliance rate increased self-reported taxable income); James Alm et al., *When You Know Your Neighbour Pays Taxes: Information, Peer Effects and Tax Compliance*, 38 FISCAL STUD. 587 (2017) (same).

same token, the more regret or remorse an individual believes she'd experience for engaging in evasion, the less likely she is to do so."[212] Thus, if perceived compliance is high, the expected social disapproval from violating the law is high, which makes it shameful; if noncompliance is understood to be widespread, then the expected disapproval and shame seems not so great.

Moral minimization obviously weakens these informal incentives. Detectives strive to convince the suspect that the crime is not serious by giving reasons to expect that the social disapproval will be lower than the suspect initially believes. As noted, the Reid manual identifies this precise mechanism: "[I]f the suspect . . . believes that the interrogator can understand and seems to forgive the offense or suspect, he may believe that others will also be sympathetic and forgiving."[213] The logic is strong because the suspect expects the police, perhaps more than anyone, to disapprove of felonies. Yet if burning a structure is a mere "prank"[214] or if sexual assault merely demonstrates that "[e]verybody fucks up in life,"[215] then the expected social disapproval is lowered. Moral minimizations thus undermine the enforcement of social norms and the external incentives to comply with a law that embodies those norms.

Moreover, the tactic explicitly attacks the reciprocity motive for compliance by referring to how "everybody" misbehaves in life and "anyone" would commit the crime under the same circumstances.[216] For employee theft crimes, one manual offers the detectives the most inflated figures for the frequency of such crimes—that "75% of employees steal from the workplace and that most do so repeatedly"—precisely to allow the detective to tell the suspect that far more people commit this type of crime than they had previously assumed.[217] The empirical evidence suggests that if people believe a crime is exceptionally common, it weakens their reciprocal incentives to obey the law.

b. Legal Legitimacy Theory

Another literature in law and social science finds that compliance with the law is inextricably linked with the public's perception of the law's legitimacy.[218] In recent years, much has been written about the law's *procedural* sources of legitimacy and the evidence that many people are more likely to obey the law and cooperate with law enforcement if they perceive the courts and police to treat them fairly and with respect.[219] Other research emphasizes what might be called the *substantive* sources

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212. Kahan, *supra* note 210, at 81.

213. INBAU ET AL., THIRD EDITION, *supra* note 130, at 341.

214. Commonwealth v. Baye, 967 N.E.2d 1120, 1130 (Mass. 2012).

215. State v. Baker, 465 P.3d 860, 864 (Haw. 2020).

216. *Id.*; INBAU ET AL., *supra* note 1, at 210.

217. *See* SENESE, *supra* note 27, at 141.

218. *See generally* MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., 2013) (1921).

219. For evidence of the relationship between procedural justice and legal compliance, see TOM R. TYLER, WHY PEOPLE OBEY THE LAW (rev. ed., Princeton Univ. Press 2006) (1990); Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051, 1052–53 (2012).

of law's legitimacy, where many people are more likely to obey the law if its content aligns with their own moral intuition.[220] Law is less effective in generating compliance when people believe the law consistently deviates from what is morally right.

To see the legitimacy problem posed by moral minimization, consider some themes from the Reid training that directly attack the substantive or procedural legitimacy of regulatory offenses. For smuggling and customs offenses, interrogators should: "[b]lame the laws, rules, regulations and policies as being unfair, unrealistic or outdated."[221] For passport fraud, the suggestion is: "Blame the government policy for placing unfair restrictions on certain countries."[222] For lacking the appropriate hunting license: "Blame the licensing agency for not providing enough licensed guides."[223]

These examples only make explicit what is already implicit: moral minimizations inevitably drive a wedge between the formal criminal law and common moral intuitions. The criminal law treats the offender's conduct as morally serious, but the detectives say it is not serious. The law treats the offender's claimed excuses and justifications as irrelevant, but the detective insists they are relevant. In situations where the law refuses to blame the victim, the detective energetically blames the victim. In all cases, the interrogator is criticizing the substantive content of the criminal law for its failure to track morality, thus undermining one mechanism for legal compliance. Moral minimization seems a peculiarly effective tool for undermining legal legitimacy because it is carried out by law enforcement officers—whom the suspects expect to support the legal rule.[224]

To summarize this section: if neutralization theory is correct, then moral minimization probably increases confessions *and* increases crime. In particular, the success of RJ conferences and appellate court reasoning about entrapment both demonstrate that a single psychologically intense interaction can trigger future criminal behavior. Furthermore, if social norms theory and/or legitimacy theory is correct, then moral minimization probably increases crime even if it has no effect on confessions.

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220. *See* John M. Darley, *Citizens' Sense of Justice and the Legal System*, 10 CURRENT DIRECTIONS IN PSYCH. SCI. 10 (2001); Elizabeth Mullen & Janice Nadler, *Moral Spillovers: The Effect of Moral Violations on Deviant Behavior*, 44 J. EXPERIMENTAL SOC. PSYCH. 1239 (2008); Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010).

221. SENESE, *supra* note 27, at 238 (example A2). Alternatively: "Blame the bureaucracy for making it so difficult to obtain the proper licenses to import items such as protected wildlife or property" (example A1) and "Blame the government/country for trying to maintain a monopoly on these goods" (example A5). *Id.*

222. *Id.* at 210 (example 1).

223. *Id.* at 165 (example C1). Another legitimacy-attacking theme: "Blame the license fee as being cost prohibitive." *Id.* (example C4); *cf. id.* at 166 (examples D3 and E3). An additional alternative theme is to "[b]lame license centers for being too far away." *Id.* at 166 (example E2).

224. Of course, those populations who do not perceive the criminal law as having any legitimacy, or who are estranged from the law, will be unaffected by this problem of moral minimization. *See supra* text accompanying notes 170–171.

C. The Criminogenic Risk in Practice

Synthesizing the various causal arguments of the prior section, we can describe the criminal contexts in which the criminogenic risk is most and least compelling. Moral minimization poses the greatest risk of inducing future crimes when (1) the suspect is a marginal offender and (2) the bases of moral minimization are *generalizable*. In addition, as incarceration sometimes prevents recidivism, we add a third condition: (3) that the resulting criminal sentence leaves open the possibility of recidivism. By contrast, the criminogenic risks are minimal or nonexistent when the suspect is an inframarginal offender, the moral minimization is not generalizable, or the criminal sentence itself incapacitates all further offending. As we show, this means that the risks are greatest for crimes like theft, assault, and sexual assault and are least significant for the crimes of drug trafficking and homicide.

First, we previously explained the significance of an offender being *marginal*. If the suspect is a professional criminal, for example, who commits a certain crime whenever the frequent opportunity arises, then it is unlikely such a person feels any need to neutralize the crime. Such inframarginal offenders have lost the capacity for feeling guilt or shame for the particular crime and are unmotivated by social disapproval or the legitimacy of law. They are therefore not made more likely to offend by moral minimization, but also not made more likely to confess (the goose/gander point). For most crimes, many offenders are marginal, but for some crimes, there may be very few marginal offenders. Drug crimes are a likely example. That sort of black market, *malum prohibitum* offense—selling contraband goods to willing buyers—are frequently committed by professionals who do not struggle with guilt or shame over the offense.

Second, we referred to moral minimizations being generalizable to future offenses. Trivializing a crime, as by suggesting that it causes no harm to steal from a corporation or wealthy individual, offers an excuse that readily applies to future opportunities for crime. Blaming a crime on alcohol or drug use does the same, as the offender is likely to be under the influence again in the future. Most obviously, blaming a female victim of assault or rape for the stereotypical reasons we saw in the scripts and appellate opinions offers an excuse that readily applies to future crimes, even against the same victim. Most moral minimizations are like these.

Yet some excuses do not generalize. Consider two murder cases discussed in Part I. Where police detectives offered the suspect the excuse for murder—that the suspect was exacting revenge against the victim for having killed his brother[225]—that rationalization probably does not generalize. At least where only one person committed the sibling's murder, and the suspect does not have other family members suffering the same fate, the offender is unlikely to again encounter another temptation for this kind of revenge. In another case, detectives proposed to a mother that she set a fire to kill her special needs daughter because she was making it impossible for her to properly raise her other three children.[226] Again, it is not apparent that such an excuse could ever apply to a future situation the mother will face. A nonmurder example is the accidental hit-and-run crime. Most people who

225. People v. Jones, No. 1–17–1623, 2021 WL 1227837, *2 (Ill. App. Ct. Mar. 31, 2021).
226. *See* Coughlin, *supra* note 14 (citing the transcripts).

accidentally hit someone with their car and then flee will not accidentally hit another person in the future; reinforcing their neutralizations for flight cannot risk causing many of them to commit the crime again.

Third, a criminal sentence may prevent future recidivism. There is no criminogenic risk if the resulting confession leads to a sentence of incarceration for life and the offender cannot reoffend in prison. If a sixty-year-old man convicted of sexual abuse of a child receives a thirty-year sentence, he is unlikely to reoffend regardless of the reinforcement of his neutralizations, in which case there is no criminogenic downside to using the tactic to secure his confession.

In most instances, however, the resulting sentence will not permanently incapacitate the offender. First, some offenses—revenge-based assaults, for example—can be and are committed *within prison*, so the neutralization might promote recidivism during incarceration.[227] Second, the Reid manuals propose moral minimizations for crimes that typically do not produce life-long prison terms: assault and sexual assault, hate crimes, arson, embezzlement, and other theft crimes. Such offenders, like most offenders, are released from prison, so we must be concerned about their reoffending.[228]

To be clear, we do not argue in favor of prison as a means of incapacitation. To the contrary, if one wishes to decrease society's use of prison, and especially if one wants to eliminate its use, it is essential to take every noncoercive action possible to dissuade offenders from reoffending, which certainly includes *not* encouraging future crime through moral minimization. Put differently, we should never allow government to perversely justify an increment of imprisonment for its incapacitating effect by saying that an offender is a particular threat to reoffend when that claim is even partly true *because* police detectives persuaded a marginal offender on the generalizable excuses and justifications for the crime.[229]

The net result of this analysis is that the criminogenic risk does not seem particularly large for the offenses of homicide or hit-and-run, but is great for the *far more common* crimes of theft, assault, robbery, and sexual assault.[230] Because there are so many perpetrators of these latter crimes, it stands to reason that some nontrivial number of them are marginal offenders. The moral minimizations police offer are generalizable reasons for trivializing the crime, for avoiding responsibility, and for

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227. *See* Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209, 1221–22 (2021).

228. *See* DANIELLE KAEBLE, BUREAU OF JUST. STAT. BULL., TIME SERVED IN STATE PRISON, 2016, 1 (2018) ("Most violent offenders (57%) released from state prison in 2016 served less than three years in prison before their initial release. About 1 in 25 violent offenders (3.6%) served 20 years or more . . . .").

229. Similarly, we disagree with criminologists who think there is only a social gain to fine-tuning moral minimization. *See* Copes et al., *supra* note 36 (reporting on interviews with fifty-nine convicted identity thieves still in prisons, as a means of helping future Reid-trained investigators interrogate identity thieves).

230. *See* John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ [https://perma.cc/CJ7Y-Z7H7] (showing that murder and nonnegligent manslaughter rates are about 5 per 100,000, while other felonies range from 42.6 per 100,000 (rape) to 1549 per 100,000 (larceny/theft)).

blaming victims. And there is no reason to think that the criminal sentence is permanently incapacitating: assault and sexual assault obviously occur in prison; for all of these crimes, most offenders are eventually released.

To further illustrate, we offer a psychological account of a hypothetical theft case using "Joe," the prototypical offender named in the manual's interrogation scripts. Let's say that Joe steals from his employer. Before embezzling funds, he rationalized away the social norms that would otherwise constrain him, wanting to preserve his identity as a "good person" who is not a "thief," despite this anticipated crime. Joe initially succeeded at this rationalization by imagining that he is the true victim of his employer, who underpays him (denial of victim); that the corporate employer is not really harmed by the amount he takes (denial of injury); and that his duty as a parent and spouse requires that he do what he must to provide for his family (higher loyalties). Substantial evidence suggests that employees do, in fact, rationalize workplace theft by focusing on what they perceive as the unfairness of being paid too little,[231] meaning that many such offenders need to neutralize their crime and are therefore marginal.

Yet Joe's rationalizations are tenuous. Joe realizes at some level that his reasoning is self-serving and suspect.[232] This would be true even if he had secured some support for his neutralizations from friends or co-conspirators because he knows that they are biased in his favor and not representative of how his broader community would view his act of taking his employer's money. While his salary is not as high as he wishes, he worries that there is no real sense in which he is underpaid. (He is paid more than some, paid more than he used to be, and was lucky in some ways to have the job at all). If he lets himself think about the aggregate amount of employee theft at his firm, he realizes that his employer is seriously harmed by such theft. And he suspects that he will use much of the money he takes on himself personally, not his family.

Now assume that Joe is arrested. At this moment, he may think about these counter-considerations and "see through" his neutralizations. When "caught," he is forced to consider how his community will regard his behavior; he worries that most people will find pro-responsibility reasoning more compelling than his self-serving rationalizations. This is the time when he is most likely to reject his neutralizations, which would mean that he would find it difficult to rely on them again in the future.

Except American detectives step into this pivotal psychological moment armed with the Reid technique. They surprise Joe not merely by understanding all of his rationalizations, but by pre-emptively endorsing them. In the interrogation, Joe learns that, not merely close friends and family, but even strangers support his rationalizations. And not merely unbiased strangers, but law enforcement officials whom Joe had expected to be biased against him, *i.e.*, the most likely in his

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231. *See* Jerald Greenberg, *Stealing in the Name of Justice: Informational and Interpersonal Moderators of Theft Reactions to Underpayment Inequity*, 54 ORG. BEHAV. AND HUM. DECISION PROCESSES 81 (1993); Jerald Greenberg, *Employee Theft as a Reaction to Underpayment Inequity: The Hidden Cost of Pay Cuts*, 75 J. APPLIED PSYCH. 561 (1990).

232. *See* INBAU ET AL., THIRD EDITION, *supra* note 130, at 331 (noting that the defense mechanisms of rationalization and projection "function through distorting or denying reality," but "this does not mean that the individual loses touch with reality; reality has merely been redefined").

community to condemn a felony. These enforcers of the law do not endorse his rationalizations blandly, but with apparent heartfelt emotion, looking him in the eye with a hand on his shoulder.[233] During the interrogation, Joe begins to think he was right to begin with and wrong to doubt himself. Whatever the law may say, community mores do *not* hold him to be a real thief. He actually is the victim; his employer really didn't suffer harm; and he in fact acted to fulfil a higher duty to his family. *Just like the detective said*.

Which means he is now a greater risk for recidivism. If he ever encounters another opportunity to steal from an employer, he will find it easier to neutralize the crime than the first time, and easier than would have been the situation where the police offered no such reinforcement. But even if he never encounters an opportunity to steal again from an employer, the neutralizations *generalize* beyond that situation. Given an opportunity, he is more likely to steal from any corporation or individual, even one that does not employ him, if their wealth might prevent them from being seriously harmed by the theft (denial of harm). He is more likely to steal from someone who wronged him in some way (denial of victim), perhaps a neighbor or family member who refused a loan he needed and thought he deserved. And he is more likely to steal in any circumstance with the possibility of benefitting his family (higher loyalty).

In sum, although there are a few situations in which the criminogenic risks of moral minimization seem insignificant, in most cases, they are substantial.

D. The Expressive Objection to the Criminogenic Claim

An objection to our criminogenic claim is that other government expression contradicts the detective's moral minimization. On this view, after a confession is obtained, the government disavows and nullifies the detective's message by the subsequent prosecution, conviction, and criminal punishment of the offender. The criminal defendant infers from the experience that there was no truth to the interrogating detective's moral minimizations. The interrogator said the crime was not serious, that anyone would have done the same, and that the real blame lies with the victim or society, but the prosecution and punishment show that society regards the crime to be serious and the suspect-convict to be morally responsible. The criminal process expresses the true moral status of the convict's conduct, and this "counter-programming" erases any effects of the detective's moral minimization. This optimistic account connects to an old idea in criminal theory that punishment is *expressive*, i.e., that it communicates societal condemnation of the criminal act.[234] This expressive objection is, however, unduly optimistic, for three reasons.

First, as previously discussed, not everyone who is interrogated is convicted. Some suspects who receive the moral minimizations are innocent and not convicted;

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233. *See id.* at 346 ("Sympathy and expression abound from the interrogator's voice.").

234. Indeed, even to define punishment, one influential account says that it is necessary to distinguish criminal sanctions from other forms of harsh treatment the government imposes on rule violators. *See* JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95–118 (1970); *see also* R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358 (2016).

some are guilty but do not confess and are not convicted; some suspects credibly share with family and friends what the police interrogators said to them. As a result, each year, thousands of people experience, directly or indirectly, how interrogators minimize a crime without ever being convicted.

Second, although we contend below that most suspects will never infer that the detectives were lying in their moral minimizations, we note that a distinct problem arises if suspects do reach this conclusion. Police deception undermines *procedural* legitimacy.[235] "The basic claims of [this] literature are that (1) 'citizens are more likely to comply and cooperate with police and obey the law when they view the police as legitimate,' and (2) '[t]he most common pathway that the police use to increase citizen perceptions of legitimacy is through the use of procedural justice,' which . . . involves the police treating civilians fairly and respectfully."[236] Legitimacy "increase[s] both willing deference to rules and the decisions of the police and the courts [, as well as] the motivation to help with the task of maintaining social order in the community."[237] Yet a simple enough prerequisite for police legitimacy is honesty; lying destroys procedural justice.[238] Thus, if suspects later infer that the detectives were deceptive when offering moral minimizations, the tactic is still criminogenic. To pin one's hopes on suspects figuring out that the sympathy the police extended was merely a ploy is merely to hope that the system loses procedural instead of substantive legitimacy. Either damages legal compliance.

Third, even when the guilty suspect confesses and is convicted, criminal proceedings will usually fail to undo the effect of the neutralizations. Remember that what matters here is not the message *intended*, or the message that *most* citizens receive, but the message the suspect actually absorbs from his encounter with the criminal justice system. We know that offenders sometimes believe themselves justified or excused for offenses even during and after criminal punishment. If, instead, the criminal justice system always persuaded offenders that their neutralizations were invalid, the additional intervention of restorative justice would not be able to decrease recidivism, as we saw above.[239] But precisely because the government's condemnatory message is not always received, there is room for an RJ conference to succeed in delivering it. By contrast, moral minimizations make it more likely that the offender persists in their neutralizing beliefs.

To elaborate this key point, we consider each of the many steps of criminal prosecution and punishment. First, nothing in the moral minimization technique leads the suspect to expect not to be prosecuted. Indeed, the manuals repeatedly express concern that the police not make promises of that level of leniency, for it

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235. *See* Margareth Etienne & Richard McAdams, *Police Deception in Interrogation as a Problem of Procedural Legitimacy*, 54 TEX. TECH L. REV. 21 (2021).

236. *Id.* at 23.

237. Tom R. Tyler, Jonathan Jackson & Ben Bradford, *Psychology of Procedural Justice and Cooperation*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 4011 (Gerben Bruinsma & David Weisburd eds., 2014).

238. Etienne & McAdams, *supra* note 235; Tracey L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO STATE J. CRIM. L. 105, 109–10 (2005) (stating that trust and belief that authority figures will act fairly is a key factor for procedural justice).

239. *See supra* text accompanying notes 181–195.

would obviously incentivize false confessions if suspects thought that a confession would be the immediate end of the matter.[240] Because the suspect expects to be prosecuted, the prosecutor's decision to bring charges does not negate the detective's reinforcement of the suspect's neutralizations.

Some may argue that a defendant who pleads guilty after a confession must show some new understanding that their behavior was seriously wrong and not the victim's fault. Yet a guilty plea need not represent any appreciation of wrongdoing. Defendants often plead guilty for strategic reasons having little to do with consciousness of wrongdoing. The literature on false confessions and resulting guilty pleas is one example where defendants do not believe what they say in the plea colloquy.[241] The literature on remorse during pleas and sentencing hearings tells a similar story.[242] Defendants sometimes tell the court just what it wants to hear,[243] and may make their post-conviction expression of remorse all the while continuing to believe the minimizing narrative the detectives reinforced.

Next, consider the effect of the judge's sentencing decision. The mere fact of punishment is not sufficient to negate the moral minimizations. First, there is uncertainty in the communicative content of non-traditional punishments, *i.e.*, probation, fines, and community service.[244] Even when the sentence involves prison, some observers may think that an unexpectedly light sentence fails to condemn the criminal act and even condones it. Consider the infamous sentence of six months of prison for Brock Turner for the crime of sexual assault.[245] Many understood the sentence as failing to condemn the crime. If the detectives in his case had, in interrogations of Turner, minimized the seriousness of his crime and/or blamed the victim, as with scripts noted above, it seems doubtful that such a short sentence, far below the mean for rape, would obliterate the effect of their neutralizations. To the

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240. *See* INBAU ET AL., *supra* note 1, at 203, 425; JAYNE & BUCKLEY, FIELD GUIDE, *supra* note 20, at 277–79.

241. *Guilty Pleas and False Confessions*, NAT'L REGISTRY OF EXONERATIONS (Nov. 24, 2015), ("People who falsely confess are likely to believe that they have no meaningful chance of winning at trial.").

242. *See* Margareth Etienne, *Remorse, Responsibility and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2123–24 (2003) (explaining that federal courts make highly subjective findings of remorse in determining whether a defendant has accepted responsibility for their conduct for sentencing purposes); Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 142 (2015) ("The existing empirical literature, though limited, generally agrees that offenders' remorse, in practice, does have an impact on legal decision-makers' perceptions and judgments about them.").

243. Etienne, *supra* note 242, at 2162–63 ("True remorse cannot be scheduled to appear precisely at the time of the crime or on the sentencing date.").

244. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

245. *See* Peter Fimrite, *Ex-Stanford Swimmer to Serve 6 Months in Unconscious Woman's Rape*, S.F. CHRON. (June 3, 2016, 9:14 AM), https://www.sfchronicle.com/crime/article/Ex-Stanford-swimmer-to-serve-6-months-in-7960806.php [https://perma.cc/J4RH-DWJR]; *see also* CHANEL MILLER, KNOW MY NAME: A MEMOIR (2019).

contrary, a felon may infer from unexpected leniency that the minimizations were correct.[246]

Even where the suspect is convicted and the criminal sentence is widely perceived by the public as fully sufficient to condemn the criminal act, the punishment will not necessarily undo the effect of moral minimization on the offender. The offender has now received two conflicting governmental messages: the first from the detectives and the second from the sentencing judge who reveals the punishment the state will inflict. The question is how the offender will resolve the expressive conflict.

The optimistic account is that the second communication (punishment) nullifies the first (moral minimization). Yet another possibility exists. The offender may view the minimizing message as demonstrating that the criminal sentence does not actually reflect community sentiment. The public is sometimes surprised by the harshness, as well as the leniency, of a particular criminal sentence, so any given sentence might not reflect common morality.[247] If so, then instead of interpreting the judge's criminal sentence as negating the detective's moral minimizations, the offender can interpret the detective's moral minimizations as negating the condemnatory message of the judge's criminal sentence.

The latter inference is the more likely one, for three reasons. First, the interrogator's communications may be more powerful than the judge's. The detectives deliver their patient minimizations in the intimate space of an interrogation room, as part of an emotional performance seeking to connect sympathetically with the offender.[248] The judge is often pressed for time and delivers the sentence at some distance from the defendant in a busy public courtroom, using legal boilerplate, and is therefore less likely to seek or create an emotional connection with the defendant. Detectives are selected in part for their ability to develop rapport with suspects during interrogation, but judges are often elite technocrats selected more for legal or political proficiency. Suspects might imagine the detectives being more in touch with common morality.

Second, the fact that the judge has the last word by speaking after the detectives is not an advantage. To the contrary, people are often subject to confirmation bias, in which they interpret new evidence in a distorted way to preserve their existing belief.[249] People are particularly prone to confirmation when it comes to preserving positive opinions about themselves; they resist negative feedback.[250] As the

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246. To be clear, we do not believe that the police use of neutralizations in interrogation should ever justify longer prison terms. Instead, we think that the failure of shorter prison terms or alternative sentencing to undo the damage of moral minimization is a reason not to use the tactic.

247. *See, e.g.*, Robinson et al., *supra* note 220, at 1974 (reporting that many people believe the appropriate punishment for drug offenses, three-strikes laws, strict liability offenses, and felony murder are far below actual punishments), 1975–78 (describing other studies finding the same divergences).

248. Recall David Simon's description of detectives putting their arm around the suspect and appearing to be on the verge of tears. SIMON, *supra* note 77, at 212.

249. *See, e.g.*, Joshua Klayman, *Varieties of Confirmation Bias*, 32 PSYCH. LEARNING & MOTIVATION 385 (1995); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998).

250. *See* David *Eil & Justin M. Rao, The Good News-Bad News Effect: Asymmetric*

detective's minimizing message reinforces the offender's pre-existing neutralizations, the literature on the bias predicts that the offender will make all possible inferences to preserve the neutralizing beliefs. Confirmation bias is even more likely when beliefs are motivated rather than rational,[251] as is true here: the offender simply *prefers* to believe that the detectives have articulated community mores more accurately than the law or the judge. The offender knows that the criminal law does sometimes "get it wrong" (fails to track moral intuitions), and conveniently reasons that *this* sentence is one of those occasions. Offenders want to believe the forgiving and justifying things the detective says, not what society wants its criminal punishment to express. The self-serving inference is easier than the self-critical one.

Third, if there was an advantage to the judge having the last word in a sentencing hearing, it would only be because the judge could *answer* the specific minimizing statements the detectives made. Yet this possible advantage is lost because the judge usually has no idea what the detectives said to the offender during interrogation. If the defendant contests the voluntariness of the confession, and if the defendant's briefing describes the minimizing details (even though they are not usually legally relevant on their own), the judge would learn what the detectives said. Yet that is rare. Ordinarily, the judge is ignorant of (1) which of the offenders they are sentencing were subject to the tactic of moral minimization; and, when the tactic was employed, (2) what the particular moral minimizations were. Detectives tailor their minimizing message to match the offender's actual neutralizations, but it can hardly be called a "counter-message" if the judge does not tailor his remarks to what the detectives said.

If the prosecutor and judge fail, the final objection to our claim may be that *other* criminal justice players provide a counter-message that undoes the criminogenic damage of moral minimization. Perhaps the detectives, defense lawyer, jury, or victim provide the expressive antidote. As things stand, however, where there is no recognition of the problem, there is no reason to think these actors do provide an effective remedy.

We find no evidence that any detectives debrief the suspect after interrogation, which detectives might naturally resist as long as there is a chance the defendant might try to recant the confession (which such debriefing would make more likely). Defense attorneys may explain to defendants that their rationalizations for the crime are not legally relevant, but it seems improbable that any will articulate the moral wrongfulness of their client's behavior to their client.

Juries offer no counter-message for the simple reason that almost all cases are resolved by guilty pleas.[252] We pause to note that this observation provides another reason that the scarcity of criminal juries is troubling. Juries are the best positioned

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Processing of Objective Information About Yourself, 3 AM. ECON. J.: MICROECONOMICS 114 (2011).

251. *See* Daniel C. Molden & E. Tory Higgins, *Motivated Thinking*, *in* THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 295, 295–96 (Keith J. Holyoak & Robert G. Morrison eds., 2005).

252. Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (2020) (stating that 3.6% of federal criminal cases were disposed of by jury trials in 2013).

of all actors in the system to undo moral minimization. They are a collective body drawn from the community who can therefore speak for the community.[253] If jury trials were common, we would therefore worry less (but still worry) about the criminogenic effects of moral minimization. Note that when the first Reid interrogation manual was published in 1962, jury trials were far more common than they are today, which might be one reason for the absence of concerns about the criminogenic effects when moral minimization was first introduced.

Victim impact testimony is promising. If presented in front of the convicted defendant at a sentencing hearing, it might undo some of the damage of moral minimization. The most plausible case is where the minimization involved a detective claiming that the victim was not really harmed; given the chance, victims can powerfully articulate their harm. Moreover, the place of esteem and respect with which those statements are regarded within the proceeding offers evidence of the victim's worth, pushing against any victim-blaming narrative.[254] The need to remedy moral minimization therefore provides a non-standard rationale for giving the victim this voice.[255]

But there are severe limitations. Even among the offenses for which we claim the criminogenic effect is likely, not every case has an individual natural victim (some theft victims are collectives or corporations), not every state guarantees the victim's right to give testimony in every case,[256] and not every victim is available or willing to testify in this way. When victims do testify, they are (thankfully) ignorant that the detectives minimized the offense during interrogation, so they cannot frame their remarks to address the minimizations. Finally, while we think victims can convincingly speak to harm, we worry that the detective's victim-blaming tactics may render the offender immune to being persuaded by what the victim says in court, or from the respect the judge shows the victim. Certainly, victim impact statements (like restorative justice conferences) would work *better* to induce the offender's sympathy and remorse if they occurred without the government officials having first privately "reinforced" the offender's reasons for blaming the victim.[257]

Our ultimate point is rather simple. There are a variety of governmental actors who communicate, by words or actions, to criminal offenders. For a variety of reasons, it matters to the offender's future behavior whether the government delivers a unified and consistent message—the offender's conduct was seriously wrong, and

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253. Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255, 1270–72 (2018).

254. *See* Bilz, *supra* note 234.

255. *See* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 338 (2002)*; see also* Julian V. Roberts & Edna Erez, *Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements*, 10 INT'L REV. VICTIMOLOGY 223, 226 (2004).

256. *See* DUBBER, *supra* note 255.

257. There is also a separate normative issue whether victim impact statements exacerbate criminal law disparities because judges and juries find some victims more appealing than others for arbitrary or racial reasons. *See* Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 AM. J. CRIM. L. 1, 13–18, 27–29 (2013); *see* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 376 (1996).

the offender was responsible for it—or conflicting messages that both condemn and condone the criminal act. The message received by offenders when the government messages contradict each other is weaker than a single, unified message. Moral minimizations are particularly likely to dilute contrary messages because they are delivered at a critical early moment in an empathetic manner by detectives from whom the suspect expects disapproval. Whatever the possibilities for remediation with other messages, the criminal system is not designed to offset the criminogenic damage of moral minimizations.

In sum, moral minimization undermines internal and informal motivations for legal compliance. American police detectives contribute to crime control by investigating and clearing crimes, but frequently employ an interrogation tactic at cross purposes, making crime more likely. The benefits of moral minimization are uncertain, and the costs are serious.

III. NORMATIVE IMPLICATIONS

The interrogation tactic of moral minimization poses risks. Section II explains how minimization weakens the internal and informal incentives to obey the law. Our aim in this article is merely to begin a conversation on what the appropriate response is. We outline two options: counter-messaging and curbing the use of the tactic.

A. Counter-Messaging: Neutralizing the Neutralizations

If nothing is done to limit the tactic of moral minimization, perhaps we could improve the counter-messaging. In Part II.C, we rejected the argument that various parts of the criminal justice system currently provide an effective counter-message undoing the harm of moral minimization.[258] Among a series of reasons for pessimism, one observation was that if no one in the criminal system has noticed the danger of moral minimization, then we cannot expect anyone to have even attempted to formulate the best counter-message. We are now in a position to ask, can we do better? If the costs we identify are no longer *unexpected*, can we retain the tactic but avoid its harm?

Ultimately, we think the answer is no, but there is room for improvement. Our focus is on the judge. There is a sentencing hearing after every conviction during which a judge may justify the announced sentence to the convicted defendant. Some judges already use this occasion to articulate the moral wrong of the offense and the basis for the defendant's responsibility. Where this message is delivered (perhaps supported by victim impact testimony), the system is taking a key step toward creating a counter-message to the detective's moral minimization. Indeed, this may be an important and neglected justification for a judge explaining the moral basis of a sentencing decision to a convicted offender: to undermine the offender's neutralizations for the crime, which may have been reinforced in interrogation via moral minimization. Not all judges take seriously this aspect of sentencing, but our analysis suggests that they should.

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258. *See supra* Part II.C.

Yet, where the judges take this part of their role seriously, they labor under disadvantages discussed in Part II.C, one of which is that the judge usually has no idea what the detectives said to the offender during interrogation. Unlike the other disadvantages, this one is correctable. As long as we continue to permit moral minimization, we offer one concrete reform to improve the expressive position of the judge.

Our proposal is for presentence reports to henceforth include a section summarizing any moral minimization tactics the detectives employed during an interrogation of the offender, and whether or not it led to incriminating statements. This would permit judges to tailor their remarks at sentencing to address and reject the specific minimizations the detectives employed. For example, if the detectives in an embezzlement case blamed the employer for paying too small a salary, the judge should be informed of this tactic and then explain to the offender at sentencing why that particular rationalization is morally unpersuasive.[259]

B. Limiting the Use of Moral Minimization

Counter-messaging is ultimately insufficient. First, it is not going to work for those exposed to moral minimizations who are never criminally charged or convicted. Second, we doubt it could ever completely undo the criminogenic damage for reasons stated in Part II.C. But even if some ideal counter-message could work perfectly in the abstract, actual counter-messaging efforts will often be imperfect and ineffective in the real world of conviction by guilty plea, busy judges who will not tailor messages to refute particular moral minimizations, and the inevitable absence of victims from some cases.

As previously indicated, there is no serious empirical evidence supporting the effectiveness of the Reid interrogation methods, much less the particular tactic of moral minimization.[260] Even without absolute clarity about the precise costs and benefits of minimization, a new acknowledgement that there *are* these costs demands recognition of the tradeoffs in using the strategy. As no one has previously identified the costs described here, they have been ignored. If detectives sense a possible benefit, but fail to recognize the risks, they inevitably use the tactic beyond the socially optimum level. Some limitation is therefore justified. We briefly discuss two options. In all cases, the reforms would be implemented either by state or local legislation, or by police department policy changes.[261]

One approach would be a partial ban, i.e., to prohibit all moral minimizations *except* where the tactic would be expected to do the least harm. As we have discussed

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259. We do not propose that judges use this information to arrive at a sentence. In our view, the fact that a defendant succumbed to confession because of a moral-minimization tactic is neither a sentencing aggravator nor a mitigator.

260. *See supra* notes 119–120 and accompanying text.

261. *See* Brandon L. Garrett, *Interrogation Policies*, 49 U. RICH. L. REV. 495 (2015). Alternatively, courts might suppress the tactic of moral minimization by holding that it so strongly implies a promise of leniency that it alone suffices to make the resulting confession involuntary. *See supra* notes 87 and 121–124. But that seems unlikely given that our argument in this article is not that the tactic is more coercive than previously understood, but that it carries criminogenic risks.

above, there are some types of crimes for which moral minimization is least likely to be criminogenic.[262] Murder is an example where the crime will be punished by such a long prison term that the concern for recidivism is attenuated.[263] There are also particular kinds of minimizations that are not generalizable, and therefore not likely to diminish internal and informal incentives to comply with the law. We illustrated again with murder examples, as in a case where detectives blamed the murder victim for having previously killed a relative of the suspect, a reason to offend that is usually not likely to repeat itself.[264] Considering these two factors on a case-by-case basis would be enormously complicated, but one could combine these points to justify a nuanced regulation prohibiting minimization only when the criminogenic risks are greatest. Or one might favor a simpler set of limited rules based on our prior generalizations, permitting moral minimization tactics in interrogations of certain crimes like murder, drug trafficking, and hit-and-run, but not in the interrogation of other crimes.

A more ambitious approach is to abandon wholesale the accusatory method of interrogation. The Reid method is one of several accusatory or confrontational interrogation methods in which the interrogator persistently asserts confidence in the suspect's guilt. Broadly speaking, the alternative to the accusatory method is the information-gathering method. In 1992, police in the United Kingdom moved from a confrontational interrogation method to an information-gathering method named PEACE, an acronym for its five phases—planning/preparation, engage/explain, account (clarification and challenge), closure, and evaluation.[265] The method involves communication strategies that encourage building rapport and encouraging suspects to develop a painstakingly detailed account of events. The suspect is induced to talk a great deal on the theory that guilty suspects tend to start contradicting themselves.[266]

England and Wales adopted PEACE as a more ethical and professional approach to investigative questioning in response to several scandals involving false confessions.[267] At least one American jurisdiction—Vermont—has adopted the PEACE framework for interrogations, and thus we have reason to believe it can be compatible with U.S. policing and the constitutional rights that attend the interrogation process.[268]

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262. *See supra* Part II.B.

263. *See supra* text accompanying note 227.

264. *See supra* text accompanying notes 225–226.

265. COLIN CLARKE & REBECCA MILNE, NATIONAL EVALUATION OF THE PEACE INVESTIGATIVE INTERVIEWING COURSE 2–3 (Home Office, Report No: PRAS/149, 2001).

266. Laura Fallon, Brent Snook, Todd Barron, Angela Baker, Mike Notte, Jeff Stephenson & Dan Trottier, *Evaluating the Vermont State Police's PEACE Model Training Program: Phase 1*, 28 PSYCH. CRIME & L. 59, 60 (2021). The PEACE method is described as a science-based approach to interviewing in which officers are "instructed to collect evidence prior to making decisions, akin to the process of hypothesis testing in scientific disciplines (and in direct contrast to traditional accusatorial interview methods)." *Id.*

267. *See* Sam Poyser & Rebecca Milne, *The Time in Between a Case of 'Wrongful' and 'Rightful' Conviction in the UK: Miscarriages of Justice and the Contribution of Psychology to Reforming the Police Investigative Process*, 23 INT'L J. POLICE SCI. & MGMT. 5, 11 (2021).

268. *See* Fallon et al., *supra* note 266.

A major research question is which method of interrogation is more successful at securing true confessions while avoiding false confessions. The existing social science research is unable to provide a definitive answer, although the existing results favor the information-gathering method.[269] The PEACE model is highly regarded among law enforcement in England and Wales and has been sought-after in Australian, European, and North American jurisdictions.[270] At least one other study concluded that PEACE strategies, when properly used, produced better outcomes, with outcomes defined as either obtaining a fuller version of the occurrence or a confession.[271] Finally, in controlled meta-studies on the cognitive form of interviewing used in the PEACE framework, the reliability of the information obtained under the PEACE model was significantly better.[272]

These empirical issues are ultimately beyond the scope of this article. Without resolving the debate, this article contributes to it by identifying the criminogenic risks of the moral minimization tactics that are exclusively a part of the accusatory method. Our analysis of the criminogenic effects of moral minimization adds to the existing literature for why a switch to an information-gathering method is desirable.

Which brings us to note the obvious point that if American police interrogators abandoned the accusatory method and switched to information-gathering, the problems we identify in this article would disappear. Prohibiting an interrogation tactic is inherently complicated by issues of remedy, but the simplest way to stop the use of moral minimization is to shift entirely away from the accusatory method. What this would require is less a prohibition of certain methods (although that might be useful during the transition) than the basic training of detectives in a new approach. If American police detectives learned from a manual that did not advocate for the reinforcement of neutralizations via moral minimization, then they would eventually stop using minimizations, at least as a central and well-elaborated theme of the interrogation.

CONCLUSION

Moral minimization is pervasive in American police interrogations today, and yet it is a relic of the past. The misogynistic victim-blaming narratives that the manuals offer to illustrate minimization tactics are every bit as old as they sound, dating back at least to 1962. We expect twenty-first-century policing to be based on data, as much as possible, and yet these tactics were created based on early or mid-twentieth

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269. *See* sources cited *supra* notes 119–120 and accompanying text. *See also* CLARKE & MILNE, *supra* note 265; Colin Clarke, Rebecca Milne & Ray Bull, *Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision and the Presence of a Legal Advisor*, 8 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 149 (2011).

270. Mary Schollum, *Bringing PEACE to the United States: A Framework for Investigative Interviewing*, POLICE CHIEF MAG., 2017, at 30, 333 ("The PEACE model has resulted in vast improvements in policing interviewing to the extent that many countries . . . have adopted it."); *see also* Fallon et al., *supra* note 266.

271. Dave Walsh & Ray Bull, *What Really is Effective in Interviews with Suspects? A Study Comparing Interviewing Skills Against Interviewing Outcomes*, 15 LEGAL & CRIMINOLOGICAL PSYCH. 305, 318 (2010).

272. *Id.*

century anecdotes. The argument for moral minimization is that "it works," but there is still no real social-science evidence supporting that claim, and it appears that the newer alternatives in the United Kingdom and elsewhere also "work," possibly better, without minimization.

In 1962, it could not have occurred to anyone that interrogations with a theme of moral minimization were more or less the precise opposite of the procedure employed in RJ conferences, because such conferences did not (widely) exist in the United States. At the time, no randomized, controlled trials demonstrated that such brief conferences could reduce recidivism by confronting and critiquing the offender's neutralizations for the crime. In the mid-twentieth century, there was little in the way of social-scientific empiricism that people obeyed the law in part because they were reciprocating the perceived compliance of others and also because they perceived the law to be substantively legitimate. As such, it would not then have been apparent that the energetic efforts of law enforcement officers to persuade suspects that "anyone" in their place would have committed the crime would damage the reciprocity motive for legal compliance, nor that convincing suspects that the crime is not serious and the blame lies elsewhere would damage the law's legitimacy and that motive for compliance. Yet all of these problems and more are apparent now.

This article proposes balance where none exists. Police officials gather to discuss crime control, such as how to best deploy patrol officers or how to maintain their procedural legitimacy. In other meetings, detectives gather to train for interrogation techniques. These distinct groups never consider that the training is undermining the crime control. Yet the explanation for the minimization tactic—that reinforcing the offender's neutralizations for the crime will disinhibit the offender's confession—necessarily implies that the tactic will also make future offending more likely. These policing groups might hope that the effects we describe are small in magnitude or short-lived. We agree that more study is needed, but hoping is not enough. As long as the interrogation value of moral minimization is uncertain, we should not continue to ignore the unintended risks of the tactic when other interrogation methods exist.

The Future of Roe and the Gender Pay Gap: An Empirical Assessment

ITAY RAVID* & JONATHAN ZANDBERG**

In Dobbs v. Jackson Women's Health Organization*, the Supreme Court upheld a Mississippi law that prohibits nearly all abortions after the fifteenth week of pregnancy and overruled the holding in* Roe v. Wade*. Among the many arguments raised in* Dobbs *in an attempt to overturn* Roe*, the State of Mississippi argued that due to "the march of progress" in women's role in society, abortion rights are no longer necessary for women to participate equally in economic life. It has also been argued that there is no empirical support to the relationship between abortion rights and women's economic success in society.*

This Article will empirically examine both of these arguments, and it provides compelling evidence to reject each of them. To do so, we adopt a novel methodology that utilizes the enforcement of Targeted Regulation of Abortion Providers (TRAP) laws as proxies for abortion restrictions. We study the effects of over forty years of legislation on the participation of American women in the labor market.

*Our findings suggest that the introduction of TRAP laws has widened the gender pay gap between women of childbearing age and the rest of the population. Our analysis offers two potential explanations regarding the mechanisms based on which TRAP laws widen this gap: they push women out of the labor force and into choosing lower-paying jobs. Ultimately, these findings foreshadow the future landscape of gender inequality in the United States in the post-*Roe *era.*

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INTRODUCTION

The 1973 landmark case, *Roe v. Wade*, in which the U.S. Supreme Court recognized a woman's constitutional right to terminate her pregnancy, was never smooth sailing in the American sea of public opinion. There are likely few cases in the history of American constitutionalism that have attracted more fire and offered a more purified example of our society's polarization. Since *Roe* was decided, a host of U.S. states have shown a great deal of creativity in attempting to narrow or limit its scope without overstepping the constitutional commitment it created.

In 2022 things seemed to escalate, with at least two states challenging the decision by enacting laws that directly oppose the precedent set forth in *Roe*: *Whole Woman's Health v. Jackson* in Texas[1] and *Dobbs v. Jackson Women's Health Organization* in Mississippi.[2] In fact, these new laws, particularly the legislation enacted in Mississippi, posed such a meaningful threat to the legacy of *Roe*, that scholars, pro-choice advocates, and policy makers have been talking for a while now about "*Roe's* last anniversary."[3]

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1. 142 S. Ct. 522 (2021) (centering around Texas Senate Bill 8 (S.B. 8), which bans abortion care after six weeks from the last menstrual period).

2. 142 S. Ct. 2228 (2022) (centering around a Mississippi law that bans abortion after fifteen weeks of pregnancy—a direct contradiction to *Roe*).

3. *E.g.*, Alanna Vagianos, *Is This the Last Anniversary of* Roe v. Wade*?*, HUFF POST (Jan. 21, 2022, 6:00 AM), https://www.huffpost.com/entry/is-this-the-last-anniversary-of-roe-v-wade_n_61e9716de4b0a864b07d0ca4 [https://perma.cc/YYH5-2BK3]; Joanna L. Grossman, *The Last Anniversary of* Roe v. Wade*: A Time to Reimagine Abortion Rights for All*, VERDICT (Jan. 27, 2022), https://verdict.justia.com/2022/01/27/the-last-anniversary-of-roe-v-wade-a-time-to-reimagine-abortion-rights-for-all [https://perma.cc/6F8N-4RUR]; Sarah Mccammon, *Activists Look Ahead to What Could Be the 'Last Anniversary' of Roe*, NPR (Jan. 20, 2022, 1:43 PM), https://www.npr.org/2022/01/20/1074227400/activists-abortion-anniversary-roevwade [https://perma.cc/L9TZ-6CLM]; Adam Cancryn & Sarah Owermohle, *Could This Be* Roe v. Wade*'s Last Anniversary?*, POLITICO (Jan. 21, 2022, 10:00 AM), https://www.politico.com/newsletters/politico-pulse/2022/01/21/could-this-be-roe-v-wades-last-anniversary-799993 [https://perma.cc/4F7Z-3QXY]; Adam Liptak, *Supreme Court to Hear Abortion Case Challenging* Roe v. Wade, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/2021/05/17/us/politics/supreme-court-roe-wade.html [https://perma.cc/B6ZR-HR8E] (describing current position of Supreme Court after Justice

And they were right. On June 24, 2022, the Supreme Court decided in favor of the State of Mississippi, ultimately holding that the Constitution does not confer the right to an abortion.[4]

Of the many arguments raised by the states in support of their newly enacted laws, Mississippi argued that the assertion, mostly raised in *Casey*,[5] that abortion rights were necessary for "women to participate equally in the economic and social life of the Nation"[6] is no longer valid due to the "march of progress"[7] that has allowed modern women to balance their professional success and private lives.[8] It has also been argued that, in any event, there is no proof of a statistical link between abortion rights and women's ability to play an equal economic role in society.[9] Unlike traditional arguments in this context that focus on the health of the fetus[10] (and to a lesser extent of the woman),[11] this portion of the Mississippi argument focused on women's *economic opportunity* and directly on the effects that access to reproductive care might have on modern day women's ability to participate as equals in our nation's labor market.

This Article empirically examines both of these arguments and provides compelling evidence to reject each of them. Given that *Roe* has recently been overturned, it is difficult, not to say impossible, to show empirically—as of now—what would be the effect on women's economic opportunities of legislation banning abortion altogether. Our Article offers a novel strategy to assess these potential effects.

Over the last fifty years, states have enacted a host of legislation known as TRAP (Targeted Regulation of Abortion Providers) laws that place restrictions on abortion facilities and providers in an attempt to restrict abortion without directly confronting the limitations that, until recently, *Roe* imposed.[12] Given the constitutional

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Ginsburg's death).

4. *Dobbs*, 142 S. Ct. at 2234.

5. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877–78 (1992). This is the landmark case that was decided twenty years after *Roe*, in which the Court replaced *Roe*'s trimester test with an "undue burden" test, holding that abortion regulations prior to fetus viability were constitutional if the purpose and effect of the statute did not constitute a "substantial obstacle" to women's access to abortions. *Id. See infra* Part I.

6. *Casey*, 505 U.S. at 856.

7. Brief for Petitioner at 4, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

8. *Id.*

9. *Id.* at 34–35; Brief of 240 Women Scholars and Professionals, and Profile Feminist Organizations in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392); *see also* Claire Cain Miller, *Mississippi Asks: If Women Can Have It All, Is* Roe *Necessary*?, N.Y. TIMES (Dec 1, 2021) https://www.nytimes.com/2021/12/01/upshot/mississippi-abortion-case-roe.html [https://perma.cc/Y79L-PQUG].

10. *See* Liptak, *supra* note 3.

11. *See id.*

12. B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1099 (2021) (providing an overview of spatial abortion regulations); Dawn Johnsen, *TRAPing* Roe *in Indiana and a Common-Ground Alternative*, 118 YALE L.J. 1356, 1369 (2009) (discussing TRAP laws in Indiana and their potential impact on the right to abortion); *see infra* Part I.

protections that had been provided in *Roe* and later in *Casey*, TRAP laws could not fully ban abortions. Regardless, and despite being promoted as reasonable measures to ensure patient safety, TRAP laws have been used by lawmakers to limit women's access to abortions.[13] As such, and in attempt to predict the potential effect on women's ability to participate in the labor market under a regime banning abortions altogether, TRAP laws can serve as a proxy to understand the potential effects of limiting access to abortions on women's economic opportunities.

This Article utilizes a data set that includes over four million observations and forty years of TRAP law legislation across twenty-five states in a weighted representative sample of the American population. The Article adopts a triple difference-in-differences quasi-experimental research approach[14] to assess whether TRAP laws have affected the participation in the labor market of American women at childbearing age. Particularly, we ask two questions:

(a) Have TRAP laws affected the gender pay gap?
(b) And if so, what is the mechanism generating this gap? Have TRAP laws affected women's career choices or selection into less lucrative career paths?

We first found evidence which suggests that the introduction of TRAP laws has widened the gender pay gap between women of childbearing age and the rest of the population. Second, we found evidence that can tease out the potential mechanisms generating this gap: the introduction of these laws has pushed women out of the labor force and/or led them to select lower-paying professions.[15]

These findings expose the fragility of progress toward gender equality. Unlike Mississippi's argument before the Supreme Court, we cannot take today's situation as a given. Women have struggled, and keep on struggling, to balance between their career aspirations and family formation choices. While we have seen progress, things could change, and limitations on women's reproductive freedoms can take us back in time. Moreover, the findings remind us how gender inequality is closely attached to freedom and opportunities, and how state decisions can meaningfully impact women's economic opportunities. From a constitutional theory vantage point, the findings contribute to establishing a tighter link between the equal protection clause and rights to reproductive care.

Finally, and probably most significantly, given that TRAP laws do not ban access to abortion altogether but still meaningfully hinder women's participation in the labor market, the findings serve as an indicator of what might happen in our post-*Roe* world, when additional restrictions on women's freedoms are adopted. As such, our Article posits that regardless of one's belief regarding the right to an abortion, the costs to women's economic inequality due to *Roe* being overturned must be

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13. *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 22, 2020), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws [https://perma.cc/STS6-V3BH] [hereinafter Guttmacher TRAP 2020]. Regardless, TRAP laws have been criticized for being excessive and medically unnecessary. *See Targeted Regulation of Abortion Providers (TRAP)*, CTR. FOR REPROD. RTS. (Aug. 28, 2015), https://reproductiverights.org/targeted-regulation-of-abortion-providers-trap/ [https://perma.cc/4R3W-MQX8].

14. *See infra* Part IV.

15. These findings were robust to a host of sensitivity tests. *See infra* Part IV.

acknowledged and mitigated. In fact, the findings subscribe empirical meaning to the constitutional concerns about *Roe*'s reversal.[16]

The Article proceeds as follows. Part I provides the background and context to the landmark decision in *Roe*, its continuation through *Casey*, and the adoption of TRAP laws. Part II surveys current empirical studies about TRAP laws and women's participation in the labor force. It shows that one can find studies about either the effects of abortions on the gender pay gap or the effects of TRAP laws on different issues, but thus far no study has directly analyzed the effects of TRAP laws on equal participation in the labor force, a void that this Article fills. Part III explores the data we utilized in the study, and Part IV discusses the unique methodology we adopted. Part V elaborates on the findings, and Part VI concludes by reflecting on the potential future in the days after *Dobbs*.

I. ROE'S AFTERMATH—CASEY AND TRAP LAWS

A. Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey

To understand the current state of abortion restrictions and how U.S. Supreme Court precedent paved the way to TRAP laws, one must obviously first start with the 1973 landmark ruling of *Roe v. Wade*. In *Roe*, the U.S. Supreme Court recognized, for the first time, a woman's constitutional right to choose to terminate her pregnancy.[17] Joint petitioners challenged a series of Texas laws that criminalized all abortions except when medically necessary to save a woman's life, on the basis that the laws were unconstitutionally vague and violated the fundamental right to bodily autonomy.[18] Justice Blackmun, writing for the majority, recognized the State's legitimate interest in "preserving and protecting the health of the pregnant woman," and its interest in protecting "the potentiality of human life."[19] Yet, the Court also recognized a woman's privacy interest in controlling her own reproduction:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[20]

In an effort to balance these competing interests, Justice Blackmun developed a trimester test to determine the various stages in pregnancy that the State could impose abortion restrictions.[21] During the first trimester, the mother, and her attending physician held full discretion to terminate a pregnancy; after the first trimester, the

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16. For more about the connections between access to reproductive care and "woman's autonomous charge of her full life's course," see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985).

17. *See* Roe v. Wade, 410 U.S. 113 (1973).

18. *Id.* at 119.

19. *Id.* at 162.

20. *Id.* at 153.

21. *Id.* at 164.

State could choose to "regulate the abortion procedure in ways that are reasonably related to maternal health;" and finally, at the point of viability of the fetus, during the third trimester, the State could regulate or prohibit abortion altogether unless the mother's life would be at risk.[22] In essence, the woman's privacy interest in bodily autonomy steadily diminished throughout her pregnancy and became outweighed entirely by the State's interest in protecting the fetus at the point when it could potentially survive outside the womb. By drawing the line at *viability*, the Court determined that it "need not resolve the difficult question of when life begins."[23]

In his dissent, then-associate Justice Rehnquist criticized the majority's use of the compelling state interest test, which he argued was reserved for equal protection matters under the Fourteenth Amendment.[24] Furthermore, Justice Rehnquist averred that the right to abortion was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[25] Nevertheless, the Court declared that laws proscribing abortion prior to viability were unconstitutional, and that laws placing restrictions on a woman's choice to terminate her pregnancy must further a compelling state interest and pass under heightened judicial scrutiny.[26]

The *Roe* decision catalyzed a period of intense political backlash from the pro-life movement.[27] Over the next sixteen years, forty-eight states enacted 306 pieces of anti-abortion legislation, and states such as Louisiana, Utah, and Pennsylvania attempted to overturn *Roe* by enacting laws that banned most abortions.[28] Pennsylvania developed a comprehensive abortion bill that included mandatory waiting periods, informed consent requirements, spousal notification, parental consent, and reporting requirements for abortion providers.[29] State legislatures

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22. *Id.* at 164–65.

23. *Id.* at 159.

24. *Id.* at 174 (Rehnquist, J., dissenting).

25. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

26. *Id.* at 155, 163.

27. *See* Linda Greenhouse & Reva B. Seigel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (noting quick shift in ideologies post-*Roe*). Greenhouse and Seigel note that prior to *Roe*, a majority of Catholics and Americans agreed with the state that "the decision to have an abortion should be made solely by a woman and her physician" along with a greater percentage of Republicans than Democrats. *Id.* at 2031. Rather than a purely moral or religious shift in ideology, much of the abortion debate was deeply rooted in politics as a way to mobilize and polarize people on the abortion issue. *Id.* at 2071. As for *Roe*'s effect on states, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (establishing effects of *Roe* on states). The majority's argument is that although the right to privacy is not specifically stated in the Constitution, it is protected by the Due Process Clause of the Fourteenth Amendment. *Roe*, 410 U.S. at 153. Further, the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and that this right is fundamental and can only be regulated on the basis of a compelling state interest. *Id.* The only state interests are in protecting maternal health and in protecting the life of the fetus, but they necessarily grow more important as the fetus matures. *Id.*

28. Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118YALE L.J. 1318, 1326 (2009).

29. *Id.* at 1328.

complained of the Court's rigid trimester test as being too "absolutist"[30] and, therefore, crafted novel ways to restrict abortion services other than by criminalizing the procedure.[31]

During his 1979 presidential election campaign, Ronald Reagan championed the pro-life movement in an effort to secure the votes of fundamentalist Christians.[32] Both Reagan and George H.W. Bush based their presidential platforms on overturning *Roe* and promised to fill Supreme Court vacancies with pro-life justices.[33] The combined efforts of Reagan and Bush led to five new conservative justices on the Court by 1992.[34] Just before the Court reexamined the abortion issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[35] liberal Justices Brennen and Marshall were replaced by Justices Souter and Thomas, each of whom were predicted to provide the necessary votes to overturn *Roe*.[36] During this time, political tensions were high as "antiabortion activists were in the midst of a nationwide campaign to shut abortion clinics down through blockades, invasions, vandalism, threats and other violence."[37]

However, the Court's 1992 decision effectively "saved" *Roe* and, until recently, stabilized abortion politics.[38] In their plurality opinion, Justices O'Connor, Kennedy, and Souter reaffirmed *Roe*'s core principle that a woman holds a privacy interest in her ability to choose an abortion before viability.[39] Yet, the Court significantly diminished *Roe*'s protections by holding that abortion restrictions would no longer be subject to strict scrutiny and instead would be analyzed under an "undue burden"

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30. *Id.* at 1325 ("Roe was 'inflexibly legislative,' preventing states from imposing a range of politically popular restrictions on abortion rights.").

31. Johnsen, *supra* note 12, at 1362; Hill, *supra* note 12, at 1099; *Devins*, *supra* note 28 at 1328 (stating that these restrictions included provisions on parental consent, spousal notification, reporting requirements, informed consent requirements, and mandatory waiting periods); *see* Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (Apr. 30, 2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades [https://perma.cc/WG36-MAPH]; Jon O. Shimabukuro, CONG. RSCH. SERV., ABORTION: JUDICIAL HISTORY AND LEGISLATIVE RESPONSE (2021) (discussing "variety of governmental actions at the national, state, and local levels" designed to reduce the effect of *Roe*); Elizabeth Nash, *For the First Time Ever, U.S. States Enacted More Than 100 Abortion Restrictions in a Single Year*, GUTTMACHER INST. (Oct. 4, 2021), https://www.guttmacher.org/article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year [https://perma.cc/V3WW-YS6U] (providing statistics on the number of abortion restrictions passed each year following *Roe*, including 1973, the year *Roe* was decided, when state legislatures passed over eighty abortion restrictions).

32. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1210 (2017).

33. *See* Devins, *supra* note 28, at 1320; Johnsen, *supra* note 12, at 1358.

34. Johnsen, *supra* note 12, at 1358.

35. *Id.*

36. Chemerinsky & Goodwin, *supra* note 32, at 1215.

37. Devins, *supra* note 28, at 1330 (internal quotations omitted).

38. *Id.* at 1321, 1335.

39. Hill, *supra* note 12, at 1137.

standard.[40] The Court overruled *Roe*'s inflexible trimester framework and declared that laws placing restrictions on abortions pre-viability are constitutional if the *purpose* or *effect* of the statute does not "plac[e] a substantial obstacle in the path of the woman seeking an abortion."[41] While offering little guidance as to what constitutes a "substantial obstacle,"[42] the Court clarified that a law which has the "*incidental effect* of making it more difficult or more expensive to procure an abortion" passes constitutional muster if it serves a valid purpose and does not "strike at the right [to have an abortion] itself."[43]

This critical language opened the door to a wide array of "seemingly neutral" regulations that placed burdensome restraints on women seeking abortions.[44] The Justices applied the new undue burden standard to uphold four of the five Pennsylvania abortion regulations at issue in *Casey*.[45] These included Pennsylvania's informed consent requirement,[46] a mandatory twenty-four-hour waiting period between the initial consultation and abortion procedure,[47] a parental-consent provision for minors seeking an abortion,[48] and extensive recordkeeping and reporting requirements for abortion facilities.[49] The Justices further permitted states to take measures "designed to persuade" a woman to choose childbirth over abortion if reasonably related to the goal of keeping her informed.[50] This essentially allowed states to enact countless laws regulating abortion under the guise of helping a woman make an "informed decision."[51]

However, the Court struck down Pennsylvania's spousal notification law which prohibited physicians from performing an abortion until the patient signed a written statement that she had notified her spouse about her decision to have an abortion.[52] The Court found that this would "impose a substantial obstacle" to women who were in dangerous or abusive relationships and had legitimate reasons to keep their reproductive decisions confidential.[53]

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40. *Id.* at 1099; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992).

41. *Casey*, 505 U.S. at 877.

42. Chemerinsky & Goodwin, *supra* note 32, at 1220 (quoting *Casey*, 505 U.S. at 878).

43. *Casey*, 505 U.S. at 874 (emphasis added).

44. Hill, *supra* note 12, at 1099.

45. *Casey*, 505 U.S. at 900.

46. *Id.* at 881. At least twenty-four hours before performing an abortion, a physician was required to "inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child." *Id.* (internal quotations omitted).

47. *Id.* at 887 (declaring that a woman has no "constitutional right to an abortion on demand").

48. *Id.* at 899 (determining that state laws requiring parental consent for minors seeking abortion were constitutional if the statute provided an avenue for a court-authorized abortion in absence of parental consent).

49. *Id*. at 900.

50. *Id.* at 878.

51. Chemerinsky & Goodwin, *supra* note 32, at 1216.

52. *Casey*, 505 U.S. at 887.

53. *Id.* at 893–94.

On its face, *Casey* appears to set identifiable boundaries to lawmakers' attempts to regulate abortion.[54] Yet, in application, scholars have characterized the undue burden standard as "amorphous" and "sufficiently malleable" to uphold nearly every abortion regulation that stops short of outright banning abortions.[55] While *Casey* prohibits laws that explicitly aim to impede women's access to abortion, the Court held that state legislatures are well within their rights to enact laws that discourage abortion and encourage childbirth.[56] But as Chemerinsky and Goodwin point out, nearly every regulation limiting abortion was written "for the purpose of discouraging abortions and encouraging childbirth."[57]

B. Implications of Casey: The Rise of TRAP Laws

The Supreme Court's legitimization of Pennsylvania's abortion restrictions prompted a movement of anti-abortion legislation throughout the United States that has resulted in the systematic erosion of women's access to abortions. While one can trace their beginning to the early 1970s, the 1990s and 2000s have experienced an exponential growth in the number of states enacting TRAP laws that place excessive restrictions on abortion facilities that were criticized for having little to do with health and safety.[58] While promoted as reasonable measures to ensure patient safety, TRAP laws have been used by lawmakers to limit women's access to abortions.[59] These regulations work by placing administrative and financial burdens on abortion providers, which cause many clinics to shut down or face crippling lawsuits. Overall, since 1970, states across the country initiated more than 1300 abortions restrictions, with TRAP laws serving as the most dominant tool to achieve these restrictions.[60]

Lawmakers have developed several different types of TRAP laws that all seek to target abortion providers rather than the patients themselves. Our Article focuses on

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54. Devins, *supra* note 28, at 1335.

55. Hill, *supra* note 12, at 1099; Devins, *supra* note 28, at 1322.

56. Chemerinsky & Goodwin, *supra* note 32, at 1220.

57. *Id.*

58. Hill, *supra* note 12, at 1099; *see also* Johnsen *supra* note 12, at 1369; Rebecca J. Mercier, Mara Buchbinder & Amy Bryant, *TRAP Laws and the Invisible Labor of US Abortion Providers,* 26 CRITICAL PUB. HEALTH 77, 79 (2015); Guttmacher TRAP 2020, *supra* note 13; *Abortion Topic Overview*, GALE (2022), https://www.gale.com/open-access/abortion [https://perma.cc/CJ93-766W] (describing how state legislatures introduced new abortion restrictions (TRAP laws) in the 1990s that resulted in restricted access to abortions); Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 421, 451–52 (2017).

59. Guttmacher TRAP 2020, *supra* note 13.

60. Nash & Cross, *supra* note 31; Roe v. Wade *Overturned: How the Supreme Court Let Politicians Outlaw Abortion*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade [https://perma.cc/S4WU-MAMF].

three main categories of TRAP laws:[61] (a) ambulatory surgical center (ASC), (b) admitting privileges, and (c) transfer agreements.[62]

ASC laws impose extremely specific building mandates for abortion facilities, requiring that clinics meet state standards for an ambulatory surgical center.[63] These types of regulations "mandat[e] the width of hallways, complex HVAC systems, down-to-the-inch dimensions for operating rooms, and specifications for outfitting janitor's closets."[64]

The cost of relocating or remodeling existing abortion clinics to comply with state ASC regulations has imposed meaningful financial burdens on abortion providers. According to the Guttmacher Institute, as of February 2023, eighteen states have enacted TRAP laws mandating the specific requirements for procedure rooms, the size of corridors, and proximity to local hospitals.[65] In 2013, the Virginia Department of Health estimated that complying with new building regulations would cost each provider up to one million dollars in renovations.[66] As suggested by Hill, not only are these building requirements unnecessary for clinics that only provide pills for

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61. While we focus on three categories, there are several other notable types of TRAP laws worth mentioning. Eight states have enacted TRAP laws that regulate facility locations, such as requiring abortion providers to be located within a certain distance from a local hospital. *See Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Feb.. 1, 2023), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [https://perma.cc/Z72K-BVQZ] [hereinafter Guttmacher TRAP 2023]. This requirement places a disproportionate burden on facilities operating in rural areas that lack a sufficient number of nearby hospitals. *Id.* Similarly, in 2017, Alabama passed a law that prohibited abortion clinics from being located within 2000 feet of an elementary school. Hill, *supra* note 12, at 1103. The law's enactment threatened to shut down two prominent clinics that provided seventy-two percent of the state's abortions, however, a federal district court found that the statute imposed an undue burden on abortion providers and struck down the law. Jennifer Gerson Uffalussy, *Alabama Governor Signs Bill to Regulate Abortion Clinics Like Sex Offenders*, GUARDIAN (May 12, 2016, 6:11 PM), https://www.theguardian.com/us-news/2016/may/12/alabama-abortion-clinics-schools-sex-offenders-bill [https://perma.cc/2Y6H-AQ2Y]; *see also* West Ala. Women's Ctr. v. Miller, 299 F. Supp. 3d 1244 (M.D. Ala. 2017). Another popular category of TRAP laws involves reporting requirements similar to those upheld in *Casey*. As of February 2023, forty-six states and the District of Columbia currently require abortion providers and facilities to submit regular reports and patients' private medical information to the state. *See Abortion Reporting Requirements*, GUTTMACHER INST. (Feb. 1, 2023), https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements [https://perma.cc/SGH4-8AF3]. According to the Guttmacher Institute, eight states require providers to report the patients' method of payment for abortion services; a requirement that has little to no connection with ensuring patient health and safety. *Id.*

62. *See* Nichole Austin & Sam Harper, *Constructing a Longitudinal Database of Targeted Regulation of Abortion Providers Laws*, 54 HEALTH SERV. RSCH. 1084 (2019).

63. *Id.*

64. Miriam Berg, *These 4 Types of TRAP Laws Are Dangerously Chipping Away at Abortion Access Under the Guise of 'Women's Health*,' PLANNED PARENTHOOD (June 15, 2016, 2:44 PM), https://www.plannedparenthoodaction.org/blog/these-4-types-of-trap-laws-are-dangerously-chipping-away-abortion-access-under-the-guise-of-womens-health [https://perma.cc/6G2R-4VDM].

65. Guttmacher TRAP 2023, *supra* note 61.

66. *Id.*

early-stage abortions, but these regulations do nothing to increase the safety of women receiving physician-assisted surgical abortions.[67]

Lawmakers have also developed TRAP laws that require abortion clinics to secure *admitting privileges* with a nearby hospital. Admitting privileges allow abortion providers to treat patients at a particular hospital and to utilize hospital equipment, as if the provider was a member of the hospital's staff.[68] States adopting this requirement justified it by the need to allow the particular abortion provider to transport and treat patients at a local hospital in the event that patients suffer complications from an abortion procedure.[69] However, fewer than 0.5% of abortion procedures result in complications that would involve hospitalization.[70] Furthermore, regardless of admitting privileges, federal law requires a patient in danger to be treated at any hospital.[71]

Laws requiring admitting privileges pose a unique obstacle to abortion providers by making their ability to practice dependent on private actors.[72] Many hospitals operate under religiously affiliated networks, and administrators may choose to deny admitting privileges to abortion providers based on their personal views of abortion.[73] While a third-party hospital's decision to deny admitting privileges appears to be outside government control, "it is a reality that legislators exploit as part of an intentional strategy to reduce abortion access."[74] Presently, twelve states require all abortion clinics to have some affiliation with a local hospital, and nine states require either admitting privileges or "an alternative arrangement, such as an agreement with another physician who has admitting privileges."[75] The states that have enacted these particular TRAP laws have seen a dramatic decline in the number of abortion facilities that remain open. After Texas passed a law requiring admitting privileges, the number of operating abortion clinics reduced by half between 2013 and 2014.[76] As a result of the state losing over twenty clinics, the number of women in Texas living over 100 miles from an abortion clinic tripled.[77]

Another type of TRAP law that will be at the focus of our study is known as "transfer agreements." These laws, that according to Austin and Harper "are a common component of ASC regulations,"[78] require any ASC facility to have a written agreement in place with a nearby hospital in case of emergency. In contrast

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67. Hill, *supra* note 12, at 1123–24.
68. *Id.* at 1100.
69. Guttmacher TRAP 2020, *supra* note 13.
70. *Id.*
71. *Id.*
72. Hill, *supra* note 12, at 1124.
73. *Id.* at 1100.
74. *Id.* at 1111.
75. Guttmacher TRAP 2023, *supra* note 61.
76. *Id.*; Carrie Feibel, *Half of Texas Abortion Clinics Close After Restrictions Enacted*, NPR (July 18, 2014, 11:01 AM), https://www.npr.org/sections/health-shots/2014/07/18/332547328/half-of-texas-abortion-clinics-close-after-restrictions-enacted [https://perma.cc/8QDF-WWDU].
77. Guttmacher TRAP 2020, *supra* note 13.
78. Austin & Harper, *supra* note 62, at 1085.

to admitting privilege requirements, transfer agreements are facility-level policies and are generally viewed as easier to secure.

Overall, between 1970 and 2016, sixteen states enacted ASC restrictions, eighteen states enacted admitting privilege requirements, and seventeen enacted transfer agreement requirements.[79] Table 1 below summarizes the enactment, enforcement, and blocking of TRAP laws across the United States since 1970 in the three main categories at the focus of our study. As we will later discuss, for analysis purposes, we used enforcement times, rather than enactment times:

Table 1: TRAP Laws in the United States During the Study Period
[extracted from Austin & Harper (2019)]

	Ambulatory Surgical Center			**Admitting Privileges**			**Transfer Agreements**		
	Enacted	Enforced	Blocked	Enacted	Enforced	Blocked	Enacted	Enforced	Blocked
AK	1970	1970	-	-	-	-	1970	1970	-
FL	-	-	-	2016	2016	-	2016	2016	-
GA	1974	1974	-	1974	1974	-	1974	1974	-
IL	1973	1973	-	1973	1973	-	1973	1973	-
IN	1973	1973	-	2011	2011	-	1973	1973	-
KY	-	-	-	-	-	-	1998	1998	-
LA	-	-	-	2014	2014	2016	-	-	-
MD	2012	2012	-	-	-	-	-	-	-
MI	1999	1999	-	-	-	-	1999	1999	-
MO	2007	2007	2017	1986	1988	2017	2007	2007	2017
MS	2005	2005	-	2012	2013	2013	2012	2013	-
ND	-	-	-	2013	2014	-	-	-	-
OH	1999	1999	-	-	-	-	1999	1999	-
PA	2011	2012	-	2011	2012	-	2011	2012	-
RI	1973	1973	-	-	-	-	-	-	-
SC	1995	1996	-	1995	1996	-	1995	1996	-
TN	2015	2015	-	2012	2012	-	2015	2015	-
TX	2003	2004	-	2013	2013	2016	-	-	-
UT	-	-	-	1998	1998	2017	1998	1998	2017
VA	2011	2012	-	-	-	-	2011	2012	-
WI	-	-	-	2013	0	2015	1976	1976	-
States that enacted a TRAP law but did not enforce it:									
AL	-	-	-	2013	0	2014	-	-	-
AR	-	-	-	2015	0	2015	-	-	-
KS	2011	0	2011	2011	0	2011	2011	0	2011
OK	-	-	-	2014	0	2014	-	-	-

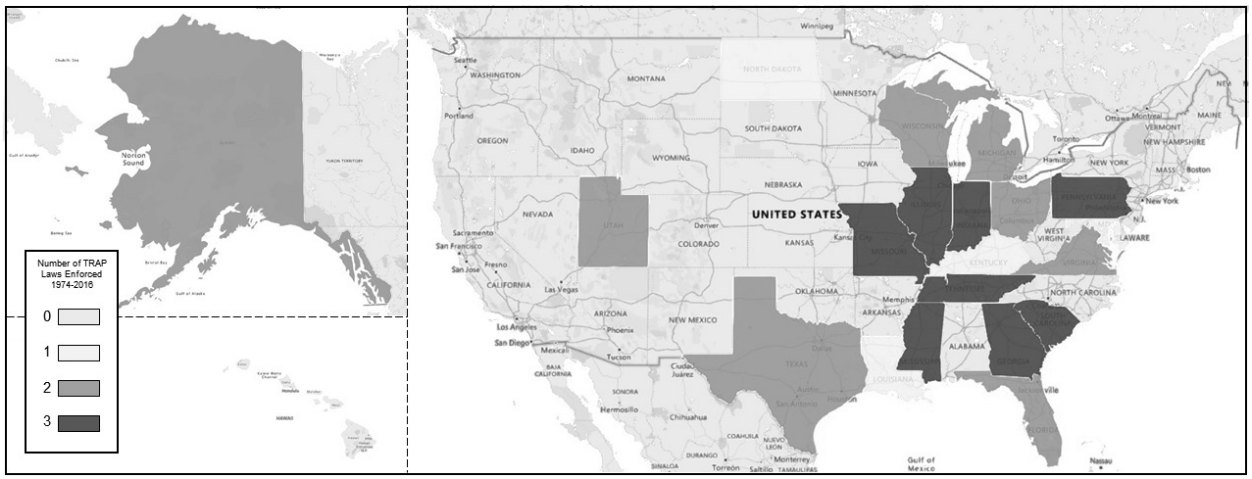
Figure 1A and Figure 1B below offer a visualization of the TRAP laws' enactment and enforcement distribution across states. The numbers represent the overall laws adopted among the three types discussed above. That is, red colored states enacted

79. *Id.* at 1087; *see also* Amalia W. Jorns, *Challenging Warrantless Inspections of Abortion Providers: A New Constitutional Strategy*, 105 COLUM. L. REV. 1563, 1565–67 (2005) (providing a background for the enactment of TRAP laws).

or enforced all three kinds of TRAP laws: ASCs, admitting privileges, and transfer agreements.

Figure 1A: Maximum Number of TRAP Laws Enacted between 1970–2016

Figure 1B: Maximum Number of TRAP Laws Enforced between 1974–2016



Despite lawmakers' claims that abortion restrictions promote the health and welfare of female citizens, scholars emphasized the true purpose of TRAP laws: shutting down the majority of abortion clinics in a given state and restricting women from accessing local abortion services.[80] By 2009, TRAP laws left Mississippi, North

80. Johnsen, *supra* note 12, at 1361–62. Moreover, currently there is no evidence that any of these laws improved women's or fetus' health sequelae following an induced abortion. If anything, there is suggestive evidence to the contrary. Mississippi, for example, which enforced all three TRAP laws discussed in this Article, has the highest infant mortality rates in the United States according to the CDC. *Infant Mortality Rates by State*, CDC (Sept. 30,

Dakota, and South Dakota "just one clinic away from being abortion free."[81] When Mississippi's Governor Phil Bryant signed an admitting privileges bill (House Bill 1390) in 2012, that would effectively close the state's last clinic, he revealed the intent behind the bill by declaring that he would "continue to work to make Mississippi abortion-free."[82]

Since establishing the "undue burden" framework in *Casey*, the U.S. Supreme Court has seldom intervened with the states' enactment of TRAP laws. Over the past four decades, women's access to abortions has steadily diminished, with the country seeing "more antichoice legislation proposed and enacted between 2010 and 2015 than the prior thirty years."[83] However, in 2016, the Supreme Court struck down two Texas TRAP laws that threatened to close nearly all of the state's remaining abortion clinics.[84] In *Whole Woman's Health v. Hellerstedt*, the Court considered the effects of Texas House Bill 2, which included an "admitting privileges requirement" and a "surgical-center requirement."[85] Writing for the majority, Justice Breyer crafted an "undue burden" balancing test, finding that neither provision of H.B. 2 promoted "medical benefits sufficient to justify the burdens upon access that each imposes," and that by "plac[ing] a substantial obstacle in the path of women seeking a previability abortion, each . . . violates the Federal Constitution."[86]

In reaching this conclusion, Justice Breyer relied on several statistical findings by the district court; mainly, that after the enforcement of H.B 2's admitting privileges requirement, the number of licensed abortion clinics reduced by half, and that if the surgical-center provision were to be enforced, only seven facilities would be left open in the state.[87] Additionally, the district court estimated that the "cost of coming into compliance" with the surgical-center requirement would likely exceed $1.5 million per clinic, and that for some facilities, modifying the existing building would be impossible.[88]

2022), https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm [https://perma.cc/Q38S-XEAR].

81. Johnsen, *supra* note 12, at 1387 (internal quotations omitted).

82. Hill, *supra* note 12, at 1091. The Fifth Circuit intervened and struck down H.B. 1390 in *Jackson Woman's Health Org. v. Currier*, holding that Mississippi's attempt to "shut down the state's last remaining abortion clinic" was unconstitutional. 760 F.3d 448, 449 (2014). In response to the State's argument that Mississippi citizens could easily procure an abortion in Tennessee, Louisiana, or Alabama, the Fifth Circuit declared that "courts do not look to the availability of abortions in neighboring states to determine whether a regulation imposed an undue burden." *Id.* at 456–57.

83. Chemerinsky & Goodwin, *supra* note 32, at 1193–94.

84. Hill, *supra* note 12, at 1090; *see* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 590 (2016). For a detailed discussion about the impact of *Whole Woman's Health v. Hellerstedt*, see John A. Robertson, Whole Woman's Health v. Hellerstedt *and the Future of Abortion Regulation*, 7 U.C. IRVINE L. REV. 623, 625 (2017) (predicting, in hindsight quite accurately, that "[t]he ultimate fate of *Hellerstedt* will thus depend on the speed at which justices retire, the views of new members, their willingness to reach out to eviscerate *Roe* and *Casey*, and how they go about unraveling those decisions").

85. 579 U.S. at 590.

86. *Id.* at 591.

87. *Id.* at 592.

88. *Id.* at 595.

Texas justified the restrictions as advancing women's health by ensuring that women have "easy access to a hospital should complications arise during an abortion procedure," however, the Court was unimpressed with these claims.[89] Justice Breyer noted that admitting privileges and surgical-center modifications brought "no such health-related benefit" as less than one-quarter of one percent of modern abortions result in death or serious complications.[90] The Court remarked that a woman is fourteen times more likely to die from childbirth than from receiving an abortion, and thus surgical-center standards for abortion clinics are unnecessary and promote no additional health benefits to patients.[91]

Justice Breyer also recognized the disproportionate impact that H.B. 2's regulations would place on "poor, rural, or disadvantaged women."[92] The Court noted that by potentially shutting down the majority of Texas abortion clinics, women would be forced to "travel long distances to get abortions in crammed-to-capacity super facilities."[93] For the first time, the U.S. Supreme Court articulated the unequal burdens that TRAP laws place on women who cannot afford to travel across state lines to receive reproductive services; a reality that the Court ignored in *Casey*.[94]

In 2020, the Supreme Court struck down a Louisiana TRAP law that was "substantially identical" to the Texas admitting privilege provision in *Whole Woman's Health*.[95] In *June Medical Services L.L.C. v. Russo*, the Court found that the regulation placed an undue burden on women's access to abortion because the law threatened to shut down two of the last three remaining abortion clinics in the State, and it offered no health benefits to patients.[96] Justice Breyer reiterated the undue burden balancing test in *Whole Woman's Health*, explaining that courts should independently review legislative justifications for an abortion regulation and balance the law's "'asserted benefits against the burdens' it imposes on abortion access."[97] While the law may not have imposed a substantial obstacle to *every* woman in Louisiana seeking abortion, the Court found that the undue burden placed on a particular group of women—mainly those that would have to travel far distances to reach one of the last remaining clinics—was enough to render the law unconstitutional on its face.[98]

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89. *Id.* at 610.

90. *Id.*

91. *Id.* at 618.

92. *Id.* at 594; Hill, *supra* note 12, at 1112.

93. *Whole Woman's Health*, 579 U.S. at 623.

94. Hill, *supra* note 12, at 1112; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 887 (1992) ("Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group.").

95. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

96. *Id.* at 2115.

97. *Id.* at 2112 (quoting *Whole Woman's Health*, 579 U.S. at 609).

98. *Id.* at 2132. *See also* Associated Press, *Texas Women Drive Hours for Abortions After New Law*, U.S. NEWS & WORLD REP. (Oct. 14, 2021), https://www.usnews.com/news/politics/articles/2021-10-13/we-have-to-be-heard-texas-women-travel-to-seek-abortions [https://perma.cc/5BD7-R3Q4] (describing difficulties women face in getting an abortion when TRAP laws are in place).

Despite the Supreme Court's recent efforts to reign in the most hostile anti-abortion restrictions, TRAP laws and other regulations continue to restrict women's ability to exercise their constitutional right to reproductive care. Since *Roe* was decided in 1973, the majority of states have passed over 1313 abortion restrictions.[99] According to the Guttmacher Institute, 2021 saw the "most devastating antiabortion legislative session in history" with 561 new regulations enacted across forty-seven states in a six-month period.[100] Six states are now down to one remaining abortion clinic, and Texas and Mississippi have recently passed legislation that would effectively end all access to abortions.[101]

II. THE EFFECTS OF TRAP LAWS ON WOMEN'S ECONOMIC STATUS—CURRENT EMPIRICAL RESEARCH

As discussed, the states' enactment of TRAP laws across the nation was intended to increase the burden on women to de facto exercise their right to reproductive freedom during the years in which it was still declared constitutionally protected in *Roe*. As it is often the case, the landscape of abortions is and always has been stratified by socioeconomic status. As such, while TRAP laws created new burdens on all American women seeking abortions, they have disproportionally affected poor women.[102]

TRAP laws have existed since 1970 and can be used to examine how restrictions to reproductive care affect women seeking abortions in different ways.[103] A recent survey of the scholarship around the macroeconomics of abortions showed, however, that most of the empirical work in this space investigated the effects of TRAP laws on demand for abortions.[104] According to these studies, the empirical evidence

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99. *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (June 14, 2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades [https://perma.cc/QN3P-W4PV].

100. *Id.*

101. Holly Yan, *These 6 States Have Only 1 Abortion Clinic Left. Missouri Could Become the First with Zero*, CNN: HEALTH, https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html [https://perma.cc/5SJP-XMV2] (June 21, 2019, 12:48 PM).

102. *See, e.g.*, Martha J. Bailey, Olga Malkova & Johannes Morling, *Do Family Planning Programs Decrease Poverty? Evidence from Public Census Data*, 60(2) CESIFO ECON. STUD. 312 (2014); Stephanie P. Browne & Sara LaLumia, *The Effects of Contraception on Female Poverty*, 33 J. POL'Y ANALYSIS & MGMT. 602 (2014).

103. *See* Austin & Harper, *supra* note 62, at 1084; Marshall A. Medoff, *State Abortion Policies, Targeted Regulation of Abortion Providers, and Abortion Demand*, 27 REV. POL'Y RSCH. 577, 580 (2010) (providing timeframe for first TRAP laws).

104. Yana van der Meulen Rodgers, Ernestina Coast, Samantha R. Lattof, Cheri Poss & Brittany Moore, *The Macroeconomics of Abortion: A Scoping Review and Analysis of the Costs and Outcomes*, 16(5) PLOS ONE 1 (2021) (noting impact of TRAP laws); Stanley K. Henshaw, Theodore J. Joyce, Amanda Dennis, Lawrence B. Finer & Kelly Blanchard, *Restrictions on Medicaid Funding for Abortions: A Literature Review*, GUTTMACHER INST. (2009); Rachel K. Jones, Mia R. S. Zolna, Stanley K. Henshaw & Lawrence B. Finer, *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSPS. ON SEXUAL &

indicates that Medicaid funding restrictions and the requirement for parental involvement reduce the abortion rate.[105] Moreover, studies have indicated that TRAP laws make it more difficult and costly for abortion providers to supply services.[106]

However, studies about the collateral effects of TRAP laws on women's life beyond the abortion itself—for example, the effects of abortion restrictions on women's socioeconomic status and economic opportunities—are few and far between. In fact, as suggested by Gammage, Joshi, and Rodgers: "The scholarly literature on the effects of women's fertility and reproductive health historically has had little engagement with women's access to the labor market, but that is beginning to change."[107]

Indeed, one can find empirical studies that show the connections between access to reproductive treatment and women's economic status, but these are mostly in the context of contraception.[108] For example, studies show that legal access to the pill has broad effects on women's choices, career investments, and lifetime wage earnings.[109] To illustrate a few: Goldin and Katz found the pill lowered the costs of engaging in long-term career investments and Bailey, Hershbein, and Miller found that women who had early legal access to the pill received an eight percent wage premium by age fifty, accounting for ten percent of the convergence of the gender wage gap during that time period.[110]

Even more limited is the work directly exploring the economic effects of access to abortions. In 2008, Diana Green Foster at the University of California San

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REPROD. HEALTH 6 (2008).

105. For a review of the literature, see Henshaw et al., *supra* note 104.

106. *Id.* A recent working paper also found that teen births in states that implemented TRAP laws increased by more than three percent relative to changes in states without these restrictions. This study also documented a downstream effect of TRAP laws on education. *See* Kelly M. Jones & Mayra Pineda-Torres, *TRAP'd Teens: Impacts of Abortion Providers Regulation on Fertility & Education* (IZA Discussion Paper Series No. 14837), https://docs.iza.org/dp14837.pdf [https://perma.cc/S9VA-R4DF].

107. Sarah Gammage, Shareen Joshi & Yana Van der Meulen Rodgers, *The Intersections of Women's Economic and Reproductive Empowerment*, 26 FEMINIST ECON. 1, 8 (2020).

108. For a comprehensive overview, see Martha J. Bailey & Jason M. Lindo, *Access and Use of Contraception and Its Effects on Women's Outcomes in the U.S.* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23465, 2017) (stating the importance of contraception on women's future). Bailey and Lindo argue that by being able to plan for a family, women were able to situate themselves in a better financial spot. As more women attended colleges and entered the professional job market, the ability to plan pregnancies and childbirth became even more important as women gained financial independence. Additional studies have empirically shown, for example, that access to the pill increased labor force participation by four percent for women twenty-six to thirty years of age and by two percent for women thirty-one to thirty-five years of age. Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q.J. ECON. 289 (2006).

109. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730 (2002); Bailey, *supra* note 108.

110. Goldin & Katz, *supra* note 109; Martha J. Bailey, Brad Hershbein & Amalia R. Miller, *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J.: APPLIED ECON. 225 (2012).

Francisco conducted one of the most comprehensive studies examining the economic effects of being admitted or denied an abortion. The study, later called "The Turnaway Study," was a prospective longitudinal study analyzing the effects of unintended pregnancy on women's lives over five years. It analyzed over 1000 women across thirty clinics in twenty-one states.[111] The goals of the study were to look at how being denied an abortion due to the facility's gestational age limit affected women's mental health, physical health, and socioeconomic status.[112] The research did not, however, focus specifically on the effects of TRAP laws. Moreover, methodologically, Foster and her team conducted biannual interviews to track the outcome of the participants.[113] The study is limited in its scope as it analyzes only 1000 women over two years.

As for the findings: Foster's study included a multidimensional set of findings, but on the socioeconomic effects of being denied an abortion, the study found that women who were denied an abortion had three times greater odds of being unemployed than women who obtained abortions, were less likely to be able to continue working at the same rate, and had almost four times greater odds of being below the federal poverty level.[114] Even with public assistance, it was not enough to meet the costs of having a child.[115]

Additional studies addressed the effects of abortions more broadly without directly addressing the effects of TRAP laws. For example, Kalist found that by reducing unwanted births, the legalization of abortion in the United States led to increased labor force participation rates for women, especially for single black women,[116] and Bloom found that lower fertility (instrumented by the legalization of abortion) increased women's labor supply and contributed positively to GDP growth.[117] Another survey-based study found that restrictions, such as those

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111. *The Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, https://www.ansirh.org/research/ongoing/turnaway-study [https://perma.cc/U33U-2KG4] (providing background of study). The Turnaway Study used data collected from women from thirty abortion facilities across the United States. *Id.*

112. *Id.* (noting types of questions asked). Notably, one of the most common reasons for seeking an abortion is financial difficulty that results in not being able to afford having a child. As previously mentioned, federally mandated parental leave does not exist in the United States and poses a significant financial burden on families where both parents must work to support the family.

113. *Id.* (describing length of study). This study was unique because other studies had not tracked women over such a long period of time. The study found that the detrimental impacts were both immediate and long lasting, since pregnancy immediately impacts women's abilities to get or retain a full-time job and childcare costs can be more than the average salary. *Id.*

114. *The Turnaway Study*, *supra* note 111.

115. *Id.* (stating financial and economic struggles women face after denied abortion).

116. David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to* Roe v. Wade, 25 J. LAB. RSCH. 503, 511–12 (2004).

117. *See generally* David E. Bloom, David Canning, Günther Fink & Jocelyn E. Finlay, *Fertility, Female Labor Force Participation, and the Demographic Dividend*, 14 J. ECON. GROWTH 79 (2009).

endorsed by TRAP laws, negatively impacted the treatment of women by causing delays, the need to travel long distances, and time away from work.[118]

Among the small number of studies investigating the effects of access to abortions on women's economic status, even fewer studies directly investigated the relationship between TRAP laws and women's financial opportunities. For example, Bhan, Kugler, Mahoney, and McGrew explored the impact of women's access to reproductive healthcare on labor market opportunities in the United States and found that lower access to contraceptives and abortions impacts job mobility, so that women in states with TRAP laws are less likely to move between occupations into higher-paying jobs.[119] Their important study, however, was limited in its scope as it studied the occupational change in one year only, from 2015 to 2016. Gammage, Joshi, and van der Meulen Rodgers posited that the cost of reproductive health access is increased by TRAP laws and suggested that economic empowerment of women and access to reproductive health are linked.[120] However, they state that the lack of data means that current studies are limited in their ability to look at further impacts of TRAP laws on women's economic empowerment and thus call for more research.[121] The most recent, and relevant, example found that the enactment of a TRAP law results in a decline in female entrepreneurship.[122]

In sum, while recent studies are finally engaging with questions related to the connections between women's reproductive rights and financial opportunities, the majority of these studies explore these questions through access to contraception. Few address the effects of access to abortions, and even fewer explore these questions through the prism of TRAP laws. Even those who do investigate the effects of TRAP laws utilize much smaller samples and shorter time periods than those used in our study. Finally, our Article offers a robust methodology to assess these relationships, and by doing so overcomes some of the challenges faced by previous studies.

Importantly, we make another connection currently overlooked by empirical and theoretical scholarship—the connections between TRAP laws and the gender pay gap. The pay gap refers to the phenomenon that women earn less than men in nearly all occupations; women earn approximately eighty-two cents for every dollar paid to

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118. Kelly Blanchard, Jill L. Meadows, Hialy R Gutierrez, Curtiss PS Hannum, Ella F. Douglas-Durham & Amanda J. Dennis, *Mixed-Methods Investigation of Women's Experiences with Second-Trimester Abortion Care in the Midwest and Northeast United States*, 96 CONTRACEPTION 401, 404 (2017).

119. Kate Bahn, Adriana Kugler, Melissa Holly Mahoney & Annie McGrew, *Do U.S. TRAP Laws Trap Women Into Bad Jobs?*, 26 FEMINIST ECON. 44 (2020) (furthering theory of the negative impact TRAP laws have on women). This study found that women in states with TRAP laws are less likely to move between occupations and into higher-paying jobs. However, women living in states with public funding for abortions have higher mobility when working full-time. *Id.*

120. Gammage et al., *supra* note 107, at 1 (discussing findings of study).

121. *Id.* at 3.

122. Jonathan Zandberg, *Family Comes First: Reproductive Health and the Gender Gap in Entrepreneurship*, 140 J. FIN. ECON. 838 (2021) (proposing effect of TRAP laws on female entrepreneurship as measure of economic impact).

a man.[123] Although this may not seem like a significant difference, the missing eighteen cents is significant over time.[124] Further, the effect is compounding when women move between jobs, as they will likely receive an offer based on the previous earnings, and women are less likely to ask for a raise than men.[125] There are many theories as to why the gender pay gap exists among those bearing the burden of childbirth and childcare. Among these theories, one can find societal and cultural expectations of women including theories that assume women are less able to handle a more senior position.[126]

Critics of the "gender pay gap" claim that this phenomenon is illegal, and therefore impossible due to the passing of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.[127] However, these laws are difficult to litigate because of the nature of bias against women, particularly women who are also mothers.[128] Moreover, balancing their family formation choices and career aspirations might push women to take lower paying jobs that are less demanding and require less hours. Given the decision in *Dobbs*, and the Supreme Court overturning *Roe* and *Casey*, it is more important than ever to understand the nature of abortion and the gender pay gap as it will continue to affect women in significant ways.

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123. Tom Spiggle, *The Gender Pay Gap: Why It's Still Here*, FORBES (May 25, 2021, 12:54 PM), https://www.forbes.com/sites/tomspiggle/2021/05/25/the-gender-pay-gap-why-its-still-here/?sh=31d963c67baf [https://perma.cc/9E9E-AT7A] (stating facts of gender pay gap in the United States). Even when adjusted for other factors besides gender, such as education, experience, location, and industry, the gap shrinks to two percent. However, the differences between white women and women of color are marked, as women of color make less than white women. *Id.*

124. *Id.* (discussing the effect of inflation on pay gap). Although inflation has increased over the past decade, the controlled wage gap has remained the same and in 2015, the wage gap was ninety-seven cents for every dollar a man made. *Id.*

125. *Id.* (addressing reasons why pay gap exists). Spiggle discusses that although women move jobs, they are more likely to look for jobs that do not necessarily have a wage increase as a benefit. For example, the ability to telecommute, flexible scheduling, or better family leave might outweigh a potential increase in wage as women are more likely to bear the burden of childcare. *Id.*

126. Elise Gould, Jessica Scheider & Kathleen Geier, *What Is the Gender Pay Gap and Is it Real?* ECON. POL'Y INST. (Oct. 20, 2016), https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/ [https://perma.cc/DD97-4A8U] (stating the criticism of gender pay gap discussion).

127. *See* Spiggle, *supra* note 123. Even though these Acts exist, the market control of an industry remains important. For example, as women's participation in a particular occupation rises, pay within that occupation falls, leading to a devaluation of that occupation and playing into the social idea that "women's work" is inherently less valuable. *Id.*

128. *See* Sonam Sheth, Madison Hoff, Marguerite Ward & Taylor Tyson, *These 8 Charts Show the Glaring Gap Between Men's and Women's Salaries in the US*, BUS. INSIDER, https://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3 [https://perma.cc/PMP6-3XB3] (Mar. 15, 2022, 11:01 AM) (noting cultural bias). According to a Senate report in 2016, employers might view motherhood as a "signal of lower levels of commitment and professional competence" as mothers put children before their careers while working fathers may be viewed as having an "increased work commitment and stability" because it is assumed that they have a family to support. *Id.*

This Article contributes to the literature that studies how improved reproductive healthcare affects women's career choices in general and, specifically, how TRAP laws affect the gender pay gap. It offers the first comprehensive analysis about the ways in which TRAP laws affect the pay gap and what that means for the current legal landscape.

The effect of TRAP laws on the gender gap has a direct impact on our understanding of the potential impact of the *Dobbs* case. [129] As mentioned, the State of Mississippi's brief argued that women's lives were bettered by the march of progress,[130] and the Mississippi Attorney General, Lynn Fitch, stated that "[i]n these last [fifty] years, . . . women have carved their own ways to achieving a better balance for success in their professional and personal lives."[131] Their argument hinges on the notion that because women are no longer burdened by sexism, a pay gap, or difficulties finding a profession, there is no need for abortions to begin with.[132] Although for the first time in history women outnumber men in college attendance, it seems too simplistic to claim that women's rights to reproductive care no longer need constitutional protection because women are able to balance a family and a professional life.[133] Given that TRAP laws have a significant impact on women's economic health, it is important to understand the extent to which they affect women's progress.

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129. *See* Adeel Hassan, *What to Know About the Mississippi Abortion Law Challenging* Roe v. Wade, N.Y. TIMES (May 6, 2022), https://www.nytimes.com/article/mississippi-abortion-law.html [https://perma.cc/9RLC-M663] (noting the importance of TRAP law impact on Supreme Court outcome).

130. Alisha Haridasani Gupta, *The Economic Reality Behind a Mississippi Anti-Abortion Argument*, N.Y. TIMES (Dec. 2, 2021), https://www.nytimes.com/2021/12/02/business/mississippi-abortion-law-economy.html?searchResultPosition=10 [https://perma.cc/747G-ALKF] (stating the economic argument raised by Mississippi).

131. *Id.* (noting Attorney General Finch's argument). Gupta states that although women are more economically independent than previously, pregnancy discrimination is still a significant issue and parental leave is still rare, as the United States is the only wealthy nation without paid maternity leave. *See id.*

132. *See id.* (restating Mississippi's position).

133. Jon Marcus, *Why Men Are the New College Minority*, ATLANTIC (Aug. 8, 2017), https://www.theatlantic.com/education/archive/2017/08/why-men-are-the-new-college-minority/536103/ [https://perma.cc/CFD3-B8L4] (noting women outweigh men in colleges); *see also* Kim Elsesser, *There Are More College-Educated Women than Men in the Workforce, But Women Still Lag Behind Men in Pay*, FORBES (July 2, 2019, 7:25 PM), https://www.forbes.com/sites/kimelsesser/2019/07/02/now-theres-more-college-educated-women-than-men-in-workforce-but-women-still-lag-behind-men-in-pay/?sh=2a2d8ae24c31 [https://perma.cc/P4QT-84VR] (furthering the argument that women outperform men in college but face the pay gap). Although college-educated women represent more than half of the workforce, women occupy less than seven percent of the top positions at companies and are not promoted at the same rate as their male counterparts. Specifically, the issue regarding upward mobility has found that lack of flexibility in childcare options requires women to choose between having a child and furthering their career, as there is no federally mandated paid parental leave. *See id.*

III. DATA

Our sample consists of a representative sample of the American population ages twenty to sixty-two between the years 1974 and 2016, totaling almost 4,000,000 observations.[134] We used data from the Current Population Survey (CPS), obtained from the Integrated Public Use Microdata Series (IPUMS) USA.[135] The survey is based on an annual sample of randomly selected individuals within a state. The CPS provides weights for each individual that indicate how many persons in the United States population are represented by a given person in a sample. Therefore, even though panel data for individuals is not available, using these weights in a weighted least square (WLS) regression generates a sample that represents the entire population of each state in a given year.

To assess women's access to reproductive care services, we constructed a TRAP laws Index. As mentioned, the index monitors three types of state-level TRAP laws as recorded by Austin and Harper, summarized in Table 1, and illustrated in Figures 1A and 1B above: ambulatory surgical center (ASC) laws, admitting privileges, and transfer agreements.[136] The TRAP laws Index increases by one once a TRAP law is enforced and decreases by one once blocked. Hence, the index varies from zero, when no TRAP laws are enforced in a specific year at a specific state, to three when all TRAP laws are enforced. Our index begins in 1974, which was the first full year that abortions became legal in the United States, and ends in 2016, which is the last full year with complete TRAP law data available. As noted, in constructing our model, we used dates in which TRAP laws were enforced, rather than enacted, given that the former is likely to have a much more meaningful effect on the behavior of individuals.

To account for micro-level factors that might confound our results and affect both a woman's propensity to terminate her pregnancy and her ability to participate in the labor market, we control for a set of individual-level characteristics provided by the CPS. We add a binary variable turning one if the individual is married,[137] a variable controlling for the number of children in a household, a binary variable turning one if the individual is a racial minority, a binary variable turning one if the individual is Hispanic, and a binary variable turning one if the individual has a college degree.

To account for macro-level economic characteristics that might impact both the propensity for seeking an abortion and an individual's total income, we included the annual state-level gross domestic product (GDP) growth as reported by the Bureau

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134. As discussed earlier, even the few studies that did investigate the effects of TRAP laws on women's financial status used a much smaller sample size, and for much shorter periods of time. *See supra* Part II.

135. SARAH FLOOD, MIRIAM KING, RENAE RODGERS, STEVEN RUGGLES, J. ROBERT WARREN & MICHAEL WESTBERRY, INTEGRATED PUBLIC USE MICRODATA SERIES, CURRENT POPULATION SURVEY: VERSION 9.0 [DATASET], IPUMS (2021), https://doi.org/10.18128/D030.V9.0 [https://perma.cc/YQ34-6P6S].

136. Austin & Harper, *supra* note 62, at 1085.

137. *See* J. E. Lycett & R. I. M. Dunbar, *Abortion Rates Reflect the Optimization of Parental Investment Strategies*, 266 PROC. ROYAL SOC'Y LOND. B, 2355, 2356 (1999) (showing that there is a negative correlation in the probability of getting an abortion and being married vs. single over time).

of Economic Analysis.[138] To account for the potential effect of the political climate, we included the fraction of Republican senators representing that state at the U.S. Senate for a given year as reported on the Charles Stewart's Congressional Data Page.[139]

Table 2 below provides summary statistics for the main variables of interest: total annual income, proportion of individuals staying out of the labor force due to housework, and average weeks worked in the prior year. Each variable was divided into three categories: all individuals, individuals at childbearing age (twenty to forty-five), and individuals above childbearing age (forty-six to sixty-three).

138. *See GDP by State*, U.S. BUREAU OF ECONOMIC ANALYSIS, https://www.bea.gov/data/gdp/gdp-state [https://perma.cc/5HN8-3NQU] (Jan. 13, 2023).

139. Garrison Nelson, *Congressional Committees*, *80th–102nd Congresses*, CHARLES STEWART'S CONG. DATA PAGE, http://web.mit.edu/17.251/www/data_page.html#1 [https://perma.cc/2UC3-EEZK]; Charles Stewart III & Johnathan Woon, *Congressional Committees, Modern Standing Committees, 103rd–115th Congresses*, CHARLES STEWART'S CONG. DATA PAGE, http://web.mit.edu/17.251/www/data_page.html#1 [https://perma.cc/M4D8-3DP8].

Table 2: Summary Statistics

	Average	Std. Dev.	Min	Median	Max	N
Total annual income						
Individuals with Income						
Male	37,269	48,970	1	25,019	1,712,933	1,830,813
Female	22,156	30,127	1	14,400	1,650,024	1,810,335
Weighted Average	29,874	41,544	1	20,000	1,712,933	3,641,148
Individuals with Income at Childbearing Age						
Male	32,435	41,752	1	22,880	1,712,933	1,216,714
Female	20,193	26,926	1	13,224	1,650,024	1,207,527
Weighted Average	26,485	35,858	1	18,000	1,712,933	2,424,241
Individuals with Income above Childbearing Age						
Male	46,846	59,644	1	32,000	1,700,287	614,099
Female	25,899	35,133	1	16,572	1,510,004	602,808
Weighted Average	36,463	50,156	1	24,000	1,700,287	1,216,907
All Individuals						
Male	35,566	48,488	(29,647)	24,020	1,712,933	1,904,474
Female	19,543	29,196	(25,897)	11,800	1,650,024	2,055,640
Weighted Average	27,411	40,651	(29,647)	17,503	1,712,933	3,960,114
All Individuals at Childbearing Age						
Male	30,801	41,318	(29,117)	21,069	1,712,933	1,269,836
Female	17,773	26,109	(25,897)	10,920	1,650,024	1,373,373
Weighted Average	24,222	35,096	(29,117)	16,000	1,712,933	2,643,209
All Individuals above Childbearing Age						
Male	45,145	59,232	(29,647)	30,243	1,700,287	634,638
Female	22,940	34,094	(19,998)	13,404	1,510,004	682,267
Weighted Average	33,671	49,187	(29,647)	21,008	1,700,287	1,316,905

	Average	Std. Dev.	Min	Median	Max	N
Proportion of individuals staying out of the labor force due to housework						
All Individuals						
Male	0.07%	2.57%	-	-	-	1,904,474
Female	7.78%	26.79%	-	-	-	2,055,640
Weighted Average	3.99%	19.58%	-	-	-	3,960,114
All Individuals at Childbearing Age						
Male	0.05%	2.32%	-	-	-	1,269,836
Female	7.17%	25.79%	-	-	-	1,373,373
Weighted Average	3.65%	18.74%	-	-	-	2,643,209
All Individuals above Childbearing Age						
Male	0.09%	3.02%	-	-	-	634,638
Female	8.96%	28.57%	-	-	-	682,267
Weighted Average	4.68%	21.11%	-	-	-	1,316,905
Average weeks worked in prior year						
All Individuals						
Male	41.7	18.5	-	52.0	52.0	1,867,553
Female	33.1	22.9	-	52.0	52.0	2,014,986
Weighted Average	37.4	21.3	-	52.0	52.0	3,882,539
All Individuals at Childbearing Age						
Male	42.3	17.7	-	52.0	52.0	1,245,686
Female	33.7	22.4	-	52.0	52.0	1,347,133
Weighted Average	38.0	20.6	-	52.0	52.0	2,592,819
All Individuals above Childbearing Age						
Male	40.7	19.9	-	52.0	52.0	621,867
Female	32.0	23.9	-	52.0	52.0	667,853
Weighted Average	36.2	22.5	-	52.0	52.0	1,289,720

IV. METHODOLOGY

Our primary strategy employs a dynamic difference-in-differences analysis based on the method used in Zandberg's 2021 article.[140]

We examined the following difference-in-differences fixed effects regression:

$$Y_{i,s,t} = \alpha_s + \gamma_t + \beta TRAP_{s,t} \times Female_i \times Age[20-45]_i + \delta_1 X_i + \delta_2 Z_{s,t} + \varepsilon_{i,s,t},$$

where subscript *s* indexes states, *t* indexes years, and *i* indexes individuals. In three separate analyses, $Y_{i,s,t}$ is either the natural logarithm of the individual's total income (Ln(Total Income)$_{i,s,t}$), a binary variable turning one if the individual is not in the labor force due to housework, or the number of weeks worked in the prior year. $TRAP_{s,t}$ is the state-year level index mapping the enforcement of TRAP laws in the United States, $Female_i$ is a binary variable turning one if the individual is a female, and *Age*[20–45] is a binary variable turning one if the individual is of childbearing age. Hence, our coefficient of interest, β, measures the effect of a TRAP law enforcement on women of childbearing age compared to the rest of the population.

X_i is a vector of individual-level characteristics (number of children, a binary variable turning one if married, a binary variable turning one if the individual is a racial minority, a binary variable turning one if the individual is Hispanic, and a binary variable turning one if the individual has a college degree), and $Z_{s,t}$ is a vector of macro-level controls (State GDP growth and the fraction of Republican senators representing the state in the U.S. Senate). We also included state (α_s) and year (γ_t) fixed effects to absorb any aggregate time trends and any state-level, time-invariant heterogeneity that could drive our results, and all the interactions between the variables *TRAP*, *Female*, and *Age* [20-45]. Standard errors were clustered at the state and year level.

Through this model, we assess the effects of TRAP laws on one's income, propensity for being employed, and the number of weeks worked per year. Comparing women at childbearing age to a control group—made of individuals that should not be affected by restrictions to reproductive care—i.e., women above childbearing age and men—following the enforcement of a TRAP law is the essence of our difference-in-differences setting. A significant coefficient in economic magnitude and statistical significance following an exogenous shock, such as the enforcement of a TRAP law, combined with micro- and macro-level controls of potential confounders, and state and year fixed effects, strengthens the robustness of our results.

To further test the robustness of our model, we ran a series of additional tests. First, we ran all our models with and without controls and with and without the weights provided by the survey. We then assessed the extensive margin of our results by restricting our sample to women with net positive income. To assess whether the

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140. *See* Zandberg, *supra* note 122, at 839, 842–43. Differences-in-differences is a quasi-experimental research design often used by social scientists to assess the causal relationship between the dependent and independent variables. The model assesses the differences between trends over time after exposure to an exogenous shock. *See id.* We treat TRAP law enforcement as our exogenous shock.

relationship between income and access to reproductive care is driven by women sorting[141] into less demanding professions, we added industry fixed effects to our regressions. Finally, we test the robustness of our results regarding choice of age by redefining our reproductive age range to twenty to forty and rerunning our baseline analyses using this range.[142]

V. FINDINGS

Table 3 serves as our baseline analysis, in which we regressed individuals' income on TRAP law enforcement. We see that every additional TRAP law is associated with a 6.5% to 4.9% drop in the total income of women at childbearing age compared to the rest of the population. This difference is statistically significant at the 95% level. Model 4, our preferred weighted model, which includes the full set of controls and fixed effects, indicates that each additional TRAP law is associated with a drop of 4.9% of the total income of women at childbearing age compared to the rest of the population.

141. For the meaning of "sorting" in the economic literature, see *infra* note 143.

142. We also tested for the existence of pre-trends by interacting relative-year variables with our gender and childbearing age variables in a difference-in-differences setting, similar to the one we ran in the full-fledged model, i.e., Model 4. *See infra* Table 3. We replaced the single triple interaction with binary variables representing single years pre- and post-enforcement. We found no evidence for the existence of pre-trends in our data. Unpublished data on file with the authors.

Table 3: Baseline Analysis—20–45 Age Group—1974–2016

	Model 1	Model 2	Model 3	Model 4
Female x Age 20–45 x	-0.0646**	-0.0506**	-0.0652**	-0.0492**
TRAP Index	(0.0242)	(0.0203)	(0.0262)	(0.0218)
TRAP Index	-0.00326	0.00745	-0.0106	0.00647
	(0.0250)	(0.0205)	(0.0250)	(0.0202)
Female	-1.723***	-1.659***	-1.688***	-1.605***
	(0.114)	(0.104)	(0.117)	(0.105)
Female x TRAP Index	0.0960*	0.107**	0.0956*	0.0994**
	(0.0522)	(0.0441)	(0.0504)	(0.0418)
Age 20–45	-0.382***	-0.470***	-0.324***	-0.385***
	(0.0257)	(0.0326)	(0.0279)	(0.0321)
Age 20–45 x TRAP Index	-0.00117	-0.00467	-0.00257	-0.00919
	(0.0121)	(0.0131)	(0.0120)	(0.0127)
Female x Age 20–45	0.207***	0.280***	0.170***	0.223***
	(0.0522)	(0.0475)	(0.0626)	(0.0568)
Married			-0.136***	-0.0568
			(0.0430)	(0.0385)
Num. of Children			-0.00553	0.00304
			(0.00791)	(0.00769)
Racial Minority			-0.428***	-0.467***
			(0.0260)	(0.0230)
Hispanic			-0.736***	-0.757***
			(0.0527)	(0.0548)
College Degree			1.135***	1.178***
			(0.0348)	(0.0340)
Fraction Republican			0.0303	0.0199
			(0.0408)	(0.0404)
State GDP Growth			0.755	0.866*
			(0.563)	(0.494)
Observations	3,989,267	3,989,130	3,945,257	3,945,166
R-squared	0.113	0.095	0.148	0.131
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Weighted	No	Yes	No	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 3: This table contains a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is the natural logarithm of the subject's total income (Ln(Total Income)). In model 1, Ln(Total Income) is regressed against the triple interaction Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a binary variable turning one if the subject is a female, Age 20–45 is a binary turning one if the subject's age is 20–45, and TRAP Index maps the number of TRAP laws enforced in the state. In model 2, we add the survey's weights. In model 3, we unweigh the model and add the subject's number of children, and binary variables turning one if married, a racial minority, if Hispanic, or if has a college degree. We also include macro-level controls, namely the state's number of Republican senators that year and the state's annual GDP growth. In model 4, we test the full-fledged, weighted, regression. Standard errors are clustered at the state and year level.

Figure 2 below illustrates the relationship we find in Table 3. It plots the drop in income for women between twenty and forty-five as TRAP laws are enforced (either 1, 2, or 3 TRAP laws) compared to states without TRAP laws (=0 at the left-hand side of the figure). We see a persistent drop in income with the enforcement of TRAP laws, compared to states without TRAP laws. In the latter states, women's income is systematically higher.

Figure 2: Women's Income in States Enforcing TRAP Laws

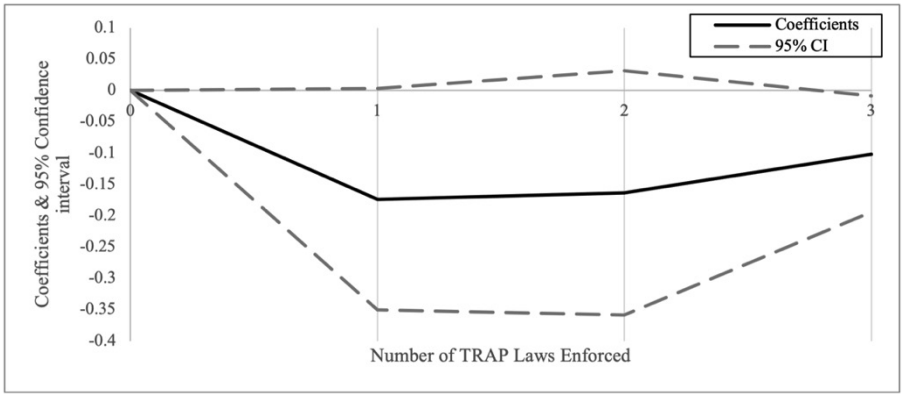

Figure 2: The figure plots the coefficients and 95% confidence intervals of the triple interactions Female x Age 20–45 x TRAP index=n [n=1, 2, 3] regressed against Ln(Total Income) in the full-fledged model (Model 4). The coefficients plot the drop in income when either one, two, or three TRAP laws were enforced relative to a state-year in which no TRAP laws were enforced.

In order to further assess the relationship between TRAP laws and the gender pay gap, we limited our sample only to individuals with income as a proxy for individuals in the work force, and once again regressed individuals' income against our TRAP law enforcement index. Table 4 summarizes the findings. We can now see that TRAP law enforcement remains associated with a drop in income for women at childbearing age compared to the rest of the population. The change in income, however, is dropping from 1.2% to 2.1%. As we will discuss later, our interpretation is that sorting in and out of the labor force might be a significant factor driving the negative association between access to reproductive care and income.[143]

143. Sorting is a general term used to describe an economic effect with an ambiguous cause. In our example, as we will discuss later, our negative coefficient can be driven by either women choosing not to work or employers choosing not to hire them. *See generally* Jan Eeckhout, *Sorting in the Labor Market*, 10 ANN. REV. ECON. 1 (2018).

Table 4: Baseline Analysis—Subjects with Income—20–45 Age Group—1974–2016

	Model 1	Model 2	Model 3	Model 4
Female x Age 20–45 x TRAP Index	-0.0212*	-0.0133**	-0.0212*	-0.0122**
	(0.0115)	(0.00528)	(0.0120)	(0.00593)
TRAP Index	-0.0108	-0.00927	-0.0117	-0.00541
	(0.0139)	(0.0129)	(0.0136)	(0.0126)
Female	-0.966***	-0.943***	-0.941***	-0.910***
	(0.0510)	(0.0499)	(0.0504)	(0.0487)
Female x TRAP Index	0.0363	0.0414*	0.0356	0.0364*
	(0.0251)	(0.0231)	(0.0239)	(0.0216)
Age 20–45	-0.248***	-0.288***	-0.210***	-0.238***
	(0.0111)	(0.0123)	(0.00994)	(0.00978)
Age 20–45 x TRAP Index	0.00517	0.00323	0.00354	-0.000210
	(0.00588)	(0.00576)	(0.00528)	(0.00504)
Female x Age 20–45	0.120***	0.163***	0.0840***	0.117***
	(0.0214)	(0.0174)	(0.0239)	(0.0198)
Married			0.0244	0.0561***
			(0.0155)	(0.0144)
Num. of Children			0.00775**	0.0112***
			(0.00358)	(0.00343)
Racial Minority			-0.127***	-0.132***
			(0.00996)	(0.00756)
Hispanic			-0.221***	-0.229***
			(0.0196)	(0.0204)
College Degree			0.684***	0.705***
			(0.0122)	(0.0104)
Fraction Republican			0.0341**	0.0309**
			(0.0144)	(0.0140)
State GDP Growth			-0.00764	-0.180
			(0.212)	(0.230)
Observations	3,681,839	3,681,708	3,641,234	3,641,148
R-squared	0.196	0.178	0.232	0.219
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Weighted	No	Yes	No	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 4: This table contains a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is the natural logarithm of the subject's total income (ln(income)). In model 1, ln(income) is regressed against the triple interaction Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a

binary variable turning one if the subject is a female, Age 20–45 is a binary variable turning one if the subject's age is 20–45, and TRAP Index maps the number of TRAP laws enforced in the state. In model 2, we add the survey's weights. In model 3, we unweigh the model and add the subject's number of children, and binary variables turning one if married, if a racial minority, if Hispanic, or if has a college degree. We also include macro-level controls, namely the states' number of republican senators that year and the state's annual GDP growth. In model 4, we test the full-fledged, weighted regression. All the samples are restricted to individuals with a positive income. Standard errors clustered at the state and year level.

To better assess our interpretation, we used an additional model, this time including industry fixed effects. As observed in Table 5, the same drop in income appears with the inclusion of the industry fixed effects. This suggests that there might also be sorting into specific industries once a TRAP law is enforced. Hence, a possible channel through which abortion restrictions affect women's earnings is through the transition into less demanding industries.

Table 5: Baseline Analysis—20–45 Age Group—with Industry FE—1974–2016

	Model 1	Model 2	Model 3	Model 4
Female x Age 20–45 x	-0.0272***	-0.0169**	-0.0305***	-0.0193**
TRAP Index	(0.00921)	(0.00700)	(0.0108)	(0.00830)
TRAP Index	0.0146	0.0287**	0.00611	0.0235**
	(0.0132)	(0.0129)	(0.0123)	(0.0106)
Female	-1.011***	-0.964***	-0.983***	-0.923***
	(0.0637)	(0.0594)	(0.0661)	(0.0612)
Female x TRAP Index	0.0404*	0.0383**	0.0437**	0.0382**
	(0.0206)	(0.0164)	(0.0207)	(0.0164)
Age 20–45	-0.624***	-0.700***	-0.624***	-0.682***
	(0.0200)	(0.0236)	(0.0225)	(0.0237)
Age 20–45 x TRAP Index	-0.00318	-0.00725	-0.00297	-0.00915
	(0.00827)	(0.0102)	(0.00873)	(0.0106)
Female x Age 20–45	0.153***	0.205***	0.146***	0.187***
	(0.0257)	(0.0239)	(0.0312)	(0.0283)
Married			-0.220***	-0.160***
			(0.0361)	(0.0317)
Num. of Children			0.0169***	0.0206***
			(0.00486)	(0.00458)
Racial Minority			-0.259***	-0.300***
			(0.0168)	(0.0151)
Hispanic			-0.508***	-0.545***
			(0.0549)	(0.0560)
College Degree			0.630***	0.649***
			(0.0121)	(0.0107)
Fraction Republican			0.0257	0.0118
			(0.0305)	(0.0302)
State GDP Growth			0.430	0.640*
			(0.418)	(0.346)
Observations	3,989,267	3,989,130	3,945,257	3,945,166
R-squared	0.404	0.388	0.416	0.399
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Industry FE	Yes	Yes	Yes	Yes
Weighted	No	Yes	No	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 5: This table contains a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is the natural logarithm of the subject's total income (Ln(Total Income)). In model 1, Ln(Total Income) is regressed against the triple interaction Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a binary variable turning one if the subject is a female, Age 20–45 is a binary turning one if the subject's age is 20–45, and TRAP Index maps the number of TRAP laws enforced in the state. In model 2, we add the survey's weights. In model 3, we unweigh the model and add the subject's number of children, and binary variables turning one if the subject is married, a racial minority, Hispanic, or has a college degree. We also include macro-

level controls, namely the state's number of Republican senators that year, and the state's annual GDP growth. In model 4, we test the full-fledged, weighted regression. All regressions include industry FE. Standard errors clustered at the state and year level.

Given our findings thus far, and in an effort to better understand the phenomenon of sorting we identified, we once again restrict the sample to individuals with positive income and also include industry fixed effects. Table 6 summarizes the findings. The weak and statistically insignificant association between the enforcement of a TRAP law and the individual's income suggests the sorting and employment prospect is what drives our results rather than an arbitrary drop in income. Our interpretation of these results is that a combination of selection out of the labor market and into specific professions following a TRAP law enforcement, affects women at childbearing age more than the rest of the population.

Table 6: Baseline Analysis—20–45 Age Group—With Industry FE & Income—1974–2016

	Model 1	Model 2	Model 3	Model 4
Female x Age 20–45 x TRAP Index	-0.00967	-0.00227	-0.0113*	-0.00337
	(0.00594)	(0.00260)	(0.00656)	(0.00263)
TRAP Index	-0.00167	0.00204	-0.00406	0.00277
	(0.00948)	(0.00937)	(0.00901)	(0.00869)
Female	-0.728***	-0.713***	-0.699***	-0.675***
	(0.0297)	(0.0290)	(0.0297)	(0.0287)
Female x TRAP Index	0.0179	0.0174	0.0194	0.0166
	(0.0146)	(0.0134)	(0.0143)	(0.0128)
Age 20–45	-0.355***	-0.389***	-0.351***	-0.377***
	(0.00759)	(0.00669)	(0.00976)	(0.00856)
Age 20–45 x TRAP Index	0.00516	0.00293	0.00456	0.000952
	(0.00337)	(0.00450)	(0.00328)	(0.00449)
Female x Age 20–45	0.0905***	0.125***	0.0748***	0.103***
	(0.0125)	(0.00993)	(0.0134)	(0.0104)
Married			-0.0648***	-0.0358***
			(0.0137)	(0.0125)
Num. of Children			0.0146***	0.0159***
			(0.00298)	(0.00276)
Racial Minority			-0.0767***	-0.0861***
			(0.00945)	(0.00985)
Hispanic			-0.152***	-0.167***
			(0.0241)	(0.0238)
College Degree			0.471***	0.483***
			(0.00897)	(0.00781)
Fraction Republican			0.0274**	0.0223*
			(0.0120)	(0.0121)
State GDP Growth			-0.0833	-0.157
			(0.167)	(0.180)
Observations	3,681,839	3,681,708	3,641,234	3,641,148
R-squared	0.402	0.389	0.416	0.405
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Industry FE	No	Yes	No	Yes
Weighted	3,681,839	3,681,708	3,641,234	3,641,148

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 6: This table contains a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is the natural logarithm of the subject's total income (Ln(Total Income)). In model 1, Ln(Total Income) is regressed against the triple interaction

Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a binary variable turning one if the subject is a female, Age 20–45 is a binary variable turning one if the subject's age is 20–45, and TRAP Index maps the number of TRAP laws enforced in the state. In model 2, we add the survey's weights. In model 3, we unweigh the model and add the subject's number of children, and binary variables turning one if the subject is married, a racial minority, Hispanic, or has a college degree. We also include macro-level controls, namely the state's number of Republican senators that year and the state's annual GDP growth. In model 4, we test the full-fledged, weighted regression. All the samples are restricted to individuals with a positive income, and all regressions include industry FE. Standard errors clustered at the state and year level.

The findings in Tables 4, 5, and 6 have offered a few indications with regards to the mechanisms generating the effects we identify in Table 3, that is, our attempts to understand not only *whether* but also *how* TRAP laws widen the gender pay gap for women in childbearing age. We offer two hypotheses—first, that TRAP laws are pushing women out of the work force, and second, that they push them into lower-paying jobs.

To further assess our hypotheses and understand whether the results are driven by childbearing-age women's participation in the workforce, we first replace our dependent variable with two variables: a binary variable turning one if the subject was not in the labor force due to housework and another continuous variable reflecting the number of weeks worked in the prior year.

Table 7 summarizes the findings for our first test—subject not in the labor force due to housework. As presented in the full-fledged model (model 4) of Table 7, an enforcement of a TRAP law leads to an 11.3% rise in the propensity that a woman at childbearing age will drop out of the workforce due to housework compared to the rest of the population. The increased propensity was calculated by dividing the coefficient (0.00813) by the mean propensity of women at childbearing age as reported in Table 1 (7.17%).

Table 7: Not in Labor Force Due to Housework—1974–2016

	Model 1	Model 2	Model 3	Model 4
Female x Age 20–45 x TRAP Index	0.00822**	0.00797***	0.00840**	0.00813**
	(0.00341)	(0.00293)	(0.00355)	(0.00304)
TRAP Index	0.00649	0.00699	0.00744	0.00750
	(0.00494)	(0.00436)	(0.00513)	(0.00448)
Female	0.110***	0.100***	0.114***	0.102***
	(0.0271)	(0.0253)	(0.0280)	(0.0259)
Female x TRAP Index	-0.0224*	-0.0224**	-0.0228*	-0.0225**
	(0.0112)	(0.0102)	(0.0113)	(0.0103)
Age 20–45	-0.00597***	-0.00522***	-0.00434**	-0.00289*
	(0.00167)	(0.00164)	(0.00171)	(0.00165)
Age 20–45 x TRAP Index	-0.000227	-0.0000327	-0.000396	-0.000144
	(0.000683)	(0.000537)	(0.000857)	(0.000608)
Female x Age 20–45	-0.0242***	-0.0225***	-0.0299***	-0.0277***
	(0.00758)	(0.00728)	(0.00904)	(0.00859)
Married			0.0208***	0.0171***
			(0.00538)	(0.00460)
Num. of Children			0.00901***	0.00821***
			(0.00207)	(0.00198)
Racial Minority			-0.0000417	-0.00110
			(0.000946)	(0.000766)
Hispanic			0.0101***	0.00718***
			(0.00298)	(0.00228)
College Degree			-0.0141***	-0.0125***
			(0.00363)	(0.00330)
Fraction Republican			-0.00216	-0.00270
			(0.00249)	(0.00226)
State GDP Growth			-0.0257	-0.0461
			(0.0210)	(0.0337)
Observations	4,004,280	4,004,142	3,960,205	3,960,114
R-squared	0.178	0.175	0.186	0.182
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Weighted	No	Yes	No	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 7: This table contains a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is a binary variable turning one if the individual is not in the labor force due to housework. In model 1, it is regressed against the triple interaction Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a binary variable turning one if the subject is a female, Age 20–45 is a binary variable turning one if the subject's age is 20–45, and TRAP Index maps the number

of TRAP laws enforced in the state. In model 2, we add the survey's weights. In model 3, we unweigh the model and add the subject's number of children, and a binary variable turning one if married, a racial minority, Hispanic, or has a college degree. We also include macro-level controls, namely the state's number of Republican senators that year, and the state's annual GDP growth. In model 4, we test the full-fledged, weighted regression. Standard errors clustered at the state and year level.

Figure 3 below illustrates the relationship found in Table 7 between women at childbearing age reporting about not being part of the labor force in states that enforced TRAP laws. We see a constant increase in such reporting in states that enforced TRAP laws compared to states without TRAP laws (=0 at the left-hand side of the figure). In the latter states, the propensity not to be in the labor force due to housework is systematically lower.

Figure 3: Propensity Not to be in Labor Force in States that Enforced TRAP Laws

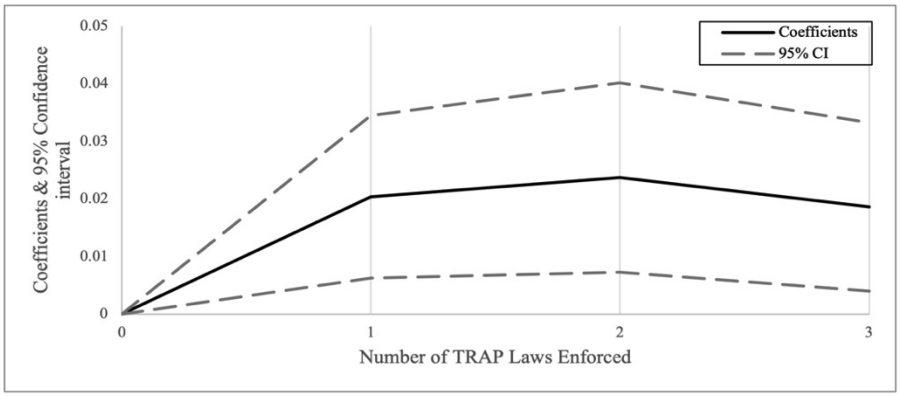

Figure 3: The figure plots the coefficients and ninety-five percent confidence intervals of the triple interactions Female x Age 20–45 x TRAP index=n [n=1, 2, 3] regressed against the binary variable indicating when not in the labor force due to housework in the full-fledged model. The coefficients plot the increased propensity of staying home due to housework when either one, two, or three TRAP laws were enforced relative to a state-year in which no TRAP laws were enforced. We see a constant and persistent rise in the propensity with a ninety-five percent statistical significance.

Table 8 summarizes the findings for our second test—number of weeks worked in the prior year. As reported in model 4 of Table 8, the enforcement of a TRAP law led to a one percent decrease in the number of weeks worked annually compared to the rest of the population, calculated by dividing the coefficient (-0.318) by the mean reported in Table 2 (33.2).

Table 8: Total Weeks Worked Annually Among Employed Individuals—1974–2016

	Model 1	Model 2	Model 3	Model 4
Female x Age 20–45 x	-0.369**	-0.351**	-0.352**	-0.318**
TRAP Index	(0.142)	(0.144)	(0.147)	(0.147)
TRAP Index	-0.289	-0.260	-0.294	-0.242
	(0.222)	(0.191)	(0.216)	(0.196)
Female	-9.538***	-9.146***	-9.116***	-8.667***
	(0.721)	(0.660)	(0.720)	(0.654)
Female x TRAP Index	0.697*	0.811**	0.701**	0.761**
	(0.346)	(0.311)	(0.330)	(0.291)
Age 20–45	1.771***	1.532***	2.663***	2.603***
	(0.227)	(0.259)	(0.230)	(0.253)
Age 20–45 x TRAP Index	0.0476	0.0749	0.0189	0.0503
	(0.153)	(0.145)	(0.146)	(0.144)
Female x Age 20–45	0.0321	0.420	-0.376	-0.105
	(0.390)	(0.352)	(0.451)	(0.410)
Married			2.152***	2.477***
			(0.216)	(0.224)
Num. of Children			-0.284***	-0.225**
			(0.0939)	(0.101)
Racial Minority			-3.250***	-3.300***
			(0.295)	(0.265)
Hispanic			-2.693***	-2.456***
			(0.314)	(0.326)
College Degree			5.845***	6.195***
			(0.244)	(0.245)
Fraction Republican			0.0744	0.118
			(0.154)	(0.156)
State GDP Growth			7.204	8.624**
			(4.307)	(3.900)
Observations	3,926,289	3,926,158	3,882,623	3,882,539
R-squared	0.062	0.052	0.084	0.076
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Weighted	No	Yes	No	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 8: This table is a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is the number of weeks the subject worked annually. In model 1, the number of weeks are regressed against the triple interaction Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a binary variable turning one if the subject is a female, Age 20–45 is a binary turning one if the subject's age is 20–40, and TRAP Index maps the number of TRAP laws enforced in the state. In model 2, we add the survey's weights. In model 3, we unweigh the model and add the subject's number of children, a binary variable turning one if married, if a racial minority, if Hispanic, and if has a college degree. We also include macro-level controls, namely the state's number

of Republican senators that year and the state's annual GDP growth. In model 4, we test the full-fledged, weighted regression. All the samples are restricted to individuals with a positive income. Standard errors are clustered at the state and year level.

Lastly, to further understand the mechanisms driving our baseline results, we ranked all 238 industries listed in the data by the average income of women of childbearing age (20 to 45). We then created four binary variables that turned one if the individual works in one of the top ten, twenty, thirty, or forty industries in terms of income. In other words—the first binary variable indicates whether an individual is working in one of the ten most lucrative professions for women at childbearing age, the second indicates whether an individual works in one of the twenty most lucrative industries, and so on. We then regressed these variables in four separate regressions using the full-fledged model. Our coefficient of interest, the coefficient of the triple interaction Female x Age 20–45 x TRAP index, measures the relative propensity that a woman of childbearing age works in these industries. We repeated this analysis by replacing the four dependent variables with binary variables turning one if an individual works in one of the bottom ten, twenty, thirty, or forty industries in terms of income.

Two things need to happen to support our hypothesis that TRAP laws widen the gender pay gap by pushing women into less lucrative jobs. First, our coefficient of interest should be negative in the first round of analysis (the propensity for working in one of the most lucrative professions) and positive in the second round of analysis (the propensity for working in one of the least lucrative professions). A negative coefficient suggests that the propensity to work in a lucrative job decreases with the enforcement of TRAP laws and vice versa with regard to the least lucrative jobs. Second, we should see diminishing economic magnitudes as we add more industries to our dependent variable. We expect to see a smaller effect when we add less lucrative professions to the top-ranked industries or more lucrative professions to the bottom-ranked ones.

Tables 9 and 9A below summarize our findings.

Table 9: Most Lucrative Professions—20–45 Age Group—1974–2016

	Top 10	Top 20	Top 30	Top 40
Female x Age 20–45 x TRAP Index	-0.00106*	-0.00165**	-0.00194*	-0.00282**
	(0.000585)	(0.000657)	(0.000974)	(0.00123)
TRAP Index	-0.00106	-0.00298***	-0.00333**	-0.00280*
	(0.000902)	(0.00108)	(0.00154)	(0.00155)
Female	-0.0125***	-0.0290***	-0.0428***	0.0168***
	(0.00145)	(0.00203)	(0.00215)	(0.00362)
Female x TRAP Index	-0.000443	0.00206**	0.00196*	0.00719***
	(0.000691)	(0.000861)	(0.00112)	(0.00171)
Age 20–45	0.00726***	0.0214***	0.0228***	0.0309***
	(0.00111)	(0.00185)	(0.00197)	(0.00198)
Age 20-45 x TRAP Index	0.000472	-0.000141	-0.000279	-0.00134
	(0.000589)	(0.000802)	(0.00128)	(0.00123)
Female x Age 20–45	0.000943	-0.00848***	-0.00794***	-0.00421
	(0.000979)	(0.00231)	(0.00247)	(0.00337)
Married	0.00497***	0.0184***	0.0212***	0.0275***
	(0.000810)	(0.00161)	(0.00163)	(0.00204)
Num. of Children	-0.00166***	-0.00132**	-0.00187***	-0.00160*
	(0.000300)	(0.000501)	(0.000562)	(0.000880)
Racial Minority	-0.000916	-0.00484***	-0.00655***	0.00886**
	(0.00120)	(0.00167)	(0.00203)	(0.00362)
Hispanic	-0.0159***	-0.0338***	-0.0429***	-0.0577***
	(0.00189)	(0.00387)	(0.00429)	(0.00507)
College Degree	0.0524***	0.0836***	0.108***	0.159***
	(0.00322)	(0.00387)	(0.00437)	(0.00387)
Fraction Republican	-0.00258**	-0.00145	-0.00270	-0.00144
	(0.00117)	(0.00140)	(0.00167)	(0.00179)
State GDP Growth	-0.00829	-0.0228	-0.0157	-0.0555
	(0.0145)	(0.0269)	(0.0363)	(0.0375)
Observations	3,641,148	3,641,148	3,641,148	3,641,148
R-squared	0.027	0.037	0.046	0.047
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Weighted	Yes	Yes	Yes	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 9: This table contains a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is a binary variable turning one if the individual is working in one of the top ten, twenty, thirty, or forty most lucrative industries. In all models, the binary variable is regressed against the triple interaction Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a binary variable turning one if the subject is a female, Age 20–45 is a binary turning one if the subject's age is 20–45, and TRAP Index maps the number of TRAP laws enforced in the state. We include

micro-level controls for the subject's number of children, and binary variables turning one if the subject is married, a racial minority, Hispanic, or has a college degree. Our macro-level controls include the state's number of Republican senators that year and the state's annual GDP growth. All the samples are restricted to individuals with a positive income. Standard errors clustered at the state and year level.

Table 9A: Least Lucrative Professions—20–45 Age Group—1974–2016

	Bottom 10	Bottom 20	Bottom 30	Bottom 40
Female x Age 20–45 x TRAP Index	0.00446*	0.00404*	0.00352	0.00296
	(0.00251)	(0.00237)	(0.00238)	(0.00255)
TRAP Index	0.00638*	0.00562*	0.00477	0.00218
	(0.00360)	(0.00296)	(0.00325)	(0.00347)
Female	0.124***	0.137***	0.127***	0.133***
	(0.00985)	(0.0116)	(0.0109)	(0.0113)
Female x TRAP Index	-0.0121**	-0.0125**	-0.00976*	-0.00807
	(0.00484)	(0.00511)	(0.00499)	(0.00501)
Age 20–45	-0.0956***	-0.0765***	-0.0773***	-0.0695***
	(0.00416)	(0.00409)	(0.00412)	(0.00430)
Age 20–45 x TRAP Index	-0.00103	0.00156	0.00200	0.00294
	(0.00273)	(0.00219)	(0.00214)	(0.00216)
Female x Age 20–45	-0.000552	0.00605	0.00501	0.00586
	(0.00617)	(0.00617)	(0.00617)	(0.00608)
Married	-0.0328***	-0.0542***	-0.0532***	-0.0609***
	(0.00368)	(0.00370)	(0.00370)	(0.00390)
Num. of Children	0.00426**	0.00204	0.00289	0.00134
	(0.00197)	(0.00208)	(0.00202)	(0.00201)
Racial Minority	0.0270***	0.0354***	0.0343***	0.0343***
	(0.00393)	(0.00381)	(0.00404)	(0.00326)
Hispanic	0.0187***	0.0526***	0.0615***	0.0615***
	(0.00656)	(0.00842)	(0.00808)	(0.00833)
College Degree	-0.0826***	-0.119***	-0.131***	-0.162***
	(0.00322)	(0.00371)	(0.00362)	(0.00374)
Fraction Republican	-0.00652***	-0.00869***	-0.00732**	-0.00880***
	(0.00223)	(0.00271)	(0.00284)	(0.00274)
State GDP Growth	0.00546	-0.00941	0.0179	0.0377
	(0.0711)	(0.0705)	(0.0673)	(0.0622)
Observations	3,641,148	3,641,148	3,641,148	3,641,148
R-squared	0.053	0.058	0.056	0.062
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Weighted	Yes	Yes	Yes	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 9A: The table contains a difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is a binary variable turning one if the individual is working in one of the bottom ten, twenty, thirty, or forty least lucrative industries. In all models, the binary variable is regressed against the triple interaction Female x Age 20–45 x TRAP Index and all the corresponding double interactions and variables. Female is a binary variable turning one if the subject is a female, Age 20–45 is a binary turning one if the subject's

age is 20–45, and TRAP Index maps the number of TRAP laws enforced in the state. We include micro-level controls for the subject's number of children, a binary variable turning one if the subject is married, a racial minority, Hispanic, or has a college degree. Our macro-level controls include the state's number of Republican senators that year, and the state's annual GDP growth. All the samples are restricted to individuals with a positive income. Standard errors clustered at the state and year level.

As expected, our coefficients of interest are negative when measured against the top forty industries and positive when measured against the bottom forty. These results indicate that the probability a woman of childbearing age sorts into high-paying jobs goes down following the enforcement of a TRAP law, and by the same principle, the probability she sorts into a low paying job goes up. Furthermore, we see that the economic magnitude goes down as we include more industries. The more ranked industries we include in the binary variable, the closer we get to the sample's average income; hence, the smaller the difference between the treated (women who experienced a TRAP law enforcement) and control (women who did not) groups.

Table 9B below summarizes the unconditional probability that a woman of childbearing age is in one of those industries and the marginal effect of a TRAP law enforcement calculated by dividing our coefficient of interest by this probability. For example, the propensity of women of childbearing age to work in the top ten (most lucrative) jobs compared to the rest of the population decreases by slightly more than 5% for every TRAP law enforced. On the contrary, the propensity of women of childbearing age to work in the bottom ten (least lucrative) jobs increases by 1.6% for every TRAP law enforced.

Table 9B: Economic Magnitudes in Industry Sorting

	Top 10	Top 20	Top 30	Top 40
Unconditional probability	2.07%	5.17%	6.97%	17.21%
Coefficient of interest	-0.106%	-0.165%	-0.194%	-0.282%
Marginal effect	**-5.11%**	**-3.19%**	**-2.78%**	**-1.64%**
	Bottom 10	Bottom 20	Bottom 30	Bottom 40
Unconditional probability	27.8%	29.8%	36.5%	40.7%
Coefficient of interest	0.446%	0.404%	0.352%	0.296%
Marginal effect	**1.60%**	**1.36%**	**0.96%**	**0.73%**

Last, we tested the robustness of our results to the choice of age by redefining our childbearing age range to twenty to forty and rerunning all our baseline analyses using this range. As reported in Table 10, the effect is robust to this choice. We observe a 4.8% to 3.4% drop in income compared to the rest of the population.

Table 10: Robustness Test—20–40 Age Group—1974–2016

	Model 1	Model 2	Model 3	Model 4
Female x Age 20–40 x TRAP Index	-0.0479**	-0.0363**	-0.0474*	-0.0342*
	(0.0222)	(0.0179)	(0.0240)	(0.0195)
TRAP Index	0.00291	0.0109	-0.00513	0.00934
	(0.0230)	(0.0194)	(0.0233)	(0.0189)
Female	-1.697***	-1.629***	-1.670***	-1.584***
	(0.109)	(0.0984)	(0.109)	(0.0985)
Female x TRAP Index	0.0795	0.0940**	0.0783	0.0860**
	(0.0492)	(0.0416)	(0.0470)	(0.0390)
Age 20–40	-0.506***	-0.586***	-0.449***	-0.500***
	(0.0334)	(0.0394)	(0.0320)	(0.0366)
Age 20–40 x TRAP Index	-0.0138	-0.0130	-0.0141	-0.0175
	(0.0145)	(0.0155)	(0.0143)	(0.0150)
Female x Age 20–40	0.207***	0.283***	0.175***	0.232***
	(0.0476)	(0.0413)	(0.0567)	(0.0499)
Married			-0.169***	-0.0889**
			(0.0426)	(0.0382)
Num. of Children			-0.0104	-0.00405
			(0.00698)	(0.00674)
Racial Minority			-0.425***	-0.463***
			(0.0257)	(0.0229)
Hispanic			-0.719***	-0.739***
			(0.0515)	(0.0535)
College Degree			1.129***	1.173***
			(0.0345)	(0.0336)
Fraction Republican			0.0306	0.0200
			(0.0405)	(0.0402)
State GDP Growth			0.740	0.853*
			(0.560)	(0.494)
Observations	3,989,267	3,989,130	3,945,257	3,945,166
R-squared	0.116	0.098	0.150	0.133
State FE	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes
Weighted	No	Yes	No	Yes

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

Table 10: A difference-in-differences analysis around the enforcement of the TRAP laws. The dependent variable is the natural logarithm of the subject's total income (Ln(Total Income)). In model 1, Ln(Total Income) is regressed against the triple interaction Female x Age 20–40 x TRAP Index and all the corresponding double interactions and variables. Female is a binary turning one if the subject is a female, Age 20–40 is a binary turning one if the subject's age is 20–40, and TRAP Index maps the number of TRAP laws enforced in the state. In model 2, we add the survey's weights. In model 3, we unweigh the model and add the subject's number of children, a binary turning one if the subject is married, a racial minority, Hispanic, or has a college degree. We also include macro-level controls, namely the state's number of Republican senators that year, and the state's annual GDP growth. In model 4, we test the full-fledged, weighted regression. Standard errors are clustered at the state and year level.

VI. DISCUSSION

This Article provides an empirical illustration of what the aftermath of overturning *Roe* might look like. In *Dobbs*, the State of Mississippi claimed that a right to an abortion does not support women's economic equality.[144] Our empirical analysis of over forty years of laws restricting access to abortions rejects this argument.

We find evidence which suggests that the introduction of TRAP laws that restrict access to abortions has widened the gender pay gap between women of childbearing age and the rest of the population. We further find that the introduction of TRAP laws has pushed women outside of the labor force or at least incentivized them to choose lower-paying jobs.

Our analysis suggests that increased regulation of abortions—as expected after the decision in *Dobbs*—will expand economic inequality. We first analyzed the full sample to assess preliminary relationships between the enforcement of TRAP laws and the average annual income. The findings were clear: across multiple specifications and several robustness tests, TRAP laws led to a drop of between 6.5% and 4.9% in the average monthly salaries of women of childbearing age compared to the rest of the population. Figure 2 similarly illustrates the drop in average salaries for women of childbearing age in states that enforced TRAP laws, compared to states that did not (and thus the average salary is represented at the zero point).

In our attempts to understand how these restrictive regulations cause such a meaningful reduction in women's income, we further restricted the data to the working population and witnessed similar effects, albeit with a lesser magnitude. This time the reduction in average income was between 1.2% and 2.1%. The drop in the economic magnitude suggests that workforce participation plays a significant role in the relationship between TRAP laws' enforcement and the gender pay gap.

We further investigated whether a selection into less demanding industries drove our results. We did so by absorbing the difference between industries with fixed effects and reevaluating our previous two settings—all individuals and only individuals with positive income. While our former setting produced robust and economically meaningful results, our latter setting suggested a more complicated story. Limiting the sample to individuals who work, while including industry fixed effects, we did not see a drop in women's salaries compared to the rest of the population, which supports our interpretation that a combination of selection into the labor force and into lower-paying industries is the core mechanism driving our results.

We included three additional specifications to reaffirm our interpretation. We investigated how the enforcement of TRAP laws affects women's drop out of the workforce due to household obligations, the number of weeks worked annually, and the propensity to work in the most and least lucrative jobs. Our analyses yielded robust and consistent results.

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144. Brief for Petitioner at 4, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

First, the enforcement of TRAP laws was associated with an increased number of women who left the workforce due to household obligations. Figure 3 illustrates how the propensity to leave the workforce due to household obligations has increased in states that enforced TRAP laws compared to states that did not. Second, the enforcement of TRAP laws reduced the number of weeks women of childbearing age worked annually. Third, TRAP laws were associated with a decreased propensity of women of childbearing age to work in the most lucrative jobs and increased their propensity to work in the least lucrative ones. All these findings provide convincing evidence that the enforcement of regulations that restrict abortion increases the gender pay gap by forcing women to leave the workplace, stay home, or sort into fewer well-paid jobs. A trade-off is forced upon women in regimes where abortions are restricted through TRAP laws—either they must not work or work in a lower-paying job that will allow more time at home.

Indeed, the "march of progress"[145] has somewhat changed the dichotomy between women's choice of either working or staying home, allowing more flexibility in career choices than once possible. However, our findings suggest that preserving this change encompasses the right to reproductive care, among additional factors. These findings remind us that women's economic equality is fragile despite years of progress. Moreover, the findings highlight the interlaced connections between women's rights to bodily autonomy, access to reproductive care, and women's economic freedoms and ability to become equal members of society. These connections raise serious concerns about gender equality in our new post-*Roe* world.

While not at the core of this Article, the empirical findings also raise a contribution to constitutional law theory. Specifically, the findings offer empirical evidence which acknowledge "the fundamental equality principles that underlie the constitutional right to an abortion."[146] In particular, our findings suggest that laws regulating abortions affect gender inequality, and that these laws de facto contribute to the perpetuation of stereotypical thinking about gender roles in society, particularly the male breadwinner/female caregiver paradigm.[147]

As such, and aligned with Seigel, Mayeri, and Murray's reading of *United States v. Virginia*[148] and *Nevada Department of Human Resources v. Hibbs*,[149] our findings suggest that discussions about regulation of abortions can also be tied to arguments surrounding the equal protection clause,[150] as these end up perpetuating "the legal,

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145. A term used by Mississippi in its *Dobbs* brief. Brief for Petitioner at 4, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

146. Brief of Equal Prot. Const. L. Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents at 7, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (No. 19-1392) [hereinafter Con Law Scholars Amici].

147. *See* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 184 (2020); Reva Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. (forthcoming 2023) (manuscript at 7) (available online: https://law.yale.edu/sites/default/files/documents/pdf/ssrn_-_siegel-mayeri-murray-ep_abortion_dobbs_colum_jgl_5-19-22_sm.pdf) [https://perma.cc/65J8-TCN8].

148. 518 U.S. 515 (1996).

149. 538 U.S. 721 (2003).

150. For a discussion alongside the more traditional arguments rooted in women's

social, and economic inferiority of women."[151] Our Article thus opens the door to further discussions on how the overturning of *Roe* will implicate states' commitment to women more broadly.[152]

Lastly, a note about the limitations of our empirical strategy is in order. The most important limitation is our inability to distinguish between labor demand and supply channels. We cannot determine whether restrictions to reproductive care increased the pay gap because women, now facing greater maternity risk, were discouraged from participating in the labor market or because employers were deterred from hiring them. The same goes for the selection into less demanding professions. With our data, we cannot determine whether it is women choosing to go into these industries or employers forcing them to do so. Another potential limitation might arise from how we formed the TRAP laws index. We do not have a reliable scientific method to weigh the severity of each one of the three restrictions, which in turn require careful readings of our reported magnitudes.

CONCLUSION

This Article offers a glimpse into the future before us, given the overturning of *Roe v. Wade*. We provided a first-of-its-kind empirical analysis that rejects some of the arguments raised by the State of Mississippi in *Dobbs*, mainly, that the right to abortions no longer advances women's success in the labor market. Using TRAP laws as a proxy to abortion-restrictive regimes, we analyzed more than forty years of restrictive regulations and their effects on the American population. We found consistent and robust evidence which suggests that TRAP laws have increased the gender pay gap of women of childbearing age. We further identified sorting as the primary mechanism through which TRAP laws affect women.

As such, this Article reminds us of what Mississippi and other states refuse to admit: that the right to abortion has played an important role in increasing women's economic success. It also reminds us how years of progress in advancing gender equality should not be taken for granted. Gender equality is dynamic, sensitive, and fragile. *Roe* had a meaningful role in achieving the current state of women's economic progress. Our findings suggest that, at least in the absence of alternative policies, such as paid parental leave and childcare, that can provide countervailing support to women's participation in the labor market, the overturning of *Roe* will likely hinder this progress.

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constitutional right to liberty and bodily autonomy, see *supra* Part I.

151. *Virginia*, 518 U.S. at 534; *see also* Siegel, *supra* note 146, at 170–72. *See generally* Siegel, Mayeri & Murray, *supra* note 146. The majority in *Dobbs* rejected this interpretation.

152. *See* Con Law Scholars Amici, *supra* note 145, at 20–28.

Frivolous Floodgate Fears

BLAIR DRUHAN BULLOCK*

When rejecting plaintiff-friendly liability standards, courts often cite a fear of opening the floodgates of litigation. Namely, courts point to either a desire to protect the docket of federal courts or a burden on the executive branch. But there is little empirical evidence exploring whether the adoption of a stricter standard can, in fact, decrease the filing of legal claims in this circumstance. This Article empirically analyzes and theoretically models the effect of adopting arguably stricter liability standards on litigation by investigating the context of one of the Supreme Court's most recent reliances on this argument when adopting a stricter liability standard for causation in employment discrimination claims.

In 2013, the Supreme Court held that a plaintiff proving retaliation under Title VII of the Civil Rights Act must prove that their participation in a protected activity was a but-for cause of the adverse employment action they experienced. Rejecting the arguably more plaintiff-friendly motivating-factor standard, the Court stated, "[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment." Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 358 (2013). And over the past ten years, the Court has overturned the application of motivating-factor causation as applied to at least four different federal antidiscrimination statutes. Contrary to the Supreme Court's concern that motivating-factor causation encourages frivolous charges, many employment law scholars worry that the heightened but-for standard will deter legitimate claims.*

This Article empirically explores these concerns, in part using data received from the Equal Employment Opportunity Commission (EEOC) through a Freedom of Information Act (FOIA) request. Specifically, it empirically tests whether the adoption of the but-for causation standard for claims filed under the Age Discrimination in Employment Act and by federal courts of appeals under the Americans with Disabilities Act has impacted the filing of discrimination claims and the outcome of those claims in federal court. Consistent with theory detailed in this Article, the empirical analysis provides evidence that the stricter standard may have increased the docket of the federal courts by decreasing settlement within the EEOC and during litigation. The empirical results weigh in on concerns surrounding the adoption of the but-for causation standard and provide evidence that the floodgates argument, when relied on to deter frivolous filings by changing liability standards, in fact, may do just the opposite by decreasing the likelihood of settlement in the short term, without impacting the filing of claims or other case outcomes.

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INTRODUCTION

As early as 1908, the Supreme Court cited its fear of opening the floodgates of litigation when making decisions.[1] In fact, from 2010 to 2013, the Court addressed this concern at least fourteen times.[2] In addition to questioning the constitutional and ethical consequences of this justification as a reason for adopting certain standards, scholars have been quick to recognize the lack of empirical support for the justification.[3] When the floodgates argument is cited for support of a stricter liability regime, the argument relies on the premise that the change in standard will deter potential filers and that those filers have frivolous claims. In turn, it also relies on the premise that it will not change the defendants' behavior. But little work has been done to explore these assumptions either empirically or theoretically. This Article seeks to do both through an analysis of one of the Supreme Court's most recent reliances on the floodgate fear—the adoption of the but-for causation standard in employment discrimination cases.

In spring 2020, the Supreme Court released three decisions analyzing the causation standards that a plaintiff must prove under certain federal antidiscrimination statutes.[4] Specifically, in each case, the Court analyzed whether the plaintiff must prove that a discriminatory reason was a but-for cause of an adverse employment action or simply that the reason was a motivating factor for the action.[5] As illustrated by how frequently the Supreme Court has addressed the issue,

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1. Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1008 n.1 (2013).

2. *Id.* at 1008.

3. *See id.*; Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223 (2014). Scholars also question the justification in preventing the flood on the executive branch, which could include the Equal Employment Opportunity Commission. *See* Levy, *supra* note 1, at 1017.

4. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020); Babb v. Wilkie, 140 S. Ct. 1168, 1171 (2020).

5. *See Bostock*, 140 S. Ct. at 1739; *Comcast*, 140 S. Ct. at 1014; *Babb*, 140 S. Ct. at 1171.

the governing causation standard is hotly litigated, and discussions of its ramifications dominate employment law scholarship.[6] This Article provides empirical evidence for how the adoption of the stricter but-for causation standard affects the filing of discrimination charges, and the progression of those charges through the Equal Employment Opportunity Commission (EEOC) and federal courts by analyzing the first time the Supreme Court adopted this standard (to apply to Age Discrimination and Employment Act (ADEA) claims) and the first-in-time circuit split (applying the standard to Americans with Disabilities Act (ADA)) claims). In turn, it also empirically tests the assumptions behind the often-cited floodgate fear.

When the Supreme Court adopted but-for causation for Title VII retaliation claims in 2013 in *University of Texas Southwestern Medical Center v. Nassar*, the Court cited a concern that a motivating-factor standard would encourage the filing of frivolous claims.[7] The Court stated, "[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment."[8] The Supreme Court made this statement with no empirical support that the heightened standard would affect filing behavior. But in fact, data did exist that could have provided insight into this claim, as the standard was first applied in employment discrimination claims (ADEA claims) in 2009, in *Gross v. FBL Financial Services, Inc.*[9]

As the Court has applied this heightened standard to at least four antidiscrimination statutes and lower courts have expanded it even further, scholars have critiqued it and feared it would result in legitimate claims being denied relief. For example, Alex Long pointed to this standard as one example of "[r]etaliation [b]acklash," noting "*Nassar*'s adoption of a but-for causation standard obviously subjects Title VII retaliation plaintiffs to a heightened causation standard, thus making it more difficult for retaliation plaintiffs to establish the requisite causal link between protected conduct and an employer's adverse action."[10] Practicing attorneys touted that "[r]etaliation [c]laims [are] [h]arder to [p]rove [a]fter U.S. Supreme Court [r]uling," even suggesting, "[e]mployers should see a reduction in retaliation claims as this new, more difficult standard of proving causation works its way through the courts."[11] But despite this assessment, little is known about how the standard actually affects the filing and outcome of discrimination claims.

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6. *See, e.g.*, Sperino & Thomas, *supra* note 3.

7. 570 U.S. 338, 352, 358 (2013). The Court adopted but-for causation for claims filed under the ADEA in 2009. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

8. *Nassar*, 570 U.S. at 358.

9. *See* 557 U.S. at 176.

10. Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 735 n.118 (2018) (summarizing articles by other legal scholars highlighting the same concern); *see also* Daiquiri J. Steele, *Protecting Protected Activity*, 95 WASH. L. REV. 1891, 1896 (2020) (calling for the Court to stop the bleeding and not adopt the more rigorous standard in other employment statutes).

11. *See, e.g.*, Phillip S. Oberrecht, *Retaliation Claims Harder to Prove After U.S. Supreme Court Ruling*, IDAHO EMP. L. LETTER, Mar. 2014, at 1, 3.

As a case study for the frivolity of the floodgate fear when adopting stricter liability standards more broadly, this Article seeks to understand the effect of but-for causation on filing and settlement behavior through the development of a theoretical model and an empirical analysis of claims filed with the EEOC and in federal court. In *Nassar*, the Supreme Court cited the fear of frivolous litigation with little to no empirical evidence of its existence or its likely effect. The Court simply cited an increase in the total number of retaliation charges filed with the EEOC—the federal agency responsible for administering claims of employment discrimination.[12] This evidence may suggest a causal effect, but it only illustrates an increase in retaliation claims over time. Although in theory one may expect a decrease in frivolous lawsuits with the adoption of the arguably more employer-friendly but-for causation standard, no empirical evidence exists establishing this relationship.

This Article also theoretically explores why adopting the stricter causation standard may actually increase the burden on federal courts and the EEOC by not having any effect on filing behavior and instead decreasing settlement rates. There are many reasons to expect that adopting a heightened liability standard cannot deter the filing of frivolous claims. Most notably, the costs of filing a claim are quite low, and there are additional reasons parties choose to file a lawsuit other than the expected award, including the possibility of early settlement or imposing costs on the defendant, such as reputational costs.[13] There is also a growing movement by employment scholars suggesting that but-for causation may in fact have little effect due to the difficulties in establishing motivating-factor causation as well.[14] An even less explored consequence of a heightened liability standard is the effect that the change in standard has on settlement, which is the most common disposition in federal lawsuits. There are reasons to expect that due to asymmetric information, even absent a change in filing behavior, settlement rates will decline due to the defendant's optimistic view of how that favorable change in law impacts the plaintiff's likelihood of prevailing in the lawsuit and the defendant's asymmetric access to that information.[15] And as settlement rates decrease, the burden on the court system expands.

By taking advantage of the variation created by the Supreme Court's adoption of the standard for ADEA claims, and of federal courts of appeals adopting different causation standards for cases brought under the ADA, I empirically test whether the adoption of the but-for causation standard affects allegedly wronged employees' filing behavior, settlement decisions, and court outcomes. Through this analysis, I find no evidence that adopting the but-for causation standard has decreased the

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12. *Nassar*, 570 U.S. at 358. Scholars also questioned the Court's floodgate concern, particularly since it was not supported by empirical evidence. *See* Sperino & Thomas, *supra* note 3, at 236–39.

13. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 534 (1997).

14. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 396 (2020) ("That may be precisely because of the tactical and ethical challenges of going down the motivating factor avenue. Tactically, such a choice creates a risk of juries splitting the baby, that is, finding for plaintiffs on liability while finding for defendants on the same decision defense.").

15. *See infra* Section II.A.

number of charges filed with the EEOC, contrary to what the Court thought would happen when adopting but-for causation in *Nassar*. I also find no evidence that the standard altered the likelihood that a pretrial motion was granted for the employer in response to a change in filing behavior. Instead, the only consistent result, both in the EEOC and federal court, is that the parties are less likely to settle following the standard's adoption. Further, likely in part due to the decrease in settlement at the EEOC, the empirical results show an increase in the filing of ADA lawsuits in federal court following the adoption of the but-for causation standard. Because most plaintiffs that receive compensation in employment discrimination cases receive it through settlement, this result could affect the deterrence of discrimination in the workplace.

In Part I of this Article, I provide the history of the movement from motivating-factor to but-for causation, particularly for ADEA and ADA claims, and a brief discussion of the Supreme Court's reliance on the floodgate fear. I then discuss the decision to file a legal claim under an antidiscrimination statute, how that decision may be informed by the causation standard, and the consequences of such claims being filed in Part II. In Part III, I provide the empirical analysis, including a discussion of the empirical strategy, the data I analyze, including the Federal Judicial Center's Integrated Database and the universe of EEOC charges accessed through a FOIA request, and the empirical results. The empirical results indicate that the but-for causation requirement has only one effect: it makes the parties less likely to settle. The results also show that the Supreme Court's floodgate concern may be unsupported in many contexts. In fact, adopting but-for causation may have led to more cases being filed in federal court. I conclude by discussing the consequences and conclusions that can be drawn from the results, including questioning the adoption of the but-for causation standard and the reliance on the floodgate fear in this context, and also recognizing the potential for long-term impacts.

I. HISTORY OF ANTIDISCRIMINATION CAUSATION AND THE FLOODGATE FEAR

As described by Marin Levy's *Judging the Flood of Litigation*, the Supreme Court has frequently cited (since 1908) a fear of opening the floodgates of litigation in a variety of circumstances.[16] One reason the Court or parties appearing in front of the Court have relied on this fear—albeit in less frequent contexts than those such as jurisdictional and standing rulings which could create an arguably new right of action—is to support the adoption or continued enforcement of a more defendant-

16. Levy, *supra* note 1, at 1008 n.1.

friendly (or stricter) liability standard.[17] That specific fear is that adopting the more liberal standard will increase lawsuit filings particularly, frivolous lawsuits.[18]

Levy and other scholars question the reliance on this fear, particularly if the concern is to protect the federal courts.[19] Critics, including several Supreme Court Justices, also recognize that this fear relies on several empirical assumptions, which have never been tested.[20] Further, the reliance on the floodgate fear assumes that the changing standard will not affect the probability that the bad act that the law intends to deter will occur, which would then increase the filing of charges. This Article provides empirical insight into those assumptions and their flaws by considering the Supreme Court's recent reliance on the floodgate fear when holding that plaintiffs alleging retaliation under Title VII of the Civil Rights Act must prove that their reporting of illegal conduct was a but-for reason for the adverse employment action that they experienced.[21]

Several federal statutes prohibit workplace discrimination on the basis of a number of protected classes. For example, Title VII of the Civil Rights Act prohibits discrimination on the basis of race, national origin, color, sex and religion.[22] The ADEA prohibits employers from discriminating against individuals over forty, and the ADA prohibits employers from discriminating against individuals who have a disability as defined in the statute.[23] These statutes also prohibit an employer from discriminating against an individual in retaliation for reporting an alleged

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17. *See, e.g.*, Henderson v. United States, 568 U.S. 266, 278 (2013) (addressing a floodgates argument when broadening the definition of plain error); *Nassar*, 570 U.S. at 358 (relying on the floodgate fear when strengthening the causation standard in employment disputes); McQuiggin v. Perkins, 569 U.S. 383, 411–12 (2013) (Scalia, J., dissenting) (citing the floodgate fear when rejecting a more liberal interpretation of a statute of limitations for habeas cases); Connick v. Thompson, 563 U.S. 51, 101–04 (2011) (Ginsburg, J., dissenting) (addressing the argument when supporting a more liberal deliberate indifference jury instruction); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007) (addressing the argument when rejecting a per se rule in antitrust cases).

18. Levy, *supra* note 1, at 1037. As Levy recognizes, the floodgate fear has variations. It sometimes comes from a place of statutory interpretation and the creation of new claims; it sometimes comes from a desire to decrease the burden on the executive branch (including, arguably the EEOC); and it sometimes comes from a desire to protect the dockets of state or federal courts. *Id.* at 1012.

19. *See id.* at 1009–10.

20. *Id.* at 1074; *Connick*, 563 U.S. at 101 (Ginsburg, J., dissenting) (citing an amicus brief to establish there was no evidence of an increased floodgates following the adoption of a more liberal jury instruction).

21. Because my data does not cover the *Nassar* decision and is limited to the ability to isolate ADA charges filed in federal court, I empirically test the adoption of the standard in the ADEA and ADA contexts. I also believe that lower courts are less likely to defect during these early stages of the but-for causation standard.

22. 42 U.S.C. § 2000e–2(a) (prohibiting discrimination on the basis of race, color, national origin, sex, and religion).

23. The ADEA, 29 U.S.C. § 623, prohibits discrimination and retaliation on the basis of age in private and public workplaces. The ADA, 42 U.S.C. §§ 12112, 12132, prohibits disability discrimination and retaliation in the workplace, and the Rehabilitation Act, 29 U.S.C. § 791, prohibits disability discrimination in the federal government. Claims of race discrimination can also be brought under the Civil Rights Act § 1981.

wrongdoing under these statutes. Generally, individuals who believe they have a claim under these statutes must first file that claim with the EEOC or a corresponding state agency before filing the claim in federal court.[24]

Each of these federal antidiscrimination statutes requires an employee or applicant for employment alleging disparate treatment to prove that they experienced an adverse employment action, such as a failure to hire or denial of a promotion.[25] The wronged individual must also prove that they were a member of a protected class or took part in a protected activity.[26] For example, someone bringing a claim under the ADA must prove that they had a disability as defined by the statute.[27] But how the plaintiff must connect the adverse employment action to membership in the protected class or participation in a protected activity remains a bit unsettled. In other words, how must the plaintiffs prove that the adverse employment action was caused by their membership in the protected class?[28]

Title VII makes it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[29] In the 1989 case *Price Waterhouse v. Hopkins*, the Supreme Court addressed the standard required to prove discrimination "because of" membership in a protected class under Title VII.[30] Most courts interpreted the plurality's holding to allow claims in which the adverse action was based on a discriminatory motive and a nondiscriminatory motive ("mixed-motive") if the plaintiff shows direct evidence; but the employer can overcome this burden if it proves that the action would have occurred even if

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24. Under section 706 of Title VII of the Civil Rights Act, any individual with a Title VII employment discrimination claim must first file the claim with the EEOC or a corresponding state Fair Employment Practices Agency (FEPA) before he or she can file a claim in federal court. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 259–61 (codified at 42 U.S.C. § 2000e–5).

25. *See, e.g.*, 42 U.S.C. § 2000e–2(a) ("It shall be . . . unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (providing standard of proof adopted by most courts for most federal antidiscrimination cases); Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (affirming application of the framework in an ADA claim).

26. *See, e.g.*, *McDonnell*, 411 U.S. at 802; Strothers v. City of Laurel, 895 F.3d 317, 327 (4th Cir. 2018).

27. *See, e.g.*, Atkins v. Salazar, 677 F.3d 667, 675 (5th Cir. 2011) (noting that plaintiff must prove he suffered an adverse action and has a disability as defined by the statute).

28. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020); Babb v. Wilkie, 140 S. Ct. 1168, 1171 (2020).

29. 42 U.S.C. § 2000e–2(a).

30. 490 U.S. 228, 240 (1989) (quoting 42 U.S.C. § 2000e–2(a)(1)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075, *as recognized in Comcast*, 140 S. Ct. at 1017.

the plaintiff was not a member of the protected class.[31] While this case arguably did not directly apply to other nondiscrimination statutes or Title VII retaliation claims, federal courts of appeals began to apply this standard in cases alleging retaliation, claims under the ADA, and claims under the ADEA.[32]

Following *Price Waterhouse*, Congress amended section 107 of the Civil Rights Act in 1991.[33] The section now states that when a plaintiff can prove that being a member of a protected class was a motivating factor for discrimination, the action is an unlawful employment practice even if other factors motivated the action, but that damages are limited if the defendant can prove it would have acted the same absent the discriminatory motive.[34] Because this section did not directly state that it applied to retaliation claims filed under Title VII or to any other statute, some circuits continued to apply the standard developed in *Price Waterhouse*.[35] Others applied the motivating-factor standard adopted by the amendments in other types of discrimination lawsuits.

In 2009, the Supreme Court adopted what was arguably a new causation standard in discrimination cases, but-for causation, when interpreting the ADEA's prohibition on discrimination "because of . . . age."[36] In *Gross v. FBL Financial Services, Inc.*, the Supreme Court held that no matter what evidence is presented, but-for causation is required for claims brought under the ADEA and that mixed-motive claims are not actionable under the statute.[37] Prior to *Gross*, motivating factor was the generally accepted causation standard for ADEA claims, and no court had explicitly required but-for causation. However, the Supreme Court held that because Congress did not amend the ADEA to include the language of section 107 of Title VII when it amended Title VII in 1991, the motivating-factor standard did not apply to ADEA claims.[38] The Court interpreted the ADEA's prohibition of discrimination "because of" age to require but-for causation.[39] This decision did not

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31. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 172 (2009) (describing the acceptance of this burden-shifting framework).

32. *See, e.g.*, Robert Tananbaum, *Grossly Overbroad: The Unnecessary Conflict over Mixed Motives Claims in Title VII Anti-Retaliation Cases Resulting from* Gross v. FBL Financial Services, 34 CARDOZO L. REV. 1129, 1133–36 (2013) (providing a discussion of the cases following *Price Waterhouse*).

33. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e–2(m)) ("Except as otherwise provided in this [subchapter], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

34. *See id.* § 107(b). Although mixed-motive claims are actionable under the statute, damages are limited if the defendant can prove they would have made the decision even if the plaintiff was not a member of a protected class. *See id.*

35. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362–63 (2013) (rejecting this standard that was applied in courts such as the Fifth Circuit); Tananbaum, *supra* note 32, at 1133–37 (discussing the confusion and application of this standard to retaliation claims before *Gross*).

36. *See Gross*, 557 U.S. at 176 (emphasis omitted) (quoting 29 U.S.C. § 623(a)(1)).

37. *Id.* at 178–79.

38. *Id.*

39. *Id.* at 177–78.

address other antidiscrimination statutes or completely define but-for causation. But following *Gross*, uncertainty resulted as to what causation standard applied to discrimination claims other than those falling under Title VII's amendment.

As for the ADA's causation history, courts were split regarding the causation standard applicable for claims filed under the ADA since its passage in 1990, and the Supreme Court has not decided this issue. Early in the ADA's history, the circuits were split as to whether a motivating-factor standard should apply or whether a "solely because of" standard should apply.[40] Similar to the original language in Title VII, the ADA proscribed an employer from discriminating "because of" a disability.[41] However, after the adoption of the 1991 Title VII amendments, the circuits that previously adopted the solely-because-of standard slowly began to reverse the standard, and the overwhelming majority of the circuits that addressed this issue applied the motivating-factor standard.[42] As described by the Fifth Circuit when it adopted the motivating-factor standard, "Under the ADA, 'discrimination need not be the sole reason for the adverse employment decision, [but] must actually play a role in the employer's decision making process and have a determinative influence on the outcome.'"[43] In *Pinkerton*, the Fifth Circuit provided a discussion of the seven federal circuits that had already adopted that standard as of 2008.[44]

The Seventh Circuit was the first circuit to adopt but-for causation for ADA claims in 2010 in *Serwatka v. Rockwell Automation, Inc*.[45] The Seventh Circuit very closely followed the logic presented in *Gross*, highlighting that Congress did not include the motivating-factor language in the statute.[46] The Seventh Circuit had previously applied only the motivating-factor standard, or a showing "that discrimination motivated an employer's adverse employment action."[47] Although

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40. *See* Lisa Schlesinger, *The Social Model's Case for Inclusion: "Motivating Factor" and "But For" Standards of Proof Under the Americans with Disabilities Act and the Impact of the Social Model of Disability on Employees with Disabilities*, 35 CARDOZO L. REV. 2115, 2122 (2014).

41. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327, 331 (codified at 42 U.S.C. § 12112).

42. S*ee* Schlesinger, *supra* note 40, at 2122–23.

43. Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008) (alteration in original) (quoting Soledad v. U.S. Dep't of Treasury, 304 F.3d 500, 503–04 (5th Cir. 2002)).

44. *Id.* at 518–19. The Sixth Circuit continued to apply the "solely because of" standard until it adopted the but-for standard in 2012. *See* Hedrick v. W. Rsrv. Care Sys., 355 F.3d 444, 454 (6th Cir. 2004) (requiring solely-because-of causation). The Tenth Circuit and the Eleventh Circuit occasionally applied a but-for standard, even before *Gross*. Schlesinger, *supra* note 40, at 2127 nn.71–72.

45. *See* 591 F.3d 957, 961 (7th Cir. 2010) ("[N]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.") (emphasis omitted) (quoting 42 U.S.C. § 12112(a)).

46. *Id.*

47. Murray v. Mayo Clinic, 934 F.3d 1101, 1104 (9th Cir. 2019) (describing the history of the circuit split and the Seventh Circuit's change), *cert. denied*, 140 S. Ct. 2720 (2020); *see also* Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999), *overruled by*

the Seventh Circuit decision was technically limited to cases filed before the 2008 amendments to the (the Americans with Disabilities Act Amendments Act (ADAAA)), the court's reasoning that the statute did not include an amendment like the Title VII amendment (allowing for mixed-motive claims) led lower courts to begin applying but-for causation to claims filed after the amendment.[48] The next

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Serwatka, 591 F.3d at 963–64.

48. *See Serwatka*, 591 F.3d at 961 (7th Cir. 2010). This case interpreted the ADA pre-2008 amendments, but district court decisions within the Seventh Circuit following *Serwatka* that interpreted the ADA applied but-for causation because the ADAAA also did not authorize mixed-motive cases. *See* Hoffman v. Bradley Univ., No. 11-1086, 2012 WL 4482173, at *12 (C.D. Ill. Sept. 27, 2012); Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc., No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at *4 (S.D. Ind. Jan. 9, 2013); Selan v. Valley View Cmty. Unit Sch. Dist. 365-U, No. 10 CV 7223, 2013 WL 146415, at *8 (N.D. Ill. Jan. 14, 2013); *see also* Awad v. Nat'l City Bank, No. 1:09-CV-00261, 2010 WL 1524411, at *10 n.4 (N.D. Ohio Apr. 15, 2010) (describing the *Serwatka* holding as "reaffirming *McNutt* and interpreting *Gross* to imply 'that when another anti-discrimination statute lacks comparable [express incorporation of the mixed-motive framework], a mixed-motive claim will not be viable under that statute'") (alteration in original) (quoting *Serwatka*, 591 F.3d at 961 (7th Cir. 2010)). In fact, the Seventh Circuit continued to cite *Serwatka* as requiring but-for causation in ADAAA cases and even referenced it as the "standard we apply in these cases" despite recognition that it had not addressed the amendments' change in language. Kurtzhals v. Cnty. of Dunn, 969 F.3d 725, 728 (7th Cir. 2020); *see* Hooper v. Proctor Health Care Inc., 804 F.3d 846, 853 (7th Cir. 2015); Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., 795 F.3d 698, 706 (7th Cir. 2015); Serafinn v. Loc. 722, Int'l Brotherhood of Teamsters, 597 F.3d 908, 915 (7th Cir. 2010) ("Mixed-motive theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act's authorization of claims that an improper consideration was 'a motivating factor' for the contested action.") (emphasis omitted) (citing *Serwatka*, 591 F.3d at 961). A similar analysis of legal blogs and case interpretations suggests lower courts applied the standard to the ADAAA particularly given the courts' strong focus on the absence of a mixed-motive provision in the ADA, which also does not appear in the ADAAA. *See 7th Circuit Affirms Summary Judgment for Employer in ADA Lawsuit*, GLICKMAN PC (Nov. 11, 2020), https://glickmanpc.com/blog/7th-circuit-affirms-summary-judgment-for-employer-in-ada-lawsuit/ [https://perma.cc/SN9N-53L5] ("The 7th Circuit applies the 'but for' causation standard notwithstanding the ADA Amendment Act of 2008, that changed the language of the ADA from prohibiting discrimination 'because of' a disability to prohibiting discrimination 'on the basis of' a disability."); *see also Seventh Circuit: Mixed-Motive Claims Not Viable Under ADA*, FAEGRE DRINKER (Feb. 15, 2010), https://www.faegredrinker.com/en/insights/publications/2010/2/seventh-circuit-mixedmotive-claims-not-viable-under-ada [https://perma.cc/QU8X-WVAA]; Tyler Anderson, *Seventh Circuit Rules on Accommodation and Causal Connection Needed for ADA Claims*, NAT'L L. REV. (May 17, 2016), https://www.natlawreview.com/article/seventh-circuit-rules-accommodation- and-causal-connection-needed-ada-claims [https://perma.cc/FC6P-Q36W]. Because plaintiffs must first file their charge with the EEOC, which takes 300 days to investigate on average, and claims can be filed up to 300 days after the adverse action in many states, many of the adverse actions at issue in the cases analyzed in this Article occurred before the effective date of the amendments, and likely the entirety of the federal court analysis includes affected claims. *See Timeliness*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/field-office/mobile/timeliness#:~:text=A%20charge%20must%20be%20filed,or%20local%20anti%2Ddiscrimination%20law [https://perma.cc/2ATX-8HZ7]; *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N,

court to adopt this standard was the Sixth Circuit, which continued to apply solely-because-of causation until it adopted but-for causation in 2012, recognizing that even the 2008 amendments did not adopt Title VII's motivating-factor standard.[49] As of 2023, at least the Second, Fourth, Sixth, Seventh, and Ninth Circuits have held that but-for causation applies to ADA claims.[50]

In 2013, the Supreme Court analyzed causation for Title VII retaliation claims, which, similar to causation in ADA cases, had been debated among the lower courts. The Court held that because Congress did not amend § 2000e–3(a), which prohibits retaliation "because" of protected activity under Title VII, but-for causation was also required to prove a retaliation claim under Title VII.[51] In *Nassar*, the Court expressed a concern that the motivating-factor standard (or some lower causation standard) would lead to the filing of frivolous charges.[52]

The move from motivating-factor to but-for causation continued in the Supreme Court with an active spring 2020. In *Comcast Corp. v. National Ass'n of African American-Owned Media*, the Court held that plaintiffs proving discrimination under 42 U.S.C. § 1981 must prove they would not have experienced an adverse action "but-for" their race.[53] And in *Babb v. Wilkie*, the Court held that claims brought under the federal-sector provision of the ADEA, 29 U.S.C. § 633a(a), do not require but-for causation, but that failing to prove but-for causation limits damages.[54] In both cases, the Court conducted a detailed statutory interpretation and relied on reasoning from *Nassar* and *Gross* despite the fact that neither statute included the "because of" language.[55] And finally, in *Bostock*, when expressing the limits of Title VII and its protection against discrimination on the basis of sexual orientation and

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https://www.eeoc.gov/what-you-can-expect-after-you-file-charge#:~:text=On%20average%2C%20we%20take%20approximately,EEOC's%20Online%20Charge%20Status%20System [https://perma.cc/ZUY7-6AND]. Notably, it is likely that the large majority of federal court summary judgment rulings and outcomes analyzed in this Article (before June 2013) were analyzing pre-ADAAA cases because of the delay in EEOC processing and subsequent filings. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050 (2013) (analyzing district court cases and finding that it was not until 2012 that the ADAAA predominantly governed the opinions that were published).

49. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 318 (6th Cir. 2012) (en banc) ("[*Gross*'s] rationale applies with equal force to the ADA.").

50. *Murray*, 934 F.3d at 1107. Because these circuits already had issued opinions adopting motivating-factor causation, up until these decisions adopting but-for, district courts should have continued to apply the motivating-factor standard. Of course, there are exceptions, but these exceptions should not be strong enough to govern a defendant's decision to settle. *See* Ross v. Indep. Living Res. of Contra Costa Cnty., No. C08-00854 TEH, 2010 WL 2898773, at *6 (N.D. Cal. July 21, 2010).

51. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362–63 (2013).

52. *Id.* at 358.

53. 140 S. Ct. 1009, 1014 (2020). Section 1981 requires "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens." *Id.* at 1015 (alterations in original) (quoting 42 U.S.C. § 1981(a)).

54. *See* 140 S. Ct. 1168, 1171 (2020). Section 633(a) instructed that all employment decisions in the public sector be "made free from any discrimination based on age." *Id.*

55. *See Comcast*, 140 S. Ct. at 1016–19; *Babb*, 140 S. Ct. at 1172–77.

transgender status, the Supreme Court clarified the but-for causation standard. The Court articulated that although there can be more than one but-for cause, but-for causation directs the Court "to change one thing at a time and see if the outcome changes. If it does, [it has] found a but-for cause."[56] This articulation has now led to activity by the EEOC encouraging lower courts to recognize this definition of but-for causation.[57] This continued litigation activity signals how contentious the move from motivating-factor to but-for causation is and the potential impact that it may have on litigation and the labor market.

II. CAUSATION'S IMPACT

It is clear, based on the many Supreme Court cases and the attention that scholars have paid to the causation dispute, that whether a but-for or motivating-factor standard applies at least arguably matters to the outcome of an employment dispute. On their faces, the two standards are different. Motivating factor requires a showing "that discrimination motivated an employer's adverse employment action."[58] And as the Supreme Court recently articulated, although there can be more than one but-for cause, but-for causation directs the Court "to change one thing at a time and see if the outcome changes. If it does, [it has] found a but-for cause."[59] And before this recent pronouncement, lower courts were more likely to apply a fairly strict interpretation of but-for causation.[60] For example, in a district court case decided shortly after the Seventh Circuit applied but-for causation in *Serwatka*, the court noted, "Similarly, the existence of multiple reasons for Plaintiff's discharge would preclude Plaintiff from recovering under the ADA, unless he could prove that 'but-

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56. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020). This description signaled that this standard might actually not be as "defendant friendly" as many opponents and proponents believed. And in fact, recently, some scholars have recently recognized the acceptance of this standard as a step in the right direction for antidiscrimination law. *See* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1624 (2021); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 358 (2021); Sullivan, *supra* note 14 ("That may be precisely because of the tactical and ethical challenges of going down the motivating factor avenue. Tactically, such a choice creates a risk of juries splitting the baby, that is, finding for plaintiffs on liability while finding for defendants on the same decision defense.").

57. *See* Stephanie L. Adler-Paindiris & Andrew F. Maunz, *EEOC Argues for Broader Causation Standard and Provides a Peek into the EEOC's Future Focus*, JACKSON LEWIS (Feb. 26, 2021), https://www.jacksonlewis.com/publication/eeoc-argues-broader-causation-standard-and-provides-peek-eeoc-s-future-focus [https://perma.cc/KE6A-XL26] (discussing the EEOC's position in Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021), *cert. denied sub nom*. Pelcha v. Watch Hill Bank, 142 S. Ct. 461 (2021)).

58. Murray v. Mayo Clinic, 934 F.3d 1101, 1104 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2720 (2020); *see also* Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999), *overruled by* Serwatka v. Rockwell Automation Inc., 591 F.3d 957 (7th Cir. 2010).

59. *Bostock*, 140 S. Ct. at 1739. One familiar with causation in tort law may pause at the suggestion that but-for causation is strict, but comparing it to motivating-factor causation illuminates the difference.

60. *See, e.g.*, Badri v. Huron Hosp., 691 F. Supp. 2d 744, 760–61 n.11 (N.D. Ohio 2010) (citing *Serwatka*, 591 F.3d at 962).

for' the alleged disability he would not have lost his privileges, inasmuch as mixed motive claims are not viable under the ADA."[61]

For years, especially following *Gross*, scholars have posited that this difference is not just superficial. Sandra Sperino and Suja Thomas described the allegedly heightened standard for retaliation claims as follows:

> *Nassar* is striking because the choice it makes will hamper legitimate claims by plaintiffs. A simplified example of an employment decision illustrates the problem. Sally's supervisor is Bob. Sally complains to the human resources department that Bob is sexually harassing her. Bob gets angry and starts micromanaging Sally's work. Bob tells his supervisor Larry that Sally is a problem employee and that she is making mistakes. Larry, who is not aware of the sexual harassment allegation, begins to think of Sally as a problem employee. Bob reports to Larry that Sally is fifteen minutes late for work two days in a row. Although Larry would normally overlook such an infraction, he decides to fire Sally. Before he does, he asks Bob whether Sally should be fired. Bob also recommends that Sally be fired. While it is clear that the sexual harassment complaint played a role in Sally's termination, it is unclear whether Sally could establish "but for" cause.[62]

Alex Long noted, "*Nassar*'s adoption of a but-for causation standard obviously subjects Title VII retaliation plaintiffs to a heightened causation standard, thus making it more difficult for retaliation plaintiffs to establish the requisite causal link between protected conduct and an employer's adverse action."[63] Long also cited five other law review articles describing but-for causation as a consequential, more difficult standard to prove,[64] and scholars have also noted that causation is a particular hurdle in ADA claims.[65]

This concern might be well-founded. At least one experimental study has shown that causation standards in employment discrimination cases can affect a jury's decision.[66] Richard Weiner and Katlyn Farnum conducted an experiment aimed at determining the effect of altering the causation standard from motivating-factor to

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61. *Id.* (citing *Serwatka*, 591 F.3d at 962); *see also* Green v. Fed Ex Nat'l LTL, Inc., No. 09 C 432, 2010 WL 3613979, at *8 (N.D. Ill. Sept. 8, 2010) ("But the employer has no liability for a mixed-motive employment decision if it would have made the same decision even in the absence of the illegal motive."); Robert v. Carter, 819 F. Supp. 2d 832, 842 (S.D. Ind. 2011) ("It must also be noted, however, that in a disability discrimination claim, the employee's perceived disability must have been *the* 'but-for' cause of the adverse action complained of.") (emphasis added).

62. Sperino & Thomas, *supra* note 3, at 228. One could imagine quite similar facts with other discrimination claims where a supervisor motivated by discrimination waits to terminate an employee member of a protected class until such infractions are reported.

63. Long, *supra* note 10, at 735 & n.118 (summarizing articles by other legal scholars highlighting the same concern).

64. *Id.* at 735 n.118.

65. *See* Michael Ashley Stein, Anita Silvers, Bradley A. Areheart, & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 719–21 (2014).

66. *See* Richard L. Wiener & Katlyn S. Farnum, *The Psychology of Jury Decision Making in Age Discrimination Claims*, 19 PSYCH., PUB. POL'Y & L. 395, 407 (2013).

but-for causation, particularly for ADEA claims. The study found that charging the participants with a but-for jury instruction as opposed to motivating-factor increased the likelihood that the participants found for the defendant from forty-five percent to sixty-two percent.[67] Similarly, David Sherwyn and Michael Heise conducted two studies in 2010 and 2013. The 2010 experiment found that "plaintiffs in cases with a motivating factor jury instruction were significantly more likely to receive litigation costs and attorney fees than plaintiffs in cases with the [but-for] jury instruction."[68] In 2013, the authors focused their attention on retaliation claims and found a similar result.[69]

Additionally, empirical evidence has shown that the failure to prove causation is the most common reason plaintiffs lose certain claims, including retaliation and whistleblowing claims. Nancy Modesitt analyzed a set whistleblowing cases decided in 2012 and found that an "[i]nability to prove causation is the single largest reason that whistleblowers lost their case."[70] In 2007, Richard Moberly analyzed administrative decisions involving Sarbanes-Oxley's antiretaliation provision and found that proving causation was a major hurdle for complainants.[71] It is this evidence, in part, that scholars rely on when expressing concern over the adoption of but-for causation.

It is worth noting that there is a growing recognition that the impact of but-for causation might be overstated.[72] This recognition stems in part from the Supreme Court's description of but-for causation in *Bostock* as not a sole-cause standard, thus aligning it quite nicely with what one might consider to be true disparate-treatment discrimination.[73] This recognition also stems from a recognition that plaintiffs might not actually advance a motivating-factor causation claim due in part to fears that pointing out the additional factors considered may not be the best tactical move due to the likelihood that it could decrease the damages that will be awarded if the plaintiff prevails.[74] Looking at the causation standard's impact empirically can provide insight into these theories as well.

A. Causation's Potential Effect on Claim Filing

When determining that but-for causation applies to Title VII retaliation claims, the Supreme Court reasoned that applying a lower motivating-factor standard would

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67. *Id.* at 405.

68. David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 903 (2010).

69. *See* David Sherwyn, Michael Heise & Zev J. Eigen, *Experimental Evidence that Retaliation Claims Are Unlike Other Employment Discrimination Claims*, 44 SETON HALL L. REV. 455, 496–500 (2014).

70. Nancy M. Modesitt, *Why Whistleblowers Lose: An Empirical and Qualitative Analysis of State Court Cases*, 62 KAN. L. REV. 165, 184 (2013).

71. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 104 (2007).

72. *See* Eyer, *supra* note 56, at 1626; Widiss, *supra* note 56; Sullivan, *supra* note 14.

73. *See* Eyer, *supra* note 56, at 1656.

74. *See* Sullivan, *supra* note 14.

encourage the filing of frivolous charges.[75] The Supreme Court did not provide empirical support for its hypothesis: adopting but-for causation would decrease the filing of frivolous charges.[76] And scholars were quick to point out the lack of empirical support.[77] But there are reasons to believe that a change in the causation standard could impact the decision to file an EEOC charge or a federal lawsuit, particularly if that action is frivolous.

All other things held equal, a plaintiff should be more likely to prevail under a motivating-factor standard than but-for causation. And an individual should be more likely to file a lawsuit if they are more likely to win. The decision to file a lawsuit has been modeled many times. At its most basic level, that decision involves a consideration of the expected award and the costs associated with the action. The costs include filing and attorneys' fees (and at times reputational concerns). The expected award is the product of the probability of success (or settlement) and the likely damages awarded (or settlement value). If the expected award is greater than the expected costs, the individual should choose to file the lawsuit.

Because but-for causation is generally thought to be more difficult for plaintiffs to prove, but-for causation should lower the plaintiff's probability of success. For the marginal filer (who has expected costs and expected awards that are somewhat close), this decrease would lower the likelihood that a plaintiff files a lawsuit. Notably, the decrease in the plaintiff's probability of success may affect the decision to file even if the plaintiff does not have detailed knowledge of the law. A lawyer will be aware of the governing standards and more likely to represent a plaintiff if her probability of success is greater.[78] In fact, Sperino and Thomas posit that following adoption of but-for causation, attorneys will advise potential claimants that "it is now difficult for the plaintiff to win even when the person's protected activity played a role in an employment decision."[79] But a plaintiff may also be aware of increased success in employment cases through other networks, such as from peers filing claims, human resource offices, and nonprofit organizations promoting awareness about filing employment discrimination claims.

Frivolous charges are generally defined as those with a very small probability of success, or a suit with a negative expected value.[80] Due to imperfect information and low costs under the American system of allocating fees, it may be rational for a

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75. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013). The Court went so far as to hypothesize that motivating-factor causation would encourage employees who have reason to be fired to quickly file a discrimination claim so as to prevent such a firing. *Id.* Of course, one may wonder why this argument cannot be made on both sides of the debate: the defendant could wait until the reporting employee commits an infraction before terminating them or conduct an investigation to find some additional reason for the termination that could diminish the effect of the retaliation.

76. *See* Sperino & Thomas, *supra* note 3, at 234.

77. *Id.*

78. The majority of individuals filing a charge with the EEOC are not represented by an attorney. *But see* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 569 (2001) (recognizing that the vast majority of employment discrimination claims filed in court are filed by an attorney). Approximately ten percent of charging parties in the EEOC dataset analyzed in this Article are represented by an attorney.

79. Sperino & Thomas, *supra* note 3, at 241.

80. Bone, *supra* note 13, at 529–30.

plaintiff to file a frivolous claim.[81] Generally speaking, settlement is possible even when lawsuits are frivolous because (1) defendants rarely know with certainty that the action is frivolous, and (2) defendants bear their own costs of responding to all charges (and often have reputational considerations that may encourage settling employment discrimination claims).[82] Accordingly, even if a plaintiff is aware that their lawsuit is frivolous, because of the prospect of settlement, the plaintiff may file the frivolous claim.[83] This is even more likely when plaintiffs' costs of filing a claim are low or nonexistent, such as the filing of an EEOC charge. In fact, Rosenberg and Shavell find that because of the costs of responding to litigation and the promise of settlement, under the American attorney's fees allocation system, a plaintiff may still file a claim even if the defendant is aware that the charge is frivolous (even if information is perfect).[84] Bone expands these models by addressing the plaintiff's wealth of knowledge, and concludes that when the plaintiff or defendant has critical private information, it is very likely that a frivolous claim is filed and unjustified settlement occurs.[85] To avoid these fairness and efficiency costs, Bone suggests that regulation is often necessary in any asymmetric information situation.[86] Notably, in the employment scenario, it is much more likely that the asymmetric information favors the employer—meaning the employer is the one more likely to know whether the plaintiff's claim is frivolous, suggesting that settlement of frivolous charges in the employment context is less likely. Specifically, under a but-for causation framework, the employer is more likely to know whether there were reasons (legitimate or pretextual) other than discrimination for the adverse employment action.

Despite the low costs of filing an employment claim, there are a number of procedural regulations that should deter the filing of frivolous charges in the EEOC or in federal court.[87] When filing a charge with the EEOC, the charging party must swear to its truth under penalty of perjury.[88] Title VII allows a court to shift fees and award employers attorney's fees if it determines a lawsuit was frivolously filed.[89] Federal Rule of Civil Procedure 11(b) requires filers to certify that, in part, "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for

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81. *See* Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 4 (1990).

82. *Id.* at 3–4 n.3.

83. *Id.* at 4.

84. *See* D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985).

85. Bone, *supra* note 13, at 576.

86. *See id.* at 579–96. In an EEOC claim, one party almost always has more factual information about the claim than the another. Such regulation suggested by Bone includes penalties, including Rule 11 of the Federal Rules of Civil Procedure, strict pleading standards, much like the Supreme Court later adopted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and early screening of claims by the court. *See id.*

87. Some of these mechanisms are unique to Title VII.

88. *See* Sperino & Thomas, *supra* note 3, at 231 (recognizing these costs).

89. *Id.*

establishing new law."[90] Rule 11(c) allows a judge to sanction the party for violating that rule.[91] Additionally, state bar rules provide for additional actions against attorneys who act in bad faith.[92] And heightened pleading standards adopted under *Twombly* and *Iqbal* allow courts to dismiss potentially frivolous claims early in the litigation under Rule 12(b)(6).[93] But of course, such sanctions must be levied with frequency for these rules to have any real effect. Surveys of federal and state judges suggest that Rule 11 did decrease frivolous suits.[94] Theoretically, Rosenberg and Shavell walk through the economic framework of sanctioning frivolous claims and conclude that sanctions can be set in a way such that they do deter future frivolous claimants.[95] On the other hand, some empirical studies of *Twombly* and *Iqbal* suggest that the heightened standards may have had little impact on claim filing.[96]

Particularly if a filing party considers these potential deterrents and costs, changing the plaintiff's probability of success could impact the prevalence of such charges. This is in fact the Supreme Court's goal when adopting a heightened standard and citing the floodgate fear. But given that filing a charge of discrimination with the EEOC is almost costless, sanctions are thought to be rare, defendants have the upper hand with information asymmetry, and defendants may even settle frivolous charges because they bear their own costs, there are reasons to expect that the Supreme Court was wrong.

Further, I posit that there are reasons to believe that in fact the Supreme Court's adoption of a stricter standard might actually increase the filing of claims in federal court (at least in the short term) by decreasing the likelihood of settlement. If the parties have perfect information about the likelihood that the plaintiff will prevail, it is unlikely that altering the causation standard would change settlement rates, instead of only changing settlement amounts. But because the parties do not have perfect information, nor do they weigh the change in any legal standard equivalently, the change in the causation standard could change settlement rates.

Take the following basic model, where absent risk aversion, the plaintiff and defendant consider the costs of litigation, the plaintiff's probability of success, and likely damages when determining whether to settle a lawsuit:

$$W_p\,(\Phi) - C_p \leq X \leq (W_p)\,(\Phi) + C_d$$

Where W_p is the probability that the plaintiff prevails at trial, Φ are the likely damages awarded, C_p are the plaintiff's costs, and C_d are the defendant's costs. The parties will be indifferent between settling for the range of values, X, or going to

90. FED. R. CIV. P. 11(b).
91. FED. R. CIV. P. 11(c).
92. *See* Sperino & Thomas, *supra* note 3, at 232.
93. *See* FED. R. CIV. P. 12(b)(6).
94. *See* Bone, *supra* note 13, at 527 n.31.
95. *See* Rosenberg & Shavell, *supra* note 84, at 9–10.
96. *See* William H. J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 J. EMPIRICAL LEGAL STUD. 474 (2017). *But see* Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 STAN. J. COMPLEX LITIG. 223, 227 n.13 (2014) (providing a discussion of potential limitations of these studies and the competing results).

trial. But this model assumes both parties know W_p or at least that they think W_p is the same. Instead, the more accurate model may be:

$$W_p\,(\Phi) - C_p \leq X \leq (W_{pd})\,(\Phi) + C_d$$

Where W_p is the plaintiff's belief that they will prevail, and W_{pd} is the defendant's belief that the plaintiff will prevail. If both parties are optimistic—meaning they believe that they have more than a 50% chance of prevailing—then settlement will be less likely. Numerically, take W_p to be 60%, W_{pd} to be 40%, both parties to have costs of \$50 ($C_p = C_d = \$50$), and both parties to believe expected damages (Φ) are \$3,000.[97] Then the plaintiff's expected earnings from the action are \$1,750 and the defendant's expected losses are only \$1,250. Settlement is unlikely to occur if both parties are risk neutral and costs are equal.[98]

How the adoption of but-for causation standard (or any change in a liability standard) affects settlement depends on how it affects W_p and W_{pd}. As W_{pd} and W_p diverge, settlement becomes less likely. If under motivating-factor causation, W_p is equal to W_{pd}, but after the adoption of but-for causation, the defendant becomes optimistic and W_{pd} is now less than W_p, then settlement rates are likely to decrease. And this scenario is quite likely when the court is addressing a floodgate fear. Floodgates are more likely in contexts where there are numerous plaintiffs and likely repeat-player defenders—think consumer, prisoner, and employment discrimination litigation. These contexts are also likely to involve asymmetric information given several known disparities between the parties.

It is quite likely that W_{pd} will be less than W_p following the adoption of but-for causation in employment discrimination claims or that W_{pd} will decrease more than W_p in reaction to a change from motivating-factor causation to but-for causation. The employer is much more likely than the employee to have information related to causation.[99] Specifically, the employer is more likely to know if there were alternative reasons (legitimate or pretextual) for the plaintiff's termination or failure to hire that could be presented to challenge the protected activity or membership in a protected class as the but-for cause.

W_{pd} may also become less than W_p because employers are more familiar with the change in the law. Many scholars have explored the fact that employers are repeat

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97. Of course, I am keeping this model at its most basic. There may be more room for settlement because it is unlikely that C_d and C_p are equivalent. When responding to an EEOC charge it is likely that the plaintiff costs are almost nothing and more likely that the defendant has an attorney that must be paid to respond to the charge and investigate the allegations. The majority of individuals filing a charge with the EEOC are not represented by an attorney. *See supra* note 78 and accompanying text.

98. For a detailed discussion of a model of settlement, including a discussion of different costs and risk aversion, see J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 75 (2016). Adding in risk aversion could of course increase the likelihood of settlement.

99. In motivating-factor causation, there could still be a decrease in settlement if W_p did not equal W_{pd}, if the difference between the two gets larger. This is especially likely if costs and damages are not the same because settlement still occurs under those scenarios even if W_p does not equal W_{pd}.

players in both litigation and arbitration.[100] The fact that they are repeat players and that employees generally are not suggests a familiarity with the law and how it might affect litigation outcomes. A survey of the employment defense bar's recognition of the Supreme Court's adoption of but-for causation in *Nassar* and the adoption of but-for causation by lower courts as well makes clear that it certainly expected the decision to impact the plaintiff's likelihood of success. For example, Jackson Lewis published a blog post ending, "This opinion is welcome news for employers confronted with increasing numbers of retaliation claims. In fact, Justice Kennedy indicated that the heightened standard of proof will assist in obtaining the dismissal of 'dubious claims at the summary judgment stage.'"[101] And other attorneys, when discussing the causation standard, noted "[e]mployers should see a reduction in retaliation claims as this new, more difficult standard of proving causation works its way through the courts" and encouraged their clients to consider the standard when handling "actual or threatened litigation."[102]

So, what does this potential effect on settlement rates mean? One consequence may be that, at least in the short term, a stricter liability standard could actually burden the courts—either due to a decrease in settlement in the EEOC, which means more cases that can be filed in federal court, or through a decrease in settlement once in federal court, adding to the court's workload. A change in the probability of settlement is unlikely to make the expected value of filing a charge negative when there are essentially no costs associated with filing in the EEOC (and certainly no threat of sanctioning within the agency), so it is unlikely to affect filings with the agency. Further, a change in settlement, particularly if the defendant is overly optimistic, means a decrease in the probability of receiving compensation for plaintiffs, including those with meritorious claims if the employers are overly optimistic.

Finally, if the change in the defendant's perceived probability of plaintiff's likelihood of victory decreases enough that settlement rates drastically decline,

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100. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190 (1997); Scott R. Bauries, *Procedural Predictability and the Employer as Litigator: The Supreme Court's 2012-2013 Term*, 52 U. LOUISVILLE L. REV. 497, 497 (2014).

101. *U.S. Supreme Court: Title VII Retaliation Claims Require Proof of 'But-For' Causation*, JACKSON LEWIS (June 25, 2013), https://www.jacksonlewis.com/resources-publication/us-supreme-court-title-vii-retaliation-claims-require-proof-causation [https://perma.cc/SB5L-3SV3]; *see also Supreme Court Adopts "But-For" Causation Standard for Title VII Retaliation Claims*, PROSKAUER (June 26, 2013), https://www.proskauer.com/alert/supreme-court-adopts-but-for-causation-standard-for-title-vii-retaliation-claims [https://perma.cc/RK6L-JSHW] ("This decision is welcome news for employers. Retaliation claims are very much on the rise – in fact they are now the most common type of claim filed against employers. Last year, 38% of all complaints filed with the EEOC included some claim of retaliation: that number is up from 22% just 15 years ago.").

102. Oberrecht, *supra* note 11; *Mixed Motive Discrimination Post-Gross*, MCGUIRE WOODS (Mar. 9, 2010), https://www.mcguirewoods.com/Client-Resources/Alerts/2010/3/Mixed-Motive-Discrimination-Post-Gross [https://perma.cc/C6QF-YVTE] ("In the meantime, employers should consult counsel in applying the lessons of *Gross* to reorganizations and other employment decisions, as well as to any actual or threatened litigation.").

adopting but-for causation could potentially deter the filing of legitimate claims in federal court even if not in the EEOC. A likely mechanism for this result is through an attorney's willingness to take the case.[103] Because plaintiffs' attorneys in employment cases generally operate on contingency fee bases, for the change to impact the filing of a federal lawsuit (absent any change in how the EEOC handles the charge), it must impact attorney representation. If an attorney is less likely to take the case once the plaintiff is ready to file the case in court, the plaintiff will front the costs of litigation and may be less likely to file.

The final stage of litigation that could be affected by the but-for causation standard (and should be affected, all else equal) is the outcome of a case that does not settle. If nothing else changes—not the rate of filing or settlement—then the but-for causation standard should decrease the likelihood that a plaintiff prevails because it is a tougher standard to prove, although as noted this has been called into question by some employment scholars.[104] Of course, if the change in standard does impact the rate of filing by decreasing the filing of frivolous charges, then it is less likely that there would be a change in the outcome of a jury or judge verdict. And in the long run, if the standard does not mean that the defendants that would have settled are more likely to prevail in court than previously, the defense bar may lower their perceived probability of success, getting us back to the status quo.

The Supreme Court may have been correct to hypothesize that a heightened causation standard (but-for) could deter the filing of frivolous charges. Or, the Court could have actually caused an increase in their docket through the adoption of the heightened standard. Scholars may also be correct to hypothesize that raising the standard might deter legitimate claims, which could be evidenced through a change in settlement rates. But because little is known about how the change in standard truly affects the parties' perception of the plaintiff's probability of success, the theory deserves to be empirically tested. I seek to address this empirical question in this Article by analyzing the effect that the standard has on the filing of claims, the probability of settlement, and dispositions that suggest the filing of a frivolous charge.[105]

B. Effect of a Change in Filing

Whether but-for causation decreases frivolous claims, meritorious claims, or both matters for deterrent purposes. As with tort liability, in addition to compensating wronged employees or applicants, federal antidiscrimination statutes should deter employers from discrimination. Overdeterrence remains a concern because employers may refuse to hire members of a protected class for fear of costs

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103. Sperino & Thomas, *supra* note 3, at 241 ("While this attorney intervention may thwart some false claims, it will also deter legitimate claims.").

104. *See* Sullivan, *supra* note 14.

105. I have applied this model to the adoption of but-for causation because it serves a recent and ideal case study for an empirical analysis, which I conduct in this Article. But the implications of this model may expand to any time that the Supreme Court adopts a liability standard in which the parties have asymmetric information and filing costs are low, which is likely to be the case in many floodgate contexts where there are numerous plaintiffs and repeat litigator defendants.

associated with charges, particularly frivolous charges.[106] Optimal deterrence is the goal. Frivolous filings may result in overdeterrence, and deterring legitimate claims will result in underdeterrence.

The Supreme Court has expressed concern over the costs associated with frivolous lawsuits in many employment discrimination cases,[107] and it has taken several measures to prevent the filing of such claims, including adopting Rule 11.[108] These costs include efficiency costs, including wasted financial resources and time. Some scholars posit that, as with its reliance on the floodgate fear, the Court's sole concern is protecting the resources and dockets of federal courts.[109] But the costs also include fairness concerns that result when unworthy plaintiffs recover for frivolous claims during settlement due to the costs of litigation.[110] Contrastingly, scholars have also suggested that frivolous lawsuits may assist in optimal deterrence because of the assumption that frivolous suits often accompany or follow legitimate suits (referred to as "piggybacking") aligning social and private incentives to take care.[111]

Scholars, practitioners, and judges have also expressed a specific concern over the prevalence of frivolous employment discrimination cases. One federal judge pointed to the great increase in summary judgment in employment discrimination as proof of a rise in frivolous claims.[112]

Despite this focus on the prevalence of and high costs associated with frivolous claims, there is a general consensus that there is a lack of empirical evidence that can support the adoption of certain standards or rules to address this potential problem.[113] This is likely because there are very few publicly available datasets that report detailed information about claims filed in federal court, including the outcome of the claim. While one could look at published opinions, it is generally understood that published opinions are not representative of all litigation and that analysis of such decisions, especially in the employment law context, could produce biased results.[114] This Article analyzes the discrimination charges filed under federal statutes—those filed with the EEOC—and all cases filed in federal court.

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106. Major G. Coleman, William A. Darity Jr. & Rhonda V. Sharpe, *Are Reports of Discrimination Valid? Considering the Moral Hazard Effect*, 67 AM. J. ECON. & SOCIO. 149, 149 (2008).

107. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980) (discussing the role of awarding attorneys' fees in employment discrimination litigation); Zatko v. California, 502 U.S. 16, 16–17 (1991) (per curiam) (discussing ways to deter frivolous in forma pauperis cases).

108. FED. R. CIV. P. 11.

109. *See* Sperino & Thomas, *supra* note 3, at 241.

110. Katz, *supra* note 81, at 3.

111. Thomas J. Miceli & Michael P. Stone, *"Piggyback" Lawsuits and Deterrence: Can Frivolous Litigation Improve Welfare?*, 39 INT'L REV. L. & ECON. 49, 49 (2014).

112. Mark W. Bennett, Essay, *From the "No Spittin', No Cussin and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y. L. SCH. L. REV. 685, 697–98 (2013).

113. Levy, *supra* note 1, at 1074.

114. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125–26 (2002).

III. EMPIRICAL ANALYSIS

A. Setup and Data

Individuals alleging discrimination under the ADA and ADEA (and Title VII) must first file a charge with the EEOC, or corresponding state agency, and receive a "right to sue" notice before filing a claim in federal court.[115] Once receiving a right to sue notice from the agency, the charging party can file a claim in the district court in the state where the alleged action occurred or where the employment records of the employer are kept.[116] Those district courts must follow the judicial interpretations of the antidiscrimination statute, including the causation standard, adopted by the federal circuit with jurisdiction over the charge. This Article uses data from the EEOC and federal courts to see if changing the causation standard from motivating-factor to but-for causation affects the total number charges filed with the agency and in federal court, settlement of those claims, and certain dispositions that signal a frivolous (or meritorious) charge.

Through a FOIA request to the EEOC, I received data on every discrimination charge filed with the EEOC since 1985 until August 2013.[117] The information provided for each charge includes the state where it was filed and the date it was filed, from which I can determine what circuit it was filed in and when it was filed.[118] When the EEOC receives a charge, it first conducts an intake interview with the charging party. From this interview, the agency obtains detailed information that is later entered into a computerized data system. This information includes characteristics of the charging party, including his or her date of birth, race, national origin, and gender. The EEOC also records information about the employer, including the industry of the employer (recorded as North American Industry Classification System (NAICS) codes since 2006), the city and state of the employer, and the employer's number of employees, which is recorded as a range.

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115. Under Section 706 of Title VII of the Civil Rights Act, any individual with a Title VII employment discrimination claim must first file the claim with the EEOC or a corresponding state Fair Employment Practices Agency (FEPA) before he or she can file a claim in federal court. Many states have agencies that receive claims of employment discrimination under state law and Title VII. If the state has a worksharing agreement with the EEOC, the charge will be dual filed with the EEOC and the FEPA. The EEOC has worksharing agreements with more than ninety FEPAs. *EEOC's Relationship with State & Local Fair Employment Practices Agencies* 5–6, http://www.nalcbayarea.com/EEO/EEO%20Guide%202007/EEOC_2007/EEO_secp.pdf [https://perma.cc/7UTJ-2MJU]; *see also* EEOC v. Com. Off. Prods. Co., 486 U.S. 107, 110 (1988) (citing 42 U.S.C. § 2000e–5(e) and describing timing procedures for filing a charge with a local agency). ADEA plaintiffs do not have to wait to receive a right to sue letter from the EEOC before filing a lawsuit in court and can instead file a lawsuit sixty days after filing an EEOC charge. Canty v. Wackenhut Corr. Corp., 255 F. Supp. 2d 113, 118 (E.D.N.Y. 2003) (citing 29 U.S.C. § 626(d)).

116. 42 U.S.C. § 2000e-5(f)(3).

117. This dataset is comprised of over two million charges; however, this analysis is limited to charges filed after 2006.

118. For a discussion of how to file a charge, see *Federal EEO Complaint Processing Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/federal-eeo-complaint-processing-procedures [https://perma.cc/2WJS-DNW2].

The EEOC records important information about the claim the charging party is making.[119] The EEOC records under which statute or statutes the charging party is filing and the basis or bases of the claim. The basis is essentially the type of violation that the charging party is claiming occurred; for example, sex discrimination, age discrimination, or disability discrimination. The EEOC also records the issue(s) that the charging party claims illustrated this basis. For example, the charging party could complain that he or she was fired, denied a promotion, transferred, received less pay, or was not accommodated.

The EEOC data also includes relevant information that provides some proxy of the merit of the charge. In 1995, the EEOC adopted a Priority Case Handling Process, in which an EEOC complaint specialist assigns a charge an A, B, or C code based on the charge's likelihood of resulting in a reasonable cause finding.[120] An "A" charge is expected to result in a reasonable cause finding, a "B" charge will likely result in a reasonable cause finding, and a "C" charge has "uncertain merit."[121] This determination affects the amount of attention and investigation that each charge will receive. Receiving a "C" charge is likely indicative of a frivolous charge. Internally, the EEOC labels "C" charges as "Charges Suitable for Dismissal." According to a 2008 study conducted by Nielsen, Nelson, and Lancaster, these charges fare much worse during the EEOC process.[122]

The EEOC also updates this computerized data as a charge is resolved. A charge can be resolved in several ways. The charge could end in settlement at several stages of an EEOC investigation. It can be mediated early on in the investigation or conciliated with the assistance of the EEOC after a finding of reasonable cause.[123] In this analysis, I consider a charge to have settled if the parties successfully conciliated or mediated the charge.

Following the closure of a charge within the EEOC, a charging party can decide to file a claim in federal or state court alleging discrimination under the federal antidiscrimination statutes.[124] The Federal Judicial Center Integrated Database (IDB) provides data on all federal court claims.[125] The IDB includes case

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119. For a discussion of EEOC procedure, see *id.*

120. *See* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 191 (2010).

121. *Id.*

122. *See id.*

123. After a charge is labeled, the EEOC attempts to mediate the claim, and if mediation fails, the EEOC will begin an investigation. Following the investigation, the EEOC must determine whether a charge has cause or not. The EEOC will find reasonable cause if it believes that an unlawful employment practice more likely than not occurred under Title VII. This determination has several important consequences, including whether the EEOC will attempt to conciliate a claim and whether the charging party decides to file the charge in federal court. If the EEOC finds cause, the EEOC must then attempt to conciliate the charge with the employer. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 118. If the EEOC does not find cause, it does not necessarily mean that the charge was frivolous, but if a charge is frivolous, it is likely that the EEOC will not find cause.

124. For a discussion of EEOC procedure, see U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 118.

125. *See The Integrated Database: A Research Guide*, FED. JUD. CTR. 1

characteristics of all federal civil cases reported by the courts on a quarterly basis.[126] Variables include the date the case was filed, the date it was resolved, the district court where it was filed, whether the plaintiff filed the claim pro se, and whether the case was a class action. Importantly, the variables also include the outcome of the case, including a variety of different resolutions, such as whether the parties settled or voluntarily dismissed the case, whether the court granted a pretrial motion, whether there was a trial, and—if there was a judgment—whether the judgment was for the plaintiff or defendant.[127] The nature of the suit (NOS) indicates the type of case filed. The nature of the suit code is not incredibly detailed. For example, Title VII and ADEA claims would both likely be considered Civil Rights Jobs NOS. But helpfully for this analysis, ADA Employment is a separate NOS code. I consider a case to include an ADA claim If the NOS code is "Civil Rights ADA Employment."[128] I limit the analysis of the IDB to NOS codes "Civil Rights ADA Employment" and "Civil Rights Jobs," as I believe these are the two primary NOS codes illustrative of employment antidiscrimination cases.

As recognized by the literature questioning empirical studies of *Twombly* and *Iqbal*'s effect on dismissal rates, empirically analyzing civil litigation is challenging.[129] Some of that challenge comes from the fact that there are many decisional points that could be affected by a change in law before a claim ever reaches a motion to dismiss. For example, a decrease in the plaintiff's rate of success at trial could (1) signal the direct effect of the adoption of the heightened but-for causation standard on the jury's verdict, (2) signal the deterrent effect of the standard on the filing of meritorious claims, or (3) be the direct result of a decrease in settlement of claims less likely to have merit. Accordingly, I look at the effect of the standard at a variety of stages. If it is the case that the adoption of but-for causation decreased the filing of frivolous (or meritorious) filings, then an empirical analysis should show a decrease in the filing of charges with the EEOC after the standard was adopted only for those charges affected and not all other charges (meaning there should be a decrease in the rate of charges affected by the standard filed with the agency). Similarly, there should be a decrease in the labeling of a charge as likely to dismiss by the EEOC if the standard decreased the filing of frivolous charges. If there is no evidence of a decrease, then a change in settlement behavior should not be tainted by a change in the merit of a charge. If the standard affected the filing of frivolous charges, there should also be a decrease of filings in federal court and a decrease in the number of filings that are dismissed in favor of the plaintiff pretrial (but this decrease could be offset by the heightened standard making it more likely that the defendant prevails on a causation ruling). Of course, if there is no evidence of a change in filing behavior, any effect on pretrial rulings would suggest changing the liability standard has an effect on a causation ruling.

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https://www.fjc.gov/sites/default/files/IDB-Research-Guide.pdf [https://perma.cc/8D7V-9KDZ].

126. *Id.*

127. *Id.* at 2.

128. Variable codebooks can be downloaded at FED. JUD. CTR., *supra* note 125. Only one NOS code can be recorded, so I may not have captured every ADA employment case if it was also filed with another claim.

129. *See* Gelbach, *supra* note 96.

Due to the novelty of the but-for causation standard before *Nassar* (and due to data limitations), I analyze whether the Supreme Court's adoption of the but-for causation standard in *Gross* in 2009 affected the number of ADEA charges filed in the EEOC as compared to other discrimination charges (meaning the rate of charges that include an ADEA claim). Approximately 24% of EEOC charges filed during the time period I analyze Include an ADEA claim. Table 4 of the Appendix provides the number of ADEA charges as compared to all other ADEA charges filed with the EEOC from 2007 to 2011.[130]

Because there are advantages to studying a circuit split (it is easier to isolate the effect of the standard when it only impacted claims filed in one circuit), I also analyze whether the Seventh Circuit's adoption of the but-for causation standard in 2010 in *Serwatka* decreased the number of ADA charges filed with the EEOC as compared to all other discrimination charges within the Seventh Circuit and after its adoption. Approximately 26% of all charges filed with the EEOC during the time period I analyze include an ADA charge.[131]

Similarly, I analyze the impact of but-for causation for both ADA claims in the Seventh Circuit following *Serwatka* and ADEA claims following *Gross* on whether a charge affected by the new standard is labeled likely to dismiss by the EEOC. Approximately 14% of all charges, 12% of all ADA charges, and 15% of all ADEA charges receive a C Label (*Dismiss Label*).

Finally, within the EEOC, I analyze the effect of the standard on the parties' settlement behavior (*EEOC Settlement*).[132] As reported in Figure 1 below, approximately 17% of all charges in this sample resulted in settlement, and approximately 21% of charges that contained only an ADA charge and 17% of charges with only an ADEA claim settled.

When studying the impact of but-for causation on ADA charges in the Seventh Circuit, I also have the ability to analyze the impact of the standard on federal court filings and whether the parties settled the claim during the pendency of the litigation (*FC Settlement*).[133] As reported in Table 3 of the Appendix, approximately 9% of

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130. *See infra* Appendix at Table 4.

131. The summary statistics presented in Tables 1, 2, 3, and 4 of the Appendix include the percentage of charges, by the sample analyzed, that included an ADA Charge, ADEA Charge, were settled, included a dismiss label, or were granted summary judgment. *See infra* Appendix at Tables 1–4.

132. I define "settled" to include charges that the EEOC coded as "Settlement with Benefits," "Conciliation," and "Withdrawal with Benefits."

133. I consider a case settled in federal court if the court recorded that the case was dismissed due to settlement, dismissed voluntarily, or that there was a consent judgment. Though there is some debate as to how to measure settlement (or plaintiffs' success) with the IDB data, I believe it is consistent with the theory that in the majority of cases the plaintiff only voluntarily withdrawals with benefit. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1592–93 (2003); *see also* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1298 n.69, 1309–11 (2005) (estimating in an audit that 35% to 45% of voluntary dismissals were settled in cases brought by individual plaintiffs, that 95% of cases coded as settled were settled, and that some percentage of consent judgments also included settlements); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial*

the employment cases filed in federal court include an ADA claim, approximately 57% of the employment cases filed in federal court settled, and approximately 59% of the ADA cases settled in this time period.[134] I am unable to analyze the effect of the Supreme Court's adoption of the but-for causation standard in *Gross* on ADEA claims filed in federal court because age discrimination is not a separate NOS code.

In addition to analyzing the effect of adopting but-for causation on the rate of ADA cases filed in federal court, I also analyze a rough proxy for whether the court granted summary judgment—whether the court granted a pretrial motion in favor of the defendant.[135] Approximately 16% of employment cases filed in federal court result in a pretrial motion being awarded to the defendant as defined in this analysis, and a very similar percentage of ADA cases have the same result.[136]

Figure 1 illustrates the summary statistics of the data that I analyze and illustrates the progression of an EEOC charge from filing to judgment or settlement. Notably, I do not know what percentage of EEOC charges that are not settled proceed to arbitration or to a filing in state court, which could also result in a judgment for the plaintiff or settlement and could still be affected by a change in the federal causation standard. As Figure 1 depicts, during the entire time period analyzed (January 2006–June 2013), approximately 17% of the charges filed with the EEOC settle, and approximately 16% are filed in federal court. The charges that do not settle in the EEOC are dismissed either with a reasonable cause determination or not; but no matter the reason for dismissal, the charging party can pursue the claim in federal

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Empirical Analysis, 78 NOTRE DAME L. REV. 1455, 1460 (2003) (testing the reliability of variables in the IDB data, generally limited to judgment type and judgment amount). My results do not change if I change the definition to only include whether the court recorded the disposition as a settlement, and in fact, the effect becomes larger (a 7.5 percentage point decrease in settlement, statistically significant at the 5% confidence level). *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (analyzing the IDB data and settlement rates).

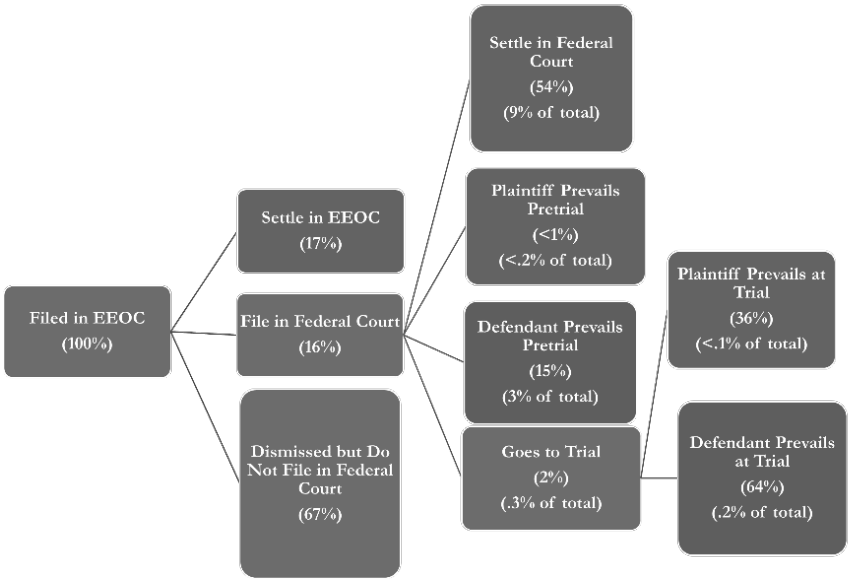
134. *See infra* Appendix at Tables 2–4. A raw comparison of the means for each subsample in these tables generally confirms the empirical results as described below. The benefit of the regression analyses is that I can control for a variety of observable characteristics that we might think are correlated with the time and region variation to more fully isolate the effect of the adoption of but-for causation. This settlement rate is consistent with other empirical analyses of employment discrimination cases. *See* Nielson et al., *supra* note 120, at 187; Charlotte S. Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. 17, 46 (2019).

135. As defined as described above, *Summary Judgment* is equal to one if the court granted a pretrial motion for the defendant. Although it is possible that this motion was a motion to dismiss, that too would signal the strength of the case or a change in the law. Dismissals for want of prosecution and lack of jurisdiction are separately coded. Limiting the analysis to cases that result in a judgment and analyzing the likelihood that the defendant is awarded summary judgment does not change the results. The results that are reported are limited to cases that were not dismissed. The benefit of a difference-in-differences estimation (DD) study is that even if there are coding errors in the IDB data, unless that missing data is correlated with the timing of the treatment effect, this should not affect my analysis. For a discussion of critiques of data analysis in civil procedure cases, see Gelbach, *supra* note 96, providing a summary of this concern, and David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1222 (2013).

136. *See infra* Appendix at Table 2.

court. Of those filed in federal court, approximately 57% settle, 16% end in a pretrial motion granted for the defendant, and 2% go to trial where the defendant prevails approximately 64% of the time. In Figure 1, green depicts the plaintiff receiving compensation, and blue represents a defendant victory. The statistics do not always add up to 100%, as I have not included any other type of dismissal. Further, because the EEOC does not track the charge through to court and the charge must first go through the EEOC's investigation, it is not the case that this figure exactly depicts the process for the EEOC charges filed during this time period, but it provides an approximation.

Figure 1: Illustration of EEOC and Federal Court Summary Statistics and Case Progression



Note: A total of approximately 715,770 charges were filed with the EEOC between January 2006 and June 2013. The first percentage in each cell represents the percentage of charges from the previous step that result in a certain outcome, and the second percentage represents the percentage of the total number of EEOC charges that result in that outcome. Green cells represent outcomes where a charging party received compensation, and blue cells represent a defendant victory (where the charging party receives no compensation). Gray cells represent intermediate steps that may or may not eventually result in a payment. These statistics represent an analysis of both the IDB data and the EEOC data, and because it is a summary of the entire time period, it is not the case that the IDB data directly represents the EEOC charges included in this analysis (it often takes the EEOC a year to resolve a charge, and the EEOC does not follow the charge to federal court). This analysis represents average information. Pretrial victories are limited to pretrial motions being granted, although including default judgments does not change the percentages reported.

B. Empirical Strategy

To isolate the effect of the switch from motivating-factor to but-for causation on the filing of charges with the EEOC and claims filed in federal court, I use regression analyses and difference-in-differences estimation (DD). This estimation takes advantage of the fact that only ADEA charges should have been affected by *Gross*'s adoption of but-for causation after June 2009, and only ADA charges filed in the Seventh Circuit following the 2010 *Serwatka* decision should have been affected by the adoption of that but-for causation standard in that case. A DD technique isolates this effect by subtracting the difference between affected and unaffected charges before and after the adoption of a standard.

To determine how the adoption of but-for causation affected the outcome of ADA EEOC charges and federal court filings, I can also compare the differences between ADA charges and other discrimination charges between the Seventh Circuit and unaffected circuits, particularly Title VII charges that were governed by motivating-factor causation throughout the relevant time period. This technique is known as triple-difference estimation (DDD). In this estimation, the only assumption necessary to isolate the effect is that there was not an unobserved shock at the time of the adoption that affected ADA charges filed in the Seventh Circuit and no other discrimination charges (such as ADA charges filed in the First Circuit or ADEA charges filed in the Seventh Circuit).[137]

I use regression analysis to estimate each specification, which controls for additional observable characteristics that might affect the outcomes and be correlated with the change in time or circuits.[138] A positive and statistically significant coefficient on the variable controlling for the adoption of but-for causation (whether the charge was filed after *Gross* and was an ADEA charge or whether the charge or lawsuit was filed in the Seventh Circuit after *Serwatka*) suggests an increase in the probability of a certain outcome due to the adoption of the but-for causation standard.[139]

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137. Although the ADA analysis has limitations because of its technical application to claims filed before the ADA amendments and the possibility that district courts were applying but-for causation in other circuits, isolating the effect with an additional comparator is important. This is truly the only but-for causation circuit split that is testable because the Seventh Circuit was the first mover after *Gross* and there was no circuit split before the Court first adopted but-for causation then. This is likely only a limitation for the analysis of claims filed in the EEOC after *Serwatka* because the claims filed in federal court during this time period were likely pre-ADA Amendment claims. A charge can be filed up to 300 days after the adverse employment action in many states. *Timeliness*, *supra* note 48. In addition, the EEOC reports spending approximately ten months investigating claims. *What You Can Expect After You File a Charge*, *supra* note 48; *see also* Befort, *supra* note 48 (analyzing district court cases and finding that it was not until 2012 that the ADAAA predominantly governed the opinions that were published).

138. I estimate each specification using Ordinary Least Squares (OLS) estimation and cluster the standard errors. For the EEOC analysis, I cluster at the receiving office of the EEOC. For the IDB analysis, I cluster at the district court level.

139. The Seventh Circuit issued a plaintiff-friendly interpretation of the ADAAA, noting that a reasonable accommodation was placing a disabled employee in a vacant position in September of 2012. *See* EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012); *see*

In the specifications analyzing the labeling and outcome of EEOC charges, I control for a variety of charge characteristics that might impact the labeling of the charge and whether it is settled. These variables include personal demographics of the charging party and other bases brought by the party that could be affected by unobserved shocks and can be expected to affect the outcome of a charge.[140] Specifically, I control for the age of the charging party when the charge was filed, the sex, race, and national origin of the charging party, whether the employer was federal or state government,[141] the basis or bases of charge, the employment issue or issues that support the charge, and whether the charge was filed in an EEOC office as opposed to a state agency office.[142] The basis of the charge includes whether it alleges sex discrimination or race discrimination, for example. The employment issue is the disparate treatment that occurred, including whether the employee was terminated or harassed. Quite frequently, a charge has multiple bases (such as disability discrimination and retaliation) and multiple issues (such as harassment and termination), and I control for any issues and bases that are alleged.

For equations estimating the effect of but-for causation on the outcome of ADA federal court cases, I control for additional case characteristics that might affect the outcome of the case. These characteristics are limited to what is coded in the data.[143]

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also Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 59 (2014) (discussing this case and many other cases that could have impacted ADA case outcomes and filings after the ADAAA). Changing the analysis to limit the post-*Serwatka* period to before that opinion does not change the results, and limiting the pre-period to match does not change the results.

140. I control for these characteristics to lessen any concerns that certain factors that could affect the outcome of a change at the same time of this decision. I do not control for these characteristics in equations analyzing the type of charge filed, because I do not believe they should affect the type of charge filed. In addition, I am interested in the total change in charge filings, not the change controlling for whether an individual of a certain type filed a charge. However, if I include this information, the results remain the same in size, significance, and direction.

141. The data also includes two-digit NAICS codes for industry when available (twenty-three industry categories, labeled "industry"). However, because these codes are frequently missing, I only control for industry in specifications that I estimated for robustness checks.

142. This control also serves as a proxy for whether the state had a FEPA office and additional antidiscrimination statutes. The variables include the following: age of the charging party when the charge was filed (*Age*), the sex of the charging party (*Female*), the race of the charging party (*Asian*, *White*, *Indian*, *Black*, *Other Race*), and the national origin of the charging party (*Hispanic*, *Mexican*, *Asian*, *Eastern*, *African*, and *Arab*), and whether the employer was federal or state government (*Education Employer*, *Federal Government Employer*, and *State Government Employer*). None of these categories provided in this description are exhaustive; however, they are the most common categories represented in the data and the most relevant to this analysis. As a result, the omitted category in the data is simply all other issues, bases, or disability type. Excluding charging party demographics, which are missing for numerous observations, does not change the size or statistical significance of the results.

143. One major benefit of DDD estimation is that it requires few assumptions about these characteristics, which makes me less concerned that I am unable to control for many. For an omitted variable to affect the analysis, that omitted variable must be something that changed in 2010, that only affected the Seventh Circuit, and that only affected ADA charges.

The case characteristics that I can control for include whether the plaintiff filed the case pro se and whether the case was a class action. The analyses of those equations are limited to employment cases, defined as those with a nature of suit equivalent to "Civil Rights Jobs" and "Civil Rights ADA Employment."[144] Analyses of the effect on ADA filings are limited to charges and cases filed between January 1, 2006, to June 24, 2013 (when the Supreme Court decided *Nassar*). Due to potential effects of the recession that are heightened by analyzing the national adoption of but-for causation in *Gross*, my analysis of ADEA filings is generally limited to 2007–2011.[145]

C. Empirical Results

The empirical results provide evidence that the only effect of adopting a stricter but-for causation standard was to discourage settlement within the EEOC and federal courts, which in turn likely burdened the court's docket and increased the filing of ADA charges in federal court.[146]

As reported in Table 5 of the Appendix, following *Gross*, I find no statistically significant evidence that the adoption of but-for causation decreased the filing of ADEA charges within the EEOC.[147] In addition, as seen in Figure 2 below, the only statistically significant result is that there was a decrease in settlement within the agency of approximately 1.2 percentage points, or 7%.[148] I am unable to test the impact of *Gross* (but-for causation) on federal court filings because the nature of suit (NOS) codes do not include age discrimination. In Figure 2, the dot represents the coefficient of interest (whether the charge was an ADEA charge filed after *Gross*), and the bars represent the 90% confidence intervals. Multiplying the coefficient by 100 equates to the percentage point effect on the dependent variable

144. *See supra* text accompanying note 119.

145. These potential concerns are discussed in more detail below. *See infra* note 147 and accompanying text.

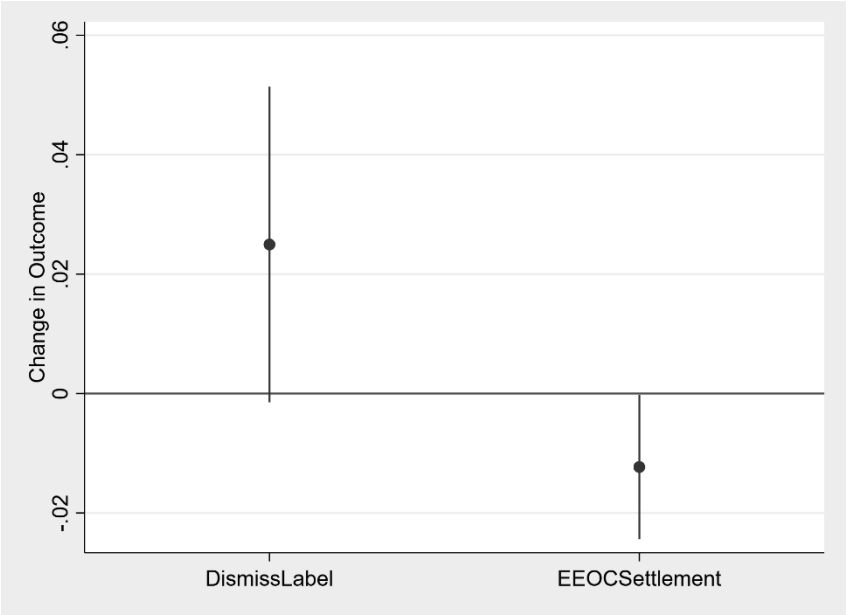
146. Full results from these regressions are available upon request.

147. When analyzing the effect of *Gross* on filings, I am only looking at the rate of charges that included an ADEA charge before and after the decision. One concern with the analysis of *Gross* is that the parallel trend assumption is conflated by the Great Recession and the peak of high unemployment in 2009 and 2010. It is possible that any decrease in the filing of charges due to the adoption of but-for causation was outweighed by an increase in age discrimination claims, which often do increase in times of economic hardship. The concern is that if age discrimination increases more than other forms of discrimination during unemployment, then that increase in the rate of ADEA charges would outweigh any effect of *Gross*. This concern is lessened by the fact that I include monthly indicator variables and am analyzing the rate of ADEA charges as compared to other charges, and employment data shows that in fact other charges should have grown at equal or higher rates at this time, because the groups most hit by the recession were younger workers and Black and Hispanic workers. Hilary Hoynes, Douglas L. Miller & Jessamyn Schaller, *Who Suffers During Recessions?*, 26 J. ECON. PERSPS. 27, 28 (2012). In fact, that difference should bias the data toward finding a decrease in filings. Further, with this statistic in mind, it is unclear why the recession would be expected to affect the merit or settlement rate of age claims differently than other types of claims.

148. On average, approximately 17.3% of EEOC charges without an ADEA charge settle. *See infra* Appendix at Table 1.

provided on the X axis. If the bar does not include zero, one can conclude with 90% confidence that the effect of the variable of interest is not due to chance.

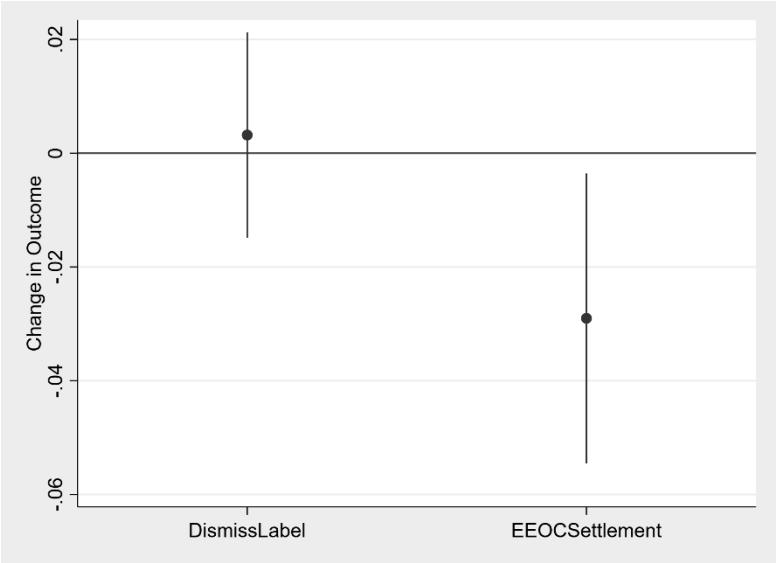
Figure 2: The Effect of *Gross* on EEOC ADEA Charges



As presented in Table 6 of the Appendix, the Seventh Circuit's adoption of the but-for standard had no effect on the relative number of ADA charges filed with the agency. The DD coefficient on whether the charge was filed in the Seventh Circuit after *Serwatka* was not statistically significant. There is also no evidence that the standard affected the likelihood that a charge received a dismiss label. Instead, the only statistically significant effect is the likelihood that the parties settled the charge within the EEOC. These results are presented in Figure 3 below and in Table 6 of the Appendix. In Figure 3, the dot represents the coefficient of interest (whether the charge was filed in the Seventh Circuit, included an ADA charge, and was filed after *Serwatka*), and the bars represent the 90% confidence intervals.

Also as illustrated in Figure 3 and Table 6 of the Appendix, the adoption of but-for causation in the Seventh Circuit decreased the likelihood that an ADA charge would settle within the EEOC by 2.9 percentage points, meaning the adoption of the but-for causation standard decreased the likelihood that the parties settled by 2.9 percentage points. This translates to a 24% effect, given that approximately 12.2% of EEOC charges with only an ADA charge are settled in the agency outside of the Seventh Circuit. Put simply, adopting but-for causation decreased the number of ADA charges that settle within the EEOC by approximately 24%.

Figure 3: The Effect of But-For Causation on ADA Claims Filed in the EEOC



In turn, as presented in Table 7 of the Appendix, the adoption of the but-for causation standard actually increased the rate of ADA cases filed in federal court by 2.5 percentage points.[149] This is consistent with a decrease of a similar magnitude of EEOC charges that were settled following the adoption of the standard; although, because the treatment period is the same as the EEOC, the entirety of the effect may not be explained by the change in settlement. In addition, as seen in Figure 4, the only other consistently statistically significant result is that the adoption of the but-for causation standard lowered the likelihood that the parties settled the claim in federal court by 7.1 percentage points, or approximately 12%.[150] The fact that the standard has no effect on a defendants' chance of prevailing before trial suggests that the increase in filings was not an increase in frivolous filings that were not settled in the EEOC, as any increase would compound the heightened standard of the but-for causation's application in such a motion.[151]

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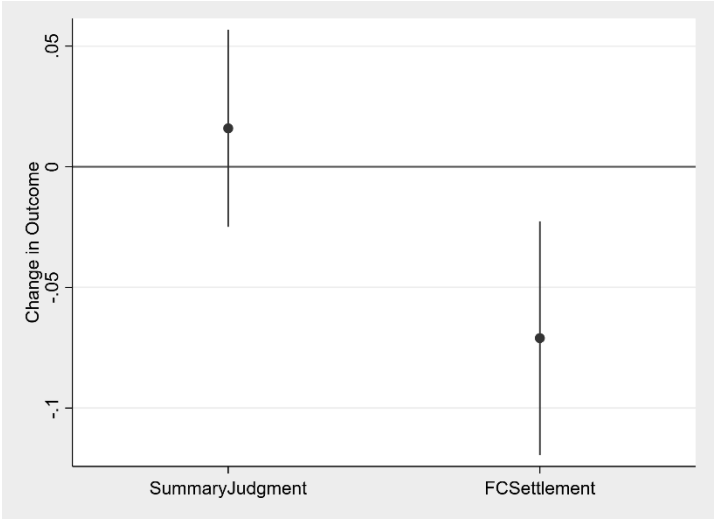
149. Of the analyzed claims not treated, 7.7% include an ADA claim, so this is a 32% increase, of which some is likely due to the decrease in settlement in the EEOC. This effect is statistically significant at the 1% confidence level.

150. This effect is significant at the 5% confidence level. Of the employment cases not treated, 56.1% settled. Both the plaintiff being pro se and case being class action statistically significantly decrease the likelihood of settlement. Pro se plaintiff cases are also statistically significantly more likely to result in summary judgment. These results are expected and support the validity of the results and dataset.

151. Additional analyses suggest that there was no impact on the probability that the defendant prevails in any form of judgment. In fact, following the decrease in settlement, there was a 0.6 percentage point increase in the likelihood that a plaintiff prevailed at trial in an ADA case, equating to a more than doubling of that likelihood given the very small percentage of cases that end in a plaintiff trial verdict. This is consistent with the idea that the claims that were settled were not frivolous. It is difficult to say anything about the impact of the standard

Figure 4: The Effect of But-For Causation on ADA Claims Filed in Federal Court



Each of the results discussed above remain of similar size and statistical significance in altered specifications. Notably, *Post-Serwatka* and *Post-Gross* were constructed such that the date of the decision marks the beginning of the post-period, and charges and lawsuits filed after the case are considered affected by it. But for the federal court filings (which first must be filed with the EEOC), if one is interested in how the filed charges changed after the adoption of but-for causation, those charges likely did not reach the federal courthouse until at least a year after they were filed with the agency. The effects in the analysis of federal court filings remain the same if the post-period is extended to take that year delay into account by changing the treatment period to a year after the decision.[152] Additional changes were made to address concerns with the similar size of the pre- and post-periods by randomly dropping circuits, and again the coefficients remained similar.[153] Further, falsification tests, such as changing the treatment circuit, suggest that these results are not subject to alternative trends or the result of using DDD estimation with microdata.[154]

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on a jury's application of causation because it could be that the increase in filings was an increase in meritorious filings not settled in the EEOC.

152. Because plaintiffs should still be affected by the change in causation standard when determining whether to file a charge in federal court after the EEOC has made its determination, my main specification treats the month of the decision as the start of the post-but-for-causation period.

153. In addition, the relevant coefficients were not statistically significant in falsification tests in which the affected group of charges was altered to a different type of charge or to a different circuit.

154. To more accurately isolate the effect of but-for causation and case outcomes, it is beneficial to analyze a circuit split because it provides additional variation and thus requires fewer assumptions about parallel trends over time between different types of charges. *See* Marianne Bertrand, Esther Duflo & Sendhil Mullainathan, *How Much Should We Trust*

There are some general difficulties with analyzing the litigation and administration of claims that should be acknowledged. First, the EEOC's consideration of relevant law could affect the EEOC's behavior. If the EEOC considers the change in the law when labelling a charge as likely to dismiss, it should be more likely to label a charge as "likely to dismiss" when applying but-for causation, which could counteract any decrease in frivolous charges that resulted from the adoption of the but-for causation standard. I am less concerned about this particularly when analyzing the circuit split because (1) EEOC intake offices are not generally comprised of attorneys,[155] and (2) there is a wealth of evidence that the EEOC only considers its own position and interpretation of the law. The EEOC frequently issues guidance in which it takes a strong position on certain employment discrimination standards that have not been settled by the Supreme Court.[156] Perhaps the most direct evidence that the EEOC promotes its own policies and interpretations when administering EEOC charges and determining the merit of the charge appears in a footnote of a guidance document that addresses employer liability for sexual harassment. In this footnote, the EEOC directly disagrees with the Fourth Circuit's interpretation of the definition of "tangible employment action."[157] More on point here, the EEOC actually filed in *Nassar* an amicus brief supporting motivating-factor causation and similarly issued guidance promoting its belief that the standard applied.[158]

Additional evidence that the EEOC considers its own policies when making decisions is found in how the EEOC determines whether it would like to represent a charging party in federal court, a right the EEOC has had since the Equal Employment Opportunity Act of 1972.[159] In 1996, the EEOC adopted a national enforcement plan in response to the recently developed Task Force on Charge Processing.[160] The resulting plan identified priorities of the EEOC, including "[c]ases having the potential of promoting the development of law supporting the

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Differences-In-Differences Estimates?, 119 Q.J. ECON. 249, 269 (2004). But one may be concerned that limiting this analysis to a circuit split doesn't tell the full story because parties may not respond to circuit court decisions in the same manner that they respond to Supreme Court decisions. Of course, circuit courts also rely on floodgate fears when justifying certain standards of liability, and a quick Google search illustrates that attorneys do follow and respond to circuit court decisions.

155. *See Equal Opportunity Investigator*, USAJOBS, https://www.usajobs.gov/job/713514000#requirements [https://perma.cc/JKB4-M6F4] (providing the job qualifications for EEOC investigators).

156. *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1999-2, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (2010).

157. *Id.* at 6 n.32.

158. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013); Brief for the United States as Amicus Curiae Supporting Respondent at 7–9, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (No. 12-484), 2013 WL 1462056, at *7–9.

159. *See* WILLIAM C. MARTUCCI, MISSOURI PRACTICE SERIES: EMPLOYMENT LAW AND PRACTICE § 3.8 (Vol. 37, 2022–2023 ed.) (citing West v. Gibson, 527 U.S. 212, 223 (1999)).

160. *U.S. Equal Employment Opportunity Commission National Enforcement Plan*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/us-equal-employment-opportunity- commission-national-enforcement-plan [https://perma.cc/P9Y4-PVKH].

antidiscrimination purposes of the statutes enforced by the Commission."[161] These cases of priority include "[c]ases involving legal issues where there is a conflict in the federal circuit courts on a plan priority or in which the Commission is seeking Supreme Court resolution of such issue."[162] This evidence is all consistent with the theory of agency nonacquiescence more generally.[163] Many administrative agencies, despite conflicting court decisions, often continue to enforce policies contradicting circuit court law until the Supreme Court issues a binding decision.[164] In part, this is likely motivated by a desire to change the law. And the EEOC has been no stranger to this practice.[165] Whether this practice is warranted is a matter for further and later discussion, but its existence strongly suggests that the EEOC's treatment of ADA cases brought in the Seventh Circuit after its adoption of the but-for causation standard impacted the treatment of claims within the agency.[166] Further, given the "likely to dismiss" category is one of three categories and meant to categorize frivolous claims, I am less concerned that this measure of merit would be tainted by a change in the EEOC's analysis of a charge due to the changing causation standard.

Another consideration is how the labor market responds to the adoption of but-for causation. An employer may respond to a more employer-friendly causation standard by increasing discrimination, such as disability discrimination. An increase in discrimination could increase the number of disability charges filed. This would confound any decrease in charges resulting from an adoption of a stricter liability standard. Of course, if this is the case—that the adoption of a stricter causation standard increases the bad act that the law was intended to deter—this too would counteract the floodgate fear. But because this change would also decrease the rate

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161. *Id.*

162. *Id.* It is also possible that, following *Gross*, district courts are applying but-for causation in other antidiscrimination cases despite the fact that circuit courts have not yet done so. Of course, district courts should not deviate from circuit court precedent without guidance from the appellate or Supreme Court, but it is a possibility. If this is the case, it would lend itself to a null result because there would be no real difference. Moreover, I am less concerned about this anomaly, meaning that this analysis has limited external validity. There would be a very rare scenario where the Supreme Court is citing the floodgate fear on a clean slate—meaning without any lower court having considered the legal action or adopted the standard at issue. In fact, this was the exact scenario the Supreme Court was addressing when it cited its floodgate fear in *Nassar*: lower courts entertained the expansion of the *Gross* analysis to other contexts, including retaliation claims, before the decision.

163. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencie*s, 98 YALE L.J. 679, 686 (1989).

164. *See id.* at 715–18.

165. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 56.

166. The fact that we see no change in the filing of charges also suggests that there could be no change in the filing of frivolous charges, which lessens any concern that the EEOC's treatment of claims changed such that it confounds a result finding no decrease in the number of charges receiving a dismiss label. I am also not concerned about the court's treatment of ADA cases conflating the analysis of the grant of a motion to dismiss or summary judgment for the same reason—if the number of frivolous charges decreased, we should see that effect at the earlier EEOC filing stage.

of frivolous charges (charges associated with any increase in discrimination in the labor market should be more likely to be meritorious), I would expect to see a change in the rate of ADA charges, or the frivolous nature of those charges, if there was an effect on the labor market, which, at least during this period, I do not.

Finally, the federal courts should (and do) apply but-for causation following its adoption, which should make it more likely that a defendant prevails pre- or post-trial, absent any change in filing or settlement behavior. This increase would be offset by a decrease in the filing of frivolous charges in federal court. But, my analysis shows no decrease in the filing of frivolous charges in federal court or in the EEOC. Instead, the increase in filings in federal court does not appear to be an increase in frivolous charges because if either the heightened standard's application makes it more difficult for a plaintiff to prevail, or charges without merit became less likely to settle in the EEOC, the results should show an increase in the grant of pretrial motions for the defendant, which they do not.[167]

IV. FLOODGATE AND DISCRIMINATION CONSEQUENCES

Employment law scholars have hypothesized that the but-for causation standard could deter legitimate employment discrimination charges.[168] Contrastingly, the Supreme Court posited that a more lenient motivating-factor standard could encourage frivolous charges.[169] Neither possibility would result in optimal deterrence. This Article calls into question at least one assumption. Following a switch from motivating-factor causation for ADEA charges to but-for causation by the Supreme Court, there was no evidence of a change in the rate of ADEA charges filed with the EEOC or a change in the likelihood that an ADEA charge receives a "likely to dismiss" label. Similarly, after the Seventh Circuit adopted but-for causation for ADA claims, there was no decrease in charges filed in the EEOC in that Circuit as compared to other discrimination claims, nor was there a decrease in the likelihood that the EEOC labels a charge as "likely to dismiss." These results question the Supreme Court's concern that the motivating-factor standard increased frivolous employment discrimination claims when it adopted the same standard for Title VII retaliation claims in *Nassar*.

For the change in causation standard to deter legitimate claims, there must be some effect (or at least perceived effect) on the outcome of the cases following a change in the standard. The probability of success for the plaintiff or the perception of that probability must change. The empirical results presented above show that adopting but-for causation may have changed the settlement behavior of the parties, suggesting at least a change in the perception that the plaintiff would prevail, likely from the viewpoint of the defendant. Adopting but-for causation decreased the

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167. It is difficult to say anything about the impact of the standard on a jury's application of causation or even on the judge's application of the standard in a pretrial motion because it could be that the increase in filings were an increase in meritorious filings not settled in the EEOC.

168. *See, e.g.*, Sperino & Thomas, *supra* note 3. This Article also contributes to the more recent debate regarding whether the standard should be expected to have an effect and its perhaps important place in antidiscrimination law.

169. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013).

likelihood of settlement both in the EEOC and in federal court by upwards of 24%. Less than 2% of the employment discrimination claims filed in federal court in this dataset go to trial.[170] And the IDB data shows that only 36% of the trials result in a plaintiff's victory. Additionally, less than 1% of cases result in a plaintiff's victory before trial through the filing of a pretrial motion.[171] The overwhelming majority of the claims that result in any award for the plaintiff occur through settlement. Therefore, despite evidence of an increase in a plaintiff's victory at trial (a more than doubling following the reduction in settlement), changing the probability of settlement could affect filing decisions in the long run as it lowers the probability of settlement. Of course, due to the costless nature of filing an EEOC charge, this may be unlikely within the agency.

But even absent a change in filing behavior, this result is significant, showing that this standard has the potential to change the behavior of parties, particularly the defendant, even if it does not necessarily change the likelihood that a plaintiff prevails at trial. And because any change in the probability that the defendant must pay out of pocket when a discrimination charge is filed, there could be a change in the behavior of the labor market long term. This change in party behavior more generally could be relevant if Congress continues to pursue expanding mixed-motive causation as a route for plaintiffs filing claims under all federal antidiscrimination statutes, not just Title VII.[172] Particularly given a rising assumption that following *Bostock*, there is little difference between but-for causation and motivating factor, the fact that settlement rates can still be affected due to a perception of a tougher standard is important to highlight.

Not only do my empirical results and theoretical model challenge the reliance on the floodgates argument when adopting stricter causation standards in employment discrimination and retaliation claims, but they may have broader implications on the reliance of the floodgate argument more generally. When courts cite the floodgate argument (or even its sister, the slippery slope argument) when tightening liability regimes, courts make several assumptions, which do not play out in this empirical analysis. The courts' biggest assumption not supported by my analyses is that the change in the law can affect whether an individual files a legal action or not. But the reality is that the American court system, particularly in the employment context, has such a low barrier to entry that it may take a pretty significant change in the perceived probability that a plaintiff prevails to move that needle—to discourage the filing of a lawsuit. This conclusion is supported in some empirical studies of the effects of the Supreme Court's adoption of stricter pleading standards in *Twombly* and *Iqbal*. William Hubbard found that despite the additional hurdles imposed by the stricter standards, they had little to no deterrent effect on the filing of frivolous

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170. This is consistent with other empirical analyses of employment discrimination cases. *See supra* note 134 and accompanying text.

171. Alternatively, 16% result in a defense victory before trial.

172. *See, e.g.*, Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009), http://www.govtrack.us/congress/billtext.xpd?bill=h111-3721 [https://perma.cc/B4C7-57PQ] (proposing the expansion of the motivating-factor language found in Section 107 of Title VII to the ADA, ADEA, and Title VII retaliation claims); *see also* Sherwyn et al., *supra* note 69, at 456–57 (describing these statutes).

claims, including rates of dismissal.[173] It is also consistent with economic models which expose why frivolous filings are likely in the first place in the American court systems.[174] So, when the Court is warranted in its desire to decrease frivolous filings, it is unlikely that changing the probability that the plaintiff prevails in the lawsuit (say by changing the causation standard or the burden of proof) is the answer. Instead, the Court might encourage stronger use of deterrent mechanisms that increase the cost of filing a claim such as sanctions, which have been proven to have some deterrent effect if actually enforced, or by altering something more salient to plaintiffs and plaintiffs' attorneys and much less subjective like the damages that can be awarded through a cap.[175]

An additional assumption that the floodgates argument makes when relied on to justify the adoption of a stricter standard of liability is that the only claims affected are frivolous claims. But this assumption depends upon the defendant's perception of the change in standard being essentially identical to the court's view of the standard and how it will change outcomes. If the defendants have an overly optimistic view of how the standard affects their likelihood of liability, what instead might occur is that the defendants become less likely to settle claims, even claims that are not frivolous, resulting in a change in the probability of success (a meritorious outcome where the plaintiff receives compensation) for claims that have merit as well.

Finally, and perhaps more fundamentally, even if one disagrees with the reliance on the floodgate fear to decrease the administrative burden on courts and agencies (here, the EEOC), this analysis and model suggest that justification is also flawed. Because, in fact, when relying on the floodgate fear to change a liability regime, it is possible that the court will instead increase the burden on administrative agencies and courts alike by decreasing the likelihood that claims settle. Here, the empirical results illustrate that the adoption of but-for causation increased the rate of ADA charges filed in federal court as a likely result of a decrease in settlement rates within the EEOC, directly increasing the burden on the court system.

CONCLUSION

Scholars and judges have called for the Supreme Court to justify its fear of opening the litigation floodgates with empirical evidence of a likely increase in litigation rates, particularly in the context of adopting a stricter causation standard

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173. *See* Hubbard, *supra* note 96, at 510. There is now much literature questioning the ability to test the effect of the 12(b)(6) standard by looking only at dismissal rates. Although I recognize some limitations to studying court data, I believe my study does not suffer from many of those critiques because it takes advantage of a DD analysis (looking at how ADA and ADEA cases were affected as compared to others) and looks at settlement behavior as well as other case outcomes conditioned on the change in settlement behavior. For a discussion of those critiques, see Gelbach, *supra* note 96, at 227 n.13.

174. *See generally*, Bone, *supra* note 13.

175. There are studies suggesting that damages caps as a method of tort reform do have an effect, particularly on the labor market and insurance rates. *See, e.g.*, Laurin Elizabeth Nutt, *Where Do We Go from Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia*, 28 GA. ST. U. L. REV. 1341, 1360 (2012).

for employment discrimination cases.[176] These scholars have expressed concern that the justification was not supported, especially when the standard could have a detrimental effect on case outcomes and deter legitimate claims. The empirical results presented in this Article suggest (1) that the floodgate fear may have been frivolous in the context of the adoption of a stricter causation standard for employment discrimination, and (2) the standard does have the potential to affect case outcomes, particularly by changing the parties' (attorneys') view of the case and decreasing the likelihood of settlement at least in the short term.

But even further, the empirical evidence calls the reliance on the floodgate fear to justify a change in the liability standard for a legal regime into question. If in fact the only effect of adopting a stricter causation standard is to decrease settlement, it may directly burden the court's docket instead of decreasing it. Further, the decrease in settlement without changing the outcome of the remaining litigation on average has the potential to increase the bad acts the law is meant to deter, again increasing the burden on the court or relevant administrative agency. Thus, relying on a floodgate argument to adopt a stricter standard may overall result in suboptimal deterrence and burden the court system, adding to the list of reasons why the Supreme Court should avoid relying on this fear.

176. *See, e.g.*, Levy, *supra* note 1; Connick v. Thompson, 563 U.S. 51, 101–04 (2011) (Ginsburg, J., dissenting) (addressing the argument when supporting a more liberal deliberate indifference jury instruction); Sperino & Thomas, *supra* note 3, at 234.

APPENDIX

Table 1: Summary Statistics of the Impact of *Gross*'s But-For Causation Standard on ADEA EEOC Charges

	Pre *Gross*	**Post *Gross***	**All Time Periods**
ADEA Charge	23.9% (187,786)	24.1% (175,031)	24.0% (362,817)
Dismiss Label	11.0% (187,258)	13.6% (174,375)	12.3% (325,234)
Only ADEA Charge	10.1% (18,993)	16.8% (17,406)	13.3% (36,399)
Other Charges	11.1% (168,265)	13.3% (156,969)	12.2% (325,234)
EEOC Settlement	17.3% (186,949)	16.2% 170,758	16.8% (357,707)
Only ADEA Charge	17.6% (18,977)	15.2% (17,123)	16.5% (36,100)
Other Charges	17.3% (167,972)	16.3% (153,635)	16.8% (321,607)

Source: EEOC Charge Data, 2007–2011. Charges filed under the Equal Pay Act and Genetic Information Nondiscrimination Act (GINA) have been omitted, as well as ADA charges not governed by motivating-factor causation (ADA charges filed in the Sixth, Tenth, and Eleventh Circuits, and in the Fifth Circuit before May 27, 2008). All duplicates have been dropped. Notes: Treatment is shaded grey.

Table 2: Summary Statistics of the Impact of the Seventh Circuit's But-For Causation Standard on ADA EEOC Charges

	Seventh Circuit		**Not Seventh Circuit**		**All Circuits/ All Time**
	Pre *Serwatka*	**Post *Serwatka***	**Pre *Serwatka***	**Post *Serwatka***	
ADA Charge	23.7% (34,910)	30.9% (27,065)	22.7% (149,910)	28.7% (172,195)	26.1% (384,147)
Dismiss Label	13.1% (34,857)	19.7% (26,951)	11.9% (149,389)	14.3% (170,967)	13.6% (382,230)
Only ADA Charge	11.2% (4,778)	14.5% (4,971)	12.2% (19,387)	11.1% (27,481)	11.8% (56,627)
Other Charges	13.3% (30,079)	20.9% (21,980)	11.8% (130,002)	14.9% (143,486)	14.0% (325,603)
EEOC Settlement	19.0% (34,703)	17.7% (25,373)	17.3% (149,221)	16.9% (151,622)	17.3 (360,978)
Only ADA Charge	23.8% (4,718)	22.6% (4,606)	19.6% (19,358)	21.5% (24,145)	21.1% (52,836)
Other Charges	18.3% (20,767)	16.7% (20,767)	16.9% (129,863)	16.1% (127,477)	16.7% (308,142)

Source: EEOC Charge Data, January 2006–June 2013, all circuits but the Sixth, Tenth, and Eleventh. Charges filed in the Fifth Circuit before May 27, 2008, have also been omitted, as have ADEA charges. All duplicates have been dropped. Charges filed under the Equal Pay Act and GINA have been omitted, as well as ADA charges that only include a reasonable accommodation allegation.
Notes: Treatment is shaded grey.

Table 3: Summary Statistics of the Impact of the Seventh Circuit's But-For Causation Standard on ADA Federal Court Filings

	Seventh Circuit		**Not Seventh Circuit**		**All Circuits/ All Times**
	Pre *Serwatka*	**Post *Serwatka***	**Pre *Serwatka***	**Post *Serwatka***	
ADA Filing	6.3% (26,682)	11.9% (5,933)	7.7% (29,946)	10.9% (32,151)	9.3% (73,878)
Summary Judgment	17.5% (5,842)	15.9% (5,927)	16.5% (29,909)	16.2% (32,128)	16.4% (73,806)
ADA Filing	15.1% (371)	15.2% (706)	15.9% (2,308)	15.8% (3,512)	15.8% (6,897)
No ADA	17.7% (5,471)	15.9% (5,221)	16.5% (27,601)	16.3% (28,616)	16.5% (66,909)
Federal Court Settlement	61.1% (5,836)	62.8% (5,912)	55.7% (29,824)	57.2% (32,040)	57.3% (73,612)
ADA Filing	68.8% (371)	65.5% (705)	56.1% (2,311)	59.3% (3,499)	59.4% (6,886)
No ADA	60.5% (5,465)	62.5% (5,207)	55.% (27,513)	56.9% (28,541)	57.1% (66,726)

Source: IDB FJC data, January 2006–June 2013, employment claims (NOS of "civil rights-jobs" and "ADA-employment"), all circuits but the Sixth, Tenth, and Eleventh. Cases filed in the Fifth Circuit before May 27, 2008, are also excluded. Summary judgment is defined as a pretrial motion being granted for the defendant.
Notes: Treatment is shaded grey.

Table 4: Number of ADEA Charges v. Other Charges Per Year

	Has Only an ADEA Charge	**Has an ADEA Charge**	**No ADEA Charge**
2007	6,513	14,907	48,170
2008	7,169	16,900	54,284
2009	7,382	17,904	55,309
2010	7,290	18,410	58,912
2011	8,153	19,027	58,994

Source: EEOC Charge Data, 2007–2011. Charges filed under the Equal Pay Act and GINA have been omitted, as well as ADA charges not governed by motivating-factor causation (ADA charges filed in the Sixth, Tenth, and Eleventh Circuits, and in the Fifth Circuit before May 27, 2008). All duplicates have been dropped.

Table 5: Estimates from OLS Regressions Estimating the Effect of the Supreme Court's But-For Causation Standard on ADEA EEOC Charges

	ADEA Charge (1)	**EEOC Settlement (2)**	**Dismiss Label (3)**
Post *Gross*	-0.004		
	(0.026)		
DD Analysis			
Post *Gross*		-0.012*	0.025
X ADEA Charge		(0.007)	(0.016)
Number of Observations	360,644	268,281	279,866

Source: EEOC Charge Data, 2007–2011. Charges filed under the Equal Pay Act and GINA have been omitted, as well as ADA charges not governed by motivating-factor causation (ADA charges filed in the Sixth, Tenth, and Eleventh Circuits, and in the Fifth Circuit before May 27, 2008). In equation 1, *ADEA Charge* is whether the charge contains an ADEA claim, and in equations 2 and 3, the variable is limited to charges with only an ADEA claim as all others could be tainted by a charge that operates under mixed-motive causation. All duplicates have been dropped. For the *Settlement* regressions, all charges that were dismissed because there was no jurisdiction, or because the EEOC could not locate the charging party are excluded. Full regression results are available upon request.

Notes: *, **, *** indicates significance at the 10, 5, and 1% levels. Robust standard errors clustered by EEOC receipt office are reported in parentheses. The coefficients reported in each row panel and each column are from individual regressions. Each regression includes the controls discussed in Part IV of the Article (the bases of the discrimination alleged in the charge, the issues alleged, demographic information of the charging party, and demographic information of the responding party, as well as time and circuit fixed effects).

Table 6: Estimates from OLS Regressions Estimating the Effect of the Seventh Circuit's But-For Causation Standard on ADA EEOC Charges

	ADA Charge (1)	**EEOC Settlement (2)**	**Dismiss Label (3)**
DD Analysis			
Seventh Circuit x Post *Serwatka*	0.003		
	(0.006)		
DDD Analysis			
Seventh Circuit x Post *Serwatka*		-0.029*	0.003
X ADA Charge		(0.015)	(0.011)
Number of Observations	381,280	268,522	290,208

Source: EEOC Charge Data, January 2006–June 2013, all circuits but the Sixth, Tenth, and Eleventh. Charges filed in the Fifth Circuit before May 27, 2008, have also been omitted, as have ADEA charges. Charges that include only requests for accommodations as the complaint have been omitted. Charges filed under the Equal Pay Act and GINA have been omitted. In equation 1, *ADA Charge* is whether the charge contains an ADA charge, and in equations 2 and 3, the variable is limited to charges with only an ADA charge as all others could be tainted by a charge that operates under mixed-motive causation. All duplicates have been dropped. For the *Settlement* regressions, all charges that were dismissed because there was no jurisdiction, or because the EEOC could not locate the charging party are excluded.

Notes: *, **, *** indicate significance at the 10, 5, and 1% levels. Robust standard errors clustered by EEOC receipt office are reported in parentheses. The coefficients reported in each row panel and each column are from individual regressions. Each regression includes the controls discussed in Part IV of the Article (the bases of the discrimination alleged in the charge, the issues alleged, demographic information of the charging party, and demographic information of the responding party, as well as time and circuit fixed effects).

Table 7: Estimates from OLS Regressions Estimating the Effect of the Seventh Circuit's But-For Causation Standard on ADA Court Filings

	ADA Case (1)	**Summary Judgment (2)**	**FC Settlement (3)**
DD Analysis			
Seventh Circuit x Post *Serwatka*	0.025***		
	(0.009)		
DDD Analysis			
Seventh Circuit x Post *Serwatka*		0.016	-0.071**
X ADA Charge		(0.025)	(0.029)
Number of Observations	73,878	73,586	73,612

Source: IDB FJC data, January 2006–June 2013, employment claims (NOS of "civil rights-jobs" and "ADA-employment"), all circuits but the Sixth, Tenth, and Eleventh. Cases filed in the Fifth Circuit before May 27, 2008, are also excluded. Cases dismissed early on for procedural error have also been excluded.

Notes: *, **, *** indicate significance at the 10, 5, and 1% levels. Robust standard errors clustered by district court are reported in parentheses. The coefficients reported in each row panel and each column are from individual regressions. Each regression includes time and circuit fixed effects, whether the plaintiff filed the claim pro se, whether the plaintiff filed the claim as part of a class action, whether the defendant was the federal government, and indicator variables for the NOS code. Summary Judgment is defined as whether a pretrial motion was granted for the defendant, and those regressions exclude cases involuntarily dismissed. "FC Settlement" is short for Federal Court settlement.

Patenting Genetic Information

DAVID S. OLSON* & FABRIZIO DUCCI**

The U.S. biotechnology industry got its start and grew to maturity over roughly three decades, beginning in the 1980s. During this period genes were patentable, and many gene patents were granted. University researchers performed basic research—often funded by the government—and then patented the genes they discovered with the encouragement of the Bayh-Dole Act, which sought to encourage practical applications of basic research by allowing patents on federally funded inventions and discoveries. At that time, when a researcher discovered the function of a gene, she could patent it such that no one else could work with that gene in the laboratory without a license. She had no right, however, to control genes in nature, including in human bodies. Universities licensed their researchers' patents to industry, which brought in significant revenue for further research. University researchers also used gene patents as the basis for obtaining funding for start-up enterprises spun out of university labs. It was in this environment that many of today's biotechnology companies started. In 2013, the Supreme Court held that naturally occurring genes could no longer be patented. This followed a 2012 decision that disallowed patents on many diagnostic processes. These decisions significantly changed the intellectual property protections in the biotechnology industry. Nevertheless, the industry has continued to grow and thrive. This Article investigates two questions. First, if some form of exclusive rights still applied to genes, would the biotech industry be even more robust, with more new entrants in addition to thriving, well-established companies? Second, does the current lack of protection for gene discoveries incentivize keeping such discoveries secret for the many years that it can take to develop a therapeutic based thereon—to the detriment of patients who could benefit from knowledge of the genetic associations, even before a treatment is developed? The Article concludes by analyzing what protection for discovering genetic associations, if any, will most increase social welfare.

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INTRODUCTION

The 1950s through the 1980s were the decades of chemistry for better living. Advances were made that improved health and saved lives. Drugs were developed that treated diseases and cured conditions that had afflicted humans for millennia.[1] In the 1980s, however, a previously nascent area of scientific and medical research began growing significantly—genetic research.[2] If the middle decades of the

1. *See A Short History of Drug Discovery: Drug Discovery in the 20th Century*, U.C. IRVINE, https://pharmsci.uci.edu/programs/a-short-history-of-drug-discovery/ [https://perma.cc/D4RC-VR85]; Viviane Quirke, *Targeting the American Market for Medicines, ca. 1950s–1970s: ICI and Rhône-Poulenc Compared*, 88 BULL. HIST. MED. 654, 665 (2014).

2. *See* Donald K. Martin, et al., *A Brief Overview of Global Biotechnology*, 35 BIOTECHNOLOGY AND BIOTECHNOLOGICAL EQUIP., S5, S6 ("The global biotechnology sector, which has been on the rise since the 1980s, is generally concentrated in high-income countries."); Hank T. Greely, *The Two Months in 1980 That Shaped the Future of Biotech*, STAT (Oct. 17, 2020) https://www.statnews.com/2020/10/17/two-months-in-1980-shaped-the-future-of-biotech/ [https://perma.cc/8QX4-CGSM]; Jonathan Smith, *Humble Beginnings:*

twentieth century were the decades of chemistry, the last decades of the twentieth century into the twenty-first century were the decades of biology—specifically biotechnology and genetic research. Not only have scientists mapped the human genome,[3] but new treatments in the form of biologics—biotechnology-produced biological products—have become increasingly important.[4] Gene therapies are an especially important biologic, because these target a disease at the genetic level.[5] The future holds the promise of more cures for diseases, as well as personalized medicine to improve genetic conditions.

Given the importance of genetic research and treatments, it is wise to ask whether current incentives are sufficient for a socially optimal amount of genetic research, gene therapy development, and distribution of genetic treatments. This may seem an odd question, because gene therapies, and biologics at large, are patentable subject matter.[6] Indeed, with worldwide biologics revenues over $200 billion per year,[7] there is obviously a lot of incentive to produce and distribute successful biologics. But the road leading to production and distribution is long, risky, and expensive.[8]

Even though a genetic product is patentable, genetic discoveries themselves do not receive patent protection—according to the Supreme Court's 2013 decision in *Association for Molecular Pathology v. Myriad Genetics, Inc*.[9] While using biologics and genetic engineering to treat a myriad of health conditions is the ultimate goal of genetic research, it is first important simply to determine the causal associations between genes and specific health conditions. Even without any treatment options, knowledge of genetic associations[10] can inform a person how to best tailor her

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The Origin Story of Biotechnology, LABIOTECH.EU (Dec. 23, 2020), https://www.labiotech.eu/in-depth/history-biotechnology-genentech/ [https://perma.cc/UTJ8-HB8J]; s*ee generally*, John Warren, *Drug Discovery: Lessons from Evolution*, 71 BRIT. J. CLINICAL PHARM. 497, 497–98 (2011); RICK NG, DRUGS: FROM DISCOVERY TO APPROVAL, at 396–97 (2d ed. 2009).

3. *See* Warren, *supra* note 2, at 499.

4. *See* NG, *supra* note 2, at 397 (explaining that "DNA products" led to the "development and use of drugs specifically targeting the sites where diseases are caused," where these targeting drugs are based on gene therapies); *What Are "Biologics" Questions & Answers*, U.S. FOOD AND DRUG ADMIN., https://www.fda.gov/about-fda/center-biologics-evaluation-and-research-cber/what-are-biologics-questions-and-answers [https://perma.cc/PC34-S9HN] (Feb. 6, 2018) (defining biologics as a category of drugs that includes the gene therapy subgroup).

5. NG, *supra* note 2, at 397.

6. *See* Erwin A. Blackstone & Joseph P. Fuhr, Jr, *The Economics of Biosimilars*, 6 AM. HEALTH & DRUG BENEFITS 469, 470 (2013) (stating that biologics, non-small molecule drugs, are patentable).

7. *See id.* at 473.

8. *See infra* notes 19–35 and accompanying text.

9. 569 U.S. 576 (2013).

10. As used in this Article, "genetic association" means a causal link between a gene and a genetic condition, as opposed to a mere genetic correlation, which is presence of a gene without any proven link to disease or condition. *See generally* Hui-Qi Qu, Matthew Tien & Constantin Polychronakos, *Statistical Significance in Genetic Association Studies*, 33 CLINICAL & INVESTIGATIVE MED. E266 (2010); *see also* Joel N. Hirschhorn, Kirk Lohmueller, Edward Byrne & Kurt Hirschhorn, *A Comprehensive Review of Genetic Association Studies,*

lifestyle and diet, when to seek more frequent medical monitoring or screening, and what conditions might be passed to offspring.[11] The knowledge that a certain enzyme indicates heart attacks, for instance, can help diagnose and treat a patient sooner, making it easier to preserve her health.

Discoveries of genetic associations can thus be valuable on their own. Accordingly, once genetic associations are discovered, sharing these discoveries is important for patients. It is also important to share these discoveries with those who can create therapies and treatments. Since the *Myriad* decision in 2013 held that naturally occurring genomic DNA cannot be patented, there has not been a way to patent or gain exclusive rights over discoveries of genetic associations.[12] This raises the question of whether there are adequate incentives to discover and share these genetic associations. There is debate on this point. Some believe that there are adequate incentives through government funding, academic research, and patentability of final products such as gene therapies.[13] Others argue that while research is occurring, it is below a socially optimal level due to the lack of incentives caused by patent ineligibility.[14] They argue that patent law should be changed so that genes (and other naturally occurring phenomena) are made patent eligible.[15] This Article explores this debate. The Article then considers, if some form of exclusive rights is to be given to discovery of newly applied genetic associations, what types of additional rights are likely to best incentivize genetic discovery at the lowest long-term cost to society.

Part I of the Article considers the importance of discovering genetic associations. Part II shows that the current interpretation of patentable subject matter doctrine makes discoveries of newly applied genetic associations unpatentable on their own. Part III discusses the current costs of discovering genetic associations and the

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4 GENETICS IN MED. 45 (2002).

11. *Genetics Basics*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/genomics/about/basics.htm [https://perma.cc/TG78-K6UJ] ("Understanding genetic factors and genetic disorders is important in learning more about promoting health and preventing disease."); Ellen Wright Clayton, Barbara J. Evans, James W. Hazel & Mark A. Rothstein, *The Law of Genetic Privacy: Applications, Implications, and Limitations*, 6 J. L. & BIOSCIENCES 1, 16 (2019) ("Companies now purport to provide genetic insights into health, ancestry and genealogy, family relationships, and lifestyle choice.").

12. *See* David O. Taylor, *Patent Eligibility and Investment*, 41 CARDOZO L. REV. 2019, 2023, 2027–29, (2019) (explaining that the U.S. Supreme Court holding in *Ass'n for Molecular Pathology*, 569 U.S. 576, and subsequent federal circuit cases effectively ended patentability over naturally occurring, non-human created genetic material, incentives to invest in such inventions decreased, stating, "[a]lmost 40% of the investors who knew about at least one of the Court's eligibility cases indicated that the Court's decisions had somewhat negative or very negative effects on their firms' existing investments, while only about 15% of these investors reported somewhat positive or very positive effects").

13. *See id.* at 2088–90.

14. *See* Jason Rantanen, *Guest Post on Patent Eligibility & Investment: A Survey*, PATENTLYO (Mar. 6, 2019), https://patentlyo.com/patent/2019/03/patent-eligibility-investment.html [https://perma.cc/V2JK-AQW4].

15. *See generally* Jeffrey A. Lefstin, Peter S. Menell & David O. Taylor, *Final Report of the Berkeley Center for Law & Technology Section 101 Workshop: Addressing Patent Eligibility Challenges*, 33 BERKELEY TECH. L.J. 551 (2018).

existing incentives to do so, and then explores whether additional incentives may be needed. Part IV outlines some ways of providing additional incentives for genetic discovery, including patentability, increased federal funding, and *sui generis* protection of the type given to other inventive activities that fall outside of IP law protections. The Article concludes in Part V.

I. THE IMPORTANCE OF DISCOVERING GENETIC ASSOCIATIONS

This Part begins by discussing the process and costs of discovering genetic associations. It then provides an overview of the main developments in the field of genomic science. Two main purposes guide this field: (1) studying an individual patient's genome to assess that patient's risk of developing a disease and (2) determining the most effective treatment for genetic diseases.[16] The ultimate goal of these developments is to achieve what is generally referred to as "personalized medicine."[17] Section I.A discusses the process and costs of discovering genetic associations. Section I.B discusses the further substantial process and costs for creating therapeutics or personalized medicine based on the underlying discovery of genetic associations. Section I.C provides some examples of well-known genetic associations and the improvements in diagnostics and therapeutics that have been enabled by their discovery.

A. The Process and Costs of Discovering Genetic Associations

Historically, the path of genetics was paved with a series of breakthrough discoveries. Gregor Mendel, considered the father of modern genetics, found that traits are passed on to generations through genes.[18] The double helix structure of DNA, however, was not discovered until 1953, when Watson and Crick, building on the X-ray images of DNA produced by Maurice Wilkins and Rosalind Franklin,[19] modeled the structure of DNA.[20] Since then, DNA sequencing technologies have

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16. Diseases that are caused by inherited genetic factors are referred to as "hereditary." The study of variations of genetic characteristics as related to drug response is known as "Pharmacogenomics" (PGx). U.S. FOOD AND DRUG ADMIN., PAVING THE WAY FOR PERSONALIZED MEDICINE 8 (2013).

17. Personalized medicine can be defined as "the tailoring of medical treatment to the individual characteristics of each patient." PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, PRIORITIES FOR PERSONALIZED MEDICINE 1 (2008) [hereinafter PCAST REPORT], https://scholarship.rice.edu/handle/1911/113024 [https://perma.cc/FTW8-DAQ2]. In general, the objective of personalized medicine is to identify the medical treatment and the drug dosages that are the most effective for a certain individual, based on his DNA. *See, e.g.*, *Personalized Medicine*, NAT'L INSTS. OF HEALTH, https://www.nih.gov/about-nih/what-we-do/nih-turning-discovery-into-health/personalized-medicine [https://perma.cc/RP39-9AWF].

18. Gregor Mendel, *Experiments in Plant Hybridization*, *in* PROCEEDINGS OF THE NATURAL HISTORY SOCIETY OF BRÜNN (1866).

19. *See generally* BRENDA MADDOX, ROSALIND FRANKLIN: THE DARK LADY OF DNA (2002).

20. James D. Watson & Francis Crick, *Molecular Structure of Nucleic Acids*, 171 NATURE 737 (1953).

developed, such as polymerase chain reaction (PCR) testing.[21] DNA contains the information that cells need to produce proteins. This information is organized into genes, which contain the genetic information for the specific protein that the genes encode. The totality of the genetic material of an individual is commonly referred to as the "genome."[22] The human genome was first sequenced in 2003, although not completely, due to limitations of then-existing technology.[23] The estimated cost of this process ranged between $500 million and $1 billion.[24] It was not until 2021 that the remaining parts of the human genome were sequenced, finally providing a complete human genome.[25]

Genes can be directly responsible for genetic conditions, or they can affect susceptibility to disease. Gene mutations are directly related to the occurrence of chromosomal diseases (such as Down Syndrome), single-gene disorders (such as Cystic Fibrosis), and mitochondrial disorders (such as Alzheimer's). Genes also are known to be a factor in the occurrence of both infectious diseases (like HIV/AIDS and tuberculosis) and non-communicable diseases (like cancer and diabetes).[26] Once the association with a gene mutation or variant is discovered, follow-on research and development (R&D) can lead to the development of diagnostic methods, treatment, drugs, and devices, although there is often a gap of many years between discovery of a gene-disease link and a treatment.[27]

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21. PCR allows sequencing of a DNA fragment by amplifying a specific region of the DNA. *See* Randall K. Saiki, Stephen Scharf, Fred Faloona, Kary B. Mullis, Glenn T. Horn, Henry A. Erlich & Norman Arnheim, *Enzymatic Amplification of B-Globin Genomic Sequences and Restriction Site Analysis for Diagnosis of Sickle Cell Anemia*, 230 SCI. 1350, 1350 (1985).

22. *See, e.g.*, *Genome*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/genome [https://perma.cc/TT3X-T9HD] ("[B]roadly: the genetic material of an organism.").

23. *See International Consortium Completes Human Genome Project*, NAT'L HUM. GENOME RSCH. INST. (Apr. 14, 2003), https://www.genome.gov/11006929/2003-release-international-consortium-completes-hgp [https://perma.cc/6QFQ-NT88] ("The finished sequence produced by the Human Genome Project covers about 99 percent of the human genome's gene-containing regions, and it has been sequenced to an accuracy of 99.99 percent.").

24. The exact number for the cost of generating this first "finished" human genome sequence cannot be determined, as it depends on which costs are included in the estimate. The U.S. government contributed approximately $2.7 billion to the Human Genome Project. For a more detailed explanation on these figures, see *The Cost of Sequencing a Human Genome*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/about-genomics/fact-sheets/Sequencing-Human-Genome-cost [https://perma.cc/CL83-RERH].

25. Michael Marshall, *The Human Genome Has Finally Been Completely Sequenced After 20 Years*, NEW SCIENTIST (May 28, 2021), https://www.newscientist.com/article/2279035-the-human-genome-has-finally-been-completely-sequenced-after-20-years/ [https://perma.cc/CB9R-MATN].

26. For a more detailed discussion of the role of genes in these diseases, see *Genomics*, WORLD HEALTH ORG. (Nov. 12, 2020), https://www.who.int/news-room/questions-and-answers/item/genomics [https://perma.cc/F5CV-J35E].

27. *See id.*; *see also* Chris Bailey, *Gene Therapies Offer Breakthrough Results but Extraordinary Costs*, MASS. MUN. ASS'N (Mar. 18, 2020), https://www.mma.org/gene-therapies-offer-breakthrough-results-but-extraordinary-costs/ [https://perma.cc/65GJ-GVQJ]

Discovering relationships between genes and diseases is an expensive and time-consuming activity.[28] Even with the data mining and machine learning tools now available that allow searching biomedical literature for gene-disease correlations,[29] the financial and time costs remain.

The genetic association discovery process typically requires a genome-wide association study. These association studies are conducted by comparing the genomes of two groups of participants—one group of people having a specific disease and the other one without the disease—to verify whether the people with the disease show specific markers of genetic variations, referred to as single nucleotide polymorphisms (SNP).[30] If such SNPs are found significantly more frequently in people with the disease, these variations are associated with the disease and can point to the region of the "genome where the disease-causing problem resides."[31] Thereafter, researchers sequence DNA base pairs in that region of the genome to identify the genetic changes that cause the disease.[32] The investments required for such R&D are substantial. Although approximations exist, providing an accurate estimate of these costs is difficult. One of the reasons is that, even at this early stage, several actors might be involved in the funding.[33]

(explaining that patients often experience "lengthy delays" between discoveries and genetic treatment); Melina Claussnitzer, et al., *A Brief History of Human Disease Genetics*, 577 NATURE 179, 183 (2020) ("Although huge strides have been made in associating specific genes with particular disorders, establishing the causal role of individual variants within those genes remains problematic, and many patients with suspected rare genetic diseases are left without a definitive diagnosis . . . . Resolving these uncertainties represents the central challenge for the field.").

28. *See* Jie Zhou & Bo-quan Fu, *The Research on Gene-Disease Association Based on Text-Mining of PubMed*, 19 BMC BIOINFORMATICS 37:1 (2018).

29. *See* Raoul Frijters, Marianne van Vugt, Ruben Smeets, René van Schaik, Jacob de Vlieg & Wynand Alkema, *Literature Mining for the Discovery of Hidden Connections Between Drugs, Genes and Diseases*, 6 PLOS COMPUTATIONAL BIOLOGY e1000943:1 (2010).

30. *Genome-Wide Association Studies Fact Sheet*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/about-genomics/fact-sheets/Genome-Wide-Association-Studies-Fact-Sheet [https://perma.cc/JNW3-4WRU] (Aug. 17, 2020).

31. *Id.*

32. For a more detailed explanation on genome-wide association studies, see *id.*

33. In this respect, the Genetic Association Information Network (GAIN), a public-private partnership with the purpose of carrying out genome association studies, published a press release when it was created in 2006, stating that

> For each study of 1,000 to 2,000 patients with a specific disease and a similar number of people who do not have the illnesses (controls), an investment of $3 million to $6 million (depending on the number of patients and controls) is needed for the first stage of genotyping. Follow-up studies to validate the results with additional patients and controls, data analysis, and patient management expenses will add to these basic costs. It is important to note, however, that these costs are a small fraction of what has already been invested in enrolling these study subjects, examining them, carrying out extensive laboratory investigations, and collecting their DNA.

Two NIH Initiatives Launch Intensive Efforts to Determine Genetic and Environmental Roots

B. Types of Biotechnology, Genetic Research, and Related Costs

Once the upstream research has been completed to discover a particular genetic association, substantial time and expense must be invested—often over many years—to arrive at a therapeutic for the condition.[34] The biotechnology industry is generally recognized as being particularly "high-risk, high-reward."[35] An industry report estimates that bringing a single biotechnology product to market, including basic research, clinical trials, and post-approval testing, now takes up to twelve years and costs on average $1.6 billion.[36] The range of biotechnology products that can be applied to healthcare is wide, spanning from diagnostics to treatments and drugs. Upstream research on genes enables the development of these products, often through recombinant technology that utilizes isolated DNA.[37] One should note that the distinction between diagnostics and treatment can be arbitrary, especially when diagnostic tools are used to determine the optimal treatment according to the genetic characteristics of the patient.

Gene-based diagnostics—also called molecular diagnostics—encompass a wide range of tests and tools to diagnose and administer drugs.[38] The basic research that enables molecular diagnostics are genetic association discoveries. Genetic associations show that a gene encodes for a specific protein, or that gene variants or mutations can cause a disease.[39] Once the association is discovered, diagnostic techniques and kits can be used for several purposes.[40] First, molecular diagnostic instruments can be used to detect the existence of a mutation, so that proactive measures can be undertaken to prevent the risk that the disease occurs.[41] Second, gene diagnostics can be used to detect pathogens that cause infectious diseases, such as HIV-1.[42] Third, diagnostic techniques can be used to predict the response to a certain drug treatment, depending on the genetic variations of the patient.[43] Indeed, drug metabolism depends on the production of specific enzymes that are produced according to genes.[44] This field of evaluation diagnostics is known as

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of Common Diseases, NAT'L HUM. GENOME RSCH. INST. (Feb. 8, 2006), https://www.genome.gov/17516707/2006-release-two-nih-initiatives-launch-intensive-efforts [https://perma.cc/HP9M-A2F4].

34. *See* Bailey, *supra* note 27.

35. EY, BEYOND BORDERS: UNLOCKING VALUE, BIOTECHNOLOGY INDUSTRY REPORT 7 (2014) [hereinafter BEYOND BORDERS].

36. ROCHE, ANNUAL REPORT 2012, at 25 (2013).

37. *See* Brief for Amici Curiae Genentech, Inc. et al. Supporting Respondents, Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576 (2013) (No. 12-398), 2013 U.S. S. Ct. Briefs LEXIS 1435.

38. *See* PCAST REPORT, *supra* note 17.

39. *See id.* at 29.

40. *See id.*

41. *See, e.g.*, Richard Zhao, *From Single Cell Gene-based Diagnostics to Diagnostic Genomics: Current Applications and Future Perspectives*, 18 CLINICAL LAB'Y SCI.: J. AM. SOC'Y FOR MED. TECH. 254, 255 (2005).

42. *Id.*

43. *Id.*

44. *See* Shabbir Ahmed, Zhan Zhou, Jie Zhou & Shu-Qing Chen, *Pharmacogenomics of Drug Metabolizing Enzymes and Transporters: Relevance to Precision Medicine*, 14

pharmacogenomics (PGx).[45] The costs of upstream research (finding the association between a gene and a disease or the association between a genetic variant and drug response) and of bringing a final product to market are exceptionally high, even for biologics. For example, one empirical study predicted that it would cost up to $6 billion and twenty years to develop effective pharmacogenomics in the United States.[46]

As mentioned above, pharmacogenomics can enable doctors to adapt treatment to a patient's genetic variants. But gene therapeutics are not limited to the optimal administration of prescription drugs according to the genetic features of the patient. The concept of "gene therapy" was theorized in 1972 by Theodore Friedmann and Richard Roblin, with a paper that anticipated that it could "ameliorate some human genetic diseases" whilst warning that, at the time, the understanding of the underlying principles was not sufficient for safely conducting human trials.[47] Fifty years later, gene therapy has become a reality, and several techniques have been developed that use genes to treat or prevent diseases through different approaches, such as replacing a mutated gene causing a disease with a "healthy" copy of the gene,[48] inactivating a mutated gene,[49] and introducing a new gene into the body to help fight a disease.[50]

The biotechnology industry is also innovating drug manufacturing. One of the main innovations is the development of biologic drugs that are derived from living matter or manufactured in living cells using recombinant DNA biotechnologies.[51] Biologic products are generally more complex than traditional small-molecule drugs, and biologics are not chemically synthesized.[52] The development of biologics typically requires several steps: locating the genes that code for a certain protein, cloning it, reproducing the proteins associated with such gene, determining the role of the encoded protein in the disease process, and finally, developing a therapy.[53]

GENOMICS PROTEOMICS BIOINFORMATICS 298, 300 (2016).

45. *See id.* at 298–99.

46. Ramy Arnaout, Thomas P. Buck, Paulvalery Roulette & Vikas P. Sukhatme, *Predicting the Cost and Pace of Pharmacogenomic Advances: An Evidence-Based Study*, 59 CLINICAL CHEMISTRY 649, 654 (2013) (estimating the amount of money and time needed to find sufficient associations between patients' genomic variants and drug response to reduce the drug-related adverse outcomes by a range of 25–50%).

47. Theodore Friedmann & Richard Roblin, *Gene Therapy for Human Genetic Disease?*, 175 SCI. 949, 954 (1972).

48. Herb Brody, *Gene Therapy*, 564 NATURE OUTLOOK S5 (2018).

49. Esther Landhuis, *The Definition of Gene Therapy Has Changed* (Oct. 26, 2021), https://www.nature.com/articles/d41586-021-02736-8 [https://perma.cc/654L-7ZDG].

50. *Id.*

51. *See Frequently Asked Questions About Therapeutic Biological Products*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/therapeutic-biologics-applications-bla/frequently-asked-questions-about-therapeutic-biological-products [https://perma.cc/26WU-96BX] (July 7, 2015).

52. *See* FED. TRADE COMM'N, EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION, at i (2009), https://www.ftc.gov/sites/default/files/documents/reports/emerging-health-care-issues-follow-biologic-drug-competition-federal-trade-commission-report/p083901biologicsreport.pdf [https://perma.cc/T23D-Y32V].

53. Thomas Morrow & Linda Hull Felcone, *Defining the Difference: What Makes*

The average R&D process for developing a biologic drug lasts ten to twelve years.[54] The cost of this process is estimated to be well over $1 billion.[55] After that, the manufacturing process is quite complex and requires extensive testing before a product reaches the market.[56] This increases the overall R&D expenses associated with these drugs.

Obtaining broad patent protection for a successful biologic is extremely difficult. In general, patent protection for biologics is narrow, because the Federal Circuit requires that biotechnology compounds claimed in patent applications be "fully characterized," and the United States Patent and Trademark Office (USPTO) holds that the claim for a genus of proteins satisfies the "written description" requirement only if a "representative number of species" is described sufficiently.[57] Consequently, inventors of biological products are more likely to obtain patent protection of a single protein identified in the patent, rather than a broader protection directed to an entire genus of proteins or nucleic acids that can be used to create the biologic.[58]

Notwithstanding the high costs associated with R&D in the field of gene therapy and biologics, the high value of final products is well recognized in the pharmaceutical sector. This seems to be confirmed by a 2021 study that examined over 300 acquisitions of companies developing prescription drugs that took place in the European Union and United States between 2005 and 2020.[59] That study found that, on average, "acquirers paid 37% . . . more for companies with biologics and gene therapeutics than small-molecule lead drugs."[60] Each of the final biologic products mentioned above depend on the discovery and continued R&D of new genetic associations.

C. Examples of Important Genetic Associations

To illustrate the state of the art concerning biotechnology products, and the associated costs in terms of R&D, this Section provides some examples of associations between genes and diseases that lead to follow-on innovation to bring successful products to market.

Biologics Unique, 1 BIOTECHNOLOGY HEALTHCARE 24, 26 (2004).

54. FED. TRADE COMM'N, *supra* note 52, at 29.

55. *See* Joseph A. DiMasi, Ronald W. Hansen & Henry G. Grabowski, *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. HEALTH ECON. 151, 181 (2003).

56. *See* Julie D. Polovina, *Mutant Biologics: The 2010 Health-Reform Legislation's Potential Impact on Reducing Biologic Research and Development Costs*, 100 GEO. L.J. 2291, 2293 (2012).

57. Krista Hessler Carver, Jeffrey Elikan & Erika Lietzan, *An Unofficial Legislative History of the Biologics Price Competition and Innovation Act of 2009*, 65 FOOD & DRUG L.J. 671, 696 (2010) (citing Ariad Pharms., Inc. v. Eli Lilly & Co., 598 F.3d 1336 (Fed. Cir. 2010)).

58. *Id.*

59. Daniel Tobias Michaeli, Hasan Basri Yagmur, Timur Achmadeev & Thomas Michaeli, *Value Drivers of Development Stage Biopharma Companies*, 23 EUR. J. HEALTH ECON. 1287, 1288 (2022).

60. *Id.* at 1287.

First, it should be noted that, in general, the number of diseases known to be monogenic (i.e., one that is hereditary and caused by a single gene mutation)[61] is relatively low, compared to the so-called heterogeneous disorders (i.e., diseases in which mutations in several different genes, or the combined effects thereof, can play a role).[62] The distinction can be confusing because the same medical condition may have both monogenic and heterogeneous forms.[63] Further complicating the matter, a "genetic association" includes the cases of (1) a single gene mutation causing a monogenic disease and (2) multiple gene mutations contributing to a medical condition.[64]

In this regard, one of the most famous examples of genetic risk factors may be the discovery of the BRCA1 and BRCA2 genes, and each gene's association with hereditary breast and ovarian cancer.[65] Mutations in either of these genes, which can be passed down through families, result in substantially greater risk of contracting breast or ovarian cancer than the general population.[66] In 1994, after years of research that built upon previous discoveries[67] and that used preexisting sequencing technologies,[68] the BRCA1 gene was isolated and sequenced by researchers from the biotechnology start-up, Myriad. Myriad was founded with the express purpose to isolate and sequence the breast-cancer-associated genes and had raised more than $100 million to accomplish this goal.[69] Shortly after isolation, a patent application was filed covering the DNA sequence.[70] Within a few months, Myriad had also

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61. Examples of monogenic diseases include Huntington's disease and sickle-cell disease. Sickle-cell disease has been found to be caused by a hereditary mutation in the beta-globin gene. *NIH Researchers Create New Viral Vector for Improved Gene Therapy in Sickle Cell Disease*, NAT'L INSTS. HEALTH (Oct. 2, 2019), https://www.nih.gov/news-events/news-releases/nih-researchers-create-new-viral-vector-improved-gene-therapy-sickle-cell-disease [https://perma.cc/R7N4-GRG6]. Currently, the only cure for this disease is bone-marrow transplant, which often proves difficult to achieve. *See, e.*g., Anna Nowogrodzki, *Medicine is in the Blood*, 564 NATURE OUTLOOK S12, S12 (2018) ("[L]ess than one-third of people with sickle-cell disease can find a matched donor.").

62. A comprehensive online database of human genes and genetic disorders, edited at the McKusick-Nathans Institute of Genetic Medicine, Johns Hopkins University School of Medicine, is available at: https://www.omim.org/ [https://perma.cc/VCT8-3DEA].

63. *See, e.g.*, Christine Klein & Ana Westenberger, *Genetics of Parkinson's Disease*, 2 COLD SPRING HARBOR PERSPS. MED. (2012).

64. *See, e.g*, *id.*

65. *BRCA Gene Mutations: Cancer Risk and Genetic Testing*, NAT'L CANCER INST. (Nov. 19, 2020), http://www.cancer.gov/cancertopics/factsheet/Risk/BRCA [https://perma.cc/4VEB-S2PG].

66. *Id.*

67. *See* Jeff M. Hall, Ming K. Lee, Beth Newman, Jan E. Morrow, Lee A. Anderson, Bing Huey & Mary-Claire King, *Linkage of Early-Onset Familial Breast Cancer to Chromosome 17q21*, 250 SCI. 1684, 1684 (1990).

68. *See id.*

69. Jorge L. Contreras, *Narratives of Gene Patenting*, 43 FLA. ST. U. L. REV. 1133, 1140–41 (2016).

70. U.S. Patent No. 5,747,282 (filed June 7, 1995) (covering common variants of BRCA1 gene).

isolated and patented the BRCA2 gene sequence.[71] Following these discoveries, Myriad began to offer genetic testing to the public to detect the existence of the mutation.[72]

Another genetic association example involves rheumatoid arthritis. Several studies have shown that some of the main genetic risk factors of rheumatoid arthritis are the genes that encode tumor necrosis factors (TNFs), in the human leukocyte antigen (HLA) region, on the short arm of chromosome 6, which contains a large number of genes that encode antigens involved in immunological processes.[73] Following this discovery, biological therapeutics for rheumatoid arthritis have been developed, and a monoclonal antibody that targets TNFs is now commonly used for treatment of this disease.[74]

Basic genetic research—discovering the link between a gene and a disease and the exact location of such a gene—enables a wide range of innovations that have the potential to revolutionize healthcare. Among the sources of incentives for innovation, the patent system is particularly important in the biotechnology industry compared to other high technology fields.[75] Genetic information, in the form of discoveries of associations between genes and disease, is both valuable in its own right as a means of alerting people to potential medical conditions but is also the building block for all downstream biologic treatments and gene therapies. The following Parts describe how gene associations were effectively patentable from the dawn of the biotechnology era until 2013, when the Supreme Court decided that "gene patents" were no longer allowed,[76] and thus effectively ended the ability to have exclusive rights to the key genetic information of gene associations, except by keeping them as trade secrets.

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71. U.S. Patent No. 5,837,492 (filed Apr. 29, 1996) (covering common variants of BRCA2 gene).

72. *See* Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 585 (2013).

73. Alan J. Silman & Jacqueline E. Pearson, *Epidemiology and Genetics of Rheumatoid Arthritis,* 4 ARTHRITIS RSCH. S265, S267 (Supp. 2002).

74. Claudia Monaco, Jagdeep Nanchahal, Peter Taylor & Marc Feldmann, *Anti-TNF Therapy: Past, Present and Future*, 27 INT'L IMMUNOLOGY 55 (2014).

75. The reliance on patents of the biotechnology industry has been affirmed both by statements of stakeholders and by empirical studies. *See, e.g.*, Stuart J.H. Graham, Robert P. Merges, Pam Samuelson & Ted Sichelman, *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255, 1278 (2009) (Finding that "[a]mong the D&B sample, biotechnology and medical device companies are much more likely to hold patents and applications than are software and Internet firms," and that "[t]here are also substantial differences across industries in the number of patents held on average, with the total patents of medical and life science companies once again substantially greater than those of the software and Internet firms in the D&B sample"). *See also* Frederic M. Scherer, *The Economics of Human Gene Patents*, 77 ACAD. MED. 1348 (2002).

76. *Ass'n for Molecular Pathology*, 569 U.S. at 580.

II. THE PATENTABILITY OF GENES

A. Judicial Exceptions to Patentable Subject Matter

Section 101 of the Patent Act sets out the patentable subject matter requirement: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[77]

A plain reading of this section results in an extremely broad scope of patentable subject matter. First, the language explicitly says that a patent may be awarded to whoever "invents or discovers" subject matter meeting the requirements of the rest of the Patent Act.[78] The most straightforward reading of the phrase "invents or discovers" is that it includes both inventions and discoveries of previously unknown phenomena. In addition, the most straightforward reading of the terms "process" and "composition of matter" in Section 101 would include natural processes and naturally occurring compositions of matter.

But the Supreme Court has pointed to the word "new" in Section 101 to avoid including naturally occurring processes and compositions in patentable subjects.[79] While the Court acknowledges that the novelty requirement is contained in Section 102 of the Patent Act,[80] where it is laid out with specificity, the Court nevertheless has interpreted the term "new" in Section 101 to exclude things that exist in nature.[81] Thus, the Court has held that the discovery of the usefulness of a naturally occurring process is not patentable subject matter because it is not "new" in the world, even if its application is new to the stock of human knowledge.[82] There are two problems with this interpretation. First, it effectively reads "discovers" out of Section 101 with respect to applications of a composition of matter. Second, it treats as different in kind what is different in degree.

One cannot divide the world of inventions into those made by humans and those that are based on applications of natural phenomena or products of nature. All inventions are the application of knowledge about naturally occurring phenomena to objects in the physical world. Humans cannot invent a single new process or composition of matter without making use of, and being constrained by, physical reality and the natural laws that govern it.[83] Accordingly, the real question for the

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77. 35 U.S.C. § 101.

78. *Id.*

79. Gottschalk v. Benson, 409 U.S. 63 (1972).

80. 35 U.S.C. § 102.

81. *See, e.g.*, *Ass'n for Molecular Pathology*, 569 U.S. at 580.

82. *See* Mayo Collaborative Servs. v. Prometheus Laboratories, Inc., 566 U.S. 66, 82 (2012) (finding claim directing doctors to apply natural law patent ineligible); *Gottschalk*, 409 U.S. at 67 (stating that "[p]henomena of nature, though just discovered . . . are not patentable").

83. The Court has recognized this in a number of cases. *See, e.g.*, *Mayo*, 566 U.S. at 71 (stating that "all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas"); *Gottschalk*, 409 U.S. at 67 (describing natural phenomena as the "basic tools of scientific and technological work"); Alice Corp. v. CLS Bank Int'l, 573 U.S. 208, 217 (2014) (attempting to discern the point where natural "building blocks" become patent eligible material).

courts has been, if discoveries of nature are not to be patentable, what addition of human ingenuity must be present in *any* application of the laws of nature in order for something to be considered an "invention" or "discovery"? [84]

Supreme Court case law has prohibited patenting discoveries of naturally occurring phenomena through repeatedly holding that physical phenomena, laws of nature, and abstract ideas are not patentable subject matter.[85] In saying that physical phenomena are not patentable subject matter, the Court prevents anyone from patenting a newly discovered plant, mineral, or other naturally occurring physical product of nature.[86] By saying that the laws of nature are not patentable subject matter, part of what the Court has attempted to do is prevent the patenting of discoveries about how the material world operates. Thus, new discoveries in math or science, in themselves, cannot be patented. The other goal the Court pursues in saying that laws of nature are not patentable subject matter is to prohibit the patenting of applications of laws of nature that are too broad.[87]

In prohibiting the patenting of "abstract ideas," the Court seeks to prohibit patenting of laws of nature and mathematical formula claimed as broad processes.[88] The Court also seeks to prohibit patent claims that are made at too abstract of a level such that the claim would give broad patent-monopoly rights to the patentee and would prohibit others from using the law of nature or mathematical formula. This could deter follow-on innovation due to the ownership of a broad scope of uses of the patented process. The Court does not want laws of nature and mathematical formulae to be patented by anyone, but instead, remain part of the "storehouse of knowledge" available to all.[89]

The current patentability test is the Alice-Mayo two-step, so called for a combination of the holdings of *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*[90] and *Alice Corp. v. CLS Bank International*.[91] Under the test, one first asks whether the claim contains patent-ineligible subject matter, such as a law

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84. *See, e.g.*, Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 134–35 (Frankfurter, J., concurring) ("It only confuses the issue, however, to introduce such terms as 'the work of nature' and the 'laws of nature.' For these are vague and malleable terms infected with too much ambiguity and equivocation. Everything that happens may be deemed 'the work of nature,' and any patentable composite exemplifies in its properties 'the laws of nature.' Arguments drawn from such terms for ascertaining patentability could fairly be employed to challenge almost every patent.").

85. *See, e.g.*, *Mayo*, 566 U.S. at 91; Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. at 594–95; Diamond v. Diehr, 450 U.S. 175, 191–93 (1981); Parker v. Flook, 437 U.S. 584, 596 (1978).

86. However, a non-natural, man-made element on the periodic table is patentable. *See Funk Bros. Seed Co.*, 333 U.S. at 131 (preventing patentability of a mixture of naturally occurring plant root bacteria).

87. *See id.*

88. *Ass'n for Molecular Pathology*, 569 U.S. at 589 ("We have 'long held that this provision contains an important implicit exception[:] Laws of nature, natural phenomena, and abstract ideas are not patentable.'") (quoting Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.).

89. *Funk Bros. Seed Co.*, 333 U.S. at 130.

90. 566 U.S. at 66.

91. 573 U.S. 208, 208 (2014).

of nature, a natural phenomenon, or abstract idea. If step one is met, then one moves on to step two, in which one seeks an inventive application of the patent-ineligible concept. The Court has said that the claim must contain an inventive application sufficient to transform the patent-ineligible concept into a patent-eligible application of the concept.[92] The Court further stated that this must be more than "well-understood, routine, conventional activity."[93] Again, we see the Court venturing into later sections of Title 35, the inquiries of novelty (Section 102)[94] and obviousness (Section 103),[95] in determining whether a claim is inventive enough beyond the novel application of the ineligible subject matter to the rest of the invention.

B. Evolution of Patentability for Applying Discoveries of Nature

A longstanding issue in determining the patentability of inventions related to discoveries of nature is where to draw the line between unpatentable naturally occurring products and processes, and patentable human "inventions." The Supreme Court has generally focused on whether there has been sufficient *application* of human ingenuity to the product or process of nature.[96] Thus, recognizing the beneficial effect of a naturally occurring mineral and prescribing a method of use of the mineral to improve health may be patentable. But discovering the health benefits of broccoli sprouts is not enough to entitle one to a patent on the broccoli sprouts, or to a process of growing and harvesting the sprouts at the right time for maximum health benefit.[97] This is the case even if the patent applicant discovers that not only are the broccoli sprouts generally healthy, but they are particularly useful as a cancer-fighting food.[98]

There exists a long line of cases attempting to draw the line between unpatentable natural phenomena and patentable application of that phenomena, with at best a fuzzy line emerging from the cases. In *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, the patent applicant discovered that a combination of bacteria useful in fixing nitrogen in leguminous plants could be used together without the different species of bacteria inhibiting the beneficial functions of each other.[99] Prior to this discovery, while it was recognized that different bacteria could have different beneficial effects

92. *See id.* at 217–18.

93. Mayo Collaborative Servs. v. Prometheus Laboratories, Inc., 566 U.S. at 79.

94. *See generally* Diamond v. Diehr, 450 U.S. 175, 188–91 (1981).

95. *See generally* KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 401–02 (2007).

96. *See, e.g.*, Le Roy v. Tatham, 55 U.S. 156, 175 (1853) ("A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered in addition to those already known. Through the agency of machinery a new steam power may be said to have been generated. But no one can appropriate this power exclusively to himself, under the patent laws. The same may be said of electricity, and of any other power in nature, which is alike open to all, and may be applied to useful purposes by the use of machinery. In all such cases, the processes used to extract, modify, and concentrate natural agencies, constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects.").

97. *In re* Cruciferous Sprout Litigation, 301 F.3d 1343, 1352 (Fed. Cir. 2002).

98. *Id.*

99. 333 U.S. 127 (1948).

on legumes, farmers did not use multiple strains of bacteria because different strains often interacted in ways that canceled out the beneficial effect of each other. The inventor discovered which strains of bacteria could be used together without this negative interaction. He filed a patent claiming a mixture of these mutually non-inhibiting strains.[100]

The Supreme Court held that the claim was not patentable subject matter because it was "no more than the discovery of some of the handiwork of nature."[101] The Court went on to say that "however ingenious the discovery of that natural principle may have been, the application of it is hardly more than an advance in the packaging of the inoculants."[102] One sees that here, just as with the Court's jurisprudence as to process claims, the Court held that a new mixture of bacteria was unpatentable not because the patentee directly claimed a natural phenomenon, nor because the mixture of bacteria was not new. Rather the Court determined that the application of the mixture of bacteria was not a sufficiently inventive application of the discovery of nature because the effects of each bacterium were not expanded past what naturally occurs.[103]

In *Diamond v. Chakrabarty*,[104] the question was not whether the original combination of pre-existing bacteria could be patent eligible, but whether a man-made living bacterium itself could be patented.[105] The invention in *Chakrabarty* was a bacterium from the genus Pseudomonas, in which the inventor had inserted two oil-degrading plasmids into the bacterium.[106] The resulting invention was a living organism with the ability to degrade oil, useful for combating oil spills.[107] In this case, the Court had to decide whether a living organism could be subject to ownership by a human via a patent. The Court decided yes, noting the broad language of Section 101 of the statute and legislative history indicating that "Congress intended statutory subject matter to 'include anything under the sun that is *made by man*.'"[108] The Court noted, however, that its decision did not upset its prior cases indicating that naturally occurring products of nature could not be patented. The Court's decision in *Chakrabarty* is often credited as helping to usher in the biotechnology revolution in the United States.[109]

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100. *Id.* at 128. The claim language stated, "[a]n inoculant for leguminous plants comprising a plurality of selected mutually non-inhibitive strains of different species of bacteria of the genus Rhizobium, said strains being unaffected by each other in respect to their ability to fix nitrogen in the leguminous plant for which they are selected." *Id*.

101. *Id.* at 131.

102. *Id.*

103. *Id.*

104. 447 U.S. 303 (1980).

105. *Id.* at 305–06.

106. *Id.*

107. *Id.*

108. *Id.* at 309 (emphasis added) (distinguishing patentable man-made bacteria from unpatentable combination of natural bacteria because §101 requires that patentable natural matter be at least partially human-modified or created).

109. Matthew Jordan, Neil Davey, Maheshkumar P. Joshi & Raj Davé, *Forty Years Since* Diamond v. Chakrabarty*: Legal Underpinnings and Its Impact on the Biotechnology Industry and Society*, CTR. FOR PROTECTION INTELL. PROP., Jan. 2021, at 1, 3.

In *Parke-Davis & Co. v. H.K. Mulford Co.*,[110] Judge Learned Hand held that a purified form of a substance found naturally unpurified in the suprarenal glands (adrenaline) was patentable.[111] Judge Hand held that the inventor was the first to make "[purified adrenaline] available for any use by removing it from the other gland-tissue . . . . [I]t became for every practical purpose a new thing commercially and therapeutically."[112]

From the combination of *Chakrabarty* and *Parke-Davis*, the USPTO and Federal Circuit both took the position that a new, useful, purified, and isolated DNA compound was eligible for patenting.[113] The Federal Circuit held that no one could patent a gene as it exists in nature, but once the genetic material was removed from the body, it was sufficiently isolated that it could be patentable.[114] Thus, under this jurisprudence, genes were patentable when isolated *outside* of the body. This led to a great deal of research to discover the function of genes, and to patent specific genes once their function was known. One such example was determining the location and structure of the BRCA1 and BRCA2 genes.[115] While several scientists and institutions collaborated and also competed to find the structure and exact location of the BRCA genes, Myriad Genetics got there first, filing a patent application in 1994,[116] and eventually obtaining a number of issued patents.[117] This 1994 patent application claimed several sequences of DNA corresponding to the BRCA1 and BRCA2 genes and their most common mutations.[118] Mutations of these genes could increase the risk of ovarian cancer by 16–60% and of breast cancer by 36–85%.[119] Thus, especially for people at high risk, testing for the BRCA genes could be lifesaving.[120] Myriad developed a genetic test and tested millions of women for BRCA gene mutations.[121]

Myriad also vigorously enforced its patents against competing testing companies. Eventually, a consortium of plaintiffs joined together and sued Myriad, seeking to invalidate its BRCA patents as not being proper patentable subject matter. After losing at the Federal Circuit, the plaintiffs appealed to the Supreme Court in

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110. 189 F. 95 (C.C.S.D.N.Y. 1911) (J. Hand, L.), *aff'd*, 196 F. 496 (2d Cir. 1912).

111. *Id.* at 103, 113–14.

112. *Id.* at 103.

113. *See, e.g.*, Utility Examination Guidelines, 66 Fed. Reg. 1092, 1093 (Jan. 5, 2001); *In re* Deuel, 51 F.3d 1552, 1554 (Fed. Cir. 1995) (upholding patent claims directed to purified and isolated DNA and cDNA molecules as non-obvious).

114. *See generally, e.g.,* Ass'n for Molecular Pathology v. U.S. Pat. Trademark Off., 689 F.3d 1303, 1317 (Fed. Cir. 2012).

115. *See generally* Jordan et al., *supra* note 109, at 2; NAT'L CANCER INST., *supra* note 65.

116. U.S. Patent No. 5,693,473 (filed June 7, 1995) (linked breast and ovarian cancer susceptibility gene).

117. *E.g.*, U.S. Patent No. 5,753,441 (filed Jan. 5, 1996) (170-linked breast and ovarian cancer susceptibility gene); U.S. Patent No. 5,710,001 (filed June 7, 1995) (17q-linked breast and ovarian cancer susceptibility gene); *id.*

118. U.S. Patent No. 5,693,473 (filed June 7, 1995).

119. *Id.*

120. *Id.*

121. *BRCAnalysis: Hereditary Cancer Testing for Hereditary Breast & Ovarian Cancer*, GENE ANALYSIS, https://geneanalysis.eu/tests/bracanalysis/ [https://perma.cc/9U5N-LN2N].

Association for Molecular Pathology v. Myriad Genetics, Inc.[122] The Supreme Court held that genomic DNA is not patentable merely because it is removed from the body and isolated from the longer DNA strand.[123] Thus, Myriad's claim to the BRCA genes as they existed in nature (even if isolated outside the body) were invalid.[124] The Court held, however, that Myriad's complementary DNA (cDNA) claims were patentable, because cDNA is synthetic and does not naturally exist in the body.[125] Unfortunately for Myriad, while synthetically creating cDNA in a laboratory is useful for certain research, competitors could use genomic DNA to work with the BRCA genes and provide testing services.[126] Thus, Myriad's monopoly over testing for the BRCA gene mutations was over.[127]

C. The Current Regime: Unpatentability of Genes and Genetic Associations

After the Supreme Court's decision in *Myriad*, genes can no longer be patented, except for cDNA.[128] Having a patent on cDNA does give some advantages,[129] but because researchers and diagnostic companies can still work unincumbered with naturally occurring DNA, being able to patent only the cDNA version of a gene does not give substantial exclusivity over the gene or its genetic associations to disease. Thus, patentability of cDNA alone does not provide significant incentive to discover new genes and their functions.

Similar to the broccoli sprouts' relationship with healthiness, genetic associations are not patentable under current law. Nor is a patent available for a way of detecting the genetic association because such methods are standardized and do not differ by the genetic structure of the gene at issue.[130] Instead, some therapeutic use of the association must be claimed, such as for a gene therapy. The problem with requiring invention of a gene therapy is that there is a particularly large lag between discovering the function of genes and their mutations and determining a therapy for

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122. 569 U.S. 576 (2013).

123. *Id.* at 590–91.

124. *Id.* (distinguishing from purified substances (i.e., adrenaline), because purified adrenaline does not exist in nature).

125. *Id.* at 588.

126. *See id.* at 590–91 (genomic DNA that is merely isolated from the body is now in the public domain); *see also* John M. Conley, Robert Cook-Deegan & Gabriel Lazaro-Munoz, *Myriad After* Myriad*: The Proprietary Data Dilemma*, 15 N.C. J.L. & TECH. 597, 599 (2014).

127. *See* Conley et al., *supra* note 126.

128. *See id.* at 600.

129. Patenting cDNA preserves freedom to conduct future research and create subsequent therapeutics. *See* Peter Lee, *The Supreme Court's* Myriad *Effects on Scientific Research: Definitional Fluidity & the Legal Construction of Nature*, 5 U.C. IRVINE L. REV. 1077, 1098–99 (2015).

130. New methods of detecting and working with genetic material in a lab generally are patentable (notwithstanding that these could be considered research intermediaries), but these techniques can then be used universally to detect any target genetic material, and thus cannot be patented on a gene-specific basis. Jung Hun Park, Ki Soo Park, Kyungmee Lee, Hyowon Jang & Hyun Gyu Park, *Universal Probe Amplification: Multiplex Screening Technologies for Genetic Variations*, 10 BIOTECHNOLOGY J. 45 (2015) (explaining universal methods for detecting DNA sequences).

the mutations. Moreover, the incentive to keep the knowledge of the correlation secret until such time as a patentable therapeutic is invented may work to prevent the dissemination of valuable knowledge that could be used to test, monitor, and treat vulnerable patients.[131] While it is unclear how prevalent the practice of keeping secret discoveries of genetic associations with disease is,[132] the lack of ability to patent such correlations reduces the incentive to engage in the research necessary to make the discoveries.[133]

If the incentive of gene association patents was available, one could expect more research into discovering genetic associations. For example, laboratory companies might fund research into genetic associations, if discoveries of genetic associations could be patented as part of a diagnostic process or product. Diagnostic patents would give laboratory companies the exclusive right to test for the association during the term of the patent. While this would make the cost of each individual test for the association higher than if there were no patent, it would likely increase total funding into the biotechnology research market.[134] Funneling research efforts and money into discovering genetic associations could move discoveries toward the socially optimal level.[135]

For instance, if someone discovers that she carries a mutation of the BRCA1 gene that greatly increases her chances of having breast cancer, she can then make choices about having a mastectomy or engaging in more frequent monitoring. If genetic testing can reveal genes that will produce an enzyme that increases the chance of heart attack, monitoring and treatment plans can be made for those at risk. If genetic associations that make people vulnerable to getting very sick with COVID-19 or future pandemics could be discovered, then people could have better information on their vulnerability. This would allow vulnerable people to take appropriate precautions. This is preferable to society having to take an approach of restricting the activities of everyone because of lack of knowledge as to which members of the public are most vulnerable. In all of these examples, there is a great deal of value in simply knowing the genetic association and having a diagnostic test, even if a genetic treatment has not yet been invented.

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131. In addition, this incentive to keep secret discoveries of genetic associations with disease could conflict with medical ethics, which is particularly problematic for doctor researchers.

132. *See* Chris Palmer, *The Myriad Decision: A Move Toward Trade Secrets?*, NIH CATALYST, Mar.-Apr. 2014, at 9 ("[B]usiness models in a post-Myriad world may focus on keeping secret innovations regarding the peripheral aspects of gene discovery—analysis algorithms, sequencing technologies, and gene databases.").

133. David O. Taylor, *Patent Eligibility and Investment*, 41 CARDOZO L. REV. 2019, 2088–90 (2020) (showing that surveyed investors were less likely to continue to invest in biotechnology when they knew that genetic association, and genetic materials, are not patentable).

134. *See id.*

135. *See generally* Jason Rantanen, *Guest Post on Patent Eligibility and Investment: A Survey*, PATENTLYO (Mar. 6, 2019), https://patentlyo.com/patent/2019/03/patent-eligibility-investment.html [https://perma.cc/8QTE-5NWW].

III. ARE ADDITIONAL INCENTIVES NEEDED TO RESEARCH GENETIC ASSOCIATIONS?

This Part inquires whether the current state of the patent system provides optimal incentives to promote research and development in the field of genetics. After explaining the importance of this question considering the specific industry that benefits from those incentives (Sections III.A and III.B), this Part draws a comparison with other countries that compete with the United States in genetic research (Section III.C). Finally, Section III.D draws conclusions about the impact of the unpatentability of genetic associations on innovation and on the development of the biotechnology industry.

A. The Costs and Process of Biotech R&D

To better evaluate whether allowing exclusive rights to discoveries of genetic associations would improve social welfare, this Section examines the costs of research, development, regulatory approval, and marketing of gene diagnostics, as well as existing avenues for companies to recoup these costs. The process that leads to the commercialization of a biotechnology product is complex, and it involves different actors that have different motivations and sources of incentives. A comprehensive discussion of this process would fall outside the scope of this Article. But a short overview is needed to understand the potential role of gene patents in genetic R&D.

Biotechnology research and development is particularly long and costly, as compared to other scientific research.[136] Early-stage basic research is a key building block for all further advances toward those products and processes that ultimately benefit patients and consumers.[137] Basic research is seldom conducted by for-profit companies, due to the lack of prospects of economic payoff.[138] Rather, most basic research is conducted either directly by government entities or carried on by universities and other federally funded research institutions.[139] One of these entities is the National Institutes of Health (NIH), which promotes basic research in the field of life sciences.[140] Although the NIH also operates through government (intramural)

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136. F.T.C., TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY ch. 3, at 16 (2003) [hereinafter FTC Report], http://www.ftc.gov/os/2003/10/innovationrpt.pdf [https://perma.cc/3MKE-ZD5U] ("R&D is particularly lengthy for biotechnology firms, because biotechnology innovation is more uncertain than innovation in other industries.").

137. Basic research is defined as "systematic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and of observable facts without specific applications towards processes or products in mind." 32 C.F.R. § 272.3 (2020).

138. Rena M. Conti, *The Societal Benefit of Nonprofit Biotechnology Companies*, 6 CLINICAL ADVANCES HEMATOLOGY & ONCOLOGY 366, 366 (May 2008), ("[F]or-profit firms tend to focus efforts on the development of drugs or small molecules where the protection of intellectual property is clearly defined and legally defensible, the target population is large enough to potentially benefit from treatment and willing and able to pay for treatment innovation, and scientific uncertainty is minimized to the extent possible.").

139. Michael S. Lawlor, *Biotechnology and Government Funding: Economic Motivation and Policy Models*, FED. RSRV. BANK DALL. 131, 131 (2002).

140. See the NIH Mission and Goals statement, *Mission and Goals*, NIH,

research, most of its budget is dedicated to funding nongovernment research organizations (extramural research).[141]

Locating and isolating a specific gene sequence, as well as finding the association between a gene or a gene mutation and a health condition, can be compared to basic research in the field of genetics. Indeed, these discoveries enable follow-on innovation, but generally do not have any commercial value themselves under current patent law.[142] The U.S. government (through the NIH) and several universities were among the main holders of gene patents.[143] Quite often, university researchers create start-up companies to further follow-on innovation.[144] In many other cases, other institutions—such as biotech or pharmaceutical companies—use the basic research to develop final products. Research has shown that the availability of equity financing to small biotechnology R&D firms is particularly important to their successful development of biotechnology research and products.[145] This emphasizes that the path from the discovery of a genetic association to the development of a commercial product is not linear and can involve several actors.[146] It also shows the importance of patent rights in both attracting funding and in controlling and obtaining significant research results.[147]

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https://www.nih.gov/about-nih/what-we-do/mission-goals [https://perma.cc/TF2P-BYFK].

141. For more detailed information, see the "Budget" page on the NIH website, *Budget*, NIH, https://www.nih.gov/about-nih/what-we-do/budget [https://perma.cc/VV59-B4AT], stating that more than "84 percent of NIH's funding is awarded for extramural research, largely through almost 50,000 competitive grants to more than 300,000 researchers at more than 2,500 universities, medical schools, and other research institutions in every state . . . [and] over 10 percent of the NIH's budget supports projects conducted by nearly 6,000 scientists in its own laboratories, most of which are on the NIH campus in Bethesda, Maryland."

142. *See supra* Sections II.A.–B.

143. John Raidt, *Patents and Biotechnology*, U.S. CHAMBER OF COM. FOUND., https://www.uschamberfoundation.org/patents-and-biotechnology [https://perma.cc/Q7LE-TPLT].

144. *See, e.g.*, Ronald Cass, Joshua Lerner, Farah H. Champsi, Stanley C. Erck, Jonathan R. Beckwith, Leslie E. Davis & Henri A. Termeer, *Financing the Biotech Industry: Can the Risks Be Reduced?* 4 B.U. J. SCI. & TECH. L. 1 (1997); Edward E. Penhoet, *Science & Technology Policy: A CEO's View*, 33 CAL. W. L. REV. 15, 22 (1996).

145. Josh Lerner & Alexander Tsai, *Do Equity Financing Cycles Matter? Evidence from Biotechnology Alliances* (Nat'l Bureau of Econ. Rsch., Working Paper No. 7464, 2000), http://www.nber.org/papers/w7464 [https://perma.cc/4J7V-M678] (finding that availability of external equity funding was important to the success of small biotechnology firms, and that firms unable to secure such financing often assigned their IP rights to corporate partners, with the result that the research outcomes were significantly less successful than firms that acquired equity financing and maintained control of IP rights); Josh Lerner & Robert P. Merges, *The Control of Strategic Alliances: An Empirical Analysis of Biotechnology Collaborations* (Nat'l Bureau of Econ. Rsch., Working Paper No. 6014, 1997), https://ssrn.com/abstract=226424 [https://perma.cc/MF4B-8WRJ].

146. *See* ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT (OECD), GENETIC INVENTIONS, INTELLECTUAL PROPERTY RIGHTS & LICENSING PRACTICES ch. 1, p. 7 (2002) ("Biotechnology is a fast-moving field in which new products and services are developed from an increasingly complex and cumulative set of underlying technologies.").

147. *Id.*

From a patent perspective, several authors have expressed concern that, given the diversity of actors involved, patents on gene sequences could hinder follow-on innovation, with a detrimental effect on R&D and on society at large.[148] However, as discussed in Section III.B, empirical studies and surveys have failed to show that gene patents had a detrimental effect on follow-on innovation. In fact, gene-related patents seem to have had a positive effect. For basic research, the primary methods for conversion into a product or process of use to consumers or patients has been via start-ups spun out of universities, licensing of the patents resulting from the basic research, and research sponsored by corporations with rights to commercialize the research.[149] To enable research institutions to license their basic inventions, Congress enacted the Bayh-Dole Act in 1980,[150] which authorized universities and other nonprofit institutions to retain ownership of inventions made through federally-funded research, subject to the fulfillment of certain obligations to attempt to commercialize the invention.[151]

Another feature of biotechnology product development is that, in addition to the substantial time and costs involved in the process,[152] only a small percentage of the research projects result in the launch of commercial products, as can be seen in both empirical and survey evidence.[153] For example, in 2013 the FDA only approved

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148. Among the most influential articles that animated the debate on the detrimental effect of gene patents on R&D was Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698–701 (1998). The main argument of this article was that patent thickets would emerge, creating high transaction costs and other impediments to obtain licenses to further research on patented genes.

149. *See* Steven M. Ferguson & Uma S. Kaundinya, *Licensing the Technology: Biotechnology Commercialization Strategies Using University and Federal Labs*, *in* BIOTECHNOLOGY ENTREPRENEURSHIP, LEADING, MANAGING AND COMMERCIALIZING INNOVATIVE TECHNOLOGIES 199 (Craig Shimasaki ed., 2d ed. 2020); REPORT OF THE NATIONAL INSTITUTES OF HEALTH WORKING GROUP ON RESEARCH TOOLS 3 (1998) ("Biomedical researchers increasingly chose to collaborate with entrepreneurial companies that understood and valued basic science . . . ."); Richard Florida, *The Role of the University: Leveraging Talent, Not Technology*, *in* A.A.A.S. SCIENCE AND TECHNOLOGY POLICY YEARBOOK 2000 366 (Albert H. Teich, Stephen D. Nelson & Celia McEnane eds., 2000) ("Joint university-industry research centers have . . . grown dramatically, and a lot of money is being spent on them."); Lynn E. Nimtz, William C. Coscarelli & Daniel Blair, *University-Industry Partnerships: Meeting the Challenges with a High Tech Partner*, 27 S.R.A. J. 9, 9 (1995) ("Today's knowledge-based, technological society demands much from higher education and the corporate world—demands that often can be met through effective university-industry partnerships."); Arti K. Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 110 (1999) ("[T]he legal developments of the 1980s and 1990s have generated a large variety of academic-industrial relationships . . . . [S]ome academic-industrial relationships resemble commercial joint ventures.").

150. 35 U.S.C.A. §§ 200–12 (West).

151. *See* Josh Lerner & Robert P. Merges, *The Control of Technology Alliances: An Empirical Analysis of the Biotechnology Industry*, 46 J. INDUS. ECON. 125 (1998).

152. The process usually takes up to a decade and involves expenditures for hundreds of millions of U.S. dollars and sometimes exceeding one billion dollars. *See* Marshall, *supra* note 25; Tim Stevens, *The Gene Machine*, INDUSTRYWEEK, Aug. 18, 1997.

153. *See, e.g.*, BEYOND BORDERS, *supra* note 35, at 8 (estimating that the failure rate for

twenty-seven new biopharmaceutical products.[154] Moreover, many biotechnology companies do not manage to recoup their expenses.[155] As the biotechnology industry keeps growing steadily, the industry's profitability is largely driven by a few blockbuster products. For example, the sales of biologics in the United States have grown at a high rate for the 2008–2013 period, from $46.5 billion to $63.6 billion.[156] These considerations lead to the conclusion, widely held among industry members and third parties, that the biotechnology industry is high-risk, high-reward.[157]

B. Gene Patents' Effects on Biotech Research and Development

This Section makes a brief survey, through a review of existing studies and evidence, of conclusions on the impact that gene patents had on the development of this industry and the possible drawbacks for follow-on research and development that also arose from this patentability of genes.

As a preliminary matter, a definition of "gene patents" is necessary to better understand the policy implications. This term can be misleading, as it customarily refers to different types of patent claims, covering (1) compositions of matter (namely, isolated DNA sequences coding for a specific protein) such as Expressed Sequence Tags (ESTs), complementary DNA strings (cDNA), and single-nucleotide polymorphisms (SNPs); (2) diagnostic methods; (3) gene therapy; and (4) scientific instruments for studying DNA.[158] After the *Myriad* decision, patents on isolated DNA sequences and SNPs were no longer allowed. Diagnostic tests also are not generally available for discoveries of genetic associations for the reasons discussed above.[159]

But even when gene patents were allowed, the wide array of meanings for "gene patents" makes it hard to evaluate the actual number of patents on genomic DNA granted by the Patent Office.[160] In any instance, given the diversity of meanings given to "gene patent," and the narrow scope of many of them, relatively few of the genes occurring naturally were ever patented.[161]

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drug development in the biotech industry averages at eighty-nine percent overall).

154. *Id.* at 87.

155. *See* Tim Stevens, *The Gene Machine*, INDUSTRYWEEK, Aug. 18, 1997, at 168, 169 ("In the [United States] alone, there are about 1,300 biotech companies, yet only a handful are profitable.").

156. For a detailed analysis of the overall sales of biotech products, see Saurabh Aggarwal, *What's Fueling the Biotech Engine—2012 to 2013*, 32 NATURE BIOTECHNOLOGY 32 (2014) (pointing out that growth is mostly driven by the sales of market leaders and blockbuster drugs).

157. *See* BEYOND BORDERS, *supra* note 35, at 7.

158. For a more comprehensive definition and history of gene patents, see Robert Cook-Deegan Cristopher Heaney, *Patents in Genomics and Human Genetics*, 11 ANN. REV. GENOMICS & HUM. GENETICS 383 (2010).

159. *See supra* Section II.C.

160. *See* Gregory D Graff, Devon Phillips, Zhen Lei, Sooyoung Oh, Carol Nottenburg & Philip G Pardey, *Not Quite a Myriad of Gene Patents*, 31 NATURE BIOTECHNOLOGY 404 (2013).

161. *See* Lisa Larrimore Ouellette, *Access to Bio-Knowledge: From Gene Patents to Biomedical Materials*, 2010 STAN. TECH. L. REV. 1, 7 (2010) ("Although DNA patents are

Finding direct empirical evidence to assess the impact of gene patents on the development of the biotechnology industry and on genetic R&D is difficult for the following reasons. First, both the growth of the biotechnology industry and the spread of gene patents are directly connected with the progress of the underlying scientific discoveries and methods. Hence, the causation between two phenomena that are both engendered by the same evolution is hard to evaluate. Moreover, patent monopoly is not the only form of exclusivity available to a company that commercializes a new product. But circumstantial evidence, statements by industry members and other stakeholders, and survey evidence point toward the conclusion that gene patents did not hinder genetic R&D and instead played a role in fueling the growth of the biotech industry.[162] The purpose of this Section is to review this evidence.

From a policy perspective, one of the main concerns that animated the debate surrounding gene patents was the argument that genetic research and development were hindered by patents on naturally occurring genes. While other arguments against gene patents exist, such as the high prices associated with patent monopolies, those arguments are not specific to the patenting of genes, but rather are a cost of the tradeoff laid down by Article I, Section 8, Clause 8 of the U.S. Constitution.[163] Among the most influential advocates of the argument that gene patents hinder research, Heller and Eisenberg argued in 1998 that the creation of patent thickets would engender transaction costs and difficulty in tracking down the holders of every patent involved.[164] But successive evidence indicates that this concern was largely misplaced. Survey evidence indicates that only a small percentage of researchers are prevented from carrying on basic research by the existence of a patent.[165] Part of the

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ubiquitous, stating that twenty percent of human genes are 'owned' is misleading, since most patents cover only a narrow use of a DNA sequence.").

162. *See infra* notes 163–168 and accompanying text.

163. The basic tradeoff of the patent system is the grant of exclusive rights and the monopoly pricing power that sometimes accompanies them, in exchange for increased innovation. Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 63 (1998) ("[T]he patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time."); *see, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150–51 (1989) ("The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years."); *see also* F. M. Scherer, *Nordhaus' Theory of Optimal Patent Life: A Geometric Reinterpretation*, 62 AM. ECON. REV. 422 (1972) (providing formal economic modeling of the patent protection-innovation function); Sean B. Seymore, *Symposium: The Disclosure Function of the Patent System*, 69 VAND. L. REV. 1455 (2016) (explaining that the "quid pro quo" of the patent system is the exchange of exclusive patent rights for the sharing of technical information about new invention); Elizabeth Pesses, *Patent and Contribution: Bringing the Quid Pro Quo into* eBay v. MercExchange, 11 YALE J.L. & TECH. 309 (2009) (arguing that one effect of the eBay decision is to decrease the incentive effect of patents, especially for those who do not practice the patent on their invention).

164. *See* Heller & Eisenberg, *supra* note 148.

165. John P. Walsh, Charlene Cho & Wesley M. Cohen, *View from the Bench: Patents and Material Transfers*, 309 SCI. 2002, 2002 (2005) (finding that, of 414 researchers surveyed,

reason for this lack of "patent thicket" effect may be that market innovations have managed to clear rights to thickly patented fields by use of such things as industry standards of not enforcing against research and the rise of commitments to "fair, reasonable, and nondiscriminatory" (FRAND) licensing of standard essential patents.[166] Moreover, empirical studies show that, in general, the same genes that are covered by one or more patents are the main subjects of research projects.[167] Indeed, research focuses on the genes that have an overall commercial value, whether or not they are covered by one or several patent claims.[168]

This evidence leads to the conclusion that gene patents do not have a substantial detrimental impact on R&D in the genetics field. The main policy argument against gene patents being unproven, it is possible to evaluate whether, on the other hand, the development of the biotechnology industry benefitted from the allowance of gene patents in the 1980s.

Many argue that the biotechnology industry long relied on gene patents to incentivize innovation and growth.[169] At the least, it is widely accepted that the ability to patent at least some of the innovations resulting from biotechnology research is crucial to funding such research.[170] The purpose of the following Section is to review the survey and empirical evidence that leads to the conclusion that patents are considered a more valuable source of incentives for biotechnology R&D than in other high technology industries. Even though this evidence is not sufficient to establish a direct correlation between the grant of gene patents and the growth of the biotech industry, it can be considered a strong indicium that this correlation exists. This statement is supported by the consideration that the industry is fueled by a few profitable companies whose businesses are supported by revenues from specific blockbuster products.[171] Another peculiarity of the industry is that a substantial portion of the start-ups that play an important role in genetic research and product development are backed by venture capitalists.[172] In the venture capital

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patents caused delays of more than a month in less than one percent of the projects, and none was abandoned due to a preexisting patent).

166. *See* David J. Teece, *The "Tragedy of the Anticommons" Fallacy: A Law and Economics Analysis of Patent Thickets and FRAND Licensing*, 32 BERKELEY TECH. L.J. 1489, 1507 (2017).

167. *See, e.g.*, Jannigje G Kers, Elco Van Burg, Tom Stoop & Martina C Cornel, *Trends in Genetic Patent Applications: The Commercialization of Academic Intellectual Property*, 22 EUR. J. HUM. GENETICS 1155, 1157–58 (2014) (showing direct correlation between commercialization of genetic products and patents over these products in the Netherlands, where genetic material is patentable subject matter).

168. *Id.*

169. *See infra* notes 171–75.

170. FTC REPORT, *supra* note 136, ch. 2, at 1 ("Biotechnology start-ups rely on their ability to patent their innovations to attract investment and continue innovating . . . ."); Bruce Lehman, *Major Biotechnology Issues for the U.S. Patent and Trademark Office*, 33 CAL. W. L. REV. 49, 50 (1996) ("[P]atenting is a very important part of commercializing biotechnology. The biotechnology industry requires considerable capital expenditure . . . . [T]he ability to get that capital is very much dependent upon the capacity to get patent protection for a prospective product.").

171. *See* Stevens, *supra* note 155.

172. Stuart J.H. Graham, Robert P. Merges, Pam Samuelson & Ted Sichelman, *High*

investment bargain, ownership of a valuable patent portfolio is a key resource to foster funds.[173] Given that biotechnology start-ups produce more valuable biotechnology research when they are able to secure equity funding, it is obvious that the ability of small firms to obtain patents is important to successful biotechnology research.[174]

The evidence collected thus far regarding the correlation between patent protection and the development of the biotechnology industry supports the argument that the former has been an important factor that enabled the latter. Of course, other factors also have had an important impact on the development of the industry, such as corollary scientific progress. An analysis of this correlation is beyond the scope of this Article.

As for the impact of the patent system, a Berkeley patent survey revealed that (1) in general, companies that hold patent portfolios are more likely to be backed by venture capital (VC), and (2) biotechnology start-ups and companies are more likely to be backed by venture capital funding than companies in other industries.[175] By applying syllogistic reasoning, where the major proposition is that VC firms are generally more likely to invest in companies that hold a valuable patent portfolio, and the minor proposition is that biotechnology companies often rely on VC funding, one could reach the conclusion that patents have a central role in securing the funding for biotechnology companies.

The view that gene patents specifically play an important role in this regard is shared among different stakeholders.[176] For example, in the U.S. Supreme Court's *Myriad* case, a variety of actors submitted briefs in support of the respondent Myriad and against the invalidation of the claims it owned covering gene sequences and methods.[177] Supporters included biotechnology companies[178], lawyers,[179]

Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey, 24 BERKELEY TECH. L.J. 1255, 1279–83, 1318–20 (2009).

173. *See* Frederic M. Scherer, *The Economics of Human Gene Patents*, 77 ACAD. MED. 1348, 1353 (2002) ("That raising venture capital is facilitated in many fields, and perhaps especially in biotechnology, when exclusive patent rights either exist or can be anticipated, appears to be the prevailing view.").

174. *See* Lerner & Tsai, *supra* note 145.

175. Graham et al., *supra* note 172, at 1255.

176. *See, e.g.*, Michael S. Mireles, *An Examination of Patents, Licensing, Research Tools, and the Tragedy of the Anticommons in Biotechnology Innovation*, 38 U. MICH. J.L. REFORM 141, 143 (2004) (noting that the Supreme Court's decision in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) and the passage of the Bayh-Dole Act in 1984 allowed universities and small companies to patent genes, which patent protection allowed them "to obtain much needed capital to fund research and development").

177. For a list of parties filing *amicus* briefs at all the stages of the litigation, see Contreras, *supra* note 69, Appendix I.

178. *See, e.g.*, Brief of Amici Curiae Gilead Sciences, Inc., Elan Pharmaceuticals, Inc., Confluence Life Sciences, Inc., Euclises Pharmaceuticals, Inc. & Biogenerator, in Support of Respondents, *Ass'n for Molecular Pathology*, 569 U.S. 576.

179. *See, e.g.*, Brief of Am. Bar Ass'n as Amicus Curiae in Support of Respondents, *Ass'n for Molecular Pathology*, 569 U.S. 576.

industry,[180] physicians[181], and public researchers.[182] The main argument that the briefs advanced was that denying patent eligibility to DNA sequences would hinder R&D in biotech products. However, this argument was unpersuasive as to the Supreme Court's decision.

Finding empirical evidence to evaluate that exact role of gene patents in the development of the biotechnology industry is a challenging task. It is always difficult to prove direct causation in a dynamic area with many contributing factors between gene patents and the development of the biotechnology industry. Nevertheless, as described below, there are many strong indications that gene patents significantly contributed to the development of the biotechnology industry by giving incentives to discover genetic associations.

C. Gene Research, Biotech, and Patentability in Other Countries

A comparison with other countries may provide more insight into the relationship between gene patent policy and the development of the biotechnology industry. The purpose of this Section is to provide a brief overview of the regime of gene patenting and the development of the biotechnology industry in Japan and Germany. According to OECD data, Japan is second to the United States in its share of biotechnology-related patents, while Germany is fourth, after South Korea.[183] In addition, given that Germany is bound by the requirements for patentability of biotechnological inventions set forth in the European Union's "biotech directive,"[184] examining Germany is a good proxy for examining EU countries more generally.

As for the concrete grants of gene patents, a 2005 study by the World Intellectual Property Organization led to the creation of a complete dataset, named the PATGEN database, that includes 15,000 patent families that sought protection for gene sequences, genetic research tools, gene-based diagnostics, and therapeutics from the three major patent offices: the USPTO, the Japanese Patent Office (JPO), and the European Patent Office (EPO).[185] Of these 15,000 patent families, approximately 5700 contained one or more patents granted by any of these offices.[186] The collected

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180. *See, e.g.*, Brief of Biotechnology Indus. Org. as Amicus Curiae in Support of Respondents, *Ass'n for Molecular Pathology*, 569 U.S. 576.

181. *See, e.g.*, Brief of the Ass'n of Am. Physicians & Surgeons, Janis Chester, M.D., & Graham L. Spruiell, M.D., as Amici Curiae in Support of Respondents, *Ass'n for Molecular Pathology*, 569 U.S. 576.

182. *See, e.g.*, Brief of the Univ. of Baltimore/Johns Hopkins Ctr. for Med. & L. and Gregory Dolin, as Amici Curiae in Support of Respondents, *Ass'n for Molecular Pathology*, 569 U.S. 576.

183. *Key Biotechnology Indicators, Economies' Share in Biotechnology-Related Patents, Based on the New Biotech Definition, OECD Countries, 2000-2019*, OECD [hereinafter OECD Key Biotech Indicators], https://www.oecd.org/innovation/inno/keybiotechnologyindicators.htm [https://perma.cc/PF3P-MSL5] (Nov. 2022) (scroll to "KBI 6" hyperlink).

184. 1998 O.J. (L 213) 13–21.

185. MICHAEL M. HOPKINS, SURYA MAHDI, SANDY M. THOMAS & PARIMAL PATEL, THE PATENTING OF HUMAN DNA: GLOBAL TRENDS IN PUBLIC AND PRIVATE SECTOR ACTIVITY (2006) [hereinafter PATGEN REPORT] https://www.wipo.int/edocs/plrdocs/en/patgen_finalreport.pdf [https://perma.cc/7K7P-G2UL].

186. *Id.* at 14.

data in this database are from a period when the biotechnology industry was developing through a period when it was well established.[187] Hence, these data are useful in understanding the process of development of the industry.

Japan is the second largest market worldwide for biotechnology-related patents in proportion with the overall economy, according to OECD data.[188] The Japanese Patent Act sets forth the requirements that an invention must meet to be patentable.[189] Article 2 of the Act defines an invention as the "highly advanced creation of technical ideas utilizing the laws of nature."[190] Most of the substantial requirements for patentability are set forth in article 29 of the Act.[191] The requirements are industrial applicability, novelty (in particular, the Act requires that the invention is not publicly known or used, nor described in a distributed publication or through telecommunication means in Japan or any foreign country), and the presence of an inventive step that makes it nonobvious for a person having ordinary skill in the art to create the invention.[192]

It was not until 1999 that the JPO released specific guidelines on human gene patents.[193] Those guidelines, however, were limited in scope (referring only to ESTs, full-length cDNA clones, and SNPs) and content: the guidelines only specified that these DNA sequences and genes are not patentable without a showing of specific utility.[194] Coming late to the allowance of patents on gene fragments and having a restrictive approach to gene patents appears to have caused Japan to lag behind in biotechnology research. Japanese patents account for only 9% of the total biotechnology patents granted by the EPO, JPO, and USPTO.[195] These data show that Japan's share of the "gene patent market" has been lower than that of the United States' for the entire 1980–2003 period.[196] Similarly, the OECD data that considers the period from 2000 to 2019 show that in 2019, Japan's biotechnology-related patents only accounted for approximately 12% of the total, while the United States had a share of almost 38% of this market.[197]

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187. *Id.* (showing data covering period 1980–2003).

188. *See Patents by Regions*, ORG. FOR ECON. COOP. & DEV., https://stats.oecd.org/Index.aspx?DataSetCode=PATS_REGION [https://perma.cc/85TV-LLHV].

189. Tokkyohō [Patent Act], Law No. 121 of 1959, *translated in* (Japanese Law Translation [JTS DS]), https://www.japaneselawtranslation.go.jp/en/laws/view/4097/en [https://perma.cc/85TV-LLHV] (Japan).

190. *Id.* art. 2.

191. *Id.* art. 29.

192. *Id.*

193. Asako Saegusa, *Japanese guidelines specify the terms of gene patents*, 401 NATURE 731 (1999).

194. *See, e.g.*, Asako Saegusa, *Japan Patent Directives*, 17 NATURE BIOTECHNOLOGY 1148, 1148 (1999).

195. PATGEN REPORT, *supra* note 185, at 14 (the PATGEN dataset shows that, of almost 5700 patent families claiming human DNA sequences, only 494 were JPO-granted patents (nine percent of the families containing patents granted by any of the three offices taken into account by the dataset and three percent of all the families).

196. *Id.*

197. OECD Key Biotech Indicators, *supra* note 183.

Germany is the member of the European Union with the largest share of biotechnology-related patents (approximately five point five percent)[198] and it is one of the top countries for biotechnology industry development.[199] As a signatory state of the European Patent Convention, Germany has been a member of the European Patent Organization since its founding in 1977.[200] Inventors seeking patent protection in any of the member states of the organization can file an application with the European Patent Office.[201] Granted patents are then subject to each country's national laws, which in turn must conform with European Union directives.[202] Hence, the laws regulating patent protection in Germany are (i) national laws, (ii) European Union directives, and (iii) the European Patent Convention.

In 1998, the European Union issued a directive regulating the patentability requirements for biotechnology inventions.[203] The directive, which sets forth the minimum requirements that member states of the European Union must adopt, generally recognizes human gene sequences as patentable subject matter.[204] The directive was implemented in German law in 2005.[205] In particular, the German Patent Act[206] provides that, subject to the requirements of novelty, inventiveness, and industrial applicability, a patent shall be granted for

> a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used. Biological material which is isolated from its natural environment or

198. *Id.*

199. *See* Dirk Fornahl, Tom Broeke & Ron Boschma, *What Drives Patent Performance of German Biotech Firms? The Impact of R&D Subsidies, Knowledge Networks, and Their Location*, 90 PAPERS REG'L SCI. 395 (2011).

200. Convention on the Grant of European Patents (European Patent Convention), Oct. 5, 1973, 1065 U.N.T.S. 199.

201. Erin Bryan, *Gene Protection: How Much is Too Much? Comparing the Scope of Patent Protection for Gene Sequences Between the United States and Germany*, 9 J. HIGH TECH. L. 52, 56–57 (2009).

202. *Id.* at 57.

203. 1990 O.J. (L 213) 12–21.

204. *Id.* at 18. Article 3 of the directive provides as follows:

> 1. For the purposes of this Directive, inventions which are new, which involve an inventive step and which are susceptible of industrial application shall be patentable even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used.
> 2. Biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature.

205. Andreas Schrell, Herbert Bauser & Herwig Brunner, *Biotechnology Patenting Policy in the European Union – as Exemplified by the Development in Germany, in* GREEN GENE TECH. 13, 29 (Armin Fiechter & Christof Sautter, eds., 2007).

206. Patentgesetz [PatG] [Patent Act], Dec. 16, 1980, Bundesgesetzblatt [BGB I] at 1981 I 1, as amended by Artikel 4 [Article 4], Oct. 8, 2017, BGB I at 3546 (Ger.) [hereinafter German Patent Act].

> produced by means of a technical process can also be the subject of an invention even if it previously occurred in nature.[207]

In addition to the requirements laid down by the directive, the German Patent Act further requires that "[t]he industrial application of a sequence or partial sequence of a gene shall be disclosed in the application specifying the function performed by the sequence or partial sequence."[208]

In practice, the EPO receives more biotechnology-related patent applications from U.S.-based applicants than from E.U.-based applicants, with Germany being the leading member state for E.U. applications.[209] Similarly, the PATGEN dataset shows that most of the gene patents granted by the EPO are owned by U.S. companies, rather than by German companies.[210] In general, biotechnology-related patents account for less than five percent of the total applications made to the EPO.[211]

The PATGEN dataset shows that the percentage of patent families containing grants by the USPTO is higher than the EPO and JPO.[212] The same study revealed the primacy of U.S. private firms and public sector institutions in patent ownership with shares as high as seventy-six percent of the U.S. gene patents, fifty-five percent of E.U. gene patents, and thirty-nine percent of Japanese gene patents.[213] These data reflect both the primacy of the United States as a market for gene patents and the role of U.S. biotechnology companies as industry leaders worldwide.[214] One factor that helps to explain this is the less stringent control and more expedited examination process in the USPTO, compared with the European and Japanese patent offices.[215] Other authors identified one of the factors that determined the supremacy of the U.S. biotechnology industry as the ability to achieve greater cooperation among different important actors, such as universities, start-ups, and venture capitalists.[216]

The 1980 Bayh-Dole Act empowered this model by allowing universities to patent and license their federally funded inventions. Additionally, the Act permitted start-ups to obtain patent rights upon living organisms and other biological products

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207. *Id.* § 1.

208. *Id.* § 1(a).

209. The data on patent applications in the field of biotechnlogy from the EPO Statistics & Trends Centre shows that, in 2021, 34.3% of the applications were filed from the United States, which is higher than the sum of applications filed from the EU. *Statistics & Trends Centre*, EUR. PAT. OFF., https://new.epo.org/en/statistics-centre#/technologyfields [https://perma.cc/UG5D-TAV4].

210. PATGEN Report, *supra* note 185, at 22.

211. *Statistics & Trends Centre*, *supra* note 209.

212. PATGEN Report, *supra* note 185, at 14.

213. *Id.* at 22.

214. Shannon K. Murphy, Comment, *Who Is Swimming in Your Gene Pool? Harmonizing the International Pattern of Gene Patentability to Benefit Patient Care and the Biotechnology Industry*, 89 U. DET. MERCY L. REV. 397, 414 (2012) ("These numbers show that the United States dominates in human gene patent ownership across the board.").

215. OECD Key Biotech Indicators, *supra* note 183.

216. Iain Cockburn, Rebecca Henderson, Luigi Orsenigo & Gary P. Pisano, *Pharmaceuticals & Biotechnology*, *in* U.S. INDUSTRY IN 2000: STUDIES IN COMPETITIVE PERFORMANCE 363, 390–92 (David C. Mowery ed., 1999).

(and, later on, genes), which was necessary to secure the venture capital used to further follow-on innovation.[217]

D. Gene Discovery Without Patents

The previous Section shows that many of the participants and funders of the industry believed that gene patentability encouraged investment and growth of the biotechnology industry. The evidence in the previous Section also strongly suggests that the patentability of genes did not lead to hold-up problems that deterred research and development of biologics and biotechnology. Again, it is possible that the growth of the industry would have been even faster, but it is undeniable that there was tremendous growth during the time that genes were patentable.

On the other hand, the biotechnology industry has continued to grow after the Supreme Court's 2013 decision in *Myriad*, so one might argue that while gene patents did not deter growth, and may in fact have helped it early on, they are no longer needed as the industry has matured and produced profitable therapeutics and products.[218] One can find support for this proposition in the fact that investment and dealmaking in biotechnology have hit a recent and significant high.[219] But the recent high may simply be the result of a "halo effect" around biotechnology after the success of the mRNA vaccines in combating the COVID-19 pandemic.[220] If one looks at the data after the Supreme Court held that genes were no longer patentable in 2013, one sees that there was a significantly slower pace of growth in biotechnology from 2013 to 2018.[221] Nevertheless, investment has continued in biotechnology, which may suggest that the status quo is sufficient for the industry to thrive. One should note, however, that a lot of the activity in financing and dealmaking around biotechnology companies concerns capturing returns on investments that were made many years ago, before the *Myriad* decision.[222] And just as we cannot know what the rate of biotechnology development would have been from 1983 to 2013 in the absence of gene patents, we cannot know if the continued

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217. Mireles, *supra* note 176, at 143 ("[T]he Bayh-Dole Act . . . created the biotechnology industry and the resulting flood of patent applications and issued patents for biotechnological inventions such as genes and gene fragments. Patent protection for those inventions allowed biotechnology companies to obtain much needed capital to fund research and development."); Howard Markel, *Patents, Profits, and the American People — The Bayh–Dole Act of 1980*, 369 N. ENG. J. MED. 794, 794 (2013).

218. Tania Simoncelli & Sandra S. Park, *Making the Case Against Gene Patents*, 23 PERSPS. ON SCI. 106, 112 (2015).

219. LAURA CANCHERINI, JOSEPH LYDON, JORGE SANTOS DE SILVA & ALEXANDRA ZEMP, WHAT'S AHEAD FOR BIOTECH: ANOTHER WAVE OR LOW TIDE? 1–2 (2021).

220. *Id.* at 6; *see also* Berkeley Lovelace Jr. & Robert Towey, *Covid Has Made Biotech Companies the Hot New Tech Sector as Investor Demand Drives Record IPOs*, CNBC, https://www.cnbc.com/2021/09/29/covid-has-made-biotech-companies-the-hot-new-tech-sector-as-investor-demand-drives-record-ipos.html [https://perma.cc/B97W-9HPY] (Oct. 24, 2021, 4:47 PM).

221. CANCHERINI ET AL., *supra* note 219, at 6. Biotechnology inventions proceeded through Phase I and Phase II clinical trials at a substantially slower rate from 2013 to 2018 than in the two years after the pandemic when there was an increased emphasis on biotechnology. *Id.*

222. *See id.*; *see also* Lovelace Jr. & Towey, *supra* note 220.

availability of gene patents would have made the rate of development faster between 2013 and now. In sum, the available evidence shows that there was rapid growth in the biotechnology industry during a thirty-year period when genes were patentable.[223] The evidence also shows that a number of participants in the industry thought and acted as if gene patents were important to funding R&D.[224] This suggests that gene patents did not deter development.[225] The evidence further shows that biotechnology development has continued after genes in the form of genomic DNA became unpatentable in 2013, although there was a slowing in the rate of growth from 2013 to 2018.[226]

One can conclude from all of the above that the biotechnology industry will continue forward even without the ability to patent genes or genetic associations. But it is also reasonable to conclude that gene patents were a key driver of the biotechnology industry through 2013. As of now, genes may not be patented both because of the *Myriad* decision and because the human genome has been sequenced, meaning that pure gene patents would now fail the patentability requirements of patentable subject matter, novelty, and nonobviousness.

The practical effect of this is that there is now no patent protection for those doing the time-consuming and very expensive research into what genes are linked to what health issues (genetic associations). Given the importance that patents played in encouraging massive investment in such research in the past, one wonders what the pace of biotechnology innovation could be if there were some patent protections for discovering genetic associations. Put differently, could we improve the pace of development and dissemination of biological research if there were some IP protections for discovering new genetic associations? Given the life-saving importance of the field, an optimized system has real and significant benefits. It is also worth looking at the incentives that the system provides to share and disseminate research and discoveries. This Section investigates these questions.

The first, obvious consequence of the lack of patent protection for genes since 2013 is some amount of reduction in the incentives for genetic research and development. This affects not only private companies but also universities and public sector research centers. Although the financial incentives for the kind of basic research that is generally conducted by universities are generally not secured through the patent system (as is specified in Part IV, public agencies, such as the NIH, provide researchers with the necessary funding), Congress enacted the Bayh-Dole Act to maximize incentives. The impact of the Act was huge: the number of patents received by American universities skyrocketed.[227] This resulted in novel treatments

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223. *Cf.* Jim Greenwood, *Gene Patents Do Not Hinder Academic Research*, 9 NATURE METHODS 1039 (2012).

224. *See* Robert Cook-Deegan & Christopher Heaney, *Patents in Genomics and Human Genetics*, 11 ANN. REV. GENOMICS HUM. GENETICS 383, 394–95 (2011).

225. *See supra* Section IV.B.

226. CANCHERINI ET AL., *supra* note 219, at 6.

227. *See* Clifton Leaf, *The Law of Unintended Consequences*, CNN (Sept. 19, 2005), https://money.cnn.com/magazines/fortune/fortune_archive/2005/09/19/8272884/index.htm [https://perma.cc/TSM3-2LZ6] ("In 1979, American universities received 264 patents. By 1991, when a new organization, the Association of University Technology Managers, began compiling data, North American institutions (including colleges, research institutes, and

for different diseases.[228] Moreover, the Act paved the way for the birth of university spin-offs that provided the seeds for growth for the early U.S. biotech industry and fostered collaboration between universities and the industry.[229] In sum, licensing revenues from university technology transfers constituted an important source of funding for research universities.[230] Biotechnology has always been considered one of the fields upon which the Bayh-Dole Act has had the greatest impact and one of the main areas of university licensing.[231] For example, Stanford University and the University of California obtained approximately $250 million by licensing the patents they held on recombinant DNA techniques.[232] In addition, the widespread practice of assigning exclusive patent rights to companies "spun off" from universities contributed to impactful acquisitions of biotechnology and gene therapy companies, such as Juno Therapeutics from the Fred Hutchison Cancer Research Center, Memorial Sloan-Kettering Center, Seattle Children's Research Institute (acquired by Celgene for $9 billion), and Purdue University's Endocyte Inc. (acquired by Novartis for $2.1 billion).[233] Since the *Myriad* decision in 2013, with gene patents no longer available, one source of revenue and incentive has been removed from universities and biotech start-ups. These patents and their licensing were useful in coordinating collaboration between researchers and industry. This does not mean that industry and universities will stop collaborating on biotechnology research, but it does mean that the system has lost one primary mechanism for universities to signal their possession of valuable research and to allocate exclusive rights to it such that the licensee is incentivized to further develop the research. There are other ways for universities and private industry to collaborate, including

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hospitals) had filed 1,584 new U.S. patent applications and negotiated 1,229 licenses with industry—netting $218 million in royalties. By 2003 such institutions had filed five times as many new patent applications; they'd done 4,516 licensing deals and raked in over $1.3 billion in income.").

228. *See id.* Note, however, that the author strongly criticizes the Act and its impact, reporting that by 2005 the U.S. biotech industry at large had lost more than $43 billion since its birth. The author further argues that the perspective of financial gains tainted the openness and the free flow of information and discoveries that characterized the scientific community, thus hindering R&D. *Id.*

229. Rebecca S. Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 VA. L. REV. 1663, 1663 (1996).

230. In this regard, it has been estimated that "[a]pproximately $2.94 billion in licensing revenue was generated in 2018 directly from the process of taking academic inventions to market . . . ." Dipanjan Nag, Antara Gupta & Alex Turo, *The Evolution of University Technology Transfer: By the Numbers,* IPWATCHDOG (Apr. 7, 2020, 5:29 PM), https://www.ipwatchdog.com/2020/04/07/evolution-university-technology-transfer/id=120451/ [https://perma.cc/DDQ4-QZX3]. This estimate was based on data from the Statistics Access for Technology Transfer (STATT) Database of the Association of University Technology Managers (AUTM). *Id.*

231. Vladimir Drozdoff & Daryl Fairbairn, *Licensing Biotech Intellectual Property in University-Industry Partnerships,* 5 COLD SPRING HARBOR PERSPS. MED. 1, 1 (2015).

232. Robert Cook-Deegan & Christopher Heaney, *Patents in Genomics and Human Genetics*, 11 ANN. REV. GENOMICS HUM. GENETICS 383, 392 (2010).

233. Nag et al., *supra* note 230.

sponsored research and trade secret agreements.[234] But these methods lack the public dissemination of the patent system.

While other avenues for collaboration between academia and industry exist, without gene patents, the ease and allocation of venture capital may be impacted, as one important signaling factor has been removed from the system. While funding has continued to increase year over year, it might have increased at a faster rate had genes remained patentable, especially from 2013 to 2018.[235] Patents have also typically been important to help new actors enter the market.[236] Indeed, venture capital has been considered an essential factor for biotech start-up companies to grow and eventually go through an initial public offering (IPO).[237] The consolidation of a few large companies—that, in extreme circumstances, can determine the birth of a *de facto* oligopoly—is what has characterized the less profitable and less innovative European market for biotechnology products.[238]

We have shown that the patentability of genes in the United States—and thus the ability to protect discoveries of genetic associations—corresponded to the creation of a more profitable biotechnology market than in any other nation. Academics and industry participants relied on patent rights to create the most robust biotechnology in the world, with university spin-offs and other start-ups taking the lead in research and development—especially at a basic "genetic association" level. This created a virtuous circle, with more gene associations discovered, and more follow-on genetic research conducted both at university and industry levels. We have also shown that biotechnology research, development, and funding have continued to increase since 2013, albeit at a slower pace for much of that time, while noting that it is impossible to say whether the development would have been faster were the incentives provided by genomic DNA patents still available. It is worth considering, however, how incentives have changed since 2013 not just in terms of biotechnology funding, but also in terms of the dissemination of knowledge.

Specifically, given that genomic DNA is no longer patentable after the 2013 *Myriad* case, the incentive to keep genetic discoveries secret has increased.[239] Accordingly, all else being equal, some discoveries that previously would have been made known to the world via a published patent application or issued patent are not being disclosed.[240] Companies can seek exclusivity for their genetic discoveries by

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234. *See* Eisenberg, *supra* note 229, at 1665.

235. CANCHERINI ET AL., *supra* note 219.

236. *See* BEYOND BORDERS, *supra* note 35.

237. *Id.* at 38.

238. *See* EUR. FED'N OF PHARM. INDUS. & ASS'NS, THE PHARMACEUTICAL INDUSTRY IN FIGURES 9 (2018), https://www.efpia.eu/media/361960/efpia-pharmafigures2018_v07-hq.pdf [https://perma.cc/99FX-AKK5] (showing annual pharmaceutical R&D expenditure growth rate at 8.6% for the United States from 2013 to 2017 and at 3% for the European Union from 2013 to 2017).

239. *See* Chris Palmer, *The Myriad Decision: A Move Toward Trade Secrets?*, 22 NIH CATALYST 9, 9 (2014).

240. Alexis K. Juergens & Leslie P. Francis, *Protecting Essential Information About Genetic Variants as Trade Secrets: A Problem for Public Policy?*, 5 J.L. & BIOSCIENCES 682, 689 (2018) (stating that "Myriad has even negotiated contracts with several US health plans that have agreed to protect their trade secrets" resulting in "challenges due to the lack of

"keeping secret innovations regarding the peripheral aspects of gene discovery—analysis, algorithms, sequencing technologies, and gene databases."[241]

Society benefits when discoveries about genes are shared quickly. Incentives to increase secrecy around these discoveries are costly to society because they create challenges for other firms who wish to achieve the same results.[242] In some cases, such duplication may be more cost-effective than simply licensing from the owner of a gene patent, but most of the time this will be needless economic waste.[243] The time lag between discovering a genetic association and inventing a treatment for the condition can be very long and can involve a great deal of cost.[244] Given this gap, the lack of patentability for discoveries of genetic associations means that researchers have less incentive to discover genetic associations.[245] Or if they do make such discoveries, they have an incentive to keep them secret.[246] Such secrecy can thwart beneficial collaboration. Advances may arise that make the gap from genetic association to gene treatment shorter, at which point the incentive to discover genetic associations will increase. But until that point, a lack of incentive exists.

It would be one thing if discoveries of genetic associations were only waypoints on the journey to a gene therapy or other treatment. In that case, the lack of incentive to make and share such discoveries would still be concerning as to the effect on inventing ultimate treatments. But genetic associations are very valuable in and of themselves.[247] Even if no treatment is currently available for a genetic condition, knowledge of the condition can be lifesaving.[248] A patient with a genetic mutation that puts her at risk of a particular type of cancer, for instance, can take steps to monitor and/or mitigate the risk of the cancer.[249] And because many genetic mutations can exist, research and cataloging of various mutations and their correlations can be crucial.

This raises the question of whether society would be better off, not just with patents on discoveries of genetic associations, but with additional patents on discoveries of the effects of each mutation of a gene. This would incentivize research on the effects of genes and their variations as strongly as possible. On the downside, this could create many patents that would have to be licensed to complete a test for all known mutations of a gene. This potential "patent thicket" might render the

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transparency about data").

241. Palmer, *supra* note 239 (summarizing remarks of Eleonore Pauwels, public policy scholar at the Woodrow Wilson International Center for Scholars).

242. *See* Juergens & Francis, *supra* note 240.

243. *See id.*

244. *See* Liza S. Vertinsky, *Patents, Partnerships, and the Pre-Competitive Collaboration Myth in Pharmaceutical Innovation*, 48 U.C. DAVIS L. REV. 1509, 1520–21 (2015) (illustrating the lengthy and cost-intensive research surrounding Alzheimer's disease).

245. *See* Michael M. Hopkins & Stuart Hogarth, *Biomarker Patents for Diagnostics: Problem or Solution?*, 30 NATURE BIOTECHNOLOGY 498, 499 (2012) (articulating hesitation of stakeholders to invest in clinical research and development without protections and incentives).

246. *See* Juergens & Francis, *supra* note 240.

247. *See* Leslie G. Biesecker & Robert C. Green, *Diagnostic Clinical Genome and Exome Sequencing*, 370 NEW ENG. J. MED. 2418, 2423 (2014).

248. *See id.*

249. *See id.*

benefits of the gene discoveries less publicly available. But a crowded field of patents is not anything new, and techniques like patent pools exist to efficiently license the necessary rights.[250]

IV. How Should Society Incentivize Discovery and Sharing of Gene Correlations?

If additional incentives are needed to achieve the socially optimal level of research and sharing of genetic associations, what form should those incentives take? This Part examines three options for providing such incentives: (A) patent protection, (B) increased federal funding of research into genetic associations, and (C) *sui generis* protection for genetic discoveries.

A. Patent Protection for Genetic Discoveries

There are two possible routes to allowing patents on discoveries of new genetic associations. First, the Supreme Court could reverse its *Myriad* decision and hold that genomic DNA, outside of a living body, is patentable. Second, Congress could amend the patent statute to explicitly make genetic discoveries patentable. The judicial route may encounter some difficulty, as discussed below. The congressional approach would allow for more ability to craft patent law, specifically to allow for the patenting of new discoveries of genetic associations, but not other natural phenomena.

The Supreme Court could overrule *Myriad*[251] and allow genes isolated outside the body to be patented as they were for decades before the decision. The Court could do this by reviving and embracing the dicta from *Parke-Davis & Co. v. H.K. Mulford Co.*, which held that a naturally occurring substance is patentable when purified and isolated from the body.[252] The advantage of this approach is that it is simple and leaves the rest of patent law unchanged. Even though the discovery of genetic associations is very similar to the discovery of other naturally occurring phenomena, under the Court's jurisprudence prior to 2013, genes were patentable, but other discoveries of nature were not. Thus, this approach would maintain the patent law status quo, other than by making genomic DNA patentable again. The advantage to this is that the incentive effect of gene patents would be restored. Under a return to pre-*Myriad* law, researchers who discover a new association between a gene and a disease would be able to file a patent on the DNA sequence of the gene and known mutations.[253]

There are possible issues with this approach, however. First, current Supreme Court jurisprudence on sufficiency of applications under § 101 utility requires that a

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250. Birgit Verbeure, Esther van Zimmeren, Gert Matthijs & Geertrui Van Overwalle, *Patent Pools and Diagnostic Testing*, 24 Trends Biotechnology 115, 115 (2006).

251. 569 U.S. 576 (2013).

252. 189 F. 95, 110 (C.C.S.D.N.Y. 1911), *aff'd*, 196 F. 496 (2d Cir. 1912).

253. Unless, of course, the gene had already been patented because someone else had already discovered an association between the disease and some other health condition. Products can only be patented once, even if a new use is found for the product. 35 U.S.C. § 102.

patent applicant know the "real world" use of the invention for which he is filing an application.[254] The Supreme Court has held that "real world" use means use to consumers or patients, not uses that are simply of interest for research purposes.[255] Because discoveries of genetic associations prove a link between a gene and a disease, but do not in themselves provide a cure, one could argue that they should be barred from patentability by § 101 because the inventor has not discovered a use of value to patients or consumers. This was not viewed as an obstacle under the law pre-*Myriad*, however. Prior to *Myriad*, the Patent Office and courts allowed patents on genes whose structure had been determined and whose link to a disease had been discovered. They treated the ability to test for the presence of the gene or its mutations as sufficient utility to patients.[256] There is no reason the Supreme Court cannot continue that way of thinking about the discovery of genetic associations.

A second potential hurdle—should the Supreme Court want to restore gene patentability—is that the entirety of the human genome has now been sequenced. Prior to this, researchers looking for genetic associations had to determine both which gene caused a disease and what the structure of that gene was. Now that the structure of all genes in the human body are known, researchers are no longer discovering new genetic structures.[257] Thus, even if the Supreme Court had gone the other way in *Myriad*, it is hard to see how human genes could be patented at this point because their structure is already known, and patent law does not allow patents on known products.[258] In *Parke-Davis & Co. v. H.K. Mulford Co.*,[259] doctors already knew that tissue from the adrenal glands could have beneficial effects for certain medical conditions. Dr. Takamine discovered how to make a concentrated and purified substance from the glandular tissue, which had superior medical effects. In that case, Judge Learned Hand held that Takamine's purified adrenaline was patentable because "it became for every practical purpose a new thing commercially and therapeutically."[260] The problem with applying this reasoning to isolated DNA

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254. *See* Brenner v. Manson, 383 U.S. 519, 534–35 (1966). The Court stated,

> The basic *quid pro quo* contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility. Unless and until a process is refined and developed to this point—where specific benefit exists in currently available form—there is insufficient justification for permitting an applicant to [monopolize] what may prove to be a broad field.

Id.

255. *Id.* at 536 (holding that an invention fails the § 101 utility requirement if the only currently known use of the invention is a "research intermediary" and stating that "a patent must be related to the world of commerce rather than to the realm of philosophy") (quoting Application of Ruschig, 343 F.2d 965, 970 (C.C.P.A. 1965)); *accord In re* Fisher, 421 F.3d 1365, 1371 (Fed. Cir. 2005).

256. Ass'n for Molecular Pathology v. U.S. Pat. & Trade Off., 689 F.3d 1303, 1333 (Fed. Cir. 2012).

257. *See generally supra* Section II.A.

258. 35 U.S.C. § 102.

259. 189 F. 95 (C.C.S.D.N.Y. 1911), *aff'd*, 196 F. 496 (2d Cir. 1912).

260. *Id.* at 103.

sequences is that the DNA had already been isolated when it was sequenced. Thus, researchers who discover new genetic associations are discovering valuable genetic information, but they are not making any novel transformation of physical matter, because the genes have already been isolated outside of the body for sequencing. Because isolated and sequenced genes are not *new*, they are not patentable subject matter under § 102, even if someone discovers a useful association between gene and disease.[261] Accordingly, even were the Supreme Court to overturn *Myriad*, it would have to also make an exception to § 102 in order for gene patents to again be patentable.

It would be difficult to make isolated and sequenced genes patentable again in the way they were when Myriad discovered the BRCA1 and 2 genes. Now that the entire human genome has been sequenced, discoveries of the functions of genes would not make the genes themselves patentable because they would not be new—their structure and location in DNA has already been discovered. Even if the Court reversed its *Myriad* decision and held that genomic DNA, outside of a living body, is patentable, it would also have to hold that known structure cannot preempt patentability until its utility is known, which would be a major shift in patent law.

Alternatively to Court action, Congress could amend the patent statute to implicitly or explicitly make genetic discoveries patentable, which current legislators are contemplating.[262] In amending the language of § 101, Congress has multiple options to ensure gene association patentability. First, it can amend the definition of "new" to include discoveries of new genetic associations.[263] Second, Congress could amend the "utility" definition to include discovery of a link between a gene and a disease as a "useful" instructive association that form the basis of gene therapies. This would allow patentability of gene association applications without the need to also find a treatment for the disease caused by the genetic mutation. This would end the current incentive to keep discoveries of genetic associations secret. With this "utility" understanding, discovery of a genetic association would be patentable, allowing profitable ownership of uses of that association, including diagnostic tests.

Congress could decide whether to make all uses of the genetic association protected by patent law, such that those who later invent gene therapies or biologic products to treat a condition would have to first license the right to make use of the genetic association from the genetic association patent holder. This approach would greatly increase the incentive to make genetic association discoveries, because genetic association patent holders would share in the profits from follow-on treatments. This raises the specter of impeding downstream innovation because of

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261. *See In re* Hafner, 410 F.2d 1403, 1405 (C.C.P.A. 1969) (holding that the utility of a product need not be known by an earlier inventor to invalidate for lack of novelty a later invention by one who discovers utility).

262. *See, e.g.*, S. 4734, 117th Cong. (2021); S. 4734, 117th Cong. (2022); H.R. 5874, 117th Cong. (2021); *see also* AM. INTELL. PROP. L. ASS'N, AIPLA LEGISLATIVE PROPOSAL AND REPORT ON PATENT ELIGIBLE SUBJECT MATTER (2017); Letter from Donna P. Suchy, Section Chair, Am. Bar Ass'n, Section of Intell. Prop. L., to the Honorable Michelle K. Lee, Under Sec'y of Com. for Intell. Prop. & Dir. of the U.S. Pat. & Trademark Off. (Mar. 28, 2017); INTELL. PROP. OWNERS ASS'N, PROPOSED AMENDMENTS TO PATENT ELIGIBLE SUBJECT MATTER UNDER 35 U.S.C. § 101 (2017).

263. *See supra* Section II.B.

the need to obtain a license from the genetic association patent holder, potentially causing patent thickets. But there is reason to think that impairment of downstream research would be rare since only a single gene association patent would have to be licensed, rather than hundreds or thousands of upstream patents that must be licensed in some high-tech products like smart phones. In addition, not only would genetic association patent holders be incentivized to license so as to share in the profits from downstream treatments, but the availability of downstream treatments would also encourage more people to get tested for genetic associations, further increasing profits. This is because before a treatment is available, some people would prefer not to know if they are more likely to suffer from a disease such as Alzheimer's. But after a treatment is available, people would have incentives to get genetic testing so that they could treat the condition if they find out they are susceptible to it because of their genes. On the other hand, if Congress is concerned about patent thickets, it could amend the patent statute in various ways to restrict the assertion of genetic association patents only to the use of those genetic associations for diagnostic testing. For example, Congress could do this by creating a statutory patentability exception for genetic association patents while leaving unaltered the current statutory language for "new" and "utility."

A final potential issue with judicially allowing gene patents is that the enablement standard for patentability of biotechnology inventions is particularly stringent and could make it difficult for researchers to patent as yet unknown mutations of a gene.[264] Congress can address concerns that Section 112 enablement could be interpreted to prevent patenting of genetic associations. Congress would have to decide how broadly the patent right should be for early-stage biotechnology inventions. It could choose to allow broad patents on a discovered association of a gene and all variants,[265] or it could choose to allow narrow coverage of only those genes and variants for which the researcher has discovered their effect, leaving open to other researchers who discover the effects of other variants to pursue patents on those variants.[266] There are trade-offs to both approaches, but either would provide significant additional incentive to make and share discoveries of genetic associations. By amending the statute, Congress could draft the language carefully to allow patenting of genetic associations with known function, but not of other

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264. Current Supreme Court and Federal Circuit jurisprudence on enablement considers a chemical compound or artificial DNA sequence patentable if the exact structure is described but is very strict on patent claims covering ranges of chemical structures not specifically described. *See, e.g.*, Vanda Pharms. Inc. v. West-Ward Pharms. Int'l, 887 F.3d 1117 (Fed. Cir. 2018). Thus, even if the Court were to allow gene patents as patentable subject matter, some gene family applications might be held unpatentable under 35 U.S.C. § 112.

265. This would be in keeping with Edmund Kitch's "prospect theory" of patents. Kitch argued that such an approach gives the patent owner incentive to continue researching in the space of the broad claim or to license others better suited to the research to do so. *See* Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

266. *See supra* notes 164–168 and accompanying text. Allowance of many, narrow patents would require mechanisms for licensing all of the relevant patents so that test companies and researchers could work with entire gene families. But as described above, the phenomenon of needing to license many patents to make a commercial device is not new, and market participates have devised several solutions to this problem, such as patent pooling. *See id.*

research intermediaries.[267] Alternatively, Congress could amend the statute to allow patenting of both genetic associations and useful research intermediaries.[268]

B. Increase Federal Funding of Research into Genetic Associations

A second congressional option would be to increase the amount of research into genetic associations to a socially optimal level by increasing government funding for such research.[269] Research into genetic associations is the sort of research in which universities participate. If university researchers could patent the genetic associations they discover, it would both bring in revenue to the university, and would free them from the restrictions that come with sponsored research. It would also allow them to have something of value to attract investors if they wish to start a company. A further benefit of increasing funding is that discoveries of genetic associations can be shared with the world immediately. This is because the method of creating a diagnostic test for any desired gene is simple using standard laboratory practices.[270] There is no need for the expensive processes of FDA trials or approvals, nor is there the time lag between discovery/invention and commercialization that the Bayh-Dole Act was passed to address.[271] In many ways, this may be the best approach for increasing research into genetic associations. Such research would be free of patents and exclusive rights, so the resulting correlations could be used by testing companies and doctors alike to detect and determine plans for those with the correlated conditions. Moreover, the academic practices of publication and transparency encourage the sharing of genetic associations with the world.

The major concern with this solution, however, is the uncertainty of sustained funding into such research, given political conditions and changes in the control of government. While federal funding for both R&D and basic research has been increasing in recent years,[272] the bulk of U.S. R&D spending now comes from industry.[273] Such spending is, of course, subject to incentives. This uncertainty as to

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267. Arguably, genetic associations are not in the same category as research intermediaries to begin with, because genetic associations, unlike research intermediaries, are of direct use to real world patients. As discussed in Part II, knowledge of the correlation between a specific gene or mutation and a condition can be lifesaving in that it can enable a patient to take steps to mediate or at least monitor known risks. *See supra* Part II.

268. There is a strong argument for patenting research intermediaries, but discussion of this issue is beyond the scope of this Article.

269. *See generally* Rantanen, *supra* note 14.

270. *See supra* note 130 and accompanying text.

271. Note, however, that there is less incentive for laboratory test companies to devise diagnostic tests for gene mutations if they do not have the exclusive right to test. Given that the method of analyzing gene sequences is well known, however, we can expect consumer demand to provide adequate incentive for testing for most conditions other than those affecting very small populations (so-called "orphan diseases"). *See supra* note 130 and accompanying text.

272. MATT HOURIHAN, AM. ASS'N FOR THE ADVANCEMENT OF SCI., A PRIMER ON FEDERAL R&D BUDGET TRENDS (Feb. 2021).

273. Mark Boroush, *U.S. R&D Increased by $51 Billion, to $606 Billion, in 2018*; *Estimate for 2019 Indicates a Further Rise to $656 Billion*, NAT'L SCI. FOUND. (Apr. 13, 2021), https://ncses.nsf.gov/pubs/nsf21324 [https://perma.cc/RQG8-9FKD].

sustained funding may limit the investment universities and companies are willing to make in researching genetic associations.

C. Sui Generis *Protection of Genetic Discoveries*

A final alternative to increase incentives for research into genetic associations is to provide specific, *sui generis* protection for discoveries of genetic associations. There is precedent for this approach in how Congress chose to protect silicon chip designs.[274] There is an uncertain fit between silicon chip designs and patent law or copyright law. Once a company has spent a large amount of money designing a chip, it designs a series of "masks" used to lay down successive layers of the chip on the substrate. Because competitors can copy such masks at a fraction of the cost of designing the silicon chip structure and layout, Congress was concerned that research and development of improved chips could be retarded by an inadequate incentive due to reasonable fears of copying by competitors.[275] Moreover, Congress was concerned that silicon chips might not be protectable subject matter under patent and copyright laws. But instead of amending existing IP protections, in 1984, Congress chose to pass *sui generis* protection for silicon chips in the form of "mask works" protection.[276] Under this statute, a chip designer may register its design within two years of commercial use and receive ten years of protection against copying.[277] In 1998, Congress did the same thing for vessel hull protection. It passed a law that allowed designers of new ship and boat hulls to register their designs and receive protection against copying for ten years from registration.[278]

Congress could pass a similar law that gives researchers exclusive rights to their genetic discoveries for a set period. Presumably, this would encourage research and discovery of genetic associations. As has been discussed above in this Article,[279] the concern is that there is a significant gap in time between the discovery of a genetic association and the invention of medical treatment for the condition. Moreover, the researcher best suited to discover genetic associations is likely not the inventor best suited to invent a treatment for the correlated condition, since these are often very different areas of research and development.[280] Thus, giving incentives for discovery of genetic associations can encourage such discoveries and sharing of such discoveries, because the researcher will have the right to license others and share in the rewards of any subsequent testing and treatment.[281]

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274. 17 U.S.C. § 902.

275. *See* John G. Rauch, *The Realities of Our Times: The Semiconductor Chip Protection Act of 1984 and the Evolution of the Semiconductor Industry*, 3 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 403, 420–25 (1993).

276. 17 U.S.C. §§ 901–14.

277. *Id.* §§ 904, 908.

278. 17 U.S.C. §§ 1301–32.

279. *See supra* Section II.C.

280. *See id.*

281. Note that when genes were patentable, it was common practice for gene patent owners to allow researchers to work with the genes in search of new variants and treatments. This was in the patent owner's best interest, as well as the interest of the public, because such follow-on research made the patent more valuable.

Given that the concern raised in this Article is with the gap between discovery of a genetic association and the ability to earn a financial return on such a discovery, it makes sense for any planned solution to this issue to be sensitive to changes that reduce this gap. If, for instance, some future tool like an advanced CRISPR[282] makes it easy to alter mutations in genes, then the gap will disappear, and the discovery of a genetic mutation can be made almost simultaneously with a solution. Researchers could file patents on the process of altering the mutated gene to a new and healthy configuration. Accordingly, it may make sense for Congress to sunset any *sui generis* protection so that it does not outlive its usefulness and become a drag on innovation, rather than a boost. Congress should make the sunset provision sufficiently long that research and development decisions can be made with some certainty (perhaps ten, fifteen, or twenty years), but such a sunset would force Congress to reexamine the need for the protection from time to time.

Congress could further encourage the sharing of genetic associations by requiring a researcher to register the association on a national genetic database. This would ensure that the association is shared before any protection is granted. It would eliminate the current problem of incentives to keep discoveries of genetic associations as trade secrets.

CONCLUSION

This Article has shown the likely need for additional incentive for research into genetic associations. Since the Supreme Court's *Myriad* decision in 2013, incentives have been reduced for conducting such research. At the same time, incentives to keep discoveries of such associations secret have increased. Genetic discoveries are a *sui generis* problem in patent law. While they provide no treatment to patients on their own, they also differ from research intermediaries in that knowledge of genetic associations is of immediate, real-world use to patients and their doctors. This Article has shown that the standard methods of appropriating returns from discoveries of nature are not currently present for genetic discoveries. Due to the standardized methods of testing for gene sequences, a researcher may not patent a method of detecting a particular genetic association. And due to the large time lag between discovery of a genetic association and a therapeutic treatment, as well as the fact that the same person or firm is often poorly suited to discover both the genetic association and invent the treatment, inadequate incentive exists to discover genetic associations. This Article notes that other countries with successful biotechnology industries allow more protection for genetic discoveries than does the United States and that the U.S. biotech industry grew to become the leading biotech industry in the world during a period when genetic associations were patentable through gene patents. Given the importance of making discoveries about genetic associations, this Article explored three methods for providing greater incentivization of these discoveries. The Article discussed whether genes should be made patentable again, recognizing that the additional incentive for research would come with considerable social cost and potential disharmony with patent law doctrines. The Article next examined whether

282. For a description of CRISPR, see Mazhar Adli, *The CRISPR Tool Kit for Genome Editing and Beyond*, 9 NATURE COMMC'NS 1 (2018).

increasing federal funding for genetic research could provide sufficient incentive for socially optimal research but found it unlikely that substantial enough funding is likely to occur. Finally, the Article argued that *sui generis* protection for discovery of associations between genes and specific diseases is likely the best way to provide additional incentive for such research, with least harm to society, especially if the protection is for a short duration and a sunset provision.

Levels of Free Speech Scrutiny

ALEXANDER TSESIS *

Inconsistencies abound throughout current exacting, strict, and most exacting scrutiny doctrines. Formalism also runs throughout recent cases that have opportunistically relied on the First Amendment in matters peripherally concerned with core principles of free speech. Jurisprudence that relies on the exacting scrutiny standard remains significantly under-theorized. The uncertainty creates doctrinal flux that shifts from case-to-case. The same unexplained malleability appears in the most exacting scrutiny jurisprudence. The Court, moreover, sometimes refers to these two standards as equivalent to strict scrutiny. On the other hand, during the last decade, and most recently in 2021, various opinions have also used exacting scrutiny as a poorly defined hybrid form of intermediate scrutiny.

This Article proposes to cure the existing inconsistencies through a tripartite model for noneconomic speech. Exacting scrutiny should apply to cases reviewing disclosure requirements on charities or political contributions. That standard should function as proportional scrutiny that treats secondary effects on speech differently than censorship of ideas and perspectives. As to strict scrutiny, its narrow tailoring requirement should apply in cases of content discrimination. Most exacting scrutiny is best fit for review of viewpoint discrimination that targets ideas, conjectures, and discourses.

Levels of scrutiny should not be formulaic but reflective of the fundamental principles of free speech protection: self-expression, self-governance, and the search for truth. Clear distinctions between various levels of heightened scrutiny would provide a functional means for checking government censorship while retaining traditional authority to detect and punish fraud.

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INTRODUCTION

The Supreme Court has with increasing frequency found regulations on expressive content to be suspect. In various opinions, it has deployed three types of stringent scrutiny tests to strike policies that are ordinarily administered by states, including healthcare,[1] consumer protection,[2] and collective bargaining.[3] In addition to strict scrutiny review, the exacting and most exacting scrutiny standards have become almost conclusive tools of deregulation. The Court relies on various heightened scrutiny tests that, in their current forms, provide insufficient guidance to lower courts for reviewing laws that affect personal disclosures, expressive contents, and individual viewpoints.

Even anti-fraud legislation is not immune from narrow tailoring requirements. In 2021, *Americans for Prosperity Foundation v. Bonta* (*AFP*) found facially unconstitutional a California statute that required tax-exempt charities to report the identities and addresses of their major donors.[4] The exertion of First Amendment muscular review is consistent with a deregulatory pattern throughout the free speech field. *AFP* adopted a narrow tailoring test that prevented the State of California from investigating fraudulent charitable contributions. The opinion is predicated on a

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1. Nat'l Inst. Fam. Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).
2. Expressions Hair Design v. Schneiderman, 581 U.S. 37 (2017).
3. Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).
4. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385 (2021). It may be helpful up-front to set out a series of cases that relied on exacting scrutiny when reviewing cases that challenged disclosure requirements. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) ("Since *NAACP v. Alabama* we have required that the subordinating interests of the State [offered to justify compelled disclosure] must survive exacting scrutiny."); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010) ("The Court has subjected [disclosure] requirements to 'exacting scrutiny'"); Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008) (governmental interest in disclosure "must survive exacting scrutiny") (quoting *Buckley*, 424 U.S. at 64); Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 204 (1998) (finding that disclosure rules "fail[ed] exacting scrutiny"); *see also* John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010).

homogenous understanding of free speech.[5] Such an approach to exacting scrutiny review welcomes judges to second-guess policies that only have a secondary effect on expressions. That opinion makes the current, poorly defined method of review increasingly unpredictable and prone to judicial formalism.[6] Never before had the Court found that anti-fraud regulation to be reviewable through a heightened level of scrutiny.[7] The majority categorized the effort to prevent fraud as a matter involving social and political concerns about contributing to charities.

Where statements concern social, economic, or political opinions, narrow tailoring protects speakers against government intrusions.[8] Not so, however, where government is acting consistently with its function to secure nonprofit integrity.

The exacting scrutiny standard remains an under-theorized and inconsistent body of law, affecting a range of opinions. These decisions tend to use exacting scrutiny as a rhetorical tool that is malleable and without uniform meaning. The ad hoc nature of the Court's exacting scrutiny jurisprudence has gone almost unaddressed in academic writing despite its increased centrality in seminal First Amendment decisions that held unconstitutional laws on aggregate campaign contributions,[9] false noncommercial speech,[10] and charitable disclosures.[11]

Elaboration of the exacting scrutiny standard is necessary for interpretive predictability. A coherent doctrine should protect speech-as-speech from the encroachment of state power. Yet, the test should not be so narrowly construed as to render suspect virtually all disclosure laws with incidental effects on core speech. Laws that deter and punish intentional or negligent deception deserve no heightened level of judicial concern because they do not censor, obstruct, nor compel

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5. Treating all laws that adversely impact speech as being suspect under the First Amendment is an approach that lacks the nuance necessary for advancing public policies designed to facilitate commercial transparency, public health, and secure banking. A variety of regulations require merchants to provide consumers with specific information about products, including "Rx only" labels on prescription drugs, 21 U.S.C. § 353(b)(4)(A); notices on alcoholic beverage containers disclosing that birth defects can result from pregnant women's alcohol consumption, 27 U.S.C. § 215(a); 15 U.S.C. § 1261(p)(1)(J)(I); warnings indicating that hazardous substances must be kept out of children's reach, 15 U.S.C. § 1261(p)(1)(J)(I); tobacco warnings detailing some of the ill effects of cigarettes and similar carcinogenic products, 15 U.S.C. 1333; bank titles, 18 U.S.C § 709; and mandatory signs indicating "that insured deposits are backed by the full faith and credit of the United States Government." 12 U.S.C. § 1828(a)(1)(B).

6. Ams. for Prosperity Found., 141 S. Ct. at 2396 (Sotomayor, J., dissenting) (asserting that in the field of disclosure law, the majority abandoned the previous exacting scrutiny evaluation of "means-end tailoring commensurate to the actual burden imposed" and "[i]nstead, it adopt[ed] a new rule that every reporting or disclosure requirement be narrowly tailored").

7. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 611–12 (2003) ("The First Amendment protects the right to engage in charitable solicitation . . . [b]ut the First Amendment does not shield fraud.").

8. *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

9. *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 196–97 (2014).

10. *See* United States v. Alvarez, 567 U.S. 709, 715 (2012).

11. *See* Ams. for Prosperity Found., 141 S. Ct. at 2383.

communications.[12] Existing exacting scrutiny doctrine is more turbid than the majority in *AFP* acknowledges. Its interpretation relies on a body of case law that lacks cohesion. Over the years, the Justices have invoked exacting scrutiny to balance different interests, while other opinions have evoked the same standard for categorical analyses that mimic strict scrutiny. This Article develops a more stable definition that would require greater judicial transparency. It further articulates a separate exacting scrutiny standard that would fit somewhere between the current intermediate scrutiny and strict scrutiny standards of review. This clarification of doctrine would allow for greater rigor of judicial reasoning.[13]

The exacting scrutiny standard is in much need of clarification, refinement, and classification. The Court's lack of analytical precision, Professor George Wright points out, "invites . . . judicial biases of various sorts" because the standard "lacks internal structure, internal differentiation, mediating elements, internal cues as to its proper application, and meaningful substantive guiding and directive principles."[14] This opacity is part of a broader judicial pattern of inconsistent judicial references to levels of scrutiny that vary from case to case and Justice to Justice.[15] Coherence is critical to adjudication that relies on a stable body of law that is nevertheless synthetic enough for flexible application to various subjects of free speech adjudication. A clarification to this form of heightened judicial review would help better articulate scrutiny standards for a variety of current issues in areas involving false digital statements, campaign disclosure requirements, and public incitement to insurrection.

Part II of this Article critiques the strengths, weaknesses, and gnarly ambiguities of the exacting scrutiny standard and begins to chart a more clearly delimited methodology. An elaboration on the current tangle of precedents demonstrates the need for consistent interpretive parameters for deploying a First Amendment standard that has increasingly become a litigation tool raised in challenges to a variety of regulations with an incidental effect on communications. Since the mid-1970s, the Court's exacting scrutiny jurisprudence has shifted its meaning from an intermediate standard to one significantly more stringent, requiring the least

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12. Until recently trademark protections were regarded as economic burdens that might have disincentivized speech but did not directly suppress expression. *See* Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927); Rebecca Tushnet, *The First Amendment Walks into A Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 406 n.98 (2016). More recently, though, Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) and Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) treated even Lanham Law provisions through the lenses of the highest level of scrutiny ordinarily reserved for viewpoint discrimination.

13. *See* ALEXANDER TSESIS, FREE SPEECH IN THE BALANCE (2020) [hereinafter FREE SPEECH IN THE BALANCE] (articulating a proportional theory of free speech).

14. R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 208–09 (2016).

15. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326–27 (2016) (Thomas, J., dissenting) ("And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it 'rational basis,' intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.").

restrictive regulations,[16] and, most recently, relying on narrow tailoring review.[17] These assertions of judicial interpretive prerogatives departed from earlier decisions that had left greater room for legislative experimentation.[18]

The exacting judicial scrutiny standard requires clarification. I have argued elsewhere in favor of a more proportional assessment of free speech that closely weighs speech and countervailing government concerns.[19] The Court's affinity to categorical reasoning is, nevertheless, undeniable.[20] Hence clear definitions are required for the various forms of free speech review rather than shifting labels stitched into rather libertarian judgments. In a Court that proclaims a commitment to categorical reasoning consistency is a must to avoid arbitrary abuse of discretion under the guise of judicially created labels.

This Article's principal contribution is to disambiguate these messy approaches of First Amendment jurisprudence and to propose more consistent standards for courts to rely on exacting, strict, or most exacting scrutiny. As Professor Rodney Smolla rightly cautions, "[v]iewpoint discrimination and content discrimination ought not to be confused."[21] The Article endeavors to articulate a straightforward approach to review noncommercial donor disclosure laws, content-based restrictions, and viewpoint discriminations.

First, exacting scrutiny should weigh speech and public interests to review antifraud laws that require contributors to political campaigns and to charitable causes to reveal their identities.[22] Second, restrictions on core free speech topics—such as philosophy, sociology, politics, and aesthetics—cannot survive unless they are narrowly tailored and address compelling government interest. Third, laws that impinge on individual viewpoints on those subjects should be analyzed by a most

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16. *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 197 (2014) (judgment of the Court).

17. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021).

18. *See* John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010).

19. *See* Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 20–21 (2016).

20. *See*, *e.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2364 (2020) (finding that "[w]hen the government seeks to censor speech based on its content, favoring certain voices and punishing others, its restrictions must satisfy 'strict scrutiny'—meaning they must be justified by interests that are 'compelling,' not just significant"); Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 171 (2015) (relying on strict scrutiny to review content based restrictions on speech).

21. Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1121 (2002); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1751 n.155 (1987) (questioning the cogency of the viewpoint and content dichotomy).

22. Exacting scrutiny should be understood to be a level of review more stringent than intermediate scrutiny used for commercial speech but, contrary to the Court's pronouncement, not as demanding as the strict scrutiny standard. The Court has on occasion mixed up "exacting scrutiny" and "strict scrutiny" analysis of whether a speech limitation is narrowly tailored for a compelling state interest. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 442 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest.").

exacting scrutiny standard that would demand government to prove that its policy is the least restrictive alternative for achieving the most pressing government imperatives, such as national security interests.[23] Without greater precision, the exacting scrutiny and most exacting scrutiny standards resemble listless ships that fluctuate at the will of Justices rather than functioning as predictable rules of decision-making.

Part II further explains the significance of distinguishing these constitutional frameworks. Exacting review should be a separate test for matters that require speakers to disclose information necessary for the enforcement of criminal policies against fraud and bribery. Such laws should apply to important government actions with an indirect effect on speech. As things currently stand, merging the two methods of review creates a confusion that renders the exacting scrutiny test manipulable and susceptible to outcome-determinative decisions. The most exacting scrutiny standard should be reserved for viewpoint discrimination, such as review of anti-flag burning statutes,[24] rather than remaining an open-ended test with shifting meanings.

Part III places exacting scrutiny review within a larger Roberts Court jurisprudential First Amendment trend, which some authors have compared with the *Lochner*ian era tendency to strike statutes on formalistic grounds.[25] This Part argues that exacting scrutiny review as it stands after *AFP* has fatal results for a variety of regulations with an incidental effect on speech. Rigidity in tests has recently cropped up in several free speech decisions. How the exacting scrutiny standard is understood is consequential for a variety of collateral issues from associational rights,[26] labor disputes,[27] campaign contributions,[28] and false statements.[29]

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23. The government is subject to a strict scrutiny burden of proof where a material-support or true-threats statute advanced national security interests. *Williams-Yulee*, 575 U.S. at 444–45 (2015) (indicating that *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) upheld the federal material support for terror statute on the basis of strict scrutiny). So too government can demonstrate a compelling interest in fair elections. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion upholding a distance restriction for campaigning near a campaign booth on the date of election).

24. *See* Texas v. Johnson, 491 U.S. 397 (1989).

25. *See* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1397–98 (2017). Such analogy itself needs further distinguishment between the specifically health measure found unconstitutional in *Lochner v. New York*, 198 U.S. 45 (1905), and those statutes that have a specific health aim but also impose to some secondary degree to the speech rights, such as public health announcements about state abortion services. Nat'l Inst. Fam. Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (striking a California requirement that ideologically driven pregnancy crisis centers post notices of public health services, one of which was abortion); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 65 (2019) (discussing pregnancy centers effort to obfuscate their ideologically driven motives).

26. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2380 (2021).

27. *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464–65 (2018).

28. *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 197 (2014).

29. *See* United States v. Alvarez, 567 U.S. 709, 724 (2012).

I. APPROACHES TO EXACTING SCRUTINY

The Supreme Court has inconsistently interpreted the exacting scrutiny standard since its first appearance in the mid-twentieth century. During that period, the Court gyrated from an intermediate balancing to strict scrutiny review. In the 2021 version, articulated in Chief Justice Roberts's *AFP* judgment, exacting scrutiny has morphed into a muscular hybrid. The tortuous progression of exacting scrutiny precedents is the topic of this Part of the Article; incoherence plagues decisions that adopt the standard's nomenclature only to deviate from past precedents and then to strike an increasing number of ordinary laws with no more than an indirect effect on speech. Cases typically shift among meanings of the term "exacting scrutiny" without explaining the changed referents of adjudication or with only fleeting and ambiguous explanations that appear results oriented.[30]

Several Supreme Court decisions purport to adhere to exacting scrutiny precedents, all the while regularly altering that standard's mode of analysis. This is most recently demonstrated by the Chief's effort to reconcile discrepancies with a test that nevertheless imposes judicial decision-making in a matter better left to the discretion of federal and state regulations of charitable contributions.

The exacting scrutiny standard currently lacks the precision critical to the rule of law.[31] The Court often invokes that standard while inexplicably merging it with language from different tests, resulting in inconsistent reasoning prone to judicial

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30. Justice O'Connor's factors to determine whether to overturn precedent are widely recognized but not always followed:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability . . . ; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . .; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . .; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . .

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (internal citations omitted), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). For additional Court discussion of the value of precedents see Montejo v. Louisiana, 556 U.S. 778, 793 (2009) (discussing precedent's antiquity); *see also* Payne v. Tennessee, 501 U.S. 808, 828–29 (1991) (discussing "spirited dissents" and voting margins).

31. Professor David Han in passing has similarly pointed out that, "At times, the Court seems to use this phrase as merely a synonym for strict scrutiny. At other times, however, the term seems to denote a standard of review more stringent than intermediate scrutiny but less stringent than strict scrutiny." David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. 613, 635 n.102 (2018) (internal citations omitted). To his insight should be added that not only exacting and strict scrutiny standards are confused in holdings but so are they sometimes used almost interchangeably with most exacting scrutiny.

overreaching. The test for exacting scrutiny should be differentiated from strict scrutiny and commercial intermediate scrutiny review. A systematically articulated exacting scrutiny standard would allow for more rigorous and contextual reasoning that is missing from current precedents.

This Part investigates the evolution of the exacting scrutiny standard. The often-unwieldy body of First Amendment law is viewed through the lens of a categorical method with its dichotomy between "most exacting scrutiny" and "exacting scrutiny," two different referents that the Court and scholars have often convoluted and treated as if they were interchangeable. The Article critiques the muddled interpretations of exacting scrutiny, culminating in the formalistic plurality in *AFP*.[32] Justice Alito, Gorsuch, and Thomas, in two separate concurrences, regarded the regulation to be subject to strict scrutiny review.

The Court relies on bright-line-sounding tests that often result in the squelching of legislative initiatives without consistently separating out workaday regulations from the suppression of topical and perspectival assertions. Much of this must be attributed to the Court's purported formalism, which masks manipulable tiers of scrutiny. When closely investigated, supposedly bright-line rules turn out to be moving targets. The exacting scrutiny standard is an example of just that sort of categorical analysis: pithy but inconsistent. It shifts while claiming for itself precedential pedigree.

The way out of the current conundrum is to regard the current flux in exacting scrutiny doctrine as an opportunity for greater sophistication in free speech adjudication. A more balanced approach would help chart a course that could curb the current trend of Court issued categorical, deregulatory decisions by justices ready to turn back economic and campaign legislation. Justice Kagan characterized this tendence as "black-robed rulers overriding citizens' choices."[33]

After surveying the current state of the law, this Article recommends a proportional method of exacting scrutiny that can refine and augment the current standards of review for free speech cases. Exacting scrutiny requires thorough weighing of private and public interests significant to cases and controversies, with relevant correlation between the policy and the stated aim. The standard should apply where disclosures are mandated for noneconomic conduct with secondary effects on speech and require courts to determine whether a policy is substantially related and relevantly correlated with ordinary and traditional regulatory functions.[34] These are not matters that involve prohibitions on pure speech. Most critical to safeguarding First Amendment principles is judicial determination that neutral bases exist, even where there are some content restrictions, that bear "no realistic possibility that official suppression of ideas is afoot."[35] A variety of laws, which Justice Kagan

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32. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2378 (2021).

33. *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

34. Secondary effects of speech have been recognized in some areas as reason why regulation is "justified without reference to the content of the . . . speech." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (emphasis omitted) (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976).

35. R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992).

called "workaday economic and regulatory policy,"[36] have speech components, but their aim is to regulate conduct rather than some constitutionally protected expression. This Part additionally argues that the most exacting scrutiny should be limited to regulations that discriminate against a speaker's viewpoint.

A. Exacting Scrutiny

The term "exacting scrutiny" first appeared in legal discourse in the late-nineteenth and early-twentieth centuries. Prior to its appearance in case law, the term was used in political advocacy. The common strand of advocacy called for close review of governmental policies, state actors, and professional conduct.[37]

The concept of heightened judicial scrutiny entered Supreme Court jurisprudence through Justice Stone's seminal framework in footnote four of *United States v. Carolene Products Co.*, which announced that the Court's interpretive authority extends to "more exacting judicial scrutiny," when law burdens civic liberties, fundamental rights, and equal protections.[38] Until the late twentieth century, when courts began to elaborate on it for substantive purposes, the phrase remained within the orbit of academic speculation. From Stone's landmark formulation emerged two analytical approaches: "most exacting scrutiny" and "exacting scrutiny." Shortly after its appearance, Professors Walton Hamilton and George Braden expected "most exacting scrutiny" to be further fleshed out but declared it to at least safeguard "procedural freedoms."[39]

Ordinary laws, however, fall outside the scope of *Carolene Products*, which only pertains to constitutional guarantees of core freedoms, equality, and democratic

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36. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting). Her use of workaday differs somewhat from the use in this article. Many regulations on speech do not even receive heightened scrutiny. They include street signs, pharmacological information containing Rx labels, tobacco warnings, antitrust laws, securities regulations, and so forth.

37. *See, e.g.*, *Foreign Miscellany*, 3 AM. REV. 447 (Apr. 1846) (referring to a twelve-day Parliamentary debate as being "subjected to the most rigid and exacting scrutiny"); *Presidential Aspirants: The Names that Indiana Offers*, N.Y. TIMES, July 10, 1875, at 1 (calling for "exacting scrutiny" of political actions); *The Convention Completes the Ticket and Adopts a Platform*, EVENING STAR, June 7, 1888, at 1 (calling for "exacting scrutiny" of the Grover Cleveland Presidential administration by means of "the most searching inquiry"); The Letter of Notification, *Mr. Cleveland Notification*, EVENING STAR, June 26, 1888, at 3 (same); *State Apportionment*, MILWAUKEE DAILY SENTINEL, Nov. 21, 1895, at 5; FRANCIS W. MARSHALL, COMMON LEGAL PRINCIPLES THAT EVERY ONE SHOULD KNOW 585 (1929). In legal academic journals, the term appeared in passing to stress the need to closely consider a matter like corporate taxes and attorney disciplinary review. *See* Francis X. Mannix, *Corporation Taxes Under the Revenue Act of 1936*, 14 TAX MAG. 640, 641 (1936); Newman F. Baker, *Prosecuting Attorney: Legal Aspects of the Office*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 647, 678 (1936).

38. 304 U.S. 144, 152 n.4 (1938). For an early academic thought on Justice Stone's method, see Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 691 (1957).

39. Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1356 (1941).

institutions.[40] When judicial review becomes formalistic, as it is in the free speech area, the power to heightened review morphs into a political weapon of judicial activism.[41] Hamilton and Branden too warned against the potential for judicial manipulation of a heightened standard of scrutiny to engage in politics from the bench.[42]

"[E]xacting scrutiny" first appeared very differently than in *AFP* in an Equal Protection Clause case, *Kramer v. Union Free School District No. 15*.[43] The petitioner challenged a state law that limited voter eligibility.[44] The majority held that the government failed to meet "the exacting standard of precision," and the laws at issue "selectively distribute[d] the franchise."[45] The Court's power to review voting disputes derived from the *Carolene Products Co*. dictum. Chief Justice Warren, writing for the *Kramer* majority, found the State failed to demonstrate that its differing classification of voters was "necessary to achieve the articulated state goal."[46] The formula invoked mixed strict scrutiny and intermediate scrutiny language. The Court had then only begun to develop a tiered scrutiny method. Denial of franchise was "not sufficiently tailored" to "further a compelling state interest."[47]

The test articulated in *Kramer*, as Professor Richard Fallon has pointed out, developed strict scrutiny into a formula resembling its current form, requiring "that a challenged statute or regulation is either necessary, narrowly drawn, or narrowly tailored to protect that interest."[48] Strict scrutiny raises a legal presumption against the necessity of the state action rather than weighing policies' substantiality, importance, or legitimacy. Yet Warren's use of "sufficiently tailored"[49] showed some play at the joints during the early stages of the doctrine. At the end of the 1960s and early 1970s, the Court had only begun to define the strict scrutiny standard.[50]

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40. *Id.* at 1355–56.

41. There are many cases where the Court undermined congressional civil rights initiatives: Civil Rights Cases, 109 U.S. 3 (1883) (holding unconstitutional the Civil Rights Act of 1875); United States v. Morrison, 529 U.S. 598 (2000) (finding the civil remedy of the Violence Against Women Act (VAWA) unconstitutional); Univ. of Ala. v. Garrett, 531 U.S. 356, 374–76 (2001) (holding state employers immune from private monetary damages claims under the Americans with Disabilities Act (ADA)). *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1833–37 (2006).

42. Hamilton & Braden, *supra* note 39, at 1356.

43. 395 U.S. 621 (1969).

44. *Id.* at 622.

45. *Id.* at 632; *see also id.* at 628 n.9 ("[W]e have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny . . . .").

46. *Id.* at 632.

47. *Id.* at 633.

48. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007).

49. *Kramer*, 395 U.S. at 621.

50. The earliest formulation of the strict scrutiny standard in *Skinner v. Oklahoma* had reviewed a state burden on the fundamental right of procreation, "one of the basic civil rights of man." 316 U.S. 535, 541 (1942). With time, and certainly by the time of *Shapiro v. Thompson*, a right to travel case, the Court also relied on the compelling government interest rubric. 394 U.S. 618, 627 (1969), *overruled in part on other grounds by* Edelman v. Jordan,

1. Exacting Balance in First Amendment Jurisprudence

Exacting scrutiny made its appearance in First Amendment jurisprudence seven years after *Kramer*. The occasion was a landmark opinion on campaign financing expenditures and disclosures, *Buckley v. Valeo*, with far-reaching and long-lasting consequences to doctrine.[51] It is in that area where the various morphisms of the standard have most often appeared.

The broad-ranging holding in *Buckley* found, in contrast to contribution regulation, that restraints on independent expenditures directly limit political candidates' and their supporters' expressions of core political speech. Candidates and their supporters used money to articulate and amplify strongly held political viewpoints.

The Court found campaign disclosure laws to be less suspect in their purposes. Disclosure regulations were necessary to administer fair and honest elections, free from special favoritism to particularly affluent donors.[52] The statutory burden imposed "only a marginal restriction upon the contributor's ability to engage in [dialogue]" since disclosure of contributors' identities only indirectly restrains political messages.[53] The holding differentiated between discussions about ideas and contributions to another's campaign.

The challenged federal statute in *Buckley*, the Federal Election Campaign Act, mandated publicizing contributors' identities, which the majority found necessary for preventing a substantial threat of corruption or the appearance of corruption.[54] That early use of the term "exacting scrutiny," as the Court later explained, pertained to both expenditure and contribution limits and required proof of more than "legitimate government interest."[55] Each involved political speech that could not be

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415 U.S. 651 (1974). *See also* Roe v. Wade, 410 U.S. 113, 162–64 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

51. 424 U.S. 1 (1976). There is brief mention of the "exacting scrutiny" standard in Justice Frankfurter's concurrence to a sound amplification case, but he did sparingly little to put the term into substantive application. Kovacs v. Cooper, 336 U.S. 77, 91–92 (1949). For a critique of *Buckley*, see FREE SPEECH IN THE BALANCE, *supra* note 13, at 159–62.

52. *See Buckley*, 424 U.S. at 15. The need for transparency in contributions to political candidates dates back at least to the Roman center at the beginning of the Civil War in the first century B.C.E. *See* PLUTARCH, THE LIVES OF NOBLE GRECIANS AND ROMANS 943 (John Dryden trans., revised by Arthur H. Clough 1977) (1st century C.E.) ("Cato [the Younger] was eager utterly to root this corruption out of the commonwealth; he therefore persuaded the senate to make an order, that those who were chosen into any office, though nobody should accuse them, should be obliged to come into the court, and give account upon oath of their proceedings in their election.").

53. *Buckley*, 424 U.S. at 20–21.

54. *Id.* at 26–27; *id.* at 58 (stating that disclosure requirements, as well as limitations on contributions "constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions").

55. Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008).

encroached without significant justification with a "substantial relation" connecting the requirement for informational disclosure and the government interest.[56] That tested the government interest's actual burden on First Amendment rights.[57]

With time, Justices Thomas and Kennedy came to question whether the current state of laws on contributions were legitimate. To them the same "serious scrutiny" was the proper test for contributions and expenditures.[58] Their libertarian approaches would have required courts to examine with great skepticism efforts to end corruption and its appearance in modern-day politics. The method would no doubt become "fatal in fact" to virtually all campaign financing legislation.[59] Thomas's and Kennedy's minority positions demonstrated the powers of resorting to free speech opportunism to strike disfavored legislation.

For the time, at least, *Buckley*'s formula remains the law in contributions cases, requiring review of whether important governmental interests are substantially related to the need for limits on speech.[60] On the other hand, expenditure limits are now reviewed through content-based strict scrutiny level of review.[61] In reference to contribution limits, the *Buckley* majority interchangeably used the terms "substantial relation" with "relevant correlation."[62] It found that the value of federal disclosure requirements outweighed contributors' personal interests in anonymity.[63] The majority's test weighed the public need for transparent contributory disclosures with the competing weighty matters of privacy and speech.[64]

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56. *Id.*

57. *Id.*

58. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409–10 (2000) (Kennedy, J., dissenting) ("To this point my view may seem to be but a reflection of what Justice THOMAS has written, and to a large extent I agree with his insightful and careful discussion of our precedents."); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 635–40 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance.").

59. *Cf.* Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (asserting that strict scrutiny "was 'strict' in theory, fatal in fact").

60. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

61. *See, e.g.*, *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 631; Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 466 (2001). The distinction between the two was so clear that in a concurring opinion Justice Thomas made it a point to say, "I would overrule *Buckley* and subject both the contribution and expenditure restrictions . . . to strict scrutiny, which they would fail." Randall v. Sorrell, 548 U.S. 230, 267 (2006) (Thomas, J., concurring).

62. *Buckley*, 424 U.S. at 64.

63. *See* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 114–15 n.9 (1982) (explaining that in *Buckley* "disclosure of recipients of expenditures would increase any difficulty the party might have in obtaining office space would be tenuous and is plainly outweighed by the 'substantial public interest in disclosure'") (quoting *Buckley*, 424 U.S. at 72). Disclosure requirements were important to inform voters of "[t]he sources of the candidate's financial support" that might signal political partiality to large donors. *Buckley*, 424 U.S. at 67.

64. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000); Frisby v. Schultz, 487 U.S. 474, 485–88 (1988) (balancing residential privacy and free expression); Columbia

The case generated some ambiguity, though, by asserting that "exacting scrutiny" is a "strict test" that includes judicial assessment of whether disclosure requirements were the "least restrictive means."[65] The least restrictive language would later become a staple in strict scrutiny analysis.[66] It does not sit so well, however, with the more balanced exacting scrutiny test the majority had articulated elsewhere in *Buckley*. The poor fit of least restrictive scrutiny cannot be reconciled with the Court's balancing elsewhere.

Chief Justice Roberts did not follow this incongruity in *AFP*, where he rejected so restrictive a standard of review in exacting scrutiny cases.[67] Moreover, *Buckley*'s reference to least restrictive means was inconsistent with its functionalist assessment of whether "governmental interests [were] sufficiently important to outweigh the possibility of infringement."[68] The Court recognized that Congress must exercise some degree of discretion in framing disclosure regulations, albeit the possibility of speech suppression remains of central judicial concern. Hence, the majority drew attention to the "not insignificant burdens on individual rights . . . [that] must be weighed carefully against the interests which Congress has sought to promote."[69] The burden was to prove that a "'substantial relation' [exists] between the governmental interest and the information required to be disclosed."[70]

Disclosure requirements that are imposed on campaign donors are subject to heightened scrutiny because they might adversely affect persons who prefer that their associational choices remain private. Collaborative voices enhance "[e]ffective advocacy of both public and private points of view."[71] *Buckley* followed the reasoning of a previous decision that did not, however, arise from political or campaign expression but, nevertheless, dealt with forced disclosures. In *National Association for the Advancement of Colored People v. Alabama*, the Court recognized that a law requiring a civil rights organization to divulge its membership

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Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102–03 (1973) ("Balancing the various First Amendment interests involved in the broadcast media . . . is a task of a great delicacy and difficulty.").

65. *Buckley*, 424 U.S. at 66, 68.

66. *See, e.g.*, United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.") (internal citations omitted); Reno v. ACLU, 521 U.S. 844, 874 (1997) ("[The CDA's Internet indecency provisions] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."); Sable Commc'ns of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

67. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2372, 2384 (2021) ("Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.").

68. *Buckley*, 424 U.S. at 66.

69. *Id.* at 68.

70. *Id.* at 64.

71. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

rolls could adversely affect the marketplace of ideas.[72] Alabama officials openly calumniated against the NAACP, and its members sought anonymity to guard against threats, harassments, and reprisals.[73] The State pursued a policy to chill associational engagement by a disfavored group. The majority found that the danger to free, interpersonal engagement of members who feared state retaliation was insufficient to justify the State's invasiveness.[74]

The critical point made by the decision is consistent with the *Carolene Products*'s recognition of the appropriateness of exacting scrutiny when state action threatens to compromise political participation. The Court developed a critical approach to review whether disclosure requirements had been promulgated to "stifle, penalize, or curb the exercise of First Amendment rights."[75] Decisions from the early 1960s onward restrained government from flexing its authority to interfere with the First Amendment rights to associate, help, and advise others.[76] Exacting scrutiny protects against state infringements upon core associational interests, whether of an individual or an association. Even with associational freedoms, there are limits as is the case with criminal conspiracies.[77] Ordinary government function includes state criminal action against "misuse, misappropriation, and diversion of charitable assets," to "false and misleading charitable solicitations," or to other "improper activities by charities soliciting charitable donations."[78] Balance of concerns comes into play with disclosures.

Nixon v. Shrink Missouri Government PAC further elaborated the exacting scrutiny standard applicable to cases dealing with political campaign contributions.[79] In this area of the law, at least, a categorical "quantum of empirical evidence" would not suffice.[80] Rather than a bright-line test, the Court recognized the need for judicial contextualization of each controversy's "novelty and [the] plausibility of the justification raised."[81] The degree of deference, for example, differed between expenditures, campaign contributions, and campaign disclosures. Each type of regulation deals with greater or lesser threats to speech and association. In order to

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72. *Id.* at 462.

73. *Id.*

74. *Id.* at 463.

75. Louisiana *ex rel*. Gremillion v. NAACP, 366 U.S. 293, 297 (1961).

76. *See* Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 5–6 (1964) ("It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow.").

77. *See Gremillion*, 366 U.S. at 297.

78. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2386 (2021).

79. 528 U.S. 377, 391 (2000) (distinguishing symbolic speech cases from those that rely on "exacting scrutiny" to decide cases dealing with political campaigns).

80. *Id.*

81. *Id.* ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

pass constitutional muster a campaign disclosure statute must be "'closely drawn' to match a 'sufficiently important interest.'"[82]

Only Justice Thomas, who was joined by Justice Scalia, in the dissent to *Shrink* argued "narrow tailoring" was required for this level of review.[83] His minority position adopted a categorical approach that would come to dominate the Supreme Court's later free speech jurisprudence.[84] The majority in *Shrink*, to the contrary, deferred to Congress's assessment that the federal government's efforts to maintain fair elections included the power to prevent improper influence by large contributors through the corrupting power of money, even when there was no specific quid pro quo at play.[85]

The later shift of the Court in the direction of Justices Thomas's understanding of the exacting scrutiny standard evolved gradually, as the succeeding Section of this Article demonstrates, so much so that the early Roberts Court articulated a proportional version of the test in *Davis v. Federal Election Commission*.[86] The case successfully challenged a portion of the Bipartisan Campaign Reform Act that raised the contribution limits in favor of non-self-financed political candidates when their opponents exceeded a statutory threshold of expenditures.[87] The majority understood exacting scrutiny to require courts to evaluate whether "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights."[88] That standard required judges to review whether a regulation interfered with a litigant's effort to communicate ideas. The Court persisted in its evaluative reliance on the exacting scrutiny standard to review disclosure requirements, but it scarcely elaborated the meaning of its formula, stating that litigants who failed in a facial attack against the statute could follow up with an as-applied challenge to enforcement.[89]

Important for our purposes is that the exacting scrutiny doctrine to this point recognized the ability of courts to rely on an evaluative balancing of private and public interests without yet requiring narrow tailoring review. Moreover, as in *Buckley*, the scrutiny for disclosures in *Davis* differed from the rigor of review required in pure speech cases. Campaign disclosure laws were not thought to infringe core expressive or associative rights. As the Court later explained, the publication of contributors' identities "do not prevent anyone from speaking."[90]

Another campaign financing case, *Citizens United v. Federal Election Commission*, reiterated the distinction between campaign expenditures and disclosures. The exacting scrutiny standard as it was then used by the Court continued to require a balanced "'substantial relation' between the disclosure requirement [on expenditures] and a 'sufficiently important' governmental

82. *Id.* at 387–88.
83. *Id.* at 427–29 (Thomas, J., dissenting).
84. *See infra* text accompanying note 113.
85. *See Shrink*, 528 U.S. at 389.
86. 554 U.S. 724, 738 (2008).
87. *Id.*
88. *Id.* at 744.
89. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010).
90. *Id.* at 366 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003)).

interest."[91] As in previous cases, the majority upheld a disclosure requirement on independent expenditures, finding it to be a sufficiently tailored regulation on corporate contributions made during the final weeks of a political campaign.[92] On the other hand, the majority used strict scrutiny to strike a different provision, which had prohibited corporate expenditure from general treasury funds to support candidates in the waning days of a campaign.[93] The narrow tailoring test applied in the judicial review of expenditure limits, but not to review of expenditure disclosures.

To review the findings to this point, until just a decade ago the Court's exacting scrutiny standard relied on proportionality analysis of disclosure requirements, which incidentally burdened but did not prohibit speech.[94] These cases reviewed whether the government's interest was sufficiently important, and the regulation substantially related to it.[95] While the standard was more rigorous than the intermediate scrutiny test used in such matters as commercial speech,[96] it did not require narrow tailoring.

Exacting scrutiny analysis focuses on whether there is adequate justification and relevant correlation to prevent a person from remaining anonymous. A heightened

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91. *Id.* at 366–67 (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)). While these disclosures did not ban speech, they placed restrictions on it. In his opinion to *Citizens United*, the Chief Justice should have also recited *Buckley*'s "relevant correlation" factor of proportionality in compelled disclosure judgments. *Buckley*, 424 U.S. at 64. That opinion follows *Buckley*, where the Court upheld a disclosure requirement for independent expenditures while invalidating a provision that had imposed a ceiling on those expenditures. *See id.* at 75–76.

92. *Citizens United*, 558 U.S. at 366–67.

93. *See Citizens United*, 558 U.S. at 322–27. For criticism of the Court's holding that corporations be treated as ordinary human speakers for expenditure purposes, see Robert C. Post, *The Tanner Lectures on Human Values*, *in* CITIZENS DIVIDED: CAMPAIGN FINANCE AND THE CONSTITUTION 3–94 (2016); Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 739–51 (2012).

94. *See* John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010).

95. Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 184–85 (1999) ("In *Buckley* [*v. Valeo*], the Court stated that 'exacting scrutiny' is necessary when compelled disclosure of campaign-related payments is at issue, but nevertheless upheld, as substantially related to important governmental interests, the reporting and disclosure provisions of the Federal Election Campaign Act of 1971.").

96. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

analytical barrier is needed against government abuses because challenges to disclosure requirements are brought to vindicate anonymity and association.[97] Even where such fundamental interests are at stake, certain requirements can be placed on speakers to directly achieve the "proper functioning of a democracy."[98] A balance is required to enforce sufficiently important government efforts against fraud and corruption without compromising communicative liberties.

2. Increased Judicial Rigor

In the past decade, exacting scrutiny precedents shifted from a proportional analysis to a more rigorous mode of review. In addition, the standard appeared in context outside the forced disclosure doctrine. The Court increasingly invoked it as part of a formalistically categorical approach of homogenizing all content regulations, irrespective of whether they affect speech directly or secondarily. The move, as we saw earlier, had long been endorsed by Justice Thomas.[99] That skews the content of pure speech, concerning topics and ideas, with ordinary regulations, concerning workaday public operations. This analytical elision convolutes compelled deanonymization requirements with content-based restrictions on core speech—such as parody, comedy, tragedy, irony, and vanity.

An example of this elision appeared in Justice Kennedy's plurality opinion in *United States v. Alvarez*. He invoked "exacting scrutiny" and applied it with the same force as "strict scrutiny," even though the Court had determined years before that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."[100] This was a doctrinal alteration of the meaning given to "exacting scrutiny" that Kennedy neither acknowledged nor explained. Indeed, although it made only sense to treat the law as an unconstitutional content-based restriction on gratuitous lies, the majority unnecessarily merged distinguishable standards of review, one strict and the other proportional. Kennedy's conversion of what had been a proportionality test into one that was categorical is consistent with other recent Supreme Court cases where the First Amendment became an analytical tool for deregulation.[101]

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97. Anonymity is related to the First Amendment right of silence. *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 782, 796–97 (1988) (stating that "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say"); Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) ("[I]nvoluntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence.").

98. *John Doe No. 1*, 561 U.S. at 198.

99. *See infra* text accompanying note 110.

100. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

101. That judicial approach has been central, for instance, to striking even healthcare notice requirement on unlicensed clinics as falling under strict scrutiny, in *National Institute of Family and Live Advocates v. Becerra*, rather than some more proportional method where substantial government interest is at play in public information about state medical services. *See* 138 S. Ct. 2361, 2371 (2018) ("[O]ur precedents distinguish between content-based and

Of particular significance is the presence of concurring Justices in *AFP* who argued that disclosure requirements should be reviewed on the basis of strict scrutiny. Cases like *Alvarez* create an opportunity for First Amendment advocates to up the ante in reviewing traditional government authority to prevent fraudulently corrupt financial support channeled to political candidates.

Elision of exacting scrutiny and strict scrutiny left the First Amendment reasoning less contextual, less nuanced, and less clear. Furthermore, it demonstrated a distrustful review of government interests behind regulations.

The doctrinal alteration first announced by the *Alvarez* plurality was echoed by another plurality opinion in *McCutcheon v. Federal Election Commission*. In the latter case, the Court once again conflated exacting scrutiny with a test indistinguishable from strict scrutiny: "Under exacting scrutiny, the [g]overnment may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest."[102] This reasoning granted even greater power to overturn campaign finance laws to judges as the Court struck down the aggregation limitation on the amount of money any individual could contribute to a total number of candidates and committees.[103]

To play down the significance of the altered exacting scrutiny standard, the Supreme Court reiterated that lower courts should use "a lesser" degree of scrutiny for contribution limits but, it added ambiguously, nevertheless continue to use a "rigorous standard of review."[104] This was using the most exacting test by relying on compelling government interest and least restrictive analysis and amorphously calling it something "lesser."

What one might have taken as oversight in *Alvarez*, but then more concerted in its importation into campaign financing issues addressed in *McCutcheon*, turned out to be a shift to something more formalistic. In *Williams-Yulee v. Florida Bar*, the Court yet again used the term exacting scrutiny interchangeably with strict scrutiny.[105] This time the formulation of "exacting scrutiny" seemed to be ever more cumbersome for the government to overcome. Solicitations on judicial campaign contributions, Chief Justice Roberts wrote, would only be upheld if they were "narrowly tailored to serve a compelling interest."[106] The majority determined that the Florida Supreme Court was correct in finding a compelling interest in judicial integrity and independence.[107] Finally, the Court found no less restrictive alternative was appropriate to prohibit judges from directly soliciting potential donors, explaining that to allow such appeals might lead to a string of judicial recusals after the elections.[108]

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content-neutral regulations of speech. Content-based regulations 'target speech based on its communicative content.'") (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)).

102. 572 U.S. 185, 197 (2014).

103. *See id.* at 193; Alexander Tsesis, *Multifactoral Free Speech*, 110 NW. U. L. REV. 1017, 1046–48 (2016) [hereinafter "*Multifactoral*"].

104. *McCutcheon*, 572 U.S. at 197 (quoting Buckley v. Valeo, 424 U.S. 1, 29 (1976)).

105. 575 U.S. 447, 457 (2015) (relying on strict scrutiny to uphold a state bar rule that prohibited judicial candidates from personally soliciting campaign funds).

106. *Id.* at 442.

107. *Id.* at 447.

108. *Id.* at 454–55.

The Chief Justice's use of the exacting scrutiny standard in *Williams-Yulee* was inconsistent with precedent prior to 2012. The strict construction of it strengthened judicial prerogative at the expense of legislative authority. It allowed a court to defer to a state bar's rules for judicial integrity, while striking federal congressional policy against corruption in politics. The need to end actual and apparent corruption might have been said to be compelling in both cases, and the plurality's statement that aggregation limits were not narrowly drawn demonstrated how powerful a tool of judicial finality the standard had become. Rather than the protective role of democratic politics that Justice Stone envisioned in his footnote to *Carolene Products*, the judiciary was using exacting scrutiny to prevent Congress from enforcing a statute created to preserve representative governance.

The formalistic approach was significantly different than the more contextual articulation in *Shrink Missouri* and *John Doe No. 1*. Professor Richard Hasen points out that the new "exacting scrutiny" had become more "rigorous" and threatens to subject all contribution disclosures to a test along the same lines of strict scrutiny.[109] To add further uncertainty, members of the Court in other contexts continued to recite the proportional version of exacting scrutiny in other contexts.[110]

Following the outcome of the most recent disclosure case to rely on exacting scrutiny, *AFP*, it has become "much harder to sustain campaign finance disclosure laws going forward."[111] Chief Justice Roberts, joined by two justices, relied on the standard to strike as unconstitutional California's compelled disclosure requirement that applied to charities registered with the State's Attorney General.[112] A three-person dissent assumed the pertinence of exacting scrutiny to the case, but criticized the lead opinion for requiring proof of narrow tailoring.[113] The field has become so muddled that two of the justices made clear their support for a strict scrutiny standard of review for charitable disclosures.[114]

The law challenged in *AFP* had required donors of more than $5000 or more than two percent of the organization's total charitable contributions to divulge their names

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109. Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 15 (2014).

110. *See, e.g.*, Janus v. Am. Fed'n of State, Cty., 138 S. Ct. 2448, 2477 (2018) ("The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech."); Del. Strong Fams. v. Denn, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from the denial of certiorari) ("[D]isclosure requirements must withstand 'exacting scrutiny.' Exacting scrutiny requires the State to establish that 'the disclosure requirement' is 'substantial[ly] relat[ed]' to 'a sufficiently important governmental interest.'") (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010)).

111. Rick Hasen, *Breaking and Analysis: Supreme Court on 6-3 Vote in AFP Case Severely Undermines Case for Constitutionality of Campaign Finance Disclosure Laws*, ELECTION L. BLOG (July 1, 2021, 7:58 AM), https://electionlawblog.org/?p=123070 [https://perma.cc/YGD2-6FYE].

112. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2372, 2383 (2021).

113. *Id.* at 2394 (Sotomayor, J., dissenting) ("The Court abandons [its previous] approach here, instead holding that narrow tailoring applies to disclosure requirements across the board, even if there is no evidence that they burden anyone at all.").

114. *See id.* at 2392 (Alito, J., concurring in part).

and addresses.[115] The complaint alleged that petitioners' First Amendment rights had been violated. The Chief Justice agreed, relying on a newly modified exacting scrutiny standard with the narrow tailoring version of the test, which proved fatal to the challenged charitable disclosure requirement. But he made it a point not to equate exacting scrutiny with the "least restrictive" requirement used in strict scrutiny analyses.[116] He was not, however, using the compelling government interest test of *Alvarez*, *McCutcheon*, and *Williams-Yulee*. The inquiry, *AFP* found, should begin by grappling with the "extent to which the burdens are unnecessary, and that requires narrow tailoring."[117] This unexplained change of direction, however, was little more than Roberts' skilled penchant to alter precedents under the guise of judicial restraint.[118]

Although the Chief's formulation was not equivalent to the highest level of review, it signaled the continued augmentation of judicial power. Rather than balance pertinent speech and government interests, it required proof that disclosure was required to deter and punish fraud.[119] His narrow tailoring analysis required proof of a closer fit than earlier versions of the exacting scrutiny standard between government policy and its disclosure requirement.[120] By adopting a narrow tailoring component, the Court struck a State's effort to guard the public's confidence in the legitimacy of charitable contributions.[121] A law tackling a "substantial government interest in preventing the public from fraud," could not survive absent a judge's perception that it was not closely enough tailored in its approach to enforcement.[122]

Narrow tailoring should apply where the state interferes with speech by enforcing uniformity, orthodoxy, or ambiguously defined statutory criteria.[123] It goes too far to apply that standard to traditional requirements of tax disclosures. In *AFP*, narrow tailoring was a basis for the Justices second-guessing legislative judgments about how to exercise a traditional governmental function. The law was directly linked to the purpose of discovering fraud. The Court's judgment, finding the state law to be an unnecessary investigative tool, was a discretionary question better left to the State Attorney General than to a fractured majority.[124]

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115. Cal. Code Regs. tit. 11, § 301 (2022); 26 C.F.R. §§ 1.6033–2(a)(2)(ii)(f), (iii) (2020).

116. *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 ("Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.").

117. *Id.* at 2385.

118. Chief Justice Roberts has used dictum to alter key aspects of precedent. For example, in his dictum, sown into *McCutcheon*, he argues that "Nazi parades" are protected by the First Amendment. McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191 (2014). Yet the precedent he cites for this formal proposition is no more than a purely procedural case, which contains no substantive holding. *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43–44 (1977). Such an interpretive approach relies on precedents instrumentally.

119. *Ams. for Prosperity Found.*, 141 S. Ct. at 2385.

120. *Id.*

121. *Id.* at 2385–86.

122. *Id.* at 2386 (quoting Schaumberg v. Citizens for Better Env't, 444 U.S. 620, 636 (1980)).

123. *See* Cantwell v. Connecticut, 310 U.S. 296, 307–08, 311 (1940) (holding invalid the conviction of someone proselytizing in public because the statute was not narrowly drawn).

124. *Ams. for Prosperity Found.*, 141 S. Ct. at 2385–86.

B. Parsing Exacting Scrutiny

This Article seeks to disambiguate the exacting scrutiny standard and to establish for it a role in review of regulations affecting disclosure requirements in noncommercial settings. The aim here is to articulate the distinctive relevance of the standard to judicial transparency and reasoning. Such an analytical advancement would, additionally, significantly benefit litigants' abilities to predict the outcome of cases. Unexplained doctrinal changes to the meaning of the standard create ambiguity, uncertainty, and unpredictability. Chief Justice Roberts' judgment in *AFP* demonstrates the point. Although he did not follow the strict scrutiny equivocation made by pluralities in *Williams-Yulee* and *McCutcheon*, he adopted a narrow tailoring version of the standard without giving adequate account for *AFP*'s gravitation away from the earlier functionalist version of the test.[125]

Exacting scrutiny should instead allow for the enforcement of anti-fraud disclosure laws and other assertions of traditional government powers.[126] The functional approach to exacting scrutiny identifies whether substantial connection exists between a mandate and a sufficiently important governmental interest, such as monitoring and prosecuting fraud.[127] Better than categorically adopting narrow tailoring would be the judicial weighing of regulatory needs and personal interests to determine whether a disclosure law directly affects philosophical, sociological, or political messages[128] or minimally and incidentally affects core forms of free speech.[129] The judicial inquiry should further look into whether under the regulatory scheme the speaker has reasonable access to alternatives for expressing unorthodox opinions.

1. A Balanced Exacting Scrutiny

The many unexplained shifts in exacting scrutiny interpretation drives home the need to develop a test that will be demanding enough to review incidental government restrictions on speech without overstepping judicial prerogatives.[130]

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125. The Court unanimously rejected the Petitioner's argument in favor of strict scrutiny. *See id.* at 2383.

126. Sara Sun Beale, *The Many Faces of Overcriminalization*, 54 AM. U. L. REV. 747, 755 (2005) (discussing government's traditional function to enforce law against crimes such as tax fraud).

127. John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010) ("To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'") (quoting Davis v. FEC, 554 U.S. 724, 744 (2008)).

128. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (identifying core First Amendment speech).

129. In a different context, Justice Powell discussed a type of ordinance with only an incidental and minimal effect on First Amendment concerns. *Id.* at 78 (Powell, J., concurring).

130. Alan K. Chen, *The First Amendment Adrift?*, ACS https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/the-first-amendment-adrift/#_ftnref3 [https://perma.cc/6G6H-U6E5] ("The battle here was over the meaning of the so-called 'exacting scrutiny' standard, which is different from the traditional tiers of strict and intermediate scrutiny the Court uses in other First Amendment cases where the government is regulating, rather than compelling, speech.").

After *AFP*, even consumer protection laws designed to deter and punish fraudulent contributions to political candidates or charitable organizations are now subject to narrow tailoring review.

In dissent, Justice Sotomayor recognized that the government's burden varies based on the significance of its interest and the extent to which the challenged law interferes with First Amendment rights, such as associational freedoms. This recognition is consistent with Justice Barrett's observation that in matters "like speech and assembly" the Court uses "nuanced" approaches to resolve "conflicts between generally applicable laws and . . . First Amendment rights."[131]

Instead of nuance, the narrow tailoring version of "exacting scrutiny" undertaken by the Court in *AFP* undermined the state's effort to identify and prosecute a charity's malfeasance. The lead opinion devalued the state legislative policies behind disclosure laws designed to prevent self-dealing or improper loan repayments through fraudulent charitable contributions.[132] The Court's unwillingness to balance anti-corruption policy against claimants' speech rights is part of a broader pattern of recent free speech jurisprudence that relies on the First Amendment to strike ordinary economic regulations.[133]

A more balanced method of review under exacting scrutiny would have the advantage of greater judicial thoroughness, allowing judges to evaluate the contexts of cases rather than out-of-hand discounting legislative concerns. To get a better sense of what such analysis involves, we can look to pronouncements of an earlier Court, one more willing to engage in contextual analysis for reviewing regulations that have an incidental effect on speech. Justice Goldberg, in his opinion in *Gibson v. Florida Legislative Investigation Committee*, explained the need for judges to review whether a regulation was proportionate as determined by the weight of the evidence in relation to free speech principles, which are understood to include openness, association, self-expression, and knowledge.[134] The case challenged a State committee that investigated organizations "whose principles or activities" included violent conduct.[135] The president of the Miami branch of the NAACP appealed a conviction for refusing to produce the group's membership list. He

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131. Fulton v. Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring)

132. These signals of fraud are relied on by investigators working for the Charitable Trusts Section of the California Department of Justice. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2372, 2401 (2021) (Sotomayor, J., dissenting).

133. *See* Francesca Lina Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 404 (2022) ("The upward trajectory of protection for commercial speech has been identified and roundly criticized by scholars as a sort of "Lochnerization" of the First Amendment—a way to constitutionally immunize economic activity from regulation via the First Amendment."); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1389 (2017) (excavating "the libertarian tradition through an analysis of Supreme Court cases that, beginning in the 1970s, consistently expanded speech protections by striking down limits on commercial speech and corporate political spending"); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 325 (2016) (identifying "emerging First Amendment theories aimed at deregulating the work place").

134. 372 U.S. 539 (1963). The *Buckley* case explicitly recognizes *Gibson*'s authority. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

135. *Gibson*, 372 U.S. at 541.

believed the government's subpoena to be part of a pattern of transparent government harassment.[136] Goldberg recognized that because the case involved "rights of free speech and association" it was the Court's "delicate and difficult task" in evaluating disclosure law "to weigh the circumstances and to appraise the substantiality of reasons advanced in support of the regulation of the free enjoyment of the rights."[137] The State had not convincingly demonstrated, the Court held, that there was "a substantial relation between the information sought and a subject of overriding and compelling state interest."[138]

Gibson acknowledged that the task of balanced decision-making was necessary, albeit "delicate and difficult."[139] Criticizing *Gibson*'s rather deferential approach, Professor Thomas Emerson warns against "ad hoc balancing."[140] Such an inquiry, he is concerned, can make but a hopelessly vague determination of legal criteria.[141] While ambiguity is certainly to be avoided in judicial opinions, especially those dealing with free speech, it can be addressed through rationally designed and neutral laws. For example, criminalization of fraud has never been thought to be within the ambit of the First Amendment.[142] Though it may be critical to separate out conduct from communication, the Court long ago brought to mind the often fragile divide between them: "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society."[143] At its most basic level, the First Amendment protects speakers who assert political, philosophical, historical, and aesthetic perspectives.[144] Judicial vigilance is essential to the preservation of the right to communicate such ideas against

136. Gibson v. Florida Legis. Investigation Comm., 126 So. 2d 129 (Fla. 1960).

137. *Gibson*, 372 U.S. at 543, 545.

138. *Id.* at 546.

139. *Id.* at 545.

140. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80 (1970).

141. *Id.* ("The guiding principle must be to determine which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental? The answer, to a great extent, must be based on a common-sense reaction, made in light of the functions and operations of a system of freedom of expression."). As an example of what he meant, Emerson called the Court out for wrongly deciding *United States v. O'Brien*. *Id.* at 84 ("[I]t is apparent that governmental control was directed at prohibiting the expression in draft card burning, not at punishing the action.")

142. United States v. Stevens, 559 U.S. 460, 468 (2010); *see also* Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 14 (1964).

143. Thornhill v. Alabama, 310 U.S. 88, 104 (1940).

144. A majority of the Justices, even those differing politically, agree on certain features of core collective free speech principles. *See* United States v. Alvarez, 567 U.S. 709, 731–32 (Breyer, J., concurring, joined by Justice Kagan) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny."); *id.* at 751 (Alito, J., dissenting, joined by Justices Scalia and Thomas) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat.").

government encroachments. The enforcement of workaday laws, such as fraud statutes is not, however, a matter requiring close judicial scrutiny.[145]

Professor John Hart Ely rightly cautions against judicial subjectivity in balancing analysis.[146] He warns that for courts to decide free speech challenges on the basis of what "element 'predominates' will . . . inevitably degenerate into question-begging judgments about whether the activity should be protected."[147] And Professor James Weinstein warns that judicial balancing can lead to "ideological bias."[148] To address these legitimate concerns against ad hoc decision-making, exacting scrutiny must attend to an objective assessment of whether a policy with only an incidental effect on speech is tied to any traditional government function.[149]

While Emerson's speech/conduct dichotomy and Ely's appeal to procedural fairness serve as important analytical starting points for selecting and exercising adequate judicial scrutiny, Emerson's distinction between free expression and action comes with its own ambiguity. He provides no way to account for why state powers can be exercised to enforce regulations with an incidental effect on speech, such as mandates on tobacco warnings,[150] pharmaceutical markings,[151] or consumer product labels.[152] At some point in a court's analysis, a judge is likely to find it relevant to determine whether the restriction affects, interferes with, or censors speakers' political, personal, or scientific autonomy. Neither he nor Ely explain why such regulations do not infringe on core First Amendment values, though each compels speech. All of them have expressive components but none has been thought to transgress free speech principles.

In order to distinguish between laws that burden core speech and those that serve traditional government functions—such as protecting consumers, health, and safety—courts must reflect upon determinations that review "the surrounding circumstances [and whether] the likelihood was great that the message would be understood by those who viewed it."[153] The exacting scrutiny standard provides a

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145. Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 283 (1992) (citing William C. Tyson & Andrew A. August, *The Williams Act After RICO: Has the Balance Tipped in Favor of Incumbent Management?*, 35 HASTINGS L.J. 53, 79–80 (1983) ("[C]riminal violations of the antifraud provisions of the federal securities laws . . . should constitute racketeering activity, provided that the conduct is in connection with the *sale* of securities.")).

146. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975).

147. *Id.*

148. James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 511 (2011).

149. Traditional functions include waste disposal, fire prevention, police protection, sanitation, public health, and parks and recreation. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 (2007) (waste disposal); Nat'l League of Cities v. Usery, 426 U.S. 833, 845–53 (1976), *overruled on other grounds by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (fire, police, sanitation, public health, and parks).

150. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333.

151. 21 U.S.C. § 353 (b)(4)(A).

152. 42 U.S.C. §§ 6292, 6294.

153. Spence v. Washington, 418 U.S. 405, 411 (1974).

necessary tool for identifying whether a burden on speech inhibits the assertion of a particularized message.[154]

When it comes to disclosure laws, the test should be formulated with the care necessary to determine whether the mandated information is substantially related to effectively fighting corruption or is an intrusion on private or political autonomy.

The narrow tailoring approach of *AFP*, on the other hand, expands judges' latitude to strike legislation without first engaging in adequate review of whether relevant correlation exists between a law requiring disclosure and the means used to achieve it. Instead, the lead opinion mechanically relied on narrow reasoning to set an almost insurmountable barrier against state enforcement of ordinary fraud law.[155] The narrow tailoring test increases judicial authority at the expense of lawmakers' prerogatives to design statutory policy with even minor speech implication. For Chief Justice Roberts in *AFP*, the formality of narrow tailoring meant that he could conclude that the State's regulatory disclosure scheme, designed to prevent charitable fraud, was unnecessarily duplicative of a federal law. The IRS regulation already mandated charitable organizations to disclose the very same information when applying for tax-exempt status.[156] Nothing in the federal law preempted states from requiring the same disclosure for law enforcement purposes.

The Chief's reasoning undervalued the State's sufficiently important need to investigate tax fraud using its own bureaucratic instruments. Recognition of the law's intent would not have been ad hoc balancing; rather, it would have allowed for evaluation of whether the disclosure provision was consistent with regulatory policy. Nevertheless, the Court in *AFP* found the requirement of de-anonymization to burden the speech of donors, despite the lack of evidence in the record that they suffered any legally cognizable harm. The state law placed no more burden on contributors' anonymity than was necessary to prevent and punish parties who cloak

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154. *Id.* (holding that expressive conduct exists where "[a]n intent to convey a particularized message [is] present" and observers are likely to understand it). Where a restriction incidentally impacts communications, only intermediate level of review is appropriate. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661–62 (1994) (holding that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech"); United States v. O'Brien, 391 U.S. 367, 381–82 (1968) (holding that where regulation does not target expression a less stringent standard applies); *Id.* at 377 (asserting that "it [is] clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

155. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 680 (1997) ("Nondisclosure where there is a pre-existing duty to disclose satisfies our definitions of fraud and deceit for purposes of the securities laws." (citing Chiarella v. United States, 445 U.S. 222, 230 (1980))).

156. The California requirement mandated charitable organizations to submit their Internal Revenue Service Form 990 to the California Attorney General's office. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2392–93 (2021). The IRS regulation required charitable organizations to submit names and addresses of all officers, directors, or trustees (or any person having responsibilities or powers similar to those of officers, directors or trustees) of the organization. 26 C.F.R. §§ 1.6033-2(a)(2)(ii), (iii) (2020).

profitmaking, especially money laundering, as charitable contributions. No proof was tendered to show that the major donors who challenged the law had experienced any harassment, reprisals, or threats. Moreover, Justice Sotomayor pointed out in dissent that the Court held the disclosure provision unconstitutional despite the challengers' lack of proof that "a substantial proportion of those affected would prefer anonymity."[157]

Moreover, State law required the Attorney General's Office to keep that information confidential.[158] No proof of illegal disclosure appeared in the record, and as Sotomayor wrote, the holding empowered regulated entities "to avoid their obligations . . . by vaguely waving toward First Amendment 'privacy concerns.'"[159] The narrow tailoring test thus favored Roberts's deregulatory decision.

Where a substantial government interest exists in obtaining disclosed information about the identity of a contributor, which the State must keep confidential, the concern over de-anonymization is secondary to the administration of tax transparency compliance. No core speech was affected. The State was not censoring ideas, repressing views, or suppressing content. Moreover, the opinion relied on an inflexible rule that lacked any balance of policy crafted to prevent fraudulent circumvention of a significant provision in the State's revenue scheme.[160]

The judgment in *AFP*, therefore, applied a standard that granted courts final say without any balance of state fiscal needs. Previously, the Court in *John Doe No. 1 v. Reed* found various interests to be sufficiently important enough to meet exacting scrutiny review. These included efforts to combat fraud, ferret out duplicative signatures, obtain donor information, and promote public accountability.[161] In one of the concurrences to *John Doe No. 1*, Justice Sotomayor pointed out that "[i]t is by no means necessary for a State to prove that such reasonable, nondiscriminatory restrictions' are narrowly tailored to its interests."[162]

As Justice Breyer further explained in a separate concurrence to that case, exacting scrutiny should be understood to be a method for weighing "competing constitutionally protected interests in complex ways" to determine whether the statute's burdens are out of proportion with "the statute's salutary effects."[163] Legitimate power to administer democratic institutions can be consistent with First Amendment rights.[164] When it comes to rooting out fraud, the State's interest in

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157. *Ams. for Prosperity Found.*, 141 S. Ct. at 2392 (Sotomayor, J., dissenting).

158. CAL. CODE REGS. tit. 11, § 310(b) (2022).

159. *Ams. for Prosperity Found.*, 141 S. Ct. at 2392 (Sotomayor, J., dissenting).

160. *Cf.* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting) ("When a person alleges a violation of the right to free speech, courts generally must consider not only what was said but also in what context it was said.").

161. John Doe No. 1 v. Reed, 561 U.S. 186, 197.

162. *Id.* at 213 (Sotomayor, J., concurring).

163. *Id.* at 202 (Breyer, J., concurring) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

164. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) ("'If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting))).

safeguarding the integrity of electoral democracy is particularly strong.[165] So too there is a substantial state interest in preventing fraudulent donor contributions, which threaten charitable integrity.[166]

After the 2021 *AFP* decision, however, exacting scrutiny requires such regulations to be "narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end."[167] The State's confidentiality provision added no substantial burden on speech; after all, the information already had to be disclosed to the IRS. The Court struck the law by invoking freedom to association as a category granting it power to strike ordinary disclosures required to protect the public from fraud. California's scheme was not unusual in rooting out fraud both at federal and state levels. Such concurrent federalist schemes aim at prohibiting elaborate deceptions that exist in a variety of other areas of law governing diverse enterprises, including banking[168] and corporate governance.[169] While both of these are answerable to federal enforcement, neither is immune from state prosecutions for common law frauds. California's scheme of requiring charities to divulge the identity of major donors did not interfere with the similar federal requirement designed to prevent tax fraud.

2. Characterizing Exacting Scrutiny

The Roberts Court's approach in *McCutcheon* and *AFP* amounted to judicial intrusion into legislative efforts to regulate fraud. Exactitude of judicial review should protect individual's enjoyment of constitutional freedoms, without sacrificing the effectiveness of government authority to carry out public functions against corrupt practices. To that end, this Article proposes that narrow tailoring be dropped from the exacting scrutiny standard. In order to better assess the burdens imposed by noneconomic disclosure regulations, review should include contextual assessment of speech interests, countervailing government concerns, whether substantial relation exists between disclosure requirements and stated legislative purposes, and whether

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165. Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.").

166. *See generally* Thomas Silk and Rosemary Fei, *Explanation of California's Charitable Integrity Act of 2004 (SB 1262)*, 46 EXEMPT ORG. TAX REV. 195 (2004) (explaining the impacts of the California Charitable Integrity Act of 2004).

167. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2384 (2021).

168. State statutes criminalize banking and lending fraud. 9 C.J.S. BANKS AND BANKING § 754 (2022). Yet, most bank fraud is litigated through federal statutes. *See* 18 U.S.C. § 1344 (bank fraud statute); 1 BANKING CRIMES *Fraud, Money Laundering and Embezzlement* § 7:1 (2022) (explaining the federalism implications resulting from Congress's grant of greater federal government power to prosecute bank fraud under § 1344).

169. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977) (distinguishing federal corporate fraud committed under Rule 10b-5 of the Securities Exchange Act of 1934 and the many types of corporate conduct, including fiduciary fraud, left to state regulators); O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 89 (1994) (holding that state rather than federal law governs claims that corporate officers had knowledge of fraud); Darryl K. Brown, *The Distribution of Fraud Enforcement*, 28 CARDOZO L. REV. 1593, 1597 (2007) (explaining that the modern state rules of corporate fraud reflect "states' collective decisions to cede the job to federal officials, and the federal government's willingness to dominate the field").

the law imposes state orthodoxy. Today's Court would also likely require review of history and tradition it found pertinent.[170]

A disclosure law that prevents fraud does not suppress ideas or perspectives. Rather, it is based on the substantial government interest to deter illicit contributions from being made to political, philanthropic, or associational causes. Nevertheless, the Court has found secondary speech interests arise where a regulation requires the disclosure of a person's identity in order to prevent tax evasion, insider trading, or contractual manipulation.

In *AFP*, no core speech rights were implicated. The California law prevented fraud, a matter that for centuries has been within the ambit of government authority.[171] The challengers presented no proof that donors' identity information was at risk. The government's substantial interest was weightier under the circumstances. Exacting scrutiny should neither lead to almost per se condemnation, as with strict scrutiny, nor almost certain approval, as with rational basis scrutiny.[172] Content, as elaborated in Section II.C.1, enjoys more rigorous protections.

Another area of law that might receive similar exacting scrutiny treatment is intellectual property law, where government plays a traditional role in matters of copyrights and trademarks, despite the second-ordered limits they may place on free expression. Thus, the Court went too far in applying formalistic viewpoint discrimination principles in *Matal v. Tam* and *Iancu v. Brunetti* to strike marks provisions against disparagement and immoral or scandalous matters.[173] The exacting scrutiny standard would have required a balancing of interests to weigh speech against important government policies on trademarks.[174] Moreover, exacting scrutiny may make sense in copyright-related cases. But to discuss those with any further depth would be too far afield here.[175]

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170. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128 (2022) ("We assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition."); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022) (relying primarily on the examination of "whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty'").

171. *See generally* EDWARD J. BALLEISEN, FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF (2017).

172. *See* United States v. Alvarez, 567 U.S. 709, 730–31 (2021) (Breyer, J., concurring).

173. Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) (discussing mark regulations against disparagement under the lens of viewpoint discrimination); Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) (treating "immoral or scandalous" provision of Lanham Act through the lens of viewpoint analysis).

174. In both *Matal* and *Brunetti*, the Court might have found the Lanham Act provisions at issue to have been outside the scope of trademark principles, rather than striking them on First Amendment grounds. *See* Laura A. Heymann, *What Is the Meaning of a Trademark?*, *in* RESEARCH HANDBOOK ON TRADEMARK LAW REFORM 250, 275 (Graeme B. Dinwoodie & Mark D. Janis eds., Edgar Elgar Press 2021) ("If trademark law is not to function as an all-purpose regulation of communication, even in its noncommercial aspects, then trademark validity should be grounded in a theory relating to what would appear to be its central motivating feature: determining if designators are functioning as names. That means thinking of trademarks as having no truth value as such.").

175. As caselaw currently stands, articulated in cases like *Golan v. Holder*, copyright does

Courts engaging in a contextual form of exacting review should reflect on the relevant speech at issue, the nature of the regulation, the means used in its enforcement, and available alternatives to regulation. Such an inquiry should help courts determine whether the speech interest at stake is central or peripheral. Each case challenging a regulation affecting free expression involves primary speech judgments. Many cases also involve second-order assessments, such as general reasoning about factors relevant to fact-specific judicial decisions but not intrinsic to core expression. True conflicts can arise between constitutional principles, such as speech and privacy.[176]

Second-order insights about the cultural meaning of communicative symbols can enable courts to balance concerns of speech and governmental police functions. For instance, the Court in *Virginia v. Black* recognized that the burning cross is so connected with the terrorizing message of the Ku Klux Klan that a State could, without violating the First Amendment, enforce a law prohibiting its use to intentionally threaten specific others.[177] The substantial interests in exercising criminal authority to punish intentional intimidation arose when the historically charged reliance on that symbol could reasonably place the audience into apprehension about their personal safety. In *Black*, the substantial interest to exercise punitive authority was linked to an exacting policy designed to punish purposeful intimidation by the public display of a symbol that threatened others with the perpetration of vigilante violence. [178]

Without second-order contextualization, holdings tend to formalistically apply free speech reasoning to disregard substantial legislative concerns that incidentally affect speech. Greater judicial deference should be granted where legislative policies require transparency in the regulation of fair elections and taxation. Their regulation does not directly impact a speaker's right to express heterodox ideas about science, history, personal relations, aesthetics, economics, or similarly protected subjects.

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not give rise to Free Speech Clause scrutiny. 565 U.S. 302 (2012). In that case, in upholding the constitutionality of Section 514 of the Uruguay Round Agreements Act, the Court relied on the idea/expression dichotomy and fair use privilege in an effort to reconcile the suppression of expressive content, which would have required strict scrutiny analysis under First Amendment review. *See id.* at 328–29 (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)) (explaining that the idea/expression dichotomy and fair use provisions are "built-in First Amendment accommodations"). *See also* Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966) ("[C]ongress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain . . . .").

176. For a more detailed elaboration on online conflicts between free speech and privacy, see FREE SPEECH IN THE BALANCE, *supra* note 13, at 53–55; DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET (2007).

177. 538 U.S. 343, 363 (2003) (clarifying the true threat doctrine and adopting a scienter element).

178. In *Black*, one of the prosecution's key witnesses saw the burning cross from afar, on her in-laws' lawn, and other people noticed it while they were driving along on an adjacent road. *Id.* at 348. The justices split on another issue of whether the prima facie element of the Virginia statute was constitutional, with a plurality of the Court holding that the scienter element of the offense must be proven beyond a reasonable doubt. *Id.* at 363–64.

C. Most Exacting and Strict Scrutiny

The conflation of the exacting scrutiny standard and the strict scrutiny standard in *Alvarez* and *McCutcheon* is not unique. The Court likewise confuses exacting scrutiny, strict scrutiny, and most exacting scrutiny, despite materially relevant differences of the expressive conduct to which they refer. *Alvarez* added further uncertainty about these standards when it interchangeably used "exacting scrutiny" and "most exacting scrutiny."[179] The importance here of these tests is that they are deeply embedded in Supreme Court jurisprudence. As the standards apply, they are currently too rigid to yield the nuance, particularity, and context of the balance between a specific law and a speech interest involved. Nevertheless, the Court has found that under certain circumstances the weighing of competing interests is required even where core speech interests are at play.[180]

We have already said that exacting scrutiny is best conceived as the noncommercial intermediate scrutiny standard for review of disclosure requirements that was first articulated for the prevention of fraud by the Court in *Buckley v. Valeo* and persists through its various progeny.[181] That theory of balancing state interests with personal expression should apply to political and charitable contributions, where past experience demonstrates substantial government interest in preventing fraud despite a secondary effect on speech.

Narrow tailoring is best left to strict scrutiny review of content discrimination, not to exacting scrutiny analysis, as in *AFP*.[182] An even more rigorous test exists, after all. "Most exacting scrutiny" is the analytical matrix that, I argue, is where the least

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179. United States v. Alvarez, 567 U.S. 709, 724 (2012).

180. Williams-Yulee v. Florida Bar, 575 U.S. 433, 444 (2015) (plurality opinion) (stating that although "it is the rare case" when a statute satisfies strict scrutiny, "those cases do arise" (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding that there is a compelling state interest in election integrity))).

181. 424 U.S. 1, 72 (relying on exacting scrutiny to find "the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged"); *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 114 n.9 (1982) (explaining that in *Buckley* "[a]n inference . . . that disclosure of recipients of expenditures would increase any difficulty the party might have in obtaining office space would be tenuous, and is plainly outweighed by the 'substantial public interest in disclosure'" (quoting *Buckley*, 424 U.S. at 72)); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010) ("The Court has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." (citing *Buckley*, 424 U.S. at 64, 44)).

182. The Court, for example, relied on narrow tailoring to find a statute unconstitutional that prohibited the display, near a foreign embassy, of any sign that "tends to bring that foreign government into 'public odium' or 'public disrepute.'" Boos v. Barry, 485 U.S. 312, 315, 318–19 (1988). That reasoning made sense in a case where the statute suppressed the expression of ideas, bringing in also the compelling interest part of the strict scrutiny test. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) (requiring state to prove that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); *see also* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 809 (1985).

restrictive standard should be the rule. That degree of judicial review on the basis of the First Amendment should be left to censorship, repression, and orthodoxy in communications about matters of theory, anthropology, science, and otherwise protected human understanding. These are all noncommercial forms of speech that have always been linked to First Amendment protection, especially when the expression is perspectival. My argument differs from the Roberts Court's wooden use of free speech labels to strike legislation intended to enforce traditional powers.

1. Content and Viewpoint Discrimination

Instead of using distinct standards of review, the Court currently relies on the same compelling government interest and narrow tailoring test for both viewpoint discrimination and content discrimination.[183] We already studied the conflation made between exacting scrutiny and strict scrutiny that appears in *McCutcheon* and *Alvarez*. Stressing this confusion in the case law, Professor Caroline Mala Corbin asserts that the distinction between the two is "slippery and not always apparent."[184] In those cases, the Court imported the narrow tailoring test from strict scrutiny and applied it as part of its exacting scrutiny analysis. Most exacting scrutiny presents an opportunity to address that shortcoming by establishing a separate test to address the most invidious speech discrimination: viewpoint censorship.

This Section turns to the distinct features of the most exacting scrutiny standard, which is best suited for review of regulations that discriminate based on speakers' viewpoints about politics, personhood, and science. As for the narrow tailoring test, it is best applied in cases arising from censorship of communications on similar topics, but not when the state regulations on information reflect serious policy efforts to deter or punish fraud, money laundering, or election interference. Just as exacting scrutiny can be disambiguated from strict scrutiny, so too most exacting scrutiny is distinguishable from those appertaining to exacting scrutiny and strict scrutiny.

Most exacting scrutiny, then, should be reserved for viewpoint discrimination as uniquely harmful to individuals, democracy, and the marketplace of ideas, more generally.[185] In First Amendment jurisprudence, the first substantive use of that

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183. *Compare* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–03 (2011) (relying on strict scrutiny analysis to hold a law was an unconstitutional form of viewpoint discrimination) *and* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 376 (2009) (Souter, J., dissenting) ("[A] government is not free to draw those lines as a way to discourage or suppress the expression of viewpoints it disagrees with[;] only narrow tailoring to serve a compelling state interest could justify that kind of selectivity." (citations omitted)), *with* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (holding that laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests" (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015))) *and* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 395–96 (1992) (determining that "[t]he dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve [the government's] compelling interests").

184. Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 651 (2008).

185. The earliest cases to use the term did so only in passing. *See, e.g.*, City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 258 (1949) ("The rulings of the district courts granting or denying jury trial are subject to the most exacting scrutiny on appeal."); San Antonio Indep.

standard appeared only in passing, connecting "most exacting scrutiny" to the highest echelon of review and granting the judiciary final say over prior restraints on expression, which had by then been suspect for over two centuries.[186] The United States' prior restraints doctrine has a prestigious pedigree dating back at least to the *Commentaries* of William Blackstone.[187] That luminary described press freedoms as "essential to the nature of a free state" and "previous restraints" as inimical to them.[188] The Supreme Court was likewise emphatic in *The Pentagon Papers Case*, that only a dire national emergency would suffice to justify prior restraints.[189] Unless most exacting scrutiny can be met, there is a strong presumption of their constitutional invalidity.[190]

The most exacting scrutiny standard was from its inception tied to review of state actions inimical to the values closely intertwined with free speech, such as dignity, association, politics, science, and the press.[191] Viewpoint neutrality is the governing principle in a variety of cases such as *Consolidated Edison Co. v. Public Service Commission*, which found unconstitutional a regulatory requirement that utilities companies included with the service bill a separate pamphlet on "controversial issues of public policy."[192] The emphasis of the case was on the liberty to freely express diverse and heterodox viewpoints, which are conjoined with the fundamental autonomy function of the First Amendment to protect self-expression, political perspective, and pursuit of knowledge.[193] State interference with the liberty to

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Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973) (holding that most exacting scrutiny does not apply to wealth discrimination); Mathews v. Lucas, 427 U.S. 495, 506 (1976) (holding that different treatment under the Social Security Act based on children's "legitimacy" did not warrant most exacting scrutiny). During that period, the term "most exacting scrutiny" was no more than a term of art in search of a definition.

186. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979) ("Prior restraints have been accorded the most exacting scrutiny in previous cases.").

187. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151 (1769).

188. However, Blackstone thought it legitimate for the State to inflict punishments for "improper, mischievous or illegal" publications. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 713–14 (1931) (citing BLACKSTONE, *supra* note 187, at 151–52). Criminal matters could, nevertheless, be published post hoc. BLACKSTONE, *supra* note 187.

189. N.Y. Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713 (1971) (per curiam) (finding unconstitutional government's effort to restrain the publication on national security grounds of a supposedly classified study); *see also Near*, 283 U.S. at 716 (ruling that government is prohibited from imposing prior restraints on speech, except in cases of national emergency).

190. *See Smith*, 443 U.S. at 102 ("Prior restraints have been accorded the most exacting scrutiny in previous cases.").

191. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (asserting that prior restraint is "the most serious and the least tolerable infringement on First Amendment rights"); *The Pentagon Papers Case*, 403 U.S. at 714 ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))).

192. 447 U.S. 530, 532 (1980).

193. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of

express private and public convictions about any of those three subjects infringes on constitutionally protected speech unless the regulation is the least restrictive means of achieving some compelling government purpose.

The Court in *Consolidated Edison Co.* found unconstitutional a measure requiring private entities to carry and disseminate messages favoring environmental conservationism,[194] which was a matter the Court decided should be left to the conscience of the individual not the policy priority of a state agency. The operational significance of applying the most exacting scrutiny test to viewpoint discrimination is best demonstrated in *Texas v. Johnson*, the landmark flag burning case.[195] The defendant in that case was convicted under a state statute that prohibited the desecration of a "venerated object."[196] The law was viewpoint specific, making the conduct illegal under circumstances where the "actor knows [it] will seriously offend one or more persons likely to observe or discover his action."[197] The Court in *Johnson* recognized that the statute not only targeted content but also proscribed a form of orthodoxy "by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity."[198] Although the Court missed the opportunity to more precisely define "most exacting scrutiny,"[199] it found the Texas statute censored a viewpoint that the State of Texas determined to be averse to its official perspective on American patriotism. As such, the rigor of its review was in keeping with the quintessentially constitutional value of individual perspective.[200]

A later flag burning case, *United States v. Eichman*, explicitly relied on the "most exacting scrutiny" test to strike the challenged federal statute.[201] As with *Johnson*, the prosecution was not only about the content (the flag) but also the reasons given for its physical destruction.[202] The kernel of Justice Brennan's majority opinion recognized that the law had sought to preserve the American flag as a patriotic "symbol of our Nation and certain national ideals."[203] That goes beyond content, to

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information and ideas."). *But see id.* at 807 (White, J., dissenting) (arguing that corporate speech "lack[s] the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment").

194. The New York Court of Appeals had explained that the legislative purpose behind the challenged law was "the conservation of our vital and irreplaceable resources." Consol. Edison Co. v. Pub. Serv. Comm'n, 47 N.Y.2d 94, 102–03 (1979), *rev'd*, 447 U.S. 530 (1980).

195. 491 U.S. 397 (1989).

196. TEX. PENAL CODE ANN. § 42.09(a)(3) (repealed 1993).

197. *Id.* § 42.09(b).

198. *Johnson*, 491 U.S. at 417.

199. *See id.* at 412.

200. This is closely allied with the role of free speech protections of each individual's autonomy, perspective, affinity, and disposition.

201. United States v. Eichman, 496 U.S. 310, 312, 318 (1990).

202. Defendants asserted that they partly challenged the Flag Protection Act to decry the "compulsory patriotism and enforced reverence to the flag." United States v. Eichman, 731 F. Supp. 1123, 1125 n.1 (D.D.C. 1990).

203. *Eichman*, 496 U.S. at 315 ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is 'related "to the suppression of free expression"' and concerned with the content of such expression." (citation omitted) (quoting *Johnson*, 491 U.S.

viewpoint-based obstruction of political perspective. The dichotomy is one that should be reflected in different levels of heightened scrutiny.

The Court elsewhere differentiated between viewpoint and content discrimination. Yet, despite that distinction, the majority in *Eichman* reviewed both under the same strict scrutiny standard. In *R.A.V. v. St. Paul*, Justice Scalia defined content discrimination as a restriction that limited an "entire class of speech."[204] Yet he also noted that a law is most suspect when it "goes even beyond mere content discrimination, to actual viewpoint discrimination."[205] This is to say that suppression or silencing of a perspective is a greater affront to the Free Speech Clause than laws that interfere with the discussion of topics. Scalia did little to flesh out this formula. Professor Rodney Smolla points out that the Court in *R.A.V.* "appeared close to adopting a *per se* rule" against viewpoint discrimination.[206] It might have outlawed the entire subject rather than only some subset of it because of the state's restrictions against distinct viewpoints. Despite the Court's recognition that viewpoint and content are distinguishable categories, Scalia relied on strict scrutiny for both. It would have been more logical to distinguish their treatments without the formalism noted by Smolla. Rather, the Court should have reviewed whether the viewpoint-based ordinance was the least restrictive means of achieving the government's compelling objective to end racial intimidation.

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at 410)).

204. 505 U.S. 377, 388 (1992).

205. *Id.* at 391. In a more recent case, the Court has further sowed misunderstanding about levels of scrutiny. *Sorrell v. IMS Health, Inc.* quoted Justice Scalia for the proposition that a state restriction on the resale of private health data went "beyond mere content discrimination, to actual viewpoint discrimination." 564 U.S. 552, 565 (2011) (quoting *R.A.V.*, 505 U.S. at 391). There is some uncertainty as to whether the Court will continue to apply the intermediate scrutiny test for commercial speech from *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980), or a heightened level of scrutiny between intermediate and strict scrutiny in cases involving content-based commercial regulations. Paula L. Gibson, *Does the First Amendment Immunize Google's Search Engine Search Results from Government Antitrust Scrutiny?*, 23 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SECTION ST. BAR CAL. 125, 136 (2014) (asserting that cases like *Sorrell* indicate that "where commercial speech is involved, an argument can now be made that the form of scrutiny is a higher form of intermediate, heightened level of scrutiny, even if not strict scrutiny"); Hunter B. Thomson, *Whither* Central Hudson*? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 COLUM. J.L. & SOC. PROBS. 171, 173 (2013) ("By declaring that content-based restrictions trigger heightened review in an area of law that is distinguished by the content of speech, the Court appears to have elevated the First Amendment protection accorded to commercial speech."). The confusion should partly be attributed to the majority, which in places spoke as if it were considering the Vermont statute as something akin to ordinary viewpoint discrimination. *Sorrell*, 564 U.S. at 565 ("[The statute] 'goes even beyond mere content discrimination, to actual viewpoint discrimination.'") (quoting *R.A.V.*, 505 U.S. at 391). From my reading of the case, I believe that intermediate scrutiny continues to be the rule. The majority specifically asserted that a content-based restriction on commercial speech cannot be sustained unless it "directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Id.* at 572. But any further analysis of this point would be beyond the scope of this Article and will require separate treatment.

206. 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:10 (2022).

As in *R.A.V.*, the *Reed v. Town of Gilbert* Court relied on the strict scrutiny standard for both content discrimination and viewpoint discrimination analyses. Yet, the majority itself distinguished viewpoint discrimination, which targets particular outlooks, and content discrimination, which concerns "public discussions on an entire topic."[207] The Court in *Reed*, as in cases before it, did not clearly articulate how these two separate forms of free speech analyses might receive a level of review commensurate with the greater judicial concern for viewpoint restrictions than for content limitations. Topic restrictions might have received strict scrutiny review, albeit not a directional sign, but most exacting scrutiny seems more logical when the challenged censorship targets "the specific motivating ideology or the opinion or perspective of the speaker."[208]

Justice Thomas reiterated in his majority opinion in *Reed*, "Government discrimination among viewpoints . . . is a 'more blatant' and 'egregious form of content discrimination.'"[209] Rather than relying on strict scrutiny for both, the Court should establish a meaningful dichotomy, adopting most exacting scrutiny to review cases of viewpoint discrimination and compelling scrutiny review of content discrimination.[210]

By examining whether the regulation under review censors expressions about subjects or motivating ideas, the Court might have found that it had no more than incidental effect on speech. Rather than adopting strict scrutiny, the matter required a balanced, exacting scrutiny analysis already explored in Section II.B. The majority's fault in *Reed* lay in equating all speech as subject to the same level of stringent judicial scrutiny. The signage ordinance at issue involved none of the ideas that deserve the highest level of scrutiny: philosophy, science, history, and the like.

Reed's dichotomy between "content" and "viewpoint" discrimination might have been correct, but its rhetorical uses of them were not linked to values behind the constitutional protection of free speech.[211] Distinguishing between content and viewpoint discrimination standards would help to better emphasize and clarify that autonomy is crucial to the maintenance of personal, political, and aesthetic identities.[212] A most exacting scrutiny test standard is perfectly compatible with

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207. Reed v. Town of Gilbert, 576 U.S. 155, 169 (2015) (quoting Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537) (1980).

208. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

209. *Reed*, 576 U.S. at 168 (quoting *Rosenberger*, 515 U.S. at 829).

210. The rationale behind viewpoint discrimination in U.S. law is similar to the argument of philosopher John Stuart Mill, who writes that opinions should not be suppressed because that oppression would deprive people the opportunity to be convinced as to the truth of a proposition or to be disabused of a mistaken impression. JOHN STUART MILL, ON LIBERTY 33 (1854) (asserting that "the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity to exchange error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth").

211. Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 237 (2016) (arguing that if all laws are subject to facial evaluations of content neutrality many will be imperiled "that pose no significant threat to First Amendment interests").

212. In our own time, government censorship is daily occurring in countries like Brazil,

personal dignity, democratic institutions, and scientific learning. The First Amendment protects entertainment, art, the individual right to expression, and the civic right to political participation. Content refers to the study of a field, while viewpoint pertains to an individual's or group's perspectives on it.

Personal protection of free speech should above all else safeguard individuals' abilities to express their humanity by identifying, articulating, and impressing upon others unique perspectives about countless subjects.

Neither is the need for viewpoint protection confined to individual self-expression; pluralistic viewpoints and associational declarations are the engines for political change and evolution. Creative thinking is constitutionally protected for its personal, professional, social, and cultural roles in furthering knowledge. Viewpoints are personal ideations and understandings of topics. The greatest judicial skepticism is warranted when ideas are censored. This Article argues for refining most exacting scrutiny to reflect that commitment to the individual right of speech in a representative democracy.

Suppression of perspectives—censorship—targets the uniquely dignitary interest of each speaker's engagement with others about private and public topics. In addition, it quells political debate and all manner of pursuit of knowledge. Viewpoint restrictions impose state orthodoxy. Content suppression, on the other hand, may be understood as an abuse of power that prevents communications on broader topics.

The blurring of the content and viewpoint categories additionally appears too in the "Fuck the Draft" case, *Cohen v. California*.[213] In *Cohen*, the Court overturned the conviction of someone who wore a jacket with a vulgar message into a courthouse.[214] The guilty ruling was based on the "underlying content of the message" on the "inutility or immorality of the draft."[215] While the Court characterized the prosecution as arising from content, the matter should instead have been analyzed under the most exacting scrutiny of viewpoint discrimination. The outcome would likely remain the same, but the reasoning would be more consistent with the Court's own assertions on the matter. Cohen's arrest and conviction were not just for the content on the jacket (the vulgar phrase), but rather for his uncouth and indelicate opposition to conscription for the conflict in Vietnam.[216] The State punished him for expressing a controversial view about a contested military, social, political, and ethical issue.[217] Professor Martin Redish writes that the case might have

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China, Nicaragua, Poland, Russia, Tunisia, Turkey, Saudi Arabia, and Venezuela. In those countries, free speech specifically and constitutional order more generally are being subverted by autocratic leaders. *See* Lat. Am. News, *Democracy Faces Perfect Storm as the World Becomes More Authoritarian—IDEA Report*, RIO TIMES (Nov. 22, 2021), https://www.riotimesonline.com/brazil-news/brazil/democracy-faces-perfect-storm-as-the-world-becomes-more-authoritarian-idea/ [https://perma.cc/W6T2-JFRX] (discussing a variety of democratic erosions around the word and concluding that "[m]any democratic governments are backsliding and are adopting authoritarian tactics by restricting free speech and weakening the rule of law").

213. 403 U.S. 15 (1971).

214. *Id.* at 26.

215. *Id.* at 18.

216. *See id.* at 16.

217. *See id.* at 18.

been decided without any evaluation of content discrimination, solely on the basis of the unconstitutionality of preventing Cohen from emphasizing his message through an expletive.[218] Redish may well be correct on that score, but the case has real implications for the broader scrutiny of cases challenging content and viewpoint censorship.

Cohen should not be understood as a case solely reviewing the impact of an offensive phrase on an audience. More significant was that the Court held unconstitutional the conviction of a man who was no more than crudely condemning conscription. Its conclusion is borne out by the context and circumstances of the case. Cohen "testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[219] The Court held that "absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."[220] Yet, there is also a central First Amendment concern for the expression of his ideas that the criminal statute, and ultimate conviction, punished. That was no light matter, as it prevented Cohen from expressing strong disapprobation with his country's perpetuation of a war then raging, reported on daily by the news media, and opposed by many segments of the U.S. population. Cohen had something to say about a specific topic that the law censored. Thus, most exacting scrutiny, which I am suggesting be limited to viewpoint discrimination cases, would require the least restrictive fit between a law against disturbance of the peace by offensive conduct, because Cohen stood trial for his viewpoint.[221]

Most exacting scrutiny, as understood to be of greater rigor than either strict or exacting scrutiny, would clear up what has been a conflation of three distinguishable categories of judicial review. The Court finds that "[g]overnment discrimination among viewpoints is a 'more blatant' and 'egregious form of content discrimination.'"[222] Yet, it currently subjects to strict scrutiny both viewpoint and content discriminations when a nuanced, most exacting scrutiny standard could better stress the very hierarchy of First Amendment values already identified in judicial opinions. The Court's repeated emphasis on the differing degrees of protection afforded to viewpoint and content discriminations renders reliance on the same level of scrutiny for both, what one scholar calls an "especially unfortunate" oversimplification.[223]

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218. *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 140–42 (1981).

219. *Cohen*, 403 U.S. at 16 (quoting People v. Cohen, 81 Cal. Rptr. 503, 505 (Ct. App. 1969)).

220. *Id.* at 26.

221. *See id.* The Court has recognized that such a distinction exists in *R.A.V.* and *Reed*; albeit both cases muddled review of separate municipal laws. *See supra* notes 204–212 and accompanying text.

222. Reed v. Town of Gilbert, 576 U.S. 155, 156 (2015) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

223. Mark Strasser, *Leaving the* Dale *to Be More* Fair*: On* CLS v. Martinez *and First Amendment Jurisprudence*, 11 FIRST AMEND. L. REV. 235, 247 (2012); *see also* Enrique

Rather than perpetuating the confusion between viewpoint and content discrimination, a more discerning doctrine is necessary to differentiate between various levels of government intrusion on speech. To this end, the Court should reserve the most exacting scrutiny standard for viewpoint discrimination, while continuing to rely on strict scrutiny for content discrimination. And, as this Article has already argued, when it comes to exacting scrutiny, the State should bear the burden of proving that the regulation is substantially related to traditional government function and that the public interest outweighs speech concerns. For example, required disclosure of the identities of top donors to a charity is consistent with the government's substantial interest in preventing fraudulent abuse of charitable contributions to avoid higher tax burdens.

Contrary to the Court's recent holding in *AFP*, disclosure laws should not be held to a narrow tailoring standard, which is better reserved for restrictions on the content of messages. When a court invokes the most exacting scrutiny standard, the balance of interests favors the right to speak about topics without risk of government interference. Views on philosophy, history, sociology, and the like are perspectives that engage a speaker's private, public, and cultural concerns. They are matters the First Amendment places beyond the reach of government, unless such expressions pose an imminent threat of violence.[224] Indeed, integrity in personal opinion, camaraderie, and the arts and sciences are inchoate human attributes that the State cannot prohibit without incurring the highest level of scrutiny.[225] Although strict scrutiny sufficed in *Burson v. Freeman* to uphold some limitation for election-day

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Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 65, 90 (2017) ("The purpose-based definition of a content-based law that had been adopted by the lower courts unnecessarily conflated the First Amendment's content neutrality requirement with its viewpoint neutrality requirement.") (emphasis omitted); Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125, 135–36 (2004) ("The confusion between the absolute prohibition against viewpoint based laws and the mere presumption against the validity of content based laws may be traced to language in the decision of the Supreme Court in *Police Department of Chicago v. Mosley* . . . ."); Smolla, *supra* note 21, at 1121; Laurence H. Winer, *Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry into Cable*, 8 CARDOZO ARTS & ENT. L.J. 257, 290 n.171 (1990) ("The Supreme Court's latest statement on content-neutrality in the first amendment context seems to conflate the notions of viewpoint discrimination and content-neutrality.").

224. Such a standard is even more stringent than the imminent threat of harm test that is so well recognized and often cited from *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The protected rights to speak of topics of cultural interest involving self-expression of the autonomous person whose fundamental right to free speech is a universal feature of humanity. Hence, immediacy against viewpoint discrimination would create an even greater barrier to state censorship. On the importance of speech to liberal democracies, see generally TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

225. *See* PLUTARCH, *Of the Tranquility and Contentment of Mind*, *in* PLUTARCH'S MORALIA: TWENTY ESSAYS 153, 180 (E.H. Blakeney ed., Philemon Holland trans., 1911) (1603) ("[W]hereas in respect of the better part we are masters over [human nature], and have her at command, when there being seated and founded most surely the best and greatest things that we have, to wit, sound and honest opinions, arts and sciences, good discourses tending to virtue, which be all of a substance incorruptible, and whereof we cannot be robbed . . . .").

campaigning,[226] the outcome of the case would not be as certain under most exacting scrutiny.

The following Section demonstrates what type of clarifications are needed to distinguish exacting scrutiny from most exacting scrutiny, just as this Section of the Article sought to explain the need to disentangle strict scrutiny from most exacting scrutiny. Such approaches would help courts better contextualize various forms of restrictions on speech, rather than formalistically lumping together analytically distinct categories.

2. Formalism or Exacting and Most Exacting Scrutiny

The exacting scrutiny standard, which in its present state of disarray lacks coherence, appears in a series of inconsistent opinions that second-guess legislative processes. These opinions purport to present some formalistic structure, which, upon closer examination, does not stand up to historical scrutiny.[227]

The Court's requirement of narrow tailoring limits lawmakers setting policies with incidental effects on speech. By invoking narrow tailoring in *AFP*, the Court single-handedly dismantled a key provision in the State's power to gather and examine materially important information used to investigate attempted tax evasion. In doing so, the Court functioned as a super-state legislature, far outside the bounds of Article III. Disclosure requirements certainly can be abused by a government actor seeking to interfere with charitable associations, but they also operate to prevent

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226. 504 U.S. 191, 198 (1992).

227. *See Multifactoral*, *supra* note 103, at 1040; United States v. Stevens, 559 U.S. 460, 470 (2010) (rejecting "ad hoc balancing of relative social costs and benefits"). The Supreme Court's recent turn to a more formalistic approach on free speech has created categories of interpretation, including exacting scrutiny, that substitute what an older generation of scholars, the pragmatic-minded legal realists like Karl Llewellyn and Felix Cohen, regarded as being empty, general propositions bereft of context. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 12 (Quid Pro Books 2012) (1930) ("We have discovered in our teaching of the law that general propositions are empty. We have discovered that students who come eager to learn the rules and who do learn them, *and who learn nothing more*, will take away the shell and not the substance."); *see also* Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 188 n.6 (2009) ("Legal realists, on the other hand, assert that ideology and contextual factors are a driving force behind judicial decision-making, not simply doctrine."); David L. Gregory, *Labor Law and the Myth of a Value-Free Legal Doctrine*, 62 TEX. L. REV. 389, 395–96 (1983) (reviewing JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983)) ("The American legal realist movement eloquently maintained that 'law' is a creature of judicial values, reflecting fluid, contextual, personal, social, economic, and political choices."). Constitutional structure creates different roles for the judiciary than for the legislature; long ago, Herbert Wechsler presented constitutional interpretation in neutral terms as requiring decision-making based on historical development rather than political expediency. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).

misrepresentation in a range of areas that include political elections,[228] tax collections,[229] union organizing efforts,[230] and informed health choices.[231]

Identifying the appropriate level of scrutiny in cases with communicative implications is not an objective exercise but one that requires judicial choices implicating political outcomes.[232] Consistent tests are necessary to avoid judicial fiat. Without a clear standard of exacting scrutiny, what remains is a jumble prone to judicial manipulation. Some exacting scrutiny cases apply a standard analogous to intermediate proportionality, others claim the label for strict scrutiny, and a handful deploy most exacting scrutiny interchangeably for content and viewpoint discrimination.[233] The jigsaw puzzle thereby created has several pieces out of place. Speaking more technically, this lack of judicial precision creates confusion for litigators and authorizes judges to alter precedents based on personal and political predilections.[234]

It would be better to make the various gradations of heightened scrutiny succinct and clear. Exacting scrutiny should be reserved for disclosure requirements, strict scrutiny for content-based restrictions, and most exacting scrutiny for the review of viewpoint discrimination. These each represent separate forms of proportionality. Speech considerations carry the greatest weight when reviewing viewpoint discrimination. Viewpoint discrimination carries great weight in claims of content discrimination and is only of lesser importance in addressing noneconomic disclosure regulations.

Formalistic understandings and analyses strongly favor reliance on free speech categories to leverage jurocentrism against legislative policies.[235] They tend to

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228. *See* Citizens United v. FEC, 558 U.S. 310, 366 (2010) (discussing the burden on speech from disclosure requirements of the Bipartisan Campaign Reform Act of 2002).

229. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2380 (2021) (discussing Internal Revenue Service Form 990, which "requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year (or, in some cases, who have given more than 2 percent of an organization's total contributions).").

230. *See* Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365, 365 (1990) ("Petitioner Guidry, a former official of respondent union and trustee of one of respondent pension plans, pleaded guilty to embezzling funds from the union in violation of § 501(c) of the Labor–Management Reporting and Disclosure Act of 1959 (LMRDA).").

231. *See* Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 76 IND. L.J. 525, 570 (2001) (discussing various disclosure requirements in health care meant to prevent fraud).

232. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 839 (1935) ("[E]ven the most cynical practitioner will recognize that the positively existing ethical beliefs of judges are material facts in any case because they determine what facts the judge will view as important and what past rules he will regard as reasonable or unreasonable and worthy of being extended or restricted.").

233. *See infra* Part II.

234. *See* GINSBURG & HUQ, *supra* note 224, at 144 ("Rather than enabling meaningful interbranch interaction, the Court has thus hobbled one side while inviting the other's aggressive action.").

235. For alternatives to the jurocentric perspective, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U.

oversimplify the multiple countervailing policy concerns, including social, political, and economic factors. The use of absolute-sounding judicial rules has created categories of decision-making that often second-guess federal and state exercises of legislative authority. The Court repeatedly deviates from judicial modesty, separation of powers, and federalism by relying on an incoherent exacting scrutiny standard to strike legislation with only secondary effects on speech.

Professors Toni Massaro and Helen Norton similarly argue that "the Court's purported insistence on formal neutrality is normatively misguided in failing to acknowledge the ways in which factual distinctions sometimes should make a legal difference."[236] Examining lower courts' decisions in the wake of the Court's insistence that all content restrictions must be subject to strict scrutiny, Professor Ashutosh Bhagwat found they "are not following the Supreme Court's marching orders."[237] Formalistic abstractions discount particularities of cases; they instead rely on bright-line rules that elide regulations of economic matters like commercial speech, warning labels on tobacco products, and markings on commercial vehicles with readily distinguishable matters that implicate core free speech values.[238] Bright-line rules tend to gloss over nuances critical to judicial reasoning. Without greater consistency, clarification, and particularity, the exacting scrutiny standard is prone to operate as a legal sophism whose rhetorical inconsistencies lend themselves to deregulatory adjudications.

The Court's penchant for wielding heightened scrutiny against ordinary regulations is evident from its opinion in *Sorrell v. IMS Health Inc.* In that case, pharmaceutical manufacturers and data miners successfully brought a First Amendment challenge to a Vermont law that prohibited the nonconsensual "s[ale],

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L. REV. 1243, 1248 (2019) ("[A]t least some constitutional provisions employ terms that are vague or open-textured; these provisions do not provide bright-line rules. Such provisions create a zone of underdeterminacy that allows for doctrinal dynamism consistent with fixed meaning."); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 464 (2007) (arguing for a functional form of construction that accepts a variety of constructive work done by extraconstitutional rules); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489–97 (2006) (arguing that constitutional doctrine is changed through a variety of governmental institutions).

236. Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1671 (2021) (emphasis omitted).

237. Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 816 (2007); *see also* William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 912 (finding that lower courts reviewing commercial speech cases were resisting the use of strict scrutiny despite the Supreme Court's leanings to that stringent form of interpretation); Kyle Langvardt, *A Model of First Amendment decision ma at a Divided Court*, 84 TENN. L. REV. 833, 851 (2017) (finding evidence that lower courts were minimizing the implications of the Supreme Court's "hard line" strict scrutiny test).

238. *See* Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811, 821 (2022) (listing various content regulations on the secondary effect of speech that do not receive First Amendment protections).

license, or exchange for value" of pharmacy records.[239] Marketers and manufacturers purchased that information about doctors' prescription histories to promote and market various expensive drugs.[240] A majority of the Court rejected a privacy challenge to the law, holding that marketing such data was subject to "heightened judicial scrutiny" because it was a form of free expression.[241] The majority relied on that ambiguous legal term to find the State regulation to be "a burden based on the content of speech and the identity of the speaker."[242] It held that Vermont's legislation disfavored "speakers with diverse purposes and viewpoints."[243] Thereby, the Court rendered a state's efforts at democratic lawmaking a nullity in the area of health care and privacy.

Such rigid First Amendment reasoning, without balancing the State's interest in preserving privacy, was dismissive of a legislative enactment designed to relieve pharmaceutical consumers from soaring drug prices.

Lack of precision in its analysis left the Court later conceding that "Congress is interested both in collecting government debt and in protecting consumer privacy."[244] Vermont and other states should not be preempted from doing the same.

The Court's bright-line test for content discrimination ignores those legitimate uses of power that have only a second-order relevance to speech. In *United States v. Stevens*, the Court announced a sweeping conclusion that all regulations on communications, save a few "historically" unprotected categories, receive content-based heightened review.[245] The *Stevens* Court held unconstitutional a federal statute that prohibited the creation, possession, or distribution of videos depicting the torture of animals.[246] The majority listed a finite and enumerated set of historically unprotected speech.[247] Outside a small number of judicially created, low-value categories—obscenity, defamation, fraud, incitement, and statements integral to criminal conduct—judges must undertake strict scrutiny.[248] Yet the Court also confused the level of scrutiny required of cases outside those enumerated categories,

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239. Sorrell v. IMS Health Inc., 564 U.S. 552, 558–59 (2011) (quoting VT. STAT. ANN. tit. 18, § 4631(d) (West 2011).

240. *See id.* at 558.

241. *Id.* at 563.

242. *Id.* at 567.

243. *Id.* at 564.

244. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2349 (2020); *cf. id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part) ("No one questions that protecting consumer privacy qualifies as a legitimate and 'genuine' interest for the government to pursue.").

245. 559 U.S. 460 (2010). *Stevens* listed low-value categories that, a later opinion explained, guarded speech against "a wholly new category of content-based regulation." Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794 (2011). I have sought to demonstrate that some categories listed by Chief Justice Roberts, including obscenity and incitement, were developed during the twentieth century, not 1791, as he claimed. *See* Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 506–13 (2015).

246. *Stevens*, 559 U.S. at 482.

247. *Id.* at 468 ("[T]he First Amendment has 'permitted restrictions upon the content of speech in a few limited areas' . . . .") (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

248. *See* United States v. Alvarez, 567 U.S. 709, 717–18, 724–25 (2012).

calling first for "most exacting scrutiny" and then convoluting the term with "exacting scrutiny."[249] This inconsistency then carried over into other categories, culminating in *AFP* with its use of the narrow tailoring test in "exacting scrutiny" analysis. Exacting scrutiny is better thought of as a heightened form of review that balances countervailing government concerns where the burden on speech is incidental to traditional government functions.

II. JUDICIAL CATEGORIES OF SCRUTINY

Lack of judicial precision in the formulation and application of exacting and most exacting scrutiny empowers judges to use formal labels to obfuscate precedents. Moreover, lack of exactitude provides confusing guidance to lower courts, legislators, and the public. It incentivizes opportunistic First Amendment litigation that variously aims at deregulation. Doctrinal inconsistency reflects poorly on judicial restraint as it sweeps away policies designed precisely to meet legitimate ends. Hence, in *AFP* the Court eviscerated a state's rational effort to prevent consumer fraud by requiring deanonymization of some larger charitable donors.

We have seen that greater exactitude in reasoning can be obtained by simply placing exacting scrutiny as a fourth tier of review somewhere between the intermediate scrutiny and strict scrutiny standards. This alteration to existing doctrine would set a method of review capable of weighing the interest of speech, countervailing government concern, regulatory fit, alternative means of communication, and relevant free speech principles. Where speech values are at their zenith—in matters of self-expression, political communication, and pursuit of knowledge—the closest judicial review is necessary of restrictions on communication. The most exacting scrutiny method of analysis is best fit to determine the constitutionality of viewpoint regulations and prior restraints. In principle, this is the rule that has endured since *Texas v. Johnson*.[250] It is in this area, not only of content discrimination but more precisely in viewpoint discrimination that courts should apply the least restrictive standard for speech regulation. Narrow tailoring should be left to strict scrutiny, prohibiting content discrimination; hence, that level of review is too stringent in the noneconomic intermediate scrutiny realm, where substantial government interests should suffice to balance speech and government interests. Distinguishing between these various standards of heightened scrutiny in the First Amendment field could create a better framework for contextual determinations of whether a law is an exercise of traditional government functions or primarily aimed at suppressing expression.

Levels of scrutiny have deep roots in First Amendment doctrine, tracing back to the Warren Court's initial elaborations during the 1960s.[251] Courts tend to rely on

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249. *Id.* at 724 (finding that other than in cases of a few enumerated categories the Court "has applied the 'most exacting scrutiny'" and then finding that the Stolen Valor Act did "not satisfy exacting scrutiny") (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)).

250. 491 U.S. 397, 414 (1989) ("If there is bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

251. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1284 (2007)

First Amendment categories as lenses through which to evaluate statutes and other government actions. At its most formalistic, the Supreme Court refers to categories as absolutes. For example, in *Reed*, a majority found that regardless of legislative purpose, courts must review content-based regulations through strict scrutiny.[252] Yet closer examination of the law demonstrates that this conclusion, amounting to a requirement that all laws, even those with only a secondary effect on speech, be facially neutral, takes too far the presumption of heightened review in all cases of content regulation. Justice Breyer pointed out in a concurrence to *Reed* that the principle of content neutrality "should not always trigger strict scrutiny" but can rather be applied to "identify unconstitutional suppression of expression."[253] Justice Kagan, in her concurrence to the case, listed a variety of ordinary uses of police powers that incidentally affect the content of communicated information but raise no constitutional concerns at all.[254] They include ordinances that regulate speed limit signs posted on roads, address plates affixed to residential houses, and markers describing historical sites.[255] Such regulations of content, as she pointed out, need only be reasonable without having to pass the stringent test of strict scrutiny.[256] Missing in the *Reed* majority is any distinguishment based on First Amendment values.

To the contrary, to pick the appropriate level of review requires assessment of whether the law harms "the [First] Amendment's expressive objectives."[257] Moreover, the Amendment should be understood within the broader meaning of any other relevant constitutional provisions.[258] The levels of judicial review should be advanced by courts as analytical gradations for balancing competing interests rather than as formalistic rules of decision.[259]

("Before 1960, what we would now call strict judicial scrutiny—that is, inquiries into whether infringements on constitutional rights are necessary or narrowly tailored to promote compelling governmental interests—did not exist. . . . By the end of the 1960s, by contrast, the narrowly-tailored-to-a-compelling-interest formula had not only become sharply defined, but also assumed a dominant importance in diverse fields of constitutional law.").

252. Reed v. Town of Gilbert, 576 U.S. 155, 166 (2015) ("Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.").

253. *Id.* at 176 (Breyer, J., concurring) (emphasis omitted).

254. *Id.* at 180–81 (Kagan, J., concurring).

255. *Id.*

256. *Id.* at 183.

257. *Id.* at 175 (Breyer, J., concurring).

258. Dean Erwin Griswold argues that balancing is a "'comprehensive' or 'integral' approach" that "accepts the task of the judge as one which involves the effect of all the provisions of the Constitution, not merely in a narrow literal sense, but in a living, organic sense, including the elaborate and complex governmental structure which the Constitution . . . has erected." Erwin N. Griswold, *Absolute Is in the Dark—a Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 172–73 (1963).

259. *See* Clay Calvert, *Escaping Doctrinal Lockboxes in First Amendment Jurisprudence: Workarounds for Strict Scrutiny for Low-Value Speech in the Face of* Stevens *and* Reed, 73 SMU L. REV. 727, 772–73 (2020).

Ultimately, well-reasoned judgments will be needed to determine applications within the meaning of the Free Speech Clause. However, even where the most exacting scrutiny applies, such as in the flag-burning cases, judicial review requires "careful consideration of the actual circumstances surrounding such expression."[260] Without such in-depth assessment, categories such as exacting scrutiny become rhetorical tools in the hands of judges. The balance can rely on categories as rules of thumb[261] to better engage in materially circumstantial analysis and to be consistent with precedents. Some regulations of expression require greater judicial skepticism than others; levels of scrutiny provide guidance. An ever-shifting standard of exacting scrutiny has the opposite effect on precedents. It conflates ordinary laws with those that censor the content or viewpoint of messages.

In defining categories, it is important to recognize that they do not determine the reach of the First Amendment, having come into the judicial repertoire over a century and a half after ratification of the Bill of Rights. Be that as it may, they should be understood and clearly demarcated to be frameworks for weighing countervailing government concerns, determining the likelihood that the regulations will accomplish the stated policies, identifying whether there are less restrictive regulatory alternatives, considering any doctrines relevant to adjudication, and identifying applicable free speech principles—be they self-expression, democratic engagement, or pursuit of knowledge. The categories of viewpoint, content, or association should reference the extent of proof the government must present to demonstrate that a burden on speech does not violate the First Amendment. The real question, though, is whether the regulation suppresses core speech interests in ideas on topics like art, science, politics, and other knowledge essential to the exercise of democracy and personal liberty.

In a legal culture that respects individuality and civility, selecting between exacting scrutiny, strict scrutiny, and most exacting scrutiny should be undertaken by keeping a focus on the principal functions of the First Amendment. For some, the value of free speech will lie in enjoying their choices of entertainment; for others, its value will be preservation of open political debate; and for others, self-development and the spread of information is its greatest worth.[262] At its core, the Free Speech Clause prevents the imposition of orthodoxy. The legal realm, however, requires definitions; it is one thing for constituents to disagree and quite another for the judiciary to provide inconsistent guidelines for the resolution of cases and the drafting of legislation.

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260. Texas v. Johnson, 491 U.S. 397, 409 (1989).

261. I am borrowing this term from Justice Breyer's concurrence in *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring). Space does not allow me to address the several issues of *Brunetti*. In that case, the majority found provisions of the Lanham Act prohibiting Trademark Office from registering "immoral" or "scandalous" trademarks to be unconstitutional forms of viewpoint discrimination. *Id.* at 2299. I regard such regulation to be commercial and therefore unworthy of full most exacting scrutiny protection. *But see* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 69 (2007). My critique of the case will require elaboration in a separate article.

262. *See* Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1027–42 (2015) [hereinafter *Free Speech Constitutionalism*].

Transparent constitutional doctrine that is grounded in free speech values is necessary to prevent arbitrary government intrusion into the procedural and substantive rights of people to freely express themselves. Moreover, balance between exacting scrutiny, strict scrutiny, and most exacting scrutiny preserves expression while relying on different gradations of review based on the free speech values at stake. Evaluating whether First Amendment principles, secondary speech concerns, or traditional government functions are at play should help determine the appropriate level of scrutiny.

The Roberts Court's adaptations of the exacting scrutiny standard have been inconsistent. Such precedents overly simplify the significance of distinct categories, being both formalistic and outcome-determinative in *Citizens United v. FEC*, *McCutcheon v. FEC*, and *United States v. Alvarez*.[263] The repeated flux, culminating with last term's *AFP* decision, renders the standard prone to the caprice of judges' understandings of federalism, privacy, campaign disclosure, audience, and investigation.

Justice Kagan recently pointed out that the majority has turned the First Amendment into a judicial device against legislative efforts to protect individual rights and to advance general welfare through economic and regulatory policies.[264] A balance of values—speech rights, government purposes, means/ends analyses, and alternatives to the challenged regulation—must provide the context to causes of action challenging restrictions on communications. "Speech," as Kagan went on to say, "is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices."[265] Inconsistency in judicial decisions reduces trust in the High Court's opinions. In *Janus v. AFSCME*, the Roberts Court struck a collective bargaining provision of a labor law. The reasoning in *Janus* was particularly suspect since the majority played so loose with the exacting scrutiny standard, claiming it to be derived from the field of commercial speech.[266] This was opposite of its earlier assertion in *McCutcheon* that equated exacting scrutiny with strict scrutiny in the context of the aggregation of election contributions.[267]

Inconsistencies abound throughout current exacting scrutiny jurisprudence, but the contradictions do not stop there. Formalism also runs through recent cases that have relied on the First Amendment in matters peripherally concerned with speech. The 2017 majority in *Expressions Hair Design v. Schneiderman* elevated vendors'

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263. *See supra* Section I.A.2.

264. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) ("[M]ost alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy.").

265. *Id.* at 2502.

266. *Id.* at 2477 ("The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech.").

267. *See* McCutcheon v. FEC, 572 U.S. 185, 197 (2014) ("Under exacting scrutiny, the [g]overnment may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.").

interests above consumer protection by invoking the First Amendment. Merchants claimed their speech was affected by New York's prohibition against imposing a surcharge on credit card sales.[268] They asserted that the law required them to label prices contrary to their commercial interests and, hence, intruded upon their right to speak freely about products.[269] The case could have been decided on the basis of precedent that had found there were "material differences between disclosure requirements and outright prohibitions on speech."[270]

Here, exacting scrutiny might have helped, but was not used by the Court. The requirement that merchants be transparent about their pricing schemes was arguably of substantial government interest.[271] The law, which dealt with surcharges on credit card sales, was not ideologically driven; it did not interfere with vendors' desire to advance their viewpoints on those matters squarely in the zone of the Free Speech Clause: self-expression; political speech; and dissemination of knowledge about matters such as philosophy, science, architecture, sociology, aesthetics, and the like.[272] Neither was there any censorship of merchants who could have chosen alternative modes for communications to criticize the policy and thereby seek to effectuate regulatory change. The case involved a law that required retailers to divulge pricing information that the state found was helpful to purchasers, with no more than a peripheral effect on the constitutional value of speech.[273]

Schneiderman's reliance on the First Amendment to analyze a matter only tangentially related to speech ignored the many regulations that do not give rise to any heightened scrutiny, including labeling of refrigerators, air conditioners, water heaters, and other electronic consumer goods;[274] "Rx only" prescription drugs;[275] alcoholic beverages likely to cause birth defects tied to pregnant women's drinking;[276] hazardous substances to be kept out of reach from children;[277] markings on commercial vehicles;[278] pharmaceuticals;[279] mandatory listings of sex offenders;[280] tobacco warnings;[281] bank titles;[282] and Federal Deposit Insurance

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268. *See* 581 U.S. 37, 39–40, 47 (2017); N.Y. GEN. BUS. LAW § 518 (McKinney 2022).

269. *Schneiderman*, 581 U.S. at 42.

270. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 650 (1985).

271. Such an analysis is not novel. In *Turner Broad. Sys., Inc. v. FCC*, the Court found substantial government interest in must-carry rules on cable operators. 520 U.S. 180, 193 (1997).

272. *See Free Speech Constitutionalism*, *supra* note 262, at 1028–29 (explaining a judge's characterization of the core principles falling under the First Amendment).

273. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (developing the doctrine of First Amendment review for speech that "does 'no more than propose a commercial transaction'") (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973)).

274. *See* 42 U.S.C. §§ 6292, 6294.

275. *See* 21 U.S.C. § 353(b)(4)(A).

276. *See* 27 U.S.C. § 215(a).

277. *See* 15 U.S.C. § 1261(p)(1)(J)(i).

278. *See* 49 C.F.R. § 390.21 (2019).

279. *See* 21 C.F.R. § 201.56 (2015).

280. *See* 42 U.S.C. §§ 20901–20932.

281. *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333.

282. *See* 18 U.S.C § 709.

Corporation notifications.[283] Ultimately, the Court's reasoning was ambiguous as to whether it regarded the matter to be about compelled speech or a regulation on communications. Exacting scrutiny should provide a clearer signpost for proportional scrutiny that treats secondary effects on speech differently than censorship of ideas and perspectives.

CONCLUSION

Exacting scrutiny, strict scrutiny, and most exacting scrutiny should be distinctly defined. The current Court too often relies on them as somewhat ambiguous rhetorical devices to strike regulations only peripheral to the First Amendment concerns of personal ideas, public participation, or discourse. Their contents should not unfold on a case-by-case basis with the concomitant uncertainty.

AFP is the latest reminder of how much the exacting scrutiny standard is currently in flux. The decision's resort to narrow tailoring review foreclosed meaningful deference to a state's regulatory scheme enacted to prevent fraudulent charitable contributions. State law authorized the exercise of traditional government functions to monitor, investigate, and prosecute tax evasion.

The exacting scrutiny standard should contextually weigh policy, its secondary effect on speech, regulatory fit, and alternative channels of communications. Sufficiently important government interests in donor transparency should not be dismissed by courts without weighing them against affected speech. Proportionality review is warranted when there is no suppression of topics or views.[284]

At present, exacting scrutiny jurisprudence remains significantly undertheorized. The Court regularly shifts the burden of proof that litigators must demonstrate to mean strict scrutiny or something that sounds like a more stringent version of intermediate scrutiny.[285] This unpredictable, malleable, and hybrid test is prone to opportunistic reliance on free speech claims that challenge traditional forms of regulation.[286]

Moreover, to date, the most exacting scrutiny standard has received insufficient scholarly engagement, despite the Court's increased reliance on it in a variety of settings. Most exacting scrutiny should be restricted to allegations of viewpoint discrimination, which raise the greatest Free Speech Clause concerns. As a substantive matter, this method of review should require state policies to be least restrictive when they target opinions that are expressive of private, political, or ideological preferences. Separate from the Court's current commitment to strict

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283. *See* 12 U.S.C. § 1828(a)(1)(B) (2006) ("Each sign required under subparagraph (A) shall include a statement that insured deposits are backed by the full faith and credit of the United States Government.").

284. *See* Citizens United v. FEC, 558 U.S. 310, 366–67 (2010).

285. *See* Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 384 (2022) ("[T]he Court's exacting scrutiny jurisprudence is contradictory. And although the Court has been clear that exacting scrutiny is distinct from the three traditional tiers of scrutiny, it is not clear how exacting scrutiny is distinguishable from intermediate scrutiny on one end, or strict on the other.").

286. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2384 (2021).

scrutiny in matters of content discrimination, most exacting scrutiny makes the best sense for review of viewpoint discrimination cases.

A court committed to differing levels of scrutiny should not be formulaic. These methods of analyses should reflect fundamental principles of free speech protection: self-expression, self-governance, and the search for truth.[287] Clear distinctions between exacting scrutiny, strict scrutiny, and most exacting scrutiny would provide functional means for checking governmental censorship or imposed orthodoxy. Proportional analysis would better explain why authority to detect and punish fraud does not implicate core free speech.

287. *See Free Speech Constitutionalism*, *supra* note 262, at 1027–42 (analyzing and critiquing three opposing interpretive theories).

In the Best Interests of Whom?: An Analysis of Judicial Bias in Custody Disputes Involving Transgender Children

CADEN POCIASK*

Anti-transgender discrimination and bias loom large in many areas of our society, but perhaps one of the most concerning settings is within the four walls of a courtroom. Evidence suggests that judicial decision making in custody determinations involving transgender children are influenced by anti-transgender bias. In this Note, I examine the current best practice for treating transgender children, the affirmative model, and explore the legal landscape of custody cases involving parents who disagree on how to treat their transgender child. I then suggest a model of comprehensive judicial education reform to help eliminate anti-transgender bias from family courts in the United States.

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INTRODUCTION

In 2019, a child custody dispute in Dallas, Texas, reignited the public debate on transgender minors, leading several conservative lawmakers to vow to ban gender-affirming medical treatment for minors.[1] The custody dispute began as many do—two parents vehemently disagreeing with each other on a material aspect of their child's life. Specifically, the parents of then five-year-old Luna[2] completely disagreed on how to treat their child's evolving gender identity problems and had to resort to the courts to resolve the issue.[3]

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1. *See, e.g.*, EJ Dickson, *How a Texas Custody Case Became a Terrifying Right-Wing Talking Point*, ROLLING STONE (Oct. 28, 2019, 4:39 PM), https://www.rollingstone.com/culture/culture-features/transgender-custody-case-dallas-anne-georgulas-mark-younger-904433 [https://perma.cc/ZRB5-AW34]. *See infra* notes 8–10 and accompanying text for the procedural history of Luna's case.

2. In this Note, children identifying as transgender are referenced by their preferred name and gender pronouns, regardless of the legal status of their name or gender marker in accordance with current best practices. *See Transgender People*, GLAAD MEDIA REFERENCE GUIDE (2021), https://www.glaad.org/reference/transgender [https://perma.cc/A9DP-4THQ].

3. *See In re* Ja.D.Y. & Ju.D.Y., No. DF-15-09887-S (Dallas Cnty. Dist. Ct. Aug. 3, 2018).

Luna was assigned male at birth, but at just three years old, she requested to wear dresses, and by five, she insisted she was a girl.[4] When Luna's deeply held conviction had still not subsided years later, her parents took to the courts, and Luna's gender identity quickly became the central issue of the custody dispute. Luna's mother supported her child's gender exploration, while Luna's father strongly opposed allowing his child to live as a girl.[5] Despite Luna receiving a diagnosis of Gender Dysphoria in Childhood (GDC)[6] from at least two clinicians, Luna's father insisted on a "wait-and-see" approach, believing that treating Luna as a boy would, over time, reverse the course of Luna's gender identity disorder.[7] Luna's father expressed that he did not believe Luna was transgender at all; instead, he believed that his ex-wife, Luna's mother, had pressured and convinced Luna into believing she was a girl and that Luna should not be given the power to make that choice at such a young age.[8]

In 2018, Luna's mother petitioned the Dallas County District Court to request modification of custody; she alleged that the father's treatment, or lack thereof, of Luna's GDC inflicted serious harm and did not align with Luna's best interests.[9] At this point, Luna had been living, and was known by most people in her life, "as a girl" for a about a year or so.[10] At first, the court was neutral on the issue of gender identity: it ordered independent psychological evaluations before making a determination and, in the interim, barred either parent from pushing Luna toward one gender expression or the other, essentially putting any further steps in Luna's social

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4. *See* Katelyn Burns, *What the Battle Over a 7-Year-Old Trans Girl Could Mean for Families Nationwide*, VOX (Nov. 11, 2019, 9:00 AM), https://www.vox.com/identities/2019/11/11/20955059/luna-younger-transgender-child-custody [https://perma.cc/8NYW-SHKZ]; Isaiah Mitchell, *Court Strips James Younger's Father of Custody but Says Permission Needed for Puberty Blockers, Gender Surgeries*, THE TEXAN (Aug. 5, 2021), https://thetexan.news/court-strips-james-youngers-father-of-custody-but-says-permission-needed-for-puberty-blockers-gender-surgeries/ [https://perma.cc/U5C7-MQHH].

5. *See* LaVendrick Smith, *Dallas Child-Custody Battle Hinges on 7-Year-Old's Gender Identity, Draws Attention of Abbott, Cruz*, DALL. MORNING NEWS (Oct. 24, 2019, 12:07 PM), https://www.dallasnews.com/news/courts/2019/10/24/dallas-child-custody-battle-hinges-on-7-year-olds-gender-identity-draws-attention-of-abbott-cruz [https://perma.cc/6YC9-W43B].

6. See *infra* Section I.A for an explanation of the terms gender dysphoria and transgender child.

7. Transcript of Hearing at 149–50, *In re* Ja.D.Y. & Ju.D.Y., No. DF-15-09887-S (Dallas Cnty. Dist. Ct. Jul. 10, 2018).

8. *See id.* at 157. When asked how he felt about Luna being allowed to dress as a girl, Luna's father responded "It's preposterous. [Luna] has at various times been a frog, but I don't feed him insects. He has at various times been a tree, and I don't water him . . . the idea that we are to affirm the choices of wonderful human beings who have these undeveloped rational faculties is completely silly." *Id*.

9. First Amended Petition to Modify the Parent-Child Relationship at 2, *In re* Ja.D.Y. & Ju.D.Y., No. DF-15-09887-S (Dallas Cnty. Dist. Ct. Jul. 2, 2018) (alleging "the Father has engaged in increasingly aggressive behavior, including physical force, toward the mother. His actions are clearly intended to threaten and intimidate the mother. Further, the Father has engaged in emotionally abusive behavior toward the child . . . .").

10. Reporter's Record at 9–11, *In re* Ja.D.Y. & Ju.D.Y., No. DF-15-09887-S (Dallas Cnty. Dist. Ct. Jul. 10, 2018).

transition to a halt and maintaining the status quo.[11] Luna was left to live in the in-between—as a girl at her mother's and as a boy at her father's—until further court action.[12] However, the 2018 order is far from the end of this story.

Disappointed by the court's middle ground determination, Luna's father took to social media to further his cause, announcing to the masses that his ex-wife was attempting to "chemically castrate" his child and the courts were going to let her—turning what was once a private family dispute into the "#SaveJames" social media campaign that blew up in 2019.[13] The cause truly exploded in October 2019, when the parents' decision-making authority was brought to a jury vote, which ultimately recommended sole custody be awarded to Luna's mother.[14] In the following days, the plea to "#SaveJames" made its way into the social media feeds of prominent politicians.[15] In Senator Ted Cruz's view, the decision was "horrifying & tragic."[16] Donald Trump Jr. added, "[t]his is child abuse. People need to start to stand up against this bullshit."[17] Texas Governor Greg Abbott boldly announced that the Texas Department of Family and Protective Services would be investigating the situation,[18] and in the subsequent years he has continued to act on his commitment

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11. Rulings Exhibit A, *In re* Ja. D.Y. & Ju. D.Y., No. DF-15-09887-S (Dallas Cnty. Ct. Aug. 3, 2018).

12. *See id.*

13. "Save James" references Luna's birthname. The "Save James" Facebook page is still active today and has amounted nearly 40,000 followers. *Save James*, FACEBOOK, https://www.facebook.com/helpsavejames [https://perma.cc/XHW4-UWM8]. The page's administrators advocate against gender-affirming treatments for transgender children like Luna and occasionally provide updates regarding the twins (Luna and her brother Jude) involved in the Younger custody dispute. *Id.* The posts retain Luna's birthname and actively resist affirming Luna's gender identity in any way, often including not-so-subtle jabs at Luna's mother. For instance, on May 7, 2022, the page posted a birthday message to the twins with photos of two birthday cards, a gift bag, and text that read, "Happy 10th Birthday to James and Jude! Jeff brought gifts and cards to his sons, but we don't know if *that woman* will allow the boys to see them. Either way, they'll know someday. Soon. Jeff cannot be bought off, and he won't back down. Help Jeff #SaveJames." Save James, *10th Birthday Well-Wishes*, FACEBOOK (May 7, 2022) (emphasis added), https://www.facebook.com/helpsavejames [https://perma.cc/3E7C-4D2H].

14. *See* EJ Dickson, *How a Texas Custody Case Became a Terrifying Right-Wing Talking Point*, ROLLING STONE (Oct. 28, 2019, 4:39 PM), https://www.rollingstone.com/culture/culture-features/transgender-custody-case-dallas-anne-georgulas-mark-younger-904433 [https://perma.cc/P9XU-2NDW]. Interestingly, Texas allows parties to a "suit affecting the parent-child relationship" to request a jury trial. *Section 9 Jury Trials*, TEX. DEP'T OF FAM. & PROTECTIVE SERVS. (Oct. 2015), https://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_9_Jury_Trials.pdf [https://perma.cc/VH7X-JHH7].

15. *See id.* See *infra* notes 16–20 and accompanying text for examples.

16. Ted Cruz (@SenTedCruz), TWITTER (Oct. 23, 2019, 8:01 PM), https://twitter.com/SenTedCruz/status/1187157024888496128 [https://perma.cc/N2QW-U2QA].

17. Donald J. Trump Jr. (@DonaldJTrumpJr), TWITTER (Oct. 24, 2019, 7:44 AM), https://twitter.com/DonaldJTrumpJr/status/1187334051386089472 [https://perma.cc/G7K9-EKNL].

18. Greg Abbot (@GregAbbott_TX), TWITTER (Oct. 23, 2019, 7:58 PM), https://twitter.com/GregAbbottTX/status/1187156266449330176 [https://perma.cc/4LH6-

to preventing families from affirming their transgender child's gender identity.[19] Representative Matt Krause vowed to propose legislation to ban puberty blockers, a reversible gender-affirming medical treatment, from being prescribed to minors.[20] By mid-2022, nearly half of states had followed suit, proposing—and in several cases passing—legislation specifically targeted at transgender youth.[21] Luna was the posterchild for what quickly became a loud and misguided cause: the quest to put an end to the affirmative treatment of transgender youth—most advocated for by those with little understanding of the true medical and psychological implications of the suppression of children's gender variance.

Several proceedings followed the jury's decision in Luna's case. The most recent at the time of this Note was in August of 2021, in which sole medical decision-making power was granted to Luna's mother with the caveat that any gender-affirming medical treatment would require the consent of both parents.[22] Despite gag orders placed on both parents,[23] the case continues to attract media attention, and the cry to "#SaveJames" and similarly situated children from the perceived harms of gender-affirming medical and social treatment has transformed into a key campaign issue for many conservative lawmakers.[24]

What makes Luna's case unusual is not that she is transgender. Rather, her case is unusual because it offers a unique opportunity to expose the lack of education and understanding about transgender children in the United States,[25] and the anti-transgender bias that persists as a result. Specifically, the political commentary that accompanied Luna's case was fundamentally flawed. It relied on the presumption that Luna, a seven-year-old child, would immediately be subject to invasive and irreversible medical procedures should her mother be awarded sole medical decision-

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19. *See* Juan Perez Jr., *Texas Judge Halts Abbott's Transgender Investigation Order*, POLITICO (Mar. 11, 2022, 7:33 PM), https://www.politico.com/news/2022/03/11/texas-judge-abbott-transgender-investigation-order-00016802 [https://perma.cc/S6DU-NM95].

20. Matt Krause (@RepMattKrause), TWITTER (Oct. 23, 2019, 9:03 PM), https://twitter.com/RepMattKrause/status/1187172853621428226 [https://perma.cc/LHC3-JNCQ].

21. *See* Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 22, 2022, 6:00 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418 [https://perma.cc/VAB4-FN9N].

22. Georgulas v. Younger, No. DF-15-09887 (Dallas Cnty. Dist. Ct. Aug. 3, 2021) (order granting motion to compel and motion for enforcement).

23. *Id.* at 2–3.

24. *See, e.g.*, Dad Talk Today with Eric Carroll, *Save James Update with Jeff Younger*, YOUTUBE (Aug. 5, 2021), https://www.youtube.com/watch?v=9Km8gCJur_k [https://perma.cc/A2MD-YEXL]; Save James, FACEBOOK, https://www.facebook.com/helpsavejames [https://perma.cc/X8LM-GLYM]; Megan Munce, *Texas Senate Resumes Push to Ban Transition-Related Medical Care for Transgender Children, Days After Bill Failed in House*, TEX. TRIB. (May 18, 2021), https://www.texastribune.org/2021/05/17/texas-transgender-children-medical-care [https://perma.cc/FYC9-X5VS] ("[Bob] Hall said the bill was 'being done with love' as he and Sen. Kelly Hancock . . . argued the bill was necessary for preserving God's will.").

25. *See supra* notes 13–21 and accompanying text.

making power, theoretically leaving no checks to ensure Luna had not been pushed into identifying as transgender before receiving such treatment.[26] Further, the outcry to "save" Luna was based on the shaky presumption that Luna had not developed her gender identity on her own, but instead, that her mother had crafted the identity herself and forced it upon Luna.[27]

The largely accepted treatment practices for the care of transgender youth, and the science behind such developments, reveal that these concerns are largely unfounded.[28] Empirical data and current best practices reveal that there is a gap between the understanding and treatment of transgender children by professionals and the treatment and understanding of those children by society.[29] This gap results in explicit and implicit anti-transgender bias that is pervasive in all realms of our society,[30] but perhaps most concerningly in the context of the minds of judges and advocates handling and deciding cases like Luna's.[31] Without remedy, custody cases involving transgender children will continue to produce inequitable and even harmful results.[32]

This Note explores the lack of education on transgender youth in the United States and its implication on the fairness of family court decisions. This Note primarily argues that substantial changes to judicial education must be made in order to reduce biases in custody determinations of transgender children. First, Part I provides a brief history of the treatment of transgender children and explores the current accepted medical treatments and best practices for transgender youth. Then, Part II examines the current disparities across the nation in the application of the best interest factors applied in custody disputes involving transgender children. Finally, Part III proposes mandatory judicial education on gender identity and sexuality as part of a comprehensive effort to reduce the anti-transgender bias infecting family courts.

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26. *See* Smith, *supra* note 5.

27. *See, e.g.*, Dad Talk Today with Eric Carroll, *supra* note 24.

28. *See, e.g.*, Herbert J. Bonifacio & Stephen M. Rosenthal, *Gender Variance and Dysphoria in Children and Adolescents*, 62 PEDIATRIC CLINICS N. AM. 1001, 1011 (2015) ("Before the administration of cross-sex hormones, mental health professionals may reevaluate GD, screen for concurrent mental health disorders, provide individual psychotherapy for youth and counseling for families, and connect youth and families with community resources to improve resiliency.").

29. *See generally*, Diane Chen, Laura Edwards-Leeper, Terry Stancin & Amy Tishelman, *Advancing the Practice of Pediatric Psychology with Transgender Youth: State of the Science, Ongoing Controversies, and Future Directions*, 6 CLINICAL PRAC. PEDIATRIC PSYCH. 73 (2018) (describing the treatments available to transgender youth, the state of science regarding those treatments, and any remaining controversy around such treatments).

30. *See* Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey,* NAT'L CTR. FOR TRANSGENDER EQUAL. (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/P9LN-DM4J].

31. *See* Katherine A. Kuvalanka, Camellia Bellis, Abbie E. Golberg & Jenifer K. McGuire, *An Exploratory Study of Custody Challenges Experienced by Affirming Mothers of Transgender and Gender-Nonconforming Children*, 57 FAM. CT. REV. 54, 55–57 (2019).

32. *See infra* Section II.B (discussing outcomes of custody cases involving transgender children in the United States).

I. MEDICAL PROVIDERS LARGELY ADOPT THE AFFIRMATIVE APPROACH TO TREATMENT OF GDC

In recent years, the professional treatment and understanding of transgender-identified people has evolved significantly.[33] Though sufficient data is somewhat lacking, a general medical consensus has developed, concluding that attempts to repress gender exploration are damaging to children. Instead, most mainstream medical professionals advocate for treating children with GDC through an affirmative model of care to best serve such children.[34] The next Section defines this Note's use of the term "transgender child" and other terms commonly used in the discussion of transgender identities.

A. Defining the "Transgender Child"

In discussing the treatment and interests of transgender children, it is helpful to initially provide an overview of some commonly used terminology, as well as specifically define what is meant by this Note's use of the term "transgender child."

First, "cisgender" describes a person whose gender identity aligns with the sex they were assigned at birth.[35] The large majority of the population is cisgender.[36] On the other hand, "transgender" is used to describe a person whose gender identity differs from their sex assigned at birth.[37] Gender identity refers to one's internal sense of gender and is distinct from one's sex assigned at birth, which may also be seen referred to as one's "biological sex."[38] Biological sex is determined by a physician at birth and refers to a set of physiological characteristics, including chromosome composition and the appearance of genitalia, to designate an individual as male, female, or intersex.[39] While biological sex is thus "assigned" at birth and limited to

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33. Bonifacio & Rosenthal, *supra* note 28, at 1005 (explaining that in the 1960s gender variance was viewed through a "disease medical model whereby such behaviors, expression, and identity were pathological and needed correction," but that over time there was a shift "toward an affirmative model that validates and encourages parents supporting their gender variant children and adolescents").

34. *See id.*

35. *Cisgender*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cisgender [https://perma.cc/9SMQ-X9GU].

36. *See* Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH. Feb. 2017 (finding the population of transgender individuals in the United States to be approximately 390 adults per 100,000).

37. *A Glossary: Defining Transgender Terms*, AM. PSYCH. ASS'N (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary [https://perma.cc/RC8J-FL6W].

38. *See id.; see also* Risa Aria Schnebly, *Biological Sex and Gender in the United States*, THE EMBRYO PROJECT ENCYCLOPEDIA (June 13, 2022), https://embryo.asu.edu/pages/biological-sex-and-gender-united-states-0 [https://perma.cc/7RPB-Y9MB]. "Sex assigned at birth" is the preferred terminology; however, "biological sex" is a useful term in providing cursory understanding of the concepts of "biological sex" and "gender identity" as distinctly different.

39. Tim Newman, *Sex and Gender: What is the Difference?*, MED. NEWS TODAY (May 11, 2021), https://www.medicalnewstoday.com/articles/232363 [https://perma.cc/V7AE-

three distinct classifications, gender identity is not so limited, as gender identity refers to a self-classification based on "'one's internal, personal sense' of belonging at some point on or off the gender spectrum . . . ."[40] For the majority of transgender individuals, their gender identity is the *opposite* of their biological sex but still fits within the male-female binary.[41] Thus, "transgender man" refers to someone whose sex assigned at birth was female but whose current gender identity is male, and "transgender woman" refers to someone whose sex assigned at birth was male but whose current gender identity is female.[42]

Although "[m]ost transgender people are men or women . . . some [transgender] people don't neatly fit into the categories of 'man' or 'woman' or 'male' or 'female.'"[43] Individuals who do not identify with the label of male or female may use a wide variety of terms to describe themselves, with non-binary being the most common.[44] While binary and non-binary transgender individuals suffer much of the same social stigma and lack of understanding, research has revealed significant differences between their respective experiences.[45] The health needs, required psychological care, and long-term health outcomes are just a few areas where the binary and non-binary transgender experience may differ significantly.[46] Additionally, there is extremely limited data on the distinct segment of transgender individuals identifying as non-binary, preventing an analysis of the health and legal outcomes of non-binary individuals that is analogous to what is available for binary

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P9V6]. Intersex is used to describe individuals with genitalia or internal sex organs atypical of the female-male binary. This may be the result of chromosomal differences or differences in sex development. *Id.*

40. *Id.*

41. *See* Bianca D.M. Wilson & Ilan H. Meyer, *Brief: Nonbinary LGBTQ Adults in the United States*, U.C.L.A. WILLIAMS INST. (June 2021), https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/ [https://perma.cc/E84L-9QGK] (finding that the non-binary population represents an estimated 32.1% of all individuals identifying as transgender).

42. *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people [https://perma.cc/ZVK6-4QHW].

43. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 12, 2023), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive [https://perma.cc/GS4L-AJ5G].

44. *Id.*

45. *See generally* Wilson & Meyer, *supra* note 41. The Williams Institute found that the non-binary transgender population exhibits "higher rates of depression but lower rates of mental health care usage" compared to the binary transgender population. *Id.*

46. *See, e.g.*, Cristiano Scandurra, Fabrizio Mezza, Nelson Mauro Maldonato, Maria Bottone, Vincenzo Bochicchio, Paolo Valerio & Roberto Vitelli, *Health of Non-Binary and Genderqueer People: A Systematic Review*, FRONTIERS PSYCH., June 25, 2019, at 2 ("[W]hile the [binary transgender] identity development usually follows a linear path usually resulting in a transition to a male or female identity, the [non-binary and genderqueer] identity development is more flexible and less linear as it usually does not lead to a particular and specific gender identity. . . . [T]his means that [non-binary and genderqueer] individuals are a specific population, with specific health needs and healthcare experiences." (citation omitted)).

transgender individuals.[47] For these reasons, this Note uses "transgender" to refer specifically to the binary transgender population, meaning individuals who identify distinctly as a transgender male or a transgender female.

In children, "gender variant" behaviors, or those atypical of what is traditionally associated with the child's biological sex, may emerge long before the child develops the capacity to understand the term transgender, let alone permanently adopt a formal transgender identity.[48] In light of this understanding, this Note uses "transgender children" as an umbrella term encompassing all children and adolescents who exhibit persistent gender variant behaviors consistent with gender dysphoria (GD), the diagnosis that ultimately gives adults and older adolescents access to gender-affirming medical treatment in the United States.[49] "Transgender children" specifically refers to a subset of gender variant children whose desire to live as the gender opposite to their biological sex remains "persistent, consistent, and insistent over time."[50] Next, this Note explores the historical understandings of transgender children, starting with a discussion of the societal treatment of these youth.

B. Historical Understandings of Transgender Children

1. Social Treatment

Until the advent of the LGBTQ+ rights movement in the 1960s,[51] individuals who were openly gay or transgender would face severe harassment, discrimination, and, often, violence.[52] However, as the LGBTQ+ rights movement progressed, public attitudes toward homosexuality shifted quickly and dramatically.[53] For instance,

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47. *Id.* ("Despite literature on [non-binary and genderqueer] population's health . . . growing in the last years, there are still no comprehensive studies specifically addressed to such a specific segment of the general transgender population." (citation omitted)).

48. ELI COLEMAN ET AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 12 (7th ed. 2012).

49. *See* Mark Moran, *New Gender Dysphoria Criteria Replace GID*, PSYCHIATRIC NEWS (Apr. 5, 2013), https://doi.org/10.1176/appi.pn.2013.4a19 [https://perma.cc/TD88-ZZ6H]. It is important to note that not all transgender individuals experience gender dysphoria or seek to medically transition. *Gender Dysphoria*, MAYO CLINIC (Feb. 26, 2022), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255 [https://perma.cc/W3QZ-F3RT].

50. Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents*, 142 PEDIATRICS 1, 2 (2018).

51. The phrase "LGBTQ+ rights movement" describes the social effort to advance the rights of lesbian, gay, bisexual, and transgender individuals beginning in the 1960s in response to "centuries of persecution by church, state and medical authorities." Bonnie J. Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCH. ASS'N (2009), https://www.apa.org/pi/lgbt/resources/history [https://perma.cc/Y3V5-9DVL].

52. *See generally* LINDA HIRSCHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION 95–118 (2012). In Hirschman's book, Martin Boyce recounts what life was like in the late '60s as a gay man who would dress in women's clothing: "Every day the police would beat you when they wanted to, they could attack you when they wanted to. We would look down a block and see who would be danger, how we could be safe." *Id.* at 102–03.

53. *See In Depth: Topics A to Z: LGBT Rights*, GALLUP (2021) [hereinafter Gallup Poll],

Gallop has consistently asked whether "gay or lesbian relationships between consenting adults should or should not be legal" since 1986; in 1986, fifty-seven percent of respondents answered "should not be legal," and by 2010 only thirty percent of respondents answered "should not be legal."[54] By the late 2000s, the LGBTQ+ rights movement had gained significant support. By the mid-2010s the movement had gained several legal victories—most significantly including the U.S. Supreme Court's decisions in *United States v. Windsor*[55] and *Obergefell v. Hodges*,[56] which cumulatively declared same-sex marriage legal throughout the nation. In 2021, just eighteen percent of respondents in the Gallop poll discussed above answered "should not be legal."[57]

Partially because the early LGBTQ+ rights movement largely focused on sexual orientation and the fight for same-sex marriage, change in public opinion and legal progress for the transgender community has been much slower to take hold.[58] Public opinion remains relatively split on "transgender issues."[59] Yet, the transgender community has gained widespread visibility through the media, with transgender people consistently appearing on popular television shows, in movies, and in documentaries.[60] Transgender adults are slowly gaining public support, and, currently, the majority of the public seems to be in support of transgender adults.[61]

Despite growing support for transgender adults, transgender children continue to spark major controversy. In a 2022 YouGov survey of one thousand Americans, just

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https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/N8KL-FT49].

54. *Id.*

55. 570 U.S. 744 (2013).

56. 576 U.S. 644 (2015).

57. Gallup Poll, *supra* note 53.

58. *See, e.g.*, *Daily Survey: Transgender Issues*, YOUGOV (Mar. 2022) [hereinafter YouGov Survey], https://docs.cdn.yougov.com/jqbb81tg24/tabs_Transgender_Issues_20220311.pdf [https://perma.cc/8VSK-FMZ9].

59. In a 2019 public opinion survey, the Williams Institute reported the following: seventy-two percent of respondents agreed that transgender individuals should be protected from discrimination, seventy percent agreed that transgender individuals should have access to gender-affirming surgeries, and sixty-five percent of respondents supported transgender individuals serving in the U.S. military. However, just forty-seven percent agreed that transgender individuals should be able to use the restroom consistent with their gender identity. WINSTON LUTHER, TAYLOR N.T. BROWN & ANDREW R. FLORES, U.C.L.A. WILLIAMS INST. PUBLIC OPINION OF TRANSGENDER RIGHTS IN THE UNITED STATES 5 (2019), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-Trans-US-Aug-2019.pdf [https://perma.cc/SM6S-JBWU].

60. Recent prominent shows, films, and documentaries featuring transgender characters include *The Fosters*, *Grey's Anatomy*, *Glee*, *Orange is the New Black*, *Big Brother*, *I am Jazz*, *Pretty Little Liars*, and *The Danish Girl*, to name a few. Tre'vell Anderson, *Visibility Matters: Transgender Characters on Film and Television Through the Years*, L.A. TIMES (Dec. 18, 2015), https://timelines.latimes.com/transgender-characters-film-tv-timeline/ [https://perma.cc/NTN4-SUFK].

61. *See* LUTHER ET AL., *supra* note 59, at 1 ("Studies suggest that a majority of the American public supports the enactment of non-discrimination protections, adoption rights, and open military service for transgender people. The public is more divided on questions about access to public restrooms based on an individual's gender identity.").

twenty-nine percent of respondents supported allowing transgender adolescents to access puberty-blocking hormones with parental consent.[62] Further, only thirty percent of respondents supported allowing schools to include material about gender identity in classroom curriculum.[63] Transgender children continue to ignite social controversy, and many people continue to maintain the belief that a transgender identity is inherently wrong, undesirable, or preventable.[64] Next, to further explore the historical understandings of transgender youth, this Note describes common medical and psychological treatment and how such treatment has evolved over time.

2. Medical and Psychological Treatment

Early forms of treatment for transgender people primarily aimed to "cure" gender dysphoria through psychological treatment, the goal being to resolve the person's feeling of gender incongruence without "transitioning" to another gender.[65] This approach, known as the reparative model, mirrors what is colloquially known as "gay conversion therapy," in which psychological "treatments" aim to rid a person of feelings of same-sex attraction.[66] Hormone replacement treatments and gender reassignment surgeries began developing in the early 20th century,[67] but remained inaccessible for decades, as they were in experimental stages and for years were not viewed as an acceptable treatment by the majority of clinicians.[68]

In 1980, "gender identity disorder" (GID) was first recognized by the American Psychiatric Association's (APA) third Diagnostic and Statistical Manual (DSM-3), with an additional diagnosis for GID in childhood (GIDC).[69] This marked the beginning of the shift toward "curing" gender dysphoria through various methods of gender-affirming medical treatment and psychological support instead of reparative therapies.[70] The approach was slow to take hold and was stunted by social stigmas present even within the medical community.[71] But, by the mid-2010s, gender-affirming medical treatment had become more widely accessible for transgender

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62. YouGov Survey, *supra* note 58.

63. *Id.*

64. Take for instance, the wave of anti-transgender legislation that appeared in 2022. See *supra* notes 13–21 and accompanying text for a discussion on how transgender children turned into a prominent right-wing talking point.

65. *See* Farah Naz Khan, *A History of Transgender Health Care*, SCI. AM. (Nov. 16, 2016), https://blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care [https://perma.cc/58H5-VP7R].

66. *See Conversion Therapy*, GLAAD (2021), https://www.glaad.org/conversiontherapy [https://perma.cc/4WBA-NU6W].

67. *See* Khan, *supra* note 65 ("The first American to undergo a sex change operation was Christine Jorgensen, who brought significant attention to the transgender revolution in America when her story hit . . . headlines in 1952.").

68. *Id.*

69. *See* Kenneth J. Zucker, *The DSM Diagnostic Criteria for Gender Identity Disorder in Children*, 39 ARCHIVES SEXUAL BEHAV. 477, 480 (2010).

70. *See* Khan, *supra* note 65.

71. *Id.* ("Slowly, but surely, strides were made towards removing the notion of 'disorder' in the context of gender identity, and with the release of the DSM-5 in 2013, gender identity disorder was replaced with the diagnosis 'gender dysphoria.'").

adults.[72] Specifically, accessibility was greatly improved in 2014 when Medicare's policy of excluding transgender-related care was removed, allowing lower-income individuals to receive gender-affirming care.[73]

Over time, the idea that transgender people were mentally ill and could be "cured" was mostly abandoned by mainstream medical and psychological organizations, and instead, efforts to destigmatize transgender people as "disordered" took hold—most prominently, in 2013, the APA replaced the diagnosis of GID with "gender dysphoria."[74] Members of the APA work group stated that the change in the DSM-5 was intended to "diminish stigma attached to a unique diagnosis that is used by mental health professionals but for which treatment often involves endocrinologists, surgeons, and other professionals."[75] Further, a consensus developed among the medical community that receiving gender-affirming care was the appropriate treatment for persistent gender dysphoria in adults and children alike; this is the leading model of care today.[76] While medical advancements did not affect transgender children as much as transgender adults given the age that gender-affirming treatment can begin, the sheer ability to receive a diagnosis of GD greatly improved the lives and prospects of transgender children by granting them early access to care, a primary barrier for many transgender individuals seeking to medically transition.[77] In the next Section, this Note describes current medical understandings and practices with respect to transgender individuals.

C. Current Medical Understandings and Practices

A 2016 survey conducted by the Williams Institute concluded that approximately 0.6% of adults in the United States identify as transgender.[78] This survey further

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72. *Id.*

73. *See id.*

74. *See* Moran, *supra* note 49.

75. *Id.*

76. GABE MURCHISON ET AL., HUM. RTS. CAMPAIGN FOUND., SUPPORTING AND CARING FOR TRANSGENDER CHILDREN 13 (2016), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/documents/SupportingCaringforTransChildren.pdf [https://perma.cc/HD59-PPCY] ("Major professional organizations, including the American College of Physicians, the American Academy of Pediatrics, the American Psychoanalytic Association, the American School Counselor Association, the American Psychological Association and the National Association of School Psychologists have explicitly rejected efforts to change a child or adult's gender identity or gender expression."); *see also* Daniel E. Shumer, Natalie J. Nokoff & Norman P. Spack, *Advances in the Care of Transgender Children and Adolescents*, 63 ADVANCES IN PEDIATRICS 79, 81–83 (2017).

77. *See* COLEMAN ET AL., *supra* note 48, at 6 ("The existence of a diagnosis for such [gender] dysphoria often facilitates access to health care and can guide further research into effective treatments."). The term "medical transition" refers to the process of undergoing medical treatments, including hormone therapy and/or gender reassignment surgeries, to better align an individual's physical characteristics with their gender identity. Samantha Newman, *What to Know About Transgender Medical Transitioning: Female to Male*, NAT'L CTR. HEALTH RSCH., https://www.center4research.org/what-to-know-about-transgender-medical-transitioning-female-to-male/ [https://perma.cc/F73E-7XZT].

78. ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N.T. BROWN,

shows that more transgender people are embracing their transgender identity at younger ages due to increased understandings and societal acceptance.[79] Contributing to the increased prevalence of the transgender population is the evolved understanding by the medical community that GD, along with associated social stigmas, causes significant distress to transgender people.[80] Thus, medical professionals have concluded that GD should be diagnosed and treated like other medical conditions.[81] Additionally, it is now recommended that the effects of social stigma be addressed through psychotherapy.[82] Current best practices also suggest that transgender children should be given a safe path to independently explore their gender identity outside of parental or societal expectations and pressure.[83] With these current understandings in mind, in the next Subsection this Note will delve further into the prevalence of GD in children.

1. Prevalence and Persistence of Gender Dysphoria in Youth

Since gender-affirming care has replaced traditional reparative approaches, more children have been referred to clinics for possible GD.[84] However, the prevalence of transgender children and adolescents in the population remains largely unknown due to a lack of sufficient data.[85] Self-report studies estimate that as many as 1.3% of adolescents identify as transgender or experience "clinically significant gender dysphoria."[86] Further, while the prevalence of GD among prepubertal children appears to fall within a similar range, reliable data is even more lacking in this area.[87]

Gender identity development begins early in life. At as early as two years old, children develop a general understanding of male and female, and by seven years

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WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf [https://perma.cc/KD6U-58WY].

79. *Id.*

80. COLEMAN ET AL., *supra* note 48, at 2 (defining gender dysphoria as "*discomfort or distress* that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth" (emphasis added)).

81. *Id.*; *see generally* Newman, *supra* note 77 (describing common medical treatment for transgender men).

82. COLEMAN ET AL., *supra* note 48, at 9–10.

83. *See id.* at 14.

84. Riittakerttu Kaltiala-Heino, Hannah Bergham, Marja Työläjärvi & Louise Frisén, *Gender Dysphoria in Adolescence: Current Perspectives*, 9 ADOLESCENT HEALTH, MED. & THERAPEUTICS 31, 32 (2018).

85. *See* Bonifacio & Rosenthal et al., *supra* note 28, at 1003.

86. Kaltiala-Heino et al., *supra* note 84, at 32 ("Studies using . . . self-reports of gender identity and its variance suggest that 0.17%–1.3% of adolescents and young adults identify as transgender. A school-based survey . . . suggested that 1.3% of 16–19 year olds had potentially clinically significant gender dysphoria.").

87. Kenneth J. Zucker, *Epidemiology of Gender Dysphoria and Transgender Identity*, 14 SEXUAL HEALTH 404, 405 (2017) ("None of the numerous epidemiological studies on the prevalence of psychiatric disorders in children and youth have examined Gender Dysphoria . . . [a]ccordingly, estimates of the prevalence have been based on less sophisticated approaches.").

old, most children realize their biological sex will not naturally change.[88] It is in these early stages of identity development that the first signs of GD might emerge.[89] Gender-variant behavior, such as a young boy wearing dresses and playing with dolls, for example, is common among prepubertal children.[90] This behavior *can* signal that a child is transgender, but at such a young age is by no means a determinative factor.[91] Often, these behaviors are a feature of normative child development.[92] However, where these behaviors are persistent and interfere with the child's daily life, the child may have GD and should consult with a psychologist to further explore issues of gender.[93] Common behaviors of transgender children include a desire to be another gender, discomfort or contempt toward the child's physical sex characteristics, and a preference for clothes, toys, and games traditionally associated with the opposite sex.[94]

It should be noted that most children who display gender-variant behaviors will not ultimately end up identifying as transgender. Oftentimes, feelings of GD in childhood subside with the onset of puberty.[95] Current available data indicates that only between twelve and twenty-seven percent of prepubertal children will experience GD that persists into and beyond adolescence.[96] Experienced clinicians suggest that a sudden increase in the intensity of GD at the onset of adolescence is an indicator that a child is not in the majority of children with fleeting feelings of gender nonconformity, but rather is likely to continue experiencing distress associated with GD absent gender-affirming treatment.[97]

Data on the persistence of GD into adulthood from adolescence is sparse, but it appears that GD in adolescence is much more likely to continue to persist into adulthood than its childhood counterpart.[98] Worsening feelings of GD at the onset of puberty are an indicator to clinicians that it may be time to begin discussions with the minor and their parents surrounding the available medical treatment options to alleviate feelings of GD.[99] In the next Subsection, this Note discusses the variety of health risks associated with GD.

2. Health Consequences of Gender Dysphoria

There are two main categories of distress associated with a transgender identity. First, there are the direct consequences of GD that stem from the internal conflict

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88. Bonifacio & Rosenthal, *supra* note 28, at 1004.

89. *See* Shumer et al., *supra* note 76, at 85.

90. CHILD.'S NAT'L MED. CTR., IF YOU ARE CONCERNED ABOUT YOUR CHILD'S GENDER BEHAVIORS: A GUIDE FOR PARENTS (2003), http://www.ct.gov/shp/lib/shp/pdf/are_you_concerned_about_your_childrens_gender_behaviors.pdf [https://perma.cc/N3QQ-G757].

91. COLEMAN ET AL., *supra* note 48, at 11.

92. *See id.*

93. *See* Shumer et al., *supra* note 76, at 85.

94. COLEMAN ET AL., *supra* note 48, at 12.

95. Shumer et al., *supra* note 76, at 85.

96. COLEMAN ET AL., *supra* note 48, at 11.

97. Shumer et al., *supra* note 76, at 85.

98. *Id.*

99. *Id.*

between biological sex and gender identity.[100] There are also the indirect social consequences of being transgender, such as family and peer disapproval of gender identity.[101] Both types of distress can be significantly relieved through gender-affirming care that helps align a person's physical characteristics with their internally felt gender identity and deal with the associated social stigma.[102] While the two categories are distinct, they come together to produce a myriad of mental health consequences for transgender children. Socially, transgender children experience higher levels of stigmatization by peers than their cisgender counterparts and are at a higher risk of experiencing social ostracism and verbal or physical harassment at school.[103] Further, transgender children will often also feel unaccepted by their family and peers, resulting in lowered self-esteem and self-isolation.[104]

This social stigmatization also accounts, to some degree, for the high prevalence of comorbid disorders among the transgender population.[105] For example, transgender children suffer staggeringly high rates of depression, anxiety, self-harm, and suicidal ideation or attempts.[106] Shockingly, a reported forty-one percent of transgender adults have attempted suicide at some point in their life.[107] Further, transgender *children* are at a "2- to 3-fold increased risk" of developing comorbid disorders, like depression and anxiety, than their cisgender counterparts.[108] These astonishing rates of comorbid disorders reveal the hefty social consequences that are associated with being transgender, as the 2011 National School Climate survey revealed that "[e]ighty percent of the transgender students reported feeling unsafe at school because of their gender expression and more than one-half of gender nonconforming students had experienced verbal harassment."[109]

Psychotherapy and medical interventions are highly useful in relieving symptoms of comorbid disorders, feelings of GD, and the damaging effects of social stigma.[110] Individuals who receive gender-affirming medical treatment are, over time, able to

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100. *See* Garima Garg, Ghada Elshimy & Raman Marwaha, *Gender Dysphoria*, NCBI, https://www.ncbi.nlm.nih.gov/books/NBK532313/ [https://perma.cc/CND8-JWBF] (Oct. 16, 2022).

101. *See* Eliana T. Baer, *Navigating the Murky Waters of Best Interests with a Transgender Child*, N.J. L.J. (June 5, 2014), https://www.law.com/njlawjournal/almID/1202658118691/navigating-the-murky-waters-of-best-interests-with-a-transgender-child/?slreturn=20211003162208 [https://perma.cc/CJ4Y-JTTC].

102. *See, e.g.*, Garg et al, *supra* note 100.

103. Bonifacio & Rosenthal, *supra* note 28, at 1004 ("Very often, gender variant youth experience levels of stigma, social ostracizing, and verbal and physical violence so great that their psychological well-being is compromised, potentially leading to depression and/or anxiety.").

104. *Id.* at 1004–05.

105. Shumer et al, *supra* note 76, at 86.

106. *Id.* at 85.

107. *Id.*

108. *Id.*

109. *Id.* at 86.

110. *Id.* ("Data . . . suggests that adolescents followed by a multidisciplinary gender team and treated with pubertal suppression followed by cross-sex hormones had improvement in psychological function . . . .").

align their physical characteristics more closely with their internal sense of gender.[111] These treatments not only alleviate feelings of GD, but also help reduce social stigma associated with being transgender. As an individual undergoes medical transition, their physical characteristics begin to match their gender identity, resulting in less unwanted attention drawn to their transgender status and more gender-affirming social treatment as their appearance becomes more aligned with traditional expectations of gender.[112] In the next Subsection, this Note describes the most commonly recommended treatment for transgender individuals—the affirmative model.

3. The Affirmative Model

The affirmative model is recommended as the model treatment for transgender patients by the majority of mainstream health organizations including the APA, the World Professional Association for Transgender Health (WPATH), and the Endocrine Society.[113] The affirmative model of care is rooted in a more positive view of transgender identities.[114] Instead of seeking to repress variant gender expressions, the affirmative model directs health professionals to aid individuals with GD to affirm their gender identity, explore available treatment options for that identity, and ultimately decide what medical treatments are a good fit for alleviating the individual's GD.[115]

The APA's fifth Diagnostic and Statistical Manual (DSM-5) recognized the affirmative model in 2013 by replacing the stigmatizing label of gender identity *disorder* with the term gender dysphoria (GD).[116] The DSM-5 offers two primary diagnoses: gender dysphoria in children (GDC), and GD in adolescents and adults.[117] The distinction in diagnostic criteria and treatment between children and adolescents reflects the consensus that GD in adolescence is much more likely to persist into adulthood than GDC.[118]

The DSM-5 defines GD in adults and adolescents as a "marked incongruence" between experienced gender and biological sex that persists for at least six months and meets two or more of the following criteria: (1) marked incongruence between gender experience and primary/secondary sex characteristics;[119] (2) strong desire to

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111. *Id.* at 87–93.

112. *See id.* (explaining the effects of hormone replacement therapy and gender-affirming surgery).

113. *See* Chen et al, *supra* note 29, at 74.

114. *Id.* ("Central to [the] paradigm shift away from pathologizing gender nonconformity is the belief that youth's asserted gender identity, expressions, and related experiences are valid, and that youth should be supported to 'live in the gender that feels most real or comfortable to that child.'").

115. COLEMAN ET AL., *supra* note 48, at 9.

116. Moran, *supra* note 49. *See supra* notes 74–75 and accompanying text discussing the shift to "gender dysphoria."

117. Moran, *supra* note 49.

118. *See* Shumer et al, *supra* note 76, at 83.

119. Primary sex characteristics refer to reproductive sex organs (i.e. ovaries, testes, etc.), whereas secondary sex characteristics refer to "features not directly concerned with

get rid of, or, in adolescents, prevent the development of secondary sex characteristics; (3) strong desire for the primary and secondary sex characteristics of the opposite sex; (4) strong desire to be a gender other than that assigned at birth; (5) strong desire to be treated as a gender other than that assigned at birth; and (6) strong conviction that they have the "typical feelings and reactions" of a gender other than that assigned at birth.[120] In addition to fulfilling two of the above, adults and adolescents must also experience related "clinically significant distress or impairment in social, occupational, or other important areas of functioning" in order to meet the DSM-5's definition of GD.[121]

After receiving a diagnosis, adults may choose to move forward with hormone replacement therapy (HRT) or gender-affirming surgeries (GAS) with the guidance of their medical team.[122] HRT is a *treatment* that involves the introduction of hormones that slowly change an individual's secondary sex characteristics to be more aligned with their gender identity.[123] For instance, testosterone may be prescribed to transgender males to produce a deeper voice, redistribute body fat composition, stop the menstrual cycle, and increase body and facial hair growth.[124] On the other hand, GASs are *procedures* intended to change an individual's primary or secondary sex characteristics to better reflect their gender identity.[125] In the case of a transgender male, he might undergo a procedure colloquially known as "top surgery," in which breast tissue is removed and the chest is masculinized.[126] Both HRT and GAS have been established as medically necessary for some transgender people to alleviate GD.[127]

The process varies slightly for adolescents. Eligibility for medical transition depends on the individual circumstances of the adolescent, such as when feelings of GD first occurred and whether the adolescent's parents' will consent to treatment.[128] Once an adolescent shows signs of GD, it is recommended the adolescent and their family work with a gender therapist to explore gender identity and navigate the

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reproduction, such as voice quality, facial hair, and breast size."). *Sex Characteristic*, AM. PSYCH. ASS'N DICTIONARY PSYCH., https://dictionary.apa.org/sex-characteristic [https://perma.cc/3QG4-WQMP].

120. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Nov. 2020), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria#:~:text=Gender%20dysphoria%3A%20A%20concept%20designated,diverse%20people%20experience%20gender%20dysphoria [https://perma.cc/KD4C-7JS8].

121. *Id.*

122. Garg et al, *supra* note 100.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id. See also Top Surgery for Transgender Men and Nonbinary People*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/top-surgery-for-transgender-men/about/pac-20469462#:~:text=Overview,your%20skin%2C%20nipple%20and%20areola [https://perma.cc/4HVK-QH3X].

127. COLEMAN ET AL., *supra* note 48, at 8. Transgender individuals may need HRT, GAS, both, or neither. *Id.*

128. *See* Emily Ikuta, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179, 187 (2016).

process of future social and medical transition.[129] At the onset of puberty, typically between the ages of ten and twelve, adolescents who have exhibited persistent GD are eligible to begin "hormone blockers" with the consent of their parents.[130] This treatment aims to delay the development of unwanted secondary sex characteristics and thereby avoid worsening GD, while giving the adolescent more time to solidify and "test out" their gender identity before beginning gender-affirming medical treatments, the effects of which include some "reversible," and some "permanent," changes to the body.[131] Hormone blockers, in contrast to HRT or GAS, are a completely reversible medical treatment; once they are stopped, puberty associated with that of the adolescent's biological sex resumes as normal for their biological sex within months, with no lingering side effects of the hormone blockers.[132] This is in contrast to HRT, which produces *both* permanent and reversible changes.[133]

At around age sixteen, when requisite capacity to provide informed consent has developed, adolescents may become eligible to begin HRT, but because this treatment is in some respects irreversible, adolescents must undergo extensive psychological evaluation before obtaining treatment referrals for HRT,[134] and again, parental consent is required.[135] Before HRT is initiated, adolescents should have extensively discussed the possibilities, limitations, and consequences of medical transition with a team of medical providers.[136] A small minority of mature adolescents (i.e., sixteen years old or older) may be eligible for some type of GAS.[137] However, by and large, these procedures are reserved for adults.[138] GAS is completely irreversible, highly invasive, and very costly (often not covered by medical insurance).[139] Nevertheless, some transgender boys may be eligible to undergo chest reconstruction surgery with parental consent if they have "lived as" a male and have been on testosterone for a year or more.[140] Thus, there are several steps in place to ensure that before beginning *any* medical treatment transgender youth have had the support to fully explore their gender identity and understand the long-term consequences of medical transition.

On the other hand, the DSM-5's diagnosis criteria for GDC are different from that of adults and adolescents in two respects. First, though there remains the requirement

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129. COLEMAN ET AL., *supra* note 48, at 15–16.

130. *See* Alexander A. Kon, *Transgender Children and Adolescents*, 14 AM. J. BIOETHICS 48, 49 (2014).

131. COLEMAN ET AL., *supra* note 48, at 18.

132. Shumer et al, *supra* note 76, at 87–89.

133. COLEMAN ET AL., *supra* note 48, at 18 ("Some hormone-induced changes may need reconstructive surgery to reverse the effect (e.g., gynaecomastia caused by estrogens), while other changes are not reversible (e.g., deepening of the voice caused by testosterone).").

134. Before being referred for HRT, an adolescent must demonstrate a "long-lasting and intense pattern of . . . gender dysphoria" and "[a]ny coexisting psychological, medical, or social problems that could interfere with treatment . . . [must be] addressed." *Id.* at 19.

135. *See* Garg et al, *supra* note 100.

136. Chen et al, *supra* note 29, at 79.

137. *See* Garg et al, *supra* note 100.

138. *See id.*

139. *See, e.g.*, Rafferty, *supra* note 50, at 7 ("[I]nsurance claims for gender affirmation, particularly among youth who identify as [transgender], are frequently denied.").

140. COLEMAN ET AL., *supra* note 48, at 21.

of incongruence between experienced gender and biological sex for six months or more, the child must meet six of the specified eight criteria to receive a diagnosis.[141] Second, the criteria for GDC differ from that for GD.[142] Specifically, the criteria include (1) a strong desire to be another gender or insistence that the child is another gender; (2) in biological males, a strong preference to wear feminine clothing, or, in biological females, a strong preference to wear masculine clothing and rejection of feminine clothing; (3) a strong preference for opposite gender roles in "make-believe play"; (4) a strong preference to participate in activities or play with toys stereotypically associated with the opposite gender; (5) a strong preference to play with children of the opposite gender; (6) in biological males, a strong rejection of masculine toys and activities, or, in biological females, a strong rejection of feminine toys and activities; (7) a strong dislike of personal sexual anatomy; and (8) a strong desire for the sex characteristics that align with the child's expressed gender.[143] Additionally, like adults and adolescents, children must experience "clinically significant distress or impairment" associated with these criteria.[144]

The affirmative treatment plan for transgender children also differs significantly from that of adults and adolescents. Specifically, it is *not recommended* that transgender children begin medical treatment, including hormone blockers, until at least the earliest signs of puberty.[145] Instead, children who meet the criteria for a diagnosis of GDC should participate in individual and family therapy to monitor the persistence of GDC, educate parents on the consequences of GDC and potential treatment options, and assist the child in independently exploring their gender identity prior to the onset of puberty.[146] Various methods of non-medical affirming care are recommended to families with transgender children.[147] Examples include allowing the child to express their preferred gender identity in set times and spaces, as well as allowing the child to complete a social transition to the opposite gender in anticipation of future gender-affirming care at the onset of puberty.[148]

Regardless of a child's treatment plan, it is evident that "doing nothing," or aiming to suppress or ignore the child's GDC, is not a "neutral decision" in the care of transgender children.[149] When GDC is left unaddressed and untreated, the problem does not disappear. As the WPATH standards of care point out, "functioning in later life can be compromised by the development of irreversible secondary sex characteristics during puberty and by years spent experiencing intense gender dysphoria."[150] Additionally, GD, when left untreated, "can drive depression, anxiety, social problems, school failure, self-harm and even suicide."[151]

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141. Garg et al, *supra* note 100.
142. *See id.*
143. *What is Gender Dysphoria*, *supra* note 120.
144. *Id.*
145. Chen et al, *supra* note 29, at 75–76.
146. *See id.*
147. COLEMAN ET AL., *supra* note 48, at 17.
148. *Id.*
149. Chen et al, *supra* note 29, at 74.
150. COLEMAN ET AL., *supra* note 48, at 20.
151. MURCHISON ET AL., *supra* note 76, at 15.

Instead of taking the "wait-and-see" approach, medical organizations recommend that parents work closely with a team of professionals experienced in the treatment of GDC to create an appropriate treatment plan for their child, and closely monitor the child for any comorbid disorders.[152] When GDC persists for an extended amount of time, social transition that allows the child to "live as" their preferred gender without medical intervention may be in the best interests of the child.[153] The affirmative model supports social transition for transgender children, recognizing that although gender dysphoria will subside for most children, there is very real and substantial harm that results from suppressing the gender exploration of children whose GDC does persist into adulthood.[154] Specifically, failing to intervene early "might prolong gender dysphoria and contribute to an appearance that could provoke abuse and stigmatization."[155]

A social transition allows a child to "live as" another gender without taking any permanent steps to medically transition.[156] The outcome of social transition in early childhood is not yet well-documented, but advocates of the affirmative model emphasize that the risk of harm stemming from a completely reversible social transition in childhood is comparatively very low to the harm that can result from actively suppressing a transgender child's gender exploration.[157] When a child socially transitions, it is recommended that the transition be gradual and child-led, meaning that the child determines when and how they want to present their gender without being pressured one way or the other by parents or medical professionals.[158] Additionally, to avoid undue influence on the child's decision, parents are encouraged to remind the child, without suggesting that it is the preferred course of action, that the child can always "go back" to living in accordance with their biological sex.[159] The social transition should be framed as a gender exploration rather than a conclusive choice to permanently live as another gender.[160]

Transgender children and adolescents who receive gender-affirming treatment show vast improvements in quality of life.[161] For example, transgender adolescents show significant reduction in the distress caused by GD and comorbid disorders after receiving gender-affirming medical treatments and additionally experience increased self-esteem and more positive social interactions.[162] Further, both transgender children and adolescents see major positive benefits from increased parental support.[163] Specifically, parental support of transgender children and adolescents is

152. COLEMAN ET AL., *supra* note 48, at 17.
153. *See id.*
154. Chen et al, *supra* note 29, at 74.
155. COLEMAN ET AL., *supra* note 48, at 21.
156. *See id.* at 17.
157. *See id.*
158. *See* Andreas Kyriakou, Nicolas C. Nicolaides & Nicos Skordis, *Current Approach to the Clinical Care of Adolescents with Gender Dysphoria*, 91 ACTA BIOMEDICA 165, 168 (2020).
159. *See* COLEMAN ET AL., *supra* note 48, at 17.
160. *Id.*
161. Chen et al, *supra* note 29, at 76, 78–79.
162. Bonifacio & Rosenthal, *supra* note 28, at 1009–10, 1014.
163. Kaltiala-Heino et al., *supra* note 84, at 35.

associated with "higher life satisfaction, lower perceived burden of being transgender and fewer depressive symptoms."[164] Prior to and throughout the process of social transition, it is essential that parents receive the support and education necessary to adequately care for a transgender child.[165] In the next Part, this Note explores current applications of the legal best interests standard in cases involving transgender children.

II. CURRENT APPLICATIONS OF THE BEST INTERESTS STANDARD TO TRANSGENDER CHILDREN

Under the legal "best interests of the child" standard, used in custody determinations across U.S. courts, judges have large amounts of discretion to determine what the "best interests" of any particular child are and award custody in accordance with what best suits the child's unique needs.[166] This discretion is a necessary feature of family courts because no family or child has identical needs. Yet, the wide latitude given to judges in best interests determinations produces unpredictable results and disparate outcomes for transgender children and their families, likely due to the influence of subjective beliefs on such determinations.[167] Because of the overwhelming lack of education about transgender children and the overpoliticization of the transgender identity in the United States, a judge's subjective beliefs related to best interests determinations for transgender children often harbor implicit or explicit biases against these children and their affirming parent.[168] Thus, court orders often reflect the abandoned reparative approach and have not evolved to match the updated psychological and medical understandings of what is best for transgender children.[169] In the next Section, this Note further

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164. *Id.*

165. *See* COLEMAN ET AL., *supra* note 48, at 17.

166. Kasia Szczerbinski, *I Am Whoever You Say I Am: How the Custodial Decisions of Parents Can Affect and Limit a Transgender Child's Freedom and State of Mind*, 36 CHILD. LEGAL RTS. J. 177, 194 (2016).

167. *Id.* at 194–96; *see* Erika Skougard, Note, *The Best Interests of Transgender Children*, 2011 UTAH L. REV. 1161, 1181–93 (2011). Skougard critiques a court determination, stating:

> First, the court failed to recognize serious problems with key expert testimony. Second, in evaluating [the child's] own testimony, the court discounted strong, direct evidence of [the child's] preference to live as a girl in favor of weaker evidence (or the unsupported presumption) that this preference was either disingenuous or the product of his mother's deliberate manipulation. Third, the record does not support conclusions the court made regarding [the child's] mother's actions—at most, the court's conclusions represent only the most cynical of all possible interpretations of available facts.

Id. at 1182–83.

168. *See* Szczerbinski, *supra* note 166, at 195 ("When judges are hostile to nonconforming gender identities and expressions, the best interests principle is unable to protect the LGBT youth's best interests. Under the guise of protecting the child's best interests, judges can make decisions based off their own personal biases.").

169. *See* Skougard, *supra* note 167.

describes the best interests standard used to control custody determinations across the United States.

A. The Best Interests Standard

The best interests standard governs in custody determinations in the vast majority of states.[170] The standard's factors differ slightly from state to state, but generally, states adopt some version of the Uniform Marriage and Divorce Act's (UMDA) "Best Interest of Child" considerations, often enumerating several additional factors.[171] The UMDA factors consider a number of things: the custody preferences of the parents and children; the relationship between the child, parents, and siblings; the child's "home, school, and community" adjustment; and "the mental and physical health of all individuals involved."[172] However, it is important to note that judges are not bound to only these factors; rather, they should also consider any other factor that might be relevant to the child's best interests.[173] There are some constitutional limitations to judges' discretion—a judge cannot make the determination based on the effects of the race or gender of either parent of the child in the determination,[174] and some states have established an additional limitation on the consideration of sexual orientation of either parent.[175]

Because both parents possess equally the fundamental right to "make decisions concerning the care, custody, and control of their children," there is no presumption in favor of either parent at the beginning of custody proceedings.[176] Thus, both parents are presumed equally fit to raise the child. After evidence is presented, legal and physical custody of the child is awarded in accordance with the child's "best interests," whatever the judge has determined them to be. Generally, this determination asks "two questions: first, what is the desirable long-term goal for the child; and second, what present arrangement is most conducive to the child reaching that goal?"[177] Subsequently, a parent may petition the court to modify custody when

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170. *See, e.g.*, CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2020), https://www.Childwelfare.gov/pubpdfs/best_interest.pdf [https://perma.cc/D9C6-PUXF].

171. UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. L. COMM'N 1973) [hereinafter U.M.D.A.]; *see, e.g.*, IND. CODE ANN. § 31-17-2-8 (West 2017) (adopting the UMDA but adding two factors: "evidence of a pattern of domestic or family violence" and "[e]vidence that the child has been cared for by a de facto custodian."); 750 ILL. COMP. STAT. ANN. 5/602.7 (West 2016).

172. U.M.D.A. § 402.

173. *See, e.g.*, IND. CODE ANN. § 31-17-2-8 ("The court consider *all* relevant factors, *including* . . . ." (emphasis added)).

174. Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding the effects of racial prejudice were impermissibly considered).

175. *See, e.g.*, *In re* Marriage of Black, 392 P.3d 1041, 1050 (Wash. 2017) ("Even if a parent's sexual orientation is contrary to the children's religious values, a trial court may not consider it in a custody determination unless the evidence shows 'direct harm to the children.'").

176. Troxel v. Granville, 530 U.S. 57, 66 (2000).

177. Matthew J. Hulstein, Commentary, *Recognizing and Respecting the Rights of LGBT Youth in Child Custody Proceedings*, 27 BERKELEY J. GENDER, L. & JUST. 171, 179 (2012).

the circumstances considered in the initial order have changed substantially, meaning the presiding judge will reconsider the best interests factors and determine whether the circumstances warrant a change in custody.[178] In the next Section, this Note discusses common legal outcomes of custody disputes involving transgender children.

B. The Legal Status of a Transgender Child's Best Interests

There is little to no binding legal precedent to guide courts applying the best interests factors to the custody determinations of transgender children.[179] When a judge is asked to assign weight to the competing values of parents who have an equal constitutional right in raising their child, as well as the child's own liberty interests, and come up with a best interests calculation, the judge's own views regarding the "right" way to bring up a child are inevitably fused into the determination.[180] These determinations have an inherently subjective quality because there is no clear calculus in deciding what will be best for any individual child.

A judge, though not permitted to explicitly prefer her own worldview in the best interests determination, nevertheless must utilize her own beliefs and understandings about the world to make the determination.[181] When parents disagree so adamantly on the best interests of their child that they resort to court action, they force the judge to utilize her personal understandings of what is "best" for the child. Specifically, judges in these cases interpret the conflicting evidence offered by both parents to decide which parent will make a better primary caregiver and provide the best future for the child; still, this interpretation rests on the judge's own understanding of what a favorable future looks like.[182]

In considering the aforementioned lack of understanding of the transgender community, it would not be farfetched to assume that best interests determinations are potentially tainted by judges' own opinions of transgender children. Thus, it is a very real possibility that the affirming parent of a transgender child will be disfavored by the court based on a judge's view that being transgender is ultimately undesirable, or that being "allowed" to be transgender will harm the child.[183] Legal scholars examining this disparity commonly cite *Smith v. Smith* as the most egregious example of anti-transgender judicial bias.[184]

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178. *See, e.g.*, IND. CODE ANN. § 31-17-2-21 (West 2021) (providing for custody modification if one or more of the factors have substantially changed since the initial order and modification is in the child's best interests).

179. Jaime B. Margolis, *Two Divorced Parents, One Transgender Child, Many Voices*, 15 WHITTIER J. CHILD & FAM. ADVOC. 125, 125 (2016).

180. *See* Hulstein, *supra* note 177, at 181.

181. *See* Claire P. Donohue, *The Unexamined Life: A Framework to Address Judicial Bias in Custody Determinations and Beyond*, 21 GEO. J. GENDER & L. 557, 573–74 (2020). Donohue examines effects of subjective views and biases around what it means to be a good mother on judicial determinations. These expectations are at play when judges make the determination that an affirming mother has pushed the child to be transgender. *Id.*

182. *Id.*

183. *See* Hulstein, *supra* note 177, at 180–81.

184. No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Ohio Ct. App. Mar. 23, 2007); *see, e.g.*,

In *Smith*, a ten-year-old child, assigned male at birth, exhibited a strong desire to live as a girl "from a very early age."[185] The child's mother was very supportive of the child's identity, allowing the child to use the name "Christine," use she/her pronouns, and "wear girls' clothing."[186] She even took her child to transgender support groups.[187] The parents' conflict came to a head when the father, who was allegedly unaware of these measures, discovered that the mother was planning to enroll the child in a new school where the child could attend as Christine.[188] The father then petitioned to modify custody, taking to court to advocate against the mother's affirmative treatment, and ultimately convinced the court that it was in the child's best interests to award primary custody of the child to him.[189]

Expert witnesses in *Smith* offered conflicting views of what course of action was best for Christine, and whether she had GDC at all.[190] Most of the proceedings centered around proving whether the child was "actually" transgender or whether, as the father argued, the mother had "pushed" the child into being transgender.[191] The judge, picking and choosing between expert opinions, found that Christine did not have GDC at all, and went further than modifying the custody arrangement.[192] Ultimately, not only was sole physical custody granted to the father, but the court's order also precluded the mother from taking the child to counseling for GDC, referring to the child in any way as a girl, or allowing the child to dress in girls' clothes.[193] Finally, the court order mandated that the child be reenrolled in school as a boy.[194]

The *Smith* decision is perhaps the most extreme example of how ill-equipped judges may be to weigh the best interests factors in cases of transgender children. One might argue the extravagant order in *Smith* can be chalked up to the culture of 2007 America. Unfortunately, this is not the case. In recent years, factually similar

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Skougard, *supra* note 167 at 1161.

185. 2007 Ohio App. LEXIS 1282 at *1.

186. *Id.*

187. *Id.*

188. *Id.* at *2–3.

189. *Id.*

190. *Id.* at *8–9. The father's argument centered around his belief that his child was not transgender, and that the child's behavior existed only to please the mother. The trial court and the appellate court did not consider the possibility that the child showed less gender variant behavior around the father due to the father's active suppression of the child's gender variance. *See id.* at *7.

191. *Id.* at *7 ("[Father] told the [child] that his behavior was an attempt to gain attention and to win the approval of his mother.").

192. *Id.* at *14–15.

193. *Id.*

194. *Id.* at *14–17. The trial court heard from five expert witnesses in total: two from each parent, and one court-appointed expert. These experts offered differing opinions to the treatment of the child—the court found much of the testimony not credible and rejected the notion of "real life experience" as a treatment altogether. The court also concluded, despite conclusions of the experts the court *did* find credible, that the mother was intent on immediate social and medical transition for the child. *Id.* What is baffling about this conclusion is that the child was ten years old, at least five years from qualifying for HRT. *See* COLEMAN ET AL., *supra* note 48, at 20.

cases, though not provoking as explicit of an anti-transgender bias, carry subconscious, and more subtle, forms of anti-transgender bias.

For example, in *Williams v. Frymire*, an affirming mother lost her role as the primary custodian of her child, despite the opinion of the guardian ad litem that continuing to reside with the mother was in the child's best interests.[195] It seemed that the court ignored the prior opinions of two clinicians who found a GDC diagnosis was appropriate for the child, and instead sided with its own appointed psychologist.[196] The psychologist concluded the mother was overreacting to the child's gender variant behaviors and again insinuated that the mother had pushed the child to be transgender.[197] Unlike in *Smith*, the *Williams* court made no formal declaration that the child did not have GDC and awarded joint legal decision-making authority.[198] Still, the court in *Williams* issued an order preventing any discussion of gender with the child outside the home and transferred primary physical custody to the father, taking the "wait-and-see" approach to "discovering" whether the child is transgender.[199]

Some courts award custody to the affirming parent or come to a more equitable determination,[200] comporting their decisions to current medical understandings and practice. However, this only adds to the illustration that parents of transgender children cannot reliably predict how any given court will interpret affirming or non-affirming behavior, putting transgender children at risk for future harm.[201]

The issue is further complicated by the fact that many family court proceedings are sealed or are not published in widely available reporters.[202] Anecdotal reports from the affirming parents of transgender children indicate that the lack of knowledge in the courts detrimentally affects transgender children and their parents.[203] In a case study examining affirming mothers of transgender youth, several

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195. *See* 377 S.W.3d 579, 586 (Ky. Ct. App. 2012). As in *Smith*, the trial court faced conflicting expert testimony. *Id.* at 582–85.

196. *See id.* at 586.

197. *See id.* at 582–83. Despite the court's conclusion that the mother pushed the child into being transgender, there was evidence to the contrary. The mother initially contacted a professional after encouragement from her parents because the child, assigned female at birth, refused to leave the house wearing girls' clothes. The court discredited the first clinician's diagnosis because he was not experienced in GDC. The mother sought out a second opinion and was again told the child likely had GDC. Curiously, this clinician's testimony was discounted because the doctor believed the mother's description of the child's behavior without confirming with the father and other members of the family. *See id.* at 585.

198. *See id.* at 580.

199. *See id.* at 590–91.

200. *See, e.g.*, Paul E. v. Courtney F., 439 P.3d 1169 (Ariz. 2019); Kristen L. v. Benjamin W., No. S-15302, No. 1502, 2014 Alas. LEXIS 111 (June 11, 2014).

201. See *supra* Section I.C.2 for a discussion of the harms of non-affirming approaches.

202. *See* IND. R. ACCESS CT. REC. 5(C) (2022) While child custody proceedings are not, per se, closed or records sealed, judges often find the potential harm from public disclosure outweighs the benefits of public access. At a minimum, the child's name is redacted from court records. *See id.*

203. *See* Kuvalanka et al., *supra* note 31, at 54 ("[A]ffirming mothers of [transgender] children who had experienced custody-related challenges reported . . . 'blame' for causing children's gender nonconformity, coercion by ex-partners, bias in the courts, negative impact

mothers reported unfavorable treatment by the courts.[204] Specifically, four of the ten participants reported losing either physical or legal custody of the child to some degree, with most sharing the seemingly common report that the proceedings put a heavy emphasis on the idea that the mothers were "making" their children transgender.[205]

It is obvious that the best interests factors in the cases of transgender children are not being applied consistently across jurisdictions in a way that aligns with the current empirical data and medical consensus concerning the appropriate treatment of transgender children, putting far too much emphasis on the actuality of a child's transgender status.[206] The transgender children who are subjects of these proceedings are left vulnerable to future harm and worsening feeling of GD. Thus, it is necessary to remedy these disparities by ensuring judges and advocates understand and implement the affirmative approach to the treatment of transgender children. In the next Part, this Note attempts to address this issue by proposing reform in judicial education to improve future outcomes for transgender children.

III. THE NEED FOR JUDICIAL EDUCATION

A. Misconceptions in Current Determinations

There are several misconceptions that reoccur in the custody determinations of transgender children. The most concerning and prominent misconceptions in legal decisions include (1) the court's belief that one parent—usually the mother—is forcing the transgender identity on the child; (2) the court's overemphasis on determining the "reality" of the child's transgender status; and (3) the court's belief that the waiting game is the best choice for transgender children and their families.[207] These misconceptions are at odds with the shift toward the adoption of the affirmative treatment model.[208] Each of these misconceptions is considered further in the following subsections.

1. Belief That One Parent Is Forcing the Transgender Identity

First, the opinion that one parent, typically the mother, has induced a child to be transgender appears frequently; it was present in both *Smith*[209] and *Williams*.[210] This consideration is somewhat relevant to the best interests of transgender children—the child should not be pushed toward one identity or the other and should, instead, be

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on children, emotional and financial toll on participants, and the critical importance of adequate resources.").

204. *See id.*

205. *Id.* at 59–61.

206. *See supra* Section I.C.

207. These factors are present in the cases discussed in Section II.B. *See supra* text accompanying notes 145–148.

208. *See supra* Section I.C (discussing the affirmative approach to medical care).

209. Smith v. Smith, No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Mar. 23, 2007).

210. Williams v. Frymire, 377 S.W.3d 579 (Ky. Ct. App. 2012).

allowed to guide their own gender transition.[211] However, the genesis of a child's gender variant behavior is rarely sparked by the actions of one parent, and a parent should not be punished for seeking professional guidance after noticing these gender variant behaviors.[212] What is concerning is that these arguments, where they have appeared, have not reliably shown that the mothers were forcing their children into being transgender, yet courts nonetheless have accepted the conclusion.[213] The opinion that a parent is pushing a child to be transgender should be grounded in evidence that the parent has led the child's gender identity development, rather than rest on the mere observance that a parent followed their child's wishes or sought assistance in dealing with a gender-variant child. Evidence that a parent has responded to their child's pronounced desire to be another gender by seeking professional guidance and allowing that child to express those desires is not an indication that the parent pushed the identity on the child, but rather a normal reaction to realizing a child is expressing gender variant behavior at a young age.[214]

2. Overemphasis on Determining the Reality of the Child's Transgender Status

Another common theme in the available case law is the overemphasis on determining whether the child is "actually" transgender. This inquiry, especially in the case of prepubescent children, is futile. It is impossible for a medical professional closely associated with the child to determine concretely whether the child's GDC will persist into adulthood, let alone a family court judge who has had no interaction with the child outside the formal walls of a courthouse, if at all.[215] This unpredictability itself supplies the reasoning behind the affirmative model's recommendation that any treatment of GDC, including a social transition, should be child-led and independent of any parental pressure.[216] A child needs the time and space to explore and discover their gender identity, and courts should not get into the business of deciding that identity for themselves. Thus, it is important that courts stray from overemphasizing the reality of a child's transgender status.

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211. *See* Kaltiala-Heino et al., *supra* note 84, at 32–33.

212. *See* MURCHISON ET AL., *supra* note 76, at 19 ("If a child in your life shows signs of gender dysphoria . . . you *should* consult a therapist or healthcare provider with gender development expertise." (emphasis added)).

213. *See, e.g.*, *supra* text accompanying note 146; *see also* Kuvalanka et al., *supra* note 31, at 61.

214. *See* Mayo Clinic Staff, *Children and Gender Identity: Supporting Your Child*, MAYO CLINIC (Oct. 1, 2022), https://www.mayoclinic.org/healthy-lifestyle/childrens-health/in-depth/children-and-gender-identity/art-20266811 [https://perma.cc/ALE7-6QET].

215. *See supra* Section I.C.1. There is no established method to reliably predict whether childhood gender dysphoria will persist into adulthood, and the efforts of a court to probe for the child's identity are likely muddled by a child's high susceptibility to be influenced by externalities. *See generally* Lucy Foulkes, Jovita T. Leung, Delia Fuhrmann, Lisa J. Knoll & Sarah-Jayne Blakemore, *Age Differences in the Prosocial Influence Effect*, DEVELOPMENTAL SCI., WILEY ONLINE (Feb. 22, 2018), https://onlinelibrary.wiley.com/doi/epdf/10.1111/desc.12666 [https://perma.cc/WS3G-D65R].

216. *See* Diane Ehrensaft, *Gender Nonconforming Youth: Current Perspectives*, 8 ADOLESCENT HEALTH, MED. & THERAPEUTICS 57, 60 (2017); Chen et al, *supra* note 29, at 75.

3. Belief That the Waiting Game Is the Best Choice

Finally, closely tied to the last misstep, there is the presumption that waiting until the child is older to allow the child to express gender variance and explore gender identity is in the best interests of transgender children. This is not the case. This "delayed transition" approach communicates to a child that being transgender is an undesirable outcome, and leaves transgender children feeling unsupported.[217] This is a concern because "youth whose families fail to affirm their . . . gender identity or gender expression are at significantly increased risk of depression, substance abuse and suicide attempts."[218] Additionally, delaying transition prolongs the time a transgender child spends suffering through intense feelings of GD.[219] On the other hand, there is not a similar level of harm in allowing a child to *explore* their gender identity at an earlier age.[220] The difference in levels of harm also negates the choice of the well-meaning judge who attempts to reach a compromise between the parents' beliefs by eliminating any discussion of the gender issue at all. While GDC often subsides upon the turn of adolescence, this does not suggest that the child's feelings should be left unaddressed, or that the child should be left to assume their identity or feelings are inherently wrong because they have been ordered by a court to suppress them.[221] Instead, judges should adhere their decisions to the tenets of the affirmative model and consider what circumstances will best allow the child to receive the support needed to independently work through their feelings of GD. In the next Section, this Note proposes a model of mandatory judicial education as a step toward eliminating anti-transgender bias from family courts.

B. Proposed Solutions

Several scholars have offered solutions to address anti-transgender bias in family courts, but, alone, they are insufficient. Instead, these solutions must be considered in conjunction with the major judicial education reform this Note proposes. The solutions suggested thus far include an emphasis on the necessity of expert witnesses and the need for parents to come to court with an educated advocate.[222] The inherent problem with these proposals is that they put the onus on the parent to inform the court wholesale about transgender children and their best interests. For families living below the poverty line, or in rural communities hundreds of miles from the nearest gender specialist, it is difficult, if not impossible, to come up with the

217. *See* MURCHISON ET AL., *supra* note 76, at 15.

218. *Id.*

219. *See* COLEMAN ET AL., *supra* note 48, at 20.

220. *See* Chen et al., *supra* note 29, at 74.

221. *See id.*; *see also* Foulkes et al, *supra* note 215. Suppressing a child's gender identity until they reach adolescence takes away valuable time for the child to solidify gender identity prior to developing secondary sex characteristics, and increases costs associated with gender-affirming care later in life. *See* Shumer et al., *supra* note 76, at 86–87.

222. *See, e.g.*, Margolis, *supra* note 179, at 148; Szczerbinski, *supra* note 166, at 198–99. Other scholars have suggested educational reform but have offered general recommendations and principles that are inadequate to remedy the problem at the systematic level. *See, e.g.*, Skougard, *supra* note 167, at 1198–1200.

resources to procure such an educated advocate or convincing expert witness, especially given that parents are not always entitled to appointed representation in custody disputes.[223]

Other scholars propose that transgender children have a constitutional right to autonomy over their gender identity, and this right must be solidified into laws governing custody through an expansion of the mature minor doctrine.[224] This proposal, while a noble idea, is currently impractical because the best interests standard is so deeply engrained into the law governing custody disputes, and many statutes already allow for a consideration of the child's own wishes.[225] Additionally, the U.S. Supreme Court has been hesitant to extend the constitutional rights of young children, especially when related to overriding parental decisions that invoke the fundamental right of parents to raise their children as they see fit.[226]

Given this, it is doubtful a change in statute to consider the child's wishes regarding their gender transition, especially a younger child, would preclude implicit judicial bias from infecting these determinations. Judges must first *understand* transgender children and the realities and typical timelines of social and medical transition in order to make an informed best interests determination. Arguably, the language contained in custody statutes is not the problem; it is that the judges applying the standard often lack a sufficient understanding of the best interests of *transgender* children. Of course, it is impractical to suggest that improving the education of judges will rid these proceedings of anti-transgender bias entirely, but it is perhaps the best starting point to improvement.

This Note proposes a model of mandatory judicial education to improve the judiciary's understanding of the transgender population, specifically transgender children. First, basic information about the LGBTQ+ population should be incorporated into judicial training. This will ensure that the entire judiciary comes to the bench with at least a basic understanding of the LGBTQ+ community and the transgender population specifically. This addition to judicial training can be conducted at a high level of generality, as it is mostly intended to familiarize future-

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223. Many states do not provide a right to counsel in divorce and child custody proceedings absent allegations of domestic or family abuse, where parents are entitled to counsel, there remains the concerning likelihood that counsel will not be knowledgeable about the transgender community. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 246 (Aug. 2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39169.pdf [https://perma.cc/GWT8-WJXC].

224. *See, e.g.*, Ikuta, *supra* note 128; Hulstein, *supra* note 177; Maureen Carroll, Comment, *Transgender Youth, Adolescent Decisionmaking, and* Roper v. Simmons, 56 UCLA L. Rev. 725 (2009).

225. *See, e.g.*, IND. CODE § 31-17-2-8 (West 2017) (giving more consideration to the child's wishes where the child is over fourteen); 750 ILL. COMP. STAT. ANN. 5/602.5 (West 2016) (accounting for a child's "maturity and ability to express reasoned and independent preferences as to decision-making" when considering weight of child's wishes); COLO REV. STAT. § 14-10-124 (2021) (considering "[t]he wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule.").

226. *See* Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 10 (2004) (discussing the line of cases from the Supreme Court that established the boundaries of children's rights).

judges with the community and expose common misconceptions. For instance, the added information might include definitions of basic terms such as "gender identity" and "transgender," and an introduction on how to treat transgender individuals who come before the courts with dignity and respect.[227]

To target the problem more acutely, family court judges who preside over cases involving transgender children should be educated on the currently advocated method of treatment for transgender children and adolescents—the affirmative model.[228] This education might be in the form of continuing judicial education (CJE) courses, judicial conferences, or even county-by-county programming; regardless, it is essential that judges receive this education *before* taking on a case involving a transgender child. Through this education, judges should learn the benefits of early gender exploration, the realities of the age limitations on medical transitions, the various checks *already* in place to ensure children do not prematurely receive medical care, and the multitude of harms that may result from suppressing or ignoring a child's feelings of GD.[229]

A few programs provide promising models for developing these education efforts, including the Lavender Law annual LGBTQ+ bar conference and the University of California Los Angeles Williams Institute's judicial education program.[230] These two programs offer short judicial conferences that include education on the transgender community and other marginalized groups, as well as trainings on implicit bias.[231] Additionally, the National Judicial College offers various online CJE courses.[232] This is an inviting prospect because the College's courses are relatively affordable and are accessible online.[233] One possibility is to work in collaboration with the National Judicial College, after developing the curriculum for a course on transgender youth and selecting an educator to host the course, to expand its online programming to offer the course to judges across the nation. If these education efforts are implemented, a more educated and less biased judiciary would emerge over time.

Further efforts to reduce anti-transgender bias in the courts should target other influential figures in custody proceedings. For instance, law school curriculum might be revised to ensure students receive at least baseline knowledge about the LGBTQ+ community in order to promote a less biased group of future advocates.[234]

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227. *See generally* C.B. Baga, *Working with Transgender Clients*, 89 HENNEPIN L. 20 (2020).

228. See *supra* Section I.C.3 for a discussion of the affirmative model.

229. *See supra* Section I.C (discussing the health consequences associated with being transgender).

230. *See The 2023 Lavender Law Conference & Career Fair*, THE LGBTQ+ BAR, https://lgbtqbar.org/annual [hereinafter "Lavender Law"]; *Judicial Education*, WILLIAMS INST., https://williamsinstitute.law.ucla.edu/programs/judicial-education [https://perma.cc/WJA5-KNAY].

231. *See* Lavender Law, *supra* note 230; Williams Institute, *supra* note 230.

232. *See Judicial Education*, NAT'L JUD. COLL., https://www.judges.org/judicial-education [https://perma.cc/FRQ7-TDVD].

233. *See id.*

234. See Buhai et al., *The Role of Law Schools in Educating Judges to Increase Access to Justice*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161 (2011) for a comprehensive review of the need for education reform in law school curriculum to reduce bias in the legal profession.

Additionally, Court Appointed Special Advocates (CASAs) and Guardian Ad Litems (GALs), who are advocates on behalf of a child during some family court proceedings, should also understand the basics of the transgender community and the affirmative model of care before taking on cases of transgender children in order to adequately assess and advocate for the child's best interests.

Critics of this proposal might suggest that education is inadequate to rid the courts of anti-transgender bias because such bias is rooted in deep-seeded beliefs that cannot be undone by a single course. This is true; education efforts will not rid each judge, attorney, and child advocate of anti-transgender bias. However, judges especially may be more susceptible to taking in empirical evidence and transforming their beliefs, given the judge's neutral and admirable position in the courtroom. Additionally, the Model Code of Judicial Conduct not only prohibits judges from acting with bias in their court; it also gives judges the responsibility of ensuring that all advocates coming before the court do the same.[235] If we start by addressing judges' role in this issue, a ripple effect may take place that allows judges to check the biases of the advocates who come before them in court. A major judicial education effort will not entirely solve the problem, but it could be the first step in a long journey toward eliminating anti-transgender bias from family courts.

CONCLUSION

There is an obvious gap between empirical data and medical consensus on the appropriate treatment of transgender children and the outcomes of custody disputes regarding such children. While the mainstream medical community adopts the affirmative model as serving a transgender child's best interests, courts have not uniformly developed the rationale behind their best interests determinations to match. Family court judges are often asking the wrong question—the question should not be "is the child actually transgender?" Rather, the appropriate inquiry is what placement will allow the child to independently explore and grow into their true gender identity over time. To remedy the gap between scientific understanding and custody outcomes, judges should be mandated to undergo judicial training on biases and the transgender community, as this Note has proposed.

235. MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS'N 2020).