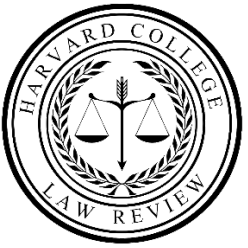
HARVARD COLLEGE LAW REVIEW



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Justices Should Court the People

PERRY ABDULKADIR
STAFF WRITER

The Supreme Court has had a complicated history with democratic theorists—a robust judiciary with the power to apply strong judicial review has been both demonized as an affront to democracy and lionized as foundational to it. In the wake of recent nominations of Justices by President Trump, there have been various proposals seeking to reform the Court. They mostly fall into the following categories: (1) impose a term limit so that each nomination is lower stakes; and (2) force the Court to practice weak review so that precedents made by an undemocratically-appointed body are not stringently applied across time. I argue that there is a far simpler option, one already used at the state level across the nation—Supreme Court Justices should be directly elected by the public.

The Supreme Court has had a complicated history with democratic theorists—a robust judiciary with the power to apply strong judicial review has been both demonized as an affront to democracy and lionized as foundational to it. The topic was thrust back into the center of the forum for public debate once again with the appointment of Justice Brett Kavanaugh. A Republican-controlled Senate was able to win out by a razor-thin margin and confirm his lifetime tenure. A similar scenario unfurled a year earlier with the confirmation of Justice Neil Gorsuch; his appointment was especially politicized because he was filling a seat that had laid vacant for months under a previously Democratic Senate and White House.

In the wake of these nominations, there have been a number of various proposals seeking to reform the Court; they mostly fall into the following categories: (1) impose a term limit so that each nomination is lower stakes; and (2) force the Court to practice weak review so that precedents made by an undemocratically-appointed body are not stringently applied across time. I argue that there is a far simpler option, one already used at the state level across the nation—Supreme Court Justices should be directly elected by the public.

The election of judicial officers is not so radical a proposal as it initially seems. First, we need not part with the Anglo-American tradition of single-member, geographically-based districts. The 326 million people in the United States could be divided into nine Supreme Court districts of approximately 36 million people each. The practice of dividing the United States into arbitrary supra-state organizations is already used: the Federal Reserve system operates across twelve different arbitrary regions; the U.S. Court of Appeals operates across eleven geographically grouped circuits. Furthermore, the Supreme Court has already changed significantly in structure during its lifetime. Because the Constitution leaves the details of establishing a Court to Congress, the number of justices in the body has varied throughout the institution's history. Finally, there already exists in American history a precedent for transforming indirectly democratic institutions into directly democratic ones. Ratified in 1913, the 17th Amendment decreed that senators are to be directly elected by the population of their states rather than by state legislatures, as was the norm.

A proposal that calls for the election of Supreme Court Justices would require a constitutional amendment. Despite the Constitution being infamously terse on the structure and operation of the Supreme Court, it does, in fact, state that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the Supreme Court."

Despite the difficulties of amending the Constitution, the ensuing democratic system of electing Justices would render many other misgivings about the Court moot. Most importantly, it would quash any concerns about how representative the Court is of the American public's will. Additionally, it would remove the perverse partisan incentives that Senators and Presidents have during the nomination process and eliminate the political hot potato that is the confirmation of Supreme Court justices, which, at best, results in the Senate wasting valuable time on the legislative docket that could be used elsewhere; at worst, constitutional crises.

The appointment of Supreme Court justices takes up time that should be spent legislating. In many cases, nominations

drag on for months. Famously, Robert Bork was nominated by Ronald Reagan in early July and was not rejected by the Senate until early October of 1987. Justice Kavanaugh's appointment process seemed to take up the entirety of the summer in 2018 and left little ability for politicians or the news cycle to focus on anything else. The most notable crisis came in the form of President Franklin Delano Roosevelt's 1937 attempt to expand the Supreme Court. Facing an obstinate and conservative Court that was rejecting his New Deal legislation, President Roosevelt proposed the Judicial Procedures Reform Bill of 1937. Because the Constitution establishes that Congress is responsible for deciding the composition and form of the Supreme Court, President Roosevelt proposed that an additional justice should be appointed for every member of the Court above the age of 70 (up to a maximum of six). This was interpreted as a power grab—Roosevelt's "court-packing plan."

We have seen other prickly constitutional questions raised by the nomination process more recently. On March 6th, 2016, President Obama appointed Judge Merrick Garland to fill the seat left by Justice Antonin Scalia. Republican Senate Majority Leader Mitch McConnell shockingly decided to let Judge Garland's nomination die in committee with no floor discussion or votes. To do so, the Senate passed the so-called "nuclear option," necessitating a simple majority for the confirmation of Supreme Court justices instead of the usual 60 votes. The claim at the time was that, with the election coming up, the voice of the American people should be heard. This move was roundly criticized as "stealing" a Supreme Court seat, as the nomination had occurred more than half a year before the 2016 election. The same novel parliamentary procedure allowed the Republican Senate to confirm Justice Brett Kavanaugh in 2018 by a razor-thin 50-48 margin straight down partisan lines.

The nebulous description of the Supreme Court in the Constitution, when combined with the incredibly high stakes of nominating a justice, result in a politically volatile landscape that encourages brinkmanship. Having the citizenry vote on Supreme Court justices would obviate the need for constitutionally questionable parliamentary maneuvering. Direct election of justices fixes an institution that is fundamentally anti-democratic

at its core. In the 2018 election, voters nationwide chose Democratic senators over Republican senators by a 7% margin, yet Republicans retained control of the Senate—and even gained seats, thanks to the malapportioned nature of the Senate. Because each state gets two senators, small, primarily rural (and conservative) states have a disproportionately large influence. This in and of itself is not a bad thing—the Senate was created specifically to defend the rights of small states and the political minority. Senate malapportionment, however, leads to malapportionment in the electoral college, which led to the bizarre scenario whereby a Senate (elected by a minority of the country) appointed Justice Kavanaugh (who was supported by a minority of the population—40% according to a *Gallup* poll from the time of his confirmation—who was confirmed by a president who lost the popular vote by millions.[1] On a structural level, allowing the Supreme Court to be selected by the Senate and President allows not just for minority protection, but minority rule.

There are those who would argue that Supreme Court nominations should not be subject to public opinion because (1) it politicizes the Court and (2) the public is ignorant of the expertise necessary to be a successful justice. I will address (1) first, as it can be refuted quite simply: that ship has sailed. A CNN exit poll conducted during the 2016 election found that for 21% of voters, Supreme Court appointments were the single most important factor in choosing for whom to vote. Another 48% listed the appointments as "an important factor" in their decision. To argue that the Supreme Court is an apolitical institution is just not a tenable position in 2019. (2), similarly, holds no water when scrutinized. The average American does not understand the United States naval policy in the South China Sea, yet we trust the American public to elect our Commander-in-Chief, the individual directly responsible for the United States naval actions in that theater. People need not know the minutiae of the law in order to select a Justice. How might they make an intelligent

[1] Gallup, Inc. "Americans Still Closely Divided on Kavanaugh Confirmation." Gallup.com. October 03, 2018. Accessed January 22, 2019. https://news.gallup.com/poll/243377/americans-closely-divided-kavanaugh-confirmation.aspx.

decision? The same way that they vote currently: due diligence, helped along by various organizations, think tanks, media outlets, Hollywood stars, and other politicians that provide their analysis of a candidate. Individuals need not a law degree to know that they believe in rehabilitative justice or that they are pro-life. Information about candidates for the Supreme Court would trickle down to voters through the same channels that people currently use to evaluate politicians.

Many states actually already elect justices to their local supreme court. Fifteen states allow non-partisan elections for judges and seven allow partisan ones. I cannot speak to the efficacy of said systems—I have not conducted any comparative studies between states with and without elected judiciaries. However, at the very least, I can say that an elected judiciary is a viable option worth exploring. Many places have been doing it for a long time with success. Furthermore, requirements can be imposed to ensure that Supreme Court Justices are properly qualified, similar to the age, citizenship, and residency requirements for members of Congress and President. This would help to prevent joke or protest candidacies.

Allowing for the direct election of Justices would allow the Supreme Court to become a truly co-equal branch of government. Supreme Court Justice is the only constitutionally-mandated position that depends upon the existence of the other two branches of government. Debates over whether judicial "overreach" or "activism" is undemocratic would vanish. The elephant in the room is, of course, the viability of passing such a constitutional amendment. Constitutional amendments require a two-thirds vote in both chambers of Congress (but, importantly, not the assent of the president) in order to be proposed. Then, three-quarters of the state legislatures must approve the amendment. The chances of the Senate voluntarily choosing to relinquish one of its most powerful responsibilities, that of "advice and consent," is near zero. The only other route to proposing a constitutional amendment is for two-thirds of the state legislatures to propose a constitutional convention, which has never happened in American history.

There is very little chance for processes involving the appointment of Supreme Court Justices to change via

constitutional amendment, barring any radical change in American politics.[2] Still, it is an option that merits serious exploration, especially given the success that direct elections of judiciaries in individual states have experienced. As discussed above, it may solve a lot of the problems inherent in the system that we have today.

[2] Plebiscites can be held for nominees, but they would count as nothing more than the non-binding advice of the People.

Freedom from Speech Codes

JACOB BLAIR
STAFF WRITER

Guaranteed by the First Amendment of the Constitution is the freedom of speech. During the 80s and 90s, however, many universities instituted speech codes, which prohibit particular types of speech, like "offensive language" and "disparaging remarks," for the purpose of fostering inclusivity while students from minority groups historically underrepresented on college campuses made their way into white-male-dominated spaces. While they may have been useful when first adopted, my article argues that speech codes now threaten to abridge our First Amendment right and need to be reevaluated.

Since America's founding, one of its core values has been the freedom of speech. Written into the First Amendment of the Constitution, every citizen of the United States reserves the right to speak and express themselves freely. While there are limitations (e.g., speech likely to incite physical violence, libel, and credible threats are not protected), the bar for censorship ought to be set quite high. College campuses provide the perfect example of a place wherein free speech and censorship intersect to raise questions about the merits of traditional American ideology.

On many college campuses throughout the nation, speech codes are in place to protect students.[1] These codes prohibit particular types of speech on the basis of content and language, often including "offensive language" and "disparaging remarks," in an effort to make the campus a more inclusive environment.[2] Perhaps necessary devices in the past, it is time to reexamine their purpose. While inclusion is undoubtedly a worthy goal, speech codes may not only be unduly restrictive but also unconstitutional in abridging our First Amendment rights.

Part of the reason why we have freedom of speech in the first place is to share ideas. Universities embody that ideal—built

[1] "Speech Code Reports." *FIRE* (blog).
[2] "What Are Speech Codes?" FIRE.

to foster thoughts, wonderings, and opinions. Speech codes were initially adopted and gained popularity in the 80s and 90s as a way to ease the transition for students belonging to demographics historically underrepresented on college campuses.[3] As women and people of color made their way into spaces dominated by white males, speech codes served to limit what students could say to their peers, which, at the time, was valuable. In fact, it ultimately cultivated the spread of ideas by helping to create a safe environment wherein minority groups were able to have a voice and contribute to conversations from which they were previously excluded.

A well-known form of speech not protected by the First Amendment is that which leads to direct and imminent harm.[4] When the codes were instituted in the 80s and 90s, inflammatory speech and the discriminatory attitudes from which they stemmed often led directly to physical violence.[5] Recognizing that sexism, racism, etc. are still alive and well today, physical violence and threats thereof are treated much more seriously by collegiate administrations and law enforcement, triggering swift and severe punishments. Speech codes simply do not serve the same purpose that they once did. In fact, many of them have been challenged and repealed in recent years because they have been found to be either too broad or too vague. However, they are being replaced by anti-harassment policies that serve almost the same function.[6] There must be other ways to create welcoming and inclusive environments that do not abridge our First Amendment rights.

On top of being unduly restrictive, speech codes are at odds with the purpose of universities, which function to facilitate the transition for young adults from high school to the "real world." Unfortunately, these policies prevent students from acquiring the skills necessary to tackle issues they will surely face

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[3] Delgado, Richard. "Legal Realism and the Controversy Over Campus Speech Codes." *Case Western Reserve Law Review* 69, no. 2 (2018): 275.
[4] "Freedom of Speech." HISTORY.
[5] Ray, Phyllis, and Adolph Simmons. "Racism on Campus: An Exploratory Analysis of Black-White Perceptions in the South." *Explorations in Ethnic Studies* 13, no. 1 (1990): 9-15.
[6] Zoeller, Mary. "Hundreds of Overbroad Harassment Policies Severely Endanger Protected Speech." FIRE. November 26, 2018.

after graduation, among them offensive language and disparaging remarks. Beyond that, universities pour money and energy into ensuring that they foster a diverse student body, including students of all socio-economic, racial, geographic, and cultural backgrounds. There is value in bringing together a manifold of perspectives to contribute to the marketplace of ideas, where progress and developments are made. Speech codes cause that market to fail. The Supreme Court shares that sentiment in *Bair v. Shippensburg*, where it ruled that determinations of infringements on free speech cannot be based solely on the reaction of the listener.[7] That speech is offensive to someone is no reason to limit our First Amendment rights.

McCauley v. University of the Virgin Islands uphold a similar principle. The Court found that universities are subject to a different standard than elementary, middle, and high schools when it comes to free speech.[8] At the primary and secondary levels, *loco parentis*, whereby an institution assumes the role of a parent, is essential because the students are typically minors who are required to be there by law. As such, there is an explicit understanding that they are to be protected from speech potentially damaging to their development of their physical, mental, and emotional faculties. At the collegiate level, though, there is no need for parental stand-ins, which emphasizes the fundamental difference between the institutions. Universities are not only allowed but encouraged to foster conversation and debate about topics that would normally be banned at the level of primary and secondary schooling, which cannot happen when trends like shutting down speakers with inflammatory ideas continue to gain popularity on college campuses. While there are undoubtedly some who should not be given a platform (like those whose speech is not protected by the First Amendment), many universities seem to apply their vague speech codes and anti-harassment policies inconsistently and haphazardly according to student reactions to the speaker. By limiting exposure to divisive ideas and opinions, colleges rob their pupils of important

[7] "Bair v. Shippensburg University, 280 F. Supp. 2d 357 (M.D. Pa. 2003)." Justia Law.
[8] "FindLaw's United States Third Circuit Case and Opinions." Findlaw.

worldviews and perspectives while engendering fear and disillusionment in those who might share similar values.

I do not mean to suggest that inclusion is a worthless goal—of course every student ought to be able to participate in and enjoy their education to the fullest extent, just not at the expense of our First Amendment rights. The transition will undoubtedly be a difficult one. It will make some students uncomfortable, angry, and upset. But I believe there are ways to mitigate the burden. Perhaps there can be "safe spaces" on campus for students who are negatively affected by certain types of speech to gather, talk, vent, decompress, and take refuge. Some already have these in the form of places of worship and multicultural centers. Universities might also sponsor town halls or other events for students to voice their concerns and spread ideas of their own. There are options out there that foster a welcoming and inclusive environment while simultaneously staying true to the underlying principles of the collegiate system and protecting our freedom of speech, which has and always will be a central tenet in our society. It is time to take off the training wheels of progress in post-secondary education.

Commonwealth v. Carter: Morality and the First Amendment

JESSICA BOUTCHIE
STAFF WRITER

In July 2014, Conrad Roy III, an 18-year-old Massachusetts resident, took his own life via carbon monoxide poisoning in Fairhaven, Massachusetts. In the four-year-long legal process that followed, his then-girlfriend, Massachusetts resident Michelle Carter, was charged with involuntary manslaughter for verbally encouraging Roy to commit suicide. The rulings of various judges involved in the process, however, have worked to add a physical component to Carter's speech, indicting her for assisting Roy's suicide, not encouraging it. Because indicting an individual for assisted suicide on words alone is unprecedented, this case has carved out an unclear verbal dimension for assisted suicide and stretched existing case law and legal statutes in the process, which will be the focus of my article.

The free speech clause of the First Amendment has long been defined by what it regulates, not how it does so.[1] As Harvard Law Professor Richard Fallon frames it, one can better understand the application of the free speech clause by viewing its jurisdiction as a sort of mapped terrain—a domain wherein years of precedent and constitutional salience overlap and allow judges to more easily decide issues within its purview.[2] Regulations of speech made in public places on matters of public interest, for example, are fairly well established—speech is not protected under the First Amendment if it creates a clear and present danger for individuals when uttered in a public space; however, protest speech, such as that during the time of the Vietnam War, may be protected as purely symbolic speech.[3]

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[1] Frederick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience," *Harvard Law Review* 117, no. 6 (2004): 1765-1809, 1. doi:10.2307/4093304.
[2] Richard Fallon in discussion with the author, October 23, 2018.
[3] "Schenck v. United States," *Oyez*; "Tinker v. Des Moines Independent Community School District," *Oyez*.

When speech occurs outside of the public domain on matters of private interest, however, the well-mapped terrain of the First Amendment becomes murky and muddled, and the free speech clause's application is no longer clear nor clarified by extensive precedent.[4] *Commonwealth v. Carter*, a case that has been making its way through the Massachusetts court system for nearly four years, finds itself squarely in this territory.[5]

In July 2014, Conrad Roy III, an 18-year-old Massachusetts resident, took his own life via carbon monoxide poisoning in Fairhaven, Massachusetts. Roy had a history of depression and had attempted suicide two years earlier, though his mental health was believed to be improving as a result of medication and treatment.[6] His suicide attempt, nonetheless, was the alleged product of a long-distance romantic relationship with then-girlfriend and defendant, Michelle Carter. Over the course of two years, Carter and Roy frequently discussed Roy's history of mental health issues and suicidal thoughts via text message.[7] Carter initially discouraged Roy's suicidal thoughts but later supported them, even discussing possible means by which Roy could commit the act.[8] When Roy ultimately went through with it, in his truck in a secluded parking lot on July 12, 2014, Carter, then 50 miles away in Plainsville, Massachusetts, engaged in two separate phone calls with Roy, later telling a friend that she had instructed Roy to "get back in" the truck after he wavered on his attempt.[9]

Carter was indicted by a grand jury for involuntary manslaughter in February 2015.[10] After a motion to dismiss the indictment failed, the case proceeded to a bench trial, where Carter was once again found guilty of involuntary

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[4] Richard Fallon in discussion with the author.
[5] "Commonwealth v. Carter: Trial Court Convicts Defendant of Involuntary Manslaughter Based on Encouragement of Suicide," *Harvard Law Review* 131, no. 3 (2018).
[6] "Michelle Carter Text Suicide Trial Verdict: Guilty," CBS News, June 16, 2017.
[7] "Commonwealth v. Carter: Trial Court Convicts Defendant," Harvard Law Review.
[8] Ibid.
[9] Commonwealth's Response to Defendant's Motion to Dismiss at 17, Carter, No. 15YO0001NE.
[10] Michael E. Miller, "Michelle Carter can face manslaughter charge for allegedly encouraging boyfriend's suicide, judge rules," *The Washington Post*, September 24, 2015.

manslaughter—this time, for both what she said and what she did not say.[11] Two months later, Judge Moniz of the Bristol County Juvenile Court imposed a sentence of two and a half years in the Bristol County House of Correction on Carter, with fifteen months to be served and the remaining fifteen to be suspended.[12] In October 2018, the case returned to the Massachusetts Supreme Judicial Court for direct appellate review, with Carter contesting the form of involuntary manslaughter for which she was charged.[13]

Commonwealth v. Carter raises a number of issues concerning the freedom of speech, questioning the Commonwealth's dubious distinction between encouraging and assisting suicide, and, consequently, the merit of the ruling against Carter. My article will first explore the legal distinction between 'encouraging' and 'assisting' suicide, noting differences between *Commonwealth v. Carter* and other court cases on the issue. My article will then note the strict standard of content-based restrictions on speech, arguing that the unclear boundary between encouraging and assisting suicide implies Massachusetts' failure to adhere to this standard. Ultimately, my article will argue that, though Carter's conduct was morally despicable, her conviction cannot reasonably be upheld under current Massachusetts law.

Assisting versus Encouraging Suicide

Assisting suicide is illegal in a number of states. In *Washington v. Glucksberg* (1997), the Supreme Court ruled that there is no constitutional right to assisted suicide; accordingly, state governments have been left to decide whether to outlaw it.[14] Assisted suicide—generally understood in the context of physician-assisted suicide or the voluntary administration of

[11] "Commonwealth v. Carter: Trial Court Convicts Defendant," *Harvard Law Review*.
[12] Brief of Defendant-Appellant Michelle Carter on Appeal from the Bristol County Juvenile Court, Commonwealth v. Carter, No. SJC-12502.
[13] Ibid.
[14] "Washington v. Glucksberg," *Oyez*.

euthanasia—has subsequently been prohibited in forty-two states, including Massachusetts.[15]

The issue of encouraging suicide, however, is not as clear-cut. Some states like Georgia and Idaho, for example, have decreed that assisting suicide requires a physical act—thus, verbally encouraging suicide is not explicitly prohibited.[16] Other states consider encouraging suicide to be constitutionally protected speech. In fact, in *Minnesota v. Melchert-Dinkel* (2014), the Minnesota Supreme Court struck down a prohibition on speech that encourages suicide on the basis that this form of speech is protected by the First Amendment.[17] The dissenting opinion even went so far as to argue that speech alone cannot constitute assisted suicide.[18] Massachusetts law, though, the same body used to convict Michelle Carter, makes no reference to the verbal encouragement of suicide.

Carter's case thus tests these uncertain boundaries between 'encouraging' and 'assisting' suicide, as the Massachusetts Supreme Judicial Court's ruling suggests that Carter 'assisted' and not merely 'encouraged' suicide. In 2016, the same denied Carter's motion to dismiss her indictment as a youthful offender and affirmed the involuntary manslaughter charge, with Justice Cordy arguing that the "coercive quality" of Carter's words in her phone conversation with Roy just before his death "[overcame] any independent will to live he might have had," and effectively led to his suicide.[19] Defining Carter's words as "coercive" potentially implies that words alone can constitute the physical act that defines assisted suicide, an implication that could clarify the legal transition from encouraging to assisting suicide.

Determining that words without any accompanying physical force could be considered assisted suicide, however, is

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[15] Ch. 201D §12.
[16] Robert Rivas, "Survey of State Laws Against Assisting in Suicide," *Final Exit Network, Inc.,* 2017.
[17] "State v. Melchert-Dinkel: Minnesota Supreme Court Determines the False Claims Used to Advise or Encourage Suicide Do Not Fall Within the *Alvarez* Fraud Exception," *Harvard Law Review* 128, no. 4 (2015).
[18] Sherry F. Colb, "Minnesota Court Rules that First Amendment Protects Encouraging a Suicide," *Justia*, April 16, 2014.
[19] Commonwealth v. Carter, 474 Mass. 624 (2016), No. SJC-12043.

unprecedented. In *Persampieri v. Commonwealth*, for example, a man convicted of second-degree murder for assisting his wife in committing suicide told her where to find his rifle, loaded it for her, and explained to her how to best reach the trigger.[20] In *Commonwealth v. Atencio*, likewise, two men convicted of involuntary manslaughter due to a fatal game of Russian roulette had each physically assisted in some manner; one defendant retrieved the firearm and the other handed it to the deceased.[21] Both cases were cited against Carter, yet neither involves a conviction on the basis of words alone. Carter, by contrast, was fifty miles away from Roy at the time of his suicide, thereby precluding any physical element of assistance. So, although the Massachusetts Supreme Judicial Court appears to have faulted Carter for assisting her boyfriend's suicide, it stretched existing case and state law to do so. Consequently, the boundary between encouraging suicide and verbally assisting suicide remains unclear.

A later ruling in the case's years-long appeals process that found Carter guilty based on an omission liability theory further complicates the boundary between encouraging and assisting suicide. In 2017, following an unsuccessful appeals process, the case proceeded to a bench trial, where Carter was again found guilty of involuntary manslaughter.[22] This time, however, Judge Moniz argued that Carter was guilty not only for her final words to Roy, but also what she did not say or do: Carter's instruction to Roy to get back in the truck, Moniz asserted, created "a life-threatening risk," and thus Carter was required to "take reasonable steps to alleviate [that] risk."[23] Carter's words and subsequent failure to discourage Roy's act therefore "br[oke] [Roy's] chain of self-causation," implicating Carter as responsible for the suicide.[24]

Suggesting that one can assist a suicide by failing to say anything that prevents the suicide, however, also raises First

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[20] Ilario Persampieri v. Commonwealth, 343 Mass. 19 (1961), 175 N.E.2d 387.
[21] Commonwealth v. Atencio, 189 N.E.2d 323 (1963).
[22] "Commonwealth v. Carter: Trial Court Convicts Defendant," *Harvard Law Review*.
[23] Ibid.
[24] Ibid.

Amendment concerns. There is, after all, a negative right to the freedom of speech; in cases like *Wooley v. Maynard*, the Supreme Court has ruled that state interests cannot compel individuals to engage in speech that they find "morally objectionable."[25] Carter's desire, however misguided it was, to see Roy end his suffering, and her ensuing refusal to impede his attempt to do so, could fall under this protection. Thus, Judge Moniz's assertion that the absence of words can implicate an individual in another's suicide further muddles the boundary between encouraging and assisting suicide. 'Encouraging' morphs into 'a failure to discourage,' and 'assisting' becomes 'not preventing.'

Classifying Carter's speech as crime-facilitating would provide a clear means of differentiating between 'encouraging' and 'assisting' suicide, but this classification is impossible given current Massachusetts law. Crime-facilitating speech, as defined by Stanford Law Professor Eugene Volokh, is "any communication that, intentionally or not, conveys information that makes it easier or safer for some listeners or readers to commit crimes."[26] Carter's texts, by definition, did convey information that made it easier for Roy to commit suicide; in one example, Carter helped Roy to decide how to commit suicide, claiming that "with a generator [of carbon dioxide, Roy couldn't] fail."[27] Yet suicide itself is not a crime in Massachusetts.[28] Hence, that Carter's speech did not facilitate a crime further obscures the boundary between encouraging and assisting suicide.

Ultimately, both prominent rulings have indirectly addressed the boundary between 'encouraging' suicide—constitutionally protected speech in some states or simply not outlawed in most others—and 'assisting' suicide—illegal in Massachusetts and forty-one other states—without clearly demarcating it. Arbitrarily deciding that a certain act has crossed the line from encouraging to assisting suicide without defining where this boundary is or what constitutes either act, however, has potentially dangerous implications beyond this specific case.

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[25] "Wooley v. Maynard," *Oyez*.
[26] Eugene Volokh, "Crime-Facilitating Speech," *Stanford Law Review* 57, (2005): 1096-1222, 1103.
[27] Commonwealth v. Carter, 474 Mass. 624 (2016), see note 4.
[28] Commonwealth v. Dennis, 105 Mass. 162 (1870).

As the ACLU of Massachusetts asserts, without clear instruction as to where verbal discussion of suicide becomes assistance, families may hesitate to engage in important end-of-life conversations with loved ones for fear of prosecution.[29]

How Far is Massachusetts Willing to Go?

Given that numerous Massachusetts judges conflated Carter's speech with some sort of physical action to assist suicide, the ruling in *Commonwealth v. Carter* implies that the Massachusetts government intends to limit some speech related to suicide. In order to be able to establish a conduct-based restriction on expressive conduct, however, the state must be able to "demonstrate that the restriction is 'necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"[30] In other words, the Court must find that a government's interest against observing the principle of freedom of speech on a certain subject is more important than the freedom of speech on the subject itself. Such is the strict scrutiny standard of judicial review.

To that end, the Commonwealth has argued that it "has an unqualified interest in the preservation of human life," and therefore a "compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide."[31] Yet identifying Carter's speech as a "causal link" to Roy's suicide once again reinforces the idea that they consider Carter's speech to be assisting suicide, a distinction that the Commonwealth has already failed to explain. To argue that any speech that could *cause* suicide, regardless of how one regards causation, therefore suggests that the Commonwealth is willing to use ambiguous legal boundaries as a catch-all means of prosecuting individuals who were, to some degree or another, aware of others' suicides.

Commonwealth v. Carter thus references insufficient case law in order to draw a boundary between encouraging and assisting suicide without labeling it. Then, *Commonwealth v.*

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[29] "ACLU of Massachusetts Statement on Michelle Carter Guilty Verdict," June 16, 2017.
[30] Mendoza v. Licensing Board of Fall River, 444 Mass. 188 (2005), see note 12.
[31] Commonwealth v. Carter, see note 17.

Carter uses this ambiguous boundary to justify the state's interest in preserving the life of private individuals, creating poorly defined legal territory for an act with severe consequences. What Michelle Carter did—and did not do—was morally reprehensible, and Conrad Roy III's death was a tragedy. However, in arguing that Carter's speech caused Roy's autonomous act, the Commonwealth has added a murky verbal dimension to assisted suicide and stretched existing case law and legal statutes in the process.

The "Weaponization" of the First Amendment

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Current dialogue on the conservative tendencies of the Supreme Court centers around the recent appointment of Justice Kavanaugh. His addition to the Bench was especially divisive among Democrats and Republicans in the Senate and marked another step toward the politicization of the Court, specifically in the direction of the political right. President Trump, like some before him, selects Justices that he believes will interpret the law in such a way that affirms Republican values. The trend is borne out in recent decisions that have drawn bright blue and red lines around the protection of certain First Amendment rights. There have been two main consequences to follow from these rulings: (1) the Court has maximized individual liberties; and (2) the Court has circumscribed the legislative power of collective institutions, thereby challenging the authority of the country's representative democracy and exercising power that exceeds its jurisdiction. My article will examine the effects of the increased politicization of the Supreme Court through an evaluation of a few of its recent decisions and the implications that they have for individual and collective liberties.

The First Amendment of the United States Constitution ensures the freedom of speech, religion, and the press, as well as the freedom to petition the Government; although conceptually basic, its interpretation by the Supreme Court has varied greatly throughout history, in no small part due to the composition of the Bench. Discussions over the First Amendment have taken center stage in many recent cases, including *Janus v. American Federation of State*, *Citizens United v. Federal Election Commission* (2010), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018). In each of these cases, the Court's majority, a decidedly conservative bunch appointed entirely by Republican presidents, expands First Amendment protections, ultimately serving as a means of deregulation and limiting the

ability of state and local authorities to legislate for their constituents.

Under its current administration, the United States has witnessed the appointment of two conservative justices to the bench. The first, Justice Neil M. Gorsuch, replaced the conservative Justice Antonin Scalia, who was the deciding vote in fifteen of the eighteen 5-to-4 decisions during his tenure.[1] Perhaps the more devastating blow to the liberal jurisprudence was the resignation of Justice Anthony M. Kennedy, who had served as the Court's resident libertarian tie-breaker for decades. His replacement, Brett Kavanaugh, had a tumultuous path to his seat on the Bench, but, having emerged victorious in his confirmation battle, now puts decisions that have been considered wild successes for the liberals everywhere, such as *Roe v. Wade* (1973), at risk.[2]

While the pressing threat of overturning cases like *Roe v. Wade* seems an ominous harbinger of a waning liberal ideology in the Court, there are other, subtler, indications that the Court majority is acting, intentionally or not, to concretize Republican values at the jurisprudential level. The slow but steady expansion of First Amendment rights is evidence. One of the more recent cases that has ballooned First Amendment rights is *Janus v. American Federation of State, County, and Municipal Employees Council* ("*Janus*"). Because public and private sector unions have become prominent voices in our current political arena, many have called the constitutionality of what are known as *agency fees*—i.e. payments required of non-union laborers in order to fund negotiation and worker advocacy in union workplaces—into question. Because no union can require that employees become union members, agency fees have been devised as a way to force non-union laborers to support unions anyway. However, in *Janus,* the petitioner argued that his freedom of speech was violated in that, by paying agency fees, he was compelled to speak through

[1] Liptak, Adam, and Alicia Parlapiano. "Conservatives in Charge, the Supreme Court Moved Right." The New York Times. June 28, 2018.
[2] Joffe, Carole. "With the Appointment of Brett Kavanaugh, Roe v. Wade Is Likely Dead." The Washington Post. July 10, 2018.

the union.[3] This was not the first time that the constitutionality of agency fees had been brought before the Supreme Court—back in 1976, it was adjudicated in the case *Abood v. Detroit Board of Education* (1977). *Abood* held that agency fees do not violate the First Amendment so long as the funds collected from nonunion members are not contributed toward unions' political activity. *Abood*, however, was thrown out in the *Janus* decision, with the Court's reasoning that the "[s]tate's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment," and that *Abood* was incorrect to conclude otherwise.[4]

To consider the implications that this case has on the distinction between individual and collective liberty, we must consider the history and purpose of right-to-work laws in the United States. Throughout history, American labor law has had to reconcile the rights of workers to form unions and assert collective power with the right of workers to undertake individual actions that conflict with those of the collective. States have had to negotiate a balance among their legislative power, union powers, and individual liberties. As might be expected given the complexity of these relationships, many states have arrived at different distributions of power. Twenty-two states require non-members of unions to pay agency fees, while the remaining twenty-eight prohibit unions from charging them.[5] This close-to-even split indicates that states feel differently about the legality of agency fees. Even within these two categories, there is a great deal of variation in what states consider to be under the purview of public sector unions (e.g., the ability to negotiate contracts, etc.).[6] *Abood* had been a great victory for collective freedom; its reversal served to empower individual workers while simultaneously diminishing the power of unions. The financial consequences they now face are substantial—in Michigan and

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[3] Feigenbaum, James, and Alexander Hertel-Fernandez. "The Supreme Court Just Dealt Unions a Big Blow..." The Washington Post. June 27, 2018.
[4] *Janus* v. *State, County, and Municipal Employees,* 585 U. S. 2 (2018).
[5] Feigenbaum.
[6] Northern, Amber M., Janie Scull, and Dara Zeehandelaar Shaw. *How Strong Are U.S. Teacher Unions? A State-By-State Comparison*. Report no. 537563. Thomas Fordham Institute.

Wisconsin, for example, teacher union fees dropped between one-third and one-half.[7] Unions, and collective freedom more generally, in the United States find themselves at a crossroads.

While the *Janus* decision impacts many public-sector employees throughout the United States, it also has broader implications for the United States and our operating interpretation of the right to free speech. In *Janus,* the Court decided that agency fees violated free speech rights to such an extent as to merit redress. Inherent in the *Janus* decision lies a tension between two legal ideals: First Amendment rights and *stare decisis*—i.e. the legal principle of precedent. Here, the majority chose to disregard the latter in favor of the former, implying that the Court believed the decision qualified for "exceptional action[s]," and thus met the criteria for "special justification—over and above the belief that the precedent was wrongly decided."[8] Accordingly, the Court's prioritization of First Amendment rights over the legal principle of *stare decisis* should not be taken lightly, as the criteria for warranting such an action is severe and rather restrictive.

The deviation from *stare decisis* is indicative of a trend in the Supreme Court in favor of expanding First Amendment rights. We should not assume that just because the Court overturned *Abood* that it was justified in doing so. In her dissent, Justice Elena Kagan cites that the Court unanimously ruled that *Abood* was "a general First Amendment principle"[9] in *Locke v. Karass* (2009).[10] *Abood* is not a decision that has simply gone unchecked over time—rather, it has been evaluated and reassessed by the Bench for the past forty years. Something, then, about the composition of the current Court has driven the new interpretation. While it is impossible to determine the motivations of each individual Justice, the deviation from precedent is a surefire victory for the political right, given that it ultimately served to "reduce voter turnout, Democratic vote

[7] Feigenbaum.
[8] *Arizona v. Rumsey*, 467 U.S. 203 (1984).
[9] *Janus* v. *State, County, and Municipal Employees,* 585 U. S. 20 (2018).
[10] *Locke v. Karass*, 555 U.S. 207 (2009)

share, and union contributions to the campaigns of Democratic politicians."[11]

In her dissent, Justice Elena Kagan accuses her colleagues of "weaponizing the First Amendment," claiming that "the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy.[12]" She warns that "[s]peech is everywhere—a part of every human activity (employment, health care, securities trading, …)" and for that reason "almost all economic and regulatory policy affects or touches speech."[13] Kagan's concern is that the prioritization of First Amendment rights has become a disguise for politically expedient deregulation. While the expansion of First Amendment Rights might give individuals more freedom, it disempowers state and local authorities to govern by limiting their abilities to navigate the murky waters of agency fees. Furthermore, if the limits on what constitutes "speech" are so expansive, it is perfectly legitimate to question whether or not there will be any room at all for more localized institutions to make their own regulatory decisions.

The aforementioned trend in the Court started in earnest in the 2010 decision of *Citizens United v. Federal Election Commission*. In this case, the Court gave corporations the same political free speech guarantees it gives to individuals, and ruled that "corporate campaign contributions constituted protected speech—and therefore could not be limited."[14] The Court effectively declared parts of the Bipartisan Campaign Reform Act of 2002 unconstitutional.[15] While it could be argued that the expansion of First Amendment rights benefits the collective freedom of corporations, the Court has in fact expanded the definition of the individual. Consequently, the Court effectively

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[11] McArdle, Megan. "Why You Should Care about the Supreme Court's Janus Decision." The Washington Post. June 27, 2018.
[12] *Janus* v. *State, County, and Municipal Employees,* 585 U. S. 26 (2018).
[13] Ibid., 27-28.
[14] Edwards, Haley Sweetland. "How the First Amendment Became a Tool for Deregulation." Time. July 19, 2018. Accessed December 17, 2018.
[15] "Citizens United v. Federal Election Commission." *Oyez*. Accessed December 17, 2018.

limits Congress's ability to legislate money's influence in election campaign and thereby its ability to regulate speech by broadening the definition of speech itself, as discussed by Justice Kagan in her *Janus* dissent less than a decade later on a Bench that is even more conservative than during *Citizens United*.

The expansion of the First Amendment continued in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2017), which ruled that a Colorado baker did not have to service a same-sex couple as it violated the Free Exercise Clause. The Court found that the Colorado Civil Rights Commission did not act in accordance with the law in their investigation of the case because they conducted their investigation in a way that violated the baker's free exercise of religion.[16] Therefore, the ruling was less about discrimination based on sexual orientation in the private sector due to religious beliefs and more about Colorado Civil Rights Commission's process in investigating these types of case. While *Masterpiece Cakeshop* bears little relevance for future cases due to its uniqueness, it is nonetheless significant in that the Court once again invokes the First Amendment to declare action at a state level unconstitutional. Once again, in empowering the individual, or, in this case, the corporation, the Court has disempowered the collective.

The ballooning of the First Amendment represents a conservative tilt in the Supreme Court brought about by highly politicized appointments at the hands of Presidents who choose Justices based on assurances that the law will be interpreted in a way that reaffirms Republican values. In *Janus v. American Federation of State, County, and Municipal Employees Council*, *Citizens United v. Federal Election Commission*, and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court capitalizes on an opportunity to expand free speech and the free exercise of religion. Empowering these individual liberties diminishes the powers of various collective powers such as Congress, unions, state and local authorities to make decisions on behalf of their constituents. While the expansion of individual rights might seem like a truly democratic, American ideal, the

[16] "Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission." *Oyez*. Accessed December 17, 2018.

United States has always operated as a representative democracy. Regulation exists to give legitimacy to these representative bodies. Recent decisions have effectively rendered the representative bodies of the United States unable to legislate on behalf of their constituents when it comes to a number of issues. The Court has drastically increased the scope of the most untouchable of freedoms, weaponizing the First Amendment in the process. While it is perhaps unavoidable that the decisions of the Supreme Court remain completely devoid of politicization, the expansion of First Amendment Rights calls into question its impartiality and specifically the process of appointments by which its composition comes about.

Risky Business: An Economic Analysis of the "Reasonable Corporation" Standard of Care

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The role of the jury in negligence cases is a hotly contested issue when it comes to tort law. Negligence is defined by the American Bar Association as "the doing of some act that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do, under the circumstances" (Nelson 2005, p. 368). Some corporations feel that civil juries "rule against them more on the basis of hostility to business than on the grounds of actual negligence" (Hans 1998, p. 327). Others subscribe to the deep-pockets hypothesis—the belief that civil juries are biased against wealthier defendants simply because they have more resources with which to spend on compensatory damages for harms sustained by plaintiffs (MacCoun 1996). While certain evidence does reveal a significant difference in plaintiff verdicts and award amounts when the defendant is a corporation as opposed to an individual, research suggests that neither anti-business sentiment nor a deep-pockets animus drive the trend. Rather, it is the application of a higher "reasonable corporation" standard of care by juries that view businesses "as having greater knowledge and expertise than individuals" such that they are better suited to avoid harm (Diamond 2013, p. 425). From an economic perspective, I find that juries are probably right—that is, holding corporations to a higher standard of care is likely more efficient than parity. Although I believe that the negligence standard of care, as currently constituted, gives civil juries the agency and authority to treat corporations differently than they do individuals, we ought to refine the law to give some guidance as to the "circumstances" allowed to be considered in rendering verdicts. This will provide for a more consistent application of the "reasonable corporation" standard of care, which is

important to achieving socially optimal levels of precaution.

I. Introduction

The role of the jury in negligence cases "ranks among the most contentious issues in contemporary debate about the merits of the tort system" (Vidmar 1993, p. 218). Negligence is defined by the American Bar Association as "the doing of some act that a reasonably prudent person[1] would not do, or the failure to do something that a reasonably prudent person would do, under the circumstances" (Nelson 2005, p. 368). Some corporations[2] feel that civil juries "rule against them more on the basis of hostility to business than on the grounds of actual negligence" (Hans 1998, p. 327). Others subscribe to the deep-pockets hypothesis—the belief that civil juries are biased against wealthier defendants simply because they have more resources with which to spend on compensatory damages for harms sustained by plaintiffs[3] (MacCoun 1996). While certain evidence does reveal a significant difference in plaintiff verdicts and award amounts when the defendant is a corporation as opposed to an individual, research suggests that neither anti-business sentiment nor deep-pockets mentality produce the result. Rather, it is the application of a higher "reasonable corporation" standard of care by juries that view businesses "as having greater knowledge and expertise than

[1] "Person" is any legal person (i.e., individual, company, or other entity which has legal rights and is subject to obligations).

[2] The legal definition of a corporation is as follows: "[a]n artificial person or legal entity created by or under the authority of the laws of a state or nation … ordinarily consisting of an association of numerous individuals, who subsist as a body politic under a special denomination, which is regarded In law as having a personality and existence distinct from that of its several members, and which is, by the same authority, vested with the capacity of continuous succession, irrespective of changes in its membership, either in perpetuity or for a limited term of years, and of acting as a unit or single individual in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law" (Garner 1999). I narrow my focus to a subset of corporations—manufacturing corporations—later on, but it is important to understand how the law determines defendant status as either a corporation or an individual.

[3] Under the deep-pockets hypothesis, juries are presumably motivated by some vision of distributive justice, seeking a more socially just allocation of wealth by taking from the "rich" (defendant) and giving to the "poor" (plaintiff).

individuals," leaving them better suited to avoid harm (Diamond 2013, p. 425).

In the field of law and economics, legal rules are analyzed from the perspective of efficiency— that is, "the question asked of a legal rule is whether its structure is such that when rational individuals act within its framework they are induced to act in ways so that the social outcome which comes about as a consequence of the totality of actions undertaken by the individuals is invariably efficient" (Jain 2012, p. 147). With respect to tort law specifically, the question becomes "how to apportion accident loss between victim and injurer so that both parties involved in the harmful interaction are induced to take socially optimal levels of [precaution] for accident prevention and loss reduction" (p. 147). The socially optimal levels of precaution are those that minimize the total social costs of accidents, which are defined to be "the sum of the costs of [precaution] taken by the two parties and expected accident loss [(i.e., the probability of an accident, which is assumed to be a decreasing function of the level of precaution, multiplied by the monetary value of the harm from an accident, which might include lost income, damage to property, medical expenses, attorney fees, administrative costs of the court, and more)]" (p. 148; Cooter 2013). My article will limit its scope to the unilateral precaution context, wherein it is optimal for only one party—namely, the injurer—to take a positive level of precaution. I do this because my goal is to determine whether juries are correct in assuming that corporations have greater knowledge and expertise such that they are able to take precaution to prevent some given accident at a lower social cost than individuals, regardless of the level of precaution taken by the plaintiff. If so, then holding corporations to a higher negligence standard of care (closer to that of strict liability), thereby inducing them to take more precaution than individuals for the same accident, may actually be efficient from a social standpoint, which would carry significant policy implications.

II. Research Objectives

In this article, I plan to evaluate the "reasonable corporation" standard of care with an eye toward efficiency. Part

III critiques the main empirical methods that have been used to study juries; understanding their respective strengths and weaknesses allows us to better gauge the validity of the results of particular jury decision-making studies. Part IV then goes on to explore the results of particular jury decision-making studies that support the existence of a higher "reasonable corporation" standard of care and assess potential explanations for the phenomenon before deciding upon the most likely among them. Part V analogizes the negligence standard of care to strict product liability in an effort to justify the "reasonable corporation" standard of care from an economic perspective. Part VI presents policy implications. Part VII discusses the results and the limitations of my analysis. Part VIII ends with some concluding remarks and ideas for future research. I ultimately decide that holding corporations to a higher standard of care is likely more efficient than parity; however, the current negligence standard of care as laid out by the American Bar Association need only subtle refinement to account for the finding.

III. Empirical Methods Used to Study Juries

A. Archival Research

Archival studies of jury behavior consist of "researchers gather[ing] data on case characteristics and jury verdicts from completed trials to analyze verdict patterns and the ability of the measured case characteristics to predict plaintiff win rates and damage patterns" (Diamond 2013, p. 415). The data mostly comes from two primary sources: (1) courts and (2) commercial jury verdict reporters. Archival research is particularly useful in "its ability to examine trends, [often times using econometric techniques], in large-scale data" (Hageman 2008, p. 06). Hence, external validity[4] is "particularly high in studies using archival research methods, as [they make] use [of preexisting] data

[4] A study is "deemed to be valid, insomuch as valid cause-effect relationships are established, if the results are due only to the manipulated independent variable (possess internal validity) and are generalizable to groups, environments, and contexts outside of the experimental settings (possess external validity)" (Onwuegbuzie 2000, p. 03).

pertaining to naturally occurring events," such as completed jury trials (Hageman 2008, p. 06).

Although convenient for establishing general trends in a given dataset, archival studies are limited in testing for causal relationships. Their "non-experimental designs lack randomization, control groups, pre-tests, and other factors, [forcing] researchers to instead measure and statistically control for alternative explanations" and thereby compromises the internal validity of the studies (Hageman 2008, p. 06). Furthermore, "some widely used archival sources are limited by selection biases that can produce misleading results" (Diamond 2013, p. 415). For example, "most commercial jury verdict reporters depend on the reports of the litigating attorneys for information on their cases, which may result in incomplete data because attorneys (1) fail to provide information on some cases, and (2) do not provide accurate information on reported cases" (Diamond 2013, p. 415). Merritt and Barry (1999) performed a study of "all [jury] verdicts from a representative urban county over a full twelve years, thus avoiding the biases of more selective databases or restricted time periods," and found a substantial underrepresentation of defense verdicts as well as lower damage awards in commercial jury verdict reports (p. 390). Lastly, a general weakness of "archival jury studies is that the case information available from even the best archival source typically includes only a limited number of variables," which limits our understanding of that which is truly responsible for the observed trends in a dataset.

B. Jury Simulation Studies

Jury simulation studies, far and away the most widely used empirical method of studying jury behavior, usually take the form of laboratory experiments, which "provide the opportunity to isolate the effects of particular treatment on outcomes" (Diamond 2013, p. 415). Their main advantage is "the ability to establish causality in relationships between and among phenomena" (Hageman 2008, p. 13). There are several qualities that define a well-designed experiment. For one, "the only difference between the set of participants receiving the

experimental treatment and the set in the control group [should be] the experimental treatment itself [so that] any differences in outcomes can be attributed to the experimental treatment" (Diamond 2013, p. 415). Furthermore, it should "capture the core features of the environment the experimenter seeks to study and represent the participant characteristics that may affect participant responses; [thus], for example, the external validity of [jury simulations] may be weakened when they only use college student participants and laboratory settings," as so many do (Diamond 2013, p. 416; Bray 1979). The best studies are those which use mock juries that accurately reflect the jury pool and most closely approximate real trials, usually involving videotaped trials with witnesses, evidence, arguments and instructions, and deliberations. Due to the ubiquitous constraints of time and money, these are typically few and far between.

One crucial drawback of using jury simulation studies to draw inferences about jury behavior is that "experiments are not as realistic as the courtroom," so they may not be representative of how real juries act and think behind closed doors during deliberation (Hans 1996, p. 244). In general, carrying out studies with a high degree of internal validity necessarily entails "contrived, artificial environments that remove participants from their natural settings," which results in "a loss of external validity and can hamper the generalizability of the study" (Hageman 2008, p. 14). Bornstein (1999), however, conducts an extensive analysis of jury simulation research published in the first 20 years of *Law and Human Behavior* and finds similar verdict results among studies that vary widely in how closely they approximate real trials, suggesting that not every difference in design will affect observed outcomes.[5] In fact, Bray (1979) recommends "mutual tolerance of differences in research methodologies since these reflect honest differences in research objectives, resources, and style" (p. 117). Nevertheless, those jury simulations that use "minimalist stimulus materials omitting elements likely to affect responses" while still boasting generalizable results can be misleading" (Diamond 2013, p. 416).

[5] For more on the procedural variations among jury simulation studies, see Bray (1979).

C. Sample Surveys

Surveys are conducted to gather information about a population by sampling[6] from a representative subset (Fricker 2016). One unique value of "sample surveys as a tool to document human thought and behavior is their ability to describe large populations within measurable levels of uncertainty" (Groves 2006, p. 646). Moreover, sample surveys are often cheaper to carry out than other empirical methods typically used to study jury behavior in terms of cost, time, and effort. With respect to isolating the effects of particular treatment on outcomes, surveys provide the researcher with a level of control less than that of a jury simulation because participant behavior cannot be directly observed, but more than that of an archival study because of the ability to manipulate their design. They are also usually able to collect data from larger swaths of the population than jury simulations that require participants to be present in person (Greeley 2018).

Sample surveys, however, have a long, well-documented list of shortcomings. Warner (1965) notes that for whatever reason, be it modesty, fear of judgment, or a reluctance to confide in strangers, "individuals in a sample survey may prefer not to confide to the interviewer the correct answers to certain questions. In such cases, individuals may choose not to reply at all or to reply with incorrect answers," which makes interpreting the results difficult (p. 63).[7] Often times, the results are unable to be generalized beyond the group of people who answered the survey due to what is known as self-selection bias: "Not everyone

[6] "Sometimes surveys are conducted as a census, where the goal is to survey every unit in the population. However, it is frequently impractical or impossible to survey an entire population, perhaps owing to either cost constraints or some other practical constraint, such as that it may not be possible to identify all members of the population" (Fricker 2016 p. 162).

[7] Economics proposes a number of explanations as to why individuals may choose not to reply to a survey or to reply with incorrect answers. For example, if there is no adequate incentive to complete the survey (whether monetary or otherwise), neoclassical theory tells us that self-interest likely drives the decision ("there are better uses of my time"). If there *is* adequate incentive but still no reply, behavioral economics points to bounded willpower, whereby humans act in ways that conflict with their long-term interests. See Jolls (1998), Mullainathan (2000), and Ofir (2009) for more on the topic.

who receives a survey is likely to answer it, no matter how many times they are reminded or what incentives are offered.[8] If those who choose to respond are different in some important way from those who do not, the results may not reflect the opinions or behaviors of the entire population under study" (Starr 2012). In fact, Groves (2006) finds that many surveys of the U.S. household population are experiencing higher refusal rates as time goes on, amplifying nonresponse bias. (p. 646). Baruch (2008) corroborates, examining the response rates for sample surveys included in 1607 studies from refereed academic journals that collectively cover more than 100,000 organizations and 400,000 individual respondents. He discovers that the "average response rate for studies that utilize data collected from individuals is 52.7 percent with a standard deviation of 20.4, while the average response rate for studies that utilize data collected from organizations is 35.7 percent with a standard deviation of 18.8" (p. 1139). These numbers are shockingly low and indicative of the perennial problem faced by researchers: even when a well-designed survey elicits a high response rate that provides a large dataset with great statistical power and small confidence intervals around sample statistics, the results still might not be representative of the larger population under study (Baruch 2008). Therefore, surveys must always be critically analyzed for potential selection bias.[9]

D. Post-trial Interviews of Jurors

Researchers also use "post-trial reports to gauge juror impressions of the evidence and to obtain a view of the deliberation process through the eyes of the participating jurors" (Diamond 2013, p. 415). Properly conducted post-trial interviews are highly informative because they provide data on real jurors

[8] In fact, the use of incentives and reminders can lead to a lower response rate (Baruch 2008).

[9] There are steps researchers can take to mitigate the shortcomings of the sample survey. For example, Baruch (2008) notes that electronic surveys elicit higher response rates than traditional mail surveys. Starr (2012) suggests including questions to identify sample bias and comparing the characteristics of respondents to those of known distributions of the population. See also Fricker (2016).

who have sat through a trial. Although most researchers would rather observe the deliberative processes directly, very few courts allow that to happen, so talking to jurors after the fact appears to be the next best option. Many prefer this empirical method to others because it is relatively inexpensive to carry out. The difficulty is getting jurors to agree to be interviewed, which, as with surveys, can lead to self-selection bias such that the results are not representative of the larger population under study.

One limitation of post-trial interviews of jurors is that "reports, however sincere, are likely to be imperfect reconstructions of what occurred earlier" (Diamond 2013, p. 415). Some may be more accurate than others. For example, interviews conducted immediately after trial are more likely to elicit better recall from jurors; similarly, reports corroborated by a substantial majority of the jurors from the same jury are more likely to be trustworthy (Diamond 2013). There is also the threat of self-serving bias, which refers to a well-documented psychological phenomenon whereby individuals "maximize the esteem in which they are held by others and, as a consequence, maximize their own self-esteem" by "taking personal responsibility for praiseworthy acts and denying personal responsibility for blameworthy acts," even when not entirely truthful (Arkin 1980, p. 24). Jurors admitting that they were anything less than rational, methodical, and intentional as fact-finders is tantamount to admitting poor performance, which could reflect negatively on their reputation. Self-serving bias also helps us to make sense of the observation by Guinther (1988) that jurors are less accurate in reporting whether a discussion about a certain piece of evidence influenced their decision when they had been admonished not to consider it by the judge. Coupled with the lack of a clear incentive for jurors to be honest about what went on behind the closed doors of deliberation[10] (their civic duty has been fulfilled by the time of the interview), self-serving bias can corrupt what might have been useful data.

[10] Perhaps there is some personal gratification at having told the truth, or, alternatively, a desire to be included in a study with accurate data, but these are merely conjecture and not at all self-evident.

Another major drawback of post-trial interviews of jurors is their vulnerability to optimism bias— the tendency for individuals to overestimate the likelihood of positive events and underestimate the likelihood of negative events—and overconfidence (Sharot 2011). Jurors, according to Bornstein (2011), generally "perceive themselves to be careful evaluators of the evidence; a strong majority interviewed after deliberating said that they thoroughly reviewed the evidence and jury instructions in the process of reaching their verdict" (p. 65). Their self-reflections may fall victim to a mixture of excessive optimism, a phenomenon which causes most drivers to believe that they are above average in driving skill, and overconfidence, which causes most students about to take a class to believe they will receive an above-the-median grade (Posner 2014). These tendencies can render the results of post-trial interviews unreliable. It is important to critically analyze the questions posed and responses given during interviews to properly assess the possibility of answer bias.[11]

Summary: Archival research, jury simulation studies, sample surveys, and post-trial interviews of jurors are the most commonly used empirical methods of studying jury decision-making behavior. They each come with their own set of strengths and weaknesses: archival research reveals general trends in pre-established datasets while maintaining a high degree of external validity but remains limited by the reliability of its sources (or lack thereof) and struggles to establish causality among and between phenomena; jury simulations can isolate the effects of particular treatment (such as the wording of specific jury instructions) on outcomes but may not be representative of how real jurors think and act; sample surveys are a relatively inexpensive way to gather information about jury-eligible populations but suffer from self-selection and nonresponse bias; post-trial interviews provide a unique view of the deliberation process through the eyes of the participating jurors but end up being imperfect reconstructions plagued by self-serving bias, optimism bias, and overconfidence. Understanding the benefits

[11] Some post-trial interview studies may also be afflicted by self-selection bias if the interviews conducted are voluntary.

and drawbacks of each empirical method will help us to better gauge the validity of the results of particular jury decision-making studies going forward.

IV. Evidence and Explanations of the "Reasonable Corporation" Standard of Care

There is evidence to suggest that juries reach more plaintiff verdicts and grant higher awards against corporate defendants; however, it is important to first rule out the possibility that juries are in fact biased toward plaintiffs rather than against defendants when the defendant in question is a corporation. Shared by many business executives is a belief in "the unreasonably sympathetic jury whose emotions overwhelm reason, leading to awards based on flimsy evidence" (Diamond 2013, p. 421). Although a tempting narrative, a large-scale jury simulation involving over a thousand jury-eligible adults from Cook County, Illinois, actually finds that the "average juror in a modern tort case is suspicious that the plaintiff's claims may be without foundation" and inclined to believe that "plaintiffs who sue and receive money damages in general receive too much rather than too little" (Diamond, Saks & Landsman 1998, p. 304). The study uses a mix of participants that matches the distribution in the Cook County jury pool[12] but remains susceptible to self-selection bias as it is populated by volunteers.[13] That said, post-trial interviews with 269 real jurors who sat on cases involving corporate defendants at a certain, undisclosed courthouse[14] corroborate the finding; however, some of them were conducted years after the trials themselves, so their reliability must be questioned (Hans 2000). Both studies are further limited in that they only use participants from localized geographic

[12] Breakdowns by gender, age, race, and education are included in the appendix of the article (p. 323).

[13] "Participation [is obtained] through telephone solicitation by a telemarketing firm and through advertisements in a local newspaper. Participants [are] offered $100 to participate in a day-long session" (p. 304).

[14] Hans does not disclose any identifying information about the courthouse for purposes of anonymity. It is unclear what effect this has on her analysis. For example, if the jury pool for that courthouse is known to harbor uncharacteristically high anti-plaintiff sentiment, the results may not be generalizable beyond the sample population due to selection bias.

locations, though their results begin to cast doubt on the claim that juries are indiscriminately pro-plaintiff. Archival research on the outcomes of 16,397 tort cases in 2005 follows suit by reporting that juries in state courts nationwide find in favor of plaintiffs approximately 51 percent of the time, with win rates varying from 22.7 percent in medical malpractice trials to 78 percent in animal attack cases (Cohen 2009). These numbers have remained relatively constant over time[15] (Gelbach 2018). Hence, it is inaccurate to say that juries generally find in favor of the tort plaintiff as a descriptive statement of what they do with the cases before them; in fact, the "empirical landscape [as it currently stands] reveals no [significant] pro-plaintiff bias by juries" (Diamond 2013, p. 422).

Having provided some evidence that juries are not indiscriminately pro-plaintiff, I turn now to the supposition that juries are biased against defendants, and, more specifically, corporate defendants. Archival research of data collected by the National Center for State Courts and the Administrative Office of the United States Courts comparing jury verdicts in cases with corporate and individual defendants shows more plaintiff verdicts and higher awards against corporate defendants, even after attempts to control for seriousness of injury and other case characteristics (Eisenberg 1996). These studies are limited in that "unmeasured differences between the cases juries decide involving corporate and individual defendants (e.g., initial claim differences, pretrial strategies, and settlement patterns) may be responsible for the observed differences" (Diamond 2013, p. 424; Saks 1992). Nonetheless, some business executives have tried to use the results to support a version of the deep-pockets hypothesis whereby juries assume the role of a "modern day Robin Hood, taking from 'wealthy corporations' to compensate needy plaintiffs," presumably to enact some sort of distributional effect (Hans 1996, p. 243). MacCoun (1996), however, posits that the deep-pockets hypothesis "confounds defendant wealth and

[15] There is a possibility that potential defendants correctly anticipate pro-plaintiff juries and look to settle before trial unless the evidence strongly favors their side (i.e., a selection bias of cases that go to trial), giving rise to the observed fifty percent win rate, but that remains beyond the scope of my analysis.

defendant identity" (p. 121). His argument is based on a jury simulation involving 256 members of the Ventura County (CA) Superior Court jury pool that varied whether the defendant is described to the participant as a poor individual, a wealthy individual, or a corporation. He finds that "[negligence findings are] significantly more likely, and awards [are] significantly greater, for corporate defendants than for wealthy individual defendants, but verdicts against poor versus wealthy individuals [do] not differ" (MacCoun 1996, p. 121). Consequently, it is not wealth driving the trend, but rather defendant status as either an individual or a corporation.

Hans & Ermann (1989) support MacCoun (1996) with the results of their experiment involving 202 students enrolled in an introductory sociology course at a Northeastern University. They "varied the identity of the central actor in a scenario involving harm to workers" to "examine whether people respond differently to corporate versus individual wrongdoers" (p. 151). Respondents applied "a higher standard of responsibility to the corporate actor. For identical actions, the corporation was judged as more reckless and more morally wrong than the individual. Respondents' judgments of the greater recklessness of the corporation led them to recommend higher civil penalties against the corporations" (p. 151). The authors address the limitations of the study in their concluding remarks:

Although our study employed juror simulation methodology, we did not intend the study to be a highly realistic simulation of actual jury decision making. We used a student sample. In addition, although our respondents received much richer descriptions than participants in other crime-seriousness studies, the scenario presented less information than in a real trial court. And given current legal practices, the particular case we employed might not find its way to court (p. 162).

Beyond that, recklessness and moral impropriety may not be perfect proxies for negligence. Nevertheless, a statewide[16]

[16] As before, Hans does not disclose the name of the state for purposes of anonymity. It is unclear what effect this has on her analysis. For example, if the jury pool for that particular state is known to be uncharacteristically hostile towards corporations, the results may not be generalizable beyond the sample population due to selection bias.

public opinion survey of 450 jury-eligible respondents performed in 1991 by Hans (1996) arrives at a similar conclusion. Although its sample is supposedly representative of the larger population, the opt-in nature of the study leaves it susceptible to self-selection bias. Regardless, a trend is emerging that juries treat corporate defendants differently than individual defendants.

Assuming that juries do in fact treat corporate defendants differently than individual defendants, the question remains unanswered as to why. Some corporate leaders have interpreted the tendency as a manifestation of general hostility to business (Hans 1998). Their in-house counsel also share unsavory opinions of the civil jury, though they tend to point to its unpredictability arising from juror reliance on personal beliefs and subjective values when making decisions. Hans & Eisenberg (2011), for example, conduct a regression analysis using (1) surveys of corporate and insurance attorneys' views of the civil justice system and (2) the outcomes of civil jury trials in state courts in an effort to comment on attorney perceptions of civil jury unpredictability.[17] The authors conclude that, despite the infrequency with which they are awarded, "punitive damages are significantly and strongly related to attorneys' judgments about jury predictability across states" (p. 01). The study is flawed for several reasons, but, for our purposes, only one is important—namely, its complete reliance on survey data from in-house counsel for "companies with annual revenues of at least $100 million annually" (p. 09). Although certainly not representative of the tort system as a whole, the data does tell us that in-house counsel for larger corporations tend to be overly concerned with relatively infrequent punitive damages awards when evaluating the civil jury.[18]

The belief that civil juries are generally anti-business and unpredictable simply does not hold up under scrutiny. Bornstein (2011), for instance, analyzes jury decision-making from a psychological perspective. He utilizes jury simulation

[17] "Unpredictability" might actually be serving as a proxy for "bad outcomes." It is difficult to tell how attorneys interpreted and assessed jury unpredictability, which is one of the weaknesses of the paper.

[18] In this case, selection bias works to our advantage.

studies and post-trial interviews of jurors to conclude that "juries generally do a good job of weighing the evidence and applying the law" (p. 63). In fact, they make use of "careful, systematic processing strategies" (p. 65). For example, when it comes to expert testimony, jurors "strive to evaluate the quality of [the] arguments and spend considerable deliberation time discussing [its] nature" (p. 65). Furthermore, Bornstein finds that "when juries *occasionally* err, they do so in [consistent] ways that reflect well-documented, universal psychological principles such as heuristic reasoning[19] and attribution errors[20] [emphasis added]" (p. 63). The general limitations of jury simulations and post-trial interviews notwithstanding, Bornstein makes a convincing argument that characterizes jury decision-making as an active evaluation of conflicting claims and a construction of a "framework that provides a plausible interpretation of the evidence" (p. 64). His analysis challenges the assertion that juries tend to be hostile to business and unpredictable when rendering verdicts.

Admittedly, there is one area in which civil juries struggle with consistency: damage awards. Although the strongest predictor of an award is "the legally relevant severity of injury," much variation is left unexplained[21] (Diamond 2013, p. 426). Saks (1997) discovers "a broad pattern of vertical equity in jury awards, that is, more serious injuries that reliably result in greater awards, yet at the same time the persistence of some horizontal equity, that is, injuries that are comparable[22] but that

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[19] Heuristics are "cognitive rules of thumb, hard-wired mental shortcuts that everyone uses every day in routine decision making and judgment" (Herbert 2010).

[20] Attribution error is "the tendency to explain someone's behavior based on internal factors, such as personality or disposition, and to underestimate the influence that external factors, such as situational influences, have on another person's behavior" (Shaver 1987).

[21] Jurors "typically lack confidence in their ability to assign dollar values to various injuries, [so] they tend to rely on the estimates provided during trial, [known in psychology as anchoring and adjusting]," which suggests that a more uniform process of providing estimates during trial could help make damage awards more consistent (Bornstein 2011, p. 07).

[22] The study compares injuries using a severity index from 1 to 8. Severity index: 1 = Minor Temporary Disability: not exceeding 30 days and not requiring surgery; 2 = Minor Temporary Disability: not exceeding 30 days but requiring surgery; 3 Major Temporary Disability: lasting more than 30 days but no longer than 2 years; 4 = Minor Permanent Partial Disability: most functionally nondisabling disabilities; 5 = Major Permanent Partial Disability: substantial damage, but not sufficient to cause

receive differing awards" (Bornstein 2011, p. 07). Judgment variability is a condition of civil juries that holds across cases involving both individual and corporate defendants such that neither side is significantly more disadvantaged than the other, so my analysis should not be affected (Saks 1997).

A number of studies (MacCoun 1987; Hans & Ermann 1989; Sanders 1996; Hans 2000) have found that corporate defendants are treated differently than individuals because jurors see them as having "greater knowledge and expertise and as a result [expect that they] will be better able to avoid potential harm" (Diamond 2013, p. 424). Reasons vary, but "the most common has to do with specific understandings and expectations of commercial enterprises rather than anti-business sentiment" (Hans 1996, p. 246). The result seems to hold for judges, as well. Hannaford (2000) issued questionnaires to 214 Arizona judges asking them to indicate post-trial whether they agreed with civil jury verdicts over a six-month period. Judges in Maricopa, Pima, Mohave, and Yavapai County Superior Courts, which account for over eighty percent of all civil trials conducted in Arizona each year, participated in the study. They agreed with jury verdicts (which were consistent with the "reasonable corporation" standard of care) over seventy-five percent of the time. Although the threat of selection bias looms especially large given that only Arizona judges are represented, the results are consistent with an older study performed by Kalven (1966). Questionnaires were mailed to 3,500 civil trial judges throughout the United States, of whom some 550 participated in varying degrees.[23] Reports of "3,500 trials were supplied, each of which told the authors how the jury had decided a given case, how the judge would have decided the same case if he were trying it without a jury, and the judge's statement of the reasons why he and the jury disagreed"

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complete loss of ability to perform most ordinary functions; 6 = Major Permanent Total Disability: substantial damage, usually sufficient to alter patient's life-style into a dependent position; 7 = Grave Permanent Total Disability: complete dependence or short-term fatal prognosis; 8 = Death. (Saks 1992, p. 1187). The groupings, though convenient, seem relatively arbitrary, which is a weakness of the study.

[23] Self-selection and nonresponse bias might prevent us from generalizing the results, though the casting of such a wide net (550 respondents is no small feat) helps to mitigate their effects.

(Goldstein 1967, p. 149). Agreement hovered around eighty percent.[24] Critics of the civil jury often "assume that judges would 'do better'—that is, reach verdicts that are more in line with the evidence, be less susceptible to extralegal influences, and so on" (Bornstein 2006, p. 56). Given Kalven (1966) and Hannaford (2000), even they must wonder whether holding corporations to a higher standard of care might be justified.

Summary: Some corporate leaders feel that civil juries "rule against them more on the basis of hostility to business than on the grounds of actual negligence" (Hans 1998, p. 327). Others subscribe to a version of deep-pockets hypothesis under which civil juries take from "wealthy corporations" and give to "needy plaintiffs" in hopes of implementing some form of distributive justice (MacCoun 1996). In-house counsel like to point to juror reliance on personal beliefs and subjective values, making the deliberative process inconsistent and unpredictable. While archival research does show more plaintiff verdicts and higher awards against corporate defendants, studies suggest that civil juries are neither pro-plaintiff, nor Robin Hood-esque, nor anti-business, nor unpredictable. Rather, they systematically apply a higher "reasonable corporation" standard of care because they view businesses "as having greater knowledge and expertise than individuals," leaving them better suited to avoid harm (Diamond 2013, p. 425). Survey studies indicate that judges may share a similar belief.

V. Economic Justification for the "Reasonable Corporation" Standard of Care

Having evaluated the strengths and weaknesses of the results of particular jury decision-making studies that support the existence of a higher "reasonable corporation" standard of care and assessed potential explanations for the phenomenon, I turn now to analyze the "reasonable corporation" standard from

[24] Agreeing with jury verdicts does not necessarily mean that judges agree with the application of a higher "reasonable corporation" standard of care. They might, for example, interpret evidence differently and reach the same conclusion. However, the consistency of the results seems to point to similarity in the decision-making processes of judges and juries.

an economic perspective.[25] We already have an economically-justified tradition in our common law of holding corporations—specifically, manufacturing corporations—to a higher standard of care than individuals in the form of strict product liability. A defendant is strictly liable for a product "when the plaintiff proves that the product is defective, regardless of the defendant's intent. It is irrelevant whether the manufacturer exercised great care; if there is a defect in the product that causes harm, they will be liable for it" (LII 2017). Importantly, the plaintiff does not need to show that the defendant was negligent in his conduct for him to be found liable.

Strict product liability minimizes the total social costs of accidents by incentivizing the injurer and victim to take socially optimal levels of precaution. In Part I of my article, I limit the scope of my analysis to the unilateral precaution context, wherein it is optimal for only one party—namely, the injurer—to take a positive level of precaution. Let us assume for the moment that either the injurer or the victim can take precaution. The minimization of total social costs entails the minimization of the sum of the costs of [precaution] taken by the two parties and expected accident loss (Jain 2012). Expected accident loss is determined by the probability of an accident multiplied by the monetary value of the harm from an accident. The probability of an accident is an increasing function of the level of "dangerous" activity (determined by the level of consumption of the product in question)[26] and a decreasing function of the level of precaution.[27] We will assume that the level of "dangerous" activity is fixed, though that assumption is relaxed in Part VII of my analysis. We will also take the monetary value of the harm from an accident as fixed.[28] Therefore, we are ultimately trying to minimize the costs of precaution taken by the two parties as well as the probability of an accident.

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[25] Concerns of unfairness (e.g., treating defendants differently for the same offense) are beyond the scope of my analysis.

[26] The more often a defective product is used, the more likely it is that an accident will occur.

[27] The more precaution is taken, the less likely it is that an accident will occur.

[28] The monetary value of harm from an accident may in fact differ for each victim in terms of their medical costs, attorney fees, etc. However, assuming constancy should not affect the results of my analysis, though it will make it simpler.

Strict product liability is efficient, then, if the injurer can take precaution at a lower cost than the victim(s).[29] According to Supreme Court Justice Traynor in *Greenman v. Yuba Power Products, Inc.* (and subsequently many economists), manufacturers can in fact take precaution at a lower cost than the individuals who use their products for several reasons (Priest 1991). For one, manufacturers are in a better position than "helpless consumers" to control safety due to informational asymmetry (p. 37). This is partly a historical development. Landes (1985) recounts the following:

The growth in the technical complexity of products (horse and buggy giving way to the automobile, patent medicines giving way to modern medicines, etc.) has been accompanied by a decline in the technical knowledge of consumers as consumers. When most people lived on farms that were largely self-sufficient, consumers were knowledgeable regarding the (few) products that they bought. This is no longer true. Partially offsetting trends are higher literacy, more education, and the emergence of consumer-information intermediaries, such as Consumer Reports, but that emergence is itself a response to the growing complexity of products (p. 548).

A 1973 report by the National Commission on Product Safety (NCPS) lends support to his assertion. It states that the nation faces "a serious product safety problem because consumers are unaware of the risks of using increasingly complex products, unable to cope with these risks even if they knew about them, unable to get accurate product information, [and] misled by questionable advertising practices" (Oi 1973). As products continue to become more advanced, consumers find it increasingly expensive to take precaution because the sort of specialized knowledge required to know what exactly to take precaution against costs time, money, and effort. Meanwhile, it has become easier for manufacturers to "ascertain the point in the chain of distribution at which a product that caused an accident became defective" (Landes 1985, p. 549). Furthermore, manufacturers

[29] It may be that the injurer can only take precaution at a lower cost than the victim up until a certain point, but because we are limiting our analysis to the unilateral precaution context, wherein it is optimal for only one of the two—victim or injurer—to take precaution, we exclude that possibility.

can easily "pass a proportionate amount of the premium [of increased precaution] along to consumers in the product price, spreading costs over the broad consuming population" (Priest 1991, p. 37).[30] Hence, they appear better suited to take precaution against product defects than the individuals using the products.[31]

Before deciding whether strict product liability actually achieves social efficiency, we need to determine whether the rule aligns private costs and benefits with social costs and benefits, which depends on how manufacturers and consumers privately decide their levels of precaution. Let us assume that both manufacturer and consumer adhere to the neoclassical theory of *Homo Economicus* in that they embody rational market actors who always attempt to maximize utility as a consumer and economic profit as a producer, thereby allocating resources to where they are most valued (Thaler 2000). When it comes to accidents, then, their goal is to minimize their expected total cost under a given liability rule. Their expected total cost is the sum of their expected liability and costs of precaution. We assume that if a manufacturer makes a defective product (or engages in negligent conduct), they will be found liable and forced to perfectly compensate the victims. Expected liability for manufacturers, then, is the probability of an accident multiplied by the monetary value of the harm from an accident. Expected liability for consumers is zero. Both parties choose the level of precaution that will minimize the sum of their expected liability and costs of precaution. The minimum occurs when the marginal cost of additional precaution equals the resulting reduction in the

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[30] Manufacturers thus become de facto insurers of their products, with the premium reflected in the cost (Priest 1991). If we were to relax the assumption that the level of "dangerous" activity is constant, then increasing the price of the product should incentivize the consumer to consume less of it, thereby reducing the level of "dangerous" activity and hence the probability of an accident. The price thus turns into a signal of the riskiness of the product.

[31] This is not to say that strict product liability is without its detractors. Oi (1973) claims that strict product liability makes a "pigeon" of the consumers (p. 23). They may in fact be the least-cost takers of precaution in some instances, so such a rigid rule under-incentivizes consumers to take precaution and over-incentivizes producers to take precaution. Oi also notes that "strict liability on sellers redistributes wealth in favor of those consumers who incur high accident costs (and who presumably are wealthier) and against poorer consumers who prefer riskier products at lower prices" (p. 27). However, concerns about distributional justice are beyond the scope of my article.

expected cost of harm (i.e., the marginal benefit of additional precaution) (Cooter 2013).[32] Consequently, strict product liability incentivizes manufacturers to take a positive, privately-efficient level of precaution, and consumers to take zero precaution, which is the socially efficient outcome as discussed earlier.

Assuming that manufacturing corporations do in fact have greater knowledge and expertise such that they are able to take precaution at a lower social cost than individuals, holding them to a higher negligence standard of care (closer to that of strict liability) is efficient. Recall that under a negligence rule with perfect compensation, the manufacturer is only liable for his actions if he fails to take due care[33] (i.e., the requisite level of precaution for his conduct to be considered non-negligent). Let us assume that the requisite level of precaution for his conduct to be considered non-negligent is equal to the socially optimal level of precaution. Let us also assume that manufacturers always find it more profitable to meet the requisite level of precaution and avoid liability than to engage in negligent conduct (i.e., the marginal benefit of taking additional precaution equals the marginal cost of taking additional precaution at the requisite level of precaution for the conduct to be considered non-negligent). The economic reasoning as to why we should hold manufacturers to a higher negligence standard of care than lone individuals is analogous to that of the strict product liability example.[34] Manufacturers are in a better position to control safety and pass additional costs on to consumers than lone individuals, leaving them able to take precaution against negligence at a lower cost (p. 246). Hence, we want to incentivize manufacturers to take precaution beyond that of lone individuals, which can be accomplished by holding them to a higher standard of care.

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[32] We assume that the marginal benefit of additional precaution for manufacturers is always positive such that they always prefer to raise their level of precaution rather than shut down production. This might not always be the case.

[33] Because I am only considering the unilateral care context, we can ignore the possibility of contributory negligence.

[34] I will not enter the debate as to whether strict liability or negligence is more appropriate for certain types of conduct. I am taking the law as given and trying to optimize the levels of precaution taken by corporations and individuals accordingly. Although I do offer suggestions as to how the wording of the law might be refined later on, I accept that conduct subject to a strict liability standard and conduct subject to a negligence standard of care remain that way.

Even if it is efficient for manufacturers to take greater precaution than individuals, it is not clear that the result holds for all corporations. Diamond (2013), for instance, claims that the higher "reasonable corporation" standard of care may reflect "a view of corporate competence and control that is exaggerated in view of what we know about organizational behavior" (p. 425). Gilson (1996) frames the corporate governance system "as an equilibrating device, an adaptive agent that forces the corporation to respond when a change in the environment disrupts a previously stable pattern" (p. 336). The equilibrating device may fail, though, for a variety of reasons. For instance, "if the investments of internal decision makers would be devalued by adaptation to the new circumstances, the corporation may not respond to the change as quickly as it should and in many markets these days, there are only the quick and the dead" (p. 337). Such self-serving bias can manifest in corporate governance and prevent an organization from taking action that would preclude negligence. In this case, a lone individual may be better able take precaution against negligence than a corporation. We have also been talking about "the corporation" as a monolithic structure, when in reality corporations vary widely in their degree of knowledge, expertise, and experience, among other factors. Still, I believe that the assumption that the typical corporation is better suited to take precaution against negligent conduct than the typical individual is not at all far-fetched.

Summary: We already have a tradition in our common law of holding corporations—specifically, manufacturing corporations—to a higher standard of care than individuals in the form of strict product liability. Strict product liability is economically justified by the fact that manufacturers can take precaution against defective products at a much lower cost than the individuals that use their products. This is because they are better positioned to control the safety of their product and able to spread their costs out in the form of higher prices to consumers. Strict product liability with perfect compensation incentivizes the manufacture (as opposed to those who use the products) to internalize the marginal costs and benefits of precaution, which leads to the socially optimal outcome. The same reasoning can be

applied to the negligence standard of care. A typical corporation is better suited to take precaution against negligent conduct than a lone individual. By subjecting corporations to a higher negligence standard of care, we incentivize them to take precaution beyond that taken by an individual.

VI. Policy Implications

Assuming that the typical corporation is better suited to take precaution against negligent conduct than the typical individual such that a higher "reasonable corporation" standard of care is economically-justified, there are important policy implications to consider. Once again, negligence is defined by the American Bar Association as "the doing of some act that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do, under the circumstances" (Nelson 2005, p. 368). It might seem as though we need to alter the jury instructions for negligent conduct to better reflect our finding. However, I argue that they need only subtle refinement. The key phrase to consider is "under the circumstances," as I believe it allows juries to treat corporations and individuals differently under the law. Because the "circumstances" of a corporation (e.g., their greater knowledge, expertise, awareness of the risks of their product, ability to take precautions to minimize those risks, etc.) are quite different from the "circumstances" of a lone individual, jurors should (and already do) hold corporations to a "higher" negligence standard of care. Another way to view the current legal definition of negligence is in terms of "reasonability"—more is expected of a "reasonably prudent corporation" than a "reasonably prudent individual." It is the same standard though applied differently to corporations and individuals. Still, I believe that the law should at least somewhat codify the "circumstances" that are allowed be considered by civil juries, even if it is not highly specific. For example, juries might be instructed to consider the "specialized knowledge, expertise, qualifications, or experience of the defendant, if deemed appropriate" in hopes of achieving a more consistent application of the "reasonable corporation" standard of care. It is important to be cognizant of the anchoring effect that

may occur as a result of these changes (e.g., civil juries might focus too heavily on the qualifications of the defendant rather than other important evidence).

VII. Discussion

Parts III and IV of my analysis are limited by my short review of the available literature and the need for further research. For example, additional jury decision-making research needs to be conducted to ascertain how the "reasonable corporation" standard of care is applied on a case-by-case basis. If corporations could somehow be grouped and differentiated by a set of characteristics, horizontal and vertical studies, respectively, could then be conducted to ascertain how intra- and inter-group liability findings, compensatory damage amounts, and punitive damage amounts differ.

Furthermore, many simplifying assumptions were introduced in Part V of my analysis that, when relaxed, call into question my results. For instance, the neoclassical theory of *Homo Economicus*, though useful, is not realistic. Studies show that individuals consistently deviate from its predictions (Thaler 2000; Posner 2014). While there is some evidence to suggest that corporations are a better fit for the model (Debnath 2018; Hussain 2012), my article could certainly benefit from the application of behavioral economics in ascertaining how corporations and individuals actually make decisions. In a similar vein, let us return to the way in which corporations were said to decide their level of precaution—namely, by minimizing their expected total cost under a given liability rule, which in turn is the sum of their expected liability and costs of precaution. I defined expected liability as the probability of an accident multiplied by the monetary value of the harm from an accident. However, a more accurate definition for expected liability is the probability of an accident multiplied by the *perceived* monetary value of the harm from an accident. If a corporation overestimates the monetary value of the harm from an accident, it could lead to too much precaution (i.e., an inefficient level of precaution), as the perceived marginal benefit of additional precaution becomes

higher than the actual marginal benefit of additional precaution. A corporation might overestimate the monetary value of the harm from an accident, for example, because they are less certain about their chances of winning at trial with knowledge of the higher, ill-defined "reasonable corporation" standard of care. Furthermore, just because corporations can pass the additional costs of precautions on to consumers does not mean they will. They have customer relationships and reputations to maintain. Instead, they might reduce their research and development spending below the efficient level, slowing or preventing important future innovation. Some of that innovation might have had the added benefit of making precaution cheaper through the development of advanced safety features. Alternatively, corporations might increase their research and development spending beyond the efficient level (especially if they overestimate the monetary value of the harm from an accident) in hopes of developing less costly precautionary measures. These possibilities are unaccounted for in my analysis.

Additionally, knowledge of the higher "reasonable corporation" standard of care might embolden individuals to bring frivolous (i.e., inefficient) lawsuits against corporations. Given that the "reasonable corporation" standard of care is neither clearly defined by the law nor consistently applied, individuals may overestimate their chances of victory at trial and bring lawsuits for which the social cost exceeds the social benefit (e.g., due to increased administrative and litigation costs). This may have the added effect of leading to an inefficient number of settlements, as well as inefficient settlement amounts. If the ill-defined, rather hazy "reasonable corporation" standard of care causes corporations to underestimate their chances of victory at trial and victims to overestimate their chances of victory at trial, corporations may choose to settle with victims more often and for higher amounts than is efficient. In reality, their conduct might not have been negligent at all, even by the "reasonable corporation" standard of care. Although settlements are usually less expensive than trials, the goal is to encourage efficient settlement. This makes it even more important for us to refine the current legal definition of the negligence standard of care, so that the beliefs of both injurer and victim about trial outcomes

converge to produce the efficient number of settlements and settlement amounts.

VIII. Conclusions

While data presented here both rejects the deep-pockets hypothesis and casts doubt on the widely-held belief that civil juries are anti-business, there is evidence to suggest that civil juries apply a higher "reasonable corporation" standard of care for corporate defendants. In considering factors like knowledge, expertise, awareness of the risks of conduct, and the ability to spread the costs of the precautions necessary to minimize those risks, I conclude that holding corporations to a higher standard of care is likely more efficient than parity. Although I believe that the negligence standard of care, as currently constituted, permits juries to treat corporations differently than they do individuals, we ought to refine the law to give some guidance as to the "circumstances" that juries can consider when rendering verdicts. This will provide for a more consistent application of the "reasonable corporation" standard of care, which, as discussed, is important to achieving socially optimal levels of precaution.

European Copyright Directive: Challenges to Implementation in Poland

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The European Union recently passed the Directive on Copyright in the Digital Single Market in an effort to strengthen copyright protections for content producers in the digital market. The reform has inspired significant controversy, with opponents indicating that the directive will place an unnecessary burden on small firms and limit creativity and the free flow of information. The vague wording of the directive, challenges in the national implementation of EU law, and the current political climate all pose unique problems for the national level execution of the directive. My article takes Poland as an example, exploring said barriers by starting with broader EU considerations and then examining contextual elements specific to Poland.

In recent years, the rapid expansion of internet services has opened up a new arena for legislation. Content streaming, data sharing, ecommerce—each sector of the digital economy has generated questions about the ownership, publication, and distribution of material online. In an attempt to navigate the growing digital space and secure further protection for content producers, the EU has recently pushed for new copyright legislation under the European Union Directive on Copyright in the Digital Single Market, honing in on the management of copyright protected content by online sharing services.[1] In March 2019, the legislation received approval from the European Parliament and European Council, meaning that within the next two years, it will take effect at the national level.[2] Decisions on the legislation, however, have not occurred without controversy.

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[1] Fox, Chris. "What Is the Controversial Article 13?" *BBC*, February 14, 2019, sec. Technology; "European Parliament Approves New Copyright Rules for the Internet." European Parliament, March 26, 2019.

[2] "European Commission - Press Release - Copyright Reform Clears Final Hurdle: Commission Welcomes Approval of Modernised Rules Fit for Digital Age."

In particular, Article 17 (proposed as Article 13 but passed as Article 17), which holds content sharing services like YouTube, Dailymotion, and Soundcloud increasingly responsible for material posted without copyright license, has incensed a variety of corporate and public interests.[3] Opponents have voiced concerns that the legislation will place an excessive burden on companies to filter content, negatively impacting creativity, sharing of information, and innovation by smaller business platforms that cannot afford such services.[4]

Given the controversy this legislation has inspired, its implementation poses a problem. How will states maintain a balance between the primacy of the European law and their own national interests if there are internal constituencies resisting the legislation? One example of particular interest is that of Poland, which has had a history of tension with both EU law and international copyright practice. While Poland is sure to comply with EU regulations, its current response invites investigation into what compliance with EU law looks like, particularly in an environment that has been increasingly hostile towards EU norms, and perhaps rightfully so (finding the desired balance between EU and state power deserves extensive discussion). Looking at Poland's past response to contentious EU directives and flexibility in national implementation of European law, my article will examine the potential manifestation of the EU Directive on Copyright in the Digital Single Market at the national level. While Poland is subject to the doctrine of the supremacy of EU law, effective national level implementation of the EU copyright directive is limited in two fundamental ways: the content of the directive and the mechanisms of EU legislative implementation. The directive lacks clarity, generating challenges with standardization, and the implementation of EU legislation is limited by the interference of broader political contexts and institutional barriers that do not effectively hold violating states accountable. Consequently, while Poland will ostensibly comply with the new directive, past Polish resistance to digital copyright legislation and EU norm expansion indicate

[3] Fox, "What is the Controversial Article 13?"
[4] Ibid.

that it is unlikely the legislation will comprehensively trickle down into the market.

On a broad level, the implementation mechanisms of EU law do not necessarily lend themselves to swift and effective execution of the EU copyright directive. On the one hand, it is clear that the EU retains significant influence over the implementation of EU law at the national level. Article 291 of the Treaty on the Functioning of the European Union specifies that "where uniform conditions for implementing legally binding Union acts are needed," implementing powers are to be conferred on to the Commission and Council, depending on the substance of the issue.[5] Furthermore, many initiatives draw on vertical integration in their implementation, including a supranational and national phase, one which is executed by the EU body and the other by member state governments.[6] In conjunction with this, provisions of EU law also draw on collaboration between member states under the principle of "sincere cooperation" to engage multiple state bodies in helping phase in a particular EU directive.[7]

On the other hand, the EU does not have decisive measures to effectively and consistently enforce state accountability. Notably, there is no mechanism for expulsion in the EU treaty, and 2018 is the first instance in which Article 7—the article triggering a potential suspension of member state rights—was invoked against any EU member state.[8] The dominant trend has instead been indirect enforcement, incentivizing and applying a degree of pressure on states to take action. However, this has not always been successful. For example, since 1988, France had not complied with EU fishing quotas, leading to two actions by the Commission bringing the matter to the Court of Justice of the European Union.[9] Extensive

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[5] Rui Tavares, Lanceiro. "The Implementation of EU Law by National Administrations: Executive Federalism and the Principle of Sincere Cooperation." *Perspectives on Federalism*, vol. 10, no. 1, 2018, p. 84.
[6] Ibid, 87.
[7] Ibid, 73.
[8] "EU Deploys Article 7 against Poland & Hungary for Democratic Backsliding." The MacMillan Center, September 17, 2018.
[9] Scholten, Miroslava. "Mind the Trend! Enforcement of EU Law Has Been Moving to 'Brussels'." *Journal of European Public Policy* 24, no. 9 (2017): 1348-352.

proceedings were necessary to draw attention to the noncompliance. In response to these types of challenges, the EU has steadily attempted to strengthen its direct enforcement capacities, reducing the barrier of resistance demonstrated by member states without needing to take more decisive and alienating action. In the last two decades, the number of EU enforcement authorities—entities that enforce EU law directly via private actors—has increased from one to seven.[10] The EU is thus taking a more present and visible role in the way it transfers legislation from the supranational to the national level. Of course, this is only one small step towards enforcing compliance; states are still the most significant unit when it comes to implementation, maintaining institutional control of the process.[11]

Going beyond the physical implementation process, the political dimension of legal implementation has often interfered with the transferring of EU law from the supranational to the domestic level. Poland's 2015 Constitutional Court crisis is a prime example of this. The Polish government enacted a series of controversial policies concerning judicial appointment and judicial retirement age, inciting EU opposition.[12] The EU Commission announced intentions to take the issue to the European Court of Justice, citing the acts as a violation of principles of judicial independence and tenure.[13] After several investigations into the situation and extensive dialogue on the matter between the EU and Poland, the Polish government made some amendments to its judicial reform program.[14] Nevertheless, the controversy lasted for several months and devolved from questions of legal origin to a broad and ineffectively managed political drama. Polish politicians cited the acts of the European Union as a violation of state sovereignty and manifestation of

[10] Scholten, "Mind the Trend!", 1353-4.
[11] Ibid, 1354.
[12] Venice Commission. "Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court Proposed by the President of Poland, and on the Act on the Organization of Ordinary Courts." Strasbourg, December 8, 2017, 3-9.
[13] Strzelecki, Marek and Marine Strauss. "EU Takes Poland to Court Over Rule of Law in Historic First." *Bloomberg*, September 24, 2018.
[14] Shotter, James. "Poland Proposes Changes to Controversial Judicial Reform." *Financial Times,* March 23, 2018.

coercive behaviors.[15] These statements riled politicians across Europe, irritating liberal and conservative tensions and challenging the political and legal role of the European Union. The Hungarian government voiced explicit support for Poland, indicating that it would in no case support sanctions against the Polish government.[16] European officials were equally inflammatory, voicing provocative and incendiary perspectives and contributing to the cacophony.[17] The Polish Constitutional Crisis demonstrates that the implementation of EU law is highly conditional on political factors and the ability of states to capitalize on the push-and-pull relationship between the European Union and its members. While the EU can use legal and financial recourse to enact pressure on member states, it walks a fine line in engaging with questions of sovereignty and national administrative authority.

Taking these limitations into consideration, it is also important to evaluate whether EU laws themselves are conducive to effective implementation. In the case of the EU Copyright Directive, the answer is no. The directive retains a high degree of vagueness, generating opportunities for differential implementation. According to the text of Article 17, if material is posted on the service in violation of copyright permissions, the company will need to demonstrate that it has made its "best efforts" to obtain permission from the copyright holder, to withhold any content the rights' holder has specifically identified, and to quickly respond to any infringements of which it was made aware.[18] However, the European Union has left the specific implementation and punishments to be imposed upon violators to the discretion of member states. One potential iteration is the imposition of a pre-screening process, a filtering of content whenever it is posted on online content-sharing platforms to

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[15] "Debate at the European Parliament Attended by Prime Minister Beata Szydło." Chancellery of the Prime Minister of Poland, January 19, 2016.
[16] Foy, Henry, and Jim Brunsden. "Orban Promises to Veto Any EU Sanctions against Poland." *Financial Times,* January 8, 2016.
[17] Skolimowski, Piotr. "Poland Demands Apology After EU's Schultz Likens Changes to Coup." *Bloomberg*, December 14, 2015.
[18] "Texts Adopted - Copyright in the Digital Single." European Parliament, March 26, 2019.

ensure that content is not infringing upon copyright protections.[19] However, states may also choose to pursue a less extensive monitoring mechanism, as the severity is not specified in the EU directive. In the case of Article 15, which enforces a "link tax" that provides journalists and content producers the opportunity to secure licensing agreements with news aggregators (Google, etc.) and obtain a share of the profits their publications receive from the aggregators.[20] However, as experts point out, the directive does not necessarily differentiate between official news aggregators and private individuals, nor does it specify limitations on the amount of content or the share of profits that can be excluded under the domain of "hyperlinks and snippets."[21] The directive has been accused of being too broad and unspecific in that which it targets, with plenty of gray area between types and purpose of usage.[22] Consequently, the EU Copyright Directive provides states with significant leeway in how they choose to apply it. States cannot be held to consistent standards if they lack clarity on the exact specifications of the law.

Narrowing to a specific example, how do the limitations of EU implementation mechanisms and legal specificity relate to the implementation of the EU Copyright Directive in Poland? The implementation of the EU Copyright Directive is issue-specific, relating specifically to how intellectual property is governed at the international level. From a topical standpoint, the Polish public has expressed opposition to measures that challenge internet and speech freedom. For example, in 2012, there was a series of protests in respect to the Anti-Counterfeiting Trade Agreement (ACTA).[23] The purpose of the agreement was to establish international standards enforcing intellectual property rights, and critics accused it of enabling censorship practices and

[19] Wagner, R. Polk, and Steven Wilf. "The New EU Copyright Directive: Too Complex to Work?" Knowledge@Wharton, April 9, 2019.
[20] Ibid.
[21] Ibid.
[22] Colangelo, Giuseppe, and Valerio Torti. "Copyright, Online News Publishing and Aggregators: A Law and Economics Analysis of the EU Reform." *International Journal of Law and Information Technology* 27, no. 1 (March 1, 2019): 75–90.
[23] "Thousands March in Poland over ACTA Internet Treaty." *BBC News*, January 26, 2012, sec. Europe.

limiting internet freedom.[24] While the government at the time was largely in favor of signing the act, the widespread public rejection pushed the government to suspend ratification and urge other states to oppose the act. Opposition to internet censure, or any provisions that may somehow limit the sharing of information online, has been a sticking point in recent years, and popular response to the EU Copyright Directive is not much more optimistic. In response to the directive, a large contingent of Polish newspapers printed a blank first page in protest.[25] Legislation of content and information sharing practices has inspired its fair share of pushback, and as the Law and Justice Party comes up for reelection, it is likely that a more toned-down commitment to implementing the EU directive will secure support from some voter constituencies. In addition to popular pressures, Poland is also economically tied to internet and technological development and will aim to prevent upset to the industry. As any implementation of the EU Copyright Directive will make it more difficult for small businesses and enterprises to deal with costs of filtering, monitoring, and evaluating content, the Polish government will likely be reticent in enforcing heavy-handed measures.

It is also noteworthy to consider the normative interstate pressure for cooperation that often accompanies implementation of EU legislation, with members joining into agreements under collective EU support and anticipated interstate benefits. In the case of the EU directive, however, this type of normative pressure may not apply because Poland is not the sole opponent to the measures. With regard to the Constitutional Court Crisis, Poland encountered pressure at the national level from both Germany and France.[26] In the case of the EU Copyright Directive, however, it seems member states will face their own domestic hurdles in securing implementation. In addition to Poland, the Netherlands, Luxembourg, Finland, and

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[24] Nowak, Jakub. "The Good, the Bad, and the Commons: A Critical Review of Popular Discourse on Piracy and Power During Anti-ACTA Protests." *Journal of Computer-Mediated Communication*, vol. 21, no. 2, 2016, pp. 177–194.

[25] "EU Parliament Approves Controversial Copyright Reform." *Deutsche Welle.* Accessed April 30, 2019.

[26] Peel, Michael and Mehreen Khan. "Germany and France Urge Poland to Halt Judicial Overhaul." *Financial Times,* September 18, 2018.

Italy all signed a joint statement expressing their opposition to the then-published version of the EU Copyright Directive in late February.[27] Furthermore, demonstrations against the directive have occurred in Germany, Austria, and Portugal.[28] The European Parliament's chief negotiator on the copyright directive has received death threats, and public sentiments are antagonistic toward the passing of the measures.[29] It is clear that EU member states as a whole will feel pressure from domestic constituencies in the execution of the directive, which indicates that the course of implementation on a broader EU level will be difficult. With pressure from domestic groupings, states may favor more lenient interpretations, setting a lower bar for Poland's engagement with the directive. It will be difficult to align with a consistent standard if substantial public and institutional opposition continue to simmer. The implementation process will thus reflect a multi-faceted balance of values, legal responsibilities, and domestic political context.

Based upon these contextual considerations and broader challenges to the implementation of EU law at large, the current direction for the EU Copyright Directive seems to be one with more limited and individualized specifications for EU member states and particularly for Poland. The directive faces obstacles related to its actual form, which lacks clarity and continues to inspire confusion among businesses and member states, as well as the political environment in which it has been passed. With domestic opposition in Poland, an upcoming election cycle, and resistant attitudes expressed in other EU member states, it is unlikely that there will be sufficient institutional and normative accountability to hold Poland liable to the highest level aims of the EU directive. It is important that the EU take a second look at the mechanisms by which it approaches the formation of a single digital market. While the project holds some benefits, current attempts at legislation indicate that there is a substantial amount of both political and legal hurdles to pushing the process

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[27] "Joint Statement on the Directive of the European Parliament and Council on Copyright in the Digital Single Market - Policy Document - The Netherlands at International Organisations." Kingdom of the Netherlands, February 20, 2019.
[28] "EU Copyright Bill: Protests across Europe Highlight Rifts over Reform Plans" *Deutsche Welle,* March 23, 2019.
[29] Ibid.

through. It is also worth noting that beyond issues of compliance, a larger question looms: is it normatively desirable for the EU to strengthen its enforcement capacities in this area? Perhaps the reason implementation of EU law is so challenging is that any alternate system would too significantly disrupt the power-sharing balance between the EU and member states and infringe on state sovereignty. While from a technical standpoint, more effective methods of implementation could increase the impact of the legislative process, it remains to be seen whether the many, complex state and non-state actors operating in the EU system would be willing to accept a shift in this direction.

In Defense of the Federal Prohibition of FGM

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In US v. Nagarwala (2018), a Detroit federal judge found a statute enacted by Congress outlawing Female Genital Mutilation—defined by the World Health Organization as those "procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons"—to be unconstitutional. I take issue with his line of argumentation and argue that a federal ban on FGM in the United States—and all nations, quite frankly—is necessary to ensuring the safety of our female population.

In the fall of 2018, a federal judge in Detroit dismissed charges brought against six physicians accused of performing female genital mutilation (FGM) on underaged girls in the case *US v. Nagarwala*.[1] Female genital mutilation is defined by the World Health Organization as "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons."[2]

To be clear, the judge wrote they were neither innocent nor guilty of committing FGM, which has been illegal in the United States since 1996, but rather he ruled that the federal court had no right to prosecute because the existing federal ban on FGM is unconstitutional. This case shows that even in the freest nation in the world, eliminating this harmful practice is incredibly difficult. Yet, this controversy about federalism is only one of several obstacles that nations around the world face in the battle to end FGM. In this paper I will explore the legal question in *Nagarwala* as well as some of the other complications that have arisen around FGM legislation in other nations. Ultimately, I will argue that, despite the decision in this case and all of the challenges around international FGM laws, a federal ban on FGM

[1] United States of America v. Nagarwala, 17-CR-20274 (E.D. Mich Nov. 20 2018)
[2] UN General Assembly, International Covenant on Civil and Political Rights, RES/2200A (Dec. 16 1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

in the United States and all nations is necessary because of both the domestic and international obligations.

The case that ensued in November of 2018, *United States v. Nagarwala*, is historically significant because it marks a defining moment in the way this country treats female genital mutilation. It was the first case challenging the 1996 ban on FGM, a law that states: "Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both."[3] It also provides for some exceptions such as surgical necessity, and it specifically states that rituals or beliefs will not be taken into account.

The victims of the practice were girls from a Shiite Muslim community in Detroit, and the procedure was undoubtedly a part of their religious tradition. It follows that the defendants were in fact in violation of the law that prohibits FGM for underaged individuals for the aforementioned reasons. The federal judge, Bernard A. Friedman, did not dispute this claim. He did find, however, that the law itself was created in violation of the United States constitution, and thus, he was not in a position to prosecute.

He deemed the law an act of congressional overreach, meaning the United States' system of federalism limits congress' powers to make laws that are outside of what the Constitution deems acceptable. Citing a number of Supreme Court cases in which the justices reached the same conclusion, the federal judge ruled that congress' national prohibition against FGM was not justifiable under two constitutional clauses: the Necessary and Proper Clause, which allows congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof"[4] or the Commerce Clause which allows congress to make laws regulating foreign and domestic

[3] United States of America v. Nagarwala, 17-CR-20274 (E.D. Mich Nov. 20 2018)
[4] U.S. Const. art I,§ 8.

trade affairs. Furthermore, he wrote that the government's argument that there exists a market for FGM in the United States, and thus it is an issue concerning interstate commerce, lacked merit.[5]

In the relevant case law, Judge Friedman cited the 1995 *United States vs. Lopez*, a case in which the Supreme Court found the Gun-Free School Zones Act unconstitutional because congress lacked authority under the commerce clause to make such a law. Although the government argued that such an issue would have long-term effects on the economy, in the eyes of the supreme court, those effects were indirect to a point of negligibility. The reasoning behind such precaution toward congressional power has to do with the historical principle of state sovereignty and the prevention of the rise of congressional police power. Loose connections to "interstate commerce" could open up congressional power to a point where it is almost without limitation. The government argued that FGM's connection to commerce was not tangential but rather that the market bore resemblance to other illegal markets, such as marijuana and child pornography both of which were allowed congressional regulation in Supreme Court Cases *Gonzales v. Raich* and *US v. Chambers*.[6] Like the present case, these cases too began with ambiguous connections to interstate commerce. Yet, Judge Friedman argued that the market for FGM was significantly smaller than that of child pornography and marijuana, so much so that it should be outside of the scope of congressional authority.

I would argue that the judge's line of argument sets a dangerous precedent. The commerce clause does not qualify the size of the market for good reason. The effect a practice has on interstate commerce may be left to the discretion of Congress, as formally stated in the US Supreme Court case *Perez v. United States*. In this instance, congress found the practice to have an impact, albeit small, on interstate commerce, and their judgement is not unfounded. Although the market for FGM is not

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[5] Belluck, Pam. "Federal Ban on Female Genital Mutilation Ruled Unconstitutional by Judge," *The New York Times*. Nov 21, 2018, https://www.nytimes.com/2018/11/21/health/fgm-female-genital-mutilation-law.html

[6] United States of America v. Nagarwala, 17-CR-20274 (E.D. Mich Nov. 20 2018)

as widespread as that of marijuana and child pornography because of the cultural makeup of the United States, to dismiss the practice as outside of commercial practice entirely, as Judge Friedman has in this case, is to ignore the prevalence of the practice in communities all over the United States. It is the equivalent of saying that the practice, which he acknowledges as wrong and harmful, is simply not big enough for congress' attention and legislation.

In her article about the eradication of this practice around the globe, Robin Maher notes some of the complications around FGM in the United States. Immigrant communities in the United States have a particularly strong attachment to the practice, as it has come to represent not only a rite of passage, but also a symbol of their culture that is constantly under the threat of westernization.[7] Thus, Judge Friedman's ideas about the American culture diluting the prevalence of this practice in the United States is simply false. In fact, it has the opposite effect. The practice may not seem like a huge market for many Americans, but for those it does affect, it is very real.

In his opinion, Justice Friedman wrote, "committing FGM is comparable to possessing a gun at school, i.e., a criminal act that 'has nothing to do with commerce or any sort of economic enterprise.'"[8] I take issue with this argument. First and foremost, it ignores the fact that FGM is a transaction, in that the doctors on trial were paid to carry out this procedure. The consequence of unequal regulation of the practice between the states is an imbalance of these transactions between the states. Judge Friedman has said that "twenty-seven states have passed FGM statutes…and nothing prevents the others from doing so."[9] But, without a federal statute, there is nothing that obliges them to make such a law either. So, what happens to the young girls in these communities whom the government leaves unprotected if the statute is lifted? Doctors willing to perform the surgery will

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[7] Maher, Robin M. "Female Genital Mutilation: The Struggle to Eradicate This Rite of Passage." *Human Rights* 23, no. 4 (1996): 12-15. http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/27880005

[8] United States of America v. Nagarwala, 17-CR-20274 (E.D. Mich Nov. 20 2018)

[9] *Ibid.*

flock to states in which the practice is legal or more lenient, creating even more of a market for the practice in the long run.

Although I would argue that FGM does affect international and interstate commerce, the more important reason why congress has the right to ban FGM is that they have an international obligation to do so. Judge Friedman's second opinion was that the government's argument that the FGM prohibition is in line with the federal government's obligation to uphold international treaties under the necessary and proper clause is invalid. He saw no explicit connection between the 1976 International Covenant on Political and Civil Rights (ICCPR) and the US prohibition on FGM. The government argued that under Article 3 of the ICCPR, the United States government, a party to the treaty, had an obligation to "ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." One of these rights, found in Article 7 of the same treaty states "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[10]

Although Judge Friedman found no logical connection between the United States prohibition against FGM and the aforementioned treaty, the connection is clear. Moreover, if this one treaty is not enough evidence of congress' "necessary and proper" obligations to the international community, one only has to look to the countless international condemnations of FGM as a human rights abuse. If the United States does not respect its international obligations, it is not only in violation of our own constitution, but it is also harmful for the international community as a whole.

The body of international law condemning FGM has been crucial in the global effort to eliminate it, and it is largely the reason that countries around the world fight so ardently to protect and refine their national prohibitions against the practice. In some countries enforcing a ban on FGM has proven so difficult that there is an argument against a federal ban entirely. In Great Britain for example, they adopted a national ban on FGM in 1985,

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[10] UN General Assembly, International Covenant on Civil and Political Rights, RES/2200A (Dec. 16 1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

and have since had problems with its implementation. In order to crack down on this elusive practice, they have put in place a number of measures to protect women from FGM before it happens.[11] Although the idea behind the various measures is well-intentioned, the very idea of FGM prevention requires the government to classify some girls as "at-risk" which comes with a whole host of complications including racist and classist prejudices. Marge Berer offers her opinion in *Reproductive Health Matters,* "I believe it is equally ill-judged to be suspicious of all African/Muslim grandparents, fathers, mothers, and aunties who are taking a child to another country, let alone to take a child into care at an airport, and keep her in care, out of contact with her family, during an investigation that leads nowhere."[12] She suggests that rather than focusing on stopping the practice before it can happen by targeting "at-risk" individuals or families, the British government should work with the women who have experienced the practice to promote social and ideological changes in these communities.

In addition to executive complications, Berer also identifies a legal complication with Britain's FGM law specifically. Voluntary labia reduction is a legal practice in the United Kingdom which completely resembles the FGM. The only difference is that it is a form of cosmetic surgery to which the women consent, while FGM is a cultural practice often performed without the consent of the participant. However, the ban on FGM is not based on consent, Berer points out. The reason behind FGM prohibition is the fact that it is a harmful procedure, and it is thus treated as a public health issue. If young girls consented to the surgery, that would not be enough for the government to lift the ban. So why then do governments allow the cosmetic surgery? This complication calls the validity of the FGM ban into question and in some ways undermines prohibition efforts.

The criminalization of FGM has also proven complicated in Ghana. Since the passage of their law in 1994, only two cases

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[11] Berer, Marge. "The History and Role of the Criminal Law in Anti-FGM Campaigns: Is the Criminal Law What Is Needed, at Least in Countries like Great Britain?" *Reproductive Health Matters* 23, no. 46 (2015): 145-57. https://www-jstor-org.ezp-prod1.hul.harvard.edu/stable/26495875.

[12] *Ibid*.

regarding FGM have been tried and prosecuted. Yet the rate of the practice as a whole has dropped from 97% in 1994 to 9-15% today. However, in their study on the effectiveness of FGM criminalization in Ghana, Matilda Aberese Ako and Patricia Akwengo argued that those numbers reflect the law pushing the practice underground. Although the law is in place "political support to ensure that the laws are effectively implemented has been lacking."[13] Robin Maher comes to a similar conclusion in her discussion of FGM: "It is one thing to pass a law, but secular disapproval means nothing to individuals who find moral and religious justification for what they do."[14]

Still, the solution to close that gap between the law and its practical effects is not to get rid of the law. The law is not effective on its own, but the law reflects a country's values and long-term priorities. Without a law that explicitly informs a population and the rest of the world about the government's stance on an issue, the grass-roots efforts to change hearts and minds will not last. For the United States to not formally recognize the prohibition of FGM as a national effort is to send a negative message to its citizens and the rest of the world. "The U.S. is looked to as a leader, so this could desperately have repercussions globally," said Maria Taher, co-founder of Sahiyo, concerning the Nagarwala case.[15] The US government was expected to appeal Judge Friedman's decision, but have instead decided to edit the law to show explicit ties to the commerce clause. Ed White, writing for the Washington Post, suggested that the government was looking to rewrite the law in such a way that it would be criminal to cross state lines to perform the task. Still, this only solves part of the problem. Will it still be illegal to do the procedure if you don't need to cross borders to do so? How will

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[13] Ako, Matilda Aberese, and Patricia Akweongo. "The Limited Effectiveness of Legislation against Female Genital Mutilation and the Role of Community Beliefs in Upper East Region, Ghana." *Reproductive Health Matters* 17, no. 34 (2009): 47-54. http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/40647445.

[14] Maher, Robin M. "Female Genital Mutilation: The Struggle to Eradicate This Rite of Passage." *Human Rights* 23, no. 4 (1996): 12-15. http://www.jstor.org.ezp-prod1.hul.harvard.edu/stable/27880005

[15] Belluck, Pam. "Federal Ban on Female Genital Mutilation Ruled Unconstitutional by Judge." *The New York Times*. Nov 21, 2018. https://www.nytimes.com/2018/11/21/health/fgm-female-genital-mutilation-law.html

governments enforce the ban without unjust discrimination of "at-risk" individuals?

We still have a lot of work to do on this issue that affects millions of women and girls all over the world, but it would be a mistake unwrite a codified condemnation of this practice from our national agenda.

Putting the Mind Before the Brain: An Analysis of MRI Evidence in the Courtroom

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This article explores the question as to how MRI can and should be used in the courtroom. It looks to the Daubert standard as a guiding measure and attempts to parse out the philosophical implications of the technology as they pertain to free will and determinism. It also uses DNA testing as an example of a trusted science and cultural touchstone in an effort to suggest how MRI evidence might be better incorporated into our legal system moving forward.

As society grows and changes, so too does our legal system. Take, for example, the introduction of new technologies into the courtroom, many of which have been created in the last forty years or so. From the polygraph, to blood spatter analysis, to fingerprinting, novel scientific developments continue to find their way into our judiciary with the promise of making the administration of justice that much more sophisticated and exact. Although many of these technologies have changed the trajectory and practice of the law for the better, some have been debunked as "bad" science, leading to errors in the decision-making process. From blatantly inexact methodology (like hair strand analysis, which tried to use color and thickness of hair left at the crime scene as an identifier) to subtly fallible techniques (like lie detection based on heart rate and electrophysiological signals), a review of our judicial record tells us that we need to be careful about what technology we allow into the courtroom.

Enter the MRI: magnetic resonance imaging. MRI technology, at its most basic, maps the level of activity in different regions of a bodily organ with a scanner. More specifically, it uses a powerful magnet to pull protons in the organ toward it before measuring the amount of energy necessary to return those protons to their proper place, which ultimately produces an image

of the organ that differentiates between various types of tissues. Functional MRI (fMRI) is a specialized form of MRI that uses blood oxygenation levels as markers for brain activity. It is increasingly employed as a diagnostic tool because of the clarity of the resulting image. For example, fMRI is commonly used to diagnose schizophrenia because it reveals telltale differences in connectivity and grey matter that uniquely mark the brains of schizophrenics. It can also help us understand disorders without such clear-cut causes, such as determining the effects of lacking amygdala and temporoparietal junction function on fear and empathy responses in psychopaths. There is great interest in the neurobiological and psychiatric fields with respect to the various uses of MRI, particularly for treatment but also for understanding non-pathological brain differences, as with people who exhibit low self-control.

MRI has recently become a more central player in the courtroom: MRI scans of abnormal, or slightly irregular, brains have been introduced to attest to the guilt or innocence of clients. There are debates as to whether MRI can act as a more accurate lie detector by tracing the blood flow to areas that control inhibition or physical regulation when a lie is being told. However, the role that MRI can or should play in our legal system is not so clear-cut. Philosophically, our legal system relies on the idea that people have freewill and are, for the most part, responsible for their actions. If MRI or a related technology can tentatively show that some aspect of a person's brain caused them to commit a crime—perhaps the part that controls their emotional regulation or self-control capabilities—it becomes difficult from an ethical standpoint to hold that person accountable. Therefore, we must be careful to delineate the limitations of MRI technology as well as the difficulty in establishing deterministic relationships. Still, the insight MRI provides into frame of mind during a criminal act and other legally relevant factors can meaningfully contribute to the swift and fair carriage of justice.

It is important to determine exactly what MRI can and cannot do (and the extent to which it can do those things) if we are to rely on it more heavily in the courtroom. For example, it has been suggested that we use the technology to detect when a person is lying. Some studies have indicated that MRI brain scans

predict lying with 70-90% accuracy.[1] This raises a number of questions, however, including what level of predictive confidence is necessary for a method like MRI to be accepted by the court. For a point of reference, polygraph tests, which are almost never admissible in a court of law[2] and have become a largely-ridiculed method of collecting evidence, are 80-90% accurate when carried out by an expert.[3] This is where the Daubert standard comes in, as it can help us answer the question as to whether, and for what purposes, MRI can be used in the courtroom.

The Daubert standard was established in 1993 by *Daubert vs. Merrell Dow Pharmaceuticals*, dictating that for expert witness testimony (in this case, testimony about MRI results) to be admissible, it must be based on scientifically valid methods and properly applied to the facts.[4] Although MRI is well-established in the medical field and can certainly provide information that is relevant to a given issue, some of its uses are controversial and have yet to gain widespread consensus in the scientific community, like that of lie detection. The worry is that judges will take MRI's reputation as an accurate and reliable method through which to analyze the brain and extrapolate that into uncharted territory, which could lead to errors in determining guilt/liability.

There are a number of examples that show the power that MRI already has in the courtroom. In a recent case of drug possession by a minor, for instance, the minor's defense successfully argued that his statement was inadmissible—not because the minor had not agreed to talk—he had—but because MRI technology showed that his brain, as with all adolescents, was more defenseless against coercive practices than fully-developed brains. Hardly breaking news, that bit of conventional wisdom was given legal weight in the eyes of the judge due to the invocation of MRI technology. A Harvard experimental psychologist and neuroscientist, Joshua Buckholtz, however,

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[1] "The Truth About Lie Detectors (aka Polygraph Tests)," *Research in Action*, American Psychological Association, 2004.
[2] "Polygraphs: Introduction at Trial," *Criminal Resource Manual*, The United States Department of Justice.
[3] Gareth Evans, "How Credible Are Lie Detector Tests?," *BBC News*, 2018.
[4] "Daubert Standard," *Legal Information Institute*, Cornell University.

raises the question as to what we would do if an individual's MRI results actually pointed us toward a different conclusion; for instance, what if the minor who was charged with a drug crime underwent an fMRI test only to reveal that his brain is actually as developed as (or more so than) that of an adult? Would the fMRI results then dictate that he should be tried as an adult rather than a minor, despite his actual age? These questions call for the law to come up with clear rules governing how MRI evidence can actually be used and the extent to which it can be allowed to alter the proceedings of a trial.

To better understand the difficulties of bringing new technologies into the courtroom in a way that stays true to the goals and values of our legal system, we can look to the example set by DNA testing. DNA evidence, now incredibly common and widely-accepted, was first introduced in 1985 and has been proven to be about 99% accurate.[5] The FBI has a DNA database composed of 50 million samples; sex offenders are required to give up their genetic information in the event that they commit crimes in the future. That said, DNA testing was not immediately trusted. Early juries confronted with DNA evidence found it unconvincing; most notoriously, jury suspicion of DNA evidence was part of what led to the not-guilty verdict for OJ Simpson back in the 90s. It has since gained widespread recognition and legitimacy due to the proliferation of research attesting to its reliability and the prevalence of DNA in popular culture—it appears in nearly every crime or spy-related TV show.

We can learn several things from the success of DNA; perhaps most important is that it has been shown to be "good" science—that is, proven time and again to be reliable and precise. Evidence cannot be compelling, or widely-accepted by the legal community, if it has an accuracy rate far below 100%. Polygraph tests have, by the most liberal estimates, 90% accuracy, which is higher than the average person's ability to tell if someone is lying but with significant room for error. DNA, on the other hand, is much more exact. It also helps that DNA has been made relatively easy to comprehend by its inclusion in popular culture and the exceptional job done by attorneys in explaining the concept to

[5] Randy James, "DNA Testing," *Time*, June 19, 2009.

juries. MRI analysis, on the other hand, does not carry the same luxuries; it is entirely possible that it obfuscates the facts of a case rather than clarifying them. It is important, then, that attorneys follow the example set by DNA testing in trying to ensure that juries understand the science behind MRI technology (which means understanding it themselves).

MRI, and neuroimaging more generally, has progressed exponentially in the past decade. We are now able to see the effects of trauma related to factors like childhood development and even racism on the brain. Combined with genetics testing, which gives increasingly more insight into how we are "programmed," MRI technology again raises questions about free will. Some studies have shown that when the idea of doing something is introduced into a subject's mind, the brain begins to plot out steps to accomplish the action before the subject is even conscious of what is happening. Is a person inherently less culpable if they are in some way predisposed to violence based on the makeup of their brain or genetics? Some biological and experiential factors are already considered mitigating in a courtroom. It will be interesting to see how MRI contributes to that area moving forward. However, we cannot be overzealous in our application of the technology. We must continue to be critical of its results and apply the Daubert standard judiciously when considering its uses. Factors to reflect on include estimations of accuracy, number of peer-reviewed articles, replicability of a study, and various measures of consensus in the scientific community. At the end of the day, MRI presents exciting opportunities in making the administration of justice that much more sophisticated and exact.

Chasing Shadows: Analyzing the FBI's Classification of Black Identity Extremism as a Growing Domestic Terrorist Threat

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On August 3, 2017, the FBI wrote a report about a growing domestic terrorist threat—the Black Identity Extremists (BIE) movement. It claims that some Black individuals are using recent cases of police shootings of Black men as justification to commit acts of premeditated violence against law enforcement personnel. Not only is there no united movement of Black extremists, but the report vastly overestimates the threat posed to law enforcement by Black people, especially considering that most individuals who shoot and kill officers are white men, and white supremacists have been responsible for nearly 75% of deadly extremist attacks in the United States since 2001. I call for the report to be withdrawn and denounced; there also needs to be a discussion about how the FBI determines who to target and prosecute for domestic terrorism.

A journalist at *The Intercept* magazine astutely noted that "who the Justice Department decides to prosecute as a domestic terrorist has little to do with the harm they've inflicted or the threat they pose to human life."[1] The 2001 Patriot Act, which followed the September 11 attacks, established a three-pronged definition of domestic terrorism: (1) the act must break a state or federal law; (2) be "dangerous" to human life; and (3) "appear to be intended to intimidate or coerce a civilian population and/or the government."[2] Its vagueness gives the Federal Bureau of Investigation (FBI)—the law enforcement agency in charge of combatting domestic terrorism—immense discretion in determining who to target and prosecute, a power which has not always been wielded fairly in protecting the

[1] "The Strange Tale of the FBI's Fictional "Black Identity Extremism" Movement." *The Intercept*. March 23, 2019.
[2] "18 U.S. Code § 2331 - Definitions." Legal Information Institute.

American people. On August 3, 2017, the FBI wrote a report about a growing domestic terrorist threat—the Black Identity Extremists (BIE) movement. The report claims that Black individuals who "perceive" racial injustice and anti-white sentiment in our criminal justice system are using recent cases of police shootings of Black men as justification to commit acts of premeditated violence against law enforcement personnel.[3] This report, which is factually inaccurate and neglectful of both historical and contemporary contexts, will serve as a case study to comment on the broader issues of FBI counterintelligence conduct and urgent need for reform.

There is a long history of law enforcement agencies using their power to subvert Black activism in the United States. Martin Luther King Jr., who insisted upon a no-violence means of racial uplift as the face of the mainstream civil rights movement, was surveilled and targeted in covert operations by the FBI beginning in 1955 and continuing throughout the 60s.[4] Far from an anomaly, the FBI counterintelligence program COINTELPRO, created in 1956, began to shift its focus to Black nationalists and civil rights organizations in 1967.[5] Its primary target was the Black Panther Party (BPP), a Marxist revolutionary political organization that advocated self-defense, racial pride, and equality. The BPP engaged in a number of social programs in addition to political organizing, such as free healthcare services for individuals living in Black communities, as well as a free breakfast program that eventually became a model for the ones we have in our public schools today.[6] However, the media still portrayed it as a violent gang, in part because the BPP believed in armed self-defense against police brutality. The FBI soon followed suit, with then-director J. Edgar Hoover calling it "one of the greatest threats to the nation's internal security."[7]

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[3] FBI Counterterrorism Division. "Black Identity Extremists Likely Motivated to Target Law Enforcement Officers."*DocumentCloud*. August 3, 2017.
[4] "Federal Bureau of Investigation (FBI)." *The Martin Luther King, Jr., Research and Education Institute*. May 21, 2018.
[5] Stockton, Richard. "How the FBI Used Murder And Blackmail To Thwart The Civil Rights And Antiwar Movements." *All That's Interesting*. January 20, 2019.
[6] Editors, History.com. "Black Panthers." *A&E Television Networks*. November 03, 2017.
[7] Ibid.

COINTELPRO sought to dismantle the BPP at all costs—they planted informants, surveilled members, sent falsified letters to leaders to breed dissent, started rumors that certain individuals were informants, generated conflict between the BPP and local gangs in hopes of provoking violence, conducted raids, and even killed leaders such as Fred Hampton in 1969.[8] In 1975, when all this came to light, the government formed a Senate committee, termed the "Church Committee" after its chairman Fred Church, to conduct a complete investigation into the conduct of the Department of Justice. The committee's final report reprimanded the FBI for its conduct, declaring many of COINTELPRO's actions to be unconstitutional.[9]

The FBI report on the Black Identity Extremists movement is eerily reminiscent of the FBI's criminalization of the BPP. It details premeditated violent crimes that have been committed or planned against police officers by Black individuals from 2014 through 2016. Though neither the crimes nor perpetrators were connected in any way, the FBI reasons that BIE ideology catalyzed them all. According to the FBI, the BIE movement has existed for decades, with one group in particular—the Black Liberation Army (BLA)—engaging in various crimes throughout the 70s with the intention of "tak[ing] up arms for the liberation and self-determination of Black people in the United States."[10] While it is true that the BLA did commit illegal acts of violence, the FBI was far more focused on the Black Panther Party during the time that they both existed. Of the 295 documented actions taken by COINTELPRO targeting Black activist groups, 233 (or roughly 79%) were against the BPP.[11] The BIE report's allusion to the BLA as opposed to the BPP seems mindfully ignorant of the FBI's scandalous history of targeting Black activists without just cause.

Furthermore, no Black organization or person, BLA or otherwise, has ever referred to themselves as Black Identity

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[8] Stockton. "How the FBI Used Murder And Blackmail"

[9] "Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate." *Internet Archive*. January 01, 1976.

[10] FBI Counterterrorism Division. "Black Identity Extremists."

[11] Newton, Huey P. *War against the Panthers*. London: Writers and Readers, 2001.

Extremists. The BIE is a movement that the FBI itself has concocted artificially, a fact that has been corroborated by various government officials and legal scholars.[12] Even law enforcement officials, specifically the National Organization of Black Law Enforcement, have denied the existence of the BIE and called on the FBI to eliminate its classification and all future assessments on the matter.[13] There have been many impassioned claims made concerning the intentions of the FBI and the impacts their report can have. Andrew Cohen, a fellow at the Brennan Center for Justice, summed up the most pressing of implications by stating, "the tactic here is almost diabolical. To deflect legitimate criticism of police tactics, to undermine a legitimate protest movement that has emerged in the past three years to protest police brutality, the FBI has tarred the dissenters as domestic terrorists; an organized group with a criminal ideology that are a threat to police officers."[14]

On the first point concerning "legitimate criticism of police tactics," the BIE report never admits to any police wrongdoing or racial injustice in our criminal justice system, as such topics are always preceded by the words "perceived" or "alleged." The evasion is both disingenuous and factually inaccurate given the mountain of evidence that confirms the existence of racial injustice. A report by the Sentencing Project to the United Nations noted that "African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites."[15] On top of that, there have been a number of police officers convicted for killing unarmed Black men, proving that injustices are not just "perceived," they are real. In light of these facts, the BIE report

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[12] Winter, Jana, and Sharon Weinberger. "The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists'." *Foreign Policy*. October 06, 2017.
[13] "NOBLE Expresses Concern Over the Black Identity Extremists FBI Assessment, Proposes Changes and Recommendations." *National Organization of Black Law Enforcement Executives*. November 27, 2017.
[14] "The FBI New Fantasy: 'Black Identity Extremists'." *Brennan Center for Justice*. October 11, 2017.
[15] "Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System." *The Sentencing Project*. April 19, 2019.

appears designed to shift the focus from police wrongdoing to Black responsibility for the tension that exists between the community and law enforcement. The BIE report never describes the exact ideology of the movement, which allows the FBI to have immense discretion in designating someone an extremist.

Interestingly, a journalist from *The Guardian* found that "in addition to an overall decline in police deaths, most individuals who shoot and kill officers are white men, and white supremacists have been responsible for nearly 75% of deadly extremist attacks since 2001."[16] Consequently, the BIE report, which alleges that there has been a resurgence of premeditated violence towards law enforcement among BIEs is misleading. It engenders unnecessary fear in law enforcement personnel by implying that their safety is at considerable risk from Black individuals, which is simply not the case. Furthermore, the BIE report was written one week before the Charlottesville white nationalist rally, where a white nationalist rammed his car into a group of people protesting the rally, killing one person and injuring nineteen others.[17] The irony of the FBI reporting about Black extremism at a time when white extremism is clearly on the rise and extremely violent casts doubt on whether the FBI is truly motivated by the safety of Americans. The influence of President Trump cannot be ignored either, as he consistently minimizes the threat of white extremists. On March 15, he told a reporter, "I think it's a small group of people that have very, very serious problems, I guess."[18] The trend of minimizing the danger of white supremacy is not a new one; the FBI did far more against the Black Panther Party than they ever did against the Ku Klux Klan, exposing remnants of the white hegemony that has governed our country since its inception.

Lurking in the background of the BIE report is the Black Lives Matter (BLM) movement, which began in 2013 following the acquittal of the man who killed Black teen Trayvon Martin

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[16] Levin, Sam. "Black Activist Jailed for His Facebook Posts Speaks out about Secret FBI Surveillance." *The Guardian*. May 11, 2018.
[17] Bergen, Peter. "Charlottesville Killing Was an Act of Domestic Terrorism." *CNN*. August 13, 2017.
[18] Hernandez, Salvador. "FBI Director Broke with Trump and Said White Supremacy Is A "Persistent, Pervasive Threat" To The US." *BuzzFeed News*. April 05, 2019.

but ultimately erupted after the police killing of unarmed Black man Michael Brown in Ferguson, Missouri, in 2014. The movement is most known for its demonstrations against instances of police killing of Black men, which have been covered extensively by the media. Eric Garner, Terrence Crutcher, Sandra Bland, Tamir Rice, Philando Castile, Alton Sterling, Stephon Clark, and Laquan McDonald are only some of the names of Black individuals who have died at the hands of police or while in police custody over the past five years.[19] BLM has become the face of Black activism in contemporary politics and taken the lead in organizing against acts of police violence against Black individuals. As a result, it is hard to believe that the FBI did not have the BLM in mind when writing its report on BIE. That the report concocts a fictitious movement as opposed to criminalizing an existing one is evidence of the FBI's intention to criminalize Black activists without making it obvious that they are doing so.

The connection between the BIE report and the Black Lives Matter movement is not merely speculative. On July 7, 2016, in Dallas, Texas, BLM organized a peaceful protest against police killings of Black individuals. After it ended, a lone gunman named Micah Johnson opened fire on a group of police officers, killing five and injuring more.[20] Johnson was angry about recent police shootings and intended to kill white people, specifically white police officers.[21] Although Johnson was not associated with Black Lives Matter or any Black movement really, many held BLM responsible for the shooting and accused it of promoting violence against police officers, the same accusation that the FBI makes of the fictitious BIE movement.[22] Furthermore, the BIE report cites the Dallas shooting as one of six terror attacks orchestrated by Black Identity Extremists, indirectly criminalizing the BLM movement.[23]

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[19] Lee, Jasmine C., and Haeyoun Park. "15 Black Lives Ended in Confrontations with Police. 3 Officers Convicted." *The New York Times*. May 18, 2017.
[20] FBI. "Black Identity Extremists."
[21] Ibid.
[22] Madhani, Aamer. "Black Lives Matter: Don't Blame Movement for Dallas Police Ambush." *USA Today*. July 08, 2016.
[23] FBI. "Black Identity Extremists."

The Black Identity Extremism classification by the FBI has already negatively impacted the life of one U.S. citizen, Rakem Balogun, whose legal name is Christopher Daniels. Balogun is a former Marine and Black activist who co-founded two civil rights groups, the Huey P. Newton Gun Club and Guerilla Mainframe, which focus on fighting police brutality and protecting the rights of Black gun owners.[24] In March 2015, Balogun participated in an Austin, Texas, rally against police brutality that caught the attention of the FBI after it was reported about on the YouTube channel Infowars, which pumps out far-right conspiracy theories concocted by its commentator, Alex Jones. The Infowars video about the rally was titled "Armed Black Militants Prep for War," clearly missing the intent of the rally.[25] While Balogun and others were armed during the rally, they were promoting their stance on self-defense, not waging a war against law enforcement. Nonetheless, the FBI adopted the opinion of the right-wing conspiracy channel and began to treat Balogun as a threat to national security. Alex Jones has since been banned from YouTube, Twitter, Apple, Pinterest, Spotify and LinkedIn for his provocative theories, like the Sandy Hook school shooting being a hoax.[26]

It speaks volumes that Alex Jones was seen as a credible source by the FBI, showcasing how little is necessary to convince them that a Black person poses a threat to society. After the Austin rally, the FBI began surveilling Balogun as a potential terrorist. On the one-year anniversary of the Dallas shooting, Balogun went on social media and expressed solidarity with Micah Johnson, leading the FBI to become even more convinced of his status as a BIE terrorist.[27] On the night of December 12, 2017, the FBI raided Balogun's home, forced both him and his 15-year old son outside in their underwear, and arrested Balogun on charges of domestic terrorism. When that charge fell through, prosecutors tried him again on weapons charges. Since Balogun was denied bail on the grounds that he posed a threat to the

[24] Levin. "Black Activist Jailed."
[25] "Inside the FBI Hunt for "Black Identity Extremists"." *VICE*.
[26] Kosoff, Maya. "Alex Jones, Diminished." *Columbia Journalism Review*. April 2, 2019.
[27] Ibid.

community, he spent five months in jail, losing his home, job, and time with his three children in the process. The judge eventually ordered his release and all charges were dropped.[28]

The Black Panther Party had an obvious influence on Balogun, who named his first organization after its leader, Huey P. Newton, and adopted one of the Party's initiatives—the open carry of firearms in neighborhoods to protect Black individuals from police violence. Unfortunately for Balogun, the FBI responded to him in a manner like they did the BPP: he was surveilled without a warrant, similar to civil rights leaders in the 60s, and his home was raided, a tactic commonly used on BPP leaders like Fred Hampton. It just goes to show that the FBI has not really changed how they interact with Black activists since the time of the BPP. Balogun was surveilled for over two years and spent five more months in jail while prosecutors struggled to build a case against him, making it clear that the FBI had little evidence to support their conclusion that he was a domestic terrorist. Time, government resources, and an incredible amount of energy were wasted pursuing Balogun and frankly the same can be said about all efforts being made to pursue a terrorist group that does not exist.

In addition to being inaccurate, the BIE report appeals to stereotypes of Black criminality, which have been persistent throughout American history and are harmful to the community. In *Illinois. v. Van Dyke*, a Chicago police officer who fatally shot Black teenager Laquan McDonald testified that "his eyes were just bugging out of his head. He had just these huge white eyes just staring right through me."[29] Fear of Black appearance appears consistently in police reports; they are often described as brutish, big, and scary. The Ferguson police officer who fatally shot Michael Brown testified that "he was just staring at me, almost like to intimidate me or to overpower me," and that when he grabbed Brown he "felt like a five-year-old holding onto Hulk Hogan."[30] A Minnesota officer justified his shooting of Philando

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[28] Ibid.
[29] "Chicago Police Officer Jason Van Dyke's Testimony in Court: Word for Word." *Chicago Sun-Times*. October 07, 2018.
[30] Mock, Brentin. "Fear of a 'Black Boogeyman' Defense Fails Chicago Officer Jason Van Dyke." *CityLab*. October 12, 2018.

Castile by noting that the smell of cannabis smoke is what led him to believe that Castile was armed and prepared to kill him.[31] The Baton Rouge officer who murdered Alton Sterling referred to him as a "thug" and stated, "from the minute I walked up I was in fear of my life."[32] These statements are endemic of the implicit association of violent criminality with Blackness. The FBI report on the BIE movement has been disseminated to over 18,000 law enforcement agencies, giving police officers further cause to buy in to stereotypes of Black criminality and expect the worst from Black suspects that they encounter in the field. Based on the BIE report, any Black individual, and especially those who speak out against police brutality, is a potential domestic terrorist, which only serves to increase the tension that exists between police and Black communities.

The problems outlined in my article concerning the FBI mandate that, first and foremost, the BIE classification be withdrawn and denounced. Not only is there no united movement of Black extremists, but the report overestimates the threat posed to law enforcement personnel by Black individuals, considering that white people are shown to kill more police officers and white extremism is far more prevalent than Black extremism. This has devastating impacts on the lives of Americans: it distracts from the problem of racial injustice by discrediting and criminalizing Black activists as terrorists and exacerbates fears of Black people as violent individuals, which has already been shown to impact how police respond to Black people in the field. The report highlights some overarching problems in the FBI that need to be addressed: racism, low standards for creating a domestic terrorist classification, and acting in accordance with white hegemony. Discussion of reform, for which I am calling, needs to take these concerns into account in order to improve the FBI and their relationship with Black activists in the United States.

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[31] Ibid.
[32] Ibid.

No Good Deed Goes Unpunished: Evaluating "War on Terror" Islamic Charity Prosecutions

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After the September 11 terrorist attacks, Islamic charities came under intense scrutiny by the United States federal government. Under the auspices of the so-called "Financial War on Terror," the United States clamped down on many of these charities, freezing their assets and, in some instances, seeking criminal convictions against charity administrators. This article reviews key cases from the "Financial War on Terror" and demonstrates that a pattern of jurisprudential deference to the federal government resulted in a significant weakening of evidentiary standards in cases involving Islamic charities, which has likely been counterproductive in achieving the stated aims of the "Financial War on Terror."

In the aftermath of the grisly September 11 attacks, the U.S. government launched a global counterterrorism campaign dubbed the "War on Terror." It would involve increased defense spending, overseas military operations, and covert surveillance programs. One area of particular interest was the financing of terrorism—the September 11 attacks cost somewhere between $400,000 and $500,000.[1] To that end, the U.S. Department of Treasury began the so-called "Financial War on Terror" with the goal of stymieing terrorist organizations by cutting them off from their funding. This meant targeting the sources and eliminating the channels through which they operated.

After watching the Twin Towers burn on live television and learning just how much time and money went into the

[1] "9/11 Panel: Al Qaeda planned to hijack 10 planes," CNN Politics, June 17, 2004, http://www.cnn.com/2004/ALLPOLITICS/06/16/911.commission/.

attacks, the Treasury Department's General Counsel remained convinced that traditional money laundering channels could not explain al-Qaeda's financial capabilities. According to him, there was something much more sinister at work; America's nemesis was lying in plain sight, ensconced in an institution we typically associate with benevolence and goodwill. The "chief enemy of peace," he reasoned, "[is] not criminal proceeds seeking a way to launder…[but]…actually money given to charities which [has] been spirited around the globe to kill people."[2] His chilling theory had some precedent—certain charities in the United States have at times played a role in funding militant groups around the world. Three decades prior, for example, the U.S. government had collected evidence that various Catholic charities aided the Provisional Irish Republican Army (IRA) with weapons procurement during its conflict with the United Kingdom.[3] CIA documents from 1996 also show that Washington suspected Islamic charities active in Bosnia of using largescale donations by Saudi nationals to fund extremist groups in the area.[4] Given the self-professed Islamic affiliation of al-Qaeda and other terrorist organizations, Islamic charities became key targets in the "Financial War on Terror." A maelstrom of legal action ensued, as the U.S. government implicated Islamic charities across the country and charged many of their administrators with aiding and abetting terrorist organizations. As the "Financial War on Terror" approaches its twentieth year with no end in sight, we must ask whether prosecuting Islamic charities has been an effective counterterrorism measure.

The U.S. government has touted every frozen asset and conviction in court as another victory over terrorism. A closer inspection of the prosecutions, however, paints a different, altogether alarming picture. While there is evidence to suggest

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[2] Warde, Ibrahim, *The Price of Fear: Al-Qaeda and the Truth Behind the Financial War on Terror*. (London; New York: I.B. Tauris), 127.

[3] Bernard Weinraub, "I.R.A. Aid Unit in the Bronx Linked to Flow of Arms," *The New York Times*, December 16, 1975.

[4] Simpson, Glenn. "U.S. Knew of Terrorist, Charity Ties; Report Indicates Officials Had Detailed Information Years before 9/11 Attacks. (1996 CIA Report)." *The Wall Street Journal,* Western Edition, 2003.

that some Islamic charities have funded terrorism, either directly or indirectly, the broad targeting and implicating of all Islamic charities represents an affront to our constitutional principles of due process and equal protection under the law. By appealing to its counterterrorism efforts, the government has been given excessive latitude to bend constitutional procedures for the purpose of landing convictions, often based on little more than fearmongering and religious stereotyping. While it may be Muslims today who are disproportionately targeted by the "Financial War on Terror," it could be Buddhists, Hindus, Jews, or other religious groups bearing the brunt of such injustice tomorrow. The sacrosanct principles of equal protection and religious freedom that form the bedrock of American society have been, and continue to be, weakened by the discriminatory practices of our government toward Islamic charities post-September 11.

This essay will argue that the methods used during the "Financial War on Terror" to implicate Islamic charities have consistently denied them due process and actually endangered our national security. I will first demonstrate how the U.S. government relied on fearmongering and Islamophobic stereotyping to bend procedural rules and lower evidentiary standards when designating Islamic charities as supporters of terrorism and prosecuting their administrators for aiding and abetting. I will then analyze how the government responded to similar issues in the past involving Irish Catholic charities and Chiquita Brands to show just how unprecedented their actions toward Islamic charities have been. Finally, I will discuss the implications of their actions with respect to national security.

How the Designation and Prosecution Processes Circumvent Civil Liberties

The methods used by the U.S. government to designate charities as supporters of terrorism and freeze their assets are fraught with due process abuses and religious stereotyping. Since September 11, the government has taken advantage of its powers

under the International Emergency Economic Powers Act (IEEPA), enacted in 1977 for the purposes of "provid[ing] broad authority to regulate a variety of economic transactions following a declaration of national emergency," to freeze the assets of (and effectively shut down) charities suspected of backing terrorism.[5] Its goal has been to conduct "public and aggressive" displays that show the world just how serious the U.S. is about cutting terrorist organizations off from their sources of funding. The IEEPA gives an incredibly wide latitude to the federal government. Even some Treasury officials have admitted that the evidentiary requirements for their actions "are quite weak" and easily manipulated to meet the political aims of the administration.[6]

As the September 11 Commission noted in 2004, the use of IEEPA against charities run by U.S. citizens raises significant civil liberty concerns because the government is able to shut down charities on basis of classified evidence, subject only to an after-the-fact judicial review. The government does not need to share its classified evidence with the defense counsel, denying the defense the ability to properly challenge the evidence.[7] Furthermore, the judicial record shows that the after-the-fact judicial review process is unduly favorable to the government. A majority opinion issued by the Court of Appeals for the D.C. Circuit's decision in *Islamic American Relief Agency USA v. Gonzales* (2007) confirms, noting that judicial review "in an area at the intersection of national security, foreign policy and administrative law…is extremely deferential" to the executive branch.[8] Courts have also been willing to accept weak evidence from the government, such as newspaper clippings and hearsay, normally deemed to be inadmissible, as was the case in two Islamic charity designation lawsuits in Illinois in 2002.[9] The loose evidentiary standards and lack of due process leave the door open

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[5] Casey, Christopher. The International Emergency Economic Powers Act: Origins, Evolution, and Use (R45618).
[6] National Commission on Terrorist Attacks upon the United States, Monograph on Terrorist Financing: Staff Report to the Commission 79 (Aug. 21, 2004), 79.
[7] Ibid., 8.
[8] Islamic Relief Agency IARA USA v. Gonzales, 2007.
[9] National Commission on Terrorist Attacks upon the United States, Monograph on Terrorist Financing, 107.

for rampant abuse and discrimination. If the government is truly convinced that certain organizations are funding terrorism, it should not be fighting its battles in the shade of the IEEPA, relying on hearsay and evidentiary loopholes to win its cases.

The American Civil Liberties Union (ACLU) notes that the evidence used to designate the Holy Land Foundation (HLF), the country's largest Islamic charity at the time, as a supporter of terrorism in 2001 relied heavily on inaccurate and misleading translations of documents and tape-recorded conversations. HLF requested an investigation by the Department of Justice Inspector General, alleging that the government's case was based on a 54-page FBI memo filled with distorted translations from an Israeli intelligence memo. An independent translating service reviewed the declassified evidence and cited 67 errors in translation in a single four-page FBI document.[10] For example, a translation from Arabic to Hebrew to English mistakenly translated the statement "we have no connection to [Palestinian-affiliated terrorist organization] Hamas" to "charitable funds were funneled to Hamas."[11] Furthermore, HLF made repeated requests to government officials for assistance with complying with U.S. anti-terrorism law in 2001, only to be rebuffed.[12]

After freezing the assets of an Islamic charity, the U.S. government often prosecuted its administrators for aiding and abetting terrorism. Similar to its logic in the hasty and haphazard charity designations, the U.S. government's strategy for prosecuting Islamic charities has been based on a stereotype associating Islam with inherent tendencies towards violence. University of South Carolina law professor Wadie Said argues persuasively that prosecutions of Muslims for crimes involving terrorism specifically involve a "double-edged sword of fearmongering and lowering the standards of proof."[13] As a result,

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[10] Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing." New York: American Civil Liberties Union, 2009, 48.
[11] Greg Krikorian, "Questions Arise in Case Over Islamic Charity," *L.A. Times*, June 18, 2006.
[12] Blocking Faith, Freezing Charity, American Civil Liberties Union, 2009, 7.
[13] Ibid., 102.

the government has been able to make up for weaknesses in their cases by filling in evidentiary gaps with sweeping appeals to counterterrorism and the dangers of "jihadist violence."

A particularly egregious example of the ways in which terrorism prosecutions bend evidentiary standards is the use of so-called expert witnesses. In cases with especially complicated facts and nuance, the inclusion of an expert witness allows the prosecution to clarify and contextualize its arguments through specialized opinion about evidence to assist the trier-of-fact.[14] Cases involving Muslim defendants, however, frequently include "expert" witnesses without proper knowledge as to the complexities and nuances of Islam. They tend to give biased or misleading testimonies about defendants, often informed by a misunderstanding of Islam, to draw conclusions about a defendant's connections to terrorism. For example, in *United States v. Hayat* (2009), a professor of Islamic studies claimed that ownership of a supplication reading ("Oh Allah, we place you at their throats and seek refuge in you from their evils") was a telltale sign of someone "completely ready to commit an act of warfare against a perceived enemy."[15] With the professor's testimony, the Ninth Circuit Court of Appeals concluded that the defendant, Hayat, had *mens rea* to commit an act of terrorism, even though Federal Rule of Evidence 704(b) explicitly prohibits expert witnesses from "offering an opinion on the issue of whether an official had the mental state required by the statute."[16] Judge A. Wallace Tashima dissented in the *Hayat* case; he pointed out that it was unfair to reason that someone had to be a jihadi terrorist simply because they owned an Islamic supplication— a testimony claiming that that someone carrying a copy of "Onward, Christian Soldiers" was inherently a Christian terrorist would be considered "laughable" by the court.[17]

Although *United States v. Hayat* did not involve an Islamic charity, it exemplifies the way in which prosecutors

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[14] Sa'īd, W. (2015). *Crimes of terror: The legal and political implications of federal terrorism prosecutions.* (New York, NY: Oxford University Press), 96.
[15] United States v. Hayat (2009).
[16] Ibid., 101.
[17] United States v. Hayat (2009).

capitalize on misconceptions and double-standards when it comes to landing convictions of Islamic defendants more generally. As we will soon see in our analysis of the Holy Land Foundation case, the government uses a similar strategy when prosecuting Islamic charities post-September 11. Symbols of Islamic devotion or references to Allah are seen as fearful harbingers of a broad, malicious conspiracy against the United States, vastly different from analogous symbols of Christian devotion or references to the Christian God. Moreover, charities affiliated with Islam are inherently viewed as suspect, lowering the evidentiary standards for a conviction accordingly.

The criminal proceedings that followed the designation of the HLF as a supporter of terrorism was marked by egregious and unprecedented due process abuses. On July 26, 2004, seven of its top officials were indicted on charges of funneling $12.4 million to individuals associated with Hamas between 1995 and 2001.[18] By the time of the first criminal trial in 2007, the government had actually dropped the narrative that the HLF provided any kind of direct support to Hamas (or any other terrorist organization, for that matter). Instead, the government was alleging that the HLF provided money to charitable *zakat* committees, which have never been designated as or shown to support terrorist organizations, and thereby raised Hamas's political capital in the Palestinian territories.[19] While the first trial ended in a hung jury, the re-trial resulted in convictions and lengthy sentences up to sixty-five years after a series of blatant due process violations and appeals to Islamophobic stereotyping. The prosecution's strategy relied on bombarding the jury with disturbing images and memories of Israeli civilians killed by Hamas and assertions that the HLF's officials supported those actions.[20] Their claims rested on the assumption that the *zakat* committees in the Palestinian territories were controlled by Hamas and thereby financed their operations.

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[18] Warde, The Price of Fear, 144.
[19] *Blocking Faith, Freezing Charity*, American Civil Liberties Union, 2009, 62.
[20] Ghachem, Malick W, "Religious Liberty and the Financial War on Terror," *First Amendment Law Review* 12, no. 1 (February 2014): 191.

The issue for the prosecution, however, was that it did not seem likely that Hamas controlled the *zakat* committees in the Palestinian territories. Edward Abington, the former consul general at the U.S. Consulate General in Jerusalem and a high-ranking intelligence official at the State Department, testified that he had never seen any evidence suggesting that the *zakat* committees were controlled by Hamas.[21] Even more damaging to the prosecution was the defense's evidence that the U.S.'s own Agency for International Development as well as the United Nations, International Red Cross, and other NGOs had donated to the exact same *zakat* committees.[22] In order to patch up the weaknesses in their argument, the prosecution filed a motion to admit two anonymous Israeli witnesses from the Israel Security Agency and the Israel Defense Forces. Surprisingly, the district court allowed the motion and admitted the two anonymous witnesses.[23] The witnesses testified that the *zakat* committees were controlled by Hamas and alleged a direct link between the HLF and Hamas.[24] Their testimonies represented a novel development in jurisprudence. Typically, when an anonymous witness is admitted by a court, he or she is only permitted to speak in a general sense without making any factual claims about the defendants. Due to the anonymity of the witnesses, the defense could not challenge their credentials or reliability except in the most general sense.[25] These two witnesses, however, were allowed to establish the crucial link that would ultimately decide the case. Moreover, the admission of anonymous witnesses sends an implicit message to the jury that the defendants are predisposed to violence and will harm the witness if identified, which likely allowed the prosecution to capitalize on preexisting fears, misconceptions, and anxieties about Muslims.

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[21] *Blocking Faith, Freezing Charity*, American Civil Liberties Union, 2009, 62.
[22] Lanouar Ben Hafsa, "American Islamic Charities in an Age of Terrorism: The Holy Land Foundation as a Case Study," *World Journal of Social Science Research* 4 no. 1 (November 2017): 50.
[23] United States v. Holy Land Foundation (2007).
[24] Sa'īd, *Crimes of Terror*, 103.
[25] Ibid.

The HLF defendants appealed the case to the Fifth Circuit Court of Appeals, alleging that the use of anonymous witnesses violated their Sixth Amendment confrontation rights. Although the Fifth Circuit's ruling conceded that the inclusion of anonymous witnesses "emasculates the right of cross-examination itself," they dismissed the appeal on the grounds that an exception should be made for the two Israeli witnesses due to "issues of witness safety."[26] Even though the government itself conceded that the HLF was not directly funding terrorist attacks, the defendants were still implicated on charges of aiding and abetting terrorism by the ruling of the Fifth Circuit, which affirmed the unprecedented loosening of witness standards at the district court level.

How the Government Has Handled Similar Cases

In recent history, there have been a number of organizations implicated in financing terrorist operations that have avoided exposure to the same scrutiny and prosecution as Islamic charities. American officials in 2001 tried to ease concerns about discrimination and bias against Islamic charities by citing examples of how Roman Catholic charities had been prosecuted for funneling money to the Irish Republican Army (IRA).[27] The issue is, however, that these purported prosecutions do not appear have ever taken place. The Irish Northern Aid Committee (NORAID), one of the largest Irish Catholic charities in the United States, was implicated in IRA weapons procurement schemes. United States intelligence agencies claimed to have found evidence that seventy-five percent of the money NORAID sent to Northern Ireland was used to buy weapons.[28] Moreover, NORAID's own 1971 and 1972 fundraising letters declared that their support went to the Provisional IRA and that their funds

[26] Ibid.
[27] Gerth, Jeff & Judith Miller, "U.S. Makes Inroads in Isolating Funds of Terror Groups," *The New York Times*, Nov. 5, 2001
[28] Weinraub, Bernard. "I.R.A. Aid Unit in the Bronx Linked to Flow of Arms," *The New York Times*, December 16, 1975.

were channeled through a convicted Irish gunrunner that had connections with Libyan terrorists.[29] Despite the fact that arms sales to the IRA were illegal at the same time that NORAID was allegedly sending funds for weapons, NORAID was never shut down, nor did it have its assets frozen. In 1981, the U.S. Attorney General did bring a civil action lawsuit to enjoin NORAID to register the Provisional IRA as their foreign principal, but no criminal case was brought, and no other Catholic charity was pursued in connection with the funding of IRA terrorism.[30] The dearth of prosecutions cannot be explained by lack of cause; a New York Times article from 1975 reported that estimates suggest "that 75 to 90 percent of I.R.A firepower is of American origin."[31]

While NORAID's controversial activities occurred before the 9/11 attacks, Chiquita Brands International, a Swiss banana company, admitted that it paid $1.7 million directly to two designated terrorist organizations in Colombia between 1997 and 2004. As a result, the U.S. government asked Chiquita Brands to pay a $25 million fine for breaking federal terrorism financing laws. In contrast to the treatment of Islamic charities, however, Chiquita Brands was not subject to any criminal charges, its assets were never seized or frozen, and it continues to operate today.[32] Although it is a private corporation and not a charitable organization, the treatment of Chiquita Brands still demonstrates the double-standard that is applied to groups associated with Islam.

The discriminatory enforcement of anti-terrorism laws against Islamic charities can be explained by the political context in America during the "War on Terror." High-profile Irish-American politicians and the large Irish population in the United States likely kept the government from aggressively pursuing Irish Catholic charities; Muslims did not have the same political

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[29] Jones, T.K. "Irish Troubles, American Money," *The Washington Post*, March 22, 1987.
[30] Ghachem, "Religious Liberty and the Financial War on Terror," 226.
[31] Weinraub, Bernard. "I.R.A. Aid Unit in the Bronx Linked to Flow of Arms," *The New York Times,* December 16, 1975.
[32] *Blocking Faith, Freezing Charity,* New York: American Civil Liberties Union, 2009, 60.

capital. Likewise, Catholics and nonreligious corporations like Chiquita are not inherently associated with "Jihadism" or other violent stereotypes. The U.S. government has found it convenient to make use of widespread misconceptions about Islam in their prosecutions of Islamic charities for the politically expedient purpose of demonstrating their progress in the "Financial War on Terror."

How the "Financial War on Terror" has Harmed U.S. National Security

Not only have the methods used in Islamic charity designations and prosecutions degraded civil liberties and due process, but they have also been counterproductive in preserving national security, which has been the primary goal. First, the Islamic obligation of *zakat*, or almsgiving, means that many Muslims will look for alternative ways to give to charity, regardless of whether specific organizations are shutdown. *Zakat* mandates that Muslims give a certain portion of their income to deserving Muslims suffering from conflict or disaster. As the U.S. government haphazardly shuts down legitimate and functioning charities without due process, it continues to lose the ability to properly monitor the flows of charitable donations. It is highly possible that the "Financial War on Terror" has actually strengthened the power of informal and underground charity channels, which are far harder for the government to track.[33] Second, the designations and prosecutions of Islamic charities without proper due process perpetuates the perception of that the "War on Terror" is above all a war on Islam, which further alienates Muslim communities and plays into the hands of terrorist groups abroad.[34] Finally, the slipshod process through which Islamic charities are implicated has de-legitimized much of the "Financial War on Terror" to the United States' allies. Independent reviews conducted in Europe and Canada have

[33] Warde, *The Price of Fear*, 147.
[34] Ibid.

cleared the names of many organizations; those countries' officials have also chastised the U.S. government for "playing fast and loose with facts and evidence."[35] Consequently, many of the U.S.'s allies have grown cynical toward the "Financial War on Terror," which has resulted in the United Nations taking a longer time to officially include terrorist groups recommended by the United States on the international terrorism financing blacklist.[36]

Where the U.S. Should Go from Here

It is clear that the methods used to implicate Islamic charities have been neither effective nor justified. It is understandable that, in a period of uncertainty, fear, and anxiety, mistakes will be made in search of ways to defeat an elusive and sprawling threat. The Islamic charity designations and prosecutions, however, cannot be considered mere mistakes. The U.S. government has compromised the foundational principle of due process in exchange for high-profile political victories, often on the basis of religious stereotyping and fearmongering. It is imperative that we, as Americans, do not let our insecurities and fears lead to compromises in our sacrosanct liberties and protections, which exist to protect even the most politically unpopular.

As the "Financial War on Terror" approaches its twentieth year, its methods are in desperate need of reform. First and foremost, the U.S. government should stop selectively enforcing legislation of terrorist financing. The process should be much more transparent and properly founded. Second, courts should hold the U.S. government to same evidentiary standards in these cases as it would any other. Charities should not be forced to shut down and lose access to their assets on the basis of dubious evidence that would normally be deemed inadmissible. Finally, the U.S. government ought to shift its priorities away from political expediency and toward preserving our national security

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[35] *Blocking Faith, Freezing Charity*, New York: American Civil Liberties Union, 2009, 121.
[36] Ibid.

and civil liberties. The two principles, contrary to current practice, need not be in conflict; in fact, they can complement each other. By upholding due process, maintaining transparency throughout legal proceedings, and advancing the right narrative, the U.S. can protect our sacred rights as Americans, endear the Muslim community rather than demonize it, and ensure that our allies remain confident in our counterterrorism policies moving forward

A Softer Sound for Hatred: Re-evaluating Hate Speech Case Law

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Over the years, the Supreme Court has upheld the constitutionality of various forms of expression in accordance with the First Amendment of the U.S. Constitution, from offensive rhetoric to risqué literature to the publication of classified government documents. One of the most controversial has been that of hate speech. This article proposes that in order to adequately address the dangers associated with hate speech, which has a history of leading to hate crime, we must alter our test for that which constitutes unprotected speech. Instead of trying to decide whether it creates an actual and imminent danger, we should determine if it presently increases an actual risk.

BACKGROUND

The First Amendment of the U.S. Constitution provides that "Congress shall make no law… abridging the freedom of speech, or of the press."[209] Over the years, the Supreme Court has upheld the constitutionality of various forms of expression, from offensive rhetoric to risqué literature to the publication of classified government documents. One of the most controversial has been that of hate speech. To understand the extent to which expressions of hatred against ethnic groups, religious affiliates, and other demographics is or ought to be protected by law, we must first consider the limitations of the First Amendment.

Not all speech is protected by the Constitution. Take, for example, defamation, which is a false and unprivileged statement of fact (whether as a result of negligence or malice) that is harmful to the reputation of an individual, causing them damages.[210] Other important exemptions are "fighting words," which either cause injury "by their very utterance" or "tend to incite an

[209] LII Staff. "First Amendment." Legal Information Institute. October 10, 2017.
[210] LII Staff. "Defamation." Legal Information Institute. September 26, 2018.

immediate breach of the peace," as well as threats and intimidations, which instill a reasonable fear of violence.[211] Interpretations of the latter vary by jurisdiction; the Supreme Court affirms in *Watts v. United States* (1969) that "true threats" are not protected by the First Amendment, but does not go into detail as to what constitutes one. In *R.A.V. v. City of St. Paul* (1992), the Court justifies its earlier ruling (and provides some clarification) by explaining that prohibiting true threats "protects individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[212] A final form of unprotected speech is that which incites illicit activity. To that end, the Court has devised what is known as the Brandenburg test, developed in *Brandenburg v. Ohio* (1969). It prohibits speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[213]

An important pattern that runs through those forms of speech not protected by the First Amendment is what this article shall term *actual and immediate danger* — that is, the danger presented by forms of expression must be in some sense material to exempt them. In the case of defamation, proof of damages is required; "fighting words" themselves constitute or cause injurious disruption; threats require a "possibility that the threatened violence will occur;" and advocacy for illicit activity must be "likely to incite or produce such action," which itself must be "imminent."[214] The concept of actual and immediate danger, therefore, generalizes the principles underlying the prohibition of the major forms of unprotected speech. Hate speech, however, introduces elements not recognized by the general test — nor by its variation, the Brandenburg test — which suggests that we

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[211] LII Staff. "Fighting Words." Legal Information Institute. September 26, 2018.
[212] Lori Weiss, Is the True Threats Doctrine Threatening the First Amendment? Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists Signals the Need To Remedy an Inadequate Doctrine, 72 *Fordham Law Review*. 1283 (2004).
[213] Ibid.
[214] Lori Weiss, Is the True Threats Doctrine Threatening the First Amendment? Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists Signals the Need To Remedy an Inadequate Doctrine, 72 *Fordham Law Review*. 1283 (2004).

may need to alter the general principles in the interest of public safety.

THE PROBLEM

Hate — based on race, religion, gender, and other demographic groupings — deserves our immediate attention because it has had a major resurgence in the past few years, especially with the advent of the Internet. The Internet is a powerful globalizing force; it allows instant communication through social media websites, like Facebook and Twitter, which presents the first major challenge to our *actual and immediate danger* principle. Put simply, attackers and peddlers of hate communicate.

A recent study by the New York Times regarding terrorist attacks perpetrated by white nationalist extremists found that more and more of them were becoming connected via web communication. In fact, studies suggest that a third of all attacks linked to white supremacy worldwide since 2011 have been inspired by other, similar ones through direct or indirect communication with other attackers.[215] For instance, in 2011, an attack in Norway left 77 people dead. Shortly after, an American white supremacist posted about it in on an online forum. He wrote that the Norwegian attacker "inspired young Aryan men to action." A few years later, he killed three people in a Jewish retirement home. Around the same time, in 2014, the Isla Vista massacre occurred. A study found that at least four white nationalists posted about it online, praising it before carrying out their own heinous attacks. The links between this violence were communications, which, because they targeted specific groups and justified or praised violent crimes against those groups, were a form of hate speech.

The problem is clear. Such hate speech can be linked to hate crimes, inspiring and proliferating them, whether directly or indirectly. However, U.S. law does not protect the public from this risk. The closest it gets is prohibiting the advocacy of illicit

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[215] Cai, Weiyi, and Simone Landon. "Attacks by White Extremists Are Growing. So Are Their Connections." The New York Times. April 03, 2019.

activity. However, the Brandenburg test requires that the illicit activity be imminent, whereas our examples show us that there may be a time gap. The Brandenburg test also requires that the incitement of imminent illicit activity be intentional.[216] In some cases, though, it would be nearly impossible to prove that hateful ideas expressed online had the intent of provoking a specific and immediate crime. Returning to the concept of actual and immediate danger, we find that this principle does not protect against the dangers of hate speech.

Another major cause of the rise in hate crimes over the last few years has been the volatile political climate that developed around the time of the 2016 U.S. Presidential Race. The growth of the alt-right in support of, and response to, the campaign and subsequent election of Donald Trump has served as a striking symbol of the rising tide of white nationalism and extremism around the world. The Trump campaign itself brought significant hate into American mainstream politics. In counties where Trump held rallies, there has been a 226% increase in reported hate crimes since 2016.[217] The University of North Texas professors that were responsible for this finding concluded that statements by Trump at these rallies "may encourage hate crimes."[218]

Here we have a political candidate — a public persona — publicly engaging in speech that, just like in our previous examples, targets specific groups of people and ignores or refuses to condemn acts of violence against those groups. This constitutes hate speech. We also have evidence that ties it to future hate crimes. Once again, however, there is no exemption to the First Amendment. Proving imminent danger or material harm would be nearly impossible. In fact, the Brandenburg test fails to apply here, because there is no explicit advocacy of illicit activity in the campaign speeches. There have been suggestions, as when Trump

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[216] Lori Weiss, Is the True Threats Doctrine Threatening the First Amendment? Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists Signals the Need To Remedy an Inadequate Doctrine, 72 *Fordham Law Review*. 1283 (2004).

[217] Choi, David. "Hate Crimes Increased 226% in Places Trump Held a Campaign Rally in 2016, Study Claims." Business Insider. March 23, 2019.

[218] *Ibid.*

mentioned at a rally that Hillary Clinton would stifle gun rights if elected, but that "maybe there [was]" something "Second Amendment people" could do.[219] Even here, though, it would be near impossible to prove imminence, because of the conditional phrasing, and intent, because of the vague language.

It seems, then, that there are real risks unattended to by current law. Before we seek novel solutions, however, we must explore the ways in which hate speech has been treated in the past.

PAST TREATMENTS

Hate speech has consistently fallen within the realm of 'seditious speech,' speech 'inciting' illicit activity, or the 'advocacy' of illicit activity. Justice Oliver Wendell Holmes in *Schenck v. United States* (1917) formulated the first test of whether such speech was protected by the First Amendment, known as the "clear and present danger" test. He described it as follows:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[220]

The "clear and present danger" test relied, at least in part, on the content of the speech in question — on its "nature" — to determine whether it created a danger. It also depended on the "circumstances" surrounding the speech to determine whether that danger was "present" — its "proximity" in Justice Holmes' explanation — and "clear." Though "clear" was ironically unclear to future Courts, Chief Justice Vinson (citing Justice Learned Hand) in *Dennis v. United States* (1950) interpreted "clear" to

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[219] Corasaniti, Nick, and Maggie Haberman. "Donald Trump Suggests 'Second Amendment People' Could Act Against Hillary Clinton." The New York Times. August 09, 2016.

[220] "U.S. Reports: *Brandenburg v. Ohio*, 395 U.S. 444 (1969)." The Library of Congress.

mean the "degree" of both the "evil" advocated by the speech in question and the "danger" created by the speech.[221]

Justice Holmes' "clear and present danger" test was used for 52 years until *Brandenburg v. Ohio* (1969), where the Brandenburg test was set forth in a *per curiam* opinion which cited *Dennis v. United States* (1951). Justices Black and Douglas, however, who had a record of absolutist First Amendment theory, wrote in their concurring opinions that the "clear and present danger" principle had no place in the evaluation of speech; they pointed to *Dennis* as the final straw in what they saw as a distortion of the idea of incitement.[222] Justice Douglas lamented in particular that the "clear and present danger" test could be "manipulated to crush…argument and discourse," and that it had no validity in a time of peace.[223] Interestingly, however, what Justice Douglas refers to as the right idea for a test of speech is another opinion issued by Justice Holmes — namely, his dissent in *Gitlow v. New York* (1925).[224]

It is important to review the history behind Holmes' dissent in *Gitlow*, which was clearly summarized in *Dennis* by Justice Vinson. He writes that Justices Holmes and Brandeis both believed that the "clear and present danger" test ought to be applied anywhere that speech was being restricted (no matter the purpose of the given statute). They dissented in *Gitlow* (and others) because they thought the speech in question did not have enough of an effect to constitute a "clear and present danger." According to Justice Vinson, the situation bore "little relation in their minds to any substantial threat…".[225]

Returning to Justice Douglas' opinion in *Brandenburg*, we see that what he admires about Justice Holmes' dissent in *Gitlow* is a passage that discusses those qualities of speech that

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[221] "U.S. Reports: *Dennis v. United States*, 341 U.S. 494 (1951)." The Library of Congress.
[222] "U.S. Reports: *Brandenburg v. Ohio*, 395 U.S. 444 (1969)." The Library of Congress.
[223] Ibid. Justice Douglas did concede that he was unsure whether the "clear and present danger" test was valid in a time of war, like when *Schenck* (1919) was decided.
[224] Ibid.
[225] "U.S. Reports: *Dennis v. United States*, 341 U.S. 494 (1951)." The Library of Congress.

make it dangerous. "Every idea is an incitement," he begins, before going on to remark that "[e]loquence may set fire to reason. But… the redundant discourse before us… had no chance of starting a present conflagration."[226] Justice Holmes was clearly, with the use of the word "present," applying his own test. Justice Douglas, nevertheless, agrees with the sentiment of the passage. Here we find an important point of concurrence between the "clear and present danger" test and the Brandenburg test: both are concerned with the manner in which speech is presented.

The Brandenburg test also introduces two novel elements: the first is intent, and the second is the nuanced distinction between "present danger" and "imminent illicit activity." The first means that the circumstances surrounding the speech together with the speech itself create a danger that could presently (proximately) be realized. The second, by contrast, focuses solely on the activity advocated by the speech and tests whether the activity is imminent. In other words, while the "clear and present danger" test restricted speech promoting violence that could, in light of the speech's context, be viewed as proximate, the Brandenburg test limits restriction to speech that calls directly for violence to occur in the proximate future (and only if the violence is likely to occur).

Thus, in generalizing the principle underlying unprotected speech as that which creates an *actual and imminent danger*, we must treat "actual" as material (as opposed to "clear," which implies degree), and "imminent" in the Brandenburg sense (not the *Schenck* sense of "proximate"). Yet it is here that we see the failure of the law to account for the dangers of hate speech discussed earlier. Even though Justice Douglas agreed with the importance of the manner of presentation, the current construction of "imminen[cy]" limits the effect that context and presentation can have on determining the danger of speech. The law fails to protect against posts or speeches that inspire hate crimes, which might not cause imminent violence but lead to violence nonetheless. The requirement of intent also hinders the assurance of public safety — direct advocacy of illicit activity does

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[226] "U.S. Reports: *Brandenburg v. Ohio*, 395 U.S. 444 (1969)." The Library of Congress.

not always figure into hate speech, though there is a clear connection between praising violence or ascribing malicious intent to a group of individuals and promoting the illicit activity of hate crimes.

All this brings us to a potential avenue of change — a proposal of a better test. In order to be effective, it must eliminate the problems of imminence and intent. In order to have validity in our legal system, it must also be steeped in precedent, taking the form of an amended hybrid of the "clear and present danger" test and the Brandenburg test.

THE PROPOSAL

This article's proposal is that in order to adequately address the problem of hate speech in the United States, we must not test whether speech *creates an actual and imminent danger*, but rather whether it *presently increases an actual risk*. Here, "presently" takes the *Schenck* form, simply meaning proximately; "actual" continues to mean material or physical; "increased risk" replaces "danger" to account for speech in the earlier examples that contributes to a context of hate and thus leads to hateful action. In order for speech to increase risk, it must be delivered in a public setting — including a public post online or a public address — where it is likely to be heard. It must also have qualities that tie it to actual risk, such as praising violent acts or vilifying entire demographics. If the proposed test were applied, for example, racial insults exchanged between private individuals would remain protected, as would some teachings about racial inferiority. The examples of speech laid out in Part II, however, could be restricted, as could the crowd's chants of "Blood and Soil" or "Jews will not replace us" at the deadly Charlottesville rally in 2017 (Nazi or neo-Nazi chants having a markedly violent history and implications).

This proposal does not stray far from the test currently used by the Court, yet it contributes a novel protection. Refining it and integrating it into case law would enact a crucial and necessary change in the jurisprudence of the First Amendment.

Most importantly, it would protect the American people from the rising threat of hatred in our country.

How (Not) to Fight Fake News

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Although "fake news" is undoubtedly detrimental to the security and wellbeing of our society, fighting it can have similarly dangerous consequences. By analyzing Singapore's recent anti-fake-news bill, we gain a better understanding of what fighting "fake news" means from a legal perspective. We learn that government bias can play a strong part in muddling the difficult task of censorship; I thus conclude that the government cannot oversee the process. Rather, a fair, neutral party is recommended.

I. Introduction

On February 15, 1898, the hull of the battleship USS Maine exploded in the port of Havana, Cuba, killing 260 of the 355 men on board. Understanding that there was already tension between Spain and the United States over the struggle for Cuban independence, newspapers such as the *New York Journal* and *New York World* published sensationalist, exaggerated, wildly inaccurate accounts to attract and engage readership. Despite a general consensus among witnesses that the explosion occurred onboard, newspapers were quick to point a finger at Spain for the "attack." Tensions mounted and, with the public riled up, the Spanish-American War began two months later.

"Yellow journalism" following the USS Maine explosion exemplified the detrimental effects of "fake news." It can lead to civil unrest, a misinformed public, and damage to our social institutions. With the advent of social media and subsequent ease with which we share and access information, it has become incredibly simple to disseminate potentially-dangerous falsehoods. As a result, many governments around the world have begun to pass anti-fake-news laws. However, their response presents dangers of its own. As soon as administrations start silencing voices, regardless of intent, we enter the realm of censorship. While some censorship can be helpful and even recommended in some instances (like that of speech which incites violence), there is a fine line between prohibiting certain forms of

expression that present a significant danger to our society and stifling the sacrosanct freedom conferred on us by the First Amendment of the U.S. Constitution.

To illustrate how a committal to fight "fake news" can turn into treacherous government censorship, let us turn now to a bill recently passed in Singapore. In March 2018, the Singapore government designated a committee of ministers and parliamentary members to hold eight public hearings on how to curtail the dissemination of false information. During the hearings, students, academics, and media representatives from Singapore and overseas submitted their concerns with respect to the silencing of voices, regardless of the words spoken. In-line with our own focus, some of the worries expressed involved free speech, the difficulty of defining what constitutes a falsehood, and the role of the government in moderating the Singapore's infosphere.[1] Despite lacking answers to the questions, the committee called for legislation addressing the epidemic of fake news. On April 1, 2019, Parliament responded with the Protection from Online Falsehoods and Manipulation Bill.

Singapore claimed to be well-intentioned with its new legislation. In a press conference held on the day the bill was introduced, Prime Minister Lee Hsein Loong justified as follows: "[i]f we do not protect ourselves, hostile parties will find a simple matter to turn different groups against one another and cause disorder in our society."[2] In a separate statement, the Ministry of Law claimed that the bill was to be applied in the narrow sense of prohibiting falsehoods that could lead to egregious harm, such as the government declaring war on its neighbors; there would be no censorship of criticism and opinion. However, the body of the text was not so placatory, leaving itself sufficiently open to civil rights abuses. By analyzing and addressing the deleterious aspects of Singapore's anti-fake-news bill, we can shine a light on the potential pitfalls of our own efforts to prevent the spread of potentially-dangerous falsehoods.

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[1] Seow Bei Yi, "7 Themes from 8 Days of Public Hearings on Deliberate Online Falsehoods," The Straits Times. April 01, 2018.
[2] Bhavan Jaipragas, "Singapore Introduces Anti-fake News Law to Combat Misinformation," South China Morning Post, April 01, 2019.

II. Reaching Too Far and Wide

First, let us look to the range of the bill. It outlines six areas of society wherein false information has the potential to be injurious: (1) security; (2) public health and safety; (3) international relations; (4) elections; (5) ill-will between different sectors of society; and/or (6) the public confidence of any agency related to the government.[3] The inclusion of (4) and (6) have dangerous implications. Whereas the other four can be approached fairly objectively, (4) and (6) directly involve the government/party in control of the government, which leaves open the possibility of impartiality. With respect to elections, any silencing of a party's members due to the alleged dissemination of false information can drastically change the public's perception of that party, altering their political capital and skewing the electoral process. Moreover, public confidence in government agencies serves as an indirect measure of overall government performance and support. With the ability to censor those who speak out against the government and thus shake public confidence in its institutions, the ruling party can easily consolidate power by prohibiting criticism.

It is important to remember that the issues I have highlighted so far are not necessarily destined to obtain; they are possible consequences of mixing haphazardly anti-fake-news efforts and government censorship. There are ways to fairly regulate the spread of false information during elections and that might diminish public confidence in important governmental institutions. For example, a third-party agency independent from those in power could provide (or evaluate) objective measures aimed at curtailing the practice, avoiding the influence of the ruling party. Unfortunately, the bill fails to implement any such safeguard. According to Section 6, the Prime Minister "…may appoint as the Competent Authority…either [a statutory board]; or the holder of any office in the service of Government or a statutory board."[4] The "Competent Authority" reports directly to the Prime Minister and Cabinet of Singapore, and "…must give

[3] "Protection from Online Falsehoods and Manipulation Bill," proposed April 1, 2019 in the Parliament of the Republic of Singapore, Section 7-1(a),(b).
[4] "Protection from Online Falsehoods and Manipulation Bill," Section 6-1.

effect to the *instructions of the Minister and any Minister* where prescribed by this Act [emphasis added]."[5] We are thus presented with two dangerous provisions. First, the Minister is responsible for the appointment of the regulating authority; second, the Minister and Cabinet of Singapore oversee the authority and its regulations. Ultimately, this allows the government to define what constitutes harmful "fake news." Hence, the bill fails to provide an adequate check on government censorship; in fact, it implements a system that endows the ruling party with the ability to consolidate power by lawfully silencing the voices of its opposition.

Admittedly, there are sections of the bill that try to pacify worries of abuse of power. For example, Sections 52 and 53 allow for the appointment of alternate authorities in place of the Minister during times of election and other periods where the bias of the Minister could affect judgement of that which constitutes false information.[6] At first glance, the content of the sections seem to nullify the argument I laid out in the preceding paragraph; however, their actual language greatly weakens the purpose for which they were written. In practice, they only really address the biases of the Minister *during election periods*. Section 53 states that "[t]he Minister or any Minister may appoint an alternate authority for such period, other than an election period, as may be specified."[7] While it does attempt to create a system that can adapt to biases as they arise, the way in which the process is initiated is inherently flawed. By having the Minister or the Cabinet, as opposed to an independent entity, instantiate the alternate authority outside of election periods, the responsibility of deciding the appropriate time to begin the affair falls upon those who would be affected by it—an instance of the prisoner playing warden. Functionally, then, the alternate authority is only invoked during elections.

However, even this limited regulation over government censorship during elections is defective. Section 52 states that "the alternate authority is a public officer appointed by the

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[5] Ibid, 6-1, 2.
[6] Ibid, Section 52, 53.
[7] "Protection from Online Falsehoods and Manipulation Bill," Section 53.

Minister or any Minister (as the case may be) before the start of any election period."[8] Hence, the Minister and the Cabinet still have *de facto* influence over government censorship during election periods via their choice of appointment. Ultimately, the attempts by Sections 52 and 53 to establish an independent and neutral process of addressing the epidemic of harmful "fake news" falls flat by allowing the reigning political figures to essentially regulate themselves. This lack of checks nullifies the basic purpose of regulation, leaving open the harrowing path of uncontrolled government censorship.

III. From Censorship to Revision

So far, my article has highlighted the bill's lack of checks and balances when it comes to government censorship. However, there is also vast overreach on behalf of the legislation when it comes to correcting the problem of "fake news," providing a legal pathway for the government to push its own agenda at the expense of those censored. Any entity now found disseminating "fake news" determined to be harmful to the public is first directed to redact the information, cease, and desist. If they refuse, they face the prospect of a fine or jail time. The government can also evoke an Access Blocking Order, which directs the Info-communications Media Development Authority (IMDA) to restrict the internet access of the user or intermediary.[9] These steps grant the government wide latitude to gag information it deems harmful to the public interest.

The bill also contains measures to "correct" the false information. To understand them, I must first define "statements" and "intermediaries." Statements pertain to single bodies of work or information—like articles or tweets. Intermediaries, on the other hand, are services that allow users to receive or transmit statements between each other: social media, video-sharing sites, online-message boards, etc.[10] The government can issue a Targeted Correction Direction and/or a General Correction Direction in response to the sharing or

[8] Ibid, Section 52, 53.
[9] "Protection from Online Falsehoods and Manipulation Bill," Sections 16-2, 28-2.
[10] Ibid, Section 2.

publishing of false statements. The former requires that the person responsible for communicating a false statement publish a notice of correction, proclaiming that the original statement is false and providing a corrected statement in its place.[11] The latter demands that the intermediary on which the false statement was published send a notice of correction to all users who have (or might have) seen it.[12] Correction Direction give the government a wide range of options through which to target and correct that which it deems to be a falsehood.

Once again, the issue here is not the correction of false statements per se, but rather the involvement of the government. The bill requires that the recipient of the Correction Direction explicitly say that their statement is false **and** provide "a specified statement of fact, or a reference to a specified location where the specified statement of fact may be found, or both."[13] The "specified statement of fact" comes from the aforementioned Competent Authority, which falls under the jurisdiction of the appointing Ministers, leaving the process open to the bias of the ruling party.

Ultimately, the bill creates a system that allows the government to change public narratives by altering information to its liking, amplified by the wide latitude it has been given to do so—it could choose to correct a single statement or ask an entire intermediary to convey a correction to all its users. Thus, not only does the government have the ability to define what constitutes a falsehood, but it can also supplant information that it deems to be correct.

IV. Flawed Appeals

There is one final step to consider in the process of monitoring, silencing, and punishing the spread of false information: appeals. It is only here where the power is wrested from any overtly-biased party. Sections 17, 29, 35, and 44 describe the appeals process for different violations. The appeals are heard

[11] Ibid, Section 11-1.
[12] Ibid, Section 21.
[13] Ibid, Section 11.

by the High Court, which is the lower division of the Supreme Court of Singapore. The bill gives the High Court the power to set aside a decision made by a Minister under any one of the following three conditions: (1) the information was not conveyed in Singapore; (2) the statement in question is not a statement of fact, or is actually a true statement of fact; and/or (3) it is not technically possible to comply with the Correction Direction.[14] (1) and (3) are fairly straightforward: if the offense does not take place in Singapore, or the information cannot be removed or corrected, then it makes sense for the decision to be set aside. (2) requires some deliberation and a decision on the truth value of the statement. However, since the determination is made by an ostensibly-neutral party as opposed to a Minister, there is less of a chance of bias.

Though well-intentioned, the appeals process, like many of the other steps, is still inherently flawed. First and foremost, by virtue of its position at the end of the censorship proceedings, the appeals process lacks effectiveness as a check on the power of the ruling party—a statement must first be censored and/or revised before it can begin. Furthermore, the bill notes that "the subject of an appeal…remains in effect despite the appeal, and only ceases to have effect if it is set aside by the High Court or the Court of Appeal on appeal from the High Court, or if it expires or is cancelled."[15] So, censorship functions similar to an injunction in that it remains in effect until overturned. Therefore, despite the inclusion of a neutral party, the functional limitations and placement at the back of the line of the appeals process prevent it from truly checking the administration in power.

V. Looking Forward

The Protection from Online Falsehoods and Manipulation Bill contains elements prone to government abuse. It ultimately endows the Minister and Cabinet of Singapore with extensive power in defining what constitutes harmful "fake news" and correcting false information. Even appeals, which are meant

[14] "Protection from Online Falsehoods and Manipulation Bill," Sections 17, 29, 35, 44.
[15] Ibid.

to check the power of the ruling party by providing the High Court the ability to overturn an instance of censorship, are flawed by their late presence in the process and limited functionality. To ensure a safe infosphere, a neutral authority with minimal bias must be established. As information becomes more connected and accessible, the need to monitor and address "fake news" continues to grow; however, Singapore's bill has shown us that the fight cannot be initiated, waged, and refereed by the government alone.

Too Quick to Quit? An Analysis of Indecision on Partisan Gerrymandering

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Historically, the Supreme Court has been silent on the issue of partisan gerrymandering. Some Justices have gone so far as to say that the Court should abandon partisan gerrymandering cases altogether because a proper standard by which to decide them did not and could not exist. Recent developments, however, such as the "efficiency gap" and "neighborhood approach," represent plausible standards of which the Court can and should make use moving forward.

The United States common law system relies on judges to make decisions and create precedent that may be used to decide future cases with similar issues. When it comes to partisan gerrymandering, however, the Supreme Court has been relatively silent. The reason has generally been the absence of a proper guiding standard by which to determine what is legal and what is not. In *Vieth v. Jubelirer*, Justice Scalia writes that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged…[therefore,] we must conclude that political gerrymandering claims are nonjusticiable."[1] However, recent developments, such as the "efficiency gap" and "neighborhood approach," along with other computer simulations, may help quantify the extent of partisan gerrymandering. These advancements appear quite promising and could provide the long-sought-after standard that has eluded the Supreme Court. As issues of partisan gerrymandering begin to be more complex, nuanced, and prevalent, it becomes increasingly important to give lower courts the tools and methodology needed to decide cases in ways consistent with the goals of our legal system.

Partisan gerrymandering is the drawing of electoral district lines in a manner that discriminates against a certain political party.[1] It is a tool used by both Democrats and Republicans alike to leverage their relative power in state legislatures and make it more likely to maintain their majority in the future. The two most common forms of gerrymandering are known as "packing" and "cracking." "Packing" occurs when district lines are drawn in a way that concentrates supporters for a particular party or candidate into a single district, thereby decreasing their ability to influence the outcome of surrounding districts.[2] "Cracking," on the other hand, breaks a voting bloc into multiple districts so that their votes will be watered down and not constitute a majority anywhere.[3] In any case, gerrymandering seeks to discriminate based on political affiliation, which begs the question as to its constitutionality.

The United States is built on a foundation of core democratic values, one of those being popular sovereignty. The notion of popular sovereignty posits that the authority of a state and its government are created and sustained by the consent of its people through their elected representatives, who then become the source of all political power.[4] Objectors to partisan gerrymandering posit that the presence and proliferation of this political tool may undermine our current system: people ought to choose their representatives, not the other way around. Some detractors argue that gerrymandering is the only means of securing any representation for minority groups; in their view, manipulating the boundaries of districts is preferable to denying some individuals a voice in government.[5] The debate over partisan gerrymandering rages on to this day, which makes it all the more important for our judicial branch to provide some clarity on its legality.

The historical development of partisan gerrymandering cases is crucial to understanding where the Supreme Court

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[1] Brittanica, "Gerrymandering," (2014).
[2] Ibid.
[3] Ibid.
[4] Martin Kelly, "What Is Popular Sovereignty?" (2018).
[5] Ibid.

currently stands on the issue, as well as how their stance came to exist. The first major partisan gerrymandering challenge came in *Davis v. Bandemer* (1986). The relevant question was whether Indiana's 1981 state apportionment violated the Equal Protection Clause under the Fourteenth Amendment.[6] The Court held that while the redistricting may have discriminated against Democrats, the effect was not "sufficiently adverse" to violate the Equal Protection Clause.[7] Six Justices concluded that gerrymandering was not simply a "political question" but rather a "justiciable controversy" that could be resolved by the courts.[8] No applicable standard was laid out, however, that would provide guidance as to how the issue should be decided moving forward.

Then came the 2004 decision in *Vieth v. Jubelirer*. In 2000, the Republican-controlled state legislature of Pennsylvania passed a redistricting plan that clearly benefited Republican candidates.[9] Members of the Democratic party were quick to sue in federal court with claims that the redistricting plan was unconstitutional. That said, between *Bandemer* and *Vieth*, not a single plaintiff convinced the Court to strike down gerrymandering on constitutional grounds.[10] The Court issued a split decision and basically decided not to intervene in *Vieth.* Writing for a four-member plurality, Justice Scalia remarked that the Court should declare all claims related to partisan gerrymandering non-justiciable. He believed that because no solution to partisan gerrymandering had been found in the 18 years since *Bandemer,* it was time to recognize that the solution simply did not exist.[11]

However, *Vieth* did not close the door entirely on partisan gerrymandering claims. Justice Kennedy declined to join the plurality in regard to their justiciability holding. This left a

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[6] Byron Raymond White and Supreme Court Of The United States. U.S. Reports: Davis v. Bandemer, 478 U.S. 109. (1985).
[7] Ibid.
[8] Ibid.
[9] Nicholas O. Stephanopoulos and Eric M. McGhee "Partisan Gerrymandering and the Efficiency Gap." *University of Chicago Law Review*, 2015, 833.
[10] Ibid.
[11] Ibid.

crack in the door of partisan gerrymandering cases going forward. Justice Kennedy stated that "the parties have not shown us, and I have not been able to discover... statements of principled, well-accepted rules of fairness that should govern districting."[12] He reasoned that although a tenable solution had not yet been found, it cannot be concluded that the solution does not exist, similar to *Bandemer*, which further muddied the waters in terms of the Court's opinion on the issue.

LULAC v. Perry (2006) represented the next major development in partisan gerrymandering challenges. In 2003, the Texas State Legislature passed a controversial redistricting plan. Critics of the apportionment claimed that it violated section 2 of the Voting Rights Act because it was designed with the purpose of ensuring a lasting partisan advantage. The Supreme Court held that the Texas Legislature's redistricting plan did not violate the Constitution, but that part of the plan violated the Voting Rights Act.[13] More importantly, however, an amicus curiae brief leading up to the trial proposed a possible remedy to decide partisan symmetry, which is "the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats."[14] Justice Kennedy was left as the swing vote and expressed in *LULAC* that he was open to the use of partisan symmetry as a test for gerrymandering. Justice Kennedy wrote that he did not "altogether discount its utility in redistricting planning and litigation."[15] Justices Stevens and Souter appreciated this comment and responded with their own interest in exploring the use of partisan symmetry for future cases.

From the notion of partisan symmetry arises a possible standard by which to measure partisan gerrymandering known as the "efficiency gap." The key insight "underlying the efficiency gap is that all elections in single-member districts produce large numbers of wasted votes."[16] A vote is considered wasted when it

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[12] Ibid, 842.
[13] Ibid, 843.
[14] Ibid, 833.
[15] Ibid.
[16] Ibid, 849.

is cast for a losing candidate or in excess of what the winning candidate needed to win. Although wasted votes are inevitable in any election, gerrymandering seeks to increase wasted votes through "cracking" and "packing." "Cracking" occurs when some voters cast their ballots for losing candidates. "Packing" occurs when other voters cast their ballots for winning candidates but in excess of what the candidates needed to prevail. Gerrymandering is simply a method of drawing districts in such a way that one party wastes many more votes than the others. The efficiency gap yields an estimate of the magnitude of the divergence between the parties' respective wasted votes by aggregating all of a plan's "cracking" and "packing" choices into a single number.[17] In technical terms, "the efficiency gap is the difference between the parties' respective wasted votes, divided by the total number of votes cast."[18] More simply, it quantifies the extent of "packing" and "cracking," which can provide an objective and theoretically impartial standard that Justices can use when deciding the point at which partisan gerrymandering crosses the line of legality.

In 2018, the Supreme Court refused to make a decision in *Gill v. Whitford*. Wisconsin voters elected a Republican majority in the state assembly and a Republican Senator in 2010. Republican leadership then developed a voting district map in order to maintain that majority.[19] The redistricting was challenged by Democrats, who argued that the plan systematically diluted the voting strength of Democratic voters statewide. The Court, in a unanimous decision, avoided the issues regarding partisan gerrymandering. The case was decided on a technical issue of judicial standing, as the plaintiffs failed to demonstrate Article III standing.[20] Article III standing requires three elements to be satisfied, one of which is "injury in fact." To show "injury in fact," a plaintiff must demonstrate that he or she

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[17] Ibid.
[18] Ibid, 851.
[19] Tacy F. Flint, Richard H. Pildes, and Jeffrey T. Green. "Brief of Political Geography Scholars as Amici Curiae in Support of Appellees – Gill v. Whitford." *Political Geography Scholars*, 5, 2017, 6.
[20] Max Kennerly "Rethinking Article III Standing Requirements." Litigation & Trial, 2019.

has suffered an "invasion of a legally protected interest" that is "concrete and particularized."[21] The Court decided that the plaintiffs did not prove *individual* harms and instead provided evidence of *statewide* harms as a result of the alleged partisan gerrymandering. The Court thus vacated the judgment of the district court and remanded for further proceedings. *Gill v. Whitford* demonstrates, yet again, an instance of the Court refusing to take a firm stance on partisan gerrymandering.

An important amicus curiae brief was filed leading up to *Gill*, however. It held that there are a few possible standards to figure out what constitutes excessive partisan gerrymandering. Specifically, the brief argued that a "neighborhood approach" could be taken, which would "quantify how efficiently voters of a party are dispersed for purposes of maximizing legislative seat wins" by analyzing the natural "packing" and "cracking" of a party's voters.[22] The analysis is conducted by looking at how closely each individual voter in a state is geographically situated relative to other voters of each party and generates a "neighborhood" for each voter that corresponds to the size of legislative districts. In essence, each voter's "neighborhood" is analogous to a district drawn in the absence of any arbitrary partisan factors.[23] The generated neighborhoods can then be "analyzed to determine what share of each voter's nearest neighbors are members of his or her own party, a measure of natural packing, and what share of each party's voters live in neighborhoods where his or her party is a majority, a measure of natural cracking."[24] The "neighborhood approach" enables courts to both identify and quantify partisan gerrymandering. In a number of states, the party in control of the redistricting process wins far more seats than would be expected based on their overall support from constituents and their voters' geographic distribution, which is measured by these statistical "neighborhoods." When that happens, "a court can rule out

[21] Ibid.
[22] Flint, Pildes, and Green, "Brief of Political," 16.
[23] Ibid.
[24] Ibid.

political geography and conclude that those disproportionate results likely arose through invidious means," or excessive discriminatory partisan gerrymandering.[25]

Recently, the Supreme Court heard the cases *Rucho v. Common Cause* (2019), a challenge to North Carolina gerrymandering, and *Lamone v. Benisek* (2019), a challenge to Maryland gerrymandering.[26] But the question remains: will they issue a decision on partisan gerrymandering this time around? Plausible options for quantifying the extent of partisan gerrymandering now exist and are certainly worth exploring, such as "the efficiency gap" and "neighborhood approach." Given how complex, nuanced, and prevalent the issue has become, it is important for the Supreme Court to take a stand on the issue and provide clarity for lower courts through the creation of guiding precedent.

[25] Ibid.

[26] Wolf, Richard. "Gerrymandering: Voting Rights and Redistricting for Elections Collide at Supreme Court." *USA Today*, 2019.

The Right Kind of Sanctions: Restricting Executive Discretion in Enforcement of International Conservation Programs

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My article evaluates the consequences of the 1986 United States Supreme Court case *Japan Whaling Association v. American Cetacean Society* on international environmental stewardship. Strengthening executive control over the imposition of environmental sanctions, *Japan Whaling* weakened the deterrent effect of a capable enforcement mechanism in environmental protection. As illegal wildlife trade continues to threaten species worldwide, renewed congressional commitment to environmental sanctions as a means to drive reform could be the silver bullet for conservation.

Though the looming specter of climate change has dominated environment-related news of late—as with the newest United Nations IPCC report[1]—there is another pressing issue that demands attention: the illegal trade in wildlife species across borders. International wildlife trade is as devastating to the environment as it is to the captive species in transit. Threats include the introduction of invasive species to vulnerable ecosystems,[2] the destruction of ecological webs that sustain communities' livelihoods,[3] and increased risk of epidemics.[4]

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[1] Intergovernmental Panel on Climate Change, "Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments," October 8, 2018.
[2] Liana Sun Wyler and Pervaze A. Sheikh, "International Illegal Trade in Wildlife: Threats and U.S. Policy," in *Illegal Trade in Wildlife*, ed. Horace O. Williams and Viktor T. Grante (New York: Nova Science Publishers, Inc., 2009), 11-12.
[3] William J. Ripple et al., "Bushmeat hunting and extinction risk to the world's mammals," Royal Society Open Science 3, no. 10 (October 2016).
[4] Wyler and Sheikh, "International Illegal Trade," 12-15; Ripple et al., "Bushmeat hunting."

Historically a leader in international environmental agreements,[5] the United States is the actor best poised to use its economic and diplomatic prowess to enhance global frameworks for the monitoring and reduction of illegal wildlife trade.[6]

Two amendments[7] to two separate congressional acts from 1976[8] granted executive authority to impose sanctions on those countries diminishing the effectiveness of fisheries agreements and environmental conservation efforts more generally. In *Japan Whaling Association v. American Cetacean Society* (1986),[9] however, the Supreme Court determined that the executive branch had broad discretion in exercising its powers under the Pelly and Packwood amendments, ultimately turning them into political tools.[10] I believe that Congress should pass (or amend) legislation that obligates harsher responses to illegal wildlife trade in order to establish a significant economic disincentive to the unsustainable trafficking of wildlife species, offering hope for those endangered and their ecosystems.

Part I of my article lays out the dispute in *Japan Whaling* and goes over relevant holdings by the Circuit Court of Appeals[11] as well as the Supreme Court. I then address the impacts of *Japan Whaling* on the effectiveness of the Pelly and Packwood amendments in enforcing environmental regulations. Part II advocates strengthening the environmental sanction mechanism established by the Pelly and Packwood amendments through additional legislation. Judicial reinterpretations of existing law fail to account for its logistical deficiencies. Moreover,

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[5]Mary Jane Angelo et al, "Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties," *Center for Progressive Reform* White Paper No. 1201 (January 2012): 2.

[6]Andrew Upton, "The Big Green Stick: Reducing International Environmental Degradation Through U.S. Trade Sanctions," *Boston College Environmental Affairs Law Review* 22, no. 3 (Spring 1995): 685-92.

[7] Pelly Amendment, Pub. L. No. 95-376, 92 Stat. 714 (1978) (codified as amended at 22 U.S.C. § 1978 (1982)); Packwood-Magnuson Amendment, Pub. L. No. 96-61, 93 Stat. 407 (1979) (codified at scattered sections of 16 U.S.C., 22 U.S.C. and 46 U.S.C.).

[8] Fishermen's Protective Act, 22 U.S.C. §§ 1971-1980 (1982); Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976).

[9] 478 U.S. 221 (1986).

[10] Curry, Virginia, "Japan Whaling Association v. American Cetacean Society: The Great Whales Become Casualties of the Trade Wars," *Pace Environmental Law Review* 4, no. 1 (Fall 1986): 278.

[11] American Cetacean Soc. v. Baldrige II, 768 F.2d 426 (D.C. Cir. 1985).

congressional clarification of the conditions that warrant sanctions would remove executive discretion in a manner compatible with *Japan Whaling*, restoring the deterrent effect of the original legislation. Renewed congressional commitment to environmental stewardship could have positive global ramifications in an under-regulated sphere.

I. The Cases

Two provisions of U.S. law govern executive discretion in enforcing international environmental conservation efforts. First is the Pelly amendment[12] to the 1967 Fishermen's Protective Act,[13] written with the intent to conserve Atlantic salmon.[14] It confers upon the executive the power to "prohibit the bringing or the importation … of any products from [an] offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization … ."[15] The power is activated when the Secretary of Commerce or the Secretary of the Interior, in consultation with the Secretary of State, determines nationals of a foreign country to be engaging in fishing operations that "diminish the effectiveness of" an international fishery conservation program.[16] In 1978, Pelly was expanded to apply to foreign nationals engaging in trade that diminishes the effectiveness of any international conservation program.[17] Upon making such a determination, the relevant Secretary shall certify the information to the President,[18] and the President may then direct the Secretary of the Treasury to impose sanctions.[19]

Second is the Packwood-Magnuson amendment[20] to the 1976 Magnuson Fishery Conservation and Management Act,[21] which extends Pelly to mandate that the Secretary of State

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[12] Pub. L. No. 95-376, 92 Stat. 714 (1978) [hereinafter Pelly].
[13] 22 U.S.C. §§ 1971-1980 (1982).
[14] Japan Whaling, 478 U.S. at 234.
[15] 22 U.S.C. § 1978 (2016).
[16] Ibid.
[17].Pub. L. No. 95-376, 92 Stat. 714 (1978).
[18] 22 U.S.C. § 1978 (2016).
[19] Ibid.
[20] Pub. L. No. 96-61, 93 Stat. 407 (1979) [hereinafter Packwood].
[21] Pub. L. No. 94-265, 90 Stat. 331 (1976).

impose penalties against a country determined by the Secretary of Commerce to be in violation of the International Convention for the Regulation of Whaling (ICRW).[22] Its phrasing denoted a mandatory (rather than a discretionary) sanction regime. Representative Oberstar noted in a statement at the time of Packwood's passage that the amendment would improve the effectiveness of Pelly, which had been hamstrung by the President's discretionary power, as exercised by Presidents Ford and Carter.[23]

In order to pass the House, however, two compromises were struck that weakened Packwood. First, representatives limited violations to those which diminish the effectiveness of the ICRW.[24] Second, Packwood's penalty for violations was weakened from Pelly's prohibition of imports to a mere fifty percent reduction on the allocation of the offending nation's fisheries within the U.S. fishery conservation zone.[25] Though Representative Oberstar and others held hope that this legislation would send a strong cautionary signal to potential violators,[26] numerous countries, including Japan, continued to harvest whales in violation of the ICRW, setting the stage for the litigation that followed.

Alas, executive power did not translate into executive enforcement, nor did Pelly and Packwood serve as sufficient deterrents to foreign nationals. Japanese nationals continued to harvest sperm whales in violation of the International Whaling Commission's zero sperm whale quota for the 1984-85 season.[27] Secretary Baldrige, serving as President Reagan's Secretary of Commerce, engaged in communications with the Japanese government in 1984 and pledged not to certify violations during both the 1984-85 and 1985-86 seasons, so long as Japan adhered to commitments laid out in a letter to eventually comply with IWC sperm whale quotas.[28]

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[22] 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 361 (1946) [hereinafter ICRW].
[23] 125 Cong.Rec. 22084 (1979) (statement of Rep. Oberstar).
[24] 125 Cong.Rec. 22083 (1979) (statement of Rep. Murphy).
[25] Ibid.
[26] Ibid.
[27] American Cetacean Soc. v. Baldrige, 604 F. Supp. 1398 (D.D.C. 1985).
[28] Ibid., 1404.

Plaintiffs at the District Court level argued that Secretary Baldrige did not have the discretion to withhold certification under Pelly.[29] Defendants conceded this point, but maintained that the Secretary has a "threshold discretionary decision" in determining whether or not the actions of foreign nationals diminish the effectiveness of a conservation program.[30] The District Court looked to the intent of Congress in passing Pelly and Packwood and found that Congress "specifically and unequivocally [sic] intended" for certifications to be issued against any nation "attempting to exempt itself from its international fishery conservation obligations."[31] Following this determination, it granted the plaintiff's motion for summary judgment.

The government appealed the District Court's decision, contending that its interpretation of discretion within Pelly and Packwood should be entitled to deference, as Congress did not address the specific question at issue.[32] The Circuit Court of Appeals used a legal test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[33] If a court finds that Congress has implicitly or explicitly delegated responsibility for interpreting statutory language to the executive, *Chevron* "commands … the court affirm an agency's interpretation of a statute it is entrusted to administer provided that it is 'reasonable.'"[34] However, *Chevron* deference does not apply where a court observes a clear congressional intent at the time it enacted the statute.[35]

The Court of Appeals again focused its analysis on Pelly, as it found the "overall thrust" of Packwood to "narrow Executive Branch discretion [in]…Pelly," looking to the legislative history to understand what Congress meant by "diminishing the effectiveness of" a conservation program. Discussions on the House and Senate floors indicated that Congress envisioned there to be no "intermediate exercise of

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[29] Ibid., 1405.
[30] Ibid., 1405.
[31] Ibid., 1406.
[32] American Cetacean Soc. II, 768 F.2d at 432.
[33] 467 U. S. 837, 467 U. S. 843 (1984).
[34] State of Montana v. Clark, 749 F.2d at 745 (D.C. Cir. 1984).
[35] Ibid., 433.

discretion," but rather immediate action upon recognition of damage to fishery programs.[36] The Court of Appeals also investigated the legislative history of the Tuna Convention Act of 1950,[37] a similar mandate,[38] and found clear intent to require executive action following the failure of a foreign country to implement international harvest recommendations.[39]

The Court of Appeals did notably depart from the District Court's holding in stating that the Secretary "may well…have discretion in [certifying]…actions inconsistent with nonbinding international resolutions…or actions that undermine achievement of binding regulations but that do not actually violate them…"[40] One notable group of actions that meet this non-discretionary holding are international programs without explicit trade or taking quotas, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[41] the primary international agreement monitoring and regulating illegal wildlife trade.[42] Unsatisfied, the government appealed once more, bringing the case to the Supreme Court the following year.

The Supreme Court reversed the Court of Appeals' decision, also applying the *Chevron* test but failing to find sufficiently clear congressional intent in either Pelly or Packwood's legislative history that would suggest the Secretary's interpretation of the two amendments was "contrary to the will of Congress."[43] The Court noted that the impetus for Pelly was the threat of extinction for entire species of fish, which demanded a lower level of discretion than general standards for international conservation programs.[44] It went on to closely examine the 1978 amendment that expanded Pelly's application from fishery conservation programs to any international conservation

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[36] Ibid., 437-38.
[37] 16 U.S.C. § 951 et seq. (1982).
[38] American Cetacean Soc. II, 768 F.2d at 438.
[39] Ibid., 438.
[40] Ibid., 439.
[41] 27 U.S.T. 1087 (1976) [hereinafter CITES]; American Cetacean Soc. II, 768 F.2d.
[42] Anna Huggins, *Multilateral Environmental Agreements and Compliance: The Benefits of Administrative Procedures* (New York: Routledge, 2018), 117-18.
[43] Japan Whaling, 478 U.S. at 231-41.
[44] Ibid., 234-36.

program.[45] The Supreme Court agreed with the Court of Appeals that the amendment granted the Secretary discretion in determining whether foreign nationals' actions are sufficiently destructive to diminish the effectiveness of international programs without explicit trade quotas, but no longer found an automatic and binding triggering mechanism.

With weaker mandates and convoluted language, Pelly and Packwood have failed to translate into global compliance. To be sure, there have been certifications and some temporary successes: certification of Norway in 1986 led to an announcement wherein Norway agreed to suspend its commercial whaling after the following season;[46] certification of Taiwan in 1989 led to an agreement between Taiwan and the U.S. on driftnet fishing;[47] and certification of Japan in 1991 led to a commitment from Japan to end its turtle trade.[48] However, each of these countries failed to make changes in response to later Pelly certifications.[49] Steve Charnovitz, Associate Professor of Law at The George Washington University Law School, notes that subsequent certifications of a country for a similar violation are "almost always … less successful than the initial [certification]."[50] This indicates that Pelly and Packwood lack a deterrent force strong enough to induce lasting changes in international conservation efforts.

It is worth noting that the certifications listed above did not result in economic sanctions on any violating country.[51] The first certification that included economic sanctions came in 1994, when Taiwan refused to halt the sale of tiger bones and rhinoceros' horns,[52] which led to structural reforms in Taiwan's monitoring of illegal wildlife trade and enforcement of CITES.

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[45] Ibid., 236-39.
[46] Steve Charnovitz, "Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices," *American University International Law Review* 9, no. 3 (1994): 765.
[47] Ibid., 765-66.
[48] Ibid., 767.
[49] Ibid., 765-68.
[50] Ibid., 772.
[51] Ibid., 772.
[52] Thomas L. Friedman, "U.S. Puts Sanctions on Taiwan," *The New York Times*, April 12, 1994.

President Clinton revoked the economic sanctions in June 1995.[53] 1994 marked the first and last imposition of economic sanctions on a country for distressing international conservation programs under Pelly and Packwood.[54] President Obama's Secretary of Commerce, Gary Locke, certified Iceland in 2011 for permitting unsustainable whaling practices, and his Interior Secretary, Sally Jewell, certified Iceland again in 2014.[55] Neither led to economic sanctions,[56] and, perhaps unsurprisingly, Icelandic nationals continue to hunt whales, most controversially through the whaling company Hvalur.[57]

Iceland is by no means the only country to hamper international conservation efforts in wildlife trade. One prime dyad of global trade that threatens wildlife species is trafficking between China and sub-Saharan Africa. China's government annually imports numerous live species protected under CITES to fill national zoos, from elephants to chimpanzees.[58] The majority of these animals come from sub-Saharan Africa, where government officials in countries such as the Democratic Republic of the Congo have agreed to the trade, despite being in clear violations of CITES.[59] Outside of government purchases, Chinese nationals export traditional Chinese medicine, which includes pangolin scales among its ingredients.[60] To satisfy global demand, Chinese nationals have hunted the pangolin to near extinction in Southeast Asia[61] and begun to engage in trafficking to obtain pangolins from their other endemic location, sub-Saharan

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[53] Fish and Wildlife Service, Interior, Notice, "Termination of the Pelly Amendment Certification of Taiwan," *Federal Register* 62, no. 83 (April 30, 1997): 23479-80.
[54] Wyler and Sheikh, "International Illegal Trade," 31.
[55] Fish and Wildlife Service, Interior, "Interior Certifies that Iceland's Commercial Whaling Undermines International Wildlife Conservation Treaty," February 6, 2014.
[56] Animal Welfare Institute, "US Imposes Diplomatic Sanctions for Icelandic Whaling, Falls Short of Trade Sanctions," April 1, 2014.
[57] Tryggvi Adalbjornsson, "Meet Iceland's Whaling Magnate. He Makes No Apologies.," *The New York Times*, August 10, 2018.
[58] Adam Cruise, "CITES Ignores Illegal Import of Wild Elephants by China," *Environment News Service*, February 20, 2018.
[59] Hannah Summers, "Outrage over alleged plan to export rare animals from Congo to China," *The Guardian*, July 2, 2018,
[60] Simon Denyer, "China's push to export traditional medicine may doom the magical pangolin," *The Washington Post*, July 21, 2018.
[61] Ibid.

Africa.[62] There, too, pangolins are now threatened with extinction.[63] The issue extends beyond the pangolin—illegal wildlife trade creates economic incentives to unsustainably hunt a host of threatened species, disrupting fragile ecosystems with global knock-on effects.[64]

If CITES were to have an internally-developed, binding enforcement mechanism, the U.S. would not need to take a leading role in international compliance. However, the sanctions enforcement mechanism within CITES is non-binding,[65] and, to the extent that is has been applied, selective enforcement has disproportionately targeted countries in the Global South,[66] undermining CITES' credibility.[67] Lack of procedural controls and transparent reporting of infractions renders the system unsatisfactory.[68] As a leader in international enforcement,[69] the U.S. is thus tasked with implementing policies that induce global compliance in international conservation programs.

II. The Solution

The solution lies not in the judiciary. Even creative reinterpretations of Pelly and Packwood would fail to set high-enough standards necessary to induce global commitments to conservation. Pelly retains executive discretion in the imposition of sanctions, which lessens the risk of punishment, while Packwood only applies to international fishery conservation programs and packs a small penalty, lacking in teeth. A charitable reinterpretation of Pelly and Packwood might look like that of the Court of Appeals, which found sufficient congressional

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[62] Sharon Guynup, "Pangolins on the Brink as Africa-China Trafficking Persists Unabated," *New Security Beat*, May 24, 2018.
[63] Ibid.
[64] Ripple et al., "Bushmeat hunting."
[65] Geir Ulfstein, *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge: Cambridge University Press, 2007), 130-31.
[66] Peter Sand, "Enforcing CITES: The Rise and Fall of Trade Sanctions," *Review of European, Comparative & International Environmental Law* 22, no. 13 (2013): 261-62.
[67] Ibid., 263.
[68] Anna Huggins, *Multilateral Environmental Agreements*, 141-42.
[69] William Clark, "Testimony of William Clark to the U.S. House of Representatives Committee on Natural Resources," in *Illegal Trade in Wildlife*, ed. Horace O. Williams and Viktor T. Grante (New York: Nova Science Publishers, Inc., 2009), 73.

intent to restrict the Secretary's discretion in determining whether foreign nationals' actions diminish the effectiveness of an international conservation program. Even so, executive discretion would remain, which leaves open the possibility of selective and subjective application for purposes of political and diplomatic expediency, as evinced by the vast majority of certifications that did not lead to economic sanctions.[70]

Congressional clarification of Pelly and Packwood is the next appropriate step.[71] Congress could keep the processes of monitoring and certification within the executive but require that automatic sanctions be imposed on countries found to be diminishing the effectiveness of international conservation programs. Congress could also define and set thresholds for actions that diminish the effectiveness of these programs. With new, explicit language, the executive would no longer retain *Chevron* deference in interpretation of the amendments. Greater oversight of agencies involved in certification could address issues of non-compliance.[72]

Because few environmental sanctions have ever been imposed, it is difficult to find empirical support for the potential efficacy of these reforms. However, from the limited history we can observe, it appears that restrictions on discretion that result in environmental sanctions are remarkably effective in reinvigorating previously-stagnant efforts. When Congress eliminated National Marine Fisheries Service (NMFS) discretion under the Marine Mammal Protection Act,[73] NMFS could no longer withhold its embargo power on tuna found to be caught with methods that endangered dolphins.[74] The automatic sanctions pressured foreign vessels to comply with regulations protecting dolphins, achieving full participation and near-perfect compliance.[75] Research suggests that the credible threat of sanctions was crucial to driving this sea change—both in

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[70] Steve Charnovitz, "An Analysis of Pelly," 772.
[71] Virginia Curry, "Casualties of Trade Wars," 298.
[72] Wyler and Sheikh, "International Illegal Trade," 31-32.
[73] 16 U.S.C. § 1361 (1994) [hereinafter MMPA].
[74] Richard Parker, "The Case for Environmental Trade Sanctions," *Widener Law Symposium Journal* 7 (2001): 23-24.
[75] Ibid., 24.

imposing financial costs and inducing cognitive and discursive shifts.[76] There is no reason to believe that these benefits would not follow from automatic sanction mechanisms linked with other conservation policies.

Restricting the executive's discretion over certification would have impacts that extend beyond U.S. waters. Threats of sanctions would serve as strong messages to trade partners across the world that environmental protection is an international priority. Reframing illegal wildlife trade as a "mainstream crime" could also generate a stronger adherence to CITES by other countries.[77] The U.S. could develop partnerships with foreign countries to establish regional enforcement agencies[78] and contribute ample diplomatic, professional, and financial resources to help agencies meet their goals.[79] Fish and Wildlife Service already works in partnership with officers in some countries and associations for this purpose[80] and could formally expand its mission should others have stronger economic incentives to comply with CITES. Harmonization of policies across countries would facilitate transparent international enforcement of CITES[81] and open discussions for new administrative procedures restoring its credibility.[82]

The Supreme Court's decision in *Japan Whaling* raises both legal and moral concerns. Accepting the judiciary's interpretation of congressional intent and recognizing the immovability of *Chevron* deference, the burden falls on Congress to pass new

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[76] Ibid., 25-26.
[77] John Sellar, "Written Testimony to the U.S. House of Representatives, Committee on Natural Resources, Regarding Poaching American Security: Impacts of Illegal Wildlife Trade," in *Illegal Trade in Wildlife*, ed. Horace O. Williams and Viktor T. Grante (New York: Nova Science Publishers, Inc., 2009), 132-33.
[78] William Clark, "Testimony of William Clark," 71-75.
[79] Ibid., 71.
[80] Benito Perez, "Testimony of Benito A. Perez (Law Enforcement U.S. Fish and Wildlife Service, Department of the Interior) Before the U.S. House of Representatives Committee on Natural Resources, Regarding *'Poaching American Security: Impacts to Illegal Wildlife Trade,'"* in *Illegal Trade in Wildlife*, ed. Horace O. Williams and Viktor T. Grante (New York: Nova Science Publishers, Inc., 2009), 147-51.
[81] Kimberley Graham, "International Intent and Domestic Application of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): The Case of the Ocelot (Leopardus pardalis)," *Journal of International Wildlife Law & Policy* 20, nos. 3-4 (2017): 288-89.
[82] Anna Huggins, *Multilateral Environmental Agreements*, 142, 151-57.

legislation that mandates sanctions against countries diminishing the effectiveness of international conservation programs. Clear and conservative thresholds outlining the trigger mechanism are necessary to prevent executive circumvention. As it stands, lists of endangered species continue to grow, with only grim ends in sight. U.S. leadership in international conservation efforts and global enforcement should be a priority for those concerned with protecting the environment on which we all depend for survival.

Better Call Saul (Because He's Your Only Option): An Analysis of the Effects of Medical Malpractice Damage Caps on the Market for Legal Representation

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Healthcare providers have lobbied state legislatures for years (sometimes successfully) to establish caps on how much plaintiffs suing for medical malpractice damages can actually receive. There are several studies that suggest that these caps negatively impact not only patient safety but also the quality of their legal representation. The latter, often overlooked, needs to be addressed in discussions about said caps moving forward.

There is a war being waged in medical malpractice litigation that has been raging on since the first wave of tort reforms in the 1970s. Healthcare providers have lobbied state legislatures for years to establish caps on how much plaintiffs suing for medical malpractice damages can collect. Their ostensible goal is to improve the healthcare system by mitigating the risk of having to dole out inordinate sums of money on a regular basis, known as "jackpot justice." There are two kinds of caps: (1) caps on non-economic damages, which are defined as "intangible [costs], including, but not limited to, pain and suffering, disability, disfigurement, loss of consortium, and loss of society"; and (2) caps on economic damages, which represent "tangible [costs], such as past and future medical expenses, loss of income or earnings, and other property loss."[1]

Proponents believe caps free doctors to perform their duties without the looming threat of crippling lawsuits and deter defensive medicine, whereby physicians order

[1] LeBron v. Gottlieb Memorial Hospital (2010), pg. 8

unnecessary (and expensive) tests and procedures simply for the sake of reducing their risk of litigation. A 2017 study, however, actually found that caps enacted in the early-mid 2000s raised Medicare Part B[2] spending by 4-5%. Paik et al. suggest that "the effects of caps in reducing assurance behavior [i.e., defensive medicine] are, on average, outweighed by their effect in reducing avoidance behavior [i.e., the tendency not to operate on patients with a higher relative risk in surgery]."[3] Furthermore, there are worries about patient safety—if doctors and medical facilities are not held as accountable for their actions (or inactions), will they take less precaution than is socially optimal? Toshiaki Iizuka's 2011 research on OB/GYN-related Patient Safety Indicators (PSIs), which are "standard measures of preventable adverse events in acute care hospitals developed by the Agency for Healthcare Research and Quality," answers in the affirmative. It indicates that punitive damage caps have significantly increased the risk of PSI 19, or obstetric trauma to the mother, and other preventable medical complications.[4] In January 2019, Zabinski and Black conducted a similar study, looking to identify the effects of non-economic damage caps enacted in five states between 2003 and 2005.[5] They found "a broad increase in adverse patient safety events [~15%] following damage cap adoption."[6] The newfound results are striking and the likelihood that the rise in PSI rates is due to random fluctuations is "extremely low ($p < 0.0001$)."[7] Thus, it is

[2] Medicare Part A reimburses hospitals for inpatient care. Part B includes physician reimbursements and outpatient services. Paik, Myungho, Bernard Black, and David Hyman. "Damage Caps and Defensive Medicine, Revisited." *Journal of Health Economics* 51 (2017): 84.
[3] Ibid.
[4] Iizuka, Toshiaki. "Does Higher Malpractice Pressure Deter Medical Errors?" 2011.
[5] Zabinski, Zenon and Black, Bernard S., "The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform." 2019. Northwestern Law & Econ Research Paper No. 13-09.
[6] Ibid, 1.
[7] Ibid.

imperative that we consider the effects of damage caps on patient safety moving forward.

More broadly, there is little evidence to suggest that medical malpractice damage caps have helped mitigate the ongoing healthcare crisis.[8] The Congressional Budget Office estimates that "caps on damages [will barely] reduce national healthcare spending by 0.5 percent."[9] It also concludes from over 25 years of Medicare data that "direct reforms, including damage caps, [have] not statistically affect[ed] healthcare expenditures."[10] Some cap supporters emphasize their power to attract doctors to a given state. However, Lindenfeld (2015) concludes that "caps [do] not increase the supply of doctors… [In fact,] in 2003, Texas was ranked as the 42nd worst physician-to-population ratio in the nation, and by 2010 had dropped to 44th."[11] Other supporters point to the fact that medical malpractice claim numbers have fallen since 1992.[12] Paik et al., though, found that tort reform only partially explains the downward trend, as there have been similar declines in states without damage caps.

One issue that is often overlooked is the effect of medical malpractice damage caps on the market for legal representation. Jerry Van Hoy (1999) found that caps instituted by Indiana in the 70s drove most plaintiff lawyers out of the Indiana medical malpractice market altogether by making it impossible for them to handle these cases

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[8] Lindenfeld, Eric. "Moving Beyond the Quick Fix: Medical Malpractice Non-Economic Damage Caps A Poor Solution to the Growing Healthcare Crisis." 2015. 41 *Thurgood Marshall Law Review*, 2016.

[9] Baltic, Scott. "Who Benefits from Tort Reform?" 2013.

[10] Sloan Frank A. & John H. Shadle. "Is There Empirical Evidence for 'Defensive Medicine'? A Reassessment," 28 *J. HEALTH ECON.* 481, 488 (2009).

[11] Figman, Alan H. "The Fallacies of Medical 'Tort Reform'." Cardozo Law Website, 1, 5 (2003).

[12] Paik, Myungho and Black, Bernard S. and Hyman, David A., "The Receding Tide of Medical Malpractice Litigation Part 1: National Trends." 2013. 7th Annual Conference on Empirical Legal Studies Paper; as published in the *Journal of Empirical Legal Studies*, pp. 612-638 (2013); Northwestern Law & Econ Research Paper No. 12-18; Illinois Program in Law, Behavior and Social Science Paper No. LBSS12-13; 7th Annual Conference on Empirical Legal Studies Paper; Illinois Public Law Research Paper No. 13-55.

profitably.[13] Due to the large reduction in expected profit, firms (and especially the good ones) are incentivized to transition into new niches. The long-run outlook is concerning, as those who suffer from medical malpractice face the possibility of subpar representation and damages far below what is considered socially optimal.

Daniels and Martin (2009) conducted a series of interviews and mail surveys of Texas plaintiff lawyers after the state enacted a $250,000 cap on non-economic damages in 2003, otherwise known as HB4.[14] According to many of them, "none of the changes in HB4 did anything to lower the cost of litigation to the plaintiff," though they certainly diminished the expected value of going to trial.[15] Another even admitted, "I turn away cases these days that I would've taken, and it has nothing to do with whether or not they are legitimate claim. It's simply caps on non-economic damages."[16] When describing the new landscape of medical malpractice law in Texas, one lamented that "[the legislature] essentially closed the courthouse door to the negligence that would kill a child, a housewife, or an elderly person."[17] One firm shut its door on medical malpractice after 2003, while another that used to consist of over 90% medical malpractice reduced its load to about 60%.[18] There are even reports that the medical malpractice firms still in existence in Texas now act as incubators for young and inexperienced attorneys because that is who they can afford.

Daniels and Martin also began to uncover some of the "hidden victims" of the reform—namely, those who have

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[13] Van Hoy, Jerry. "Markets and Contingency: How Client Markets Influence the Work of Plaintiffs' Personal Injury Lawyers," *International Journal of the Legal Profession* 6, 345 (1999).
[14] Martin, Joanne and Daniels, Stephen, " 'The Juice Simply Isn't Worth the Squeeze in Those Cases Anymore:' Damage Caps, 'Hidden Victims,' and the Declining Interest in Medical Malpractice Cases." 2009.American Bar Foundation Research Paper No. 09-01.
[15] Ibid, 14.
[16] Ibid, 21.
[17] Ibid, 35.
[18] Ibid, 22.

suffered medical malpractice but are not likely to secure large economic damages. One lawyer remarked, "I will not take a medical malpractice claim involving an older person because of the changes in the law. I've turned down seven of them in the past year, and it is not because I didn't think the cases had any merit." After hearing similar narratives, Daniels and Martin decided to come up with a survey study to nail down the effects of the non-economic damage cap on the willingness of lawyers to take certain medical malpractice cases. They drew up three different types of clients who would suffer from the same bout of medical malpractice: (1) a 45 year-old married male, fully employed with dependents (the ideal client in terms of securing economic damages); (2) a 45 year-old stay-at-home mother; and (3) a 70-year-old male who is retired and without dependents, having only basic medical bills tied to an injury (least likely to secure large economic damages). The two researchers then gauged the willingness of each plaintiff attorney to accept each case both before and after the cap is in place.[19] The results are striking. Regarding the 45-year-old male, his case was taken 92.5% of the time before the cap and only 58.6% of the time after. Regarding the 45-year-old female, her case was taken 92.5% of the time before and only 26.6% after. Regarding the 70-year-old male, his case was taken 79.4% of the time before and only 4.3% of the time after.[20] It is easy to see that certain plaintiffs are more heavily affected by the non-economic damages cap, potentially stifling their ability to obtain proper representation.

It is also worth examining the constitutional landscape of medical malpractice damage caps. In Atlanta Oculoplastic Surgery v. Nestlehutt, upon appeal, the Georgia Supreme Court remanded caps on non-economic damages, determining they encroach on the Seventh Amendment right to a jury trial. Furthermore, in Lebron v. Gottlieb Memorial Hospital, a plaintiff faced the risk of having her awards for

[19] Ibid, 44.
[20] Ibid. As seen in Table 3a Pg. 58

pain and suffering reduced by a statute limiting non-economic damages. On appeal, the Illinois Supreme Court found the statute unconstitutional, writing that "the capping of medical malpractice damages violates the separation of powers clause because it unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law."[21] They also noted "that 'everybody is doing (tort reform)' is hardly a litmus test for the constitutionality of the statute."[22] As of April 23, 2019, the Supreme Court of Oklahoma in Beason v. Miller Services found non-economic damages to be an "impermissible special law that violates Article 5. Section 46 of the Oklahoma Constitution because it singles out for different treatment less than the entire class of similarly situated persons who may recover for bodily injury."[23]

My research begs an incredibly important question: who truly benefits from medical malpractice damage caps? A Harvard Law School study by Viscusi and Born (2004) looked at medical malpractice insurance markets from 1984-1991 and found "that reforms of non-economic damages limit the potential liability of the defendant and enhance profitability during the sample period."[24] Healthcare providers also stand to gain by limiting the risk taken on in their services. However, the evidence I have presented shows that the medical malpractice damage caps in existence have not only threatened patient but also potentially left clients without adequate representation. Beyond that, they might not even be constitutional. It is vital that state legislatures consider these factors in the future.

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[21] Ibid, 14.
[22] LeBron v. Gottlieb Memorial Hospital (2010), pg. 23
[23] Beason v. Miller Services, Inc. (2019) pg. 1
[24] Viscusi, W. Kip and Born, Patricia H., "Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance." 2004. Harvard Law and Economics Discussion Paper No. 467.

Litigating the U.S. Opioid Epidemic: Public Torts, Public Health, and the Legacy of Big Tobacco

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The United States is currently facing an unprecedented public health crisis in the form of the opioid epidemic. Many local and state governments have begun to seek compensation from major pharmaceutical companies that have played a part in fueling the calamity. Their "public tort" approach has drawn significant comparisons to suits against "Big Tobacco" in the 90s that culminated in the Master Settlement Agreement (MSA)—the largest civil settlement in U.S. history. I argue that litigation can play a similar role today in effecting social change, especially when legislative efforts fail.

Few public health issues have gripped the American public quite like the current opioid epidemic. According to the Center for Disease Control and Prevention (CDC), an average of 115 people in the U.S. die each day from an opioid overdose.[374] While the human toll is staggering, the financial consequences have been equally as severe, costing hundreds of billions of dollars.[375] As local and state governments continue to spend on treatment and services for their constituents, many have turned to litigation to seek compensation from pharmaceutical companies that have played a large role in fueling the crisis. Their "public tort" approach has drawn significant comparisons to the suits against "Big Tobacco" that took place in the 90s, especially those that culminated in the Master Settlement Agreement (MSA)—the largest civil litigation settlement in U.S. history, involving nearly all the major tobacco manufacturers and 46 U.S. states.[376] My article explores the possibility of litigating the opioid

[374] Centers for Disease Control and Prevention, "Opioid Overdose - Understanding the Epidemic," *Centers for Disease Control and Prevention*, August 31, 2017.
[375] Mike Moore, Phone Interview, January 30, 2019.
[376] Ibid.

epidemic much like "Big Tobacco" to effect public health and policy change.

In *The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product That Defined America*, Allan Brandt asserts that "[t]he historical development of American tort law is predicated on the theory that it leads to greater safety of consumer goods."[377] Manufacturers thus have a strong incentive to safeguard against potential harms that their products could cause. If they choose not to do so, they "are responsible for the excess social costs that ensue."[378] Strict liability torts, which emerged after World War II, further expanded manufacturer accountability for harms caused by their products, as their actions no longer needed to be "negligent" (the reigning standard at the time) for them to be held responsible. In other words, strict liability was "'unburdened by fault.'"[379] Brandt writes, "[t]ort law became a tool for indirect regulatory policy; the full costs of the product would be borne by a company with appropriate incentives for safety and risk reduction."[380] "Public tort" litigation is a more recent development in product liability law. Legal scholar Richard C. Ausness defines it as suits filed by "federal, state, or local government entities to recover the cost of public services provided to persons who have been injured as the result of a defendant's alleged misconduct."[381] Most well-known is the "Big Tobacco" litigation of the 90s, during "which more than forty states brought suit against the leading tobacco companies to recoup the cost of providing health care services to indigent smokers."[382] Also included were the suits brought by municipalities against handgun manufacturers and paint companies (due to the inadvertent harms caused by lead-based paint).[383]

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[377] Allan M. Brandt, *The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product That Defined America,* New York: Perseus, 2007.
[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] Richard C. Ausness, Public Tort Litigation: Public Benefit or Public Nuisance, 77 Temp. L. Review 2004, *HeinOnline,* pp. 826-827, https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1391&context=law_facpub.
[382] Ibid., p. 827.
[383] Ibid.

Much analysis of the "Big Tobacco" litigation focuses on the infamous 1998 Master Settlement Agreement. Its legacy is one of the most enduring and defining aspects of the so-called "tobacco wars," carving out a path for addressing future public-health crises, like the current opioid epidemic.[384] However, much of the money paid out to states as a result of the MSA was not actually directed towards anti-smoking efforts, which has made many wary about the potential of a largescale opioid settlement to significantly impact the pharmaceutical industry and ongoing epidemic.

Since the release of OxyContin in 1996, thousands of lawsuits have been filed against doctors, hospitals, pharmacies, and pharmaceutical companies (manufacturers and distributors), with the majority of them filed over the past five years. Over 1,400[385] have been by local governments (including Native American tribes and county and municipal governments). Thirty states have also filed, with forty-one forming a coalition to investigate opioid manufacturers in November 2018.[386] Gluck, Hall, and Curfman (2018) argue that local governments have been particularly motivated to file separately due to concerns that, as with the financial payouts of the 1998 MSA, financial damages awarded in a potential opioid settlement with states may not reach local communities or may be used for purposes other than those related to the complaints themselves.[387]

One of the most significant developments in recent times has been the consolidation of over 1,400 opioid lawsuits filed by county, municipal, and tribal governments, primarily against large pharmaceutical companies,[388] into a Multidistrict Litigation (MDL) suit (MDL 2804 to be exact); it falls under the purview of

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[384] Derek Carr, Corey S. Davis, and Lainie Rutkow, "Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons From the Tobacco Wars," *Public Health Reports* Vol. 133, Issue 2, pp. 207-213, March 1, 2018.

[385] As of 2019, that figure has surpassed 1,800 lawsuits and continues to climb rapidly.

[386] Ibid.

[387] Abbe R. Gluck, Ashley Hall, Gregory Curfman, "Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis," *Journal of Law, Medicine, & Ethics,* p. 8, July 17, 2018.

[388] Curtis Weyant, "Opioid Lawsuits," *Consumer Safety*, Accessed November 20, 2018.

Judge Dan Aaron Polster in the United States District Court for the Northern District of Ohio.[389] Multidistrict courts hear "civil actions involving one or more common questions of fact," even if they were initially filed in different districts.[390] MDL is often handled by a single judge, maximizing efficiency.[391] Plaintiffs involved in the Ohio MDL are suing for damages stemming from public nuisance, racketeering and corruption, fraud, and federal and state laws governing controlled substances.[392] It has gained the attention of a number of media outlets and legal scholars in large part due to the intensity with which Judge Polster is pushing for settlement discussions in hopes of quickly mitigating the effects of the ongoing opioid crisis.[393]

There are four key factors from successful "Big Tobacco" suits of the past that can offer insight into the potential of current opioid litigation to effect meaningful change via the legal process. First, they made clear the need for a public tort model of litigation rather than individualized suits, as the latter tended to fail at a higher rate. Second, historic (and heavily publicized) discovery processes throughout early tobacco litigation—including tens of millions of damning industry documents—uncovered unethical and deceptive business practices (like marketing to children) that had been employed by the tobacco industry for decades, which served to shift public opinion about smoking and tobacco use. [394] Counsel representing the People in MPLs today should continue to circulate damning documents from the opioid industry that elucidate the extent to which pharmaceutical companies have known about the addictiveness of drugs like OxyContin as well as their explicit efforts to fight potential liability by "hammer[ing]"

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[389] Daniel Fisher, "Time Running Out for Lawyers Suing Opioid Industry to Show Specific Proof," *Forbes*, October 19, 2018.
[390] 28 U.S. Code § 1407.
[391] Abbe R. Gluck, Ashley Hall, Gregory Curfman, "Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis," *Journal of Law, Medicine, & Ethics,* p. 15, July 17, 2018.
[392] Jan Hoffman, "Can This Judge Solve the Opioid Crisis?" *The New York Times*, March 5, 2018.
[393] Jan Hoffman, "Can This Judge Solve the Opioid Crisis?" *The New York Times*, March 5, 2018.
[394] Mike Moore, Phone Interview, January 30, 2019.

onto the "abusers"[395] and calling those who misuse their drugs "reckless criminals."[396] Third, officials capitalized on legal victories to enact regulatory and policy changes, such as the creation of smoking-free public spaces laws. Fourth, there needs to be an understanding of where the damages collected in major settlements will be spent, so that they are not misused as they often were in the past.

Litigation is ultimately an imperfect and imprecise instrument for effecting public health and policy change, but it can be a start. While causes of the opioid epidemic are multiple and contested, highly aggressive, deceptive marketing tactics (particularly of OxyContin) by major pharmaceutical companies, often coupled with unsubstantiated claims[397] and insufficient monitoring of massive shipments of prescription opioids certainly contributes to the crisis. Litigation has the unique ability to cut through special interests that frequently tie up legislative relief efforts, such as the congressional failure to pass the 1997 tobacco agreement, forcing pharmaceutical companies to the negotiating table. It will be up to Attorney Generals to consider the historical example of Big Tobacco litigation and resulting MSA in crafting a settlement that restricts funds to public health efforts. I do not mean to suggest that the MSA was a silver bullet or maximally effective solution to public health issues involving smoking and the tobacco industry. However, it does emphasize the role that litigation can play in effecting social change, whether by securing funds for public-interest projects or exposing predatory business practices via discovery and document release. State and local governments are uniquely positioned to claim compensatory damages via public tort litigation for the massive human and financial costs of the ongoing opioid crisis.

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[395] Commonwealth of Massachusetts v. Purdue Pharma L.P., Purdue Pharma Inc., Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Saclker, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, Judith Lewent, Craig Landau, John Stewart, Mark Timney, and Russell J. Gasdia, Suffolk Superior Court, C.A. No. 1884-cv-01808, p. 78.

[396] Ibid.

[397] Commonwealth of Massachusetts v. Purdue Pharma, p. 78.