COLUMBIA LAW REVIEW

VOL. 125 **JANUARY 2025** **NO. 1**

COLUMBIA LAW REVIEW

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CONTENTS

ARTICLE

NOTES

ESSAY

COLUMBIA LAW REVIEW

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ABSTRACTS

ARTICLE

For over a century, the federal government has wielded the immigration subpoena power in darkness, forcing private individuals, subfederal governments, and others to help it detain and deport. This vast administrative power has remained opaque even to those who receive these subpoenas and invisible to those it affects most. Indeed, the very people targeted by these subpoenas often don't know they exist, much less how they facilitate arrest and deportation. For these reasons—and more—this power has escaped the legal battles raging over other immigration enforcement tactics and the scrutiny of journalists, scholars, and courts. Thus, as state- and locality-held information has become central to immigration enforcement, this power raises urgent questions about when, how, and with what constraints the federal government uses it more broadly.

This Article provides the first comprehensive account of the immigration subpoena power. Drawing upon previously undisclosed agency records and an original dataset reflecting thousands of subpoenas issued nationwide, this Article shows how Immigration and Customs Enforcement (ICE) deploys a power created to facilitate racial exclusion at the border to reach deep into our communities and people's lives. It demonstrates how ICE uses subpoenas to pierce state and local sanctuary laws and force subfederal governments—and others—to become unwilling partners in arrests, detention, and removal. And it exposes a range of other unlawful practices.

These findings shed vital light on the immigration subpoena regime. They help resolve important constitutional questions, illuminate new constraints, and offer lessons that transcend the immigration realm.

NOTES

The Antiterrorism Act (ATA) enables injured parties to sue "any person who aids and abets, by knowingly providing substantial assistance, . . . an act of international terrorism [committed by a

designated foreign terrorist organization]." In the Supreme Court's 2023 Twitter, Inc. v. Taamneh *decision, the Justices considered the elements of a secondary liability claim under the ATA. While ultimately resolving the case based on the foundational tort principle that liability does not usually extend to inaction or nonfeasance, the unanimous Court also discussed the mens rea requirement for ATA aiders and abettors, noting that courts should view this requirement in light of the common law development of secondary liability.*

But common law aiding and abetting cases have rarely been lucid, and courts—including the Supreme Court in Taamneh*—have referenced a similar collection of precedents to support meaningfully different mens rea tests. Much ink has been spilled over this confusion in the criminal law context, and in the wake of* Taamneh*, a similar puzzle now applies to the ATA.*

This Note provides a path forward, proposing a sliding scale for lower courts to apply when interpreting Taamneh *and adjudicating ATA claims. By organizing the ATA's mens rea and level of assistance prongs on a sliding scale, with a weaker showing of one demanding a stronger showing of the other, courts can ensure that the ATA fulfills its critical mandate: deterring terrorism, compensating injured victims, and crippling terrorist organizations, all without impeding ordinary business activities.*

U.S. legislators are taking aim at technology companies for their role in the nation's fentanyl crisis. Members of Congress recently introduced the Cooper Davis Act, which would require electronic communications service providers to report evidence of illicit fentanyl, methamphetamine, and counterfeit drug crimes on their platforms to the Drug Enforcement Administration. For the first time, such companies would be obligated to report suspected criminal activity by their users directly to federal law enforcement. While the Cooper Davis Act is modeled after a federal statute requiring providers to report child sexual abuse material (CSAM), the proposed bill targets a qualitatively different kind of crime—one highly dependent on context. By requiring providers to report directly to the government and by prohibiting deliberate blindness to violations, the Cooper Davis Act would incentivize providers to conduct large-scale automated searches for drug-related activity, raising novel questions about the Fourth Amendment's applicability to mandatory reporting laws for crimes other than CSAM.

This Note examines the implications of extending practical and legal frameworks for regulating CSAM—such as the private search doctrine, which has created a circuit split in online CSAM cases—to other contexts. This Note argues that courts should adopt a narrow interpretation of the private search doctrine, in line with the Second and Ninth Circuits, in cases involving automated searches for criminal activity. This approach would resolve the circuit split in CSAM cases and clarify the doctrine's scope for other kinds of warrantless digital searches.

Further, the degree to which any taxpayer partakes in each role depends on both their own income and the income inequality within the community structured by federal taxation. Under this taxonomy, the propriety of disclosure falls onto a spectrum, and transparency is more appropriate for ultrawealthy taxpayers in times of high economic inequality. The Essay thus provides insights to help policymakers design public-disclosure regimes that cohere with the norms implicit in our fiscal social contract with the state.

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COLUMBIA LAW REVIEW

VOL. 125 **JANUARY 2025** **NO. 1**

COLUMBIA LAW REVIEW

VOL. 125 JANUARY 2025 NO. 1

ARTICLE

THE IMMIGRATION SUBPOENA POWER

*Lindsay Nash**

For over a century, the federal government has wielded the immigration subpoena power in darkness, forcing private individuals, subfederal governments, and others to help it detain and deport. This vast administrative power has remained opaque even to those who receive these subpoenas and invisible to those it affects most. Indeed, the very people targeted by these subpoenas often don't know they exist, much less how they facilitate arrest and deportation. For these reasons—and more—this power has escaped the legal battles raging over other immigration enforcement tactics and the scrutiny of journalists, scholars, and courts. Thus, as state- and locality-held information has become central to immigration enforcement, this power raises urgent questions about when, how, and with what constraints the federal government uses it more broadly.

This Article provides the first comprehensive account of the immigration subpoena power. Drawing upon previously undisclosed agency records and an original dataset reflecting thousands of subpoenas issued nationwide, this Article shows how Immigration and Customs Enforcement (ICE) deploys a power created to facilitate racial exclusion at the border to reach deep into our communities and people's lives. It demonstrates how ICE uses subpoenas to pierce state and local sanctuary laws and force subfederal governments—and others—to become unwilling partners in arrests, detention, and removal. And it exposes a range of other unlawful practices.

* Associate Professor of Law, Benjamin N. Cardozo School of Law. For helpful comments, I am grateful to Josh Chafetz, Adam Cox, Ingrid Eagly, Kate Evans, Pamela Foohey, David Hausman, Mary Holper, Eisha Jain, Michael Kagan, S. Deborah Kang, Eunice Lee, Kate Levine, Peter Markowitz, Fatma Marouf, Katherine Miller, Jennifer Nou, Michael Pollack, Shalini Bhargava Ray, Shalev Gad Roisman, Emily Ryo, and Stew Sterk. I also thank the staff of the National Archives and Records Administration, the participants of the Ninth Annual Administrative Law New Scholarship Roundtable, ACS Junior Scholars Public Law Workshop, Immigration Law Teachers and Scholars Workshop, and workshops at Texas A&M University School of Law and Cardozo Law. For excellent research assistance, I am indebted to Saul Thorkelson, Paloma Bloch, Lindsay Brocki, Melanie Gold, and Noa Gutow-Ellis. For improving this piece in many ways, I thank Noah B. McCarthy and the *Columbia Law Review* staff.

These findings shed vital light on the immigration subpoena regime. They help resolve important constitutional questions, illuminate new constraints, and offer lessons that transcend the immigration realm.

INTRODUCTION

After a series of public losses in its war on "sanctuary" cities, the first Trump Administration deployed the immigration subpoena, a new and formidable weapon in this fight.[1] It used these agency-issued subpoenas to retaliate against its political foes—cities and states that refused to participate in federal immigration enforcement—and demand they do what the federal government could not otherwise compel: provide confidential information that would allow ICE to arrest, prosecute, and deport their constituents.[2]

Unlike President Donald Trump's prior efforts, this tactic proved effective. Of course, some cities initially resisted,[3] but once the spotlight faded, that defiance was short-lived. Challenging these subpoenas, the cities seemed to conclude, was futile. And they stood down, quietly turning over the very information they had promised to protect.[4]

Though brief, this battle had enormous implications. For the immigrants caught in the crossfire, it meant exposure to some of the harshest penalties in our legal system: arrest, detention, and exile from their families and homes.[5] For cities and states, it exposed a major chink

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1. Colleen Long, Immigration Agency Subpoenas Sanctuary City Law Enforcement, AP News (Jan. 15, 2020), https://apnews.com/article/immigration-ap-top-news-subpoenas-arrests-politics-ba19871e3754e9c4c9838bd3b600154e [https://perma.cc/TV3V-3P6P] [hereinafter Long, Immigration Subpoenas] (quoting ICE leadership describing this use of immigration subpoenas as a major change and indicating that they had "never been sent to law enforcement agencies before").

2. Stef W. Kight, Trump Has Declared War on Sanctuary Cities, Axios (Feb. 19, 2020), https://www.axios.com/2020/02/19/trump-immigration-lawsuit-subpoena-sanctuary-cities [https://perma.cc/3ZGV-JJW8] (describing the Trump Administration's efforts to force state and local cooperation with federal immigration enforcement); see also Jim Mustian, ICE Ups Ante in Standoff With NYC: 'This Is Not a Request', NBC News (Jan. 18, 2020), https://www.nbcnewyork.com/news/local/ice-ups-ante-in-standoff-with-nyc-this-is-not-a-request/2261924/ [https://perma.cc/MVQ6-TE4G] (reporting that ICE issued subpoenas to New York City in an attempt to circumvent the city's sanctuary policies).

3. See, e.g., Colleen Long, Denver Officials Won't Hand Over Information Sought by Immigration and Customs Enforcement, Colo. Sun (Jan. 17, 2020), https://coloradosun.com/2020/01/17/denver-ice-immigrants-subpoena/ [https://perma.cc/MR2X-R7HV] (reporting that Denver officials refused to comply); Jim Mustian, Feds Ask Judges to Enforce Immigration Subpoenas Sent to NYC, AP News (Feb. 3, 2020), https://apnews.com/article/cdaba9b7b87e4542b43fbf003a560f8a [https://perma.cc/75DK-3TLZ] (last updated Feb. 3, 2020) (reporting that New York City initially did not provide information in response to the subpoenas, arguing that they "lack[ed] a legitimate purpose").

4. See, e.g., Memorandum in Support of Motion to Dismiss at 2, United States v. City of New York, No. 1:20-mc-256 (E.D.N.Y. filed Feb. 18, 2020), 2020 U.S. Dist. Ct. Motions LEXIS 415314 (reporting that New York City complied with the subpoena); Conor McCormick-Cavanagh, Denver Won't Appeal Judge's Ruling in Fight Against ICE, Westword (May 7, 2020), https://www.westword.com/news/ice-wins-round-in-legal-fight-with-denver-11705038 [https://perma.cc/NC94-76DB] (similar for Denver).

5. See, e.g., McCormick-Cavanagh, supra note 4 (reporting that ICE planned to use the information subpoenaed to deport the noncitizen targets); Conrad Wilson, Oregon

in the armor of local sovereignty, one that could undermine subfederal policy on policing, privacy, and control of local resources.[6] And, for the effort to disentangle local government from immigration enforcement, it landed a trenchant blow. It showed how these subpoenas could jeopardize one of the most powerful immigrant-protective movements of the twenty-first century[7]: the sanctuary policies that prevent state and local actors from providing confidential information and other resources to facilitate federal immigration enforcement.[8] In other words, the immigration subpoena offensive worked as intended—and ICE suggested that this was only the beginning and that it might start using this tactic "much more broadly."[9]

But has it? And how else does ICE use these administrative subpoenas—issued without judicial sign-off, active litigation, or even probable cause—to demand that recipients provide confidential records, testify against others, or present themselves for interrogation? The problem—perhaps the biggest takeaway from this episode—is that no one

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State Police, Hillsboro, Clackamas County Sheriff to Defy ICE Subpoenas, The Bulletin (Mar. 8, 2020), https://www.bendbulletin.com/localstate/oregon-state-police-hillsboro-clackamas-county-sheriff-to-defy-ice-subpoenas/article_ce3e6e54-616f-11ea-98a7-13a93a34fe6d.html [https://perma.cc/Y9FD-9J83] (last updated Apr. 13, 2021) (reporting that ICE sought the subpoenaed information to commence removal proceedings against the noncitizen targets).

6. See Bridget A. Fahey, Data Federalism, 135 Harv. L. Rev. 1007, 1010–12, 1028 (2022) (observing this type of connection between federal subpoenas and threats to local sovereignty); Robert A. Mikos, Can the States Keep Secrets From the Federal Government?, 161 U. Pa. L. Rev. 103, 154 (2012) (same).

7. Anti-immigrant groups saw this potential, touting immigration subpoenas as the "key to unlock[ing] sanctuary jurisdictions" and forc[ing] hundreds of localities nationwide to help ICE arrest and detain. David Jaroslav, Opinion, ICE Should Use Subpoenas as a Key to Unlock Sanctuary Jurisdictions, The Hill (July 10, 2020), https://thehill.com/opinion/immigration/506684-ice-should-use-subpoenas-as-a-key-to-unlock-sanctuary-jurisdictions/ [https://perma.cc/SRH3-3K54].

8. The term "sanctuary" is generally used to refer to laws and policies that "prohibit[] the use of subfederal resources to enforce immigration laws," often by barring state and local officers from arresting and detaining for ICE. Huyen Pham & Pham Hoang Van, Subfederal Immigration Regulation and the Trump Effect, 94 N.Y.U. L. Rev. 125, 130–34, 154, 162 (2019). Although not the focus of this Article, no discussion of the contemporary sanctuary movement's power would be complete without recognition of the role that community-based organizations and impacted people have played in the adoption of these laws and policies. See, e.g., John Washington, Another Way to Keep Families Together: Join the New Sanctuary Movement, The Nation (June 28, 2018), https://www.thenation.com/article/archive/another-way-keep-families-together-join-new-sanctuary-movement/ [https://perma.cc/L62Q-HRBG] (discussing the role of community-based organizations in advocating for this legislation).

9. Adam Shaw, ICE Subpoenas NY for Info on Illegal Immigrant Accused of Murder, as Sanctuary City Fight Escalates, Fox News (Jan. 18, 2020), https://www.foxnews.com/politics/ice-subpoenas-new-york-sanctuary-city-fight [https://perma.cc/6TZN-3ZFW] (internal quotation marks omitted) (quoting former Acting Director of ICE Matthew Albence); see also Long, Immigration Subpoenas, supra note 1 (referring to comments by the deputy executive associate director of ICE's Enforcement and Removal Operations).

knows. In short, this episode revealed major, unanswered questions about when, how, and with what constraints the massive immigration enforcement agency uses its subpoena power more broadly.

These questions are particularly pronounced because the immigration subpoena regime has long operated in darkness.[10] Although the immigration subpoena power is over a century old,[11] information about when and how the government uses it is virtually nonexistent in the public domain.[12] Unlike the typical subpoena issued by a federal court,[13] these

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10. This Article focuses on "immigration subpoenas," by which it means subpoenas issued by the Enforcement and Removal Operations (ERO) subcomponent of ICE, which is responsible for civil immigration enforcement in the nation's interior. See Memorandum from John Morton, Assistant Sec'y, ICE, to All ICE Emps. 1 (June 9, 2010), https://www.washingtonpost.com/wp-srv/hp/ssi/wpc/MortonMessage.pdf [https://perma.cc/4KUM-5AVN] [hereinafter Morton, ERO Memorandum] (announcing the creation of the Enforcement and Removal Operations directorate and outlining its functions); see also Stipulation and [Proposed] Order at 2, Nash v. Immigr. & Customs Enf't, Nos. 21-cv-04299 & 23-cv-06994 (S.D.N.Y. filed Nov. 18, 2024), ECF No. 60 [hereinafter Stipulation and Proposed Order] (confirming that the majority of subpoenas that the Enforcement and Removal Operations subcomponent issues are for civil immigration purposes). It does not cover subpoenas issued by other ICE subcomponents primarily focused on different types of enforcement, immigration judges (IJs) adjudicating removal proceedings, or DHS officers adjudicating naturalization applications.

11. See infra section I.A.

12. Just Futures Law and Boston University's immigration clinic have done critical work to expose the issuance of administrative subpoenas to technology companies, primarily by ICE's Homeland Security Investigations component (HSI). See Just Futures L. & Bos. Univ. Sch. of L., ICE Issued Hundreds of Requests to Major Tech Companies for Personal Data 1 (n.d.), https://pigeon-orb-9y46.squarespace.com/s/Final_JFL-ICE-admin-subpoenas-factsheet.pdf [https://perma.cc/D4NZ-J299] (reflecting subpoenas issued by HSI); Just Futures L., First Production from ICE_Redacted, Document Cloud (July 28, 2023), https://www.documentcloud.org/documents/23889930-first-production-from-ice_redacted (on file with the *Columbia Law Review*); Just Futures L., First Production from ICE_Spreadsheet of Administrative Subpoenas Issued to Certain Tech Companies, Document Cloud (July 28, 2023), https://www.documentcloud.org/documents/23893291-first-production-from-ice_spreadsheet-of-administrative-subpoenas-issued-to-certain-tech-companies-1 (on file with the *Columbia Law Review*); Just Futures L., Second Production From ICE_Redacted, Document Cloud (July 28, 2023), https://www.documentcloud.org/documents/23921560-boston-u-v-ice_second-production_redacted (on file with the *Columbia Law Review*). This information is extremely valuable but distinct because HSI focuses on criminal and national security–related enforcement, not civil immigration enforcement. See Morton, ERO Memorandum, supra note 10, at 1. Innovation Law Lab also did important work related to immigration subpoenas in the wake of the 2020 initiative. See Toolkit for Resisting ICE Administrative Subpoenas, Innovation L. Lab, https://innovationlawlab.org/toolkit/toolkit-resisting-ice-administrative-subpoenas/ [https://perma.cc/7Z94-VSQJ] (last visited Jan. 17, 2025).

13. See, e.g., Fed. R. Civ. P. 45(a)(4) (requiring the notification of all parties prior to service of pretrial subpoenas seeking, inter alia, records, inspections, and tangible objects). Though a full study is beyond the scope of this Article, this is also true for at least some administrative adjudication. See 8 C.F.R. § 1003.35 (2024) (permitting IJs to issue administrative subpoenas of removal adjudications); Exec. Off. for Immigr. Rev., Immigration Court Practice Manual § 3.2, https://www.justice.gov/media/1239281/dl?inline [https://perma.cc/YP48-76ZF] (last updated Aug. 12, 2024) (requiring

"investigative" subpoenas issued by ICE are not part of public, ongoing legal proceedings, nor are they formally connected to any filed charge or complaint. And, since ICE may issue these subpoenas to obtain information about almost any matter related to the immigration domain without a reason to even suspect that a legal violation has occurred,[14] these subpoenas may never make it into any public record or onto any litigant's radar.

Perhaps for these reasons, immigration subpoenas have largely escaped both the legal battles raging over other ICE tactics and the scrutiny of scholars, reporters, and courts. To be sure, scholars such as Professors Medha D. Makhlouf and Bridget Fahey have published important work identifying some of the concerns that ICE's subpoenas and other information-gathering tools could raise.[15] But no scholar has examined the immigration subpoena regime as a whole or how the agency wields this power on the ground. Indeed, the government itself lacks the fundamental information necessary to study this regime because ICE has no functional system for even tracking—much less analyzing—subpoenas' use in the immigration realm.[16] Thus, despite in-depth examinations of other aspects of immigration enforcement[17] and administrative subpoenas

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parties seeking such a subpoena in removal adjudications to file a motion and serve it upon opposing counsel).

14. See infra Part I.

15. See Fahey, supra note 6, at 1028, 1052–53 (describing ICE's efforts to obtain information from local governments); Medha D. Makhlouf, Health Care Sanctuaries, 20 Yale J. Health Pol'y, L. & Ethics 1, 30–32 (2021) (examining immigration surveillance in the context of health care and arguing, inter alia, that prior ICE policy did not sufficiently limit its use of administrative subpoenas and other information requests in that space). Others have noted some of the legal questions these tools might create. See, e.g., Aleksandar Dukic, Stephanie Gold & Gregory Lisa, Key Legal Considerations Relating to "Sanctuary Campus" Policies and Practices, 44 J. Coll. & Univ. L. 23, 34 (2018) (questioning the legality of mandates requiring that educational institutions turn over students' information); Lisa A. DiPoala, Note, Immigration Reform and Control Act of 1986: A License for Warrantless Searches, 40 Syracuse L. Rev. 817, 829–33 (1989) (arguing that the employer-investigation provisions of Immigration Reform and Control Act, including different administrative subpoena provisions, violate the Fourth Amendment); Kathryn Perrotta, Case Comment, Immigration Law—Third-Party Subpoenas—Can the INS Find John Doe?, Peters v. United States, 853 F.2d 692 (9th Cir. 1988), 13 Suffolk Transnat'l L.J. 866, 867–76 (1990) (analyzing a case related to group subpoenas).

16. See infra section II.A.

17. To note some of the many shining examples: Scholars have examined aspects of immigration enforcement's relationship with state and local law enforcement. E.g., Adam B. Cox & Thomas J. Miles, Policing Immigration, 80 U. Chi. L. Rev. 87 (2013); Eisha Jain, Jailhouse Immigration Screening, 70 Duke L.J. 1703 (2021); Michael Kagan, Immigration Law's Looming Fourth Amendment Problem, 104 Geo. L.J. 125 (2015); Pham & Van, supra note 8. Others have looked at this issue through the lens of enforcement at the border. E.g., S. Deborah Kang, The INS on the Line: Making Immigration Law on the U.S.-Mexico Border, 1917–1954 (2017); Eunice Lee, Regulating the Border, 79 Md. L. Rev. 374 (2020). Others have considered its internal structures and governance. E.g., Fatma Marouf, Regional Immigration Enforcement, 99 Wash. U. L. Rev. 1593 (2022); Shalini Bhargava Ray, Abdication Through Enforcement, 96 Ind. L.J. 1325 (2021). Others have argued for

in other contexts,[18] the immigration subpoena regime remains unstudied, largely unchallenged, and, for many, entirely unknown.

The need to understand this regime has never been greater. While local governments have long played an important role in federal immigration enforcement in the nation's interior,[19] the increased resistance to state and municipal collaboration has changed the enforcement landscape.[20] Specifically, because so many local law enforcement agencies now refuse to arrest and detain for immigration purposes, ICE relies even more heavily on information gathered, generated, and retained by local governments.[21] As the federal fury over sanctuary cities' refusal to provide this information shows, the interior immigration enforcement regime depends on this information at every stage, from identifying potential targets to executing arrests to effecting deportations.[22]

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rethinking it entirely. E.g., Peter L. Markowitz, Rethinking Immigration Enforcement, 73 Fla. L. Rev. 1033 (2021); Emily Ryo, Less Enforcement, More Compliance: Rethinking Unauthorized Migration, 62 UCLA L. Rev. 622 (2015). And still others have examined its uncomfortably close relationship with administrative adjudication in the immigration context. E.g., Ingrid Eagly & Steven Shafer, Detained Immigration Courts, 110 Va. L. Rev. 691 (2024); Mary Holper, The Fourth Amendment Implications of "U.S. Imitation Judges", 104 Minn. L. Rev. 1275 (2020).

18. Given the ubiquity of administrative subpoenas in contemporary practice, they come up in many excellent articles. For some important recent examples, see Aram A. Gavoor & Steven A. Platt, Administrative Investigations, 97 Ind. L.J. 421 (2022) [hereinafter Gavoor & Platt, Administrative Investigations] (providing a first-of-its-kind survey of the law of administrative investigations); Jennifer D. Oliva, Prescription-Drug Policing: The Right to Health-Information Privacy Pre- and Post-*Carpenter*, 69 Duke L.J. 775, 795 (2020) (arguing that, in light of recent Supreme Court precedent, administrative subpoenas for certain health information violate patients' Fourth Amendment privacy rights). For articles exploring the federalism implications of administrative subpoenas among other federal information-gathering tools, see, e.g., Fahey, supra note 6, at 1028; Mikos, supra note 6, at 116–18.

19. See Cox & Miles, supra note 17, at 87, 92–99 (discussing the history of these partnerships and their dramatic expansion starting in 2008).

20. See Lindsay Nash, Deportation Arrest Warrants, 73 Stan. L. Rev. 433, 460–61 (2021) [hereinafter Nash, Warrants] (discussing local declinations to participate in immigration enforcement).

21. See Fahey, supra note 6, at 1028, 1052–53 (describing a range of ways that ICE attempts to obtain and use data held by state and local government entities). In this sense, interior immigration enforcement is different than enforcement at the border, which often functions through border surveillance, observation, and arrests. See, e.g., Dan Whitcomb & Ted Hesson, Nine Migrants Die Trying to Cross Rio Grande River Into United States, Reuters (Sept. 3, 2022), https://www.reuters.com/world/us/eight-migrants-die-trying-cross-rio-grande-river-into-united-states-2022-09-03/ [https://perma.cc/QAQ4-VCAY].

22. See supra notes 2–3 and accompanying text; see also Pham & Van, supra note 8, at 128, 148 (describing how the Trump Administration, in particular, "relentlessly extracted participation from . . . so-called 'sanctuary cities,' or jurisdictions that refuse to fully cooperate with federal immigration enforcement").

While ICE has publicly focused on obtaining this information from police, jailors, and probation departments,[23] its reach into local interactions does not end there. Because immigration arrests and prosecutions can implicate virtually every aspect of people's lives—including spouses' employment, children's schooling, and medical care—so too can ICE's investigative powers.[24] In this way, these investigations can extend beyond the individuals under investigation to anyone—including U.S. citizens—with whom they associate.[25] Thus, knowing how ICE uses its subpoena power to obtain this information is critical to understanding the extent to which local entities remain complicit in immigration enforcement, the practical and legal implications of the immigration subpoena regime, and the efficacy of constraints on this power in the civil immigration realm.

This Article begins to answer these questions, providing the first comprehensive account of the immigration subpoena power. Drawing on previously undisclosed agency records reflecting thousands of subpoenas used in investigations nationwide,[26] it shows how the agency wields a power initially created to facilitate racial exclusion at the border to reach deep into some of the most intimate areas of people's lives, including schools, social services agencies, and other historically protected domains.[27] Indeed, it shows that the agency has long used these subpoenas to obtain children's records from schools, compel sensitive records from local agencies, surveil people's movements, and more.[28]

This Article also reveals the significant federalism implications of ICE's subpoena practice. It demonstrates that, contrary to the agency's own representations,[29] ICE regularly used these subpoenas to compel state and local law enforcement to participate in federal immigration enforcement well before Trump and has continued doing so to the present day.[30] But it also shows that ICE's practice of subpoenaing states and

23. See supra notes 2–3 and accompanying text.

24. See infra section I.B.

25. See infra section I.B.

26. The author obtained these data and other records through Freedom of Information Act (FOIA) requests—and ultimately two lawsuits. See infra section II.A. This Article refers to the author's dataset as "Combined FOIA Data." This dataset and the underlying records are on file with the *Columbia Law Review* and available on request.

27. See infra sections II.A–.B.1. Although ICE and its predecessors are agency subcomponents, this Article refers to them as "agencies" for readability and because the immigration enforcement subcomponent's name has changed throughout history.

28. See infra section I.B.

29. See, e.g., Kight, supra note 2 ("Former ICE director Thomas Homan told Axios that during his 34 years working in immigration enforcement, DHS never had to subpoena another law enforcement agency."); Press Release, ICE, ICE Issues Subpoenas to Obtain Information Refused Under Connecticut's Sanctuary Policies (Feb. 13, 2020), https://www.ice.gov/news/releases/ice-issues-subpoenas-obtain-information-refused-under-connecticuts-sanctuary-policies [https://perma.cc/A5CE-V22T] (claiming that ICE has not "historically needed to use its lawful authority to issue . . . subpoenas" against law enforcement agencies).

30. See infra section II.B.2.

localities that refuse to participate in federal immigration enforcement has recently transformed and become embedded in ICE policy, creating a formal structure for waging an intersovereign subpoena battle that rages on, largely in secret, today.[31]

This Article not only shows where the agency uses this power but also provides troubling new insight into how. It reveals that the agency has sought to broaden its subpoena power to make prospective demands for information and real-time surveillance, attempted to foist investigatory functions upon subfederal government entities, and tried to obscure its subpoena practices by imposing all-encompassing, indefinite—and unlawful—gag orders upon subpoena recipients.[32] Ultimately, this study paints a troubling picture of how ICE uses this power to force subfederal governments and others to contribute to immigration arrests and detention.

In addition to this descriptive contribution, this Article makes two important analytical claims. First, it argues that this examination exposes patterns of unauthorized and unconstitutional conduct that permeate the immigration subpoena regime.[33] It shows how ICE's use of immigration subpoenas implicates a host of constitutional questions—related to federalism, privacy, and free speech—that have gone unanswered and, in some respects, entirely unexplored. And it contends that this study helps raise and even resolve some of these questions by demonstrating the ways that ICE's practices impinge on core constitutional rights and constraints. These findings are important not only to identify these issues but also because they open three paths to agency restraint: They give rise to viable legal challenges in an area where judicial review is notoriously weak;[34] raise troubling policy questions that, in other contexts, have prompted

31. See infra sections II.B.2, II.D.

32. See infra sections II.B.2–.B.4.

33. See infra Part III.

34. See, e.g., United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 208 (1946) (concluding that the Fourth Amendment guards "at most" against "too much indefiniteness or breadth" in subpoenas for the production of records); Gavoor & Platt, Administrative Investigations, supra note 18, at 423 (describing the "highly deferential standard [of review] that rarely results in the quashing of agency investigative action or the exercise of agency self-restraint"); Diego A. Zambrano, Discovery as Regulation, 119 Mich. L. Rev. 71, 106 (2020) ("Regulated entities almost never succeed in challenging an administrative subpoena on scope, burden, or other reasons.").

subregulatory self-constraint;[35] and arm the public with information necessary to exert pressure through other means.[36]

Second, this Article argues that understanding how the immigration subpoena power is implemented has doctrinal and normative implications that transcend the immigration field.[37] As the first scholarship to date that examines a large set of primary administrative subpoena records—agency-level subpoenas and data[38]—it offers new insights that apply to administrative subpoena use and investigations more broadly. Specifically, it argues that this ground-level view of agency practice suggests the need to rethink the presumption of administrative regularity and the application of internal administrative law principles in at least some similar contexts. These insights are especially important in considering enforcement regimes that, like ICE's, impose extraordinarily harsh penalties and bear most heavily on historically marginalized populations who often lack resources and political power. Ultimately, this Article makes the case for greater external constraints and more probing judicial review in the immigration subpoena regime and beyond.

The Article proceeds in four parts. Part I explores why the immigration subpoena power was created and what that power looks like today. It traces the history of the immigration subpoena from its origins as a mechanism for racial exclusion to the broad, uncanalized power of compulsory information-sharing and surveillance it has become. And it shows why, despite the general acceptance of administrative subpoenas in other regimes, the immigration subpoena power raises distinct and urgent questions—ones that demand a closer look at how it functions in practice.

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35. See, e.g., FBI, Termination Procedures for National Security Letter Nondisclosure Requirement 1 (2015), https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf [https://perma.cc/59HH-QWL9] (limiting use of agency-issued gag orders in national security–related compulsory process); see also Memorandum from Merrick Garland, Att'y Gen., DOJ, to the Deputy Att'y Gen., the Assoc. Att'y Gen., Heads of Dep't Components, U.S. Att'ys & Fed. Prosecutors 1 (July 19, 2021), https://www.justice.gov/ag/page/file/1413001/download [https://perma.cc/5SJ2-J5FG] (limiting subpoenas sent to media).

36. See, e.g., Alan Z. Rozenshtein, Surveillance Intermediaries, 70 Stan. L. Rev. 99, 149–54, 162 (2018) (discussing the role of public pressure in constraining other surveillance regimes).

37. See infra Part IV.

38. It seems that the only other scholarship that closely examines agency-level subpoena practices is the fascinating work of scholars who have examined subpoenas issued to news media but done so through interviews with and surveys of media recipients. See, e.g., Vince Blasi, The Newsman's Privilege: An Empirical Study, 70 Mich. L. Rev. 229, 235–39 (1971); RonNell Andersen Jones, Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media, 93 Minn. L. Rev. 585, 620–24 (2008); RonNell Andersen Jones, Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism, 84 Wash. L. Rev. 317, 350–53 (2009). Many scholars have done valuable work on administrative subpoenas based on case law resulting from challenges to these subpoenas. See, e.g., supra notes 6, 18. The vast majority of administrative subpoenas, however, do not wind up in litigation, meaning that judicial decisions reflect an important but small part of the larger administrative subpoena picture.

Part II illuminates the current immigration subpoena regime. It uses new agency data and records obtained under the Freedom of Information Act to show how ICE uses this authority in the nation's interior. Ultimately, it provides a first-of-its-kind view of how this tool is used in practice and of the unlawful conduct that permeates the immigration subpoena regime. Part III explores the constitutional and doctrinal implications. It argues that the findings in this Article raise a number of serious constitutional questions, help resolve some of those questions, and justify important doctrinal and procedural changes. Part IV argues that these findings offer valuable lessons about administrative subpoena doctrine and practice that transcend the immigration regime.

I. THE IMMIGRATION SUBPOENA POWER

The standard administrative subpoena origin story centers on the expansion of agencies' power to investigate and regulate industry, associating administrative subpoenas' growth with the rise of administrative governance and explaining their place in the related transformation of legal norms.[39] To the extent that immigration subpoenas are mentioned at all, they're essentially footnotes in that narrative.[40] But the immigration subpoena story was—and remains—distinct in critical ways. This Part tells that tale.

It begins by tracing the immigration subpoena power from its beginnings as a mechanism to facilitate racial exclusion to its current place as a powerful—and largely unconstrained—tool of compulsory process, detention, and deportation in the nation's interior. It then considers the current immigration subpoena framework and its place in the broader administrative subpoena expanse. As a whole, this Part shows that the immigration subpoena power raises distinct and urgent questions and explains why it's so vital to understand how it functions on the ground.

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39. See, e.g., Mariano-Florentino Cuéllar, Foreword: Administrative War, 82 Geo. Wash. L. Rev. 1343, 1402, 1422 (2014) (describing the growth of the administrative state's investigative powers); Kenneth Culp Davis, The Administrative Power of Investigation, 56 Yale L.J. 1111, 1111–14 (1947) (same); Milton Handler, The Constitutionality of Investigations by the Federal Trade Commission (pt. 2), 28 Colum. L. Rev. 905, 924–29 (1928) (same); David E. Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694, 696–99 (1926) (same); Christopher Slobogin, Subpoenas and Privacy, 54 DePaul L. Rev. 805, 814 (2005) [hereinafter Slobogin, Privacy] (same); see also William J. Novak, The Progressive Idea of Democratic Administration, 167 U. Pa. L. Rev. 1823, 1845 (2019) ("In the late nineteenth and early twentieth centuries, reformers turned to administration, independent agencies, and regulatory commissions as a new kind of democratic check on private economic corruption and public legislative capture.").

40. See, e.g., Handler, supra note 39, at 925–26 (mentioning the existence of the immigration subpoena power, but not elaborating); Lilienthal, supra note 39, at 697–98 (same).

A. *The Development of Immigration Subpoena Authority*

The immigration subpoena story begins in the 1890s, amid the clash between nativist labor interests and those supportive of immigration. At that point, Herman Stump, the superintendent of the newly created Bureau of Immigration and an unabashed racist,[41] was attempting to respond to demands from labor advocates and Congress that the agency more effectively prevent migrant workers—especially those racialized as undesirable—from reaching U.S. shores.[42] In 1894, Stump argued to the Treasury Secretary—then charged with immigration enforcement and adjudication—that, to do so, the Bureau needed stronger tools.[43] He explained that the Bureau had run into challenges when enforcing the "contract-labor laws," which prohibited helping certain migrant workers come to the United States[44]: It was difficult to prosecute the bosses, agents, and employers who were ultimately responsible for violations of this law because the noncitizens they helped migrate were often unwilling to testify against them.[45] Accordingly, Stump recommended legislation authorizing a small set of high-level Bureau officers to "examine books and papers" and "summon" witnesses to testify before the administrative tribunals that adjudicated the admissibility of noncitizens seeking to enter the United States.[46] The Secretary evidently agreed, elevating Stump's request to the House Committee on Immigration and Naturalization shortly thereafter.[47] But the agency's subpoena authority request was soon displaced by further-reaching asks and fell off the agency's legislative agenda entirely.[48]

Although Stump's idea was novel, he did not invent it from whole cloth. Just a few years before, Congress had created federal administrative

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41. For example, then-Representative Stump made a racism-laced plea that his colleagues enact the infamously harsh 1892 amendment to the Chinese exclusion laws. See H.R. Rep. No. 52-255 (1892).

42. See H.R. Doc. No. 53-247, at 2–4 (1894) (letter from Stump to the Treasury Secretary explaining the need for increased investigative powers); see also Brian Gratton, Race or Politics? Henry Cabot Lodge and the Origins of the Immigration Restriction Movement in the United States, 30 J. Pol'y Hist. 128, 133–35 (2018) (describing the "ethnic rift" underlying this effort); Matthew J. Lindsay, Immigration, Sovereignty, and the Constitution of Foreignness, 45 Conn. L. Rev. 743, 802–04 (2013) (describing the xenophobic and racist considerations that motivated Congress).

43. 1894 Ann. Rep. of the Superintendent of Immigr. to the Sec'y of the Treasury 16 [hereinafter Superintendent of Immigration Report] (asking Congress to provide the Bureau with increased investigative authority).

44. See H.R. Doc. No. 53-247, at 4 (explaining the challenges of enforcement under the "contract-labor laws" and the Department's desire to have the laws revised by Congress); Superintendent of Immigration Report, supra note 43, at 16, 21 (same); see also Foran Act, ch. 164, 23 Stat. 332 (1885) (repealed 1952) (prohibiting "the importation and migration of foreigners and aliens under contract . . . to perform labor").

45. Superintendent of Immigration Report, supra note 43, at 16.

46. Id.

47. See H.R. Doc. No. 53-247, at 1–2.

48. See, e.g., Treasury Dep't, Report of the Immigration Investigating Commission 40–46 (1895) (recommending legislation on a host of other immigration-related issues).

subpoena authority through an 1887 law that established the Interstate Commerce Commission (ICC) to regulate railroads and other common carriers.[49] Borrowing from the model used in standard judicial adjudication, Congress vested the ICC—which functioned as a quasi-judicial tribunal—with the power to subpoena the testimony of witnesses and production of records to allow it to investigate, conduct hearings, and ultimately adjudicate complaints.[50] And, if subpoena recipients refused to comply with administrative subpoenas' demands, the ICC could turn to federal courts for orders of enforcement and, if necessary, contempt.[51] But at its inception and even through the first decades of the twentieth century, the ICC's power to subpoena was highly contested.[52] Courts bristled at the idea of vesting executive agencies with the historically judicial power to compel testimony and demand "exposure of[] one's private affairs and papers" for use in administrative investigations and even for quasi-judicial administrative adjudication.[53] And so the very notion of agency-issued subpoenas—and whether they could be used outside of administrative adjudication or against people in their private capacity—remained in considerable doubt when Stump suggested bringing it into the immigration realm.

This legal uncertainty did not prevent the Bureau from reviving its call for subpoena authority roughly a decade later, this time to increase more overtly race-based exclusion. At this point, the Bureau made the case for immigration subpoena power in terms that were sure to resonate with Congress: as a way to increase Chinese exclusion.[54] After all, many within the agency and Congress believed that Chinese immigrants posed a particular racialized threat to the conception of the United States as a white, homogenous nation and that Chinese immigrants were uniquely "cunning" in their attempts to circumvent the morass of laws specifically

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49. Interstate Commerce Act, ch. 104 §§ 11–12, 24 Stat. 379, 383–84 (1887).

50. Id. §§ 12–13, 24 Stat. at 383–84.

51. Id. § 12, 24 Stat. at 383.

52. See, e.g., Gavoor & Platt, Administrative Investigations, supra note 18, at 426 (discussing the initial judicial skepticism toward the ICC's subpoena power); Davis, supra note 39, at 1120–21 (same).

53. Davis, supra note 39, at 1120 (internal quotation marks omitted) (quoting In re Pac. Ry. Comm'n, 32 F. 241, 251 (C.C.D. Cal. 1887)); see also Lilienthal, supra note 39, at 695–96 (arguing that "[t]o the lawyer or judge of one hundred years ago, it was inconceivable that the government should require" disclosure of private documents without judicial process).

54. In that era, race, ethnicity, and national origin were often conflated and functionally merged, particularly in the context of citizens of China. See Erika Lee, At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943, at 81 (2003) [hereinafter Lee, America's Gates] (describing the use of characteristics such as descent, language, nationality, and association in attempts to categorize people by race); Mae M. Ngai, The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924, 86 J. Am. Hist. 67, 69–70 (1999) (discussing the racialization of certain immigrant groups).

designed to keep them out.[55] This framing was also suited to the times: In the first decade of the 1900s, Congress and the agency were already actively devising ways to strengthen and expand the machinery of Chinese exclusion.[56]

Against this backdrop, Hart Hyatt North, the commissioner of the Bureau of Immigration's San Francisco office, suggested the creation of immigration subpoena authority to facilitate Chinese exclusion.[57] North was focused on excluding what he described in racist terms as the "'wily Chinee'" and was "somewhat obsessed" with Chinese criminality.[58] He was also the top official of the most important port for the Bureau's enforcement of the Chinese exclusion laws.[59] Given this—and particularly coupled with his assertions of high rates of fraud among citizens of China entering the country—his suggestion that officers be empowered to summon witnesses to testify about matters relevant to the admissibility of Chinese applicants carried significant weight.[60]

In 1909, the Bureau began elevating North's suggestion to Congress and incorporated it into the Bureau's proposed legislation.[61] Although North made this suggestion to facilitate the exclusion and removal of Chinese citizens, the Bureau proposed adding subpoena power to its general immigration law enforcement powers.[62] This was presumably because the Bureau, by this point, prosecuted most Chinese citizens under the general immigration laws (rather than the narrower and more

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55. 1909 Comm'r Gen. Immigr. Ann. Rep. 128 [hereinafter 1909 CGAR]; see also Lee, America's Gates, supra note 54, at 190 (discussing the government's "institutional and racialized suspicion of Chinese" people during that period); Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law 33–34 (1995) (discussing the then-widespread feeling that Chinese immigrants "should continue to be excluded"). The original Chinese exclusion law was extended and modified through at least fifty-eight laws. See 1930 Comm'r Gen. Immigr. Ann. Rep. 6.

56. See, e.g., V.H. Metcalf, Sec'y of Com. & Lab., Compilation From the Records of the Bureau of Immigration of Facts Concerning Enforcement of Chinese Exclusion Laws, H.R. Doc. No. 59-847, at 9 (1906).

57. 1909 CGAR, supra note 55, at 129–30. For more on Commissioner North, see Lee, America's Gates, supra note 54, at 190.

58. Erika Lee & Judy Yung, Angel Island: Immigrant Gateway to America 12 (2010) (quoting Hart Hyatt North); Lee, America's Gates, supra note 54, at 190. While not wishing to perpetuate this language, it seemed important to recognize and convey the particular type of racism at issue here.

59. See H.R. Doc. No. 59-847, at 9 (1906).

60. See 1909 CGAR, supra note 55, at 129–30; Memorandum from the Special Immigrant Inspector to the Comm'r-Gen. 2–3 (Mar. 16, 1910) (on file with the *Columbia Law Review*) (describing this provision as a means of ensuring attendance and compulsion of "truthful evidence" in "Chinese cases" that would require witnesses, including applicants for admission, to testify under oath on pain of perjury and contempt).

61. See 1911 Comm'r Gen. Immigr. Ann. Rep. 177; 1910 Comm'r Gen. Immigr. Ann. Rep. 157, 181 [hereinafter 1910 CGAR]; 1909 CGAR, supra note 55, at 129–30, 156–57, 177.

62. See 1909 CGAR, supra note 55, at 156–57.

cumbersome Chinese exclusion laws).[63] Specifically, the Bureau suggested an expansive provision that would vest immigration inspectors—who handled both enforcement and adjudication—with broad authority to compel testimony and the production of records in connection with virtually every type of entry, exclusion, or deportation decision the agency made.[64] But despite the broad request, the racial-exclusion purpose behind its subpoena proposal remained clear. The Bureau explained that this provision would "remedy those vexatious conditions which have always characterized the attempts of our officers to secure a proper enforcement of the Chinese-exclusion laws" and noted that, if Congress was unwilling to adopt a broader provision that applied beyond the context of Chinese exclusion, it should at least grant immigration inspectors the power to compel evidence from one particular racialized group: Chinese citizens.[65]

In the end, this targeted fallback proved unnecessary. By 1913, the Bureau's broad subpoena proposal had been incorporated in ultimately successful legislation that sought, among other things, to dramatically expand Asian exclusion.[66] Perhaps reflecting the novelty of this subpoena power at the time, the legislation did not go quite as far as the Bureau had hoped. First, it sought to vest subpoena authority only in commissioners and inspectors-in-charge—a set of high-level administrative officers—rather than low-level immigration inspectors as the agency had proposed.[67] Second, the legislation appeared to deny the portion of the agency's request seeking subpoena authority to prosecute noncitizens facing removal in the nation's interior, instead granting subpoena authority only to facilitate the exclusion of migrants at the border.[68]

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63. See Salyer, supra note 55, at 115; see also Nat'l Comm'n on L. Observance & Enf't, Report on the Enforcement of the Deportation Laws of the United States 33 (1931); Memorandum from the Special Immigrant Inspector to the Comm'r-Gen., supra note 60, at 2–3.

64. See 1909 CGAR, supra note 55, at 177.

65. 1910 CGAR, supra note 61, at 147.

66. See H.R. Rep. No. 62-1340, at 13 (1913) (Conf. Rep.).

67. Id. At that time, there was no presumption that subpoena power could be subdelegated to lower-level officers. See, e.g., Lowell Sun Co. v. Fleming, 120 F.2d 213, 216 (1st Cir. 1941) (refusing to find that subpoena-issuing power could be subdelegated absent clear statutory language).

68. See S. Rep. No. 64-352, at 12 (1916) (suggesting that the Bureau initially understood the provision to permit subpoenas only in the context of admission); 1915 Comm'r Gen. Immigr. Ann. Rep. 39–41 [hereinafter 1915 CGAR] (same). Subsequently, a number of courts interpreted the enacted version of this provision (containing the same language) as authorizing subpoenas in the context of deportation from the interior of the country rather than only in connection with exclusion determinations. See, e.g., Loufakis v. United States, 81 F.2d 966, 967 (3d Cir. 1936); United States v. Parson, 22 F. Supp. 149, 154 (S.D. Cal. 1938); In re C—, 4 I. & N. Dec. 415, 416 (B.I.A. 1951). But other courts—including the Supreme Court in dicta—interpreted the statute as only "deal[ing] with the examination of entering aliens by the Immigration Service." United States v. Minker, 350 U.S. 179, 184 (1956) (discussing the 1917 law containing the same language); Sherman v. Hamilton, 295 F.2d 516, 520 (1st Cir. 1961) (interpreting the 1917 provision similarly).

Congress adopted this provision almost verbatim in an omnibus immigration law enacted in 1917.[69] This legislation both widened the scope of Asian exclusion[70] and vested the agency with the procedural tools—including subpoena power—to more completely effect this bar.[71] Specifically, it enacted a provision vesting commissioners and inspectors-in-charge (who played both enforcement and adjudication roles) with the power to "require by subpoena the attendance and testimony of witnesses" before immigration inspectors determining whether noncitizens were subject to exclusion and to compel "the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States."[72] In terms of enforcement authority, the 1917 Act hewed to the ICC model: Rather than empowering the agency to enforce its subpoenas directly by vesting it with the power of contempt, it authorized agency officers to obtain orders of enforcement—and if necessary contempt—from district courts when subpoena recipients failed to comply.[73] And while the 1917 Act's legislative history was dominated by debate about more controversial issues,[74] it makes clear that Congress relied on the Bureau's prior recommendations and rationale for needing this and other administrative enforcement tools.[75]

When the Bureau began using its new power, it proceeded with caution—understandably so given the still-questionable legal status of administrative subpoenas.[76] The Bureau almost immediately adopted a rule emphasizing that this authority should be used sparingly—only when "absolutely necessary"—and directed the high-level subpoena-issuers to send reports to the Bureau's central office each time they used this power.[77]

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69. See Act of Feb. 5. 1917, ch. 29, § 16, 39 Stat. 874, 886 (repealed 1952).

70. See Hardeep Dhillon, The Making of Modern U.S. Citizenship and Alienage: The History of Asian Immigration, Racial Capital, and U.S. Law, 41 Law & Hist. Rev. 1, 18 (2023) (explaining that the 1917 Act's "exclusion zone" spread "roughly from Afghanistan to the Pacific").

71. See § 16, 39 Stat. at 886.

72. Id.

73. Id.

74. See, e.g., Henry Fairchild, The Literacy Test and Its Making, 31 Q.J. Econ. 447, 449 (1917) (discussing additional proposed changes, including the introduction of a literacy test).

75. See S. Rep. No. 64-352, at 12 (1916) (referencing the agency's recommendations in its annual reports and reiterating the House Committee's comments on virtually identical legislation from a prior session); S. Rep. No. 63-355, at 1–2 (1914) (noting that the Secretary's and Commissioner General's recommendations for improving the "machinery" for the "effective enforcement" of the law have been "adopted wherever possible"); see also 1916 Comm'r Gen. Immigr. Ann. Rep. at XXVII; 1915 CGAR, supra note 68, at 40–41; 1914 Comm'r Gen. Immigr. Ann. Rep. 24; 1913 Comm'r Gen. Immigr. Ann. Rep. 255.

76. See supra notes 52–53 and accompanying text.

77. Immigr. & Naturalization Serv., DOL, Immigration Laws: Immigration Rules and Regulations of January 1, 1930, Rule 24, at 185–86 (1937); Bureau of Immigr., DOL, Immigration Laws: Rules of May 1, 1917, Rule 24, at 69 (1917).

Despite this mandate, it is difficult to know precisely how the immigration enforcement agency used this power in these years. It may be that the Bureau in fact exercised restraint. A government-commissioned study of the immigration agency (then part of the Immigration and Naturalization Service (INS) within the DOJ) concluded as much in 1940; it noted that immigration subpoenas were "rarely resorted to" during this period, and decisions involving immigration subpoenas were sparse, particularly when compared to the case law involving other types of administrative subpoenas issued during that time.[78] Or it could be that, as now, agency recordkeeping was lacking, subpoena-issuers failed to report subpoena use, and few subpoenas resulted in litigation.[79] Whatever the reason, immigration subpoenas remained largely under the radar as legal challenges to other administrative subpoenas proliferated and did not even warrant a mention in the Attorney General's "complete statement" of administrative subpoena practices in 1941.[80]

But the immigration subpoena power emerged from relative quiescence in 1952, when Congress overhauled and restructured the nation's immigration laws. At the time, both the INS and the McCarthy-era Congress were particularly focused on the risk of foreign "subversives," especially among those who were or would become naturalized U.S. citizens.[81] Accordingly, after an in-depth congressional investigation of the immigration and nationality systems,[82] Congress enacted the 1952 Immigration and Nationality Act (INA).[83] This act combined the once-separate immigration and naturalization laws and amended them to require more probing review of naturalization applications, eliminate obstacles to denaturalization, facilitate the identification and exclusion of

78. Immigr. & Naturalization Serv., DOL, Report of the Committee on Administrative Procedure 70 (1940).

79. See infra section II.A.

80. Off. of the Att'y Gen., Final Report of the Attorney General's Committee on Administrative Procedure 125, 414–35 (1941). This omission is particularly notable because immigration subpoena power (then vested in the Bureau's successor, the Immigration and Naturalization Service) had been moved into the DOJ and under the Attorney General's purview. See Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (June 4, 1940); Act of June 4, 1940, ch. 231, 54 Stat. 230–31 (codified as amended at 8 U.S.C. §§ 1551–1552 (2018)) (enacting the Reorganization Plan).

81. In re Barnes, 219 F.2d 137, 145 (2d Cir. 1955) (discussing Congress's "particular sensitivity" to these fears in drafting the 1952 Act), rev'd sub nom. United States v. Minker, 350 U.S. 179 (1956); S. Rep. No. 81-1515, at 781, 787 (1950) ("[T]he conclusion is inescapable that the Communist party and the Communist movement in the United States is an alien movement . . . .").

82. See S. Rep. No. 81-1515, at 1 (report to the Senate Committee on the Judiciary on the results of the investigation).

83. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. ch. 12 (2018)).

expatriated U.S. citizens, and "strengthen[] . . . the investigatory powers" of the agency to accomplish those goals.[84]

To those ends, the 1952 Act broadened the INS's immigration subpoena power in three major ways.[85] First, it expanded the INS's authority to vest subpoena power in lower-level employees, permitting the Attorney General (then responsible for immigration enforcement) to grant "any immigration officer" the power to issue subpoenas.[86] Second, it changed the term "alien" to "person," empowering the INS to issue subpoenas in investigations of U.S. citizens.[87] Third, it added language that widened the subpoena power's scope, meaning that it could be used to obtain evidence not only related to exclusion at the border, but about any person's right to "enter, reenter, reside in, or pass through the United States" and any other "matter which is material and relevant to the enforcement of this Act and the administration of the Service."[88] In other words, Congress extended the subpoena power to almost any matter under the INS's purview.[89]

By this point, judicial resistance to the idea of administrative subpoenas had largely dissipated. Amid the exigencies of World War II, courts' "careful policing" of administrative subpoenas began to ebb and, in the decade that followed, was largely eliminated.[90] This shift was hastened by a series of Supreme Court decisions beginning in 1943 that collectively sanctioned the notion of agency-issued subpoenas in the context of industry regulation, rationalizing this power as necessary for effective enforcement in a quickly expanding administrative state.[91] In these cases—a succession of challenges to administrative subpoenas

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84. *In re Barnes*, 219 F.2d at 145; see also INA §§ 246(b), 335(b), 340, 349(a)(2), 349(a)(4); S. Rep. No. 81-1515, at 722, 766–69.

85. Although beyond the parameters of this Article, it is worth noting that the 1952 Act also provided for administrative subpoenas in the context of naturalization proceedings and for use (by the precursor to immigration judges) in adjudicating removability. See INA § 335(b).

86. INA § 235(a), 66 Stat. at 198–99; see also *Minker*, 350 U.S. at 187 (interpreting this provision).

87. § 235(a).

88. Id.

89. See, e.g., *Minker*, 350 U.S. at 187 (describing the breadth of the provision); United States v. Van, 931 F.2d 384, 387 (6th Cir. 1991) (same); Sherman v. Hamilton, 295 F.2d 516, 520 (1st Cir. 1961) (same).

90. Cuéllar, supra note 39, at 1347, 1401–07.

91. Davis, supra note 39, at 1113–14 (discussing the Court's rulings in this era); see also United States v. Morton Salt Co., 338 U.S. 632, 652–53 (1950) ("Even if one were to regard the request for information . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves . . . ."); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 217–18 (1946) ("There is no harassment when the subpoena is issued and enforced according to law."); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 508–10 (1943) ("The subpoena power delegated . . . is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions . . . .").

seeking records from corporate entities—the Court dispensed with longstanding constitutional questions related to privacy and self-incrimination.[92] And it found these subpoenas unproblematic from a civil liberties perspective, explaining that the opportunity for judicial review before an administrative subpoena could effectively "safeguard" subpoena targets from agency abuse.[93] But this review, the Court made clear, was not the judicial policing of the past[94]: These cases inaugurated the enduring rule that "[a]s long as the subpoena was not excessively broad and called for materials relevant to a legitimate administrative purpose," it should be enforced.[95]

Armed with the 1952 Act's broader subpoena authority and the prospect of more deferential review, the INS began using immigration subpoenas in its nationwide denaturalization campaign.[96] The INS sought to use these subpoenas to compel naturalized citizens to provide potentially incriminating testimony in investigations to determine whether to institute denaturalization proceedings in federal court (and, presumably thereafter, in deportation cases before the agency).[97] These subpoenas were quickly challenged on both statutory and constitutional grounds, culminating in a set of consolidated cases that soon reached the Supreme Court.[98]

This challenge—the 1956 case *United States v. Minker*—was the first and only time that the Supreme Court has squarely considered the immigration subpoena power.[99] And, although its recent decisions had consistently "legitimiz[ed] the routine use of administrative subpoenas" and rejected the individual liberties concerns they raised,[100] the 1952 subpoena provision gave the Court significant pause. Given the subpoena statute's broad language and Congress's distinct scheme for

92. See Davis, supra note 39, at 1127–29; Slobogin, Privacy, supra note 39, at 814–16 (discussing this doctrinal shift in major subpoena-related decisions from that era); see also *Okla. Press*, 327 U.S. at 198–217; *Endicott Johnson Corp.*, 317 U.S. at 510.

93. *Okla. Press*, 327 U.S. at 217.

94. Id.; Gavoor & Platt, Administrative Investigations, supra note 18, at 426 (discussing this evolution in case law).

95. Cuéllar, supra note 39, at 1408.

96. See, e.g., Lansky v. Savoretti, 220 F.2d 906, 907 (5th Cir. 1955), rev'd, 350 U.S. 952 (1956); In re Oddo, 117 F. Supp. 323, 324 (S.D.N.Y. 1953), rev'd sub nom. In re Barnes, 219 F.2d 137, 140 (2d Cir. 1955), rev'd sub nom. United States v. Minker, 350 U.S. 179 (1956); In re Minker, 118 F. Supp. 264, 265 (E.D. Pa. 1953); see also Patrick Weil, The Sovereign Citizen: Denaturalization and the Origins of the American Republic 136–37 (2013) (describing denaturalization campaigns).

97. See, e.g., *In re Barnes*, 116 F. Supp. 464, 468–69 (N.D.N.Y. 1953).

98. See, e.g., Brief for Respondent at 2–4, *Minker*, 350 U.S. 179 (Nos. 35, 47), 1955 WL 72401 (raising those challenges).

99. *Minker*, 350 U.S. at 187. The only other Supreme Court case in which an immigration subpoena played a central role is United States v. Balsys, 524 U.S. 666 (1998), which focused on the scope of the Fifth Amendment's protection against self-incrimination.

100. Cuéllar, supra note 39, at 1404; see also supra note 92 and accompanying text.

denaturalization proceedings, the Court pronounced the statute ambiguous as to whether it allowed the INS to subpoena subjects of potential denaturalization actions.[101] It ignored its recent precedents directing deference, instead focusing on the "extensive" authority conferred by the statute and the fact that "[t]he subpoena power 'is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer.'"[102] The Court then explained that, while the statute provided an opportunity for judicial review pre-enforcement, that was not enough in this case; it elaborated that even an "improvidently issued" subpoena "has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation."[103] Given these features and the stakes, the Court construed the expansive statute narrowly, holding that it did not authorize the INS to subpoena testimony from subjects of denaturalization investigations.[104]

Despite the Court's evident discomfort with the broad power the 1952 Act seemed to bestow, *Minker* was quickly confined to its denaturalization-based facts.[105] Indeed, the case law since then—though surprisingly thin—has been consistent in that respect.[106] Courts have distinguished or ignored *Minker*, even assuming that immigration subpoenas issued to force individuals to provide evidence for deportation and other immigration investigations should be treated like those issued in corporate investigations and applying the Supreme Court's precedents directing heightened deference.[107] And this has remained true even though, as the next Part describes, the INA (and therefore the immigration subpoena power itself) has expanded dramatically in the decades that followed[108]

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101. *Minker*, 350 U.S. at 186–90.

102. Id. at 187 (quoting Cudahy Packing Co. v. Holland, 315 U.S. 357, 363 (1942)).

103. Id. (internal quotation marks omitted) (quoting *Cudahy Packing Co.*, 315 U.S. at 363–64).

104. See id. at 190.

105. See, e.g., Sherman v. Hamilton, 295 F.2d 516, 519 (1st Cir. 1961) (finding that *Minker* placed no limits on the INS's subpoena power in the context of deportation proceedings); United States v. Zuskar, 237 F.2d 528, 532 (7th Cir. 1956) (distinguishing *Minker*).

106. See, e.g., *Sherman*, 295 F.2d at 519; *Zuskar*, 237 F.2d at 532; United States v. Ragauskas, No. 94-C-2325, 1994 WL 445465, at *2 (N.D. Ill. Aug. 12, 1994) (distinguishing *Minker*).

107. See, e.g., Immigr. & Customs Enf't v. Gomez, 445 F. Supp. 3d 1213, 1217 (D. Colo. 2020) (applying such precedents in resolving a challenge to an immigration subpoena); see also Laqui v. Immigr. & Naturalization Serv., 422 F.2d 807, 809 (7th Cir. 1970) (distinguishing *Minker*); *Sherman*, 295 F.2d at 519 (same).

108. See infra note 112 and accompanying text.

and the Court has increasingly recognized the fundamental rights at stake in immigration matters outside the denaturalization context.[109]

B. *The Modern Immigration Subpoena Power*

Although the INA has changed in major ways since 1952, the language of its immigration subpoena provision has not.[110] The current INA still vests the agency head with the authority to empower "any immigration officer" to subpoena testimony and records for use in any civil or criminal investigation under its purview except, as *Minker* found, denaturalization.[111] But while the statutory language is essentially unchanged, its reach is now even broader due to the dramatic expansion of the INA and the agency's "administration" in the decades since.[112]

The agency, for its part, has delegated the full expanse of its subpoena power to a range of law enforcement officers across the nation. Using both published regulations and nonpublic, internal memoranda, the agency has empowered ICE employees—even those focused on civil immigration enforcement—to demand records and testimony from *any* person or

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109. See, e.g., Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010) (recognizing that deportation is a sufficiently severe penalty to trigger obligations under the Sixth Amendment when it would result from a criminal conviction); Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (finding that noncitizens' liberty interests warrant construing the statute authorizing post–removal order detention to contain an implicit temporal limit).

110. Compare Immigration and Nationality Act of 1952, ch. 477, § 235(a), 66 Stat. 163, 198–99 ("[A]ny immigration officer . . . shall have power to require by subp[o]ena the attendance and testimony of witnesses . . . and the production of books, papers, and documents . . . ."), with 8 U.S.C. § 1225(d)(4) (2018) (containing the same language).

111. 8 U.S.C. §§ 1103(a)(4), 1225 (d)(4)(A); 8 C.F.R. § 287.4(a)–(b) (2024); DHS, Privacy Impact Assessment for the ICE Subpoena System 2 (2011), https://www.dhs.gov/sites/default/files/publications/privacy_pia_27_ice_iss.pdf [https://perma.cc/BC2L-69LC] (describing the range of contexts in which ICE (including HSI) issues subpoenas); see also Peters v. United States, 853 F.2d 692, 695–96 (9th Cir. 1988) (observing that the immigration subpoena statute provides the agency with authority to issue subpoenas in civil and criminal investigations). Although the statute still says "Attorney General," this function was transferred to the DHS Secretary. See 6 U.S.C. § 557 (2018). DHS's subpoena authority ends once removal proceedings before an IJ begin; thereafter, any subpoenas must be issued by DOJ-based IJs. 8 C.F.R. §§ 287.4(a), 1003.35(b), 1287.4(a) (2024).

112. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 302, 321, 341, 346, 110 Stat. 3009, 3009–576, –579 to 84, –635 to 36, –700 (codified as amended in scattered sections of 8 & 18 U.S.C.) (creating summary removal processes and adding new grounds of removability); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, 3537–44 (codified in scattered sections of 8 U.S.C.) (adding provisions to identify and penalize marriages entered into for immigration benefits). As the agency explained nearly four decades later, Congress has "not need[ed] to grant subpoena authority to the Service" since then—even when dramatically expanding the scope of immigration-related regulation—because "it had already granted that authority" in 1952, and the continual extension of its subpoena power has been presumed. Powers and Duties of Service Officers; Availability of Service Records, Control of Employment of Aliens, 56 Fed. Reg. 41,767, 41,777 (Aug. 23, 1991) (codified at 8 C.F.R. pts. 103, 247a).

entity in order to obtain information for *any* civil *or* criminal investigation within the agency's broad domain.[113] And, at present, there is generally no requirement that officers have probable cause, identify the suspected violation, or exercise restraint.[114] Accordingly, through a combination of statutory expansion and broad administrative subdelegation, the immigration subpoena power today is far more expansive than even the one *Minker* worried was an "extensive delegat[ion] . . . 'capable of oppressive use.'"[115]

In one sense, the fact that the agency has broad investigative subpoena power is not unique to the immigration scheme. In fact, many administrative subpoena statutes sound just as expansive, similarly vesting agencies with the power to issue subpoenas to investigate essentially any offense under their purview.[116] But the immigration subpoena power stands somewhat alone in allowing investigating enforcement officers to reach so deeply and consequentially into people's lives and with so few checks or constraints.

One reason the immigration subpoena power reaches so deeply is the substance of the INA, especially its admission and removal provisions. These provisions—which cover everything from mental and physical health to housing arrangements to intimate family relationships—can put suspected noncitizens' and their families' whole lives on the table.[117] Even people's intentions when entering the United States or in undertaking

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113. See 8 C.F.R. § 287.4(a); 2023-ICLI-00031, at 0032 (on file with the *Columbia Law Review*) (subdelegating authority in 2010); id. at 0033 (same in 2009); 2021-ICLI-00047, at 5516–18 (on file with the *Columbia Law Review*) [hereinafter 2007 Torres Memo] (same in 2007). In some instances, even officers who have not been delegated such authority (e.g., supervisory deportation officers) have issued subpoenas. See, e.g., 2021-ICLI-00047, at 372–79. All sources cited in this Article that begin with "2021-ICLI" were produced in the first FOIA lawsuit, described in section II.A, and are on file with the *Columbia Law Review*. All sources cited in this Article that begin with "2023-ICLI" were produced in the second FOIA lawsuit, described in section II.A, and are on file with the *Columbia Law Review*.

114. See, e.g., United States v. Zuskar, 237 F.2d 528, 534 (7th Cir. 1956) ("There is nothing in § 235(a) requiring the Director to state a cause of action in his subpoenas."); see also infra section I.C.

115. See United States v. Minker, 350 U.S. 179, 187 (1956) (quoting Cudahy Packing Co. v. Holland, 315 U.S. 357, 363–64 (1942)); Jennifer Nou, Subdelegating Powers, 117 Colum. L. Rev. 473, 475 (2017) (defining "subdelegation" as the phenomenon that occurs when agency heads "take authority granted from Congress or the President and further redelegate it to their subordinates").

116. See, e.g., 26 U.S.C. § 7602(a)–(b) (2018) (permitting the IRS to issue administrative "summons" to inquire into "any offense connected with the administration or enforcement of the internal revenue laws"); 42 U.S.C. § 405(d) (2018) (authorizing subpoenas for investigations "under this subchapter, or relative to any other matter within the [SSA] Commissioner's jurisdiction").

117. See, e.g., 8 U.S.C. § 1182(a)(1)(A)(i)–(iii) (2018) (denying admission to those with certain physical-and mental-health conditions); id. § 1186a(d)(1)(B)(i) (making a spouse's "actual residence" a consideration for good-faith marriage determinations); id. § 1227(a)(1)(G) (providing for removal based on marriage fraud).

past acts can be the subject of investigation in the immigration context.[118] As a result, unlike many enforcement actions in which administrative subpoenas are used,[119] immigration prosecutions regularly involve inquiry into a person's entire life, and often their family and community as well. Some investigations may inquire into marital spats, contraceptive use, and sex.[120] Others may scrutinize people's relationships with their parents, their parents' relationship with each other, and all of their living arrangements for decades.[121] Or a person's medical conditions.[122] Or sexual orientation.[123] Or all of these at once. And while it's true that other enforcement regimes also permit inquiry into intimate issues, none—so far as research for this Article has revealed—permit the whole-life scrutiny authorized by the INA.[124]

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118. See, e.g., id. § 1182(a)(6)(C)(i) (providing for inadmissibility based on willful misrepresentation of material fact); id. § 1182(a)(10)(A) (providing for inadmissibility if a person enters for the purpose of practicing polygamy); id. § 1182(a)(10)(C)(ii) (providing for inadmissibility if a person intentionally aided someone else in failing to comply with a child custody order).

119. Often, these enforcement actions focus on specific (often corporate) transactions or incidents, including tax violations, financial misconduct, and healthcare fraud. See, e.g., 26 C.F.R. § 301.7602-1(c)(4) (2024) (providing examples of the scope of tax liability investigations).

120. See Nina Bernstein, Do You Take This Immigrant?, N.Y. Times (June 11, 2010), https://www.nytimes.com/2010/06/13/nyregion/13fraud.html (on file with the *Columbia Law Review*) (describing the questions in a marriage fraud inquiry); see also United States v. Chowdhury, 169 F.3d 402, 405 (6th Cir. 1999) (discussing conflicting stories about whether a marriage was consummated).

121. See, e.g., U.S. Gov't Accountability Off., GAO-21-487, Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations 2 (2021), https://www.gao.gov/assets/gao-21-487.pdf [https://perma.cc/5HAD-ZWCR] (noting policy requiring ICE to investigate claims or indicia of citizenship prior to enforcement actions); Immigrant Legal Res. Ctr., Chart C: Derivative Citizenship (2022), https://www.ilrc.org/sites/default/files/resources/natz_chart-c-2022-3-17.pdf [https://perma.cc/7HX6-GBVL] (showing requirements for derivative citizenship).

122. See, e.g., In re LaRochelle, 11 I. & N. Dec. 436, 438 (B.I.A. 1965) (holding that those who were medically inadmissible at entry but nevertheless entered are deportable); In re A—, 8 I. & N. Dec. 12, 14 (B.I.A. 1958) (finding it "proper to determine in this deportation proceeding whether the respondent suffered an attack of insanity prior to her last entry").

123. See, e.g., Em Puhl, Immigrant Legal Res. Ctr., Family-Based Petitions for LGBTQ Couples 8 (2020), https://www.ilrc.org/sites/default/files/resources/bona_fide_marriage_lgbtq_couples_final.pdf [https://perma.cc/3R9G-R3CF] (explaining how this issue arises in the context of determining whether a marriage is in good faith); see also Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) (finding that "sexual abuse due to a person's gender identity or sexual orientation" constitutes torture under the Convention Against Torture).

124. Compare supra notes 120–123 and accompanying text (discussing the wide range of potential immigration-related investigations), with DOJ, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities 12, 14, 16, 133 (2022) [hereinafter DOJ Subpoena Report] (describing the scope of the investigative administrative subpoena authority in certain other civil, criminal, and hybrid (civil and criminal) enforcement schemes).

But it's not just a matter of intrusiveness. The other reason that ICE's subpoena power is so consequential is the way it combines with and amplifies ICE's even more extraordinary powers.[125] Immigration enforcement officers, unlike any other federal law enforcement agents, are also vested with the power to unilaterally deprive people of liberty for extended periods of time—or forever.[126] Specifically, ICE officers can detain people for weeks, months, or years—and even issue their own arrest warrants—without any judicial review of the arrest or detention whatsoever.[127] ICE officers are also empowered to deprive certain people of liberty by unilaterally ordering them removed; in those circumstances, ICE is both the prosecutor and the adjudicator, as it initiates removal prosecutions *and* "adjudicates" them by issuing the removal order itself.[128] Adding subpoena authority to these extraordinary powers magnifies the impact of both.[129] And although neither this type of lengthy executive detention nor these prosecutor-issued deportation orders existed when Congress enacted the immigration subpoena statute,[130] the vast growth of the former has transformed the latter. It has converted these subpoenas from a tool to gather information for admissibility and removability determinations to one that also facilitates raids, lengthy executive detention, and processless deportations.

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125. See James L. Houghteling, Sec'y of Lab., Statement Before the House Judiciary Committee, Wednesday, February 8, 1939, *in* DOL, Twenty-Seventh Annual Report of the Secretary of Labor 213, 213–14 (1939) ("[T]he Secretary . . . stands virtually alone among executive officers in his right to restrict personal liberty and freedom of individual action of human beings."); Lindsay Nash, Inventing Deportation Arrests, 121 Mich. L. Rev. 1301, 1303–04, 1309 (2023) [hereinafter Nash, Arrests] (describing the ways in which ICE's arrest power is extraordinary and diverges from other legal regimes).

126. Nash, Warrants, supra note 20, at 455–56 (describing how a range of enforcement officers can authorize arrests for their colleagues or even themselves).

127. See Jennings v. Rodriguez, 583 U.S. 281, 328 (2018) (Breyer, J., dissenting) (describing the length of time people may be detained); Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1305 (2010) (describing the absence of probable cause determinations in removal proceedings); Kagan, supra note 17, at 127–28, 163 ("In immigration enforcement, . . . there is no automatic, neutral review of probable cause if the arrested person is held in custody . . . .").

128. 8 U.S.C. §§ 1225(b)(1)(A)(i)–(iii), 1228(b) (2018).

129. See infra Part II; see also Hearings Before the President's Comm. on Immigr. and Naturalization, 82d Cong. 1007 (1952) (statement of Nat'l Union of Marine Cooks and Stewards) (expressing alarm about the unique combination of subpoena and arrest powers that were vested in the immigration agency).

130. When Congress adopted the 1952 provision, noncitizens facing deportation could seek release on bond from at least quasi-independent adjudicators since mandatory detention—that is, detention without the opportunity to ask an IJ for release on bond—did not yet exist. See Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 490 (2007) ("Mandatory detention made its immigration debut with the enactment of the Anti-Drug Abuse Act of 1988."). Similarly, expedited removal—which permits law enforcement officers to order the removal of people arrested in the interior—did not exist. See Jennifer Lee Koh, Removal in the Shadows of Immigration Court, 90 S. Cal. L. Rev. 181, 195 (2017) (discussing the "creation of expedited removal in 1996").

C. *Immigration Subpoena Constraints*

Given the stakes, one might expect some substantial protections to accompany immigration subpoenas. After all, many other administrative subpoena schemes—even those involving more limited inquiries or lower stakes—have some significant rules and rights built in.[131] Some agencies, for example, require employees to go through substantial internal approval processes when seeking certain investigatory subpoenas, including the submission of justifications memoranda or independent consultations before this compulsory process will issue.[132] Some schemes condition subpoena authority on a formal threshold approval after a preliminary investigation,[133] reserve subpoena-issuing power to the agency head,[134] or require the vote of a multimember commission.[135] Some impose heightened standards of cause before a subpoena can be used,[136] some guarantee certain rights to recipients,[137] and some—especially when

131. Due to constraints of space, time, and the literature, this Article does not cover the rules and practices associated with all three-hundred-plus statutes that authorize administrative subpoenas. See Gavoor & Platt, Administrative Investigations, supra note 18, at 436–37. Instead, it draws on a range of sources to consider a cross-section of administrative subpoena schemes.

132. See, e.g., 47 C.F.R. § 0.111(h) (2023) (FCC); FBI, Domestic Investigations and Operations Guide §§ 18.6.4.3.2.3, 18.6.4.3.3.2 (2021) [hereinafter FBI, Domestic Investigations]; Memorandum from William A. White, Enf't Couns. for Superfund, to Regional Couns., EPA 3 (Aug. 30, 1991), https://www.epa.gov/sites/default/files/documents/subpoena-cercla-mem.pdf [https://perma.cc/RA4L-DF74]; Memorandum from Thomas L. Adams, Jr., Assistant Adm'r, EPA, to Reg'l Adm'rs, Regions I–X, EPA, Reg'l Couns., Regions I–X, EPA, & Dirs., Waste Mgmt. Div., Regions I–X, EPA 6–7 (Aug. 25, 1988), https://www.epa.gov/sites/default/files/documents/cerc-infreq-mem.pdf [https://perma.cc/R9SD-5JM4] [hereinafter 1988 CERCLA Mem.]; Off. of Inspector Gen. & Off. of Investigations, Dep't of Energy, Policies and Procedures Manual 8-37–8-41 (2014), https://www.governmentattic.org/11docs/DOE-OIGinvestigations%20Manual_2012.pdf [https://perma.cc/3RNE-2ERU]; Off. of Enf't, DOL, Enforcement Manual: Subpoenas, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/enforcement/oe-manual/subpoenas.pdf [https://perma.cc/4W6G-KTX8] (last updated Mar. 18, 2022).

133. See, e.g., 12 C.F.R. § 622.104 (2024) (requiring the Farm Credit Administration to open a formal investigation); 17 C.F.R. § 202.5(a) (2024) (SEC); DOJ Subpoena Report, supra note 124, at app. A (Federal Reserve System's Board of Governors); SEC, Enforcement Manual 17–18 (2017) [hereinafter SEC Manual].

134. See, e.g., 15 U.S.C. § 2076(b)(10) (2018) (permitting head of Consumer Safety Protection Commission to delegate any power except their subpoena power).

135. See, e.g., 52 U.S.C. § 30107(a)(3) (2018) (FEC); 11 C.F.R. § 111.12 (2024) (same); 16 C.F.R. § 2.7(a), (c) (2024) (FTC); 17 C.F.R. § 11.4 (2024) (Commodity Futures Trading Commission).

136. See, e.g., 5 U.S.C. § 406(a)(4) (2018) (authorizing inspectors general to issue subpoenas only when "necessary" and not against the federal government); 12 U.S.C. § 5562(c) (2018) (requiring, among other things, that the CFPB have a "reason to believe" there is a violation); DOJ Subpoena Report, supra note 124, at app. A (discussing DOT subcomponent).

137. See, e.g., 16 C.F.R. § 2.9(b) (2024) (discussing the right to counsel in any compelled FTC deposition); FCC, Enforcement Overview 9 (2020),

the power is vast and stakes are great—mandate subpoena-issuing restraint.[138] And while it may seem counterintuitive that agencies would adopt these constraints, they appear to find it in their interest to do so, for example, to avoid judicial decisions, public outcry, or amendments that could impose greater limits on their authority.[139] Of course, as the next Part shows, policies tell only part of the story in this space and may not necessarily be reflected in practice.

Consistent with this, agencies often have robust rules for administrative subpoena recordkeeping. These requirements include directives that investigating officers maintain detailed records of subpoenas issued, justifications memoranda, and any responses from subpoenaed parties.[140] This helps preserve evidence for prosecution, but serves oversight goals as well: Recordkeeping permits agencies to self-police, ensure compliance with protocols, and protect investigated parties from agency abuse.[141] Importantly, careful recordkeeping should also facilitate external checks and input, allowing those outside the agency—including Congress and the public—to understand and help shape an agency's subpoena practice.[142]

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https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf [https://perma.cc/8P4T-BEJT] (same for the FCC).

138. See, e.g., DOJ Subpoena Report, supra note 124, at 16–17, apps. A, B (discussing Secret Service, DOT, Department of Education, and certain DOL approaches); Drug Enf't Admin., DOJ, DEA Agents Manual § 6614.23 (1999) (discussing subpoenas under the Controlled Substances Act); see also infra note 139 (collecting sources).

139. See, e.g., Seth F. Kreimer, Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror, 7 U. Pa. J. Const. L. 133, 181 (2004) (discussing an FBI memo directing careful use of discretion due to the risk of losing such authority); Jessica Schneider & Hannah Rabinowitz, DOJ Codifies Rule Barring Secret Subpoenas of Journalists' Records, CNN (Oct. 26, 2022), https://www.cnn.com/2022/10/26/media/doj-journalists-records-biden [https://perma.cc/M44E-NRT8] (discussing new DOJ regulations placing limits on subpoenas of journalists' records); see also 1988 CERCLA Mem., supra note 132, at 13 (imposing certain documentation requirements prior to the issuance of a subpoena, including that the agency provide a justification for the subpoena, "[s]ince the use of administrative subpoenas may be judicially challenged").

140. See, e.g., I.R.S. Deleg. Order 25-1 (Rev. 2), IRM 25.5.5.1.5 (Mar. 16, 2022) (requiring that IRS employees retain summons, approval memoranda, and counsel review records in administrative case files); SEC Manual, supra note 133, § 3.2.9 (outlining procedures for maintenance of investigative files); sources cited supra note 139.

141. As the IRS explained, doing so allows agency management to periodically review subpoena-issuing practices to "ensure taxpayer rights were protected" and evaluate agency policy and practice. I.R.S. Deleg. Order 25-1 (Rev. 2), IRM 25.5.5.1.4; see also FBI, Domestic Investigations, supra note 132, § 18.6.4.3.3.1 (describing the filing requirements and form to be completed prior to issuance of an administrative subpoena); Off. of the Inspector Gen., DOJ, A Review of the Federal Bureau of Investigation's Use of National Security Letters: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 Through 2009, at 20 (2014), https://oig.justice.gov/reports/2014/s1408.pdf [https://perma.cc/JA5M-A8LV] (describing the FBI's implementation of systems to reduce human error in subpoena recordkeeping).

142. See Off. of the Inspector Gen., supra note 141, at 20.

Finally, some schemes have mechanisms that facilitate judicial review. This matters because judicial scrutiny is often said to be the backstop in this context, a "disciplining force" and safeguard against agency overreach.[143] In theory, judicial review is available to any subpoena recipient, as agencies must seek court enforcement before subpoena recipients can be punished for noncompliance,[144] and, at that point, recipients can raise challenges of their own.[145] But recipients often don't know they have this right, aren't able to exercise it, and, even if they could, are reluctant to wait around to see if they will get sued.[146] So, to make the potential for judicial review more meaningful, some administrative schemes explicitly empower subpoena recipients to affirmatively challenge administrative subpoenas.[147]

Of course, empowering subpoena recipients to raise challenges may not help much when it comes to subpoenas issued to third-party record-holders.[148] In those cases, the people whose records are at issue—the ones with most incentive to challenge the subpoena—may not know about the subpoena and, even if they do, may not have a right to challenge it in

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143. See United States v. Powell, 379 U.S. 48, 58 (1964) (describing the court's role in preventing abuses of process when called to enforce administrative subpoenas); United States v. Morton Salt Co., 338 U.S. 632, 640 (1950) (same). The helpful characterization of judicial review as a "disciplining force" comes from Professor Wendy E. Wagner's discussion of this dynamic in a different type of agency decisionmaking. See Wendy E. Wagner, A Place for Agency Expertise: Reconciling Agency Expertise With Presidential Power, 115 Colum. L. Rev. 2019, 2028 (2015).

144. See In re Nat'l Sec. Letter, 33 F.4th 1058, 1063 (9th Cir. 2022) ("The 'power to punish is not generally available to federal administrative agencies,' and so [subpoena] enforcement must be sought 'by way of a separate judicial proceeding.'" (quoting Shasta Mins. & Chem. Co. v. Sec. & Exch. Comm'n, 328 F.2d 285, 286 (1964))); see also Interstate Com. Comm'n v. Brimson, 154 U.S. 447, 489 (1894) ("[T]here is no such thing as contempt of a subordinate administrative body.").

145. See, e.g., United States v. Ramirez (In re Ramirez), 905 F.2d 97, 98 (5th Cir. 1990) (explaining that courts often "dismiss anticipatory actions filed by parties challenging such subpoenas as not being ripe for review because of the availability of an adequate remedy at law if, and when, the agency files an enforcement action"); Atl. Richfield Co. v. Fed. Trade Comm'n, 546 F.2d 646, 649 (5th Cir. 1977) (same).

146. See United States v. Minker, 350 U.S. 179, 187 (1956) (describing subpoenas' "coercive tendency").

147. See, e.g., 18 U.S.C. § 1968(h) (2018) (involving subpoena-like "civil investigative demands" for civil or criminal racketeering investigations); 18 U.S.C. § 3486(a)(5) (involving subpoenas for criminal investigations of health care fraud, child sexual abuse, certain unregistered sex offenders, and imminent threats to people in Secret Service protection). In still other schemes, recipients may challenge subpoenas through what are functionally administrative appeals. See 11 C.F.R. § 111.15(a) (2024) (FEC); 12 C.F.R. § 1080.6(e) (2024) (CFPB); 16 C.F.R. § 2.10 (2024) (FTC).

148. See Slobogin, Privacy, supra note 39, at 823–25 (arguing that the Court's interpretation of the Fourth Amendment affords little protection to third parties, "regardless of how much information in those records is provided by the subject of the records or the contractual arrangements between the parties"); see infra notes 388–393 (discussing more recent precedent affording some protection).

court.[149] But again, Congress has, in at least some cases, adopted specific provisions that grant the person whose records are at issue the right to challenge these subpoenas as well.[150] And so, despite the enduring precedents that tightly circumscribe judicial review in the administrative subpoena space, impacted parties' ability to bring suit has played an important role in exposing abuses, changing agency practice, and constraining administrative subpoena schemes.[151]

But the immigration subpoena regime lacks many of these features—and practically any meaningful constraints. While detailed subpoena guidance is common across the administrative state, the immigration agency generally provides almost none to civil enforcement officers.[152] For subpoenas to most types of recipients, the agency gives these officers almost no instruction about when (within the vast expanse of matters under the agency's purview) these subpoenas should be used, when (considering the sensitive issues immigration enforcement implicates) they should not, or the degree of suspicion that justifies compulsory process. ICE doesn't generally require its civil immigration enforcement officers to explain why they think a subpoena is appropriate or mandate

149. See, e.g., Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior, 180 F.3d 1192, 1200–01 (10th Cir. 1999) (finding that courts only have jurisdiction to review subpoena challenges brought by the agency); *In re Ramirez*, 905 F.2d at 98 (same); Belle Fourche Pipeline Co. v. United States, 751 F.2d 332, 333–35 (10th Cir. 1984) (same); see also Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) (finding no constitutional, statutory, or doctrinal requirement that agencies notify the subjects of records that it has subpoenaed their records from a third party).

150. The tax scheme, for instance, directly grants those rights, imposing default requirements that the agency notify taxpayers under investigation when it subpoenas their records from third parties and granting taxpayers the right to challenge subpoenas in court (or intervene if third-party recipients sue). 26 U.S.C. § 7609(a)(1), (b) (2018). While the tax scheme may be an outlier in this respect, other agencies' practices are heavily mediated by similar provisions in broader privacy statutes that generally require agencies to provide advance notice to subjects of certain types of records and provide those subjects a right to seek judicial review. See, e.g., 12 U.S.C. § 3405 (2018) (relating to certain financial records); 45 C.F.R. § 164.512(e)(1)(ii)(A), (e)(1)(iii) (2023) (relating to certain medical information).

151. See, e.g., John Doe, Inc. v. Mukasey, 549 F.3d 861, 866–67 (2d Cir. 2008) (describing the litigation and subsequent limitation of certain national security–related compulsory process and construing the statute to require additional protections); In re McVane, 44 F.3d 1127, 1137 (2d Cir. 1995) (recognizing certain privacy rights implicated by agency subpoenas); Dow Chem. Co. v. Allen, 672 F.2d 1262, 1276 (7th Cir. 1982) (concluding that the impact on academic freedom should be considered in determining the reasonableness of a forced disclosure); Barnhart v. United Penn Bank, 515 F. Supp. 1198, 1203–04 (M.D. Pa. 1981) (describing legislative amendments that provide greater procedural safeguards in reaction to decisions in prior litigation).

152. This description is based on extensive research and the results of a second FOIA lawsuit seeking all agency guidance (in any form) governing subpoena issuance and recordkeeping. See Complaint at 5, Nash v. Immigr. & Customs Enf't (*Nash II*), No. 23-cv-6994 (S.D.N.Y. filed Aug. 8, 2023) (requesting records reflecting "requirements and standards" that ICE officers must follow in issuing and "recording the issuance of these subpoenas").

restraint.[153] And, though agency policy prohibits other types of enforcement actions in schools, hospitals, and other entities that provide essential services to noncitizens and their families, ICE permits its agents to subpoena people's sensitive information from these very same places.[154]

The only instances in which ICE has issued more detailed guidance involve subpoenas that are issued to entities in positions of particular power or that are likely to draw public scrutiny.[155] For almost two decades, the only headquarters guidance at all was a nonpublic memorandum tersely stating that "sensitive" subpoenas—for example, those issued to obtain information from journalists, about foreign governments, or from public officers—and those seeking information about large groups of people had to be "vetted" through headquarters.[156] But the Trump Administration's highly politicized subpoena use resulted in two targeted policy changes. First, as part of a campaign by the Trump Administration to increase the agency's use of immigration subpoenas targeting sanctuary jurisdiction law enforcement, ICE disseminated a new internal policy that lays out detailed review and tracking protocols only for subpoenas to law enforcement in "non-compliant" (sanctuary) jurisdictions.[157] As is discussed more below, this policy purports to require some justification and headquarters review for these subpoenas, but records reflecting this

153. Although it's not possible to know whether communication occurred outside of the records produced for this study, emails reflecting field office–level processes and subpoena requests indicate that officers will issue them based on barebones subpoena forms. See, e.g., 2023-ICLI-00031, at 273; 2021-ICLI-00047, at 2973–76, 5521–22, 5601.

154. Memorandum from Alejandro N. Mayorkas, Sec'y, DHS, to Tae D. Johnson, Acting Dir., ICE, Troy A. Miller, Acting Comm'r, Customs & Border Prot., Ur M. Jaddou, Dir., USCIS, Robert Silvers, Under Sec'y, Off. of Strategy, Pol'y & Plans, Katherine Culliton-González, Officer for Civ. Rts. & Liberties, Off. of Civ. Rts. & Liberties, and Lynn Parker Dupree, Chief Priv. Officer, Priv. Off. 2, 4 (Oct. 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf [https://perma.cc/Z2PV-TXVL] [hereinafter 2021 Protected Areas Guidance] (limiting "service," but not issuance, of subpoenas at these locations); see also infra section II.B.3.

155. See infra notes 157–160 and accompanying text.

156. 2007 Torres Memo, supra note 113, at 5516–17. When obligated to produce all guidance in any form, only two field offices identified records resembling additional guidance. The Los Angeles field office issued guidance in 2017 encouraging the use of subpoenas and noting only that they could be a "beneficial and valuable" way to obtain records from a range of places, including schools and businesses. 2023-ICLI-00031, at 272–73. This office required retention of subpoena-related records in "alien files," but that directive was apparently not followed. See infra note 171 and accompanying text. The San Antonio field office issued guidance in 2007 (in connection with its use of search warrants, administrative subpoenas, and other compulsory process) mandating that the field office director receive and concur with a "detailed brief" before officers moved forward with any of those enforcement activities. 2023-ICLI-00031, at 390, 394 (directing officers to also consider all the intended and unintended consequences without elaboration). But that requirement may have fallen away, as San Antonio leadership did not mention it in a subsequent email that simply reiterated the minimal headquarters guidance. Id. at 383.

157. 2023-ICLI-00031, at 34–40, 146.

process in practice raise serious concerns about the nature and goals of even this review and process.[158]

Second, following the Trump Administration's efforts to use immigration subpoenas to force journalists to reveal sources and impermissibly "intimidate the press,"[159] Congress directed ICE to issue a formal policy that required the elevation of these subpoenas to high-level personnel and mandated a related training.[160] ICE did so under President Biden, and that policy significantly limited the agency's use of immigration subpoenas to obtain journalists' sources.[161] But these policies apply only to these specific scenarios; for subpoenas to all other entities, the agency has essentially given its employees—from career law enforcement to political appointees—free rein.

The agency's hands-off approach extends to subpoena record-keeping. ICE's civil immigration enforcement subcomponent has declined to use the agency's software that automatically tracks information about subpoenas issued and does not use any other standardized system that would allow agency oversight of its subpoena regime.[162] ICE did issue an internal memorandum directing the heads of its twenty-five field offices to keep logs of certain subpoena-related information and corresponding copies of these subpoenas.[163] But the agency issued that memorandum almost two decades ago, and ICE headquarters has apparently never collected or reviewed these logs since.[164] (If it had, it would have learned that few if any of these field offices fully complied and some have not kept logs at all.[165]) Accordingly, in contrast to other agencies that appear to

158. See infra notes 334–335.

159. Hamed Aleaziz, The Trump Administration Is Trying to Force BuzzFeed News to Divulge Its Sources With a Subpoena, BuzzFeed News (Dec. 4, 2020), https://www.buzzfeednews.com/article/hamedaleaziz/ice-subpoena-buzzfeed-immigration-sources [https://perma.cc/Q2NJ-5QMU].

160. Hamed Aleaziz, ICE Is Creating a New Policy for Subpoenaing Reporters After Trying to Force *BuzzFeed News* to Turn Over Information, Buzzfeed News (Mar. 21, 2022), https://www.buzzfeednews.com/article/hamedaleaziz/ice-policy-subpoenaing-reporters [https://perma.cc/V4CC-XJWF]; see also Division F—Department of Homeland Security Appropriations Act 33–34 (2022), https://docs.house.gov/billsthisweek/20220307/BILLS-117RCP35-JES-DIVISION-F.pdf [https://perma.cc/3QW4-6Q4V] (outlining the requirements included in the fiscal year 2022 Appropriations Act).

161. See 2023-ICLI-00031, at 34–39.

162. See infra section II.A. As described below, ICE headquarters has made an effort to track subpoenas issued to sanctuary jurisdiction law enforcement as part of its initiative launched under Trump, but even that is not complete.

163. See 2007 Torres Memo, supra note 113, at 5516–17.

164. See id.; see also infra note 167 and section II.A (explaining that ICE headquarters only identified a specific type of headquarters log in its custody and lacked basic information about field office subpoena use).

165. See Nash v. ICE, Project ICE (on file with the *Columbia Law Review*) (documenting the field offices from which ICE was able to identify and produce logs, which is not the full set of field offices that issued subpoenas); infra section II.A.

track and review information about subpoena use,[166] ICE headquarters—which includes agency leadership, management, legal, and policy teams—lacks critical insight into ICE's subpoena practices and has no meaningful opportunity to self-police.[167]

In some ways, ICE's approach to rules and recordkeeping makes sense: ICE has had little to fear in terms of scrutiny or review. Since the immigration subpoena statute doesn't provide even recipients of immigration subpoenas—much less the people whose personal records are being sought—a right to affirmatively challenge the subpoenas in court,[168] judicial review is far less likely and largely within the agency's control. Other types of legal challenges are functionally impossible because the people whose information is on the line may never know about these subpoenas and ICE is not generally obligated to notify them that it's demanding their personal information.[169] Moreover, unlike enforcement proceedings in which investigation targets learn through discovery that agencies have used administrative subpoenas and those targets may be able to challenge the admission of evidence unlawfully subpoenaed,[170] the fact that ICE has used immigration subpoenas may *never* come out. Noncitizens facing removal may never know about it, as they have no right to discovery in removal proceedings, and even those who manage to obtain their "alien files" (individual case files) under the Freedom of Information Act (FOIA) are unlikely to find the subpoena there either.[171] And even if litigants could find out that ICE issued a subpoena in their case, they have little incentive to challenge it at that point since it may not result in the exclusion of evidence or termination

166. See supra note 139 (collecting examples).

167. As an example of the fact that ICE leadership and headquarters staff generally don't know how field offices exercise this power, see 2021-ICLI-00047, at 2325–28 (asking field offices, in 2019, whether they issue immigration subpoenas to law enforcement).

168. See In re Ramirez, 905 F.2d 97, 100 (5th Cir. 1990) (upholding the dismissal of a motion to quash a subpoena filed by the subpoena recipient because the court only had jurisdiction to consider challenges in the context of enforcement actions or enforcement counterclaims filed by the agency).

169. ICE is subject to generally applicable privacy statutes imposing default notice requirements on, for example, certain health, education, and financial records. See supra note 150. But it appears that most subpoenas in the available data do not seek records covered by these laws and, in those that do, ICE sometimes imposes gag orders that override default notice requirements. See infra sections II.B–.C.

170. See, e.g., United States v. Gayden, 977 F.3d 1146, 1151 (11th Cir. 2020) (discussing a motion to suppress evidence obtained through an administrative subpoena).

171. See August Joint Status Update at 1–2, Nash v. Immigr. & Customs Enf't (*Nash I*), No. 21-cv-4288 (S.D.N.Y. filed Aug. 30, 2024), ECF No. 56 (explaining that when ICE searched the relevant "alien files" for subpoena forms issued by three different field officers, the subpoenas were not there); Geoffrey Heeren, Shattering the One-Way Mirror: Discovery in Immigration Court, 79 Brook. L. Rev. 1569, 1573 (2014) (explaining that a noncitizen facing removal "cannot even get basic documents from her own immigration file without pursuing a cumbersome FOIA process" and recommending the adoption of a discovery process).

of a removal case anyway.[172] Thus, structural obstacles in the immigration system and the agency's implementation of its subpoena authority have largely immunized immigration subpoenas from judicial review, explaining both the odd silence in the federal reports and why the agency can behave as the next Part describes.

* * *

In sum, a number of features of the immigration subpoena power—the distinct and troubling history, extraordinary stakes, and exceptional dearth of constraints—make it unique within the administrative investigative state. These features also raise urgent questions about how this power is deployed, whether it is adequately restrained, and why—even through the information age—it has operated in secret for so long. To answer these questions, the next Part looks inside the immigration subpoena regime.

II. THE IMMIGRATION SUBPOENA REGIME

This Part illuminates the modern immigration subpoena regime. Using previously undisclosed agency data and records, it provides a comprehensive picture of how ICE uses the immigration subpoena power. This Part first describes the scope of these data and how the underlying records were obtained, and then maps the immigration subpoena regime in practice. It uses newly obtained data to show who ICE subpoenas, what ICE subpoenas, and how and why ICE wields this power. In so doing, it not only shows how the federal immigration regime forces a range of nonfederal entities to assist with enforcement but also reveals patterns of unlawful conduct that permeate immigration subpoena practice. Ultimately, this examination demonstrates that, in the context of immigration subpoenas, the stakes are far greater than previously known and the standard mechanisms for constraint have failed. But it creates opportunity too: As described in the Parts that follow, understanding how this power functions on the ground offers new possibilities for meaningful restraint.

A. *Immigration Subpoena Data*

Although administrative investigations are often opaque, government oversight, public pushback, and litigation have played an important role in bringing information about other administrative subpoena schemes to light. But unlike other subpoena schemes and even other aspects of immigration enforcement, the immigration subpoena regime has operated in the shadows, with little trace outside agents' files. This is due,

172. See Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not generally apply to removal proceedings); Nash, Arrests, supra note 125, at 1305.

in part, to the difficulty of challenging these subpoenas in litigation[173] but also to ICE's efforts to ensure that its use of immigration subpoenas is not disclosed and to ICE's failure to track and retain important subpoena-related information itself.[174] And the result is that information about how ICE uses its subpoena power is limited even within the agency and almost nonexistent in the public domain.

To obtain information about ICE's immigration subpoena practice, this Article turns to FOIA requests—and ultimately litigation.[175] While the initial FOIA request focused on information about the way that ICE uses immigration subpoenas to obtain information from state and local governments for purposes of civil immigration enforcement,[176] the records that ICE produced in litigation provide a far broader view of the agency's subpoena practices.[177] The records—consisting of aggregate data (fifty-nine unique logs from nineteen of ICE's twenty-five field offices[178] and two headquarters-level logs[179]); other primary documents (including 705 individual immigration subpoena forms (I-138 forms) and related communications); and agency descriptions of its subpoena practices—reflect the details of more than 3,000 immigration subpoenas issued between 2007 and 2023 (n=3,159). Together with both previously undisclosed policy memoranda obtained under FOIA and also government descriptions of its subpoena-related practices shared during

173. See supra section I.C.

174. See supra note 171; infra notes 180–185 and accompanying text.

175. See Complaint at 1, *Nash II*, No. 23-cv-6994 (S.D.N.Y filed Aug. 8, 2023); Complaint at 1, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed May 12, 2021).

176. See Complaint exh.A at 1–2, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed May 12, 2021).

177. Because ICE was required to produce full subpoena logs rather than only portions responsive to the state- and local-government-focused FOIA request, the dataset drawn from logs is not limited to subpoenas to state and local government entities. Since seven of the fifty-nine field office logs only contained subpoenas to subfederal government entities, I questioned whether ICE had produced the full logs, but ICE reissued the full record for one of those logs and confirmed that the remaining six were in fact the full, unabridged logs. See Stipulation and Proposed Order, supra note 10, at 2 (confirming that all logs of ERO subpoenas ultimately produced by field offices and headquarters were the full, unabridged logs). All logs cited in this Article are on file with the *Columbia Law Review*. ICE does not appear to have limited its production of subpoena forms in terms of recipient type either; the forms produced include subpoenas issued to a wide range of other entities. See Combined FOIA Data. Moreover, the proportion of state and local government subpoenas in the form subset of data was lower than the proportion of those subpoenas in the log subset.

178. The field office logs were produced from field offices of ICE's ERO subcomponent, which is primarily responsible for civil immigration enforcement and primarily issues subpoenas for civil immigration enforcement. See Morton, ERO Memorandum, supra note 10, at 1–2; Stipulation and Proposed Order, supra note 10, at 2 (confirming that the majority of subpoenas ERO issues are for civil immigration purposes).

179. See Criminal Apprehension Program HQ (CAPHQ) Log [hereinafter CAPHQ Log]. The CAPHQ Log begins in 2020 and apparently aspires to track subpoenas to sanctuary jurisdiction law enforcement. ICE produced both an initial and updated version.

the FOIA litigation, these records provide a ground-level view of the immigration subpoena regime through multiple administrations.

Because ICE does not comprehensively track even the issuance—much less record the details—of immigration subpoenas, however, the data are incomplete.[180] While ICE's subcomponent focused on criminal enforcement uses a centralized electronic system to track and automatically log all subpoenas it issues,[181] the ICE subcomponent that is primarily responsible for civil immigration enforcement—Enforcement and Removal Operations (ERO)—does not.[182] Nor do ERO officers reliably use any other consistent system for recording information about subpoenas they issue or for retaining the physical subpoena forms.[183] Instead, ERO's twenty-five field offices (and some portion of its 188 suboffices) handle subpoena recordkeeping in a variety of different ways, and some do not maintain logs or perhaps any system at all.[184] A majority of field offices maintained a subpoena log of some form for a portion of the 2007–2023 span, but even when logs exist, they contain different amounts of detail and are often incomplete.[185] Even when field offices maintained a log, some did not record information about the target of the subpoena, which made it impossible for ICE to find the actual subpoena it issued or any information about the case associated with the logged

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180. See, e.g., Agency Update to Nash Logs Chart (Sept. 6, 2023) (on file with the *Columbia Law Review*) (detailing the subset of field offices and suboffices that, after multiple searches, could identify logs, though they are not the full set of those that issued subpoenas); see also 2021-ICLI-00047, at 5337–42 (Los Angeles Log, failing to include what was subpoenaed); id. at 5354–64 (Newark Logs, same); New York City Log (failing to include dates or entries for subpoenas that the log itself shows the field office issued).

181. See DHS, supra note 111, at 2 (outlining HSI's subpoena tracking system); Homeland Sec. Investigations, ICE, Who We Are, https://www.ice.gov/about-ice/homeland-security-investigations [https://perma.cc/5EGE-S8JT] (last updated Apr. 30, 2024) (describing the HSI's mission and powers).

182. Enf't and Removal Operations, ICE, https://www.ice.gov/about-ice/ero [https://perma.cc/P2LC-LP6U] (last updated June 27, 2023); supra notes 157, 163 and accompanying text.

183. See, e.g., supra note 180 (collecting examples); infra note 185 (same); see also *Nash I*, No. 21-cv-4288, ECF Nos. 54, 56 (reporting that ICE was unable to find nearly half of the subpoena forms that it was required, by court-ordered stipulation, to produce); July Joint Status Update at 1, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed July 11, 2024), ECF No. 54 (discussing ICE's failure to locate a number of requested subpoenas); August Joint Status Update, supra note 171, at 1–2 (noting ICE's continued failure despite repeated attempts).

184. See supra notes 180 and 183 (collecting examples).

185. See, e.g., supra notes 180, 183. For more examples, compare 2021-ICLI-00047, at 5855, 5863 (containing two subpoenas with two different tracking numbers issued by the Seattle field office to Raymond School District in 2021), with Seattle Log (listing only one of these subpoenas). Or compare New York City Log (listing only subpoenas to government agencies), with 2021-ICLI-00047, at 5994, 6197, 6238 (indicating the New York City field office also issued subpoenas to private entities), and CAPHQ Log, supra note 179 (indicating that the New York City field office issued subpoenas to government entities that were not in the New York City Log).

subpoena.[186] And the physical subpoena forms that ERO field offices produced are revealing, but, because ERO offices appear to lack reliable organizational or retention systems when it comes to these records, they are not comprehensive either; instead, they reflect the subpoena forms that ERO field officers were able to find. Accordingly, although ICE conducted multiple searches over nearly three years, the records it located are incomplete.

Given these limits, it is worth emphasizing that, for the most part, the data described in this section are best understood as a massive collection of examples rather than an exhaustive accounting or representative model. The limits of ICE recordkeeping meant that it was not possible to obtain either a complete set of data or a representative sample of subpoenas or logs. As a result, the figures in the data presentation that follows reflect the available data but may not necessarily reflect the frequencies of nationwide use.[187] This also means that, in some instances, it is possible to discern regular uses of immigration subpoenas or subpoena tactics but not possible to determine or even extrapolate their frequency, geographic reach, or temporal scope. And, of course, it is not possible to know what data exist beyond this dataset if, for example, ERO employees are more likely to record or preserve subpoenas of certain types or that are issued in certain cases.

Even so, this large, nationwide dataset offers a powerful view of the way that ICE uses the immigration subpoena power. The logs, hundreds of individual subpoenas, agency communications, and other records reflect important new agency policies and practices and the details of more than 3,000 subpoenas issued by ERO. Moreover, although drawing data directly from hundreds of physical subpoenas and follow-up communication was tedious, it yielded enormous unanticipated benefits: It allowed for a granular understanding of how ICE uses the immigration subpoena power in practice, providing far more insight into how this regime operates than even the most comprehensive ERO logs capture.[188] Accordingly, although the limits of available data made certain calculations impossible, the records nevertheless show highly consequential patterns and practices, ones that raise serious questions of law and policy and that, unchecked, will likely persist.

Using these forms and logs, I created a comprehensive original dataset that compiles all data produced about the immigration subpoenas that ERO has issued since 2007.[189] To do so, I created one dataset by

186. See August Joint Status Update, supra note 171, at 1–2 (discussing ICE's failure to locate a number of requested subpoenas).

187. In some instances, multiyear field office-level logs do appear to provide at least some indication of frequency and trends for specific jurisdictions and time periods.

188. For example, while field office logs merely indicate that ICE subpoenaed schools for "records," 2021-ICLI-00047, at 343, individual subpoenas provide detail showing that ICE used them to obtain information about students' families. See infra section II.B.3.

189. For more information, see infra Appendix.

recording eleven categories of information from each subpoena form and coding this information for a range of variables. I created a second dataset by combining the unique logs, adding field office information separately obtained from ICE through a partial settlement agreement, removing entries that were duplicates of subpoenas included in the subpoena forms, and coding this data as well. In so doing, I created what appears to be the first and only source of systemic data about how the immigration subpoena regime functions in practice.

B. *Who and What ICE Subpoenas*

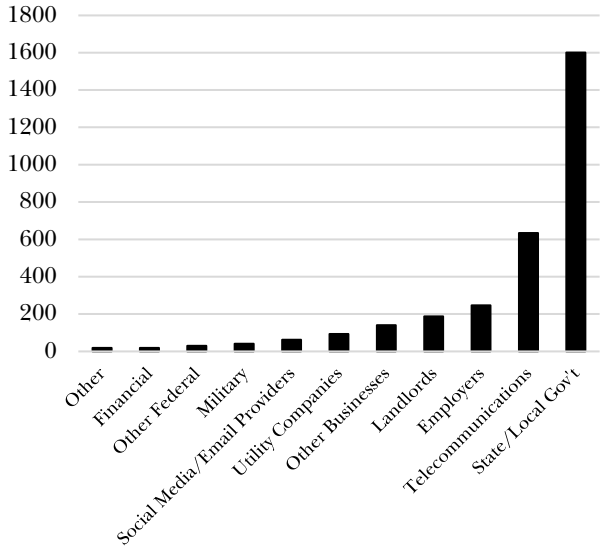
When immigration subpoenas burst into public view in 2020, ICE described its subpoena use in limited terms. It explained that the immigration subpoena regime was primarily focused on compelling information from employers and landlords, and its use of immigration subpoenas against state and local law enforcement in 2020 was highly unusual—according to ICE's former director, unprecedented.[190] And it has tried to downplay its immigration subpoena practice since, claiming that it doesn't "routinely" subpoena technology companies for non–criminal enforcement but declining to say more.[191] This section investigates these assertions and examines, more broadly, who and what ICE's civil immigration enforcement component subpoenas.

To provide a sense of the breadth of this regime, Figure 1 shows the range of entities to which ICE's civil enforcement component issued subpoenas. It demonstrates that ERO (referred to hereinafter as ICE) uses immigration subpoenas to obtain information from a range of sources, including employers and landlords, but also many other actors central to people's daily lives. Indeed, the data reveal that ICE routinely demanded information from sources ranging from utility companies to social media companies to telecommunications providers to the military to schools—and a large swath of other state and municipal actors.

190. See supra note 29.

191. Johana Bhuiyan, This Is What Happens When ICE Asks Google for Your User Information, L.A. Times (Mar. 24, 2021), https://www.latimes.com/business/technology/story/2021-03-24/federal-agencies-subpoena-google-personal-information (on file with the *Columbia Law Review*).

FIGURE 1. IMMIGRATION SUBPOENA RECIPIENTS IN DATASET, 2007–2023[192]



In addition, although deficiencies in ICE's recordkeeping make it impossible to determine the frequency with which each type of subpoena was issued nationwide, these data at least suggest some relative proportions in which each type of subpoena was issued during this time frame.[193] They indicate that subpoenas to employers and landlords constitute, even taken together, a small proportion of this practice, particularly when compared to subpoenas to state and local government actors.[194] Ultimately, this first glimpse of the data shows that ICE frequently uses subpoenas to compel subfederal governments and a far broader range of actors than previously known to contribute to civil immigration enforcement. The remainder of this section explores these categories in more depth and considers their implications.

1. *State and Local Government, Generally.* — While each category of subpoena recipient raises different questions and concerns, subpoenas issued to state and local government are, in important ways, unique. For

192. This figure incorporates the data from logs and forms (n=3,077); it excludes eighty-two subpoenas that were impossible to categorize by function due to ICE recordkeeping and, in some instances, redactions. For more information on categorizing these subpoenas, see infra Appendix.

193. As noted below, the relative proportions appear to have shifted significantly over time. See infra Figure 2.

194. Combined, subpoenas to landlords and employers comprised only 14.1% (n=435) of subpoenas in the data, whereas subpoenas to state and local government actors comprised 52.0% (n=1,601). See supra Figure 1.

one thing, states and their political subdivisions—municipalities—have a distinct constitutional relationship with the federal government, one that permits them to decline to participate in federal enforcement programs in a way that private parties may not.[195] For another, states and localities have special relationships with their residents. Not only are states sovereign democracies in their own right,[196] but state and local governments are also the main providers of critical services and core rights—such as social services and education—in their residents' lives.[197] As a result, the survival and functioning of these subfederal governments and their residents often depend on frequent touchpoints and obligatory exchanges of residents' personal information. For all these reasons, federal subpoenas to state and local government actors raise a distinct set of questions and concerns.[198]

When it comes to ICE's use of immigration subpoenas against these actors, the data offer several important insights. First, and perhaps most importantly, they reveal that this practice is far larger than previously known. They show that, in fact, the Trump Administration's 2020 immigration subpoena offensive was neither unprecedented nor extraordinary: From at least the Obama Administration to the present day, ICE has been using immigration subpoenas to compel the disclosure of information from state and local government entities—including from state and local law enforcement and often from sanctuary jurisdiction actors.[199] As Figure 2 shows, these subpoenas to state and local governments were not one-off occurrences or the product of unprecedented circumstances requiring a unique, intersovereign exercise of compulsory power. Rather, the data make clear that these subpoenas were—and continue to be—regular tools that ICE uses to force state and local governments to search for, compile, and disclose information about their constituents.

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195. See Printz v. United States, 521 U.S. 898, 925, 935 (1997) (finding that the Tenth Amendment prohibits federal commandeering of state and local resources); see also infra section III.A.

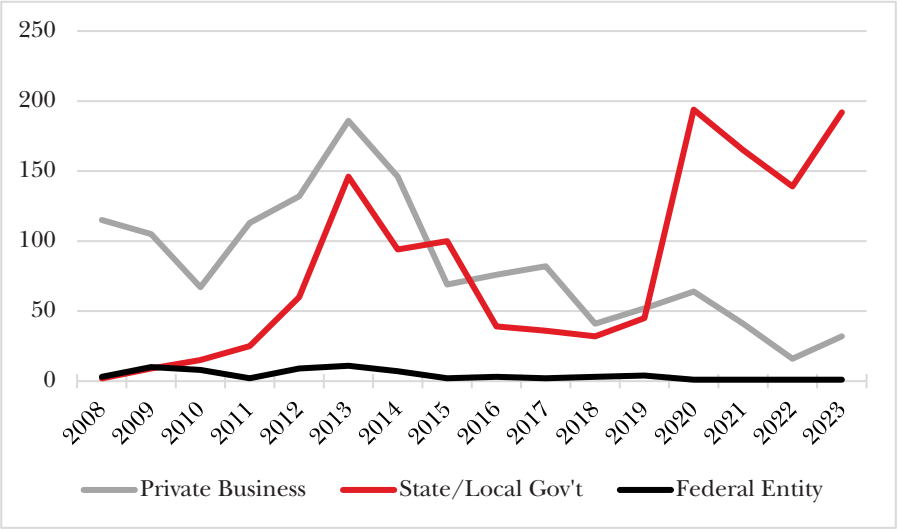
196. See Murphy v. NCAA, 138 S. Ct. 1461, 1475–77 (2018) (explaining that the residual sovereignty reserved to the states means that the federal government may not commandeer state legislative processes).

197. See Omer Kimhi, Reviving Cities: Legal Remedies to Municipal Financial Crises, 88 B.U. L. Rev. 633, 659 (2008) ("Local governments are the main providers of public services in the United States, and they supply services that are essential to residents' lives."); Hannah J. Wiseman, Rethinking Municipal Corporate Rights, 61 B.C. L. Rev. 591, 598 (2020) (discussing municipalities' provision of "essential public services—particularly to people who otherwise would struggle to obtain those services").

198. See, e.g., Fahey, supra note 6, at 1028, 1062–64 (describing some of the federalism concerns raised when the federal government uses administrative subpoenas and other means to "requisition state data"); Mikos, supra note 6, at 154–58 (arguing that compelling states to provide information via administrative subpoenas imposes "structural harms" and violates the Tenth Amendment's anticommandeering rule).

199. See infra section II.B.2.

FIGURE 2. IMMIGRATION SUBPOENAS USED TO OBTAIN RECORDS FROM STATE AND LOCAL ENTITIES IN DATASET, 2008–2023[200]



Second, it appears that this practice is on the rise. As Figure 2 illustrates, the data show an increase in ICE's use of immigration subpoenas against states and localities in recent years, suggesting a significant shift in agency practice. Of course, the limits of ICE recordkeeping make it impossible to reliably assess the frequency of subpoena use against particular actors nationwide, but other agency records corroborate this recent shift.[201] For example, as Trump-era ICE prepared to launch the January 2020 subpoena initiative, the vast majority of ICE's fields offices reported in 2019 that they did not use administrative subpoenas against state and local law enforcement at all.[202] Since then, as section II.D describes, ICE leadership launched an internal campaign to expand the use of immigration subpoenas against subfederal law enforcement.[203] As a result, the number of field offices that have issued these subpoenas to state and local law enforcement has more than

200. For more information, see infra Appendix. This figure begins in 2008 because there were so few data from 2007. For this figure, n=2,698; it does not reflect 356 subpoenas for which ERO did not record date information, seventy-nine that were not possible to categorize by sector, sixteen issued to nonprofits, two with obvious log date errors, or the ten from 2007.

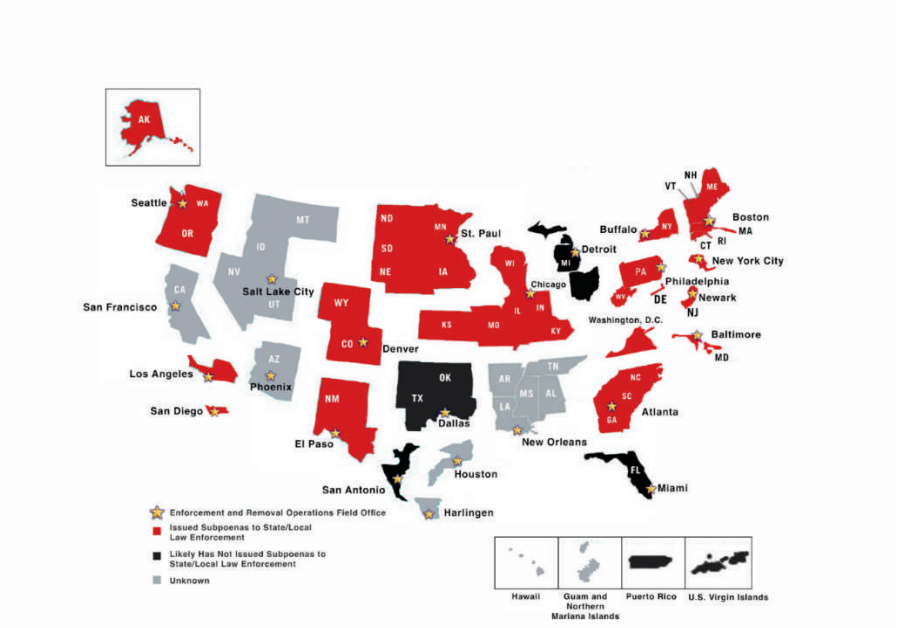
201. Field offices could have become more likely to preserve or log subpoenas to state and local government entities, but given the policy change described below, it seems unlikely that even such a new bias in recordkeeping would fully explain this shift. See infra Figure 3 and note 205.

202. See 2021-ICLI-00047, at 2325–28 (providing field offices' self-reports on the use of administrative subpoenas against subfederal law enforcement).

203. See infra notes 204–206 and accompanying text.

doubled since 2019,[204] meaning that a practice described as unprecedented in 2020—and that was then far more limited in scope—spread across much of the nation.

FIGURE 3. ICE FIELD OFFICES THAT ISSUED SUBPOENAS TO STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2019–2023[205]



The increase in subpoenas to states and localities also emerges sharply in logs from field offices that tracked their subpoena use regularly over time. For example, the log for ICE's Washington field office, which covers Washington D.C. and Virginia, indicates that it issued an average of 5.6% (average n=1.3) of its subpoenas annually to state and local entities from 2008 to 2020.[206] But in 2021, this rate rose dramatically to 89.0% (n=65),

204. See infra Appendix Table 1.

205. This map is a modified version of one published by ICE. See ICE, Ann. Rep. Fiscal Year 2022, at 3 (2022), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf [https://perma.cc/8AM7-S2SN] [hereinafter ICE, 2022 Report]. Credit to Bryan Jackson, Director of Digital Communications and Marketing at Cardozo Law, for invaluable assistance modifying it. It depicts the evidence of a field office-level policy shift between 2019 and 2023 to contrast with the agency's reported practices before that time. Importantly, field office use of these subpoenas appears likely to have varied significantly in terms of volume and may have changed within this time period, so this figure should not be taken to indicate volume or current practice. In addition, field office policy may not always be consistent with the practices of suboffices in their jurisdiction. For more information, see infra Appendix Table 1.

206. Washington Logs Fiscal Year 2008–2020.

and similarly high rates have continued through 2023.[207] The San Diego field office couldn't find any pre-2020 logs but reported not issuing subpoenas to state and local enforcement prior to then.[208] From 2020 on, however, it has issued these subpoenas regularly—and in large numbers.[209] In similar fashion (though on a smaller scale), the Los Angeles field office log shows that it almost never used subpoenas to seek information from state and local entities before 2020; however, by 2022—the most recent year reflected in the log—almost all of the logged subpoenas (seven out of eight) were issued to state and local actors.[210]

Yet this increase varies significantly by region.[211] Some field offices, like those in Buffalo, New York, and St. Paul, Minnesota, have long deployed subpoenas regularly against state and municipal actors.[212] And other field offices—namely those in Texas and Florida—appear to have little use for this type of subpoena since state "anti-sanctuary" laws essentially require localities to assist ICE even without an immigration subpoena.[213] Thus, the available data suggest a marked increase in subpoenas to state and local actors from ICE field offices across the nation but one that varies by region and, as the next section describes, is particularly pronounced in areas with sanctuary jurisdictions.

In sum, the records reveal both a longstanding practice and an expansion of the federal government's use of immigration subpoenas to compel information from states and localities in recent years. They show that, while ICE used this power against states and localities prior to Trump, the Trump Administration created an institutional shift; this project lasted for the remainder of his presidency and survived him, quietly continuing under Biden and across ICE field offices today.

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207. Washington Logs Fiscal Year 2021–2023. Data for 2023 spans January through April 2023.

208. See 2021-ICLI-00047, at 2325–26.

209. See infra section II.E. The Chicago field office similarly couldn't find logs prior to 2020 but issued them regularly in 2020 and 2021. See infra section II.E.

210. See 2021-ICLI-00047, at 5340 (Los Angeles Log).

211. In this sense, it may be another example of the "drastic regional variations" in enforcement practices of ICE field offices that Professor Fatma Marouf has documented in the context of detainers, arrests, detention, and removals. See Marouf, supra note 17, at 1595.

212. 2021-ICLI-00047, at 343–51 (Buffalo Logs); St. Paul Logs.

213. See Fla. Stat. Ann. §§ 908.101–.105 (West 2024); Tex. Gov't Code Ann. § 752.053 (West 2023); 2021-ICLI-00047, at 5342–52 (Miami Logs). Even before Florida's 2019 "anti-sanctuary" law passed, local politics made it unnecessary, as Florida "[did]n't have any sanctuary cities." Brendan Farrington, Florida Governor Signs Bill Banning Sanctuary Policies, PBS News (June 14, 2019), https://www.pbs.org/newshour/politics/florida-governor-signs-bill-banning-sanctuary-policies [https://perma.cc/PE3Z-4RAU]; see also Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, Anti-Sanctuary and Immigration Localism, 119 Colum. L. Rev. 837, 844 (2019) (identifying and analyzing this "emerging federal and state anti-sanctuary trend[]" of laws that effectively prohibit localities from adopting sanctuary laws).

2. *State and Local Criminal Legal Systems.* — Given the longstanding thrust of immigration enforcement priorities,[214] it may not be surprising to learn that a large share of the immigration subpoenas sent to state and local government sought information from criminal legal system actors. As Figure 4 shows, the data reflect immigration subpoena practices that are heavily focused on compelling records and other assistance from criminal legal system actors—largely police departments, jails, and probation offices, but also juvenile detention facilities and even courts.

FIGURE 4. IMMIGRATION SUBPOENAS ISSUED TO STATE AND LOCAL CRIMINAL LEGAL SYSTEM ACTORS IN DATASET[215]

The data also show a particular focus within the sprawl of subfederal criminal enforcement: criminal legal system actors in sanctuary jurisdictions. For instance, the Washington field office's dramatic uptick

214. See David K. Hausman, The Unexamined Law of Deportation, 110 Geo. L.J. 973, 975 (2022) (discussing the focus of immigration enforcement on those with criminal charges and convictions).

215. This figure incorporates data from logs and forms (n=1,601). The patterned bar does not reflect the six subpoenas issued to other actors in the criminal legal system or subpoenas issued to courts (as it was not always possible to determine whether they related to the criminal legal system). The "Entity that Acts as Police *and* Jailor" category reflects the large subset of subpoenas that the logs report were issued to the San Diego County Sheriff's Department, which both operates a police force and oversees local detention facilities. Based on the instances in which ICE produced forms that corresponded to log entries, it seems extremely likely that all these subpoenas were issued to the San Diego County Sheriff's Department in its capacity as a jailor. Finally, it is worth noting that the San Diego field office issued more than half (57.8%) of all subpoenas to state and local law enforcement in the dataset, followed by 17.5% issued by the Washington field office; it is not clear whether they issue more of this type of subpoena than all other field offices, simply retain more records, or some combination of the two. For more information, see infra Appendix.

in subpoenas to state and local law enforcement was comprised entirely of subpoenas issued to a police department in Fairfax County, Virginia; this practice began just as the county adopted a sanctuary policy in 2021.[216] Similarly, records from the Atlanta field office demonstrate that, after successful community advocacy to persuade the Clarke County Sheriff's Office to cease detaining people for ICE in 2018,[217] ICE issued subpoenas to that office as well.[218] Or take the San Diego and Chicago field offices. Although ICE could not find pre-2020 logs related to those jurisdictions, the logs covering 2020 onwards show those field offices issuing many (for San Diego, hundreds) of subpoenas to subfederal law enforcement covered by state sanctuary laws.[219] And, though field offices covering other major sanctuary jurisdictions like New York City and Connecticut were unable to provide comprehensive subpoena logs, the records that ICE did find similarly indicate the use of subpoenas to target sanctuary jurisdiction law enforcement in those areas as well.[220] Thus, while ICE's attempt to use state and local criminal law enforcement as deportation "force multipliers" is hardly news, the data show the significant, previously unknown extent to which ICE has used immigration subpoenas to force state and local actors into that role. Moreover, as described in section II.D, the records show how ICE has formalized and systematized this practice.

The records also provide important insight into what exactly ICE is demanding of these state and local government actors. Because even the ICE officers who did log subpoenas often did not record what each subpoena sought in detail (if at all), the logs are lacking in this respect.[221] But the individual subpoena forms paint a vivid picture, showing both the sheer volume and the minute details of ICE's demands. They show—unsurprisingly given the extent to which criminal legal system involvement bears on immigration status—that many subpoenas seek records reflecting alleged noncitizens' criminal history.[222] But many sought personal

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216. See Fairfax Cnty., Va., Trust Policy 1 (2021), https://www.fairfaxcounty.gov/topics/sites/topics/files/assets/documents/pdf/fairfax-county-trust-policy.pdf [https://perma.cc/E5ND-L5WK].

217. See Sheriff of Clarke Cnty., Ga., General Order No. WD 9010.04 § IV(G)(7) (2018) (providing that people "for whom a detainer is issued" by ICE but whose detainer is not accompanied by a "federal warrant or court order signed by a federal magistrate or federal judge, shall not be held solely on the ICE detainer").

218. See 2021-ICLI-00047, at 2337, 2339.

219. See Combined FOIA Data. It appears that the Los Angeles field office similarly has begun using its subpoena power almost exclusively to obtain records from subfederal law enforcement covered by a state sanctuary law. Id. (showing that seven of eight subpoenas issued in 2022 were to subfederal law enforcement).

220. See Combined FOIA Data.

221. See, e.g., 2021-ICLI-00047, at 5337 (failing to record *what* was subpoenaed in the Los Angeles Log); 2021-ICLI-00047, at 5349–51 (same for Miami); 2021-ICLI-00047, at 5353–64 (same for Newark).

222. See, e.g., 2021-ICLI-00047, at 28, 2699, 2703 (showing subpoenas issued to the Athens-Clarke County Sheriff's Office and the New York City and Suffolk County probation departments).

information—and virtually all of the forms issued to criminal legal system actors since 2017 sought location information: home addresses, expected dates of release from state or local custody, or dates of future probation appointments.[223] In addition, these records show that ICE has regularly demanded that state and local law enforcement indefinitely provide updates if and when people's release dates and times change.[224] As described in section II.D, these records also show why the agency is demanding this information: "to improve [ICE's] ability to effectuate arrests," whether at people's homes or the minute they step out of subfederal law enforcement's doors.[225]

The records also reflect a dramatic expansion in the scope of these subpoena demands in the past few years. The individual forms in the dataset suggest that subpoenas issued to law enforcement before 2017 tended to be narrower and targeted, often seeking a single, defined document such as a presentence investigation report or permanent resident card.[226] Many subpoenas issued in recent years, by contrast, have ballooned, both in terms of their scope and the burden they impose on subfederal officers attempting to respond.[227] Lengthy, numbered lists of demands spill onto separate pages appended to many of the subpoena forms, and, rather than listing documents that the receiving officer must send, ICE often sets forth a laundry list of issues about which the officer must identify and produce "any and all" evidence "sufficient to establish" certain facts.[228] And, as noted, many recent subpoenas have obligated states and localities to go well beyond providing existing records, demanding calculations of the date, time, and place that subjects will be

223. See Combined FOIA Data. Note that this description includes both explicit requests for these pieces of information and requests for records that would necessarily contain this information.

224. See, e.g., 2021-ICLI-00047, at 331, 333, 2895, 2898, 2911, 2914 (subpoenas to Connecticut probation departments and the Illinois Department of Corrections); see also infra section II.C.1.

225. 2023-ICLI-00031, at 460; see also Declaration of David Thompson exh.A ¶¶ 47–48, Immigr. & Customs Enf't v. Gomez, No. 1:20-mc-00011 (D. Colo. Feb. 6, 2020) [hereinafter Thompson Aff.] (explaining that, when issuing a subpoena to local law enforcement, ICE sought the most up-to-date home and work addresses to efficiently execute arrests); Reply in Support of Petition at 10–11, *Gomez*, No. 1:20-mc-00011 [hereinafter Gomez Reply] (explaining that, in subpoenaing law enforcement, ICE seeks targets' and emergency contacts' location information to allow it to locate targets for arrest and removal); Petition to Enforce Administrative Subpoenas ¶¶ 24–25, *Gomez*, No. 1:20-mc-00011 ("[A]ddresses . . . assist ICE in locating the aliens and in assessing how best to safely take them into custody."); 2021-ICLI-00047, at 2923 (reporting that arrest authorization had been approved and seeking subpoena approval because the Illinois Department of Corrections "does not notify ICE prior to releasing any convicted aliens").

226. See, e.g., 2021-ICLI-00047, at 2651, 2986, 5381.

227. Compare 2021-ICLI-00047, at 281, 347, 2701, 2985 (demanding discrete documents prior to 2016), with 2021-ICLI-00047, at 329, 341, 2933 (issuing sweeping requests in 2020–2021).

228. 2021-ICLI-00047, at 289, 337–340; see also id. at 327–29, 2854–55, 2893–95, 2939–40 (additional sweeping requests).

released—and notification of subsequent changes—in perpetuity.[229] Thus, the records show a major shift in the scope of and burden imposed by subpoenas to sanctuary jurisdictions that has continued into the Biden era.

The practical and doctrinal implications of these revelations are profound. This study has shown that the federal government has long used these subpoenas to force unwilling states and localities to assist with immigration enforcement and that the scope of this effort has been—and continues to be—far greater than previously known. Perhaps most obviously, this information has important practical ramifications for noncitizens and others who rely on local commitments to refrain from information-sharing: It alerts them that these governmental promises come with significant limits and that, absent some change, personal information shared with state and local law enforcement could still wind up in ICE's hands. Understanding how the federal government compels this information—and the extent to which states and localities are complicit—also empowers the public to engage in debate and use levers of political power to push back.[230] And this information is critical to understanding the federalism issues that immigration subpoenas can present and that are central to state and local resistance. As Part III shows, this new understanding of how ICE wields its power to compel the assistance of state and local government has serious implications for percolating questions about the balance of state and federal powers—and it shows precisely the type of infringement that contemporary Tenth Amendment doctrine forbids.

3. *Schools and Other Essential Services.* — Despite the focus on subpoenas to criminal law actors, ICE's reach into subfederal governments' interactions with their residents does not end there. ICE also uses immigration subpoenas to delve into a wide range of other sensitive areas, including ones that are essential to people's survival and daily lives. Specifically, the data show that ICE has subpoenaed information from schools of every level,[231] social services agencies,[232] agencies that

229. See, e.g., 2021-ICLI-00047, at 331, 333, 2842, 2895, 2898, 2911, 2914; Chicago Log.

230. See Lindsay Nash, Violating Sanctuary 5 (2024) (on file with the *Columbia Law Review*) [hereinafter Nash, Violating Sanctuary] (unpublished manuscript) (discussing the importance of public information and of the public's ability to help ensure compliance with sanctuary laws).

231. See, e.g., sources cited infra note 242 and accompanying text.

232. See, e.g., 2021-ICLI-00047, at 477, 2612 (seeking "any and all records regarding the aforementioned subject relating to his nationality and citizenship" from a social services department); id. at 461 (seeking a child's case records from a social services nonprofit focused on foster care, adoption, and domestic violence services).

administer physical and mental health programs,[233] and even foster care providers.[234]

Subpoenas to schools, in particular, warrant a closer look. After all, education has long been seen as "perhaps the most important function" that state and local governments provide their residents,[235] regardless of students' citizenship or immigration status.[236] Indeed, the Supreme Court has made clear that schooling is critical for children to become self-sufficient members of society and for the preservation of our democratic government.[237] The states appear to view it similarly, overwhelmingly providing that primary education is both constitutionally guaranteed and legally required.[238] Even ICE appears to have recognized that schools are somewhat sacred, long classifying them as "protected" spaces generally off limits for most immigration enforcement.[239]

Yet schools are surprisingly common sites of immigration subpoena use. Even this incomplete dataset shows that ICE has regularly subpoenaed records from schools—from primary schools to colleges—and from state education departments. While subpoenas to schools appear far less frequently in the data than subpoenas to some other actors, records from some field offices show that they have issued several per year and indicate that subpoenas to schools are encouraged—and ongoing.[240] The data also indicate that the majority of these school subpoenas targeted information provided by children—most of these subpoenas were not sent to

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233. See, e.g., 2021-ICLI-00047, at 487 (seeking information related to Medicaid applications); id. at 499 (same); id. at 503 (seeking information from a health insurance company about a person's Medicaid use and prescription pick-up location).

234. See, e.g., 2021-ICLI-00047, at 2590, 2636 (custodial and foster care records); see also 2021-ICLI-00047, at 461 (same); 2021-ICLI-00047, at 5302 (adoption records).

235. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

236. See Plyler v. Doe, 457 U.S. 202, 222, 227–30 (1982) (invalidating a state law denying children access to elementary and secondary public education on the basis of immigration status).

237. See id. at 221; Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (noting that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system").

238. See State Education Practices, Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/programs/statereform/tab1_2-2020.asp [https://perma.cc/96TT-RHR6] (last visited Sept. 15, 2024) (tracking compulsory school attendance laws by state); see also LaToya Baldwin Clark, Stealing Education, 68 UCLA L. Rev. 566, 587–89 (2021) (discussing state constitutional rights related to public education).

239. 2021 Protected Areas Guidance, supra note 154, at 2; see also Memorandum from John Morton, Dir., ICE, to Field Off. Dirs., Special Agents in Charge & Chief Couns. (Oct. 24, 2011) (on file with the *Columbia Law Review*) (limiting certain enforcement actions at schools and other "sensitive" locations).

240. See, e.g., 2021-ICLI-00047, at 343 (Buffalo Log); id. at 2061, 5315, 5753 (Seattle Logs); St. Paul Logs; see also 2023-ICLI-00031, at 272–73 (describing subpoenas as a "beneficial and valuable" way to get records from schools and other entities).

universities but to primary schools, school districts, and subfederal education departments.[241]

Even more surprising, these subpoenas demanded information about students and their families. In some instances—largely the subpoenas directed to universities—ICE demanded information such as transcripts and student schedules, records that *may* be relevant to determining if noncitizens on student visas violated the terms of their status.[242] But in many of the school subpoena forms produced, ICE sought to compel far more, demanding that schools turn over records that students are typically required to provide for enrollment: identity documents, birth certificates, addresses, and contact information for parents and caregivers.[243] In some subpoenas, ICE went even further, demanding the addresses of siblings and other family members, and indicating—even outright stating—that it intended to use this information to target members of students' families.[244] And some of these subpoenas show that ICE specifically demanded standard enrollment records like student birth certificates and identification showing alienage—likely to prosecute the students themselves.[245]

Taken together, these data provide valuable insight into how ICE uses immigration subpoenas in spaces otherwise "protected" from immigration enforcement: They demonstrate that ICE has used subpoenas to obtain personal information that children and others are obligated to provide to access essential services.[246] They also suggest that ICE does so to locate and presumably arrest these people or their family members. In so doing, these findings expose a major gap in the Department of Homeland Security's "protected areas" policy, which directs ICE officers to generally refrain from enforcement that would "restrain people's access to essential services or engagement in essential activities" in "protected areas" like schools and social service agencies.[247] While this policy generally prohibits a range of enforcement actions, including arrests and the *service* of subpoenas in

241. See Combined FOIA Data.

242. See, e.g., 2021-ICLI-00047, at 236, 240; St. Paul Logs Fiscal Year 2010–2011.

243. See, e.g., 2021-ICLI-00047, at 138, 448, 2620; Seattle Log Fiscal Year 2015; St. Paul Log Fiscal Year 2009.

244. See 2021-ICLI-00047, at 138 (seeking the last known address of a student's parent, who was "the subject of an official investigation"); see also 2021-ICLI-00047, at 498, 2620 (demanding information on "parental figures").

245. See, e.g., 2021-ICLI-00047, at 149, 498. ICE also reported seeking "all records" about students, "identification documents," and "student info," which would likely have covered these records as well. See, e.g., 2021-ICLI-00047, at 2295; Seattle Logs 2016–2022; St. Paul Logs, Fiscal Year 2012–2013.

246. In this sense, it reaffirms and expands on the concerns that Professor Makhlouf and others have raised about the risks of subpoenas issued by DHS officers to sensitive locations. See, e.g., Makhlouf, supra note 15, at 30 (discussing prior DHS policy that did not limit the service of subpoenas at even sensitive locations).

247. 2021 Protected Areas Guidance, supra note 154, at 2.

these locations, it does not limit the *issuance* of subpoenas at all.[248] By showing why ICE subpoenas these entities—to facilitate arrests and removal—this study demonstrates why issuing immigration subpoenas to these entities burdens access to these services nearly as much as arrests on site and, consequently, why this gap should be closed.

This clearer understanding of ICE subpoenas to schools and other sites of essential services also exposes the privacy and federalism concerns that these subpoenas present. As Part III details, these data surface an important new dimension to the federalism debate by showing the myriad ways immigration subpoenas can affect states' and localities' relationships with constituents who rely on them for core functions and essential services. They show the particular risks these subpoenas pose in low-income communities, which often rely on schools and other local government entities for critical welfare services that require sensitive information about students and their households.[249] And these findings signal broader harms to state and local government than previously known: They show that these subpoenas not only distort lines of political accountability for states' and localities' role in immigration-related arrests but also jeopardize future participation in state and local democracy by imposing potentially prohibitive costs on public education for children in immigrant and mixed-status families.[250]

4. *Employers, Tech Companies, and Other Providers of Indispensable Services.* — While the immigration subpoena power presents unique issues when deployed against other sovereigns, it's important to understand its reach into private domains as well. Private sector entities comprise nearly half (45.0%) of all subpoena recipients in the data and a large—if perhaps diminishing—proportion of the subpoenas issued annually.[251] Moreover, ICE's use of immigration subpoenas in the private sector covers a wide range of entities—and inquires into some intimate and traditionally protected aspects of people's lives.[252] This section will focus primarily on

248. See id.; see also 8 C.F.R. § 287.4(a)–(c) (2024) (distinguishing between subpoena service and issuance).

249. See Fanna Gamal, The Private Life of Education, 75 Stan. L. Rev. 1315, 1341–45 (2023) ("As schools are structurally tasked with providing food, medical care, mental health services, and other social services they will invariably collect greater amounts of private student information.")

250. See Plyler v. Doe, 457 U.S. 202, 223 (1987) ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions . . . ."); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[Education] is the very foundation of good citizenship."); Eisha Jain, The Interior Structure of Immigration Enforcement, 167 U. Pa. L. Rev. 1463, 1486 (2019) [hereinafter Jain, Interior Structure] (describing how some noncitizens avoid school and health care for fear of immigration-related arrests).

251. See supra Figures 2, 3. That percentage excludes the eighty-two unknown recipients.

252. See, e.g., 2021-ICLI-00047, at 204, 207, 450, 503 (demanding social security numbers, home and work addresses, call records, text messages, "private messages" from

the two largest categories of private subpoena recipients: employers and telecommunications providers, which collectively comprise approximately 29.3% of the subpoena recipients in the dataset, are indispensable to modern survival, and now control massive amounts of private data about individuals' whereabouts, movements, and personal lives.[253] Indeed, as the Supreme Court recently explained, many of these companies hold detailed records that reveal people's locations, movements, and, consequently, their "familial, political, professional, religious, and sexual associations"—in short, they hold information that reveals Fourth Amendment–protected "privacies of life."[254]

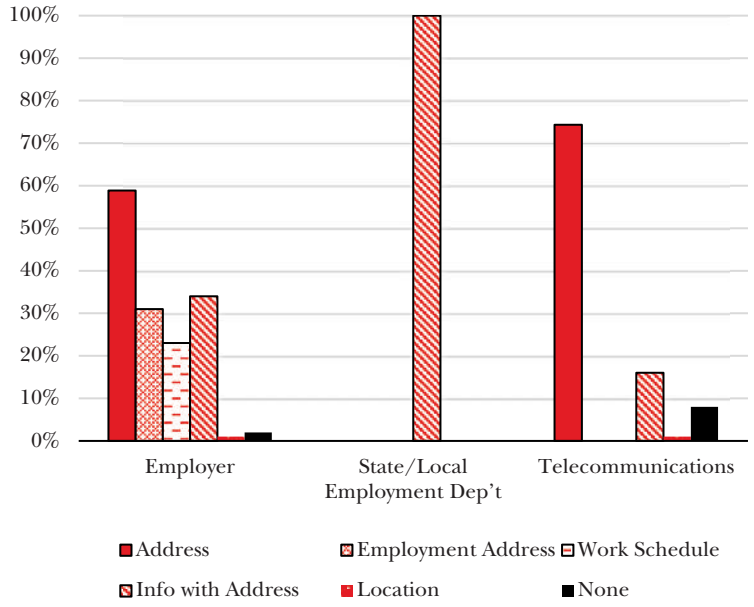
This study indicates that, in fact, this information about location is precisely what ICE wants. The records suggest that subpoenas issued to telecommunications providers and employers overwhelmingly sought information that could be used to locate ICE's targets. For example, of the 124 employer subpoenas produced, 122 of them sought location information, often seeking multiple types at once. The subpoena forms to telecommunications providers were similarly focused, with 90.8% of them (139 out of 153) seeking this type of information as well.

social media, medication information, and other personal information); Washington Logs (subpoenaing employers, cell phone carriers, social media companies, and housing providers).

253. See Combined FOIA Data.

254. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

FIGURE 5. SUBPOENA FORMS IN DATASET THAT DEMAND LOCATION INFORMATION, BY RECIPIENT TYPE AND INFORMATION TYPE[255]



What type of location information did ICE seek? As Figure 5 shows, subpoenas to obtain information from employers most often sought home addresses—frequently by explicitly demanding the addresses of their current or former employees, but also by compelling information that would necessarily include addresses.[256] At times, ICE sought people's employment information to locate their loved ones, for example demanding that employers provide location information for employees' spouses or emergency contacts as well.[257] Many subpoenas went much further in compelling employers to provide location information about employees: ICE demanded employment addresses, daily worksite

255. For this figure, *n*=357. This represents the number of requests within the subpoena forms, rather than the quantity of unique forms to these entities (296). The figure does not include the two subpoenas in these categories in which it was unclear whether the subpoenas sought location or address-related information. The data for this figure were drawn exclusively from subpoena forms because, although some logs reflected subpoenas seeking this type of data, they did not consistently contain enough detail to accurately code. Subpoenas to subfederal government employment departments were included in this illustration of subpoenas to private actors because these subpoenas frequently demanded information initially collected by employers.

256. See Combined FOIA Data (reflecting, for example, subpoenas for employment-related records, such as I-9 forms).

257. See, e.g., 2021-ICLI-00047, at 262, 264, 270 (subpoenaing employee records, "wife's numbers, etc.," and emergency contacts); Washington Log Fiscal Year 2012 (similar); St. Paul Log Fiscal Year 2019 (similar); see also 2021-ICLI-00047, at 2961 (seeking the address of an ICE target's family members).

locations, and specific work schedules, allowing ICE to ambush and arrest the employee not only at home but also at work.[258] Indeed, one field office's subpoena log makes the arrest motive in seeking this information clear; it contains notations next to subpoenas issued to the New Mexico Department of Labor demanding employment records indicating that the "agency complied, employment record led to arrest" and similar language reflecting that demands for employment records led to arrests.[259] And, in some cases, ICE used subpoenas to compel an employer to even more actively help with location and arrests by demanding that a company, in one case, arrange a meeting on site with their employee, and, in another, bring multiple noncitizens—with their passports—to a deportation officer.[260]

Similarly, nearly every subpoena issued to telecommunications providers sought subscribers' addresses or "subscriber information," which is used to locate—and likely arrest—the subscriber.[261] In some instances, ICE demanded data showing people's movements over long periods of time or in real time. For example, it has demanded information such as weeks' worth of cell-site location data—that is, digital information about cell phone users' location that is produced by users' phones, often without their knowledge; this type of data allows ICE to create a "comprehensive" and intimate picture of the cell phone user's movements over time.[262] In other instances, ICE demanded that providers "ping" people's phones, which is generally done to ascertain a target's location in real time.[263] In other words, the data show that ICE subpoenas employers and telecommunications companies for largely the same ultimate purpose as those issued to public entities: to obtain information and other assistance that will allow the agency to locate, arrest, and detain targets.

Understanding how ICE uses subpoenas in the private sector has important implications for people, doctrine, and policy. It is, of course, critical for noncitizens and their families to understand the risks of providing personal information to these entities. It also expands and adds nuance to our conception of worksite immigration enforcement, which has understandably tended to focus on employer sanctions, verification of

258. See Combined FOIA Data.

259. 2021-ICLI-00047, at 2959; see also, e.g., 2021-ICLI-00047, at 2949–50 (reporting, for a subpoena to the New Mexico Department of Labor seeking employment records, "agency complied, positive response, arrested"); id. at 2950 (reporting "agency complied, arrested").

260. 2021-ICLI-00047, at 234, 2728.

261. See Combined FOIA Data; see also United States v. Caira, 833 F.3d 803, 804 (7th Cir. 2016) (describing how an internet service subscriber's information allows law enforcement to locate them).

262. See Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (describing how using cell phone–generated location data can "provide an all-encompassing record of the holder's whereabouts"); 2021-ICLI-00047, at 13–15, 5214–16 (subpoenaing cell phone location/cell tower information for specific dates and times).

263. See, e.g., 2021-ICLI-00047, at 5337-5340 (Los Angeles Log).

employment authorization documents, and large on-site raids.[264] Particularly given the well-recognized harms that worksite enforcement imposes on noncitizen workers and the labor market as a whole, this subpoena-based enforcement raises significant questions about whether current limits on "highly visible" worksite raids are sufficient to mitigate the less visible—but similarly impactful—consequences that flow from worksite enforcement via subpoenas.[265] It deepens our understanding of the consequences of both worksite enforcement and subpoenas; it shows how ICE's demands for employment information can incentivize records-free (i.e., under-the-table) employment even for noncitizens who are lawfully present, drive these workers deeper into the shadows, deprive them of worksite protections, and depress labor conditions more broadly. And finally—but importantly—the use of immigration subpoenas to compel private information from these critical entities raises significant Fourth Amendment concerns. Indeed, as described in Part III, these practices may—and in some cases likely did—violate constitutionally protected privacy rights, which has implications for doctrine, the subjects of these records, and the subpoena process more broadly.

C. *How ICE Subpoenas*

Shining a light on ICE's subpoena practice as a whole also illuminates some of its tactics.[266] In many ways, this study reveals phenomena that scholars have observed in other aspects of immigration enforcement: the regional variation and "street-level bureaucracy" that emerge as guidance deficits empower lower-level officers to develop policies and practices of their own.[267] But two particularly consequential—and unlawful—tactics emerge sharply and consistently in the nationwide data. This section describes them and their implications.

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264. See, e.g., Memorandum from Alejandro N. Mayorkas, Sec'y, DHS, to Tae D. Johnson, Acting Dir., ICE, Ur M. Jaddou, Dir., USCIS, & Troy A. Miller, Acting Comm'r, Customs & Border Prot. 2–3 (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf [https://perma.cc/46EM-T2SG] [hereinafter Mayorkas, Worksite Enforcement Memorandum] (discussing these features of ICE's worksite enforcement); Brandon L. Garrett, Corporate Crimmigration, 2021 U. Ill. L. Rev. 359, 374–78 (same); Rebecca Smith, Ana Avendaño & Julie Martínez Ortega, Iced Out: How Immigration Enforcement Has Interfered With Workers' Rights 5–6, 10–11, 24–25 (2009), https://www.nelp.org/app/uploads/2015/03/ICED_OUT.pdf [https://perma.cc/5GR7-HD7F] (discussing, inter alia, worksite raids and employer verification).

265. Mayorkas, Worksite Enforcement Memorandum, supra note 264, at 3.

266. For example, it shows that ICE convinces third parties to disclose records by merely threatening to serve subpoenas. See, e.g., 2021-ICLI-00047, at 2169–70 (discussing an airline which provided requested information to ICE after a mere threat of serving a subpoena). It also shows that ICE uses subpoenas in contravention of public policy. See, e.g., Washington Logs (compelling an immigration attorney to turn over a client record that could have incriminated their client or facilitated their deportation).

267. Fahey, supra note 6, at 1050–52; see also Marouf, supra note 17, at 1624 (discussing regional variation in ICE enforcement practices).

1. *Demands for Objects and Action.* — The few limits on today's immigration subpoena power derive largely from the authorizing statute, which permits officers to subpoena testimony and "the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States."[268] Thus, the statute provides ICE with broad power to compel information but—unlike other statutes that authorize broader compulsion[269]—limits this power to the forms enumerated: testimony, books, papers, and documents.

But the records show that ICE uses immigration subpoenas well beyond these statutory bounds, deploying them to force recipients to provide a range of objects and actions to assist with immigration enforcement. The records demonstrate that ICE uses subpoenas to compel a wide array of objects, including cell phones, other devices, telephone and video recordings, and digital image files.[270] In recent years, ICE has begun regularly using subpoenas to compel actions as well. For example, it has demanded that telecommunications companies "ping" people's phones, which allows ICE to ascertain the owner's location.[271] ICE has also used this type of subpoena to command the recipient to schedule a pretextual meeting with ICE's target on the company's premises, presumably to help ICE effect an arrest.[272] Similarly and more commonly, ICE has ordered local law enforcement to affirmatively provide notifications—in perpetuity—if and when the times, dates, or locations for the release of people in state or local custody change.[273] And, while the limits of the available data make it impossible to know how often ICE uses subpoenas to compel recipients to turn over objects and take action,[274] this type of demand appears, in at least some jurisdictions, to be standard practice for subpoenas to sanctuary jurisdiction law enforcement.[275]

The data thus expose a pattern of immigration subpoena abuse, one in which ICE has regularly—and overtly—exceeded even its broad statutory powers. They show that ICE routinely uses subpoenas to compel

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268. 8 U.S.C. § 1225(d) (2018).

269. See, e.g., 15 U.S.C. § 57b-1(c)(1) (2018) (permitting the agency to compel "tangible things").

270. See, e.g., 2021-ICLI-00047, at 281, 335, 5371 (phone call recordings); id. at 2971 (phones and other devices); id. at 5340 (video); id. at 5600 (video footage); id. at 5626 (digital thumbprints).

271. Id. at 5339.

272. See, e.g., id. at 234.

273. See, e.g., id. at 2842, 2845, 2855, 2875 (requiring "[n]otification of any subsequent rescheduled date, time, and location of [the subpoena] subject's release"); see also supra section II.B.2.

274. Because the logs generally do not capture this type of detail about these demands, information about this practice was drawn largely from the subpoena forms produced.

275. This type of demand was contained in, for example, all of the individual subpoenas produced by the Chicago field office and many subpoenas produced by the Boston field office that were issued to subfederal law enforcement governed by sanctuary laws in 2020 and 2021. See Chicago Logs; 2021-ICLI-00047, at 5310–31 (Boston Logs).

people and entities to assist with immigration enforcement in ways that are not permitted by the subpoena statute. The statute does not offer "books," "papers," "documents," and testimony as examples of a broader body of things that might be compelled: It specifies four discrete sources of information that may be subpoenaed.[276] Thus, basic statutory interpretation[277] as well as background subpoena norms[278] and the way courts have considered similar textual specificity in other subpoena provisions[279] all point in the same direction: The enumerated categories constitute the full and complete list of what may be compelled. Moreover, it would lead to absurd results to conclude that, when Congress provided a defined list of things that an agency can compel, it actually intended to empower the agency to use subpoenas to compel any thing or action it desires or to impose indefinite, prospective obligations.[280] Against this backdrop, it is difficult to imagine how ICE would justify these demands in court, but it does not appear that ICE has ever had to try. In fact, the data on compliance—though limited—suggest that recipients of even these plainly ultra vires subpoenas often comply.[281] In other words, the records show consistent, fairly obvious agency overreach and the failure of existing checks to correct it.

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276. 8 U.S.C. § 1225(d) (2018); see also supra notes 268–269 and accompanying text.

277. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (applying the canon of expressio unius est exclusio alterius); Requests for Information Under the Electronic Communications Privacy Act, 32 Op. O.L.C. 145, 147 (2008) [hereinafter OLC ECPA Memo] (invoking expression unius to interpret a similar provision for compelling information and reaching a similar conclusion).

278. See, e.g., In re Order Authorizing Prospective and Continuous Release of Cell Site Location Records, 31 F. Supp. 3d 889, 894–95 (S.D. Tex. 2014) (explaining that administrative subpoenas are "typically satisfied by a one time production of documents" and "do not involve ongoing surveillance"); erinMedia, LLC v. Nielson Media Rsch., Inc., No. 05-CV-1123-T-24, 2007 WL 1970860, at *4 (M.D. Fla. July 3, 2007) ("A subpoena addresses itself to documents in existence as of the date the subpoena is responded to, not documents created thereafter.").

279. See, e.g., MetroPCS v. Thomas, 327 F.R.D. 600, 614 (N.D. Tex 2018) (refusing to permit a party to subpoena testimony when federal rules only authorized document productions or inspections); Haaf v. Grams, 355 F. Supp. 542, 546 (D. Minn. 1973) (refusing to permit a party to compel the provision of a voice exemplar when federal rules only permitted compulsion of "tangible evidence"); see also OLC ECPA Memo, supra note 277, at 147 (interpreting a statute's list of information that may be compelled to "foreclose[] an interpretation that would add other types of information" to that list).

280. Congress has sharply distinguished between law enforcement authority to demand prospective-location information sharing (surveillance) and to make a one-time information demand. See *In re Order Authorizing Prospective and Continuous Release of Cell Site Location Records*, 31 F. Supp. 3d at 894–95 (noting that, in the limited instances Congress has permitted prospective surveillance, it has imposed significant restrictions on it (providing wiretaps, pen registers, and tracking devices as examples)).

281. See, e.g., 2021-ICLI-00047, at 2169–70 (emails reflecting target compliance following the threat of a subpoena); CAPHQ Log, supra note 179 (reflecting a high compliance rate).

2. *Gag Orders.* — At least, it has been said, immigration subpoenas are more transparent than some other law enforcement information demands.[282] After all, some statutes authorizing compulsory process permit agencies to obtain court orders that gag administrative subpoena recipients, prohibiting them from disclosing the substance and even existence of the agency's demand for some potentially lengthy period of time.[283] And certain national security–related statutes even permit investigating agencies themselves to issue limited nondisclosure orders to prevent recipients of "national security letters" (NSLs, essentially a version of administrative subpoenas) from disclosing certain information demands as well.[284] But, the argument goes, the agency's immigration subpoena practice is more transparent because the immigration subpoena statute—like virtually all administrative subpoena provisions—doesn't permit this type of constraint.[285]

It is true that subpoena recipients' freedom to speak is important. The ability to speak about subpoenas is of course necessary for recipients to challenge subpoenas they've received, as they must disclose the subpoena to legal counsel and court staff to raise legal claims.[286] In the context of subpoenas to third-party record holders, recipients' ability to disclose subpoenas is also essential to allow them to notify the person whose records are at issue—and thereby enable that person to raise challenges of their own.[287] And recipients' ability to speak about these subpoenas is critical for structural reasons as well; without it, agency practices would be "effectively immune" from judicial and other external scrutiny.[288] Indeed, when Congress empowered the FBI to issue NSLs that imposed all-encompassing, indefinite gag orders on recipients, courts made this very point.[289] Courts explained that NSL recipients' ability to speak about NSLs

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282. Bhuiyan, supra note 191 (explaining that administrative subpoenas are usually "one of the more transparent ways law enforcement can request user information from tech companies").

283. For example, the Stored Communications Act, which regulates government access to stored wire and electronic communications, provides this authority and enumerates the factors that should guide this judicial determination. 18 U.S.C. § 2705(b) (2018).

284. In re Nat'l Sec. Letter, 33 F.4th 1058, 1063 (9th Cir. 2022) (explaining that NSLs are "best understood as a form of administrative subpoena").

285. Doe v. Ashcroft (*Doe I*), 334 F. Supp. 2d 471, 485 (S.D.N.Y. 2004) (observing that "most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases," for example, when a court so orders), vacated as moot sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

286. See id. at 494–95 (discussing the importance of disclosing information demands to counsel for effective judicial review).

287. See Aziz Z. Huq & Rebecca Wexler, Digital Privacy for Reproductive Choice in the Post-*Roe* Era, 98 N.Y.U. L. Rev. 555, 629 (2023) ("Notice . . . enables the actual target of the investigation to assert their privacy rights and mount legal challenges . . . in court.").

288. *Doe I*, 334 F. Supp. 2d at 506; see also Rozenshtein, supra note 36, at 149–53 (discussing the ways that targets of surveillance can trigger external scrutiny, including by alerting policymakers).

289. See *Doe I*, 334 F. Supp. 2d at 492.

was "important to an ongoing, national debate about the intrusion of governmental authority into individual lives," and they enjoined the legislation allowing the agency to indefinitely prevent the "very people who might have information regarding investigative abuses and overreaching" from sharing it with the public and legislators.[290] So in theory, the immigration subpoena regime is constrained, in important ways, by virtue of the fact that subpoena recipients can speak freely about these demands.

Except that, in reality, many can't. The data show a widespread, longstanding, and previously unknown practice of ICE-issued gag orders in immigration subpoenas. As Figure 6 shows, in more than a quarter of the subpoena forms in the dataset (26.6%, *n*=187), ICE formally "command[ed]" recipients to refrain from disclosing the subpoena's content or existence—indefinitely.[291] Virtually all (99.0%, *n*=185) of these gag orders forbade the recipient from speaking to *anyone* about the subpoena indefinitely. (The other two gag orders were also indefinite in duration, but prohibited disclosure only to the subject of the records.[292]) In some cases, ICE officers have even imposed nondisclosure orders on courts, ordering one to consider "the existence of [the subpoena]" sealed and therefore not subject to disclosure.[293] And, in another 5.5% (*n*=39) of the subpoenas, ICE added nondisclosure requests, telling recipients that disclosure may damage "an official law enforcement investigation" and asking for their silence.[294]

290. Doe v. Gonzales (*Doe CT*), 386 F. Supp. 2d 66, 75, 82 (D. Conn. 2005); see also *Doe I*, 334 F. Supp. 2d at 506.

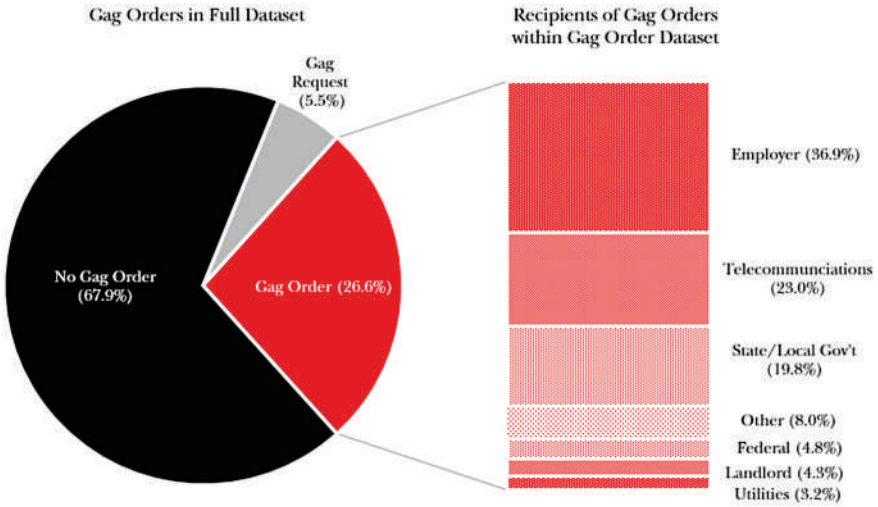
291. For example, one recent subpoena stated: "You are hereby commanded not to divulge the existence of this subpoena at any time, as any disclosure could impede an investigation, unless ordered to do so by a competent judicial administrative authority of the United States of America." 2021-ICLI-00047, at 30. An additional subpoena apparently intended to issue this same command but erroneously omitted a portion of the sentence. Id. at 2971.

292. Id. at 2248, 2249.

293. Id. at 2252, 2777.

294. See Combined FOIA Data.

FIGURE 6. ICE-ISSUED GAG ORDERS AND GAGGED ENTITIES IN DATASET[295]



This revelation has major implications. First, and perhaps most obviously, it offers a powerful (if partial) explanation for the silence surrounding modern immigration subpoena practice. Subpoena recipients under official order to refrain from disclosure to anyone cannot inform their attorneys about these subpoenas, much less notify the media, government watchdogs, or courts about even patently unlawful agency demands. And while there's no indication that ICE could lawfully penalize someone for failing to comply with one of its gag orders or persuade a court to do so,[296] recipients may never know that (given the prohibition on disclosure even to counsel), would presumably be disinclined to risk violating such a direct official command, and, even if informed and resourced enough to take on that fight, may lack the incentive to do so on behalf of the noncitizens in ICE's crosshairs.

Second, this finding reveals nearly insurmountable obstacles to external constraints. Indeed, the data show an agency practice that, by prohibiting disclosure to *anyone* (including counsel and courts), renders judicial review impossible in a large proportion of cases. For similar

295. The data for this figure were drawn from the subpoena forms issued by ERO offices nationwide (n=703). This figure does not include the two subpoenas in which it was not clear whether ICE included a nondisclosure command or request. No subpoena log tracked this information. The "other" category consists primarily of private businesses, including insurance and hospitality companies, a bail-bond company, social media/email providers, and one unknown recipient.

296. Just as the immigration subpoena statute and regulations do not provide for or mention these gag orders, they also do not provide a mechanism for enforcement of gag orders. See supra note 285 and accompanying text.

reasons, it significantly limits the potential for the extrajudicial strategies that, in other arenas, record holders and the public have developed for input and debate.[297] In short, these gag orders do what courts feared when invalidating the NSL gag order legislation in the early aughts: They prevent many of the people with the most knowledge about the agency's practices from sharing that information and virtually guarantee that those subpoenas will remain insulated from checks.[298] And, because these ICE-issued gag orders have not been discussed in any publicly available source, this practice creates different and in some ways more intractable threats to transparency and constraints than even the NSL gag order statute.

Third, the data expose an agency practice that violates the law. Specifically, as these gag orders are ultra vires, ICE lacks the statutory authority to issue all or virtually all of them. The immigration subpoena statute provides no authority of this sort.[299] And although Congress did enact new, more limited statutory provisions that allow agencies to issue narrower gag orders in NSLs after courts found the broader NSL gag orders unconstitutional,[300] none of the amended NSL statutes authorize these immigration subpoena gag orders either. Among other distinguishing features, two of the five provisions only vest authority to issue nondisclosure orders in the FBI.[301] And the three that vest this authority in non-FBI agencies permit these orders only in specific circumstances and to specific recipients (e.g., financial institutions, credit agencies)—not the types of subpoenas in which ICE ordered nondisclosure.[302] And even if these statutes did apply to these immigration

297. Cf. Rozenshtein, supra note 36, at 149–54 (describing how surveillance intermediaries can promote congressional oversight by publicizing information about agencies' use of surveillance tools).

298. See *Doe I*, 334 F. Supp. 2d 471, 492, 506 (S.D.N.Y. 2004) ("[T]he absence of meaningful judicial review . . . may also lead to violation of [NSL targets'] constitutional rights."), vacated as moot sub nom. Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

299. See 8 U.S.C. § 1225(d) (2018).

300. See In re Nat'l Sec. Letter, 33 F.4th 1058, 1063 (9th Cir. 2022).

301. See 15 U.S.C. § 1681u(d)(1) (2018) (permitting NSLs only for demands for counterintelligence-related information issued by the FBI and to consumer reporting agencies if they are subject to strict procedures for certification of harm and permit disclosure to counsel); 18 U.S.C. § 2709 (2018) (permitting NSLs only for demands for counterintelligence-related information issued by the FBI to electronic communications services or remote computing services, subject to strict procedures for certification of harm, if they permit disclosure to counsel).

302. Compare 12 U.S.C. § 3414 (2018) (permitting NSLs to financial institutions, subject to strict procedures for certification of harm, if they permit disclosure to counsel), and 15 U.S.C. § 1681v(c)(1) (permitting NSLs only to consumer reporting agencies for international terrorism investigations if they are subject to strict procedures for certification of harm and permit disclosure to counsel), and 50 U.S.C. § 3162 (2018) (permitting NSLs only to certain financial institutions, consumer reporting agencies, and other commercial entities related to foreign travel by executive branch employees if they are subject to strict procedures for certification of harm and permit disclosure to counsel), with infra Figure 6 (showing the breadth of those targeted by ICE gag orders). The "Other" category contains only one subpoena issued to a financial institution, but even if it otherwise fit within one of

subpoenas (which they don't), they would still not authorize the indefinite, all-encompassing gag orders that ICE has issued; gag orders under the amended NSL statutes are much more limited because they permit some disclosure (e.g., to legal counsel), are generally time limited, and allow recipients to challenge them in court.[303] In fact, the only statute that *might* authorize any of these gag orders is a terse provision nestled in the Family Educational Rights and Privacy Act (FERPA), a statute designed to protect the privacy of student education records by, inter alia, imposing a default requirement of notice to subjects of educational records before the school discloses them even pursuant to compulsory process.[304] But although FERPA itself contains some language that recognizes that agencies can overcome that default through nondisclosure orders, it is not clear whether it actually provides authority to issue nondisclosure orders because the regulation implementing the provision simply exempts law enforcement subpoenas with nondisclosure orders from FERPA's default notice rule.[305] To the extent FERPA does authorize these gag orders, it could at most be the basis for the eight gag orders that ICE issued to school/education departments, but even then it is difficult to know whether these orders would survive judicial scrutiny without NSL-like constraints because there is no case law on this provision. In fact, although all or nearly all of ICE's gag orders would likely be found ultra vires, nonbinding,[306] and unconstitutional,[307] none of these ICE-issued gag orders have been litigated to a reported decision (if ever raised) in court.[308]

D. *Why ICE Subpoenas*

The previous sections show an administrative subpoena regime that has shifted dramatically from one focused on obtaining evidence for the adjudication of substantive questions of immigration law and toward one focused on obtaining location information to facilitate arrests. They also show a practice heavily, likely increasingly, focused on compelling

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these statutes (which is not clear from the records), it was all-encompassing and did not permit disclosure to counsel. See 2021-ICLI-00047, at 392 (seeking identity and address information related to certain financial transactions from Western Union).

303. See supra notes 296–297; see also *In re Nat'l Sec. Letter*, 33 F.4th at 1066–67 (outlining the features of the amended statute); FBI, Termination Procedures for National Security Letter Nondisclosure Requirement 2–4 (2015), https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf [https://perma.cc/6TWG-CQN6].

304. See 20 U.S.C. § 1232g(B)(1)(J)(ii) (2018).

305. See 34 C.F.R. § 99.31(a)(i)(9)(ii)(B) (2024).

306. See, e.g., United States v. Zadeh, No. 4:14-CV-106-O, 2015 WL 418098, at *14 (N.D. Tex. Jan. 31, 2015) (finding a nondisclosure order issued alongside a Controlled Substances Act subpoena ultra vires and nonbinding).

307. See infra section III.C.

308. Westlaw searches of federal cases, as of September 19, 2024, for "immigration and nondisclosure /s order! or provision! and subpoena! /s 1225! or 235!" and "immigration and nondisclosure /s order or provision and subpoena!" return no on-point decisions.

information from state and local government entities. But considering the vast amount of data that ICE obtains from private "data brokers" (companies that amass and sell personal data),[309] one may wonder why ICE uses subpoenas to obtain information at all. Put differently, given the other surveillance and information-gathering tools at its disposal, what makes ICE decide to use an immigration subpoena? Although this is a difficult question due to the limits of the data and of government transparency laws,[310] this section offers some insights and partial answers.

As an overarching theme, the records strongly suggest that ICE uses these subpoenas in significant part to obtain current address and precise location information that other sources do not provide. ICE has explained that attempting to obtain this type of information from commercial databases and other aggregated government data sources is more resource-intensive with no guaranteed success because even databases that pool this information are "often incomplete, incorrect, or outdated."[311] And these sources generally lack the details that make arrests easiest for ICE: people's work schedules, updated addresses, exact locations, and times, dates, and places arrested noncitizens will leave state or local custody.[312] Thus, while it appears that ICE can get much of the substantive information relevant to removal cases through other sources,[313] it often

309. See, e.g., Nina Wang, Allison McDonald, Daniel Bateyko & Emily Tucker, Ctr. on Priv. & Tech., Georgetown Univ. L. Ctr., American Dragnet: Data-Driven Deportation in the 21st Century 3, 5, 17, 30 (2022), https://americandragnet.org/report-english [https://perma.cc/DRF9-9AH5] ("By contracting with private data brokers, ICE has been able to access utility record information belonging to over 218 million utility customers . . . ."); Fahey, supra note 6, at 1022–26 (describing the breadth of information in criminal history databases). For more, see generally Just Futures L. & Mijente, The Data Broker to Deportation Pipeline: How Thomson Reuters & LexisNexis Share Utility & Commercial Data With ICE, https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/62df020189b0681d1b9398a8/1658782211567/Commercial+and+Utility+Data+Report.pdf [https://perma.cc/L37B-J6TB] (last visited Sept. 19, 2024).

310. See, e.g., 5 U.S.C. § 552(b)(5), (b)(7)(E) (2018) (exempting certain information from agency disclosure requirements).

311. Wang et al., supra note 309, at 35 n.185 (internal quotation marks omitted) (quoting Administrative Record at 24, Lewis-McCoy v. Wolf, No. 1:20-cv-01142-JMF (S.D.N.Y. filed Apr. 24, 2020), ECF No. 43-1 (ICE Memorandum)); see also Thompson Aff., supra note 225, ¶¶ 47–48 (explaining that the NCIC database and other resources often contain outdated addresses and that using outdated information "wastes resources").

312. See, e.g., Thompson Aff. , supra note 225, ¶¶ 47–48 (explaining that, in issuing the subpoenas, ICE sought "contact information that the aliens provided to DSD upon their arrests," which is "the most up-to-date contact information for these individuals"); 2023-ICLI-00031, at 470–71 (seeking a subpoena to obtain the addresses the targets gave upon intake at the jail).

313. See, e.g., ICE, Secure Communities (SC) Standard Operating Procedures (SOP) 7, https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf [https://perma.cc/NTW5-VVTS] (last visited Sept. 15, 2024) (detailing how fingerprints taken by subfederal law enforcement officers allow ICE to obtain, inter alia, immigration status, arrest, and conviction information); Response to Petition to Enforce Administrative Subpoenas at 4–5, Immigr. & Customs Enf't v. Gomez, 445 F. Supp. 3d 1213

turns to subpoenas to quickly and cheaply (in terms of resources) obtain current or near real-time location information to make arrests.[314]

The longer history of ICE programs using subfederal law enforcement to make immigration arrests shows just how much this updated location and release information matters for ICE's detention scheme. For decades, ICE obtained information from and effectuated arrests through subfederal law enforcement using immigration "detainers"—ICE-issued forms requesting that state or local law enforcement either (1) detain someone they arrest beyond the time that person should be released from criminal custody to allow ICE to pick them up, or (2) notify ICE when subfederal law enforcement plans to release the person so ICE can arrest the person as they step out of subfederal law enforcement's doors.[315] This assistance and real-time information about a person's release made immigration arrests easy and cheap; it allowed ICE to funnel people directly from subfederal to immigration custody.[316] So the wave of subfederal "sanctuary" legislation prohibiting law enforcement from providing this assistance to ICE not only de-linked states and localities from immigration enforcement in a major way,[317] it meant that, if ICE wanted to make an arrest, it would have to do that work itself.

Since late 2019, ICE has issued many immigration subpoenas to state and local law enforcement, first driven by a desire to retaliate against sanctuary jurisdictions and then to recreate this local-arrest-to-immigration-detention pipeline.[318] Initially, as part of the Trump Administration's attempt to use subpoenas in its public battle against sanctuary jurisdictions, ICE leadership launched an initiative focused on

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(D. Colo. 2020) (identifying other sources from which ICE could have obtained criminal history information to determine removability); Gomez Reply, supra note 225, at 10–11 (responding by focusing largely on subpoenaed location data that ICE could not otherwise obtain).

314. See sources cited supra note 309. One of the limited categories of information that headquarters retains about immigration subpoenas is a folder of "Arrested I-138 [Immigration Subpoena Form] Lead[s]" from sanctuary jurisdiction subpoenas. 2023-ICLI-00031, at A-436.

315. See Form I-247A, DHS (2017), https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf [https://perma.cc/8DEW-6783].

316. See Markowitz, supra note 17, at 1046 (discussing the local-enforcement-to-ICE pipeline); Eisha Jain, Arrests as Regulation, 67 Stan. L. Rev. 809, 830 (2015) [hereinafter Jain, Arrests] (noting that this approach can "conserve enforcement dollars").

317. Markowitz, supra note 17, at 1045 (noting that many states and localities have refused to become "entangled" with immigration enforcement). Most of these laws generally disentangle subfederal law enforcement from federal civil immigration enforcement, but some contain exceptions based on the nature of any underlying conviction or for certain enforcement types. See, e.g., Pham & Van, supra note 8, at 143 (noting that California's legislation, though "positive and pro-immigration," contains such exceptions).

318. See, e.g., 2023-ICLI-00031, at 459–60; supra section II.B.2.

generating negative press and outrage for sanctuary jurisdictions.[319] Through at least mid-2020, this appeared to drive much of ICE's decisionmaking about when and against whom to issue these subpoenas. Field offices would "nominate" sanctuary jurisdictions to target with immigration subpoenas, and, once headquarters leadership selected sanctuary jurisdiction targets, headquarters leadership directed field office leadership to identify set numbers of cases with facts that would play well in the media and courts: ones with "recent arrests/declined detainers, egregious criminals, and[—]ideally[—]prior removals so that alienage is not an issue."[320] And ICE officers around the country identified cases with these facts even while, at times, wondering what they could possibly subpoena since the person was already in ICE custody.[321]

By August 2020, ICE leadership sought to routinize this practice and use it to replicate the pipeline it had lost in sanctuary jurisdictions. To that end, it issued a detailed policy directive and training specifically for subpoenas to subfederal law enforcement that refused to comply with ERO's requests for information, "including advance notification of release dates pursuant to an immigration detainer."[322] As might be expected given ICE's focus on enforcement against noncitizens who have had contact with the criminal legal system,[323] the directive required that these subpoenas be directed at noncitizens with criminal convictions, others ICE deems public safety threats, and those with prior removal orders.[324] And while this policy permitted ICE officers to subpoena any information that would "reasonably . . . lead to an enforcement . . . action" and was not otherwise "feasible" to obtain, it was clearly aimed at facilitating arrests immediately upon or shortly after release from subfederal custody.[325] As for process, the directive required that, for this single category of subpoena, enforcement officers prepare summaries explaining why the subpoena was justified, update a national log, obtain headquarters approval, and report back on

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319. ICE leadership's goal, as one internal email explained, was to select cases that would allow ICE to "mirror the outrage (significant media attention)" that resulted from the subpoena offensive of January 2020. 2023-ICLI-00031, at 488.

320. 2023-ICLI-00031, at 71, 488–92 (indicating, in May 2020, that he (an assistant field office director) was getting pressure from headquarters to find cases for immigration subpoenas and indicating that he needed more time).

321. See 2021-ICLI-00047, at 5806–07 (noting, after summaries showing that cases met the requested criteria, "[i]n custody" and "[n]ot sure what to subpoena").

322. 2023-ICLI-00031, at 8; id. at 34 (ICE Policy Directive 11165).

323. See Hausman, supra note 214, at 975 (arguing that the "law of deportation depends on criminal charges and convictions"); Jain, Arrests, supra note 316, at 829–30 (discussing ICE's reliance on criminal arrests in enforcement decisions).

324. See 2023-ICLI-00031, at 35.

325. Id. (explaining that this directive was only for "noncompliant" jurisdictions that refused to cooperate with detainers and other enforcement actions and suggesting that officers could use them to seek "release dates" and "post-arrest whereabouts," among other things).

resulting arrests.[326] ICE leadership emailed this directive to all ERO employees, announcing this now widely available tool for pushing back on "non-compliant law enforcement agencies" that refused to "cooperat[e]."[327] And, under this policy, field offices around the country have used immigration subpoenas to force sanctuary jurisdiction actors to help facilitate arrests into the Biden era and likely to the present day.[328]

Outside of the sanctuary-law enforcement context, the criteria for subpoena use are far less clear. As noted, even the guidance encouraging their use is silent about when or why to issue one.[329] Some subpoenas are clearly aimed at establishing specific facts, but again here, a large proportion appear to be focused on obtaining location information and facilitating arrests.[330] The subpoena forms and logs generally do not reflect the facts of the underlying cases or, in most instances, reliably indicate the type of violation suspected.[331]

E. *How Often ICE Subpoenas*

One lingering question about the immigration regime is a basic one: How frequently does ICE subpoena? And, perhaps equally important for some of the issues these subpoenas raise, how often does it subpoena specific entities? Due to the limits of the data, this study cannot provide comprehensive or fully satisfying answers. But this section sketches out some suggestions from the available data and some issues for further research.

Given ICE's coordinated effort to use subpoenas to counteract sanctuary legislation, one might wonder about the scale of this practice and how it compares to the number of detainers those jurisdictions decline. It is difficult to know. On the high end of subpoena issuers in the dataset is the San Diego field office, which has directed its officers to initiate a subpoena every time a detainer is declined[332] and which issued approximately 167 subpoenas in 2023 (amounting to nearly one every

326. Id. at 16–30.

327. Id. at 146.

328. See Combined FOIA Data.

329. See, e.g., 2023-ICLI-00031, at 272–73 (providing an email to the Los Angeles field office which purportedly gives instructions on "issuing ICE [s]ubpoenas" but does not specify when they should be issued); see also supra note 219 and accompanying text.

330. See supra section II.B.4.

331. As might be expected given ERO's primarily civil enforcement mission, the government confirmed that the majority of the subpoenas produced relate to civil matters. See supra note 178. The limited data on this front showed that all or nearly all recent subpoenas to sanctuary jurisdiction law enforcement relate to civil administrative matters. See CAPHQ Log, supra note 179. The data also indicate that some subpoenas are issued in connection with criminal matters (often status-based offenses—such as unlawfully reentering after a prior removal order, 8 U.S.C. § 1326 (2018), or investigations of both civil and criminal matters). See, e.g., St. Paul Logs.

332. 2023-ICLI-00031, at 426 (requiring ERO officers in the "Criminal Alien Program" to initiate the process each time a detainer is declined).

other day) to local law enforcement covered by California's sanctuary law.[333] The Washington field office also appears to issue immigration subpoenas to a single sanctuary jurisdiction police department frequently; its log shows that it issued twenty-three such subpoenas in the first three-and-a-half months of 2023, amounting to more than twice a week.[334] The Chicago field office, for its part, issued at least eighteen subpoenas to the Illinois Department of Corrections in 2021 (through mid-September 2021), approximately one every other week.[335] Other field offices in areas with major sanctuary jurisdictions issued this type of subpoena as well, likely in smaller numbers, but logs from those field offices were generally too unreliable to provide a sense of frequency in this period.[336] But even if these data were complete enough to provide reliable numerators (which seems unlikely), we lack an appropriate denominator to evaluate their relative use in the sanctuary battles (as ICE does not publish information about the number of detainers these entities declined during this period)[337] or in civil enforcement investigations more broadly (since ICE does not publish that data either). Even so, it is worth noting that neither the data nor other records suggest that the scale of subpoena use has approached the quantity of detainers ICE issues or of arrests it makes in the interior.[338]

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333. This number is approximate because it includes data from multiple sources whereas the headquarters log indicates 161 subpoenas. See CAPHQ Log, supra note 179. Though, that log is not complete. See infra note 336. For more on deduplication across different data sources, see infra Appendix.

334. See Combined FOIA Data. The log from this field office ended in mid-April 2023, a few months before ICE produced it in litigation. See Washington Log Fiscal Year 2023.

335. See Combined FOIA Data. ICE represented that the Chicago field office at some point stopped issuing subpoenas due to a governing sanctuary law. See Stipulation and Proposed Order, supra note 10, at 2. This representation is consistent with the data produced but doesn't explain the absence of pre-2020 Chicago field office logs and logs covering private entities not governed by the state sanctuary law.

336. See supra section II.B.2. The headquarters log was also not a reliable indicator—for example, it did not contain any of the subpoenas from the Washington field office—and at least one other field office only became aware that it needed to use the headquarters log and process through the FOIA litigation. See 2023-ILCI-00031, at 288–89 ("After dealing with this latest FOIA . . . I think we'll all need to get together on this to make sure we are doing everything correct.").

337. See New Data on ICE Immigrant Detainers Show Sharp Drop Since Start of Biden Administration, Transactional Recs. Access Clearinghouse (June 20, 2023), https://trac.syr.edu/reports/719/ [https://perma.cc/2SWP-G2JK] [hereinafter TRAC, Data on Ice Detainers] (explaining that ICE has conceded that past reports of declined detainers were inaccurate and that this information "does not appear to be reliably kept by the agency").

338. See ICE Enforcement and Removal Operations Statistics, ICE, https://www.ice.gov/spotlight/statistics [https://perma.cc/4Q8M-EUK9] (last visited Sept. 15, 2024) (arrest statistics); ICE Detainers, Transactional Recs. Access Clearinghouse, https://trac.syr.edu/phptools/immigration/detention/ (on file with the *Columbia Law Review*) (custody statistics).

Agency records also indicate that the presidential transition shortly after the sanctuary subpoena initiative launched may have slowed its growth and spread. Internal agency communications suggest that, under the Biden Administration, leadership's demands that officers find cases for subpoenas may have died down.[339] It appears that the Biden Administration had far less appetite to litigate when sanctuary jurisdictions raised hurdles in response to ICE's demands.[340] And it seems likely that the new prosecutorial discretion policies played a role as well; the Biden Administration's policy of being more judicious about when to make arrests in the nation's interior has meant fewer instances in which ICE seeks subfederal assistance for arrests.[341]

Resource considerations may affect the frequency with which ICE issues subpoenas as well. Though ICE has attempted to streamline its process for sanctuary jurisdiction subpoenas,[342] officers must still engage in *some* internal process to obtain sign-off from issuing officers, serve the subpoena, wait for a response, and sometimes follow up. To be sure, records of the process suggest that, in practice, ICE has ignored some of its own sanctuary jurisdiction directive's requirements and simply issued subpoenas based on its desire to arrest the target, the target being in the custody of sanctuary jurisdiction law enforcement that will not help ICE make that arrest, and vague assertions of a public safety threat based on (even minor or mere allegations of) criminal history.[343] But these steps still take time and do not guarantee an in-custody arrest. Consequently, while ICE's new subpoena policy and practice is alarming because it has succeeded in piercing sanctuary laws where ICE's other efforts have generally failed,[344] political and practical factors may have limited its growth and spread.

The limits of the data make it even more difficult to know how often ICE uses immigration subpoenas outside the sanctuary law enforcement context. The records indicate that some of ICE's twenty-five field offices issue subpoenas regularly but don't suggest that any field office issued

339. See 2023-ICLI-00031, at 231–35 (showing an ICE officer in the Denver field office asking, in June of 2021, whether the immigration subpoena initiative was "in full swing").

340. See id. (showing a U.S. Attorney's Office finding the desired address information through means other than suing for contumacy); id. at 148 (showing that, in response to pushback in April 2021, ICE declined to bring suit).

341. See TRAC, Data on ICE Detainers, supra note 337 (showing a decrease in ICE detainers once Biden took office).

342. See 2023-ICLI-00031, at A-424–37 (showing that ICE created step-by-step instructions, templates, and electronic systems for uploading and obtaining sign-off for these subpoenas).

343. See, e.g., 2021-ICLI-00047, at 6355 (describing the entirety of a target's criminal history as a single DUI arrest); id. at 6349 (same for a single DUI conviction and prior arrests).

344. See, e.g., Pham & Van, supra note 8, at 149–150 (discussing ICE raids and attempts to eliminate certain federal funding to sanctuary jurisdictions).

more than 200 total a year.[345] Others, like the San Antonio and Dallas field offices, may issue few or none at all annually.[346] At least some of ICE's 188 suboffices keep separate records, and, while ICE only produced a few suboffice logs, the ones produced show those suboffices issuing between one and sixteen subpoenas a year.[347] But again, field offices and suboffices appear to vary significantly in this and other respects, and, without a reliable numerator (number of subpoenas) or denominator (number of investigations), it's difficult to quantify further. And of course, it's worth underscoring that issued subpoenas may be only the tip of the iceberg. Given that ICE can use the mere threat of a subpoena to compel "voluntary" compliance with its demands,[348] the number of instances in which ICE uses its subpoena power to compel information and assistance may be far greater than the number of subpoenas actually issued.

* * *

Ultimately, this examination shows not only how ICE wields the immigration subpoena power but also the ways that its use of this tool amplifies the agency's power to detain, exceeds its statutory bounds, and implicates protected—even vital—relationships between states, localities, and their constituents. This study bears out the early concerns about the scope of compulsory process in this realm and its potential to magnify the enforcement agency's already extraordinary powers to deprive people of liberty, family, and more. It also shows that, although this power is no longer focused on enhancing the enforcement of overtly racist laws, it continues to serve its original racialized purpose by facilitating similarly discriminatory modes of enforcing our removal laws.[349] And it shows how this power has become, perhaps most of all, a mechanism for forcing state and local government to assist with federal enforcement. Indeed, it reveals that this aspect has transformed in recent years and become a systemized process for conscripting the resources and political capital of states and localities unwilling to devote them to federal goals.

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345. See Combined FOIA Data.

346. See Stipulation and Proposed Order, supra note 10, at 2 (stating that the Dallas and Chicago field offices stopped issuing subpoenas); 2021-ICLI-00047, at 5811–12 (showing just five subpoenas issued by San Antonio from 2017–2020) .

347. Compare 2021-ICLI-00047, at 5349 (Stewart suboffice log), with 2021-ICLI-00047, at 5350–52 (San Juan suboffice log).

348. See supra note 266.

349. See, e.g., Juliana Morgan-Trostle & Kevin Zheng, Black All. for Just Immigr. & N.Y.U. L. Immigrants' Rts. Clinic, The State of Black Immigrants 20 (2020) (describing the extent to which Black immigrants are disproportionately represented in removal proceedings); Cecilia Menjívar, The Racialization of "Illegality", Dædelus, Spring 2021, at 91, 91–92 (similar with "Latina/o" immigrants).

III. BOUNDING IMMIGRATION SUBPOENAS

While the preceding Parts show an immigration subpoena regime that operates well beyond its statutory limits, in violation of the agency's rules, and in conflict with important norms, that information, on its own, may not spur change. That's because the doctrinal barriers that people—especially targets of enforcement—face in litigation pose significant, often insurmountable, hurdles to challenges on statutory or regulatory grounds.[350] But the practices documented above also have troubling implications for core constitutional protections and rights. And understanding these constitutional concerns is critical, not only because they illuminate the deeper stakes of an unchecked immigration subpoena regime but also because challenges on these bases would avoid pitfalls that doom so many nonconstitutional claims and open paths to judicial constraint in immigration subpoenas' virgin doctrinal terrain.

This Part begins where this Article started, by focusing on the implications of a federal immigration subpoena scheme that targets state and local government. It lays out the serious federalism concerns that this practice creates, argues that it conflicts with the Tenth Amendment's rule against federal commandeering of state and local resources, and suggests an anticommandeering interpretation of the immigration subpoena statute. Next, this Part turns to the privacy implications of this regime. It argues that ICE's tactics raise a range of Fourth Amendment questions and that recognizing the constitutionally protected privacy rights at stake in this regime has important implications for procedure and doctrine. Finally, it turns to questions of transparency and free speech, describing how ICE's widespread gag orders vitiate critical First Amendment rights. In sum, this Part sketches out how and why courts should recognize the constitutional bounds of the immigration subpoena power.

A. *Federalism and Commandeering Avoidance*

When it comes to the clash between sanctuary jurisdictions and the federal government, federalism questions virtually always loom large. After all, in our dual-sovereign system, states and localities stand on special ground when it comes to federal demands. Indeed, the whole concept of state and local sanctuary laws is based on this constitutional distribution of power—the idea that, although federal law is supreme in some domains, the Tenth Amendment's protection of "powers . . . reserved to the States" has been construed to prohibit the federal government from commandeering state and local resources for use in federal regulation.[351]

The Supreme Court articulated this constitutional anticommandeering rule perhaps most clearly in *Printz v. United States* when considering a federal law that required state and local law enforcement to assist with

350. See supra notes 168–172 and accompanying text.

351. U.S. Const. amend. X; Printz v. United States, 521 U.S. 898, 935 (1997).

federal gun control efforts by performing "research" in subfederal government's recordkeeping systems and other tasks to screen prospective gun buyers.[352] Although the federal government argued that the database searches the law required imposed only minimally on subfederal officers, the Supreme Court rejected this distinction, finding that this federal mandate nevertheless violated the Tenth Amendment because it effectively "command[ed] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[353] In other words, the Court held that assigning subfederal officers even those mundane tasks unlawfully "[]commandeer[ed]" them, which infringed on states' resources, democratic accountability for their actions, and sovereignty.[354] Thus, when sanctuary states and municipalities began declining to assist with federal immigration enforcement, it was widely understood that the Tenth Amendment's anticommandeering rule prevented the federal government from forcing them to do so.[355]

Given this, one might think that the immigration subpoena question would be easily resolved, that unwilling states and localities could simply decline to comply with ICE-issued subpoenas on Tenth Amendment grounds. Indeed, Professor Robert Mikos argued as much more than a decade ago, persuasively explaining why federal administrative subpoenas and other information-gathering tools constituted unlawful commandeering when used against cities and states.[356] This argument is complicated by the fact that *Printz* left open the question of whether federal "reporting requirements" imposed on states created the same unlawful commandeering problem that the background check tasks did.[357] And, on this basis, some courts have found that certain federal information demands don't constitute the type of compelled enforcement that the

352. 521 U.S. at 903–04.

353. Id. at 935.

354. Murphy v. NCAA, 138 S. Ct. 1461, 1476–77 (2018).

355. See, e.g., United States v. California, 921 F.3d 865, 889–91 (9th Cir. 2019) (finding that "California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal [immigration enforcement] efforts"); City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 651 (E.D. Pa. 2017) (finding Philadelphia likely to succeed in a Tenth Amendment–based challenge to the federal government's efforts to compel their assistance with immigration enforcement), aff'd in part, rev'd in part, City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276, 292 (3d Cir. 2019); N.Y. Att'y Gen., Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions 7 (2017), https://ag.ny.gov/sites/default/files/sanctuary_guidance_and_supplements.pdf [https://perma.cc/QPK8-LUJW] (discussing the limits that the Tenth Amendment imposes on the federal government's demands that states and localities provide assistance with immigration enforcement).

356. See Mikos, supra note 6, at 154–59, 171. More recently, Professor Bridget Fahey provided additional reasons why the anticommandeering rule applies to data-sharing, arguing that data is a governmental resource that requires voluntary surrender and that opting to surrender data is subfederal policymaking. See Fahey, supra note 6, at 1062.

357. *Printz*, 521 U.S. at 936 (O'Connor, J., concurring); see also Mikos, supra note 6, at 138–39.

anticommandeering rule prohibits, reasoning that those information demands did not infringe on state sovereignty because they imposed little economic or political burden on subfederal governments' gathering of that information anyway.[358] As Mikos pointed out, federal subpoenas requiring state and local employees to gather and report information *do* obligate them to enforce—because subpoenas essentially force them to investigate—and raise the very concerns that impelled the decision in *Printz*.[359] Nevertheless, courts have continued to suggest that there may be a distinction between at least some of ICE's information demands and the federally compelled "enforcement" that *Printz* forbids.[360]

Perhaps because of this case law, Tenth Amendment challenges to federal administrative subpoenas are rare. In other high-profile clashes over federal administrative subpoenas directing states to turn over confidential information about their residents, states have not even raised this claim.[361] Nor did most sanctuary cities confronted with immigration subpoenas; even those that came out punching when initially confronted with the Trump-era subpoenas ultimately backed down instead of resting on this defense.[362] And in *ICE v. Gomez*—the single case in which the issue *was* squarely decided—the court rejected the municipal defendant's (Denver's) anticommandeering defense.[363] The *Gomez* court recognized that, in some circumstances, information demands could theoretically raise commandeering concerns.[364] But its decision turned on the scope of the agency's information demands. The court distinguished the agency's limited, "sterile request for specific identifying information" in that case

358. See, e.g., Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 214 (4th Cir. 2002) (holding that a federal law which merely required states to forward information did not violate the Tenth Amendment); Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F. Supp. 2d 1260, 1295 (M.D. Fla. 2009) (same), aff'd, 451 F. App'x 862 (11th Cir. 2012); United States v. Brown, No. 07 Cr. 485 (HB), 2007 WL 4372829, at *6 (S.D.N.Y. Dec. 12, 2007) (same), aff'd on other grounds, 328 F. App'x 57 (2d Cir. 2009). But see City of Chicago v. Sessions, 321 F. Supp. 3d 855, 871 (N.D. Ill. 2018) (declining to find an information-sharing exception to the anticommandeering doctrine based on *Printz*'s dicta), aff'd sub nom. City of Chicago v. Barr, 961 F.3d 882 (7th Cir. 2020).

359. See Mikos, supra note 6, at 154, 158.

360. See, e.g., New York v. Dep't of Just., 951 F.3d 84, 114 (2d Cir. 2020) (noting but declining to decide this open question); Immigr. & Customs Enf't v. Gomez, 445 F. Supp. 3d 1213, 1217 (D. Colo. 2020) (finding that a "sterile" ICE demand for "specific" information did not violate the anticommandeering rule but also noting that any demands for "ongoing cooperation" would present a different issue).

361. See, e.g., Dep't of Just. v. Utah Dep't of Com., No. 16-cv-611-DN, 2017 WL 3189868, *1, *7 (D. Utah July 27, 2017) (involving a DEA subpoena for patients' medical prescription records in a state database); Or. Prescription Drug Monitoring Program v. Drug Enf't Admin., 998 F. Supp. 2d 957, 961–62 (D. Or. 2014) (same), rev'd, 860 F.3d 1228 (9th Cir. 2017); Complaint ¶¶ 1–18, *Or. Prescription*, 998 F. Supp. 2d 957 (No. 12-cv-02023), 2012 WL 5898554 (same).

362. See CAPHQ Log, supra note 179 (showing widespread compliance); supra note 4.

363. See 445 F. Supp. 3d at 1217.

364. Id.

from the "ongoing cooperation" that the anticommandeering rule prohibits.[365] It continued that "[i]f such subpoenas become a regular occurrence, then some day a federal court may have a more difficult decision," but made clear that "this is not that day. . . . [T]his is a unique process in the history of ICE."[366] Thus, the court drew a constitutional line between a recurring practice of federal information demands and what it believed to be a discrete, limited instance.

But this study indicates that ICE uses the immigration subpoena regime to make precisely the type of enforcement demands that *Printz* forbids. As described above, it shows that the agency has used these subpoenas, across the country and in large numbers in some jurisdictions, to demand significant assistance from state and local governments.[367] Part II documents how ICE routinely uses these subpoenas to force state and local employees to conduct wide-ranging searches of databases and local files for "any and all records" that might establish certain facts, determine whether these employees believe the documents establish those facts, and even play surveillance and lookout roles for ICE arrests.[368] It also shows ways that ICE's demands can harm state and local government, because ICE uses these subpoenas to compel information from schools, foster and health care agencies, licensing boards, and other governmental actors that play vital roles in their communities.[369] Specifically, it demonstrates how subpoenas can create major impediments to subfederal governments' ability to carry out core local functions, particularly for low-income communities that depend on these services the most.[370] In short, the data show that ICE has routinely deployed these subpoenas to compel state and local employees to do the same resource-intensive research and analysis—with the same sovereignty- and accountability-infringing effects—that the Court forbade in *Printz*. (And in some cases, ICE has gone even further by forcing subfederal employees to actively facilitate federal arrests.[371]) As a result, this examination offers the very facts that the *Gomez* litigants were missing—facts which the *Gomez* court suggested would present a serious Tenth Amendment question—and aligns these subpoenas with the federal demands found unlawful in *Printz*.

Of course, since *Printz*, the Court has clarified that not every act that requires states and localities to play some role in federal enforcement runs afoul of the Tenth Amendment.[372] As it explained most recently, the

365. Id.

366. Id.

367. See supra section II.B.

368. See supra section II.B.

369. See supra section II.B.

370. See Khiara M. Bridges, The Poverty of Privacy Rights 9–10, 67 (2017) (describing the relationship between poverty, government assistance, and privacy rights).

371. See supra section II.B.1.

372. See, e.g., Murphy v. NCAA, 138 S. Ct. 1461, 1478–79 (2018) (explaining that the doctrine does not apply "when Congress evenhandedly regulates an activity in which both

anticommandeering doctrine does not apply when the federal government "evenhandedly regulates an activity in which both States and private actors engage."[373] At first blush, this might seem to eliminate the commandeering concerns here, as the immigration subpoena statute appears to sweep broadly when it comes to subpoena recipients, and ICE in fact issues subpoenas to state, local, and private entities alike. But this study demonstrates that ICE has used its power against these entities in very different ways. As discussed in Part II, ICE organized and launched public and internal campaigns focused exclusively on the use of these subpoenas against state and local entities, encouraging and creating a unique system to facilitate their use against sanctuary jurisdictions. ICE also uses subpoenas to obtain information and assistance from state and local government entities in a way that generally imposes far more burdensome demands, requires more active investigation assistance, and intentionally thwarts state and local policies of declining to participate in federal enforcement.[374] In other words, it documents ICE's intention and broad success in using these subpoenas to do what Professor Fahey has convincingly argued is prohibited commandeering under *Printz*: compelling information to undercut subfederal policymaking regarding when and how to share data.[375] And finally, Part II indicates that these subpoenas to states and localities are very different when it comes to volume: They comprise the overwhelming majority of the subpoenas that at least some field offices issue, and at least one field office makes initiating the subpoena process mandatory for a large category of removal cases.[376] In short, this study shows that, as a matter of policy and practice, ICE does not use its subpoena power evenhandedly against subfederal versus private entities.

Ultimately, courts may not need to decide the precise contours of the anticommandeering rule for each and every subfederal government subpoena. Given that the immigration statute does not specify that it permits the federal government to subpoena subfederal entities and that the Supreme Court requires an "unmistakably clear" statement in the statutory text for federal legislation to be considered binding on states,[377]

States and private actors engage"); Reno v. Condon, 528 U.S. 141, 143 (2000) (holding that a federal law regulating the disclosure and resale of drivers' personal information by states did not violate the doctrine because it was generally applicable and regulated states only as owners of databases).

373. *Murphy*, 584 S. Ct. at 1478–79.

374. To put this in the language of what Professors Heather Gerken and Jessica Bulman-Pozen have termed "uncooperative federalism," this subpoena initiative was specifically launched to quell the productive "state-centered dissent" that subfederal entities have expressed through sanctuary laws and policies. See Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1259 (2009); see also infra note 382.

375. Fahey, supra note 6, at 1062.

376. See 2023-ICLI-00031, at 426 (requiring that officers, upon rejection of an immigration detainer, begin the process to issue an immigration subpoena).

377. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

courts may be able to avoid the commandeering concerns by simply construing the subpoena statute to *not* authorize ICE-issued subpoenas to states and localities.[378] Or, considering the multiple other indications that Congress constructed the Immigration and Nationality Act to avoid this type of commandeering problem,[379] courts could follow the Supreme Court's approach in *United States v. Minker* and construe the immigration subpoena provision to not apply to subfederal governments in light of this statutory structure.[380] After all, in crafting the provisions addressing state and local interactions with the immigration enforcement agency, Congress made clear that the INA permitted *willing* states and localities to assist (under federal control), but that it was not requiring—or authorizing the federal agency to compel—information, investigation, or other enforcement assistance from states or localities.[381] This anticommandeering interpretation may be novel, but it is supported by the statutory text, context, and current doctrine, and it would avoid the serious constitutional concerns raised here. But regardless of whether this question is resolved on constitutional or statutory grounds, this study

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378. See, e.g., Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) (interpreting the statute to avoid federal preemption of a state telecommunication regulation in the absence of a clear statutory statement to the contrary); Nina A. Mendelson, A Presumption Against Agency Preemption, 102 Nw. U. L. Rev. 695, 699 (2008) ("We should not assume that Congress authorized a federal agency to preempt state law unless that authority is clearly delegated.").

379. For example, consider 8 U.S.C. § 1373(a) (2018), which explicitly governs communication between state and local governments and federal actors. This section bars states and localities from adopting any law intended to restrict state and local employees from sharing two discrete types of information (citizenship or immigration status information) with the federal government. See id. But Congress pointedly chose not to mandate that states and localities provide immigration status—or any—information, and the government's current construction of the subpoena statute would render § 1373(a) superfluous. After all, if Congress had thought that, simply by signing a subpoena form, the federal enforcement agency could force state and local actors to provide citizenship and immigration status information regardless of any state or local prohibitions on disclosure, there would have been little point in enacting § 1373(a). Similarly, consider 8 U.S.C. § 1357(g) (2018), which governs the "[p]erformance of immigration officer functions" by state and local employees. This provision authorizes agreements between ICE and subfederal government actors that permit subfederal officers to perform certain immigration enforcement functions. See id. It shows that Congress created a scheme to allow willing state and local officers to assist with enforcement (subject to federal direction and control) while going out of its way to dispel any suggestion that states or localities could be compelled to participate. Congress's evident desire to avoid these federalism concerns is even more understandable because it was considering these provisions just as *Printz* went to the Supreme Court. Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), cert. granted sub nom. Printz v. United States, 518 U.S. 1003 (1996) (granting certiorari on June 17, 1996); Printz v. United States, 854 F. Supp. 1503, 1506 (D. Mont. 1994); H.R. 3610, 104th Cong. (1996) (proposing amendments to § 1357(g)).

380. See supra note 101 and accompanying text.

381. See supra note 372 and accompanying text.

reveals an important constitutional question with implications in the immigration regime and beyond.[382]

B. *Privacy, Vindicable Rights, and Notice*

While the federalism implications of the immigration subpoena regime are profound, state and local governments are not the only ones with underappreciated rights at stake. This Article's examination of the immigration subpoena regime also reveals constitutionally protected privacy rights held by immigration subpoena targets and shows how the agency's subpoena practices may—and in some cases almost certainly do—violate the Fourth Amendment in previously unrecognized ways.

On some level, the idea that someone whose personal information is being compelled would have certain privacy rights may sound unremarkable. It seems intuitive since their personal information is on the line. But in a world in which most of the personal information that the government seeks is held by third parties—schools, cell service companies, employers, and more—that assumption would be wrong.[383] That's because decades ago, the Supreme Court concluded that the subjects of personal records lack Fourth Amendment–protected privacy interests in even sensitive information when that information was retained by third parties.[384] And courts have adhered to this idea—known as the "third-party doctrine"—for decades, even as technology has radically changed the amount of personal data that third-party record holders collect and retain.[385]

The third-party doctrine has shaped the modern administrative subpoena landscape. This concept—that the people whose personal records are at stake have no constitutionally protected privacy rights in information held by third parties—is the very reason that courts have upheld subpoena schemes that don't provide notice to the subject of the records. Specifically, just after endorsing the third-party doctrine, the Supreme Court considered a case challenging an agency's failure to notify the subject of the subpoenaed records that it was demanding their

382. It also adds to the literature on uncooperative federalism by offering these subpoenas as an example of the blunt force commandeering that "stifle[s]" rather than generates productive state dissent. See Charles W. Tyler & Heather K. Gerken, The Myth of the Laboratories of Democracy, 122 Colum. L. Rev. 2187, 2237–38 (2022) (recognizing that "[s]ome forms of commandeering . . . stifle state experiments that countermand federal policy" and arguing for a more "calibrated" commandeering doctrine).

383. See Slobogin, Privacy, supra note 39, at 825–26 (noting the general lack of Fourth Amendment protection "for personal records held by third parties").

384. See id. at 824–25; see also Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (finding no Fourth Amendment protection for information held by a third-party phone company); United States v. Miller, 425 U.S. 435, 443 (1976) (same for financial records held by a bank).

385. See, e.g., United States v. Gayden, 977 F.3d 1146, 1152 (11th Cir. 2020) (finding no protection for a doctor's prescribing records disclosed via an automated "computerized tracking system" to a third party); United States v. Caira, 833 F.3d 803, 806–07 (7th Cir. 2016) (same for IP addresses shared automatically with Microsoft upon logging into email).

personal information.[386] Relying exclusively on the third-party doctrine, the Court held that the Fourth Amendment did not require the agency to notify the subject of the records that it was compelling their personal information because they would have no constitutionally protected privacy rights to vindicate in a challenge anyway.[387] Thus, the belief that subjects of the records being compelled have no constitutional rights to vindicate in challenges to third-party subpoenas has not only dramatically limited the universe of actors who could contest these demands, it has also shaped procedural protections within administrative subpoena practice.

But more recent case law has changed the calculus. Even as it seemed well established that people lack constitutionally protected privacy interests in information retained by third parties, courts began limiting the reach of that doctrine by recognizing that subpoenas to third-party record holders that seek particularly personal information from someone who is not under investigation fall into a different category.[388] That is, courts recognized that people who are not an investigation's target "have a greater 'reasonable expectation of privacy'" under the Fourth Amendment than do the investigation's targets in some cases and, consequently, unique constitutional bases to challenge third-party subpoenas.[389]

In 2018, the scope of the third-party doctrine changed far more dramatically when the Supreme Court decided *Carpenter v. United States*.[390] In *Carpenter*, the Supreme Court disavowed the longstanding notion that people necessarily lose constitutional privacy interests simply because the information is held by a third party.[391] It made clear that the third-party doctrine would continue to apply in many contexts, but recognized that people—even targets of investigations—can retain constitutionally protected privacy rights in information held by third parties and identified a number of factors—including the knowing and voluntary nature of the information-sharing—for determining when they do.[392] And while the question presented in *Carpenter* focused on what the Fourth Amendment required of an agency seeking a person's cell-site (digital location) information from telecommunication providers, it has been clear from the

386. Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc., 467 U.S. 735, 737–38, 751 (1984).

387. Id. at 743, 751.

388. See McVane v. Fed. Deposit Ins. Corp. (In re McVane), 44 F.3d 1127, 1137 (2d Cir. 1995) (finding that a target's family members who are not involved in the object of an inquiry have a greater privacy interest in their own personal records than does the investigation's target); see also Fed. Deposit Ins. Corp. v. Garner, 126 F.3d 1138, 1144 (9th Cir. 1997) (adopting but distinguishing *McVane* because the agency's subpoena here provided "explicit allegations" linking the target's family's information to the alleged misconduct).

389. *In re McVane*, 44 F.3d at 1137 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

390. 138 S. Ct. 2206, 2223 (2018).

391. Id.

392. Id. at 2220.

outset that its holding would apply more broadly, including in the administrative subpoena context.[393]

Of course, these newer recognitions of constitutionally protected privacy interests are fact specific and won't bear equally on every subpoena or scheme. But this Article's look inside the immigration subpoena regime reveals their import here; it shows new, highly consequential Fourth Amendment questions and even violations of recognized Fourth Amendment rights.

First, this examination reveals that ICE has used subpoenas to seek people's personal information to conduct enforcement against their family members.[394] As described in Part II, it shows that ICE uses subpoenas to seek children's personal information from schools to target their parents and people's personal information from employers to target their spouses—and, given the limits of the records produced, this tactic might be even more common than the available records show. Thus, understanding how and why ICE uses these subpoenas demonstrates that at least some of the people whose information ICE demands via subpoena likely "have a greater 'reasonable expectation of privacy'" in the records at issue,[395] and, consequently, significant, previously unrecognized constitutional rights at stake in these subpoenas.

Second, this examination shows that ICE has used these subpoenas to obtain information that, under *Carpenter*, is likely—and in some cases almost certainly—constitutionally protected as well.[396] For example, it shows that ICE used these subpoenas to obtain cell-site location information from telecommunications providers before *Carpenter* found it unconstitutional to do so without a judicial warrant, and at least once even afterward, when it was clear that doing so violated the Fourth Amendment.[397] The records also show that ICE *still* uses these subpoenas to obtain targets' location data from telecommunications providers—

393. Id. at 2234 (Kennedy, J., dissenting) (arguing that the majority "calls into question the subpoena practices" of many investigative bodies); see also Matthew Tokson, The Aftermath of *Carpenter*: An Empirical Study of Fourth Amendment Law, 2018–2021, 135 Harv. L. Rev. 1790, 1800, 1829 (2022) (arguing that *Carpenter* opens the door to challenge "pervasive government surveillance" and discussing the application of *Carpenter* to cases involving subpoenas).

394. See supra sections II.B.1–.B.4.

395. McVane v. Fed. Deposit Ins. Corp. (In re McVane), 44 F.3d 1127, 1137 (2d Cir. 1995) (quoting Katz v. United States, 389 U.S. 347, 360 (1967)); see also, e.g., Fed. Deposit Ins. Corp. v. Garner, 126 F.3d 1138, 1144 (9th Cir. 1997) (adopting *McVane*'s standard but distinguishing its facts).

396. Although *Carpenter* was a criminal case, it has been applied it in the context of civil matters as well. See, e.g., Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 527 (7th Cir. 2018). This is logical in the context of an investigative tool, considering the often vanishingly thin line between civil and criminal offenses and since, in an investigation, the investigator may not know whether they will bring civil or criminal charges.

397. See supra section II.B.4.

including through phone pings, which reveal information that multiple courts have already found is constitutionally protected under *Carpenter*.[398] And the records show similar *Carpenter*-based questions outside the telecommunications sphere. For instance, ICE has used subpoenas to order primary schools and education departments to turn over the very personal information that children are required to provide when enrolling (and when enrollment was required by states' compulsory attendance laws).[399] Accordingly, given *Carpenter*'s focus on whether disclosure to the third-party record holder was truly voluntary and the data showing that ICE has compelled information from schools that students are legally obligated to provide, there is good reason to believe that students targeted by ICE subpoenas retain constitutionally protected privacy interests in the records demanded as well.[400]

This is not to say that all targets of immigration subpoenas have constitutionally protected privacy interests in the records that ICE seeks; many surely will not. But some immigration subpoenas clearly do implicate these rights.[401] And this, in turn, has important implications for the targets of immigration subpoenas and for subpoena procedure. It means that subpoena targets may have constitutional bases to object to subpoenas

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398. See, e.g., Commonwealth v. Reed, 647 S.W.3d 237, 246–48 (Ky. 2022) (holding that real-time cell-site data obtained by "pinging" a phone is constitutionally protected); State v. Sylvestre, 254 So. 3d 986, 991 (Fla. Dist. Ct. App. 2018) (same).

399. Compare 2021-ICLI-00047, at 149, 448, 451, 498 (subpoenas to schools for birth certificates, identity documents, addresses, contact information, information on minors' parents, "responsible adults," extended family, and more), with Registration Requirements, Syracuse City Sch. Dist., https://www.syracusecityschools.com/districtpage.cfm?pageid=1657 [https://perma.cc/6KEM-MMXZ] (last visited Sept. 14, 2024) (requiring submission of extensive documentation as part of school registration), and Pre-Registration Checklist, NYC Dep't of Educ., https://www.schools.nyc.gov/docs/default-source/default-document-library/pre-registration-checklist [https://perma.cc/BG9D-JDUE] (last visited Sept. 14, 2024) (same), and N.Y. Educ. Law § 3205 (McKinney 2024) (requiring school attendance by minors age six-to-sixteen).

400. Of course, the voluntary nature of the information-sharing is not the only factor in determining Fourth Amendment privacy interests; the sensitivity of the information shared is another important factor. See Matthew Tokson, The Emerging Principles of Fourth Amendment Privacy, 88 Geo. Wash. L. Rev. 1, 13–15 (2020) [hereinafter Tokson, Emerging Principles] (describing "the intimacy of the place or thing targeted by the government" as an important factor). But school and some telecommunication records are considered private or quasi-private even to a general population. See Christopher Slobogin, Government Data Mining and the Fourth Amendment, 75 U. Chi. L. Rev. 317, 337 (2008) (drawing on a study of the perceived intrusiveness of different types of investigation). And that information would likely be considered even more intimate in communities disproportionately affected by policing and enforcement. See, e.g., Jain, Interior Structure, supra note 250, at 1486, 1509–10 (describing the significant extent to which targeted communities seek to avoid sharing personal information with external entities).

401. As Professor Tonja Jacobi and attorney Dustin Stonecipher have made clear, *Carpenter*'s reach is still emerging. See Tonja Jacobi & Dustin Stonecipher, A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contract Tracing, and Mass Surveillance, 97 Notre Dame L. Rev. 823, 863–66 (2022) (arguing that the decision "raises more questions than it answers").

issued to third parties, empowering them to affirmatively challenge disclosure even if the record holders themselves do not. It also means that the central reason that agencies are excused from notifying targets about subpoenas of their personal records—the assumption that they have no constitutional rights to vindicate[402]—does not necessarily hold true in the immigration space. This, coupled with the structural obstacles that prevent violations of these privacy rights from being remedied in the immigration system and the agency's inability to prevent those violations,[403] provides reason to consider imposing a default requirement of notifying the targets of immigration subpoenas and to rethink the obstacles that make it so difficult for targets to raise and vindicate these rights. These changes would, of course, increase the resources that the agency would have to expend when using these subpoenas, but that could be beneficial too: As Professor Matthew Tokson has pointed out, higher-cost tools for compelling surveillance (and presumably other information) are, as particularly relevant here, "more likely to be narrowly applied," more judiciously used, and, due to their "greater budgetary and political salience," less likely to be abused.[404]

C. *Free Speech and Restraints on Restraints*

Of course, judicial review is not the only way to ensure that administrative investigations stay within bounds. As Professors Alan Rozenshtein and Rebecca Wexler have shown, administrative subpoena recipients have played a powerful role in other contexts by sounding the alarm and pushing for constraints through advocacy within and without the judicial domain.[405] But this dynamic—and the pressure this public pushback generates—has not played out the same way in the immigration subpoena space. This may be partially due to the fact that, unlike the tech giants who have played this role in other arenas,[406] the small businesses and local government entities subpoenaed by ICE have far fewer resources

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402. See Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc., 467 U.S. 735, 741–44 (1984) (finding that target had no Fourth, Fifth, or Sixth Amendment rights to vindicate in a subpoena challenge).

403. See supra section I.C; see also supra Part II.

404. Tokson, Emerging Principles, supra note 400, at 23–24; see also Michael C. Pollack, Taking Data, 86 U. Chi. L. Rev. 77, 83 (2019) (arguing that imposing costs for privacy invasions can force the government to internalize "privacy-related externalities generated by" investigations and make their efforts more "thoughtful" and "tailor[ed]").

405. Rozenshtein, supra note 36, at 149–54 (surveillance intermediaries); Rebecca Wexler, Warrant Canaries and Disclosure by Design: The Real Threat to National Security Letter Gag Orders, 124 Yale L.J. Forum 158, 164–73 (2014), https://www.yalelawjournal.org/pdf/WexlerPDF_xpc2ib9k.pdf [https://perma.cc/K9NN-A5EZ] (tech companies).

406. See, e.g., In re Nat'l Sec. Letter, 33 F.4th 1058, 1069 (9th Cir. 2022) (involving a challenge brought by, inter alia, CREDO Mobile); At CREDO, Your Privacy Is Not for Sale, CREDO Mobile, https://blog.credo.com/at-credo-your-privacy-is-not-for-sale/ [https://perma.cc/6HMZ-KSBC] (last visited Sept. 14, 2024).

and, often, incentives to resist.[407] But, as Part II showed, a significant proportion of subpoena recipients cannot play this role *or* notify targets to allow them to advocate for themselves because the recipients are indefinitely subject to ICE-imposed gag orders.[408]

This practice is, as described, ultra vires, but it also impinges on core First Amendment rights. The First Amendment only permits restrictions "'abridging the freedom of speech'" in certain instances and provided they can survive the appropriate level of scrutiny.[409] When the government restricts speech based on its content, that restriction only passes constitutional muster if it is "narrowly tailored to serve compelling state interests."[410] And even if the government could constitutionally impose a particular content-based restriction, it generally may not do so by imposing "prior administrative restraints."[411] Such ex ante restraints on speech are "presumptively unconstitutional"[412] and only permitted if implementing officials have "narrow, objective, and definite standards"[413] to guide them and if the system contains "procedural safeguards that reduce the danger of suppressing constitutionally protected speech."[414] Such safeguards include, as relevant here, the availability of "expeditious judicial review" and the assurance that any pre-review restraint be brief.[415]

The litigation surrounding the national security–related administrative subpoenas (the NSLs discussed above) shows how this analysis applies here, in the context of administrative gag orders and subpoenas. The early NSL gag orders, like ICE-issued gag orders, imposed indefinite, ex ante restrictions on recipients' speech, indefinitely forbade recipients from speaking to anyone about the subpoena or accompanying gag orders, and lacked any mechanism for judicial review.[416] And every court to consider

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407. Subfederal law enforcement may also have competing interests. For example, limits on federal techniques could easily wind up limiting subfederal investigations, or subpoenas could offer helpful cover for subfederal officers to circumvent subfederal limits on information sharing. Still, in at least some cases, subpoena recipients are inclined to speak up and doing so—even nonpublicly—may dramatically affect ICE's practices. See infra note 458 and accompanying text.

408. See supra section II.C.2.

409. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (quoting U.S. Const. amend. I).

410. Id. (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)).

411. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

412. Dawn C. Nunziato, First Amendment Protections for "Good Trouble", 72 Emory L.J. 1187, 1192 (2023).

413. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (internal quotation marks omitted) (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969)).

414. Id. at 559 (citing *Bantam Books*, 372 U.S. at 71).

415. Thomas v. Chi. Park Dist., 534 U.S. 316, 321 (2002) (internal quotation marks omitted) (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990) (plurality opinion)).

416. See *Doe I*, 334 F. Supp. 2d 471, 476, 492 (S.D.N.Y. 2004) (describing these features of one of the then-existing NSL statutes); National Security Letter from Marion E. Bowman,

these NSL gag orders found that these restrictions on speech violated core First Amendment rights.[417] Specifically, courts concluded that these NSL gag orders were subject to strict scrutiny because they were a prior restraint on speech, a content-based restriction, or both.[418] Moreover, these courts found, these all-encompassing gag orders flatly failed that test: Given the blanket prohibition on speech, indefinite duration, and dearth of opportunities for judicial review, they lacked adequate safeguards and were not narrowly tailored to even legitimate government interests in national security.[419] In addition, one court explained, the harms of this constitutional violation extended well beyond those who were gagged and seriously undermined the First Amendment's purpose of "protect[ing] the free discussion of governmental affairs."[420]

Because the immigration subpoena gag orders exposed through this study are virtually identical to the early NSL gag orders in terms of their all-encompassing scope, indefinite nature, and preclusion of judicial review, they almost certainly violate the First Amendment in the same ways. Indeed, the outcome is even clearer here, as the government cannot seriously claim the same interest in restricting speech or risk of harm in these civil immigration matters as in the NSL realm.[421] Moreover, as Professor Hannah Bloch-Wehba described in the context of NSLs, these indefinite gag orders do not just permanently bar constitutionally protected speech, they impinge on expressive, associational, religious, and even media rights as well.[422] Thus, this examination has revealed yet another way that this regime raises serious constitutional concerns, one that has significant consequences for individual liberties, is likely ongoing, and has undermined structural constraints in a significant way.[423]

Senior Couns., Nat'l Sec. Affs., Off. of the Gen. Couns., FBI (2004) (on file with the *Columbia Law Review*) (prohibiting disclosure "to any person").

417. See, e.g., *Doe I*, 334 F. Supp. 2d at 476.

418. See In re Nat'l Sec. Letter, 33 F.4th 1058, 1072 (9th Cir. 2022) (content-based); *Doe CT*, 386 F. Supp. 2d 66, 73–75, 82 (D. Conn. 2005) (prior restraint); *Doe I*, 334 F. Supp. 2d at 511–12 (both) .

419. *Doe CT*, 386 F. Supp. 2d at 82; *Doe I*, 334 F. Supp. 2d at 524.

420. *Doe CT*, 386 F. Supp. 2d at 72 (internal quotation marks omitted) (quoting Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838 (1978)); id. at 81.

421. National security violations are generally understood to involve significant risk to the nation's safety, for example terrorism or espionage. See DOJ, Just. Manual, § 9-90.000 (2018) (discussing the scope of national security prosecutions and work). Civil immigration violations are not similarly understood; in fact, courts routinely exercise their discretion to grant relief to people who are removable, including those ICE detains. See Speeding Up the Asylum Process Leads to Mixed Results, Transactional Recs. Access Clearinghouse (Nov. 29, 2022), https://trac.syr.edu/reports/703 [https://perma.cc/G6KB-SB2F] (showing grant rates for asylum (a discretionary form of relief) by custody status).

422. Hannah Bloch-Wehba, Process Without Procedure: National Security Letters and First Amendment Rights, 49 Suffolk U. L. Rev. 367, 381 (2016).

423. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring in the judgment) (describing the First Amendment's "structural" role).

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Fleshing out the constitutional implications of the modern immigration subpoena regime shows the magnitude of the harms that the agency's subpoena practices impose on targets, communities, subfederal governments, and the public. It shows the myriad and widely distributed costs of vesting an enforcement agency with such expansive powers in a system with few remedies or restraints. But importantly, it offers opportunity too. It breaks new ground by illuminating paths toward change, as these new constitutional bases for challenge can empower impacted parties to make judicial review meaningful and bring this power into compliance with critical, long-neglected constraints.

IV. BEYOND IMMIGRATION SUBPOENAS

It is easy to read the preceding account as an immigration story, as part of a larger narrative about ICE or, perhaps, the costs of treating immigration procedure as simultaneously ordinary (regulatory adjudication meriting no special protections) and exceptional (immune to many rights claims and constraints). But, as this Part shows, this first-of-its-kind account of how an agency operationalizes its subpoena power provides lessons that transcend the immigration realm. First, this fuller view raises important questions about trans-substantive subpoena doctrine, in particular the presumption of regularity that plays such a significant role in the administrative subpoena space. Specifically, it shows why courts should recognize that, when presented with evidence of systemic irregularities, they should not presume regularity. Second, this fine-grained account of agency practice contributes to the growing body of scholarship on internal administrative law.[424] It shows just how little litigation, statutes, and even agency policy may tell us about how agencies actually wield authority day to day, and it offers important insights for studying and shaping administrative power on the ground.[425] Third, it suggests some ways to impose limits on these practices outside the law.

A. *Presumption of Regularity*

The presumption of regularity is a sprawling and powerful—if undertheorized—principle of deference to agency decisionmaking.[426] It

424. See, e.g., Gillian E. Metzger & Kevin M. Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239, 1266 (2017); Christopher J. Walker & Rebecca Turnbull, Operationalizing Internal Administrative Law, 71 Hastings L.J. 1225, 1229 (2020).

425. See, e.g., Nicholas R. Parrillo, Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 Yale J. on Regul. 165, 167, 170 (2019) ("[L]itigation is only the tip of the iceberg. The iceberg itself is administrative practice . . . ." (footnote omitted)); Walker & Turnbull, supra note 424, at 1229 (arguing for increased attention to internal agency procedures and practices).

426. See Aram A. Gavoor & Steven A. Platt, In Search of the Presumption of Regularity, 74 Fla. L. Rev. 729, 731, 733, 748, 757 (2022) [hereinafter Gavoor & Platt, Presumption]

allows courts to presume that executive officers are acting lawfully in undertaking a wide range of administrative actions, and it "heavily weigh[s] in favor of the government in administrative law litigation."[427] It does so by dramatically limiting inquiry into administrative officers' decisionmaking processes and motivations, cutting off litigants' access to evidence of agency decisionmaking and narrowing the scope of judicial review.[428] As a result, it insulates agency decisionmaking—especially in the context of enforcement[429]—from scrutiny by the judiciary and any external actor.

This presumption rests heavily on courts' confidence in administrators' discipline, conscience, and competence.[430] And although the presumption of administrators' good faith may be technically distinct,[431] it often bleeds into the concept of regularity too.[432] This makes some sense, because a disciplined and competent execution of the law frequently requires an intention to faithfully apply it, that is, to act in good faith.[433] But this presumption is not based on any sort of study of administrators' faith or agency decisionmaking. And though initially applied to administrators and agency action in a very different era of the

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(arguing that there are at minimum fourteen unique ways that courts have applied the presumption); Z. Payvand Ahdout, Enforcement Lawmaking and Judicial Review, 135 Harv. L. Rev. 937, 957 (2022) (noting that the presumption of regularity is "lesser-studied"); Note, The Presumption of Regularity in Judicial Review of the Executive Branch, 131 Harv. L. Rev. 2431, 2432 (2018) ("The Court often invokes the [presumption of regularity] without elaboration . . . ."). Important exceptions include some of the work cited here.

427. Gavoor & Platt, Presumption, supra note 426, at 733.

428. See id. at 733–34.

429. See Eloise Pasachoff, Executive Branch Control of Federal Grants: Policy, Pork, and Punishment, 83 Ohio St. L.J. 1113, 1191 (2022) (noting that the presumption has "particular bite in the enforcement context").

430. See Gavoor & Platt, Presumption, supra note 426, at 745; see also United States v. Armstrong, 517 U.S. 456, 464 (1996) (discussing the presumption in the context of a challenge to prosecutorial decisionmaking); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (noting that a searching inquiry "into the mental processes of administrative decisionmakers is usually to be avoided" (citing United States v. Morgan, 313 U.S. 409, 422 (1941))); *Morgan*, 313 U.S. at 421 (explaining that administrative officers may be presumed to be of "conscience and intellectual discipline, capable of judging a particular controversy fairly").

431. See Gavoor & Platt, Presumption, supra note 426, at 750; see also Tecom, Inc. v. United States, 66 Fed. Cl. 736, 761–62 (2005) (discussing the history of the presumption of good faith).

432. *Tecom*, 66 Fed. Cl. at 762 (noting that the "presumptions of regularity and of good faith" come together "in cases such as *Armstrong*"); *Armstrong*, 517 U.S. at 464; see also, e.g., United States v. Lewis, 517 F.3d 20, 25 (1st Cir. 2008) (treating the presumption of good faith as part of the presumption of regularity); Fed. Trade Comm'n v. Invention Submission Corp., 965 F.2d 1086, 1091 (D.C. Cir. 1992) (finding that both presumptions can be rebutted with evidence of bad faith); Fed. Trade Comm'n v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 975 (D.C. Cir. 1980) (same).

433. *Armstrong*, 517 U.S. at 464; *Tecom*, 66 Fed. Cl. at 762.

administrative state,[434] this presumption has grown along with it, extending to the issuance of administrative subpoenas and a range of other agency officers and actions.[435]

The presumption of regularity has left a heavy imprint in the administrative subpoena space.[436] It has been important in decisions that place onerous burdens on litigants challenging administrative subpoenas,[437] limit opportunities for discovery in challenges to administrative subpoenas,[438] and deflect concerns about the risk of agency abuse.[439] Of course, it is only a presumption. But the burden to rebut it is high,[440] perhaps prohibitively so in the administrative subpoena context due to the short timeline for responding to subpoenas and the intense informational disadvantage that subpoena-challengers face. And this presumption appears to frequently carry the day and likely discourages many litigants from even raising challenges.[441] In brief, this assumption that administrative officers are lawfully discharging their duties makes it far more difficult or even impossible to show that they are not.

This Article shows the fallacy of this presumption in the immigration subpoena realm and raises serious questions about its application in related spaces. It depicts a regime in which agency actors—from the top

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434. See United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926) (articulating the presumption of regularity before much of the critical growth and change in the administrative state).

435. See, e.g., Gavoor & Platt, Presumption, supra note 426, at 751; supra notes 430–431 (collecting cases). But see Conley v. United States, 5 F.4th 781, 790–91 (7th Cir. 2021) (distinguishing the presumption as articulated in *Armstrong* from selective enforcement challenges to "street-level police investigations").

436. See infra notes 437–439.

437. See, e.g., *Owens-Corning Fiberglas Corp.*, 626 F.2d at 975 (reversing the district court's grant of additional protections for subpoenaed information because of the presumption of regularity to be afforded to the agency in the absence of evidence showing bad faith); Lightning Rod Mfrs. Ass'n v. Staal, 339 F.2d 346, 347 (7th Cir. 1964) (applying a presumption that the enforcement officer did their duty); Hyster Co. v. United States, 338 F.2d 183, 187 (9th Cir. 1964) (same); Am. Pharm. Ass'n v. Dep't of Just., Antitrust Div., 344 F. Supp. 9, 12 (E.D. Mich. 1971) (finding, despite plaintiff's allegations of wrongdoing, that "the court is . . . bound [by the presumption of regularity] to believe the affidavits of the Assistant Attorney General"), aff'd sub nom. Am. Pharm. Ass'n v. Dep't of Just., 467 F.2d 1290 (6th Cir. 1972).

438. See, e.g., Sec. & Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1388 (D.C. Cir. 1980) (permitting discovery in a subpoena challenge only if the plaintiff can raise doubts about the agency's good faith); Fed. Trade Comm'n v. Match Grp., Inc., No. 1:22-mc-54 (RJL/GMH), 2023 WL 3181351, at *18 (D.D.C. May 1, 2023) (same).

439. See, e.g., United States v. Zuskar, 237 F.2d 528, 534 (7th Cir. 1956) (finding that, though it "would be unrealistic to ignore [the] possibility that . . . subpoenas could become a device for pre-viewing and turning up" suspects, the presumption of regularity supports official acts).

440. The burden is often considered to require "clear evidence" that officials did not properly discharge their duties. See Gavoor & Platt, Presumption, supra note 426, at 753, 765.

441. Id. at 754.

ranks to the rank-and-file—violated the agency's rules, statutory constraints, and likely constitutional mandates. It shows widespread dysfunction, problematic exercises of discretion, and disregard for constraints in one of the only administrative subpoena regimes that has been studied in such a granular way.[442] And this vitiates the very basis of this presumption—the belief that agency officials can be presumed to act with discipline, competence, conscience, and good faith. Rather, it supports the assumption that there's a significant risk that administrators *have not* properly discharged their duties in the immigration and perhaps other subpoena regimes.

Of course, a single study does not mean that all administrative subpoena regimes should be presumed so problematic. Many regimes have more guardrails that may minimize and catch these abuses, including statutory and regulatory constraints,[443] different relationships between regulators and regulated parties,[444] and regulated parties' greater resources. But while this presumption may be justifiable when mechanisms for checks and input are more robust—especially when affected parties have greater legal resources and political power—this study suggests that it may be deeply misguided and more difficult to overcome in other, highly consequential domains.

As such, this examination offers a simple but important lesson for trans-substantive administrative subpoena doctrine: It suggests the need for a principle that, when there is evidence of systemic abuse in an agency's subpoena regime, that agency ought to lose the presumption of regularity for that scheme. After all, this presumption does not require courts to blindly defer in the face of conflicting facts,[445] and doing so would undermine the legitimacy of the presumption when it should apply. So when the data reflect widespread abuses of discretion in an agency's subpoena regime, courts should decline to afford the agency any initial presumption of regularity when it comes to its subpoena practice. This is particularly true given the time and resources that would be required of

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442. While this is the only such scholarly examination to my knowledge, some offices of inspectors general have investigated other regimes. See, e.g., Off. of Inspector Gen., DEA, A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Bulk Data 3–4 (Mar. 2019), https://oig.justice.gov/reports/2019/o1901.pdf [https://perma.cc/U8GV-5SL7]; Off. of Inspector Gen., DHS, Management Alert—CBP's Use of Examination and Summons Authority Under 19 U.S.C. § 1509 2 (Nov. 16, 2017), https://www.oversight.gov/sites/default/files/oig-reports/OIG-18-18-Nov17.pdf [https://perma.cc/Y26F-D3LZ].

443. See supra section I.C.

444. See, e.g., Shalini Bhargava Ray, Rethinking the Revolving Door 7–10 (May 21, 2024) (on file with the *Columbia Law Review*) (unpublished manuscript) (describing some of the benefits of the "revolving door" between regulators and regulated parties in other areas of administrative enforcement).

445. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–75 (2019) ("[Courts] are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977))).

parties attempting to rebut this presumption in individual cases.[446] Admittedly, it will not always be easy to know whether data reflecting irregularity are representative or how to weigh the trappings of regularity (e.g., guidance and systems) against evidence of problems in practice. But given the informational disadvantage that challengers face, their burden should be relatively low; this would still give agencies an opportunity to rebut, incentivize them to retain the records to do so, and at most, simply put the parties in "equipoise" when it comes to resolving the substantive challenge.[447]

The idea that a bad actor might lose the presumption of regularity is not wholly new. During the tumult of the Trump Administration, some scholars argued that the wide range of Trump-era irregularities provided strong evidence for rebutting the presumption or rethinking it entirely,[448] and at least one scholar suggested that it would warrant stripping the Trump Administration of deference "as a general matter across contexts and issues," at least until it was earned back.[449] In their seminal study of this presumption, Professors Aram A. Gavoor and Steven A. Platt resisted the notion of a "deference detention box" for particular administrative officials or actors, arguing that it lacks a limiting principle that would not politicize the judiciary, may require courts to decide issues not before them, and may not meaningfully change the standard of review.[450] But tying the loss of the presumption to a particular agency and scheme would not create the same risk of politicized judicial decisionmaking or extra-case fact finding because the determination would be task- and fact-based; it would not require courts to cast judgment on all actions of a public official or a presidential administration as a whole.

It's worth clarifying what, to Professors Gavoor and Platt's point, eliminating this presumption would actually do. For one thing, it would put the parties on a more even playing field in terms of burdens of proof

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446. It would be nearly impossible to document some of the problems described above in the short time between the receipt of a subpoena and the response deadline. Compare section II.A (documenting the years of litigation needed to obtain records), with Combined FOIA Data (showing that ICE often demanded information within three days, even "immediately" or "ASAP").

447. Michael J. Wishnie, "A Boy Gets Into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism, 97 B.U. L. Rev. 1709, 1771 (2017).

448. See, e.g., Ming Hsu Chen & Daimeon Shanks, The New Normal: Regulatory Dysfunction as Policymaking, 82 Md. L. Rev. 300, 353–54 (2023) (arguing that we should assume "predictable irregularity" and aim to prevent misuse of irregularities that lead to policymaking dysfunction); Leah Litman, Revisiting the Presumption of Regularity, Take Care Blog (Jan. 28, 2019), https://takecareblog.com/blog/revisiting-the-presumption-of-regularity [https://perma.cc/F53U-23KD] (identifying Trump-era irregularities that may rebut this presumption).

449. Dawn Johnsen, Judicial Deference to President Trump, Take Care Blog (May 8, 2017), https://takecareblog.com/blog/judicial-deference-to-president-trump [https://perma.cc/EH8V-TVRY].

450. Gavoor & Platt, Presumption, supra note 426, at 770.

by lifting the thumb on the scale for the agency.[451] Probably more importantly here, dispensing with this presumption would eliminate a significant obstacle to discovery for litigants challenging subpoenas.[452] To see why this matters, recall the *Gomez* litigation: the single instance in which a sanctuary jurisdiction (Denver) resisted the Trump Administration's subpoenas in court.[453] There, the court recognized that the challenged subpoenas could raise significant constitutional concerns if they were part of a larger effort to compel resources from state and local governments, but it rejected Denver's challenge because neither Denver nor the court knew that ICE was launching an initiative to use subpoenas precisely that way. Had Denver been permitted discovery that would have allowed it to uncover that information, the outcome in that case (and other sanctuary jurisdictions) might have looked very different.

To be sure, more inquiry into process would add some delay and costs to the use of some subpoenas. But that could be reduced by using the independent government investigations and audits of these schemes that the next section recommends.[454] In addition, raising the costs of these demands to some degree could have important benefits.[455] And finally, agencies' desire to streamline decisions on this question and demonstrate that they have earned a presumption is all the more reason for agencies to develop and retain evidence of practice. In sum, eliminating the presumption of regularity based on an agency's track record would have multiple practical advantages, including reducing the asymmetries that can doom meritorious subpoena challenges and increasing the odds of meaningful judicial review.

B. *Internal Administrative Law*

That said, considering the vast amount of regulatory action that is never subject to judicial review, scholars have increasingly turned to internal administrative law as a source of order and constraint.[456] As Professors Gillian Metzger and Kevin Stack explain, this source of law—the "processes, guidelines, and policy issuances" created by the agency (or the executive branch) to "structure the actions of [their] own officials"—

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451. See Wishnie, supra note 447, at 1771 (arguing that elimination of the presumption of regularity—for veterans applying for a discharge upgrade—would put the "burden of proof" in "equipoise").

452. See supra note 438 and accompanying text.

453. See supra notes 363–366 and accompanying text.

454. See John Doe, Inc. v. Mukasey, 549 F.3d 861, 879–80 (2d Cir. 2008), as modified (Mar. 26, 2009) (relying on an OIG report finding that an agency violated the law and internal guidelines and then concluding that the risk of administrative error was significant and required an adequate judicial review procedure).

455. See supra note 404 and accompanying text.

456. See, e.g., Metzger & Stack, supra note 424, at 1240–41; Walker & Turnbull, supra note 424, at 1231 (encouraging the exploration of internal administrative law as a source of constraint).

holds real promise for administrative governance.[457] As they describe it, this type of internal law can instill "traditional rule-of-law values of consistency, certainty, transparency, and reason giving" and play a valuable role in constraining agency action.[458] And this instinct toward internal administrative law may be especially strong when considering agencies' investigative power, where judicial review is notoriously relaxed and enforcement discretion is at its apex.[459]

But major questions remain about internal administrative law in the trenches.[460] Indeed, Professor Christopher Walker and Rebecca Turnbull recently underscored this point when it comes to agency enforcement, observing the need for more work in this arena and calling for "a more-sustained scholarly inquiry" into internal administrative law's "effectiveness in constraining agency overreach" in particular.[461]

This Article responds to that call but suggests that the prospects for internal administrative law—at least from within the agency—may be dim in some enforcement spaces. The immigration subpoena regime can claim at least some features of internal administrative law: management structures; some internal, "centrally generated" guidance; and high-level decisionmakers (i.e., subpoena-issuers).[462] It's of course possible that there's just not enough, that more centralization, guidance, and leadership involvement could resolve some of these problems. But that seems unlikely to ameliorate the larger concerns about how the agency uses its discretion in this context. After all, the decisions to *not* mandate restraint, to *not* use tracking software, to *not* conduct oversight, to generally *not* provide guidance, and to *not* prohibit issuing subpoenas to sensitive locations were all choices—ones made by leadership at that. And while some top-down direction (e.g., the initiative to target sanctuary jurisdictions) did achieve some consistency and predictability, that only created additional cause for concern about ICE's decisionmaking and use of discretion. In short, this study suggests that, in some enforcement spaces, the problems may go far beyond compliance and systematization and be—as they were here—as much top-down as bottom-up. Ultimately this study provides reason to doubt the potential for internal administrative law from within the agency to constrain overreach in the immigration scheme and administrative regimes with similar features. In this sense, it builds on the observations of Professors Shalini Bhargava Ray, Emily

457. Metzger & Stack, supra note 424, at 1248.

458. Id.

459. See id. at 1278.

460. See id. at 1307; see also Emily S. Bremer & Sharon B. Jacobs, Agency Innovation in *Vermont Yankee*'s White Space, 32 J. Land Use & Env't L. 523, 542 (2017) (describing potential future lines of research).

461. Walker & Turnbull, supra note 424, at 1229.

462. Metzger & Stack, supra note 424, at 1256. Most subpoenas produced were issued by assistant field office directors—high-level officers. See Combined FOIA Data (recording the title of issuing officers).

Chertoff, and others that traditional administrative law principles may not map well onto the immigration and other police-like regimes.[463]

Yet internal administrative law interventions from outside the agency may offer more hope. The immigration subpoena scheme—and others that can impose similar harms—should, at minimum, be monitored and audited by independent, non–law enforcement officials, in some ways similar to the audits Congress mandated for NSLs (under amended NSL statutes) after the early aughts litigation raised serious concerns.[464] These monitors and audits should review and publicly report on agencies' compliance with recordkeeping and other procedural requirements as well as the legal validity of their subpoenas and the agency's use of discretion.[465] This examination should also prompt the Administrative Conference of the United States (ACUS) to study and issue recommendations for investigative administrative subpoenas—focusing on regimes that can impose harsh penalties on individual people.[466] And this study counsels in favor of externally imposed mandates requiring agency consideration prior to, and reasoned explanations for, subpoena decisions.[467] These mandates should require agencies to evaluate the impact of subpoena use beyond the enforcement mission, including the effect on targets' rights, risks of burdening access to essential services, and ramifications for state and local interests.[468] That's because, while the

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463. See, e.g., Emily R. Chertoff, Violence in the Administrative State, 112 Calif. L. Rev. 1941, 1957–59 (2024); Shalini Bhargava Ray, Immigration Law's Arbitrariness Problem, 121 Colum. L. Rev. 2049, 2110 (2021).

464. See, e.g., USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006) (requiring OIG audits of the FBI's use of NSLs).

465. Providing the public with more information about agencies' practices is an important first step in broadening opportunities for input, but affording meaningful input opportunities may also require creating new mechanisms. See Michael Sant'Ambrogio & Glen Staszewski, Democratizing Rule Development, 98 Wash. U. L. Rev. 793, 813, 842–43 (2021) (describing ways to improve meaningful public access in rulemaking); see also Christopher S. Havasy, Relational Fairness in the Administrative State, 109 Va. L. Rev. 749, 787 (2023) (outlining important considerations for ensuring "relational fairness" between agencies and affected persons).

466. Encouragingly, ACUS launched a study on agency investigative procedures last year. Agency Investigative Procedures, Admin. Conf. U.S., https://www.acus.gov/projects/agency-investigative-procedures [https://perma.cc/RJ4D-97U8] (last visited Sept. 15, 2024).

467. See Bijal Shah, Administrative Subordination, 91 U. Chi. L. Rev. 1603, 1650–51, 1655 (2024) (examining how agencies subordinate regulated parties' interests to institutional priorities, for example, efficiency and costs, and recommending detailed reason-giving guidance as a potential solution). To balance agency resource and time constraints, it seems possible that, at least in some circumstances, this could be done categorically instead of subpoena by subpoena.

468. See Shah, supra note 467, at 1650–51, 1655; see also Anya Bernstein & Cristina Rodríguez, The Accountable Bureaucrat, 132 Yale L.J. 1600, 1668 (2023) ("[P]olicymaking in a democratic polity requires that government actors provide reasoned justifications for

decision to issue an investigative subpoena is in some sense an initial, exploratory step in an enforcement action, it's also a decision on its own—one that can have radiating effects and far-reaching harms.

Finally, this study offers insights as others take up Walker and Turnbull's call for inquiry. It first highlights the potential to be misled by the facade of internal administrative law—for example, policy memoranda, processes, and high-level decisionmakers—while missing the lawlessness in practice. That is, it shows just how important it is to look beyond certain markers of internal administrative law and to wade through case records, forms, and other indicia of practice to study internal administrative law in action. Second, it shows the exceptional obstacles that external actors face in doing so, demonstrating the need for the government to facilitate these inquiries and for more scrutiny from independent, non–law enforcement government actors.

C. *Limits Beyond Law*

Yet one of the most effective constraints on overreach and abuse may lie outside the law. Limiting legislative amendments, regulatory self-restraint, and robust judicial policing could offer important victories, but generally require resources and lawyers already in too short supply. This study ends by surfacing some alternative and powerful ways that the public can help shape this type of agency decisionmaking: by making it less easy, less cheap, and more public—in short, by forcing law enforcement to bear greater costs from using this tool.

This study—and the silence surrounding this regime—indicate that ICE generally faces little resistance even to fairly obviously unlawful demands.[469] But this study also suggests that, when pushback happens, it may powerfully affect agency practice. Compare, for example, the recent immigration subpoena experiences in Chicago and San Diego. Although the Chicago field office had issued subpoenas to law enforcement covered by Illinois's sanctuary law for nearly two years, the federal government recently represented that ICE stopped doing so in or after the fall of 2021 because of a governing sanctuary law.[470] But the Chicago field office had been issuing subpoenas to Illinois law enforcement not only in spite of, but *because of* Illinois' sanctuary law,[471] and it appears that Illinois law

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their choices and that those choices . . . take into account the needs and views of affected publics . . . .").

469. See, e.g., 2021-ICLI-00047, at 2169–70 (showing a subpoena canceled by ICE after the target complied prior to service); CAPHQ Log, supra note 179 (showing a high compliance rate).

470. See supra note 335.

471. See, e.g., 2021-ICLI-00047, at 2923–24 (explaining that Illinois's sanctuary laws preclude notification to ICE prior to release of the target and justifying the subpoena by saying that the target was in the Illinois Department of Corrections' custody); see also supra section II.D.

enforcement generally complied.[472] So what caused this sudden change? It is difficult to be certain, but emails between ICE and Illinois officials suggest that ICE changed its position because Illinois law enforcement changed its response: Illinois employees started raising questions and pushing back.[473] That starkly contrasts with the experience of the San Diego field office, whose primary subpoena recipient is a local sheriff's department that has chafed against California's sanctuary law and has been a willing subpoena participant.[474] And, perhaps relatedly, the San Diego field office now issues the most subpoenas to sanctuary law enforcement of any ICE office in the dataset.[475] Or, as another example, consider the developments in Dallas. After employers who received subpoenas from the Dallas field office told their employees about the subpoenas, the Dallas field office stopped issuing subpoenas entirely.[476] Though limited, these anecdotes imply that recipient pushback—even outside of courts and Congress—can significantly affect agency practice.

It is not clear whether this pushback forced ICE to reconsider legal risks, norms, or simply the costs of doing business via subpoena. But regardless, these experiences suggest a powerful way to help shape a previously impenetrable regime. And this, in turn, indicates that education and pressure may be valuable parts of remedying overreach in administrative subpoena practice. Education is critical to ensure that recipients know that they can question subpoenas and raise challenges. It would also help recipients understand that ICE-issued gag orders are likely unlawful and unenforceable. Pressure—from political advocacy to boycotts—may be important to persuade unmotivated recipients to actually exercise those rights. And these strategies can be important to foster productive pushback not only when subpoenas are formally issued but also in the space law rarely mediates: the instances in which recipients are intimidated into "voluntarily" complying with agencies' informal but forceful demands.

But strategies to limit rather than proceduralize the use of these subpoenas could understandably raise questions about the risk of diminishing an agency's access to information. In many contexts, the

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472. See, e.g., CAPHQ Log, supra note 179.

473. See 2023-ICLI-00031, at 148–49 (noting, in April 2021, that the Illinois Department of Corrections was reevaluating its policy and raising questions about how the target fit within ICE's prosecution guidelines); id. (reporting that ICE was not seeking to sue regarding the subpoena even though it was a high priority case).

474. See 2021-ICLI-00047, at 6349, 6354–55 (noting that, even after California's prohibitory sanctuary law was signed into law in 2017, the San Diego Sheriff's Office "continued to notify [the San Diego field office] regarding inmates being released from county custody" until 2019); see also Nash, Violating Sanctuary, supra note 230, at 7 (discussing the office's pushback against the California sanctuary law).

475. See Combined FOIA Data.

476. Stipulation and Proposed Order, supra note 10, at 2 (confirming that the Dallas field office stopped issuing subpoenas because employers had informed employees about records subpoenas).

impulse might be to consider whether there are other, better alternatives to allow agencies to get this information: Is there another way to ensure agency access to this information while minimizing problematic consequences? But another question we might ask focuses on the alternative of the agency not getting the particular piece of information it seeks: What are the potential social and individual costs of the agency's demands, and what are the costs if the agency doesn't get it? This Article shows a regime in which the social and individual harms can be extensive, reverberating, and potentially irreparable. And one where the value of the information—often details that make it easier and cheaper for the agency to execute civil arrests—is comparatively low.[477] As such, the more reasonable alternative in those circumstances is accepting the risk that the agency may not get the details that make enforcement easiest or cheapest. This calculus will be different in other contexts with different externalities and social costs. But this type of consideration—and the availability of other meaningful opportunities for input—should, and presumably would, inform the extent of public and recipient pushback. Ultimately here, in a regime otherwise insulated from judicial, media, and public scrutiny, introducing some justified and productive friction could have enormous benefits.

CONCLUSION

In sum, the federal government has used the immigration subpoena power to violate some of the most sacred spaces and relationships in our communities in its effort to detect, detain, and deport. It has used these subpoenas to neutralize efforts—by states and municipalities—to divest from immigration enforcement; burden people's access to essential survival services; and undercut one of the most significant immigrant-protective movements of our time.

Yet, as this Article has shown, this past need not be prologue. Shedding light on these tactics reveals the widespread violations and problematic practices that permeate this regime and empowers the many parties affected by these abuses to impose meaningful constraints. It also offers broadly applicable lessons about the extent to which high-level subpoena doctrine applies—or doesn't—on the ground, particularly in regimes focused on enforcement against historically marginalized populations who often lack resources and political power.

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477. It appears ICE can often use other techniques to obtain location information if it believes it important enough, even if doing so is more resource intensive. Off. of the Inspector Gen., DHS, OIG-20-13, Immigration and Customs Enforcement's Criminal Alien Program Faces Challenges 6, 9 (2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-02/OIG-20-13-Feb20.pdf [https://perma.cc/BX9H-YGXQ] (explaining that arrests become more costly without this information, but not suggesting that they become impossible).

APPENDIX

This Appendix provides additional detail on the data analyzed in this Article. While the Article summarizes how the underlying agency records were obtained from ICE through FOIA requests and litigation and this Article's methodology for analyzing them, this Appendix offers a detailed description of how the data were extracted, coded, and analyzed.

A. *Obtaining the Data*

To obtain information about the immigration subpoena practices of ERO, I submitted and ultimately litigated two FOIA requests. The first FOIA request sought data reflecting the immigration subpoenas that ERO issued to state and local governments from 2003 onwards.[478] But due to the nature of the records that contained this information, negotiations and partial settlement agreements for particular searches,[479] and ICE's FOIA processing practices, the records that ICE produced in litigation were not limited to subpoenas to state and local entities. Specifically, because ICE was required to produce full subpoena logs rather than only portions responsive to the state- and local-government-focused FOIA request, the data drawn from logs were not limited to subpoenas to state and local government entities. Since seven of the fifty-nine field office and suboffice logs only contained subpoenas to subfederal government entities, I sought to confirm whether ICE produced the full logs; ICE reissued one of those logs in full and confirmed that the remainder were the full, unabridged logs.[480] When it comes to individual subpoena forms, ICE does not appear to have limited its production to state and local entities either; the forms produced include subpoenas issued to a wide range of entities from the private, federal, and nonprofit sectors.

The second FOIA request was focused on internal policies and procedures. Specifically, it sought (1) guidance regarding the standards, procedures, and requirements that govern (and limit) ICE employees' issuance of administrative subpoenas and (2) guidance regarding any requirements and standards that ICE officers must follow in recording the issuance of these subpoenas and any responses to these subpoenas.[481] Given the nature of ICE's dissemination of internal policies and directives,

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478. See Complaint exh.A at 1–2, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed May 12, 2021).

479. For example, following ICE's consistent difficulties in identifying comprehensive records from field offices, one partial settlement agreement required subpoena-issuing ERO officers at seven ERO field offices to search their email for all records from January 1, 2021, to November 30, 2023, that contained the term "I-138" (the immigration subpoena form number); this agreement and the resulting productions were not limited to subpoenas to state and local government entities. See Stipulation and Order at 2–3, *Nash I*, No. 21-cv-4288 (S.D.N.Y. filed Dec. 1, 2023), ECF No. 44 [hereinafter *Nash I* Stipulation and Order].

480. Stipulation and Proposed Order, supra note 10, at 2 (confirming that the field office logs are complete).

481. Complaint exh.A at 1, *Nash II*, No. 23-cv-6994 (S.D.N.Y. filed Aug. 8, 2023).

the request sought not only formal policies but also informal guidance contained in emails, trainings, and the like.

These requests generated a large amount of data about ICE's immigration subpoena use and practices. In response to these requests, ERO produced aggregate data (fifty-nine unique logs from nineteen of its twenty-five field offices and suboffices[482] and two versions of a headquarters-level log[483]), and other primary documents (including 705 individual immigration subpoena forms (I-138 forms) and related internal communications). Together, these data reflect the details of 3,159 immigration subpoenas issued between 2007 and 2023.[484] For the reasons described in this Article, the limits of ERO recordkeeping mean that these data may not necessarily reflect the frequencies of nationwide use.[485] It also meant that, at times, it was impossible to determine or even extrapolate the frequency, geographic reach, or temporal scope of certain occurrences in the data. Nevertheless, this large dataset provides a powerful view of how ERO has wielded the immigration subpoena power and reveals a number of highly consequential patterns and practices.

In response to the second request, ERO produced records that included previously undisclosed policy memoranda, numerous communications among agency staff, and some communication between agency staff and subpoena recipients. In addition, ERO provided significant information about its immigration subpoena regimes through communications in the course of the FOIA litigation.

B. *Compiling the Data*

Using the forms and logs produced by ICE, I created a comprehensive, original dataset that compiles data about the immigration subpoenas that ERO has issued since 2007.[486] To create this original

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482. The field offices and suboffices that retained the logs are all part of ERO, which primarily issues subpoenas for civil immigration enforcement. See Stipulation and Proposed Order, supra note 10, at 2 (confirming that the majority of subpoenas ERO issues are for civil immigration purposes).

483. The only log of ERO-issued subpoenas that ICE identified in the custody of its headquarters was one dedicated to tracking subpoenas against sanctuary jurisdictions. See CAPHQ Log, supra note 179.

484. Redactions in the final set of subpoena forms and logs were fairly minimal. With respect to the subpoena forms and logs, ICE generally redacted personally identifying information (including names, addresses, and unique identifying numbers). See, e.g., 2021-ICLI-00047, at 11–12 (showing these redactions). In many cases, ICE redacted the subpoena tracking number—the purportedly unique tracking number that ICE assigns to each subpoena—as well. Id. Despite the name "tracking" numbers, these numbers often did not allow ICE to track the subpoena to the underlying case or associated target of the subpoena.

485. In some instances, multi-year field office logs do appear to provide an indication of frequency and issuance trends for specific jurisdictions and time periods. See, e.g., Washington Logs (providing logs by fiscal year from 2008 to 2023).

486. All logs and all but four of the forms were produced as a result of the FOIA litigation described above. The other four subpoena forms were obtained from filings in

dataset, I constructed two subsets of data: one from subpoena forms (I-138 forms, which had relatively more information about each subpoena) and one from subpoena logs maintained by ERO headquarters and field offices.[487]

To create the dataset from the subpoena forms, my research assistants and I recorded eleven types of information from each of the 705 subpoena forms. I checked this information against the subpoena forms and coded it for the following variables (described as necessary in more detail below):

(1) name of the recipient;
(2) function of the subpoena recipient;
(3) whether the subpoena was issued to a subfederal (i.e., state, county, or municipal) government versus a private, federal, or "other" (generally nonprofit) entity;
(4) field office that issued the subpoena;
(5) position of the ICE officer who issued the subpoena;
(6) date associated with the subpoena (generally when it was issued or, if not available, when it was served);
(7) whether the subpoena was issued in connection with a criminal or civil (at times described as "administrative") investigation;
(8) nature of the records or testimony sought;
(9) whether the subpoena sought address/location information and, if so, what type;
(10) whether the subpoena imposed a nondisclosure order upon the recipient, requested nondisclosure, or sought neither; and
(11) time period (in days) between the date the subpoena was issued and the deadline for the recipient's response.

I used a similar process to create the dataset from the subpoena logs. My research assistants and I compiled data from each of the fifty-nine unique subpoena logs. I then coded this dataset for variables (1)–(8); the logs did not contain sufficient data to code for variables (9)–(11). The log dataset also contains data, if available, regarding recipients' compliance with subpoenas.

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recent subpoena enforcement actions. See, e.g., Declaration of Kimberly M. Joyce in Support of Respondents' Motion to Dismiss the Petition for Mootness exh.A at 1, United States v. City of New York, No. 1:20-mc-00256 (E.D.N.Y. filed Feb. 18, 2020), ECF No. 7-1 (attaching one such subpoena).

487. The dataset includes entries for unique subpoenas produced pursuant to the above-described FOIA litigation from July 2021 through July 2024. Because ICE was unable to find some of the specific subpoena forms that it was required to produce, ICE produced a set of more than fifty subpoena forms in August 2024 in an attempt to resolve the dispute. See August Joint Status Update, supra note 171, at 1–2. But because many of the subpoenas appeared to be merely duplicates of previously produced subpoenas and because of the limits of the production timeline for this Article, the unique subpoenas (if any) in that production were not included.

I also attempted to fill in any gaps in the form and log information. For example, because many of the logs did not contain the name of the field office that issued the subpoenas, I obtained a list from ICE that correlated the logs to their respective field offices through a partial settlement of certain disputes in the FOIA litigation.[488] I merged the field office names from that list with the dataset. Similarly, because some of the logs contained only the locations of the local ICE offices rather than the corresponding field office, I used an ICE-generated map to identify the relevant field offices.[489] Likewise, in instances in which the subpoena forms did not contain the location of the local ICE office that issued them, I identified the issuing ICE office using the area code of the phone number that the issuing office provided on the form. And, since some of the subpoenas and many of the logs contained only partial names, acronyms, and even illegible text where they should have indicated the subpoena recipient, I used a variety of methods to obtain this information. I negotiated a separate partial settlement agreement with ICE requiring it to provide additional information to confirm some pieces of missing information.[490] (This was complicated by the fact that, in many instances, ICE was unable to find subpoena forms or, in some cases, even identify the underlying cases associated with subpoena log entries.) In other instances, I was able to reasonably infer missing, partial, or ambiguous data points by searching the acronym and location of the issuing field office, the recipient address, etc., to identify those recipients. When I was not able to obtain the information to make these reasonable inferences, the data points were coded as "unknown."

In producing records under FOIA, ICE uses technology that assists it with "de-duplication" to remove duplicate records prior to production.[491] But since productions may nevertheless contain duplicates, I took significant measures to identify and remove them. I reviewed each subpoena form for duplicates and removed all subpoenas that I thought

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488. See Nash v. ICE, Project ICE (on file with the *Columbia Law Review*) (providing a corresponding field office for portions of the production). ICE had difficulty determining which subpoena log was from which field office, and twice produced lists that it later recognized were incorrect. The final list ICE produced appears to be accurate, except that it incorrectly attributes the Buffalo field office's log to the Boston field office. Using details in the hard copies of the subpoena forms and the logs, I was able to match the underlying subpoenas to the entries in the log; the forms indicate that the subpoenas in that log were issued by high-level officers in the Buffalo field office, so I coded it as a Buffalo field office log.

489. ICE, 2022 Report, supra note 205, at 3.

490. For example, the Boise suboffice log indicates that it sent certain subpoenas to "DOL." See Boise log. I was able to identify this as the Idaho Department of Labor based on the office's regular use of subpoenas to the Idaho Department of Labor and by obtaining two of the underlying "DOL" subpoenas through a negotiated agreement with ICE.

491. DHS, 2024 Chief Freedom of Information Act Officer Report Submitted to the Attorney General of the United States 31 (2024), https://www.dhs.gov/sites/default/files/2024-07/24_0729_PRIV_2024-Chief-FOIA-Officer-Report.pdf [https://perma.cc/LG35-6TXJ].

were likely to be duplicates based on my comparison of the text of the subpoenas, dates issued, subpoena tracking numbers (when ICE did not redact them), and other details. To guard against double-counting a single subpoena that appears in both the form and log datasets, I manually searched for each form subpoena in the log dataset and removed (from the log dataset) entries that I believed were likely duplicates. Nevertheless, because (1) ICE redacted personally identifying information and most of the unique tracking numbers assigned to subpoenas and (2) the logs contain sparser details, I could not identify duplicates with complete certainty. This was particularly difficult for field offices that regularly subpoena the same entities.[492] For the vast majority of this process, however, the available information was sufficient.

In creating the dataset, I generally removed the (few) subpoenas marked as not having been served or as having been canceled. The only exceptions to this were the few instances in which the subpoenas were canceled post-issuance because the threat of the subpoena produced the same result.[493] I included those subpoenas because they were issued and served their purpose, even if they were technically canceled after the fact. Of course, the scope of the FOIA litigation did not include the subsequent history of each subpoena issued (nor does it appear that ICE could have produced all of the subpoenas' subsequent histories since it could not find the subpoena forms or associated case file for some entries in the logs). Given that, it is possible that other subpoenas were subsequently modified or withdrawn. I also removed one subpoena form in which, due to redactions, it was not possible to discern the subpoena recipient *or* the type of subpoena request, making it essentially impossible to extract any useful information from the form.[494]

Finally, it is important to note that some of the subpoena forms that ICE produced are incomplete. In some cases, the subpoenas issued by certain field offices do not contain signatures from the issuing officers. In other cases, the subpoena forms are signed, but the certificates of service are not filled out. To determine whether this was a flaw in ICE's recordkeeping or an indication that ICE ultimately did not issue the subpoena, I (1) checked to see whether other records (such as the logs) indicated that subpoenas like this were nevertheless issued and served or (2) obtained final, issued versions of subpoenas from these field offices through a partial settlement agreement with ICE.[495] (This second method

492. For example, the Chicago field office produced a log that did not contain dates related to individual subpoenas. See Chicago Log. Since that field office frequently subpoenaed the same state law enforcement agency, it was impossible to know whether the undated subpoenas were unique or duplicates of the Chicago field office–issued subpoenas reflected in the CAPHQ Log, so that spreadsheet has not been added to the dataset.

493. See, e.g., 2021-ICLI-00047, at 2169–70 (emails reflecting target compliance following the threat of a subpoena).

494. 2021-ICLI-00047, at 104.

495. See, e.g., *Nash I* Stipulation and Order, supra note 479, at 2–3.

of verification was complicated by ICE's inability to find some subpoena records.[496]) These inquiries generally indicated that some field offices had a practice of saving unsigned copies of subpoenas even when they did indeed issue the subpoenas. Given the results of these checks and the fact that the underlying FOIA request sought only subpoenas that had been actually issued by ERO, I concluded that the absence of a signature did not mean that the field office did not issue or serve the subpoena.[497]

C. *Coding Subpoena Recipients*

To understand the types of entities from which ERO demands information and other assistance, I coded subpoena recipients in two ways. First, I coded them by function category. To provide just a few examples of how I categorized recipients by function, the "Social Media/Email Providers" category includes entities like Facebook and Myspace. The "Financial" category includes institutions such as banks and credit unions. The "Businesses Other" category includes a range of businesses from Lyft to hotels to medical facilities to insurance providers. Second, I categorized subpoena recipients according to their sector, coding them as one of the following: private entity; federal entity; state or local entity; "other" (which includes nonprofit entities); and "unknown."

It is worth noting that, at times, some entities could be subpoenaed in connection with their public-facing function, for example, as a hotel or medical care provider, or in connection with their role as employers. To disaggregate the two, I coded entities as "employers" when they were subpoenaed in connection with records about an employee and by their public-facing function in all other cases.[498] In some instances (largely in the logs), the absence of detail about the demand made it difficult to know whether the entity subpoenaed was subpoenaed in its capacity as an employer or as a business. In those cases, I coded the entity by its function. As a result, Figure 1 may underestimate the proportion of subpoenas that were issued to entities in their capacity as employers.

In categorizing the subpoena recipients, I also relied on information that I gleaned from the dataset as a whole. For example, the data showed that subpoenas to entities such as apartment complexes and real estate management companies virtually always sought information about tenants and, as a result, were issued to them in their capacity as landlords. Accordingly, I coded subpoenas to these entities as "landlord" subpoenas

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496. Id.

497. This conclusion is also informed by other aspects of ICE's immigration subpoena practice that reflect a lack of attention to detail in subpoena issuance and recordkeeping. This includes, for example, instances in which the subpoena's return date precedes the date the subpoena was served or even issued.

498. I concluded that entities were subpoenaed in their capacity as employers based on the substance of the demands, for example, demands for I-9 (employment eligibility verification) forms, employee work schedules, and "identity docs."

even when the logs did not explicitly state the type of information sought from them. Similarly, when the subpoena log indicated that it sought personnel records (such as an I-9 form), but did not list the employer, I coded those subpoenas as subpoenas to private entities because virtually all of the employer subpoenas that were clear in the data were issued to private rather than governmental employers. I also used field office–specific practices to make inferences.[499] This same logic applies to instances in which tenant info was subpoenaed; because the available data indicated that all subpoenas that sought tenant information sought it from private landlords, I coded subpoenas seeking tenant information as subpoenas to private actors. Of course, this research and these inferences did not allow me to reasonably infer the function of every subpoena recipient. In those eighty-two cases, I coded the function as "unknown."

D. *Dating Subpoenas*

To understand changes in subpoena-issuing practices over time, the dataset reflects (and Figure 2 charts) the subpoena data by year. In most cases, the year was recorded based on the date that the subpoena was issued. In some cases, ERO only recorded the date that the subpoena was served upon the recipient or the "return date," that is, the date that the recipient was obligated to respond to the subpoena. In those instances, I used the year of the service date if available and, if not, the year of the return date. I concluded that this method was appropriate because the records indicated that subpoena return dates were typically close to the date of issuance (often between three days and three weeks from the date of issuance) and that the service date was generally even closer to the date of issuance.

In certain instances, ERO officers neglected to record any date associated with the subpoena in the logs. In some of those instances, I could infer the date based on when they were recorded in a chronologically arranged log. In some instances, I was not able to reliably infer return, service, or issuance dates associated with subpoenas (for example, the subpoenas recorded by the El Paso field office). Those subpoenas are therefore not included in Figure 2's visualization of subpoena use over time.

E. *Immigration Subpoenas to State and Local Law Enforcement*

The table below reflects field office issuance of subpoenas to state and local law enforcement before 2019 and from 2019 on, drawn from both

499. For example, many field office logs consistently used the term "work history" and "employment history" to describe employment-related records sought from state departments of labor whereas they used terms like "I-9" and "identity docs" to describe information sought from private employers. By contrast, the Washington field office appeared to use "employment records" mostly or exclusively when seeking them from employers, so I coded those as requests to private employers. See Combined FOIA Dataset.

the self-reports provided by most field offices in internal agency emails and from subpoena-issuance records.[500] These data reflect the use of subpoenas in the covered periods, but may not reflect current practice. The data below also do not generally reflect the volume of subpoenas issued during these periods, which varied significantly across field offices in the dataset. These data also pertain to ERO's field offices, but as discussed below, the practices of suboffices within the jurisdiction of those field offices may vary.

TABLE 1. CHANGE IN ERO FIELD OFFICE ISSUANCE OF SUBPOENAS TO STATE AND LOCAL LAW ENFORCEMENT

Field Office	Pre-2019	2019 to Present
Atlanta	No	Yes
Baltimore	Yes	Yes
Boston	No	Yes
Buffalo	Yes	Yes
Chicago	Unknown	Yes[501]
Dallas	Likely Not	Likely Not
Denver	No	Yes
Detroit	Likely Not	Likely Not
El Paso	No	Yes
Harlingen	Unknown	Unknown
Houston	Unknown	Unknown
Los Angeles	No	Yes
Miami	No	Likely Not
Newark	Likely Not[502]	Yes
New Orleans	No	Unknown

500. For purposes of this table, "state or local law enforcement" refers to state or local government entities conducting law enforcement within the criminal legal system, such as police, jails, prisons, correctional departments, and probation departments.

501. The Chicago field office used immigration subpoenas regularly during the Trump Administration and into the Biden era. See, e.g., CAPHQ Log, supra note 179; 2021-ICLI-00047, at 2928, 2931 (subpoenas from 2021). In litigation, the government represented that the Chicago field office stopped issuing immigration subpoenas at some point after September 2021. See Stipulation and Proposed Order, supra note 10, at 2.

502. When asked in 2019 whether it then issued subpoenas to state and local field offices in 2019, the Newark field office answered "maybe," and indicated that it may start to do so. 2021-ICLI-00047, at 2325.

New York City	Yes	Yes
Philadelphia	No	Yes
Phoenix	No	Unknown
Salt Lake City	No	Unknown
San Antonio	No	Likely Not
San Diego	No	Yes
San Francisco	No	Unknown
Seattle	No	Yes
St. Paul	Yes	Yes
Washington	Yes[503]	Yes

Pre-2019. In general, field office self-reports were consistent with the available data. As long as the data did not deviate by more than three subpoenas from the field office's self-report, I accepted (and used) the field office's self-report as a statement of its general policy and practice.[504] In one instance, however, the data diverged by more than three subpoenas from the office's self-report; in that case, I relied on the practice reflected by the data.

The records produced did not contain a self-report from all field offices regarding the issuance of subpoenas to state and local law enforcement. When the record did not provide the field office's self-report, I concluded that a field office did "likely not" issue subpoenas pre-2019 if ICE produced records from that field office from that time period and there was no evidence that they issued subpoenas to state or local law enforcement during that time (and in consideration of ICE's statements that ICE had historically not issued subpoenas to state and local law enforcement). In some instances, the field office did not produce any data or self-reports for the pre-2019 period; in those instances, I coded the practice as "unknown."

503. In 2019, the Washington field office reported that it did not issue subpoenas to state and local law enforcement, but the data show that it had issued at least eight such subpoenas before 2019 (including several in each of 2016 and 2017). Compare 2021-ICLI-00047, at 2326 (claiming the Washington field office does not issue subpoenas to state and local law enforcement agencies), with, e.g., Washington Logs Fiscal Year 2016–2017 (showing several such subpoenas).

504. Note that two field offices (Miami and Boston) reported in 2019 that they did not issue this type of subpoena, but the data show that the Hartford suboffice of the Boston field office had independently issued subpoenas to state and local law enforcement before then and that the San Juan suboffice of the Miami field office may have done so, depending on the capacity in which it subpoenaed the Puerto Rico Institute of Forensic Science. See Hartford suboffice log (showing subpoenas issued by the Hartford suboffice from 2013 to 2015 to, among others, police departments and correctional centers); 2021-ICLI-00047, at 5350–52 (San Juan suboffice log).

2019 to Present. For purposes of this table, I concluded that field offices did issue subpoenas if they issued two or more subpoenas to state or local law enforcement during this period. I concluded that field offices did "likely not" issue this type of subpoenas from 2019 on if (1) I had relatively comprehensive-appearing logs reflecting the field office's subpoena use for that period and there was no evidence that it issued such subpoenas in that period or (2) other information (such as the government's representations in litigation) indicated that the field office did not issue subpoenas in that period. In some instances, the field office did not produce any data or produced only obviously incomplete data for the post-2019 period; in those instances, I coded the practice as "unknown."

NOTES

READING MINDS: THE MENS REA REQUIREMENT FOR ATA AIDING AND ABETTING LIABILITY IN LIGHT OF *TWITTER, INC. V. TAAMNEH*

*Alexei Mentzer**

The Antiterrorism Act (ATA) enables injured parties to sue "any person who aids and abets, by knowingly providing substantial assistance, . . . an act of international terrorism [committed by a designated foreign terrorist organization]." In the Supreme Court's 2023 Twitter, Inc. v. Taamneh *decision, the Justices considered the elements of a secondary liability claim under the ATA. While ultimately resolving the case based on the foundational tort principle that liability does not usually extend to inaction or nonfeasance, the unanimous Court also discussed the mens rea requirement for ATA aiders and abettors, noting that courts should view this requirement in light of the common law development of secondary liability.*

But common law aiding and abetting cases have rarely been lucid, and courts—including the Supreme Court in Taamneh*—have referenced a similar collection of precedents to support meaningfully different mens rea tests. Much ink has been spilled over this confusion in the criminal law context, and in the wake of* Taamneh*, a similar puzzle now applies to the ATA.*

This Note provides a path forward, proposing a sliding scale for lower courts to apply when interpreting Taamneh *and adjudicating ATA claims. By organizing the ATA's mens rea and level of assistance prongs on a sliding scale, with a weaker showing of one demanding a stronger showing of the other, courts can ensure that the ATA fulfills its critical mandate: deterring terrorism, compensating injured victims, and crippling terrorist organizations, all without impeding ordinary business activities.*

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INTRODUCTION

On April 8, 2019, President Donald Trump designated the Islamic Revolutionary Guard Corps (IRGC) as a "Foreign Terrorist Organization" (FTO) under Section 219 of the Immigration and Nationality Act.[1] Initially established to defend the Iranian government from external and internal threats in the aftermath of the 1979 Revolution,[2] the IRGC has developed into "the most powerful controller of all important economic sectors across Iran."[3] IRGC subsidiaries built the Tehran–Tabriz railway, the

1. See Press Release, Donald Trump, U.S. President, Statement From the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization (Apr. 8, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-designation-islamic-revolutionary-guard-corps-foreign-terrorist-organization/ [https://perma.cc/XCT3-8SZV].

2. CFR.org Eds., Iran's Revolutionary Guards, Council on Foreign Rels., https://www.cfr.org/backgrounder/irans-revolutionary-guards [https://perma.cc/NFD2-DFS3] (last updated Nov. 12, 2024).

3. Munqith Dagher, The Iranian Islamic Revolutionary Guard Corps (IRGC) From an Iraqi View—A Lost Role or a Bright Future?, Ctr. for Strategic & Int'l Stud. (July 30, 2020), https://www.csis.org/analysis/iranian-islamic-revolutionary-guard-corps-irgc-iraqi-view-lost-role-or-bright-future [https://perma.cc/K4E5-U6VF]. The IRGC's economic

Karkheh Dam, and a gas pipeline from Asaluye to Iranshahr.[4] Beyond infrastructure construction, the IRGC owns or controls companies in land, air, and marine transportation; tractor and aircraft manufacturing; and the natural gas and telecommunications sectors.[5]

But there is a darker side to the IRGC. The Iranian government uses the organization to "provide support to terrorist organizations, provide cover for associated covert operations, and create instability in the [Middle East]."[6] In addition to offering training and funds to Hezbollah[7] and Hamas,[8] the IRGC has been accused of masterminding several international crimes, such as a 2007 kidnapping of five British nationals,[9] a 2007 attack on American soldiers,[10] and a 2019 explosion that damaged commercial ships in the Gulf of Oman.[11] As for the previously mentioned

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muscle grew to such an extent that "some western sources estimated the extent of the economy controlled by the IRGC to be around one to two thirds of Iran's GDP." Id.

4. See Frederic Wehrey, Jerrold D. Green, Brian Nichiporuk, Alireza Nader, Lydia Hansell, Rasool Nafisi & S.R. Bohandy, The Rise of the Pasdaran: Assessing the Domestic Roles of Iran's Islamic Revolutionary Guards Corps 60–61 (2009), https://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG821.pdf (on file with the *Columbia Law Review*).

5. See Dagher, supra note 3; Babak Dehghanpisheh & Yeganeh Torbati, Firms Linked to Revolutionary Guards to Win Sanctions Relief Under Iran Deal, Reuters (Aug. 10, 2015), https://www.reuters.com/article/iran-nuclear-sanctions/firms-linked-to-revolutionary-guards-to-win-sanctions-relief-under-iran-deal-idINL5N10I3N320150810 (on file with the *Columbia Law Review*); Saeed Ghasseminejad, Iranian Companies' Shares Plummeted After Treasury Designations, Found. for Def. Democracies (Nov. 2, 2018), https://www.fdd.org/analysis/2018/11/02/iranian-companies-shares-plummeted-after-treasury-designations/ (on file with the *Columbia Law Review*); Press Release, U.S. Dep't of Treasury, Treasury Sanctions Multinational Network Supporting Iran's UAV and Military Aircraft Production (Sept. 19, 2023), https://home.treasury.gov/news/press-releases/jy1745 [https://perma.cc/SYJ5-PN6Z].

6. Bureau of Counterterrorism, Country Reports on Terrorism 2021: Iran, U.S. Dep't St., https://www.state.gov/reports/country-reports-on-terrorism-2021/iran/ [https://perma.cc/82YM-3E3M] (last visited Sept. 13, 2024).

7. Kali Robinson, What Is Hezbollah?, Council on Foreign Rels., https://www.cfr.org/backgrounder/what-hezbollah [https://perma.cc/XE4G-5CS9] (last updated Sept. 28, 2024).

8. Mark Mazzetti, Striking Deep Into Israel, Hamas Employs an Upgraded Arsenal, N.Y. Times (Dec. 31, 2008), https://www.nytimes.com/2009/01/01/world/middleeast/01rockets.html (on file with the *Columbia Law Review*).

9. Mona Mahmood, Maggie O'Kane & Guy Grandjean, Revealed: Hand of Iran Behind Britons' Baghdad Kidnapping, The Guardian (Dec. 30, 2009), https://www.theguardian.com/world/2009/dec/30/iran-britons-baghdad-kidnapping (on file with the *Columbia Law Review*).

10. Shawn Snow, US Offering $15 Million for Info on Iranian Planner of 2007 Karbala Attack that Killed 5 US Troops, Military Times (Dec. 5, 2019), https://www.militarytimes.com/flashpoints/2019/12/05/us-offering-15-million-bounty-for-info-on-iranian-who-planned-2007-karbala-attack-that-killed-5-us-troops/ [https://perma.cc/Z8QN-5RR2].

11. Iran Directly Behind Tanker Attacks off UAE Coast, US Says, Gulf News (May 25, 2019), https://gulfnews.com/world/mena/iran-directly-behind-tanker-attacks-off-uae-coast-us-says-1.64179304 [https://perma.cc/A9B2-R8ZE] (last updated May 26, 2019).

IRGC-controlled subsidiaries that are central to the Iranian economy, they help comprise a "web of front companies" that the IRGC exploits to "fund terrorist groups across the region, siphoning resources away from the Iranian people and prioritizing terrorist proxies over the basic needs of its people."[12] Ultimately, according to President Trump, "If you are doing business with the IRGC, you will be bankrolling terrorism."[13]

Of course, the "bifarious" nature of the IRGC and its subsidiary entities is not unique.[14] And the United States government employs a variety of tactics to counter the terrorist activities of these organizations, including economic sanctions[15] and criminal liability.[16] While these measures may be effective preventative and punitive tools, neither directly help compensate those injured in terrorist attacks.[17]

The Antiterrorism Act (ATA) serves this compensatory function, enabling injured parties to sue "any person who aids and abets, by

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12. Press Release, U.S. Dep't of Treasury, Treasury Designates Vast Network of IRGC-QF Officials and Front Companies in Iraq, Iran (Mar. 26, 2020), https://home.treasury.gov/news/press-releases/sm957 [https://perma.cc/4SYW-5EJU] (internal quotation marks omitted) (quoting Treasury Secretary Steven T. Mnuchin); see also Dagher, supra note 3 ("[Iranian] protests that began in autumn 2019 . . . directed their criticism at the IRGC, denounced the role of Iran in regional feuds, and chanted slogans such as: 'No to Gaza and Lebanon, I will give my life for Iran,' and 'Leave Syria, think about us!'").

13. Trump, supra note 1; see also Kenneth Katzman, Cong. Rsch. Serv., IN11093, Iran's Revolutionary Guard Named a Terrorist Organization 2 (2019), https://crsreports.congress.gov/product/pdf/IN/IN11093 (on file with the *Columbia Law Review*) ("State Department officials asserted that the IRGC . . . has used [its power and money] to support attacks on the United States and its allies.").

14. This Note uses "bifarious" to characterize entities that pursue both legal and illegal objectives, such as generic infrastructure projects and international terrorism. See, e.g., United States v. Marzook, 383 F. Supp. 2d 1056, 1067 (N.D. Ill. 2005) (describing Hamas as a "bifarious" organization). For two additional examples of bifarious organizations discussed in a relatively recent Supreme Court decision, see Holder v. Humanitarian Law Project, 561 U.S. 1, 9 (2010) ("[T]he [Kurdistan Workers' Party] and [the Liberation Tigers of Tamil Eelam] engage in political and humanitarian activities. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens." (citation omitted)).

15. Press Release, U.S. Dep't of Treasury, Treasury Targets Iran's Islamic Revolutionary Guard Corps (Feb. 10, 2010), https://home.treasury.gov/news/press-releases/tg539 [https://perma.cc/B424-QX6T].

16. A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary, 109th Cong. 2–4 (2005) (statement of Barry Sabin, Chief, Counterterrorism Section, Criminal Division, DOJ).

17. See Charles Doyle, Cong. Rsch. Serv., R41333, Terrorist Material Support: An Overview of 18 U.S.C. § 2339A and § 2339B 1–2 (2023), https://crsreports.congress.gov/product/pdf/R/R41333 (on file with the *Columbia Law Review*) (outlining federal statutes that "sit at the heart of the Justice Department's terrorist prosecution efforts"); see also How Much Are the Penalties for Violating OFAC Sanctions Regulations?, Off. Foreign Assets Control (Mar. 8, 2017), https://ofac.treasury.gov/faqs/12 [https://perma.cc/5AY7-SV8M] (last updated Aug. 21, 2024) (discussing civil penalties for violations of OFAC-administered sanctions programs).

knowingly providing substantial assistance, . . . an act of international terrorism [committed by an FTO]" and "recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."[18] So under the ATA, private parties can sue both the organizations committing terrorist attacks *and* any actor who aids and abets the illegal conduct. That said, considering the difficulties of bringing FTOs into American courts, much of the litigation is directed at those who aid and abet terrorist attacks.[19] Put differently, instead of suing the IRGC itself, terrorism victims can sue the deep-pocketed companies who "knowingly provid[ed] substantial assistance" to the IRGC and its subsidiaries.[20] And as the statutory language indicates, a potential aider and abettor's mental state is a critical component of establishing liability under the ATA.

But in the Supreme Court's 2023 *Twitter, Inc. v. Taamneh* decision, the Justices provided a scrambled account of the ATA's mens rea inquiry and reshaped the scope of secondary liability in the process.[21] Although the unanimous Court clarified that culpable aiders and abettors are those who both operate with "general[] aware[ness]" of the role they are playing in the FTO's terrorist activity and "knowingly" provide substantial assistance to an act of international terrorism[22]—two distinct inquiries that are not "carbon cop[ies]" of one another[23]—the majority left unclear how much knowledge (or purpose) is needed to satisfy the latter mens rea element. Consequently, how lower courts interpret the ATA's mens rea analysis in light of *Taamneh* will determine an injured victim's ability to obtain compensation, a defendant's potential exposure to treble damages, and the American court system's capacity to "interrupt, or at least imperil, the flow of" support to terrorist organizations.[24]

This Note proceeds in three parts. Part I provides a background of civil liability under the ATA and the Justice Against Sponsors of Terrorism Act (JASTA), which expanded ATA liability to aiders and abettors. It then analyzes *Halberstam v. Welch*—the framework that JASTA adopted for aiding and abetting claims—and summarizes circuit court cases applying JASTA and *Halberstam* prior to *Twitter, Inc. v. Taamneh*. Part II examines *Taamneh* and identifies the problem that the Supreme Court's opinion

18. 18 U.S.C. § 2333 (2018).

19. Jimmy Gurulé, Holding Banks Liable Under the Anti-Terrorism Act for Providing Financial Services to Terrorists: An Ineffective Legal Remedy in Need of Reform, 41 J. Legis. 184, 184 (2015) ("[T]he threat of a large civil monetary judgment is unlikely to have a deterrent effect on foreign terrorists or terrorist organizations that 'are unlikely to have assets, much less assets in the United States.'" (quoting Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev. (*Boim I*), 291 F.3d 1000, 1021 (7th Cir. 2002))).

20. 18 U.S.C. § 2333.

21. 143 S. Ct. 1206 (2023).

22. Id. at 1219 (internal quotation marks omitted) (quoting Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983)).

23. Id. at 1229.

24. S. Rep. No. 102-342, at 22 (1992).

created vis-à-vis what it means to "knowingly" assist acts of international terrorism. To highlight this problem and its practical significance, Part II considers the three mens rea tests that the Supreme Court discussed and compares these distinct standards to their criminal law analogs. Part III proposes a solution for lower courts applying the *Taamneh* framework to ATA lawsuits, focusing chiefly on extending liability only to culpable actors.

I. BACKGROUND: THE ATA'S FLUCTUATING SCOPE

To fully contextualize the Supreme Court's discussion of the ATA's mens rea requirement in *Taamneh*, it is necessary to provide an overview of the ATA's historical development. Of particular importance is that secondary liability is a relatively recent feature of the ATA. Accordingly, this Part begins by charting the expansion of the ATA and comparing the Act to its criminal law counterpart: the federal material support statutes. Then, this Part describes the codification of aiding and abetting liability in the ATA and finishes with a discussion of circuit court cases applying JASTA before *Twitter, Inc. v. Taamneh*, illustrating the complex landscape of secondary liability under the ATA prior to the Supreme Court's intervention.

A. *The ATA's Legislative History and Statutory Language*

Introduced on the heels of the Palestine Liberation Organization's hijacking of a cruise ship and murder of an American passenger,[25] the ATA was designed to accomplish two related—but distinct—goals. First, the ATA sought to "empower[] victims of terrorism with the right to their day in court to prove who is responsible for all the world to see."[26] To do this, the statute would "fill a gap in the law by establishing a civil counterpart to the existing criminal statutes,"[27] thereby ensuring that "United States victims of international terrorism were not left without an adequate legal remedy."[28]

But beyond American victims, Congress also viewed the ATA as a means of crippling terrorist organizations. Revealing this motivation, Senator Charles Grassley, the bill's chief cosponsor, argued during a floor debate that the ATA would be critical to holding terrorists "accountable

25. Gurulé, supra note 19, at 188 ("On October 7, 1985, terrorists hijacked the Italian cruise liner Achille Lauro, and murdered Leon Klinghoffer, a passenger bound to a wheelchair, who was shot and his body dumped into the Mediterranean Sea.").

26. 136 Cong. Rec. 26,717 (1990) (statement of Sen. Grassley); see also S. Rep. No. 102-342, at 45 ("This bill opens the courthouse door to victims of international terrorism.").

27. Ests. of Ungar ex rel. Strachman v. Palestinian Auth., 304 F. Supp. 2d 232, 238 (D.R.I. 2004).

28. Gurulé, supra note 19, at 188.

where it hurts them most: at their lifeline, their funds."[29] Similarly, in a hearing on the ATA, an expert witness reminded the subcommittee that "anything that could be done to deter money-raising in the United States, money laundering in the United States, the repose of assets in the United States, and so on, would not only help benefit victims, but would also help deter terrorism."[30] Thus, according to Senator Grassley, the ATA would send an unmistakable message to terrorists to "keep their hands off Americans and their eyes on their assets."[31]

For these reasons, Congress passed the ATA's civil liability provision in 1990.[32] Under the relevant statutory language that remained largely untouched until 2016,[33] "[a]ny national of the United States injured . . . by reason of an act of international terrorism . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including attorney's fees."[34] The statute further defines "international terrorism" as activities that (1) "involve . . . acts dangerous to human life that are a violation of [U.S.] criminal laws"; (2) "appear to be intended" to "intimidate . . . a civilian population," "influence the policy of a government by intimidation," or "affect the conduct of a government by mass destruction, assassination, or kidnapping"; and (3) "occur primarily outside the territorial jurisdiction of the United States."[35] Rephrased, the term requires a dangerous crime, a terrorist intention, and an

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29. 136 Cong. Rec. 26,717 (1990) (statement of Sen. Grassley); see also S. Rep. No. 102-342, at 22 (noting that the ATA imposes "liability at any point along the causal chain of terrorism . . . [to] interrupt, or at least imperil, the flow of money").

30. Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary, 101st Cong. 79 (1990) (statement of Joseph A. Morris, President and General Counsel, Lincoln Legal Foundation).

31. 136 Cong. Rec. 26,717 (1990) (statement of Sen. Grassley). Even Senator Grassley confessed that the ATA was, "in part, symbolic," Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary, 101st Cong. 2 (1990) (statement of Sen. Grassley), given terrorist organizations likely would not have many assets within U.S. jurisdiction to satisfy court judgments, see Jack V. Hoover, Note, The Case for Reforming JASTA, 63 Va. J. Int'l L. 251, 257 (2023). Still, as the Senator noted, the ATA would ensure that "[i]f terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them." 136 Cong. Rec. 7592 (1990) (statement of Sen. Grassley).

32. Technically, due to an error from the enrolling clerk, the 1990 version of the ATA was repealed in 1991. S. Rep. No. 102-342, at 22. But Congress repassed the same bill and language in 1992, which remain in force today. Brief of Anti-Terrorism Act Scholars as Amici Curiae in Support of Respondents at 5 n.2, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) (No. 21-1496), 2023 WL 361671 [hereinafter Brief of Anti-Terrorism Act Scholars].

33. See infra notes 61–66 and accompanying text.

34. Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 2333, 104 Stat. 2240, 2251 (1990) (codified as amended at 18 U.S.C. § 2333 (2018)).

35. 18 U.S.C. § 2331(1); see also Gill v. Arab Bank, PLC, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012) (comparing a cause of action under § 2333(a) to "a Russian matryoshka doll, with statutes nested inside of statutes" (internal quotation marks omitted) (quoting Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1032 (E.D.N.Y. 2006), rev'd sub nom. McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008))).

international element,[36] although the latter two requirements have received "scant attention" from courts.[37]

B. *Liability Under the ATA Before JASTA: A Circuit Split*

The pre-JASTA Antiterrorism Act raised a critical question at the heart of potential civil liability: *Who* could be held liable? Presumably, victims could sue the individual terrorists who "pull[ed] the trigger or plant[ed] the bomb" in the relevant attack,[38] but what about the parties that aided the terrorists and FTOs in their criminal activities? This question was especially important because direct perpetrators of terrorism were typically shielded from ATA lawsuits, as they often died in the terrorist attacks, lived beyond the personal jurisdiction of the United States, or lacked assets to satisfy court judgments.[39] But the text of the ATA—which simply allowed those "injured . . . by reason of an act of international terrorism . . . [to] sue"[40]—was ambiguous as to which parties could be held civilly liable and which theories of liability would apply.[41] In fact, Congress deliberately left these details unspecified, predicting that "the fact patterns giving rise to [ATA] suits will be as varied and numerous as those found in the law of torts."[42]

Consequently, district and circuit courts were forced to determine the ATA's scope, and they provided at least three different answers to the outstanding liability question. One solution was premised on the Supreme Court's rule from *Central Bank of Denver v. First Interstate Bank of Denver* that courts should not presume Congress's intent to impose secondary liability based on "statutory silence."[43] Thus, according to courts that adopted this approach, the ATA's sparse statutory text permitted only primary liability

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36. Doyle, supra note 17, at 13. There are other requirements for bringing an action under the ATA—such as jurisdiction, venue, and statute of limitations provisions—that are outside the scope of this Note. Id. at 16 n.108.

37. Gurulé, supra note 19, at 193–94.

38. *Boim I*, 291 F.3d 1000, 1021 (7th Cir. 2002).

39. Brief of Anti-Terrorism Act Scholars, supra note 32, at 8; see also *Boim I*, 291 F.3d at 1021 (observing that direct perpetrators of terrorist attacks "are unlikely to have assets, much less assets in the United States," whereas the entities "support[ing] and encourag[ing] terrorist acts are likely to have reachable assets").

40. Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 2333, 104 Stat. 2240, 2251 (1990) (codified as amended at 18 U.S.C. § 2333).

41. Brief of Anti-Terrorism Act Scholars, supra note 32, at 8. Courts also struggled to ascertain the ATA's mens rea requirement. See Olivia G. Chalos, Note, Bank Liability Under the Antiterrorism Act: The Mental State Requirement Under § 2333(a), 85 Fordham L. Rev. 303, 307 (2016) (noting that the Second Circuit required "knowledge" while the Seventh Circuit demanded "deliberate wrongdoing"); see also Gurulé, supra note 19, at 186 ("While the courts uniformly agree that § 2333(a) is not a strict liability statute, they disagree on the requisite mens rea to support civil liability.").

42. S. Rep. No. 102-342, at 45 (1992).

43. See 511 U.S. 164, 185 (1994).

for principals, such as the individual perpetrators of terrorist attacks.[44] Conversely, several courts across the country held the exact opposite: that the ATA overcame the *Central Bank* presumption and established secondary liability for aiders and abettors.[45]

An en banc panel of the Seventh Circuit provided a third interpretation of the ATA's scope based on a broad reading of the term "international terrorism."[46] Specifically, instead of defining the phrase to mean simply "pull[ing a] trigger or plant[ing a] bomb,"[47] the majority determined that providing material support under 18 U.S.C. § 2339A and § 2339B could also qualify as "international terrorism."[48] A brief description of these statutes is helpful not just to explain the Seventh Circuit's reasoning but also to illustrate the confusion that lower courts created when applying the ATA before its 2016 modifications. Under § 2339A, parties are prohibited from providing material support to another while "knowing or intending that they are to be used" to violate—or prepare to violate—a statutorily enumerated violent crime.[49] As for § 2339B, actors can be criminally liable for "knowingly" providing material support to an FTO if they "have knowledge" that the organization is a designated FTO or has engaged in terrorism.[50]

Returning to the Seventh Circuit's analysis, the court first applied the *Central Bank* presumption and reasoned that "statutory silence on the subject of secondary liability means there is none."[51] But almost contradictorily, the en banc panel also concluded that "Congress has expressly imposed liability on a class of aiders and abettors."[52] Justifying this apparent paradox, the court explained that the ATA allows recovery

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44. See, e.g., Rothstein v. UBS AG, 708 F.3d 82, 97–98 (2d Cir. 2013) ("We doubt that Congress . . . can have intended § 2333 to authorize civil liability for aiding and abetting through its silence.").

45. See, e.g., *Boim I*, 291 F.3d 1000, 1020–21 (7th Cir. 2002) ("[W]e do not think *Central Bank* controls the result here, but that aiding and abetting liability is both appropriate and called for by the language, structure and legislative history of section 2333."); Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 57 (D.D.C. 2010) (holding that the "plaintiffs have convinced the Court to rebut the [*Central Bank*] presumption"); see also Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) ("It is of no consequence that [the defendant] did not himself throw the incendiary device. . . . [ATA liability] includes aiders and abettors . . . who provide money to terrorists.").

46. For a discussion of the term "international terrorism" under the ATA, see supra notes 35–37 and accompanying text.

47. *Boim I*, 291 F.3d at 1021.

48. See Boim v. Holy Land Found. for Relief & Dev. (*Boim II*), 549 F.3d 685, 690 (7th Cir. 2008) (en banc).

49. 18 U.S.C. § 2339A (2018). For a breakdown of the elements needed to prove a § 2339A violation, see Doyle, supra note 17, at 2–11.

50. 18 U.S.C. § 2339B. For an analysis of the components of a § 2339B violation, see Doyle, supra note 17, at 16–26.

51. *Boim II*, 549 F.3d at 689.

52. Id. at 692.

for those injured "by reason of an act of *international terrorism*,"[53] a term that, as explained above, requires a dangerous crime, a terrorist intention, and an international element.[54] And because providing material support to terrorists under § 2339A and § 2339B—"like giving a loaded gun to a child"—is a dangerous crime, the panel established that "a donation to a terrorist group that targets Americans outside the United States" could qualify as the "act of international terrorism" giving rise to the plaintiff's injuries.[55] Through this broad definition of "international terrorism" that included both terrorist attacks and monetary contributions to FTOs, the Seventh Circuit effectively neutralized the impact of its earlier *Central Bank* discussion, as "[p]rimary liability in the form of material support to terrorism has the character of secondary liability."[56]

Aside from the complexity of the Seventh Circuit's reasoning—which puzzled even some judges on the panel[57]—adopting an expansive interpretation of "international terrorism" also produced an additional layer of complication in ATA cases, namely whether plaintiffs needed to prove that the defendant's provision of material support proximately caused their injuries. The Seventh Circuit majority seemed to embrace a relaxed causation requirement when "primary liability is that of someone who aids someone else," refusing to rule out the possibility that the ATA would cover a party who "contributed to a terrorist organization in 1995 that killed an American abroad in 2045."[58] Other circuits rejected this

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53. Id. at 688, 690 (emphasis added) (internal quotation marks omitted) (quoting 18 U.S.C. § 2333(a)).

54. See supra notes 35–37 and accompanying text.

55. *Boim II*, 549 F.3d at 690, 698 (holding that "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities," and "the fact that you earmark [the resources] for the organization's nonterrorist activities does not get you off the liability hook"). But see Linde v. Arab Bank, PLC, 882 F.3d 314, 326 (2d Cir. 2018) ("[T]he provision of material support to a terrorist organization does not invariably equate to an act of international terrorism [because] . . . providing financial services to a known terrorist organization may afford material support to the organization even if the services do not involve violence or endanger life . . . .").

56. *Boim II*, 549 F.3d at 691; see also Brief of Anti-Terrorism Act Scholars, supra note 32, at 9 ("[A]s Judge Posner explained, the *primary* liability imposed by the ATA includes circumstances in which the predicate federal criminal violation is nothing more than the provision of material support to terrorists—which is, itself, a form of secondary liability.").

57. See *Boim II*, 549 F.3d at 707 n.5 (Rovner, J., concurring in part and dissenting in part) ("I must confess to some uncertainty as to the majority's meaning. . . . [T]he majority sees some continued relevance—I am not sure what—in aiding and abetting . . . concepts to liability under section 2333.").

58. Id. at 692, 695–700 (majority opinion) (providing several examples of tort cases that did not require strict but-for and proximate causation, which, to the majority, demonstrated that while "[i]t is 'black letter' law that tort liability requires proof of causation[,] . . . the black letter is inaccurate if treated as exceptionless"). According to Judge Diane Wood, the majority's opinion had "no requirement of showing classic 'but-for' causation, nor, apparently, . . . even a requirement of showing that the defendant's action would have been sufficient to support the primary actor's unlawful activities or any

approach and concluded that the ATA's "by reason of" language required proof of proximate cause.[59] Needless to say, given these divergent and tangled interpretations of the ATA's scope, legal scholars began calling for congressional intervention.[60]

C. *Expanding Liability to Aiders and Abettors: JASTA and the* Halberstam *Framework*

In 2016, Congress passed JASTA over the veto of President Barack Obama.[61] The bill was primarily designed to narrow the scope of foreign sovereign immunity regarding acts of international terrorism committed within the United States.[62] But intending to "provide civil litigants with the broadest possible basis . . . to seek relief against [those] . . . that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities,"[63] Congress also extended ATA liability to anyone who "aids and abets, by knowingly providing substantial assistance," an FTO in committing an act of international terrorism.[64] Further, in JASTA's statutory notes,[65] Congress indicated that

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limitation on remoteness of liability." Id. at 721 (Wood, J., concurring in part and dissenting in part).

59. See, e.g., Rothstein v. UBS AG, 708 F.3d 82, 95–98 (2d Cir. 2013).

60. See, e.g., Gurulé, supra note 19, at 222 ("In order to alleviate the problem confronting plaintiffs, Congress should amend § 2333(a) to explicitly authorize liability for aiding and abetting acts of international terrorism.").

61. See Seung Min Kim, Congress Hands Obama First Veto Override, Politico (Sept. 28, 2016), https://www.politico.com/story/2016/09/senate-jasta-228841 (on file with the *Columbia Law Review*).

62. See Hoover, supra note 31, at 260 ("[N]early all of the debate surrounding JASTA centered on liability for foreign states, not private actors, and most discussion in hearings and on the floors of Congress understood the bill to single out governments."); see also David Smith, Congress Overrides Obama's Veto of 9/11 Bill Letting Families Sue Saudi Arabia, The Guardian (Sept. 29, 2016), https://www.theguardian.com/us-news/2016/sep/28/senate-obama-veto-september-11-bill-saudi-arabia [https://perma.cc/G2Z5-EVHT] ("Barack Obama suffered a unique political blow on Wednesday, when the US Congress overturned his veto of a bill that would allow families of the victims of the September 11 terrorist attacks to sue Saudi Arabia.").

63. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, sec. 2(b), § 2333, 130 Stat. 852, 853 (2016) (codified as amended at 18 U.S.C. § 2333 (2018)). But see Hoover, supra note 31, at 261–62 ("A search of the legislative history and leading thought pieces at the time reveals that the issue of secondary liability for U.S. companies engaging in business abroad—as well as for non-governmental organizations and development corporations contracted by the U.S. government—*was not considered* during debates about the law.").

64. 18 U.S.C. § 2333(d)(2); see also supra notes 46–59 and accompanying text (examining the scope of the term "international terrorism" under the ATA). For a discussion of who or what a party must aid and abet to be liable under § 2333, see Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1223–25 (2023) ("[A] defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism.").

65. The Supreme Court and lower courts alike have applied these statutory notes to JASTA cases. See infra sections I.D, II.A; cf. infra note 124 and accompanying text.

the D.C. Circuit's opinion in *Halberstam v. Welch* "provides the proper legal framework" for aiding and abetting claims under the ATA.[66]

In *Halberstam*, the D.C. Circuit upheld a finding of liability in a wrongful death suit against Linda Hamilton, the live-in partner of a serial burglar, for aiding and abetting the murder of a burglary victim even though Hamilton had not been present at the time of the murder, aware of the murder, or told of her partner's plan to burglarize the victim's home.[67] Nevertheless, the court determined that Hamilton was a "willing partner" in the burglar's activities because she had served as his "banker, bookkeeper, recordkeeper, and secretary" during their five years of living together and had witnessed their fortunes turn from "rags to riches," all while her partner lacked any outside employment.[68]

To support this conclusion, Judge Patricia Wald, writing for a panel that also included Judge Robert Bork and then-Judge Antonin Scalia, applied a tripartite framework derived from common law aiding and abetting cases.[69] First, "the party whom the defendant aids must perform a wrongful act that causes an injury."[70] Second, "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance."[71] Third, "the defendant must knowingly and substantially assist the principal violation."[72] Regarding this third prong, the court articulated six factors for assessing whether one's assistance was "substantial": (1) "the nature of the act assisted," (2) "the amount of assistance" given, (3) the defendant's presence or absence at the time of the act, (4) the defendant's "relation to the tortious actor," (5) "the defendant's state of mind," and (6) "the duration of the assistance."[73]

Thus, there are two relevant mental state requirements in this aiding and abetting analysis: "general[] aware[ness]" of one's role in the illegal

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66. Justice Against Sponsors of Terrorism Act § 2333, 130 Stat. at 852. Also in the statutory notes, Congress indicated that its purpose was to permit U.S. nationals to "pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries." Id., 130 Stat. at 853. Insofar as the addition of "recklessly"—which is a lesser mens rea than "knowingly"—in the purpose section has any legal force, it likely references JASTA's extension of secondary liability to foreseeable consequences of principal violations. See infra note 77 and accompanying text.

67. See Halberstam v. Welch, 705 F.2d 472, 474–76 (D.C. Cir. 1983); see also *Taamneh*, 143 S. Ct. at 1218–20; Hoover, supra note 31, at 273.

68. *Halberstam*, 705 F.2d at 474–76, 487.

69. The D.C. Circuit's framing of secondary liability is noticeably different from that in federal criminal law cases, even though courts in both contexts purport to be drawing on the common law. See infra section II.B.

70. *Halberstam*, 705 F.2d at 477.

71. Id.

72. Id.

73. Id. at 488 (emphasis omitted).

activity and "knowing[]" assistance of the principal violation.[74] Applying these two relevant mental state requirements to the facts, the court concluded that Hamilton's actions demonstrated she was both generally aware of her role in a "continuing criminal enterprise"[75] and assisting the burglar "with knowledge that he had engaged in illegal acquisition of goods."[76] As to the murder, "it was enough that [Hamilton] knew [her partner] was involved in some type of personal property crime at night . . . because violence and killing is a foreseeable risk in any of these enterprises."[77]

D. *Lower Court Application of* Halberstam*'s Mens Rea Prongs Before* Taamneh

In the years between JASTA's enactment and *Taamneh*, several circuit courts struggled to differentiate between *Halberstam*'s two mens rea requirements and adapt the framework from its burglary origins to the international terrorism context.[78] To begin, most courts agreed that the first mens rea element demands that the alleged aiders and abettors be

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74. See Weiss v. Nat'l Westminster Bank, PLC, 993 F.3d 144, 164 (2d Cir. 2021) ("[T]he second and third *Halberstam* elements require proof that at the time the defendant . . . aided the principal, the defendant was 'generally aware' of the overall wrongful activity and was 'knowingly' assisting the principal violation." (quoting *Halberstam*, 705 F.2d at 477)). This Note refers to the general awareness prong as the first mens rea requirement and the knowing assistance inquiry as the second mens rea requirement. Admittedly, there is also a third mens rea analysis as part of the substantiality factors. *Halberstam*, 705 F.2d at 488 (fifth factor). But since the *Halberstam* court regarded the substantiality factors as "variables" rather than "elements" of aiding and abetting liability, compare id. at 483, with id. at 477, and courts have recently determined that "the absence of some need not be dispositive," Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 856 (2d Cir. 2021), this Note does not group the third mental state *analysis* with the other two mens rea *requirements*.

75. *Halberstam*, 705 F.2d at 488. According to the court, Hamilton knew that "something illegal was afoot." Id. at 486.

76. Id. at 488; see also Katie Berry, Note, JASTA in an Era of Fake News, Publicity Infused Terror, and a Directive From Congress, 70 Ala. L. Rev. 841, 860 (2019) ("[*Halberstam*] suggests that a common purpose, or specific intent, is not necessary to establish secondary liability . . . ."). Granted, in its analysis of Hamilton's mens rea vis-à-vis the fifth substantiality factor, the court found that because "Hamilton's assistance was knowing, . . . it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise. Hamilton's continuous participation reflected her intent and desire to make the venture succeed . . . ." *Halberstam*, 705 F.2d at 488. While some analysts have interpreted this language to imply that *Halberstam* may demand more than pure knowledge, see Hoover, supra note 31, at 279, assuming purpose from a showing of knowledge is the functional equivalent of simply requiring knowledge.

77. *Halberstam*, 705 F.2d at 488. In other words, as long as aiders and abettors have knowledge of the principal tort, a lesser mens rea vis-à-vis any foreseeable consequences does not excuse liability. See Berry, supra note 76, at 860–61 ("[A] person who assists, even recklessly, could be deemed liable if the facts offer a justifiable conclusion that the secondary actor likely had knowledge that he or she was assisting the primary wrongful act.").

78. See Gonzalez v. Google LLC, 2 F.4th 871, 902 (9th Cir. 2021), rev'd, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) ("The scenario presented in *Halberstam* is, to put it mildly, dissimilar to the one at issue here.").

generally aware of their roles in the FTO's terrorist activities, even if not in the specific terrorist attack at issue.[79] Moreover, although the general awareness prong requires more than the mental state requirement in § 2339B[80]—a statute that imposes liability on those who "knowingly" provide material support to an FTO with "knowledge about the organization's connection to terrorism"[81]—the circuits agreed that "*Halberstam*'s general awareness standard[] does not require proof that the defendant had a specific intent [to further terrorist activity]."[82] As the Second Circuit reasoned in *Kaplan v. Lebanese Canadian Bank*, "*Halberstam*'s attachment of the 'generally' modifier imparts to the concept 'generally aware' a connotation of something less than full, or fully focused, recognition."[83]

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79. See, e.g., Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018) ("Nor does awareness require proof that [the defendant] knew of the specific attacks at issue . . . . What the jury did have to find was that, in providing [financial] services, the [defendant] was 'generally aware' that it was thereby playing a 'role' in Hamas's violent or life-endangering activities." (quoting *Halberstam*, 705 F.2d at 477)); see also Honickman v. BLOM Bank SAL, 6 F.4th 487, 496 (2d Cir. 2021) ("The defendant need not be generally aware of its role in the specific act that caused the plaintiff's injury . . . ."); *Gonzalez*, 2 F.4th at 908 (finding that the first mens rea requirement is satisfied when "defendants [are] generally aware that ISIS use[s] defendants' platforms to recruit, raise funds, and spread propaganda in support of their terrorist activities"); *Kaplan*, 999 F.3d at 865 (holding that to be liable under the ATA, the defendant must have been "at least generally aware that through its money-laundering banking services . . . [the defendant] was playing a role in Hizbollah's terrorist activities").

80. See *Linde*, 882 F.3d at 329–30 (holding that 18 U.S.C. § 2339B "requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities"); see also *Kaplan*, 999 F.3d at 860 ("[K]nowingly providing material support to an FTO, without more, does not as a matter of law satisfy the general awareness element.").

81. Holder v. Humanitarian L. Project, 561 U.S. 1, 16–17 (2010); 18 U.S.C. § 2339B (2018); see also Doyle, supra note 17, at 16–26 (analyzing the components of a § 2339B violation). Thus, while the Supreme Court concluded in *Holder* that § 2339B extends to parties who wish to provide monetary donations, legal training, and political advocacy to FTOs, *Holder*, 561 U.S. at 10, 16–17, the Second Circuit determined that "the facts in *Holder*—adequate for criminal material support—fall short for the general awareness element of JASTA aiding and abetting," *Honickman*, 6 F.4th at 499; see also Transcript of Oral Argument at 38, *Taamneh*, 143 S. Ct. 1206 (No. 21-1496), 2023 WL 9375469 (statement of Justice Kagan) ("[T]he material support statute is, if I help Hamas build hospitals, I'm still liable under the material support statute . . . and I'm not liable under [the ATA].").

82. *Kaplan*, 999 F.3d at 863; see also Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 220 (D.C. Cir. 2022), vacated, 144 S. Ct. 2675 (2024) (mem.) (holding that *Halberstam*'s first mens rea requirement does not demand a showing of "specific intent"); *Gonzalez*, 2 F.4th at 903 (noting the same); *Linde*, 882 F.3d at 329 ("Such awareness may not require proof of the specific intent demanded for criminal aiding and abetting culpability, i.e., defendant's intent to participate in a criminal scheme as 'something that he wishes to bring about and seek by his action to make it succeed.'" (emphasis omitted) (quoting Rosemond v. United States, 572 U.S. 65, 76 (2014))).

83. 999 F.3d at 863. Granted, other circuit courts appeared to treat this mental state element as more demanding. See Bernhardt v. Islamic Republic of Iran, 47 F.4th 856, 869 (D.C. Cir. 2022) ("Even if we could infer that [the defendant] was aware of [a customer's] connections to al-Qaeda, [the plaintiff] fails to allege that those connections were so close

But the circuit courts diverged when analyzing *Halberstam*'s second mens rea requirement (*knowingly* providing assistance), especially as it relates to the first (*general awareness* of one's role in the overall illegal scheme).[84] Some courts appeared to merge the two prongs, seeking to determine whether a defendant "knowingly played a role in the terrorist activities."[85] Similarly, when attempting to parse "the *Halberstam* factors relat[ing] to whether the defendant 'knowingly' and 'substantial[ly]' assisted" a terrorist attack—which is the third prong in the *Halberstam* framework—a Fifth Circuit panel invoked language from a Second Circuit opinion, asserting that "'aiding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist organization'; it requires 'awareness.'"[86] But the Second Circuit's reasoning in this quoted passage was directed at *Halberstam*'s general awareness inquiry,[87] not the knowing assistance element that the Fifth Circuit was examining.

Other courts seemed to drop the second mens rea analysis altogether.[88] For instance, in characterizing the *Halberstam* framework, a panel of the D.C. Circuit explained that the precedent "spells out three elements that establish the referenced aiding or abetting—wrongful acts, general awareness, and substantial assistance."[89] A Second Circuit panel engaged in a similar exercise, offering a lengthy exploration of the general awareness and substantial assistance prongs without analyzing the meaning of "*knowingly* and substantially assist[ing] the principal

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that [the defendant] had to be aware it was assuming a role in al-Qaeda's terrorist activities by working with [the customer].").

84. See *Halberstam*, 705 F.2d at 477.

85. Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 224 (2d Cir. 2019); see also *Bernhardt*, 47 F.4th at 870 ("There is significant overlap between the requirement that the assistance be 'knowing' and the general awareness required by *Halberstam*."); Hoover, supra note 31, at 279 ("Some courts have fully merged prongs of this test.").

86. Retana v. Twitter, Inc., 1 F.4th 378, 383 (5th Cir. 2021) (second alteration in original) (emphasis omitted) (quoting *Linde*, 882 F.3d at 329).

87. See *Linde*, 882 F.3d at 329 ("[A]iding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist organization. Aiding and abetting requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." (quoting *Halberstam*, 705 F.2d at 477)).

88. This is particularly striking given that *Halberstam*'s third prong (and thus second mens rea requirement) most closely resembles JASTA's statutory text. Compare *Halberstam*, 705 F.2d at 488 (stating that the third prong of its aiding and abetting inquiry is "the defendant must knowingly and substantially assist the principal violation"), with 18 U.S.C. § 2333(d)(2) (2018) (extending liability "to any person who aids and abets[] by knowingly providing substantial assistance").

89. Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 216 (D.C. Cir. 2022), vacated, 144 S. Ct. 2675 (2024) (mem.); see also Honickman v. BLOM Bank SAL, 6 F.4th 487, 496 (2d Cir. 2021) (describing *Halberstam*'s second prong as the "general awareness" element and the third as the "substantial assistance" factor).

violation."[90] But *Honickman v. BLOM Bank* provides the most direct illustration of a court finding the second mens rea requirement to be a superfluity, as the panel held that "[*Halberstam*] did not require Hamilton to 'know' anything more about [the burglar's] unlawful activities than what she knew for the general awareness element."[91]

To the extent that courts did discuss the bounds of the knowing assistance prong, they appeared to view the requirement as easy to satisfy. In the Second Circuit, "knowingly" giving assistance meant that the defendant did not act "innocently or inadvertently."[92] Likewise, in the D.C. Circuit, if defendants could not prove that their actions were "in any way accidental," then their "assistance was given knowingly."[93] Finally, the Ninth Circuit placed significant emphasis on *Halberstam*'s discussion of foreseeability.[94] So if a social media company was "generally aware" that terrorist organizations used its platform to recruit and fundraise but "refused to take meaningful steps to prevent that use," then the company "knowingly assisted" the terrorist organization's "broader campaign of terrorism" from which specific terrorist attacks were "foreseeable."[95] But under a standard in which a company's general awareness of its role in terrorism fundraising and recruitment equates to knowing assistance of the FTO's "broader campaign of terrorism,"[96] the second mens rea requirement independently factors into the analysis only insofar as the

90. *Linde*, 882 F.3d at 329–31 (emphasis added) (internal quotation marks omitted) (quoting *Halberstam*, 705 F.2d at 488). In a footnote, *Linde* did mention the relevance of a secondary actor's "state of mind" in the *Halberstam* framework. *Linde*, 882 F.3d at 329 n.10 ("[E]vidence of the secondary actor's intent can bear on his state of mind, one of the factors properly considered in deciding whether the defendant's assistance was sufficiently knowing and substantial to qualify as aiding and abetting."). That note, however, likely referred to *Halberstam*'s fifth substantiality factor. See supra text accompanying note 73. To the extent this statement *was* directed at the second mens rea requirement, see infra notes 100–102 and accompanying text.

91. 6 F.4th at 500.

92. Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 864 (2d Cir. 2021).

93. *Atchley*, 22 F.4th at 222.

94. See *Halberstam*, 705 F.2d at 488.

95. Gonzalez v. Google LLC, 2 F.4th 871, 905, 908–09 (9th Cir. 2021), rev'd, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); see also *Taamneh*, 143 S. Ct. at 1229 ("[The Ninth Circuit] analyzed the 'knowing' subelement as a carbon copy of the antecedent element of whether the defendants were 'generally aware' of their role in ISIS' overall scheme.").

96. *Gonzalez*, 2 F.4th at 903–05. For an additional example besides *Gonzalez v. Google LLC*, see *Kaplan*, 999 F.3d at 860 ("[A] defendant may be liable for aiding and abetting an act of terrorism if it was generally aware of its role in an 'overall illegal activity' from which an 'act of international terrorism' was a foreseeable risk." (quoting *Halberstam*, 705 F.2d at 488)).

specific act of terrorism is *not* a "foreseeable result" of the FTO's "broader campaign of terrorism,"[97] which is likely a fairly infrequent occurrence.[98]

Even the courts that did engage in two mens rea inquiries, however, made clear that *Halberstam*'s third prong does not require proving a secondary actor's purpose (or "conscious[] desire[]"[99]) to participate in the terrorist attack.[100] That said, providing evidence of the alleged aider and abettor's purpose could certainly help establish that "the defendant's assistance was sufficiently knowing and substantial to qualify as aiding and abetting."[101] Nevertheless, as the D.C. Circuit held, "Knowledge of one's own actions and general awareness of their foreseeable results, not specific intent, are all that is required" under JASTA.[102]

To summarize the JASTA landscape before *Twitter, Inc. v. Taamneh*, courts agreed that the *Halberstam* framework required a greater mens rea than that in § 2339B but a lesser one than any purpose to partake in the terrorist attack. Between these two guideposts, the circuits trained the bulk of their mens rea analysis on whether the secondary actors were generally aware of their roles in the FTO's terrorist activities, viewing *Halberstam*'s third prong as predominantly focused on substantial assistance with, at most, a nominal mens rea requirement. But as the following Part illustrates, *Taamneh* redistributed the weight between these two mens rea requirements and even revised the role that the *Halberstam* framework plays in a JASTA analysis, potentially changing the scope of ATA secondary liability in the process.

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97. *Gonzalez*, 2 F.4th at 904–05 (holding that "when assessing whether the [plaintiff] satisfies the third element of aiding-and-abetting liability, we consider ISIS's broader campaign of terrorism to be the relevant 'principal violation'" because the specific terrorist attack at issue was "a foreseeable result of ISIS's broader campaign of terrorism").

98. This reading of the ATA's mens rea requirements also starts to bleed into § 2339B, effectively extending liability to social media companies for "knowingly" providing material support (here, a platform) to ISIS when the parties "have knowledge" that ISIS is a designated FTO. See supra notes 50, 80–81 and accompanying text; cf. Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018) ("[A]iding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*.").

99. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

100. See, e.g., *Kaplan*, 999 F.3d at 860 ("[A]n absence of proof of intent is not fatal to the aiding-and-abetting claim because intent is not itself a *Halberstam* element."); see also Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 224 (D.C. Cir. 2022), vacated, 144 S. Ct. 2675 (2024) (mem.) ("A specific intent, or 'one in spirit,' requirement is contrary to *Halberstam* as incorporated into the JASTA."). For a discussion of purpose vis-à-vis *Halberstam*'s general awareness prong, see supra notes 79–83 and accompanying text.

101. *Linde*, 882 F.3d at 329 n.10.

102. *Atchley*, 22 F.4th at 223.

II. AN ONGOING PUZZLE: PURE KNOWLEDGE, TRUE PURPOSE, AND INTENT TO FACILITATE

In 2023, the Supreme Court waded into this confusion over *Halberstam* and ATA secondary liability, providing both clarity and uncertainty regarding JASTA's mens rea requirements.[103] This Part begins with a description of *Taamneh*'s factual history and procedural posture. Then, it highlights the Supreme Court's concerns with JASTA and *Halberstam*'s mens rea requirements, exemplified both at oral argument and in the Court's opinion. Finally, this Part draws from the common law development of secondary liability—which the Court emphasized is critical to understanding the scope of JASTA—to provide three potential ways to read and apply *Taamneh*'s mens rea analysis.

A. Twitter, Inc. v. Taamneh*: Clarification and Confusion*

Twitter, Inc. v. Taamneh arose from a shooting massacre that took place in Istanbul, Turkey, where an ISIS-trained terrorist attacked the Reina nightclub and killed thirty-nine people.[104] The following day, ISIS claimed responsibility for the killings.[105] Relatives of one of the victims sued Twitter, Google, and Facebook under the ATA for aiding and abetting the Reina attack.[106] According to the plaintiffs, the social media companies failed to identify and remove numerous ISIS-related posts despite "extensive media coverage, complaints, legal warnings, petitions, congressional hearings, and other attention" alerting the companies that ISIS was exploiting their platforms to recruit members, raise funds, and spread propaganda.[107] The plaintiffs alleged that through these actions, Twitter, Google, and Facebook "knowingly provid[ed] substantial assistance" to ISIS and its terrorist activities, including the Reina attack.[108]

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103. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023).

104. See Gonzalez v. Google LLC, 2 F.4th 871, 883 (9th Cir. 2021), rev'd, *Taamneh*, 143 S. Ct. 1206.

105. Id.

106. Id.

107. Id. (internal quotation marks omitted) (quoting Third Amended Complaint ¶ 20, Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156 (N.D. Cal. 2018) (No. 4:16-cv-03282-DMR), 2017 WL 6040930); see also *Taamneh*, 143 S. Ct. at 1215–17. After the companies successfully appealed to the Supreme Court, the plaintiffs also argued that the defendants employed a "recommendation" algorithm that connected ISIS posts with other users, further aiding in ISIS's terrorist activities. See Transcript of Oral Argument, supra note 81, at 118 (statement of Eric Schnapper) ("[I]nsofar as the recommendations were affirmatively calling the attention of . . . users to ISIS materials, that would . . . be extremely valuable to ISIS in recruiting more fighters . . . ."); see also *Taamneh*, 143 S. Ct. at 1217 ("[P]laintiffs assert that defendants aided and abetted ISIS by knowingly allowing ISIS and its supporters to use their platforms and benefit from their 'recommendation' algorithms, enabling ISIS to connect with the broader public, fundraise, and radicalize new recruits.").

108. *Taamneh*, 143 S. Ct. at 1218.

The district court dismissed the plaintiffs' complaint, and the Ninth Circuit reversed.[109] Finding that the plaintiffs' complaint satisfied the first two prongs of the *Halberstam* framework,[110] the court focused its attention on whether the companies "knowingly and substantially assist[ed] the principal violation."[111] And having already determined that the "principal violation" referred to "ISIS's broader campaign of terrorism," the court concluded that the companies' "assistance to ISIS was knowing" because they had "been aware of ISIS's use of their respective social media platforms for many years . . . but ha[d] refused to take meaningful steps to prevent that use."[112] Then, after applying *Halberstam*'s six substantiality factors and deciding that the social media companies' assistance was substantial, the court held that the plaintiffs stated a claim for aiding and abetting liability under the ATA.[113]

The social media companies successfully petitioned for certiorari,[114] raising the question of whether their failure to remove ISIS accounts and posts despite their awareness of ISIS's activities qualified as "knowingly providing substantial assistance" to the terrorist group.[115] According to the companies, the Ninth Circuit erred when finding that the defendants "knowingly" assisted ISIS simply because they were aware that ISIS

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109. See *Gonzalez*, 2 F.4th at 880. The Ninth Circuit consolidated the *Taamneh* plaintiffs' case with two similar lawsuits against the social media companies based on separate ISIS terrorist attacks. See id. at 879.

110. None of the parties contested the first prong, and the court quickly determined that the complaint demonstrated the companies were generally aware of their role in ISIS's terrorist activities. See id. at 908 ("These allegations suggest the defendants, after years of media coverage and legal and government pressure concerning ISIS's use of their platforms, were generally aware they were playing an important role in ISIS's terrorism enterprise by providing access to their platforms and not taking aggressive measures to restrict ISIS-affiliated content.").

111. Id. at 903–05 (alteration in original) (quoting Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983)).

112. Id. at 905, 909.

113. See id. at 910.

114. The plaintiffs from one of the other consolidated cases that the Ninth Circuit decided also petitioned for certiorari to challenge the scope of Section 230 immunity. See Petition for a Writ of Certiorari at i, Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023) (per curiam) (No. 21-1333), 2022 WL 1050223. The Supreme Court similarly granted this certiorari petition but ultimately declined to answer the question presented, choosing instead to resolve the case based on its holding in *Twitter, Inc. v. Taamneh*. See *Gonzalez*, 143 S. Ct. at 1192 ("We therefore decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief. Instead, we vacate the judgment below and remand the case for the Ninth Circuit to consider plaintiffs' complaint in light of our decision in *Twitter*.").

115. Conditional Petition for a Writ of Certiorari at i, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) (No. 21-1496), 2022 WL 1785719 (internal quotation marks omitted) (quoting 18 U.S.C. § 2333(d)(2) (2018)). The Court also granted certiorari on the companies' second question: whether aiders and abettors needed to assist a particular "act of international terrorism"—rather than a campaign of terrorism—to be liable under the ATA. Id. (internal quotation marks omitted).

members used the social media platforms, thereby "effectively transform[ing] the statute's knowledge requirement into something akin to recklessness or negligence."[116] Instead, the petitioners contended that JASTA's text extends liability only to secondary actors who both "knowingly undertook the specific conduct that comprised substantial assistance to the act of international terrorism" and "understood that its conduct would substantially assist such an act."[117] Supporting the petitioners, the U.S. government concurred, emphasizing the importance of establishing that the defendants had knowledge they were assisting in a terrorist attack.[118]

But the petitioners and government's otherwise comprehensible knowledge standard began to blur during oral argument as the Court bombarded both lawyers with hypotheticals and the Justices expressed their skepticism of the *Halberstam* framework. For example, Justice Elena Kagan asked Edwin Kneedler, representing the government, whether a bank could be liable under the ATA if, among hundreds of customers, the bank knew that Osama bin Laden opened an account and was using it to conduct terrorist activities.[119] When the Deputy Solicitor General responded in the affirmative, Justice Kagan appeared to agree, admitting that she "would be shocked if the government gave that one away."[120] But when Justice Samuel Alito posed a similar hypothetical—whether a telephone company would be liable as an aider and abettor if it were told that a gangster was using his phone to conduct mob activities—Kneedler was unsure, saying, "Perhaps not. Probably not. I mean, it depends."[121] Expressing his surprise, Justice Alito remarked, "Wow. That's a perhaps?"[122]

The Justices then directed their ire at *Halberstam* itself, both for its broad scope and confusing framework. According to Justice Alito, "[T]he problem is *Halberstam*, and we're stuck with *Halberstam*[,] because

116. Brief for Petitioner at 37, *Taamneh*, 143 S. Ct. 1206 (No. 21-1496), 2022 WL 17384573; see also Transcript of Oral Argument, supra note 81, at 18–19 (statement of Seth Waxman) ("[T]he Second Circuit [in *Kaplan*] and the D.C. Circuit [in *Atchley*] erred . . . because they collapsed the mental state required under Step 2 and Step 3 of *Halberstam*." (emphasis added)).

117. Brief for Petitioner, supra note 116, at 38.

118. Brief for the United States as Amicus Curiae in Support of Reversal at 18, *Taamneh*, 143 S. Ct. 1206 (No. 21-1496), 2022 WL 17548394 ("JASTA incorporates a knowledge requirement twice over: It requires that the defendant 'knowingly provid[e] substantial assistance,' 28 U.S.C. 2333(d)(2), and it invokes the *Halberstam* framework and thus adopts its similar mens rea requirements." (alteration in original)).

119. See Transcript of Oral Argument, supra note 81, at 72–73 (statement of Justice Kagan).

120. Id. at 73 (statement of Justice Kagan).

121. Id. at 79 (statement of Edwin Kneedler).

122. Id. (statement of Justice Alito).

[*Halberstam*'s] three factors are met in . . . my telephone example."[123] Similarly, Justice Neil Gorsuch pleaded with Kneedler to agree that the Court could decide the case based on JASTA's statutory text alone and avoid having to "wade through [*Halberstam*'s] three elements where the third element has two prongs and the second prong is made up of six factors, some of which you tell us don't apparently count for very much."[124]

Consequently, the Justices proposed ways to simplify the case and limit the scope of secondary liability under the ATA. Of particular note is Justice Alito's suggestion that the Court engage in a more rigorous mens rea analysis, asking if "it [would] be consistent with *Halberstam* to read 'knowingly' to mean, oh, just a *shade* short of 'purposefully,'" as that would give "some substance" to the *Halberstam* framework.[125] Relatedly, Justice Sonia Sotomayor wondered if, "[i]nstead of knowledge," *Halberstam*'s third factor can "have some purpose to it."[126] Not responding directly to these questions, Kneedler expressed his belief that courts should "make a judgment, basically, a societal . . . judgment, are we prepared to hold that person liable?"[127]

With Justice Clarence Thomas writing the opinion, a unanimous Court accepted the government's recommendation to focus on culpability, concluding that the "point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue."[128] According to the Court, simply creating social media platforms and algorithms is not culpable, meaning that the thrust of the plaintiffs' complaint "rests so heavily on defendants' failure to act" rather than on

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123. Id. at 80 (statement of Justice Alito) (emphasis added); see also id. at 21–22 (statement of Justice Alito) ("If this were a criminal case, I think it's clear that there would not be aiding and abetting liability . . . . [W]e've addressed aiding and abetting in criminal cases directly, and it requires the intention of causing the crime to be committed."). Justice Alito also specifically criticized *Halberstam*'s general awareness prong, arguing that it has "very little meaning." Id. at 22 (statement of Justice Alito).

124. Id. at 89 (statement of Justice Gorsuch) ("Is there some way to cut through [*Halberstam*'s] kudzu and . . . decide this case on the statutory terms? Please say yes."); see also id. at 69 (statement of Chief Justice Roberts) ("[E]ach one of these situations that will come along will have different of [*Halberstam*'s factors] prominent and different ones not there, and . . . is there any way to articulate how to approach these cases without having a 6- or 12- . . . or maybe 36-factor test?").

125. Id. at 80–81 (statement of Justice Alito) (emphasis added).

126. Id. at 85–86 (statement of Justice Sotomayor). Justice Gorsuch proposed a different limiting principle based on a requirement that secondary actors aid a particular person rather than an act. See id. at 90–91 (statement of Justice Gorsuch). Nonetheless, he too expressed a desire to "cabin[] in the [ATA's] scope and prevent[] secondary liability from becoming liability for just doing business." Id. at 91 (statement of Justice Gorsuch).

127. Id. at 77 (statement of Edwin Kneedler); see also id. at 80 (statement of Edwin Kneedler) ("It's a judgment call as to whether the defendant is culpable, has become complicit, in . . . the way a conspirator would."); id. at 83 (statement of Edwin Kneedler) ("I think it's a judgment that a company engaged in this sort of activity which is overall very helpful to society should not be held responsible, culpable, a willing participant . . . .").

128. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1230 (2023).

any "affirmative misconduct."[129] Emphasizing that both tort and criminal law are reluctant to impose secondary liability for "mere passive nonfeasance," the majority ruled that the companies could not be liable as aiders and abettors under JASTA.[130]

But before resolving the case based on the foundational tort principle that liability does not usually extend to "mere omissions, inactions, or nonfeasance,"[131] the Court discussed aiding and abetting under JASTA generally, potentially reshaping the scope of liability in the process.[132] While acknowledging the applicability of the *Halberstam* framework, the Court noted that the precedent should be viewed "in context of the common-law tradition from which it arose" without narrowly focusing on the D.C. Circuit's "exact phrasings and formulations."[133] Thus, the Court canvassed the common law growth of secondary liability in the criminal law setting—which is "rough[ly] simila[r]" to its tort law counterpart even if appreciably different from the framework in *Halberstam*[134]—and determined that the "phrase 'aids and abets' in § 2333(d)(2), as elsewhere, refers to a conscious, voluntary, and culpable participation in another's wrongdoing."[135] When describing the mental state needed to prove "conscious, voluntary, and culpable participation," however, the Court referenced and quoted from cases that adopted different mens rea requirements,[136] clarifying only that the "knowing" element of a JASTA inquiry is "designed to capture the defendants' state of mind with respect to their actions and the tortious conduct . . . , not the same general

129. Id. at 1226–28; see also id. at 1227 ("At bottom, . . . the claim here rests less on affirmative misconduct and more on an alleged failure to stop ISIS from using these platforms. But, as noted above, both tort and criminal law have long been leery of imposing aiding-and-abetting liability for mere passive nonfeasance.").

130. Id. at 1227.

131. Id. at 1220–21.

132. See id. at 1218–23. Beyond critiquing the Ninth Circuit's application of *Halberstam* to the present case, however, id. at 1229–30, the Court did not discuss the various lower court understandings of the *Halberstam* framework.

133. Id. at 1218, 1220; see also id. at 1231 (Jackson, J., concurring) ("The Court . . . draws on general principles of tort and criminal law to inform its understanding of § 2333(d)(2).").

134. Id. at 1223 (majority opinion) (alteration in original) (internal quotation marks omitted) (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)).

135. Id.

136. See infra section II.B; see also Baruch Weiss, What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law, 70 Fordham L. Rev. 1341, 1376 (2002) ("[C]ourt[s] will often cull legal pronouncements indiscriminately from previous aiding and abetting cases without realizing that those earlier cases are wholly inconsistent with one another."). For a similar critique of a different Supreme Court case, see Rosemond v. United States, 572 U.S. 65, 84–85 (2014) (Alito, J., concurring in part and dissenting in part) (contending that when determining the mens rea requirement for secondary liability in criminal law, the majority "refers interchangeably" between knowledge and purpose, thereby "leav[ing] our case law in the same, somewhat conflicted state that previously existed").

awareness that defines *Halberstam*'s second element."[137] Therefore, the *Taamneh* opinion raised an important question: If *Halberstam* should not be read as an "inflexible code[],"[138] what mens rea must the aider and abettor have to be liable under the ATA?

B. *The Three* Taamneh *Tests*

As this section explains, the *Taamneh* Court invoked criminal law secondary liability to help clarify JASTA's scope, even though aiding and abetting in the criminal setting has rarely been lucid. The overarching question is what, if anything, beyond pure knowledge is required to sustain liability for a secondary actor. Many courts, including the Supreme Court in *Taamneh*,[139] cite to Judge Learned Hand's opinion in *United States v. Peoni* as the conclusive statement on the mens rea requirement for aiders and abettors in criminal law.[140] But the meaning of *Peoni* is in the eye of the beholder,[141] and courts have championed Judge Hand's words to support meaningfully distinct mens rea tests.[142] Much ink has been spilled over this confusion in the criminal law context,[143] and in the wake of

137. *Taamneh*, 143 S. Ct. at 1229.

138. Id. at 1225.

139. See id. at 1221.

140. See, e.g., *Rosemond*, 572 U.S. at 76–77; United States v. Urciuoli, 513 F.3d 290, 299 (1st Cir. 2008); People v. Cooper, 40 N.W.2d 708, 711 (Mich. 1950); see also Weiss, supra note 136, at 1350 ("Since *Peoni*, . . . the prevailing wisdom among courts and commentators has been that the issue is now closed.").

141. See Weiss, supra note 136, at 1373 (arguing that courts "disagree as to what the *Peoni* standard is" even though they "uniformly adopt Judge Hand's standard," leaving accomplice liability "hopelessly muddled and divided, despite the sixty years that have elapsed since Judge Hand's decision in *Peoni*, and despite the seeming clarity of his pronouncements"); see also Daniel C. Richman, Kate Stith & William J. Stuntz, Defining Federal Crimes 507 (2d ed. 2019) ("Sometimes the same Circuit—and in fact, the same *judge*—has vacillated between a strict *Peoni* and a knowledge standard.").

142. Compare United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940) (referencing *Peoni* to hold that secondary actors "must in some sense promote their venture himself, make it his own, have a stake in its outcome" to sustain liability), with *Rosemond*, 572 U.S. at 76–77 (quoting *Peoni* but also applying the "principle" that the "intent requirement [is] satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense"), Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) (citing *Peoni* and *Nye & Nissen* to conclude that aiders and abettors must have an "intent to facilitate the crime" to be held liable), and United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995) (citing *Peoni* but holding that despite a literal reading, "in the actual administration of [the *Peoni* rule,] it has always been enough that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would . . . make the principal's success more likely"). For a broader discussion of the convoluted mens rea requirement in criminal law aiding and abetting cases both before and after *Peoni*, see Weiss, supra note 136, at 1350–52.

143. See Charles F. Capps, Accomplice Liability 8 (2020) (Ph.D. dissertation, University of Chicago) (on file with the *Columbia Law Review*) (quoting various commentators who have criticized the state of secondary liability in criminal law). For a thorough discussion of the mens rea requirement in the criminal law aiding and abetting context, see generally Weiss, supra note 136.

Taamneh, a similar puzzle now applies to JASTA. Unlike in criminal law, however, the burden will ordinarily fall on judges, not prosecutors and juries, to draw the lines of ATA secondary liability in motions to dismiss or for summary judgment, subjecting some parties to legal penalties while absolving others.

The various mens rea tests for secondary liability can be broadly organized into three categories: pure knowledge, true purpose, and intent to facilitate.[144] The differences between these standards are subtle, but the Supreme Court has regarded the nuances as "[p]erhaps the most significant, and most esoteric, distinction drawn by [a mens rea] analysis."[145] Although courts sometimes collapse these mental states,[146] as "there is [often] good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results" of their actions,[147] there are certain categories of cases in which the distinctions are emphasized, such as murder and treason.[148] Given the language in *Taamneh* and the similarity of terrorist attacks to murder and treason vis-à-vis seriousness and blameworthiness, the ATA is likely another area where the presence of "heightened culpability . . . merit[s] special attention" for the mens rea analysis.[149] Still, the lines separating the three mens rea tests, and especially delineating true purpose from an intent to facilitate, are hazy, which further supports the discussion in Part III that recasts the mens rea rules as a single continuum rather than three distinct standards.

To illustrate the differences between these three mens rea tests—and thus demonstrate the practical significance of determining which one the *Taamneh* Court adopted for JASTA cases—this section consistently references a hypothetical ATA lawsuit that is similar to several real JASTA

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144. *Halberstam* and *Taamneh* also recognized a fourth category for aiding and abetting liability in which secondary actors are liable for the "natural and foreseeable consequence[s]" of their conduct. Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983); see also *Taamneh*, 143 S. Ct. at 1225 ("[P]eople who aid and abet a tort can be held liable for other torts that were 'a foreseeable risk' of the intended tort." (quoting *Halberstam*, 705 F.2d at 488)); supra notes 66, 77. The "natural and probable consequences" test, as Baruch Weiss labels it, also has deep support in the common law. See Weiss, supra note 136, at 1424–31. But since this test alters more than just the mens rea inquiry—simultaneously relaxing the act requirement for secondary actors and adding a nexus requirement between the assisted act and actionable tort, id. at 1425; see also *Taamneh*, 143 S. Ct. at 1225 ("[A] close nexus between the assistance and the tort might help establish that the defendant aided and abetted the tort, but even more remote support can still constitute aiding and abetting in the right case.")—this fourth aiding and abetting category is beyond the scope of this Note.

145. United States v. Bailey, 444 U.S. 394, 404 (1980).

146. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) ("Next down, though not often distinguished from purpose, is knowledge." (citing *Bailey*, 444 U.S. at 404)).

147. *Bailey*, 444 U.S. at 404 (internal quotation marks omitted) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978)).

148. Id. at 405.

149. Id.

cases and complaints.[150] Assume that a telecommunications company sold its products to an IRGC-owned corporation. The IRGC told the company that some of the communication devices would be used for a military mission, others for a so-called "foreign disruption," and the rest resold to regular consumers. As it turned out, the "foreign disruption" was a terrorist attack that injured U.S. nationals abroad. Since the IRGC used the communication devices to orchestrate the incident, the injured Americans sued the telecommunications company under the ATA for aiding and abetting the attack.[151] *Halberstam*'s first two elements are satisfied, as the IRGC "committed a wrong" that caused the injuries and the telecommunications company knew it was "playing some sort of role in [the IRGC's] enterprise."[152] So if the assistance was substantial, the plaintiffs' ability to recover treble damages and the company's exposure to liability would hinge on the company's mens rea.[153]

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150. For instance, this hypothetical is loosely based on the facts giving rise to a recent ATA lawsuit in the Eastern District of New York. See Zobay v. MTN Grp. Ltd., 695 F. Supp. 3d 301, 314–20 (E.D.N.Y. 2023). Although the author worked in Judge Carol Bagley Amon's chambers while the case was pending, nothing in this Note references any discussion or material beyond what is published in the court's opinion. For even newer ATA complaints of a similar character, see Ava Benny-Morrison, Binance Sued by Hamas Hostage, Families of Victims in Attack, Bloomberg (Jan. 31, 2024), https://www.bloomberg.com/news/articles/2024-01-31/binance-sued-by-hamas-hostage-families-of-victims-in-attack (on file with the *Columbia Law Review*); Riley Brennan, Greenberg Traurig Files Suit Accusing Groups of Acting as Hamas 'Propaganda Division,' Spreading Falsehoods, Law.com (May 2, 2024), https://www.law.com/2024/05/02/greenberg-traurig-files-suit-accusing-groups-of-acting-as-hamas-propaganda-division-spreading-falsehoods/ (on file with the *Columbia Law Review*); see also Amal Clooney and Jenner & Block File Lawsuit in US Court Seeking Accountability for Genocide Against Yazidis, Jenner & Block (Dec. 14, 2023), https://www.jenner.com/en/news-insights/news/amal-clooney-and-jenner-and-block-file-lawsuit-in-us-court-seeking-accountability-for-genocide-against-yazidis [https://perma.cc/6TMV-7BF3].

151. For the purposes of this hypothetical, assume that the terrorist attack occurred after the IRGC was designated as an FTO and satisfied the "international terrorism" requirements listed in § 2331. See 18 U.S.C. §§ 2331(1), 2333(d)(2) (2018).

152. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1225 (2023); see also Trump, supra note 1 ("If you are doing business with the IRGC, you will be bankrolling terrorism."). For a discussion of corporate mens rea in the criminal law context, see generally Michael A. Foster, Cong. Rsch. Serv., R46836, Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses (2021), https://crsreports.congress.gov/product/pdf/R/R46836 (on file with the *Columbia Law Review*).

153. In *Taamneh*, the Supreme Court advised that *Halberstam*'s "'knowledge and substantial assistance' components 'should be considered relative to one another' as part of a single inquiry designed to capture conscious and culpable conduct," with "a lesser showing of one demanding a greater showing of the other." *Taamneh*, 143 S. Ct. at 1222, 1228–29 (quoting Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991)). The IRGC hypothetical and this Note, however, are focused less on the depth of a complaint's factual allegations and more on the legal standard itself. See infra notes 235, 265 and accompanying text. After all, "the facts from which a mental state may be inferred must not be confused with the mental state that the [plaintiff] is required to prove." See People v. Beeman, 674 P.2d 1318, 1325 (Cal. 1984).

1. *Test One: Pure Knowledge.* — The first mens rea test that some courts apply for alleged aiders and abettors is pure knowledge, which does not require any intent to either commit a tort or assist in the commission of a tort.[154] As the Supreme Court recently explained, parties act with pure knowledge when they are "aware that [a] result is practically certain to follow" from their conduct.[155] In the aiding and abetting context, the common law epitome of this test is *Backun v. United States* in which the defendant knowingly sold stolen items to a third party who subsequently traveled to another state to resell those goods.[156] Writing for the Fourth Circuit panel, Judge John Parker upheld the defendant's conviction for interstate transportation of stolen merchandise as an aider and abettor because the defendant knew that the third party would leave the state to resell the goods even though he never specifically desired the third party to do so.[157] Canvassing several common law cases,[158] the court adopted a pure knowledge test for secondary liability, holding that a party who sells items "which he knows will make [a felony's] perpetration possible *with knowledge* that they are to be used for that purpose" aids and abets the

154. One reading of *Rosemond v. United States* suggests that the Supreme Court accepted a pure knowledge test for secondary liability in criminal law, see John Kaplan, Robert Weisberg & Guyora Binder, Criminal Law: Cases and Materials 803 (9th ed. 2021), as the Court noted that the mens rea requirement is "satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense," 572 U.S. 65, 77 (2014) (referencing Supreme Court decisions in *Pereira v. United States* and *Bozza v. United States* to support the holding that an "active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun"); see also id. at 79–80 ("What matters for purposes of gauging intent . . . is that the defendant has chosen, with full knowledge, to participate in the illegal scheme . . . . The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding."). But see id. at 77 n.8 ("We did not deal in these cases, nor do we here, with defendants who incidentally facilitate a criminal venture rather than actively participate in it.").

155. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (alteration in original) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)). Alternatively, proving "willful blindness" satisfies the pure knowledge test, such as when "the facts suggest a conscious course of deliberate ignorance." United States v. Littlefield, 840 F.2d 143, 147 (1st Cir. 1988); see also infra note 172.

156. 112 F.2d 635, 636 (4th Cir. 1940); Kaplan et al., supra note 154, at 786; see also Charles F. Capps, Upfront Complicity, 101 Neb. L. Rev. 641, 644–45 (2023) [hereinafter Capps, Upfront Complicity] (referencing *Backun* and *Peoni* as the two leading twentieth-century cases on the mens rea requirement in accomplice liability); Sherif Girgis, Note, The Mens Rea of Accomplice Liability: Supporting Intentions, 123 Yale L.J. 460, 468 (2013) (citing *Backun* as an example of "some federal and state authorities" holding that "a helper need not intend that the principal commit his crime" as long as "he *kn*[*e*]*w* that the principal will commit it").

157. See *Backun*, 112 F.2d at 636–37; Kaplan et al., supra note 154, at 786.

158. See *Backun*, 112 F.2d at 637–38 (compiling cases that permitted secondary liability based on an actor's knowledge of another's criminal intentions); see also Anstess v. United States, 22 F.2d 594, 595 (7th Cir. 1927) ("One who, with full knowledge of the purpose with which contraband goods are to be used, furnishes those goods to another to so use them, actively participates in the scheme or plan to so use them.").

commission of the crime.[159] Further, as is also relevant in the JASTA context, the panel asserted that the "seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise."[160] In other words, there is no requirement that the defendant "hav[e] a stake" in the crime's commission because "those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise."[161]

The support for a pure knowledge test in the JASTA context is easy to identify: Both the statutory text and *Halberstam* use the word "knowingly."[162] While the *Taamneh* Court warned parties that "any approach that too rigidly focuses on *Halberstam*'s . . . exact phraseology risks missing the mark,"[163] this admonition likely does not apply to JASTA's statutory text itself.[164] Moreover, if common law terms such as "aids and abets" "'brin[g] the old soil' with them,"[165] this "old soil" presumably includes *Backun* and similar common law cases that adopted a pure knowledge test, some of which the *Taamneh* opinion expressly

159. *Backun*, 112 F.2d at 637 (emphasis added).

160. Id.

161. Id. (rejecting Judge Hand's test in United States v. Falcone, 109 F.2d 579 (2d Cir. 1940)). The Fourth Circuit noted that even if it were to reject the pure knowledge test, the defendant's conviction could still be upheld based on the evidence. See id. at 638 ("[E]ven if the view be taken that aiding and abetting is not to be predicated of an ordinary sale made with knowledge that the purchaser intends to use the goods purchased in the commission of felony, . . . the circumstances relied on by the government here are sufficient to establish . . . guilt . . . ."). Nevertheless, the opinion still exemplifies a court willing to hold an aider and abettor liable based on mere knowledge of another's planned wrongdoing.

162. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1214 (2023) (repeating the language of § 2333 that defines aiding and abetting as "knowingly providing substantial assistance" (internal quotation marks omitted) (quoting 18 U.S.C. § 2333(d)(2) (2018))); id. at 1219 (citing *Halberstam*'s third prong for secondary liability, which requires the defendant to "knowingly and substantially assist the principal violation" (internal quotation marks omitted) (quoting Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983))). Insofar as the limited legislative history is instructive, it also lends support to Congress's adoption of a pure knowledge test in JASTA. See Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Const. & Civ. Just. of the Comm. on the Judiciary, 114th Cong. 13 (2016) (statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary) ("Aiding and abetting liability should only attach under the ATA to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization, in connection with the organization's commission of an act of international terrorism.").

163. *Taamneh*, 143 S. Ct. at 1223.

164. See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 22 (1997) ("The text is the law, and it is the text that must be observed.").

165. *Taamneh*, 143 S. Ct. at 1218 (alteration in original) (quoting Sekhar v. United States, 570 U.S. 729, 733 (2013)).

referenced.[166] The Court also suggested in dicta that secondary liability is premised on a defendant's "*conscious* participation in the underlying tort," which resembles characterizations of pure knowledge more than descriptions of true purpose.[167] Even the petitioners and government (perhaps erroneously) appeared to concede at oral argument that pure knowledge could result in JASTA liability without any proof of purpose or an intent to facilitate the commission of a terrorist attack.[168]

To apply the pure knowledge test to the hypothetical laid out at the beginning of this section,[169] the telecommunications company actively selling its products to the IRGC for a "foreign disruption" would be liable as an aider and abettor under the ATA as long as the company was "aware" that an act of terrorism was "practically certain to follow" from its actions.[170] Considered in conjunction with the IRGC's reputation,[171] these facts alone are likely sufficient to support liability, as the company knew that the FTO was planning a "foreign disruption" separate and distinct

166. See, e.g., Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991) ("[A]iding and abetting not only requires assistance, but also knowledge of a wrongful purpose."); Monsen v. Consol. Dressed Beef Co., 579 F.2d 793, 802–03 (3d Cir. 1978) (holding that the "combination of knowledge and action" is sufficient to sustain secondary liability even without "evidence of an intent by the [defendant] to assist a primary violation of [the] law"); see also *Taamneh*, 143 S. Ct. at 1222 (referencing these cases). Granted, the *Taamneh* Court also rejected a rule that would "effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them." *Taamneh*, 143 S. Ct. at 1229. While this language could be interpreted to mean that the majority rejected a pure knowledge test, the sentence is more likely meant to demonstrate that a failure to act is insufficient to sustain JASTA liability. See supra notes 129–131 and accompanying text.

167. *Taamneh*, 143 S. Ct. at 1222 (emphasis added); cf. infra section II.B.2. While the Court did not further explain the meaning of "conscious participation," Merriam-Webster defines "conscious" as, inter alia, "perceiving, apprehending, or noticing with a degree of controlled thought or observation." See Conscious, Merriam-Webster, https://www.merriam-webster.com/dictionary/conscious [https://perma.cc/Q33E-W5E9] (last visited Sept. 14, 2024).

168. See Transcript of Oral Argument, supra note 81, at 26 (statement of Seth Waxman) (conceding that "culpable knowledge" could be inferred if Twitter were told about specific accounts planning terrorist attacks but refused to take them down); see also supra text accompanying notes 119–120.

169. See supra notes 150–153 and accompanying text.

170. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

171. See Trump, supra note 1 ("If you are doing business with the IRGC, you will be bankrolling terrorism."); supra notes 6–13 and accompanying text. Of course, the company's general awareness of its role in the IRGC's overall scheme is not sufficient alone to sustain JASTA liability. See *Taamneh*, 143 S. Ct. at 1229 (noting that the "knowing" part of the *Halberstam* inquiry is not a "carbon copy of the antecedent element of whether the defendants were 'generally aware' of their role" in terrorist activity). Nonetheless, along with its direct interactions with the IRGC and its subsidiary, the company's knowledge about how and where the devices would be used distinguishes this hypothetical from *Taamneh*. See id. at 1226 ("Notably, plaintiffs never allege that ISIS used defendants' platforms to plan or coordinate the Reina attack; in fact, they do not allege that [the terrorist] himself ever used Facebook, YouTube, or Twitter.").

from any conventional commercial or military objective.[172] That the telecommunications company did not care how the IRGC used the devices and instead treated the organization as any ordinary paying customer would be irrelevant.[173] Thus, compared to the true purpose and intent to facilitate tests, pure knowledge would create the broadest scope of liability.

2. *Test Two: True Purpose.* — The second mens rea standard that the *Taamneh* Court favorably referenced is the true purpose test, which demands the greatest culpability. Beyond being "practically certain" that a proscribed result would follow from their conduct, parties must "consciously desire[]" the illegal outcome to satisfy the true purpose test—so here, actors must want a terrorist attack to occur.[174] The canonical case adopting this test—a precedent that has since been cited in several Supreme Court cases[175]—is Judge Learned Hand's opinion in *Peoni*, which Judge Hand further developed in *United States v. Falcone*.[176] In *Peoni*, the defendant sold counterfeit bills to a party who resold the same bills to another person.[177] The trial court convicted the defendant for aiding and abetting the possession of counterfeit money, and the government supported this verdict on appeal by arguing that the defendant knew the first party would resell the bills to the second.[178] Rejecting this argument,

172. These facts may even support a jury instruction based on willful ignorance, colorfully known as "ostrich instructions." See United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990) ("The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings."); see also United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976) ("[D]eliberate ignorance and positive knowledge are equally culpable. . . . To act 'knowingly' . . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required."); supra note 155.

173. See Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) ("One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun . . . .").

174. *Counterman*, 143 S. Ct. at 2117 (internal quotation marks omitted) (quoting *Bailey*, 444 U.S. at 404).

175. Rosemond v. United States, 572 U.S. 65, 76 (2014) ("[T]he canonical formulation of th[e] needed state of mind [for secondary liability]—later appropriated by this Court and oft-quoted in both parties' briefs—is Judge Learned Hand's [in *Peoni*] . . . .").

176. 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940); see also Kaplan et al., supra note 154, at 785. For a countervailing argument that *Peoni* adopted the "natural and probable consequences" test that left the mens rea question for secondary actors unresolved, see Weiss, supra note 136, at 1432–35. But see id. at 1466 ("[A]lthough *Peoni* may not be Judge Hand's definitive aiding and abetting case, when it is read together with Judge Hand's other cases, it is clear that Judge Hand was a strong proponent of purposeful intent.").

177. See United States v. Peoni, 100 F.2d 401, 401 (2d Cir. 1938); Kaplan et al., supra note 154, at 785. For another example of the true purpose test, see United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991), aff'd, 506 U.S. 534 (1993) ("To be proved guilty of aiding and abetting . . . the defendant [must have] desired the illegal activity to succeed.").

178. *Peoni*, 100 F.2d at 401–02.

the Second Circuit opinion surveyed common law cases and held that aiding and abetting "carr[ies] an implication of purposive attitude towards it."[179] In oft-quoted language, Judge Hand concluded that the defendant must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."[180] Reasserting this rule less than two years later, Judge Hand wrote, "It is not enough that [the defendant] does not forego a normally lawful activity, . . . the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome."[181]

There are several portions of the *Twitter, Inc. v. Taamneh* decision that favorably discussed the true purpose test. As with several other Supreme Court opinions,[182] the Court frequently cited *Peoni* to illustrate the common law meaning of the term "aids and abets."[183] For instance, when describing criminal law aiding and abetting cases that the Court considered "rough[ly] simila[r]" to the tort context,[184] the opinion quoted the *Peoni* rule as adopted in a prior Supreme Court decision, *Nye & Nissen v. United States*.[185] Similarly, while canvassing civil aiding and abetting cases at common law, the majority not only referenced several

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179. Id. at 402.

180. Id. Notably, Judge Hand suggested in dicta that the court's decision might have been different if the case were civil rather than criminal. Id. The *Taamneh* Court did not appear to raise this distinction in its opinion, potentially because Judge Hand was likely referencing tort law's negligence standard that is insufficient under JASTA. See *Falcone*, 109 F.2d at 581 ("Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts.").

181. *Falcone*, 109 F.2d at 581. Put differently, a "seller's knowledge [of another's unlawful activity is] not alone enough. . . . [H]is attitude towards the forbidden undertaking must be more positive." Id.; see also United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951) ("[T]he crime must be a fulfillment in some degree of an enterprise which he has adopted as his; his act must be in realization of his purpose.").

182. See, e.g., Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" (quoting *Peoni*, 100 F.2d at 402)); see also Rosemond v. United States, 572 U.S. 65, 76–77 (2014); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994).

183. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218 (2023) ("[T]erms like 'aids and abets' are familiar to the common law, which has long held aiders-and-abettors secondarily liable for the wrongful acts of others.").

184. Id. at 1223 (alteration in original) (internal quotation marks omitted) (quoting *Cent. Bank*, 511 U.S. at 181).

185. Id. at 1221 ("[C]riminal law thus requires 'that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed"' before he could be held liable." (quoting *Nye & Nissen*, 336 U.S. at 619)); see also Kevin Cole, Purpose's Purposes: Culpability, Liberty, Legal Wrongs, and Accomplice Mens Rea, 2 Ga. Crim. L. Rev., no. 1, 2024, at 1, 18 ("[T]he cases *Taamneh* cites in describing the criminal-law approach [to secondary liability] skew towards the purpose standard.").

precedents that adopted a true purpose test[186] but even recited the operative language from one that required the defendant's actions to be "'*calculated and intended to produce* [an injury]' to warrant liability for the resulting tort."[187] In a footnote, the Court also raised the question—initially proposed by the Second Circuit—of "whether any of [the common law tort cases'] 'elaborate discussions of the aiding and abetting standard . . . "have added anything except unnecessary detail"' to the formulation set forth by Judge Learned Hand in *United States v. Peoni* and adopted by this Court in *Nye & Nissen v. United States*."[188]

Beyond its common law case analysis, the *Taamneh* Court also invoked true purpose language when engaging in JASTA-specific reasoning, such as recasting the *Halberstam* framework as principally "designed to hold defendants liable when they consciously and culpably 'participate[d] in' a tortious act in such a way as to help 'make it succeed.'"[189] This language reflects the questions that Justices Alito and Sotomayor asked during oral argument regarding whether the Court could read *Halberstam* as requiring purpose in addition to knowledge.[190] Further, when applying the *Halberstam* framework and rejecting secondary liability for the social media companies, the Court concluded that "[t]he fact that some bad actors took advantage of these platforms is insufficient to state a claim that defendants . . . aided and abetted those wrongdoers' acts."[191] While this language does not explicitly reference the true purpose test, the Court's analysis resembles Judge Hand's decision in *Falcone*, which was similarly concerned with criminalizing "normally lawful activity, . . . the fruits of which [the defendant] knows that others will make an unlawful use."[192]

The practical significance of the Court's language becomes clearer once one compares the true purpose test to the pure knowledge standard. With true purpose, only aiders and abettors who "consciously desire[]" a

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186. See Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003) ("[T]he ordinary understanding of culpable assistance to a wrongdoer . . . requires a desire to promote the wrongful venture's success."); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975) ("[A]n alleged aider-abettor should be found liable only if scienter of the high 'conscious intent' variety can be proved."); Smith v. Thompson, 655 P.2d 116, 118 (Idaho Ct. App. 1982) (adopting the rule from Bird v. Lynn, 49 Ky. 422 (1850)); see also *Taamneh*, 143 S. Ct. at 1222, 1226 (referencing these cases).

187. *Taamneh*, 143 S. Ct. at 1222 (emphasis added) (quoting *Bird*, 49 Ky. at 423).

188. Id. at 1222 n.10 (second alteration in original) (citations omitted) (quoting Sec. & Exch. Comm'n v. Apuzzo, 689 F.3d 204, 212 n.9 (2d Cir. 2012)).

189. Id. at 1225 (alteration in original) (quoting *Nye & Nissen*, 336 U.S. at 619); see also id. at 1223 (quoting the *Nye & Nissen* true purpose test when characterizing JASTA and *Halberstam*'s "conceptual core").

190. See Transcript of Oral Argument, supra note 81, at 80–81 (statement of Justice Alito); id. at 85–86 (statement of Justice Sotomayor); see also supra notes 125–126 and accompanying text.

191. *Taamneh*, 143 S. Ct. at 1228; see also id. at 1226 (holding that the plaintiffs' allegations do not satisfy the *Nye & Nissen* true purpose test).

192. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940).

terrorist attack can be liable.[193] Using the hypothetical above,[194] the fact that the telecommunications company knew the IRGC's "foreign disruption" was code for a terrorist attack—and the company's knowledge that "[i]f you are doing business with the IRGC, you will be bankrolling terrorism"[195]—is insufficient alone to sustain JASTA liability because the court likely could not infer that the company "participate[d] in [the terrorist attack] as in something that [it] wishe[d] to bring about."[196] As a result, the scope of secondary liability under the true purpose test is appreciably smaller than under the pure knowledge rule, and the burden on the plaintiffs to uncover more incriminating evidence of the company's intentions is even greater.

3. *Test Three: Intent to Facilitate.* — The intent to facilitate test sits in between the pure knowledge and true purpose standards, incorporating aspects of both. As the California Supreme Court explained in *People v. Beeman*, the intent to facilitate rule requires that the aider and abettor "know[] the full extent of the perpetrator's criminal [objectives] and give[] aid . . . with the intent . . . of facilitating the perpetrator's commission of the crime."[197] Granted, since "facilitate" means making something easier to complete,[198] one may initially regard this standard as the functional equivalent of the true purpose test.[199] But according to some courts, the critical distinction between an intent to facilitate and full-blown purpose is that the former does not depend on whether the secondary actor had a stake in the underlying crime or "consciously desire[d]"[200] the proscribed result, which, in this context, is an act of terrorism.[201]

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193. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

194. See supra notes 150–153 and accompanying text.

195. Trump, supra note 1.

196. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). Circumstantial evidence of this true purpose can include, for example, a pecuniary interest in the commission of the crime or a special relationship between the principal and secondary actors. See United States v. Irwin, 149 F.3d 565, 572 (7th Cir. 1998) (discussing United States v. Pearson, 113 F.3d 758 (7th Cir. 1997), United States v. Blankenship, 970 F.2d 283 (7th Cir. 1992), and United States v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990)).

197. 674 P.2d 1318, 1326 (Cal. 1984) (holding that intent to facilitate "mean[s] neither that the aider and abettor must be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and abettor must seek to share the fruits of the crime"); see also Model Penal Code § 2.06(3)(a) (Am. L. Inst. 1962) (defining an "accomplice" as one who provides assistance "with the purpose of promoting or facilitating the commission of the offense").

198. See Facilitate, Merriam-Webster, https://www.merriam-webster.com/dictionary/facilitate [https://perma.cc/8FSW-8X5L] (last visited Sept. 14, 2024).

199. See supra text accompanying notes 145–149.

200. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

201. Perhaps this distinction most resembles the Model Penal Code's nuanced definition of the "purposely" culpability level itself. If the relevant statute uses "purposely"

United States v. Moses illustrates the intent to facilitate rule and the meaningful—if nuanced—distinctions between the three mens rea tests.[202] In *Moses*, two undercover agents asked the defendant if she knew where to obtain illegal drugs.[203] Although the defendant did not possess any drugs herself, she introduced the officers to a group of men from whom she had previously purchased drugs and confirmed that they were "all right."[204] Then, the officers and the group of drug dealers left the defendant, and she did not witness or participate in any of the subsequent drug transactions.[205] The government charged the defendant with aiding and abetting the sale of illegal drugs even though her actions "were not intended for personal gain, present or future, nor to secure drugs for herself."[206]

The district court convicted the defendant in a bench trial.[207] While conceding that the defendant would not be an aider and abettor if all the government could prove was that she *knew* a drug deal would take place between the undercover agents and the group of men,[208] the court determined that the defendant need not "have any stake in the success of the crime" to be liable as a secondary actor.[209] Consequently, that the defendant had no vested interest in whether a drug deal would actually occur after the men left her house did not defeat secondary liability as long as the defendant harbored "the purpose of assisting" the transaction.[210] Since the defendant actively "vouched" for the group of men, which "was an essential ingredient of the entire transaction," the court deduced that she had an intent to facilitate the drug sale and thus could be convicted as an aider and abettor.[211]

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to modify a result element of the offense, the government must prove that "it [was the defendant's] conscious object . . . to cause such a result." Model Penal Code § 2.02(2)(a)(i). If this mental state applies to a conduct element, however, the prosecution must establish only that "it [was the defendant's] conscious object to engage in conduct of that nature." Id. Regardless, the blurriness between the true purpose and intent to facilitate standards further supports the solution provided in Part III that reframes the mens rea levels as a single continuum.

202. 122 F. Supp. 523 (E.D. Pa. 1954), rev'd, 220 F.2d 166 (3d Cir. 1955).

203. See id. at 525.

204. Id.

205. Id.

206. Id. ("[The defendant's] actions in this case were taken solely for the purpose of helping two persons whom she thought to be addicted to the drug habit . . . .").

207. Id.

208. Id. at 526 ("If all that the defendant had done in this case was merely to direct the agents to an address where, or even to a person from whom narcotics might be obtained, without more, she would not be an aider and [abettor].").

209. Id.; cf. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940) (holding that an aider and abettor "must in some sense . . . have a stake in [the] outcome" of the "forbidden undertaking").

210. *Moses*, 122 F. Supp. at 526 (internal quotation marks omitted) (quoting Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952)).

211. Id. at 526–27.

Quoting the *Peoni* rule as adopted in *Nye & Nissen*, the Third Circuit reversed because the defendant had no "personal or financial interest in bringing trade to" the drug sellers.[212] Instead, the Court reaffirmed the "general rule" that "one who has acted *without interest* in the selling cannot be convicted as a seller."[213] Put differently, the circuit panel distinguished between an intent to facilitate and true purpose, ultimately rejecting the district court's holding that proof of the former is sufficient alone to sustain secondary liability.

In several Supreme Court opinions—including *Taamneh* and cases that *Taamneh* referenced—the Court invoked language that resembles the intent to facilitate test. For example, the *Central Bank* Court explained that aiding and abetting under federal law requires "knowing aid to persons committing federal crimes, with the intent to facilitate the crime."[214] Likewise, in *Rosemond v. United States*, one of the Supreme Court's most recent cases on criminal secondary liability, the Court held that "a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission."[215] Aside from naming and quoting these precedents, the *Taamneh* Court also appeared to employ the intent to facilitate test when rejecting the plaintiffs' JASTA claims against the social media companies, highlighting "the lack of any defendant *intending to assist* ISIS."[216] Furthermore, again harkening back to Justices Alito and Sotomayor's questioning during oral argument,[217] the *Taamneh* opinion concluded by holding that the "plaintiffs have failed to allege that defendants *intentionally* provided any substantial aid to the Reina attack,"[218] which is noticeably different wording than JASTA's requirement that aiders and abettors "*knowingly* provid[e] substantial assistance."[219] Finally, in a case decided a few weeks after *Twitter, Inc. v. Taamneh*, the Supreme Court cited *Taamneh* as an illustration of aiding and abetting

212. United States v. Moses, 220 F.2d 166, 168–69 (3d Cir. 1955).

213. Id. at 169 (emphasis added).

214. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994); see also Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218, 1220, 1223 (2023) (citing *Cent. Bank*, 511 U.S. at 181). Oddly, the *Central Bank* Court cited *Nye & Nissen* to support this proposition. See *Cent. Bank*, 511 U.S. at 181; cf. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (adopting the true purpose test from *Peoni*).

215. 572 U.S. 65, 76 (2014); see also *Taamneh*, 143 S. Ct. at 1220, 1221, 1223, 1224 (referencing *Rosemond* and citing the majority's determination that a criminal defendant must act "with the intent of facilitating the offense's commission" to be liable as an aider and abettor (internal quotation marks omitted) (quoting *Rosemond*, 572 U.S. at 71)). For an argument that *Rosemond* is actually unclear as to which mens rea standard the majority embraced, see *Rosemond*, 572 U.S. at 84–85 (Alito, J., concurring in part and dissenting in part) ("The Court refers interchangeably to both [the pure knowledge and true purpose] tests and thus leaves our case law in the same, somewhat conflicted state that previously existed."); see also supra note 154.

216. *Taamneh*, 143 S. Ct. at 1230 (emphasis added).

217. See supra notes 125–126, 190 and accompanying text.

218. *Taamneh*, 143 S. Ct. at 1231 (emphasis added).

219. 18 U.S.C. § 2333(d)(2) (2018) (emphasis added).

liability, which requires "the provision of assistance to a wrongdoer *with the intent to further* an offense's commission."[220]

To end with the IRGC hypothetical,[221] a court applying the intent to facilitate test would demand evidence from which to infer that the telecommunications company was more than indifferent about whether the IRGC would use the devices to orchestrate a terrorist attack. In other words, the company's argument that the IRGC was just another paying customer would carry more exculpatory weight under the intent to facilitate standard than in the pure knowledge context. That said, the injured Americans need not allege that the company "consciously desire[d]" terrorism and certainly not that the company had any "personal or financial interest in" a terrorist attack.[222] Therefore, although the plaintiffs' burden is greater here than under the pure knowledge standard, the intent to facilitate test provides plaintiffs with a better chance of recovering treble damages than in a true purpose regime.

C. *The Foggy State of the ATA Post-*Taamneh

As detailed in the previous sections, *Taamneh* provided support for three distinct mens rea tests for courts to apply in a JASTA inquiry, each of which would delineate a meaningfully different scope of liability. Few JASTA cases have been adjudicated in the months since *Taamneh*,[223] but those that have reveal some confusion regarding the Supreme Court's proclamations in the opinion and its impact on the ATA. One district court concluded that *Taamneh* "does not constitute a change in intervening law"

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220. United States v. Hansen, 143 S. Ct. 1932, 1940 (2023) (emphasis added); see also id. at 1945 ("[A]iding and abetting implicitly carries a mens rea requirement—the defendant generally must intend to facilitate the commission of a crime." (emphasis omitted)).

221. See supra notes 150–153 and accompanying text.

222. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)); United States v. Moses, 220 F.2d 166, 168 (3d Cir. 1955).

223. In one of these cases, a district court found "conscious participation in the underlying tort" in an opinion that was subsequently vacated due to newly discovered information bearing on the plaintiffs' factual allegations. Sotloff v. Qatar Charity, 674 F. Supp. 3d 1279, 1321 (S.D. Fla. 2023), vacated, No. 22-CV-80726-MIDDLEBROOKS, 2023 WL 6471413 (S.D. Fla. Sept. 29, 2023). Additionally, the D.C. Circuit recently discussed *Taamneh* in the context of a civil aiding and abetting claim under common law, which independently involves the *Halberstam* framework, but determined that the plaintiffs failed to allege the defendants were "generally aware" of their role in terrorist activities. Ofisi v. BNP Paribas, S.A., 77 F.4th 667, 675 (D.C. Cir. 2023); see also Newman v. Associated Press, No. 1:24-cv-20684-KMM, 2024 WL 5063288, at *6 (S.D. Fla. Dec. 10, 2024) (dismissing a JASTA claim because the defendant "lack[ed] general awareness" and thus could not "be said to have knowingly assisted [the] FTO"). As for the Supreme Court, the Justices vacated the D.C. Circuit's judgment in *Atchley* and remanded the case "for further consideration in light of" *Taamneh*. AstraZeneca UK Ltd. v. Atchley, 144 S. Ct. 2675, 2675–76 (2024) (mem.).

but rather "largely align[s] with . . . Second Circuit precedent"[224]—even though pre-*Taamneh* "Second Circuit precedent" was not completely harmonious.[225] As for the mens rea inquiry, the court determined that *Taamneh* is fully consistent with prior JASTA opinions that defined "knowing" assistance as anything beyond "innocent [or] inadvertent" aid,[226] a rule that is akin to the pure knowledge test.

Another district court was less certain, expressly "declin[ing]" to "pronounce that Second Circuit precedent is entirely consistent with [*Taamneh*] and no 'tension' exists."[227] And when applying *Halberstam*'s "'knowing and substantial' assistance" prong in light of *Taamneh*, the court focused on the defendant's "specific intent" to facilitate the production of explosive IED ingredients,[228] which resembles the intent to facilitate and true purpose standards.

Finally, instead of using any of the three mens rea tests outlined above, a third district court interpreted *Taamneh* as entailing "a balancing act, considering 'the nature and amount of assistance' on the one hand, and 'the defendant's scienter' on the other."[229] Accordingly, the court inferred "conscious and culpable" participation from the defendant's "'direct and extraordinary' assistance."[230] And notably, the court cited circuit court precedents only when considering *Halberstam*'s general awareness prong and six substantiality factors, not when evaluating whether the defendant had "knowingly" assisted a terrorist attack.[231]

In sum, though the *Taamneh* Court provided some mens rea guideposts to consider when adjudicating JASTA claims, courts are still struggling to synthesize and implement the *Taamneh*–*Halberstam* framework. And the question of what mens rea test courts should apply to potential aiders and abettors in light of *Taamneh* will almost certainly intensify as more JASTA lawsuits are filed,[232] meaning courts and litigants will not be able to avoid confronting the issue altogether.

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224. King v. Habib Bank Ltd., Nos. 20 Civ. 4322 (LGS), 21 Civ. 2351 (LGS), 21 Civ. 6044 (LGS), 2023 WL 8355359, at *3 (S.D.N.Y. Dec. 1, 2023).

225. See supra notes 84–102 and accompanying text.

226. *King*, 2023 WL 8355359, at *3; see also supra notes 92–93 and accompanying text.

227. Bonacasa v. Standard Chartered PLC, No. 22-cv-3320 (ER), 2023 WL 7110774, at *9 (S.D.N.Y. Oct. 27, 2023).

228. Id. at *5, *10 (quoting Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1221–25 (2023)).

229. Zobay v. MTN Grp. Ltd., 695 F. Supp. 3d 301, 346 (E.D.N.Y. 2023) (quoting *Taamneh*, 143 S. Ct. at 1223).

230. Id. at 347 (quoting *Taamneh*, 143 S. Ct. at 1222).

231. See id. at 336–54.

232. See, e.g., Benny-Morrison, supra note 150; Brennan, supra note 150; see also Amal Clooney and Jenner & Block File Lawsuit in US Court Seeking Accountability for Genocide Against Yazidis, supra note 150.

III. A SLIDING SCALE SOLUTION

This Part provides a framework for lower courts to apply when interpreting *Taamneh* and adjudicating JASTA claims, which is especially important in the tort law context because the burden falls on judges, not prosecutors and juries, to screen and decide cases. After first explaining and contextualizing a sliding scale for ATA cases, this Part demonstrates why a sliding scale is faithful to the Supreme Court's opinion in *Taamneh*, consistent with JASTA's statutory text, and aligned with the overarching policy aims of the ATA.

A. *The JASTA Sliding Scale*

While Part II describes three mens rea tests that courts adopt in aiding and abetting cases, the three standards often blur together,[233] comprising more of a mental state continuum than three discrete categories. Rather than fight this dynamic and choose a single mens rea requirement to apply in JASTA cases, lower courts should read *Taamneh* as embracing a sliding scale for aiders and abettors. After all, the mens rea requirement is merely one proxy in a broader normative analysis designed to impose liability on only those who engaged in "truly culpable conduct."[234]

A JASTA sliding scale would balance the two components of *Halberstam*'s third prong (knowing and substantial assistance), with a higher showing of one allowing for a lower showing of the other. This sliding scale is more than just the amount of evidence required to satisfy each element; the mens rea requirement itself changes depending on the level of assistance provided.[235] Thus, if there is significant substantial assistance (almost all six of the substantiality factors are conclusively established[236]), then the mens rea prong will require only pure knowledge. Conversely, if the assistance provided is more modest (only a couple of the substantiality factors are satisfied), the mens rea requirement will heighten to true purpose. Anything in between—for example, a large corporation seeking to help all customers, law-abiding and nefarious, in all their activities, whether lawful or criminal—will result in an intent to facilitate

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233. See United States v. Bailey, 444 U.S. 394, 404 (1980) ("In the case of most crimes, 'the limited distinction between knowledge and purpose has not been considered important since "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results."'" (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978))).

234. *Taamneh*, 143 S. Ct. at 1221.

235. See People v. Beeman, 674 P.2d 1318, 1325 (Cal. 1984) ("[T]he facts from which a mental state may be inferred must not be confused with the mental state that the [plaintiff] is required to prove."); see also supra note 153; infra note 265.

236. As a reminder, these six factors are (1) "the nature of the act assisted," (2) "the amount of assistance" given, (3) the defendant's presence or absence at the time of the act, (4) the defendant's "relation to the tortious actor," (5) "the defendant's state of mind," and (6) "the duration of the assistance." Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983) (emphasis omitted).

rule.[237] Finally, if parties provide significant substantial assistance *and* do so with true purpose, then they can be liable for each and every terrorist attack committed by the FTO.[238]

To make this abstract sliding scale more tangible, consider the IRGC hypothetical introduced in Part II.[239] When adjudicating the plaintiffs' JASTA suit, courts should first apply *Halberstam*'s six substantiality factors.[240] Assuming the telecommunications company's assistance to the IRGC was substantial—such as if the company provided hundreds of specially made devices to the IRGC over a long period of time and taught IRGC leaders how to operate the gadgets—the mens rea requirement would slide to pure knowledge, meaning a court need only find that the company was "aware" that an act of terrorism was "practically certain to follow" from its actions to sustain liability.[241] Given its knowledge of the IRGC's "foreign disruption" plans, the telecommunications company would likely be liable under the ATA.[242]

Alternatively, if the company merely engaged in a one-off sale of generally available products at arm's length, the plaintiffs would need to prove the company's "conscious[] desire[]" to participate in a terrorist attack, which is the true purpose test.[243] Nevertheless, even though several of *Halberstam*'s six substantiality factors are not established in the latter scenario, the plaintiffs could still prevail if they, for instance, discovered recordings of the company's executives discussing the economic benefits of driving competitor businesses out of the region through acts of terrorism. That there is still an avenue—albeit a narrow one—to impose liability on the company in this situation would ensure that the ATA covers "truly culpable conduct."[244]

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237. At first glance, the intent to facilitate test may seem most applicable to the social media companies in *Taamneh*, since the platforms were "agnostic" as to the material they promoted and thus "match[ed] any content (including ISIS' content) with any user who [wa]s more likely to view that content." *Taamneh*, 143 S. Ct. at 1227. But considering the lack of any affirmative assistance from the companies, who "at most allegedly stood back and watched" once the "algorithms were up and running," the true purpose rule is probably more appropriate. Id. ("[P]laintiffs would need some other very good reason to think that defendants were consciously trying to help . . . the Reina attack. . . . [But] plaintiffs point to no act of encouraging, soliciting, or advising the commission of the Reina attack . . . ."). Regardless, given the parallels between the true purpose and intent to facilitate tests, the analysis of the companies' mens rea under either would likely be similar. See supra notes 197–213, 221–222 and accompanying text.

238. See infra notes 266–268 and accompanying text.

239. See supra notes 150–153 and accompanying text.

240. See supra notes 65–66 and accompanying text.

241. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

242. See supra notes 169–173 and accompanying text.

243. *Counterman*, 143 S. Ct. at 2117 (internal quotation marks omitted) (quoting *Bailey*, 444 U.S. at 404).

244. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1221 (2023).

Admittedly, a sliding scale could pose administrability concerns, potentially adding a "vague[] mathematical metaphor" on top of a *Halberstam* framework that has puzzled and frustrated judges for years.[245] But even if a sliding scale does not completely "cut through [*Halberstam*'s] kudzu,"[246] this approach would provide a coherent structure with which to analyze *Halberstam*'s third prong and assess the defendant's mens rea and level of assistance, thereby promoting both accuracy and efficiency.[247] As a result, although there may be some vagueness regarding whether a defendant's assistance is sufficiently substantial to change the mens rea requirement from true purpose to pure knowledge, the sliding scale would guide judicial discretion while also granting courts flexibility to impose civil liability only on culpable parties.[248] Short of amending JASTA to eliminate any reference to *Halberstam*, this approach best addresses the indeterminacies of the *Halberstam* framework without distracting from the core inquiry in aiding and abetting cases: the defendant's overall culpability.[249]

Moreover, though not expressly applying it, several courts have favorably discussed a mens rea standard that resembles a sliding scale in the criminal law aiding and abetting context, which lends further support to this framework in the JASTA setting.[250] For example, the Second Circuit adopted a pure knowledge test for secondary actors unless their assistance merely involved routine, lawful sales or their relationship to the principal was tenuous, in which case the mens rea requirement would heighten to

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245. Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. Chi. L. Rev. 1, 17 (1993) (describing a sliding scale for unconscionability); see also supra notes 84–102, 119–127 and accompanying text.

246. Transcript of Oral Argument, supra note 81, at 89 (statement of Justice Gorsuch).

247. Some scholars have concluded that in certain contexts, sliding scales are more efficient than sharp lines. See, e.g., Edward Fox & Jacob Goldin, Sharp Lines and Sliding Scales in Tax Law, 73 Tax L. Rev. 237, 249 (2020) (analyzing sliding scales in tax law).

248. Vagueness concerns could make some uncomfortable with a sliding scale in criminal law. Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) ("[A penal] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."). But this framework is more attractive and useful in a tort law setting that must balance several competing policy considerations, such as deterrence and corrective justice. See John Makdisi, Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability, 67 N.C. L. Rev. 1063, 1067–75 (1989) (arguing for a proportional liability approach to tort law rather than all-or-nothing rules).

249. See *Taamneh*, 143 S. Ct. at 1230 (noting that "[b]y their very nature, the concepts of aiding and abetting and substantial assistance do not lend themselves to crisp, bright-line distinctions").

250. See Richman et al., supra note 141, at 508 (characterizing some court opinions as adopting a "sliding scale" for criminal law aiding and abetting cases); see also *Taamneh*, 143 S. Ct. at 1220 (adjudicating an ATA claim in light of "the common law of aiding and abetting upon which *Halberstam* rested and to which JASTA's common-law terminology points").

true purpose.[251] Similarly, some courts have adopted a true purpose test for secondary actors but relaxed this requirement when "the crime is particularly grave."[252] So while shopkeepers marketing dresses to prostitutes are criminally liable as aiders and abettors only if the prosecution can prove true purpose,[253] parties who knowingly provide military goods to rebels[254] or sell guns to someone who expressed a desire to kill[255] can be held secondarily liable for treason and murder respectively even without evidence of purpose. Justifying this flexible approach using language that is strikingly similar to the third *Halberstam* prong, Judge Richard Posner reasoned that courts can infer secondary actors want the principal to succeed when they "knowingly provide[] essential assistance."[256]

There is even some historical support for creating a sliding scale that balances the mens rea requirement with the level of assistance provided, which is most analogous to the JASTA context. Under the Model Penal Code's 1953 draft, although true purpose was always sufficient to sustain secondary liability, pure knowledge was also adequate if accompanied by substantial assistance.[257] The Seventh Circuit also appeared to favor this approach in *United States v. Irwin*.[258] In that case, the court determined that while evidence of true purpose was sufficient to support liability even when "the assistance was quite minor,"[259] a defendant "who, knowing the criminal nature of another's act, deliberately renders what he knows to be active aid in the carrying out of the act is . . . an aider and abettor even if there is no evidence that he wants the acts to succeed" as long as "the assistance is deliberate and material."[260] Rephrased, though true purpose was required in both instances, the court was more willing to infer this purpose when the government provided evidence of knowledge and substantial assistance.[261]

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251. Weiss, supra note 136, at 1397–400 (discussing United States v. Campisi, 306 F.2d 308 (2d Cir. 1962)).

252. United States v. Fountain, 768 F.2d 790, 798 (7th Cir.), opinion supplemented on denial of reh'g, 777 F.2d 345 (7th Cir. 1985).

253. Id.

254. Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870) (holding that a defendant "cannot be permitted to stand on the nice metaphysical distinction" between true purpose and pure knowledge when the "consequences of his acts are too serious and enormous").

255. *Fountain*, 768 F.2d at 798.

256. United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991), aff'd, 506 U.S. 534 (1993).

257. Scales v. United States, 367 U.S. 203, 225 n.17 (1961) (citing a tentative draft of the Model Penal Code that required "purpose" to sustain accomplice liability unless, "acting with knowledge that such other person was committing or had the purpose of committing the crime, [the secondary actor] knowingly, substantially facilitated its commission").

258. 149 F.3d 565 (7th Cir. 1998).

259. Id. at 572.

260. Id. (quoting United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995)).

261. See Weiss, supra note 136, at 1409 (arguing that *Irwin* "attempted to reconcile the [pure] knowledge cases with the [true purpose] cases," concluding "that knowledge

B. *Staying Faithful to* Taamneh *and JASTA's Statutory Text*

While the Supreme Court did not expressly adopt or even mention a sliding scale, the *Taamneh* opinion implicitly endorsed the logic of a sliding scale for the mens rea analysis.[262] Importantly, the Court consistently cautioned against reading *Halberstam* as an "inflexible code[]" and instead refocused the inquiry on the defendant's overall "culpability,"[263] which is largely a normative inquiry that depends on both one's mental state and the amount of assistance provided to the criminal activity. So when considering hypothetical "situations where the provider of routine services does so in an unusual way or provides such dangerous wares" to an FTO, the nine Justices could not "rule out the possibility" of JASTA liability for the provider.[264] Justifying this conclusion, the Court noted that when parties offer "more direct, active, and substantial [assistance] than what we review[ed] here[,] . . . plaintiffs might be able to establish liability with a lesser showing of scienter."[265] Relatedly, when characterizing the facts and analysis from *Halberstam*, the Court determined that "Hamilton's assistance to [the burglar] was so *intentional and systematic* that she assisted each and every burglary committed by [him]."[266] In other words, a secondary actor—providing significant substantial assistance with true

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coupled with substantial assistance was a fair basis from which to infer desire or purposeful intent"). In his proposed jury instructions for criminal law aiding and abetting cases, Baruch Weiss also supported a relaxing of the mens rea requirement when the defendant "*substantially* aided" the principal. See id. at 1489–90.

262. Additionally, the Court also appeared to favorably discuss a sliding scale based on the nexus between the defendant's acts and the terrorist attack, as in *United States v. Campisi*. Compare Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1230 (2023) ("When there is a direct nexus between the defendant's acts and the tort, courts may more easily infer such culpable assistance. But, the more attenuated the nexus, the more courts should demand that plaintiffs show culpable participation through intentional aid that substantially furthered the tort."), with supra note 251 and accompanying text.

263. *Taamneh*, 143 S. Ct. at 1225, 1229; see also id. at 1221 ("[C]ourts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct."); id. at 1223 (defining "aids and abets" in § 2333(d)(2) as "conscious, voluntary, and culpable participation in another's wrongdoing"); id. at 1230 (stating that the "fundamental question of aiding-and-abetting liability" is whether "defendants consciously, voluntarily, and culpably participate in or support the relevant wrongdoing"); id. ("The point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue.").

264. Id. at 1228.

265. Id. It is unclear whether the phrase "lesser showing of scienter" refers to a lower mens rea test—such as pure knowledge—or a reduced burden of production, simply allowing courts to infer culpable participation more easily. See id.; see also supra note 153. Either way, the logic of the Court's dicta fits cleanly with a sliding scale. See Zobay v. MTN Grp. Ltd., 695 F. Supp. 3d 301, 346 (E.D.N.Y. 2023) (characterizing *Taamneh*'s discussion of the mens rea and substantiality inquiries as "a balancing act").

266. *Taamneh*, 143 S. Ct. at 1224 (emphasis added).

purpose—can be liable for every tort committed by the principal,[267] which directly supports the extreme iteration of the sliding scale.[268]

Granted, both JASTA's statutory text and *Halberstam*, which JASTA's statutory notes adopt as "the proper legal framework" for secondary liability,[269] use the word "knowingly" without mentioning a sliding scale or any requirement of purpose.[270] As the *Taamneh* Court highlighted, however, the statute also uses the term "aids and abets,"[271] which is "familiar to the common law" and thus "'brin[gs] the old soil' with" it.[272] And a sliding scale mens rea test is an implicit feature of several common law aiding and abetting cases, including those cited in *Taamneh*.[273] For instance, in *Camp v. Dema*, the court held that "[s]ome knowledge [of the primary violation] must be shown, but the exact level necessary for liability remains flexible and must be decided on a case-by-case basis."[274] The *Rosemond* Court similarly appeared to contemplate the possibility of a sliding scale in criminal law aiding and abetting cases. Although the Court held that secondary liability extends to those "who *actively* participate[] in a criminal scheme *knowing* its extent and character," the majority deliberately did not address the mens rea needed for actors who "*incidentally* facilitate a criminal venture rather than actively participate in

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267. Id. at 1225 ("[I]n appropriate circumstances, a secondary defendant's role in an illicit enterprise can be so systemic that the secondary defendant is aiding and abetting every wrongful act committed by that enterprise . . . ."); see also supra text accompanying note 238.

268. Some court watchers have argued that the Supreme Court's aiding and abetting cases during the 2023 term "foreshadow[ed] a sliding scale approach to mens rea depending on the substantiality of aid given and the seriousness of the facilitated offense," specifically identifying *Taamneh* as possibly "foreshadow[ing] a less rule-like approach" to the mens rea inquiry. Cole, supra note 185, at 3, 14.

269. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, sec. 2(a)(5), § 2333, 130 Stat. 852, 852 (2016) (codified as amended at 18 U.S.C. § 2333 (2018)).

270. See 18 U.S.C. § 2333; see also Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983).

271. See 18 U.S.C. § 2333.

272. *Taamneh*, 143 S. Ct. at 1218 (quoting Sekhar v. United States, 570 U.S. 729, 733 (2013)). The *Taamneh* Court also warned against regarding *Halberstam*'s language as "totemic" or "inflexible." Id. at 1225.

273. In *Woodward v. Metro Bank of Dallas*—which both *Taamneh* and *Halberstam* cite—the Fifth Circuit favorably discussed several distinct sliding scale mens rea tests, such as those based on the existence of an affirmative duty, the type of assistance offered, and the nexus between the defendant's acts and the principal violation. See 522 F.2d 84, 95, 97 (5th Cir. 1975); see also *Taamneh*, 143 S. Ct. at 1222. Likewise, the Eleventh Circuit reasoned in *Woods v. Barnett Bank of Fort Lauderdale* that "[f]or an aider and abettor who combines silence [in the face of securities violations] with affirmative assistance, the degree of knowledge required should depend upon how ordinary the assisting activity is in the involved businesses." 765 F.2d 1004, 1010 (11th Cir. 1985) (citing *Woodward*, 522 F.2d at 96–97); see also *Taamneh*, 143 S. Ct. at 1222.

274. 948 F.2d 455, 459 (8th Cir. 1991); see also *Taamneh*, 143 S. Ct. at 1222, 1229 (citing *Camp*, 948 F.2d at 459–60).

it."[275] Accordingly, when analyzing these and other cases, the *Taamneh* Court deduced that courts frequently view the knowing and substantial assistance "requirements as working in tandem, with a lesser showing of one demanding a greater showing of the other."[276]

Another potential critique of adopting a sliding scale for the mens rea inquiry is that this test places significant weight on *Halberstam*'s six substantiality factors, as the presence or absence of these considerations will determine the precise mens rea requirement. Yet *Halberstam* itself recognized that these factors are not "immutable components" of aiding and abetting liability,[277] a warning that the *Taamneh* Court repeatedly echoed.[278]

But unlike the Ninth Circuit's approach that was criticized in *Taamneh*, a sliding scale does not render the *Halberstam* elements "a sequence of disparate, unrelated considerations without a common conceptual core."[279] Instead, the sliding scale, in which the six substantiality factors combine with the mens rea analysis to determine the defendant's liability, ensures that "'the knowledge and substantial assistance' components '[are] considered relative to one another' as part of a single inquiry designed to capture conscious and culpable conduct."[280] This structure would consequently "help courts capture the essence of aiding and abetting: participation in another's wrongdoing that is *both significant and culpable enough* to justify attributing the principal wrongdoing to the aider."[281] Ultimately, by cementing the relationship between the defendant's mens rea and level of assistance on a sliding scale, this framework would prevent ATA liability from straying "far beyond its essential culpability moorings."[282]

C. *Aligning With the Overarching Policy Aims of the ATA*

A sliding scale would also help achieve the ATA's principal policy goals. Specifically, the ATA is designed to simultaneously provide victims of terrorist attacks with their day in court and an avenue to recover compensation for their injuries while also punishing and deterring

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275. Rosemond v. United States, 572 U.S. 65, 77 & n.8 (2014) (emphasis added). The specific scenario the Court pondered was an "owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used." Id. at 77 n.8.

276. *Taamneh*, 143 S. Ct. at 1222. Put differently, "less substantial assistance required more scienter before a court could infer conscious and culpable assistance. And, vice versa, if the assistance were direct and extraordinary, then a court might more readily infer conscious participation in the underlying tort." Id. at 1222 (citation omitted).

277. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983).

278. See *Taamneh*, 143 S. Ct. at 1220, 1223, 1225, 1230.

279. Id. at 1229.

280. Id. (quoting Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991)).

281. Id. (emphasis added).

282. Id. at 1228–29.

organizations that fund terrorism.[283] These policy aims even drove some of the questioning during the *Taamneh* oral argument.[284] Each of the mens rea tests outlined above, however, is inherently inflexible and hence could frustrate the ATA's objectives. For example, the true purpose standard is often underinclusive, failing to extend civil liability to actors who deliberately provide substantial assistance to terrorists but lack any desire for a terrorist attack to occur.[285] Conversely, the pure knowledge rule can be overinclusive, especially when the assistance provided stemmed from routine, lawful conduct.[286]

Rather than pick one of these blunt mens rea instruments, a sliding scale would balance the policy goals of the ATA, smoothing the rough edges of the traditional mens rea tests. In applying the expansive pure knowledge standard to only the narrow subset of actors who provided significant substantial assistance to terrorist attacks, the sliding scale would help the ATA deter and punish organizations that fund terrorism while avoiding the overinclusivity concerns of the conventional mens rea rule. Likewise, demanding a showing of true purpose when the secondary actor offered more modest assistance would prevent courts from haphazardly penalizing routine, lawful conduct without inhibiting plaintiffs' ability to

283. See 136 Cong. Rec. 26,716 (1990) (statement of Sen. Grassley) (quoting Lisa Klinghoffer, who explained that her lawsuit against the Palestine Liberation Organization was "a search for justice" intended to "legally set responsibility for [those] who gave the orders to murder my father; for [those] who gave the orders to hijack the ship"); supra notes 25–31 and accompanying text; see also John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 2–3 (2020) (defining torts as "legally *recognized* wrongs of a particular sort" and explaining that a central principle of tort law is a "person who is the victim of a legal wrong is entitled to an avenue of civil recourse against one who wrongs her").

284. For instance, Justice Amy Coney Barrett asked the government if one reason for its proposed test was to "make sure that whatever we said about social media companies wouldn't get banks off the hook when they have those kinds of special relationships that you're talking about," to which Edwin Kneedler agreed and added that the government was also concerned about charities escaping liability. Transcript of Oral Argument, supra note 81, at 107–08 (statements of Justice Barrett and Edwin Kneedler).

285. See Capps, Upfront Complicity, supra note 156, at 643 ("The common refrain is that the [true purpose] requirement is underinclusive insofar as it fails to hold liable accomplices who, though genuinely complicit, do not care whether the principal's criminal conduct occurs.").

286. See Alexander F. Sarch, Condoning the Crime: The Elusive Mens Rea for Complicity, 47 Loy. U. Chi. L.J. 131, 141 (2015) (arguing that the pure knowledge test "sets the [liability] bar too low"); Gideon Yaffe, Intending to Aid, 33 Law & Phil. 1, 10 (2014) ("Generally speaking, the intent position seems to set the bar of liability too high, and the knowledge position too low."); see also Transcript of Oral Argument, supra note 81, at 134 (statement of Justice Kavanaugh) ("[W]e want to have fair notice for major sanctions, civil or criminal."); Weiss, supra note 136, at 1398 (noting that even though *United States v. Campisi* adopted the pure knowledge test, the court clarified that a "merchant who makes a routine sale of lawful goods should not become an aider and abettor of the customer's subsequent crime absent a purposeful desire . . . to aid and abet that crime").

recover damages from parties—such as banks or charities[287]—who stealthily supported a terrorist attack.

Although striking a proper scope of liability is obviously a critical aspect of any tort regime, this balance is even more important in the JASTA context, considering the ATA "function[s] as [a] prototypical private enforcement statute[]" in which private parties "independently enforce the government's national security laws and policies through litigation."[288] Therefore, to adequately (1) compensate plaintiffs for their terrorism-related injuries, (2) deter organizations from assisting the activities of FTOs, and (3) further the United States' national security objectives, courts should resist the simplicity of the blunt mens rea rules and instead adopt a sliding scale that recasts the mens rea inquiry as a single continuum designed to "cabin aiding-and-abetting liability to cases of truly culpable conduct."[289]

CONCLUSION

The ATA is charged with the difficult task of simultaneously deterring terrorism, compensating injured victims, and crippling FTOs, all without impeding ordinary business activities. And after the Supreme Court's opinion in *Twitter, Inc. v. Taamneh*, courts adjudicating these high-stakes claims must now apply *Halberstam*'s tripartite, dual-pronged, six-factor framework in light of the common law aiding and abetting cases from which it arose, opinions that are often "hopelessly muddled and divided."[290] Adopting a sliding scale would provide coherence to an otherwise unruly scheme and ensure that *Halberstam*'s mens rea inquiry fully captures the defendant's culpability. Above all, in the rapidly evolving context of international terrorism, a sliding scale would guard against rigid applications of *Halberstam* and *Taamneh* that could disturb the ATA's delicate policy balance.

287. See supra note 284.

288. Maryam Jamshidi, The Private Enforcement of National Security, 108 Cornell L. Rev. 739, 742, 746 (2023).

289. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1221 (2023).

290. Weiss, supra note 136, at 1373; see also *Taamneh*, 143 S. Ct. at 1225.

DIGITAL DOG SNIFFERS

*Alice Park**

U.S. legislators are taking aim at technology companies for their role in the nation's fentanyl crisis. Members of Congress recently introduced the Cooper Davis Act, which would require electronic communications service providers to report evidence of illicit fentanyl, methamphetamine, and counterfeit drug crimes on their platforms to the Drug Enforcement Administration. For the first time, such companies would be obligated to report suspected criminal activity by their users directly to federal law enforcement. While the Cooper Davis Act is modeled after a federal statute requiring providers to report child sexual abuse material (CSAM), the proposed bill targets a qualitatively different kind of crime—one highly dependent on context. By requiring providers to report directly to the government and by prohibiting deliberate blindness to violations, the Cooper Davis Act would incentivize providers to conduct large-scale automated searches for drug-related activity, raising novel questions about the Fourth Amendment's applicability to mandatory reporting laws for crimes other than CSAM.

This Note examines the implications of extending practical and legal frameworks for regulating CSAM—such as the private search doctrine, which has created a circuit split in online CSAM cases—to other contexts. This Note argues that courts should adopt a narrow interpretation of the private search doctrine, in line with the Second and Ninth Circuits, in cases involving automated searches for criminal activity. This approach would resolve the circuit split in CSAM cases and clarify the doctrine's scope for other kinds of warrantless digital searches.

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INTRODUCTION

Fentanyl poisoning is now the leading cause of death among Americans ages eighteen to forty-five, surpassing traffic accidents, suicide, and COVID-19.[1] Electronic communications and social media have played an outsized role in the ongoing opioid epidemic, leading the Drug Enforcement Administration to take aim at technology companies in recent years.[2] In 2021, the DEA issued a public warning about the growing number of fentanyl-laced counterfeit pills being sold online and blamed social media companies for failing to protect their users.[3] Between May 2022 and May 2023, the DEA conducted more than 1,400 investigations resulting in 3,337 arrests and the seizure of nearly 193 million deadly doses of fentanyl.[4] Over seventy percent of those investigations involved social

1. DEA Administrator on Record Fentanyl Overdose Deaths, Get Smart About Drugs, https://www.getsmartaboutdrugs.gov/media/dea-administrator-record-fentanyl-overdose-deaths [https://perma.cc/S3UM-JGM7] (last visited Sept. 11, 2024); Fentanyl by Age: Report, Fams. Against Fentanyl (Dec. 15, 2021), https://www.familiesagainstfentanyl.org/research/byage [https://perma.cc/HP3A-JCMQ].

2. See Kristin Finklea & Lisa N. Sacco, Cong. Rsch. Serv., IN12062, Policing Drug Trafficking on Social Media 1 (2022), https://crsreports.congress.gov/product/pdf/IN/IN12062 [https://perma.cc/WAY8-XW4X]; U.S. Gov't Accountability Off., GAO-22-105101, Trafficking: Use of Online Marketplaces and Virtual Currencies in Drug and Human Trafficking 11 (2022), https://www.gao.gov/assets/gao-22-105101.pdf [https://perma.cc/4PXM-Y37X]; Marcus A. Bachhuber & Raina M. Merchant, Buying Drugs Online in the Age of Social Media, 107 Am. J. Pub. Health 1858, 1858 (2017). Teenagers and young adults are increasingly turning to social media platforms like Instagram and Snapchat to obtain fentanyl and other synthetic opioids. See, e.g., Robin Buller, Their Kids Died After Buying Drugs on Snapchat. Now the Parents Are Suing, The Guardian (Oct. 18, 2023), https://www.theguardian.com/technology/2023/oct/18/snapchat-sued-overdose-deaths [https://perma.cc/Q5UR-P4TW]; Jan Hoffman, Fentanyl Tainted Pills Bought on Social Media Cause Youth Drug Deaths to Soar, N.Y. Times (May 19, 2022), https://www.nytimes.com/2022/05/19/health/pills-fentanyl-social-media.html (on file with the *Columbia Law Review*). Drug distributors also use social media to connect with manufacturers and buyers. See Comm'n on Combating Synthetic Opioid Trafficking, Final Report 43–44 (2022), https://www.rand.org/content/dam/rand/pubs/external_publications/EP60000/EP68838/RAND_EP68838.pdf (on file with the *Columbia Law Review*) [hereinafter Commission Report] ("The internet presents unique challenges for drug control in that chemical suppliers in Asia openly advertise synthetic opioids and related chemicals on public platforms, including social media forums and B2B websites.").

3. See Devlin Barrett & Elizabeth Dwoskin, With Overdose Deaths Soaring, DEA Warns About Fentanyl-, Meth-Laced Pills, Wash. Post (Sept. 27, 2021), https://www.washingtonpost.com/national-security/dea-warning-counterfeit-drugs/2021/09/27/448fcb18-1f27-11ec-b3d6-8cdebe60d3e2_story.html (on file with the *Columbia Law Review*); see also Devlin Barrett, Poison Pill: How Fentanyl Killed a 17-Year-Old, Wash. Post (Nov. 30, 2022), https://www.washingtonpost.com/national-security/2022/11/30/fentanyl-fake-pills-social-media/ (on file with the *Columbia Law Review*) (reporting that DEA Administrator Anne Milgram described social media sites like Snapchat as "the superhighway of drugs").

Federal law prohibits the distribution of controlled substances by means of the internet without a valid prescription. See 21 U.S.C. § 829 (2018).

4. Press Release, Drug Enf't Admin., DEA Operation Last Mile Tracks Down Sinaloa and Jalisco Cartel Associates Operating Within the United States (May 5, 2023),

media sites and encrypted communications platforms like Facebook, Instagram, Signal, Snapchat, Telegram, TikTok, WhatsApp, Wickr, and Wire.[5]

But these efforts have been insufficient, according to a bipartisan group of congressmembers, and the fentanyl crisis has worsened as "federal agencies have not had access to the necessary data to intervene."[6] To address the inaccessibility of data held by third parties, Senators Roger Marshall and Jeanne Shaheen introduced in March 2023 the Cooper Davis Act, which would require tech companies to report evidence of illicit fentanyl, methamphetamine, and counterfeit drug crimes occurring on their platforms to the DEA.[7] In July 2024, Representatives Angie Craig and Mariannette Miller-Meeks introduced the Cooper Davis and Devin Norring Act, which mirrors the Senate bill, in the House.[8] The proposed legislation would, for the first time, require electronic communications service providers and remote computing services ("providers"[9]) to report

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https://www.dea.gov/press-releases/2023/05/05/dea-operation-last-mile-tracks-down-sinaloa-and-jalisco-cartel-associates [https://perma.cc/JW73-7FZ3].

5. Id.

6. See Press Release, Jeanne Shaheen, U.S. Sen. for N.H., Shaheen, Marshall's Bipartisan Bill to Crack Down on Online Drug Sales Through Social Media Clears Key Committee Hurdle (July 13, 2023), https://www.shaheen.senate.gov/shaheen-marshalls-bipartisan-bill-to-crack-down-on-online-drug-sales-through-social-media-clears-key-committee-hurdle [https://perma.cc/6E8H-3Q9E] [hereinafter Shaheen Press Release] (reporting that in a five-month period, the DEA conducted 390 drug-poisoning investigations and found that 129 had direct ties to social media).

7. Cooper Davis Act, S. 1080, 118th Cong. (2023). The bill was first introduced in September 2022 by Senator Roger Marshall and died in committee. See S. 4858, 117th Cong. (2022). In March 2023, Senators Marshall and Jeanne Shaheen reintroduced the bill, with Senators Dick Durbin, Chuck Grassley, Amy Klobuchar, and Todd Young as cosponsors. Press Release, Doc Marshall, U.S. Sen. for Kan., Senator Marshall's Cooper Davis Act Heads to the Senate Floor Following Major Victory out of Committee (July 13, 2023), https://www.marshall.senate.gov/newsroom/press-releases/senator-marshalls-cooper-davis-act-heads-to-the-senate-floor-following-major-victory-out-of-committee/ [https://perma.cc/28QL-9N8H] [hereinafter Marshall Press Release].

8. Cooper Davis and Devin Norring Act, H.R. 8918, 118th Cong. (2024); Press Release, Angie Craig, U.S. Rep. for Minn., Rep. Angie Craig Introduces Bipartisan "Cooper Davis and Devin Norring Act" to Stop Fentanyl Trafficking on Social Media Platforms (July 2, 2024), https://craig.house.gov/media/press-releases/rep-angie-craig-introduces-bipartisan-cooper-davis-and-devin-norring-act-stop [https://perma.cc/46LB-NG2U] [hereinafter Craig Press Release]. Representatives Dan Crenshaw, Don Davis, Jake LaTurner, and Kim Schrier cosponsored the bill. Craig Press Release, supra. The Cooper Davis and Devin Norring Act is named after two teenagers who died of fentanyl poisoning after purchasing counterfeit fentanyl-laced prescription drugs on Snapchat. Id.

This Note refers to the proposed legislation as the Cooper Davis Act and primarily deals with S. 1080, as the Senate bill was introduced first and the laws' contents are largely identical. The only material difference between the two bills for purposes of this Note is an encryption-protection provision in the House bill. See infra note 153.

9. This Note adopts the definition of "provider" in the Cooper Davis Act and 18 U.S.C. § 2258E(6) (2018), which refers to an "electronic communication service provider or remote computing service." Electronic communication service providers give to the public the ability to send or receive wire or electronic communications, id. § 2510(15), and

suspected criminal activity by their users directly to federal law enforcement.[10] The Senate Judiciary Committee approved the Cooper Davis Act in July 2023.[11] The bill expired in January 2025.[12]

Providers use a variety of nonhuman moderation tools to detect content that violates their terms of service, such as drug transactions, spam, hate speech, and child sexual abuse material (CSAM).[13] Federal law requires providers to report evidence of CSAM to the National Center for Missing & Exploited Children (NCMEC), but providers are not statutorily obligated to report any other kind of suspected illegal activity.[14] The Cooper Davis Act is modeled after the federal statute requiring providers to report CSAM: the PROTECT Our Children Act of 2008 (PROTECT Act). Both laws aim to make technology companies play a more proactive role in aiding law enforcement and public safety efforts.[15]

While courts have upheld the constitutionality of providers detecting and reporting CSAM pursuant to the PROTECT Act,[16] the proposed bill targets a qualitatively different kind of crime—one highly dependent on context.[17] This Note argues that by requiring providers to report directly to the government and prohibiting deliberate blindness to violations, the Cooper Davis Act would incentivize providers to conduct large-scale automated searches for drug-related activity, raising novel questions about

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remote computing services provide to the public computer storage or processing services by means of an electronic communications system, id. § 2711(2).

10. S. 1080 § 2.

11. Marshall Press Release, supra note 7. On September 5, 2023, the bill was amended and placed on the Senate Legislative Calendar. Actions - S.1080 - 118th Congress (2023–2024): Cooper Davis Act, S. 1080, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/1080/all-actions [https://perma.cc/5MGR-Y4UJ].

12. The bill was not voted on by the Senate by the time the 118th Congress ended in January 2025. The House bill also died in committee. Actions - H.R.8918 - 118th Congress (2023–2024): Cooper Davis and Devin Norring Act, H.R. 8918, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-bill/8918/all-actions [https://perma.cc/QF3Z-36EE]. While the Cooper Davis Act was not enacted into law, history suggests the bill's cosponsors may reintroduce it in the new congressional session. See supra note 7. And regardless of whether it is enacted, the issues examined in this Note remain relevant as legislatures continue to grapple with public safety concerns and criminal activity on social media platforms. See infra notes 237–238 and accompanying text.

13. See Hannah Bloch-Wehba, Automation in Moderation, 53 Cornell Int'l L.J. 41, 48–66 (2020) [hereinafter Bloch-Wehba, Automation in Moderation] (tracing the history of providers' automated tools to screen, rank, filter, and block user-generated content).

14. See infra section I.A.1 (describing platforms' reporting obligations). Providers often still collaborate with law enforcement voluntarily. See, e.g., Suzanne Smalley, Senate Bill Crafted With DEA Targets End-to-End Encryption, Requires Online Companies to Report Drug Activity, The Record (July 17, 2023), https://therecord.media/senate-dea-bill-targets-end-to-end-encryption-requires-companies-to-report-drugs [https://perma.cc/S2YN-D8VN] (reporting that many social media sites share data with the police).

15. See infra note 25 and accompanying text.

16. See infra section I.B.

17. See infra section II.A.

the Fourth Amendment's applicability to mandatory reporting laws for non-CSAM crimes.[18]

This Note examines the constitutional problems raised by the Cooper Davis Act and, more broadly, legislation requiring providers to report evidence of illegal activity based on automated computer searches of their users' communications. Part I introduces the proposed bill, its model statute, and Fourth Amendment issues stemming from providers' CSAM reporting requirement, including a circuit split over the private search doctrine's application in online CSAM cases. Part II discusses the differences between automated searches for CSAM and drug-related activity and outlines the novel Fourth Amendment questions raised by the Cooper Davis Act. Part III then explores these issues, concluding that courts would likely treat providers as private parties under the bill. Accordingly, Part III argues that courts should adopt a narrow private search exception to the Fourth Amendment, which best balances users' privacy rights against the government's public safety interests. This approach would also resolve the circuit split in online CSAM cases and provide clear guidance to courts as they confront algorithmic search methods in the future.

I. PROVIDERS' FEDERAL REPORTING REQUIREMENTS, FROM CSAM TO FENTANYL

This Part introduces the Cooper Davis Act and the Fourth Amendment issues that its statutory inspiration, the PROTECT Act, has raised. Section I.A describes providers' reporting requirements under the proposed bill and the PROTECT Act. Section I.B then explains how courts have rejected Fourth Amendment challenges to the PROTECT Act scheme under the private search doctrine. Finally, section I.C discusses a circuit split regarding the scope of the private search exception in online CSAM cases.

A. *Comparing the Cooper Davis Act and the PROTECT Act*

1. *The Cooper Davis Act's Reporting Requirements for Drug Crimes.* — The Cooper Davis Act requires providers to report to the DEA "as soon as reasonably possible after obtaining actual knowledge of any facts or circumstances" establishing the unlawful sale, distribution, or manufacture of fentanyl, methamphetamine, and counterfeit substances.[19] Providers are not required to search for illegal drug activity under the bill, and they need not "engage in additional verification or investigation to

18. See infra section II.B.2.

19. Cooper Davis Act, S. 1080, 118th Cong. § 2(a) (2023) (adding § 521(b) to Part E of the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 28 U.S.C. § 801 et seq. (2018))). The proposed bill also authorizes, but does not require, providers to submit reports based upon a "reasonable belief" of violations. Id.

discover facts and circumstances that are not readily apparent."[20] But a provider may not "deliberately blind itself" to readily apparent violations of the statute.[21]

Reports to the DEA must include "information relating to the account involved in the commission of a crime."[22] While providers are not required to include the contents of users' electronic communications when reporting information about an account, the Cooper Davis Act authorizes them to report such communications, including "direct messages, relating to [proscribed] activity."[23] The bill also requires providers to specify whether the facts being reported were discovered through content moderation conducted by a human or via "a non-human method" like an algorithm or machine learning.[24]

2. *The PROTECT Act: The Cooper Davis Act's Statutory Inspiration.* — A review of the statutory framework that inspired the Cooper Davis Act helps illuminate the Fourth Amendment issues raised by the proposed bill.[25] Congress enacted the PROTECT Act in 2008 to "increase the ability of law enforcement agencies to investigate and prosecute child predators."[26] The law requires providers to report "any facts or circumstances from which there is an apparent violation of" specified criminal offenses involving CSAM.[27] Providers must submit reports to the National Center for Missing & Exploited Children, a private nonprofit established by Congress in 1984 that operates a centralized reporting system for online CSAM called the CyberTipline.[28]

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20. Id. (adding § 521(g) to Part E of the Controlled Substances Act); see also infra note 44 (quoting the text of the proposed provision).

21. S. 1080 § 2(a) (adding § 521(g)(4)).

22. Id. (adding § 521(c)(1)(A)).

23. Id. (adding § 521(c)(2)(C)).

24. Id. (adding § 521(b)(1)(C)).

25. See Shaheen Press Release, supra note 6 ("Social media companies . . . have similar reporting requirements for child sexual exploitation under [the] PROTECT our Children Act of 2008. The Cooper Davis Act would establish a comprehensive and standardized reporting regime that would enable the DEA to better identify and dismantle international criminal networks and save American lives."). In a Senate Judiciary Committee hearing, Senator Alex Padilla noted that the CSAM reporting requirement under § 2258A "is what inspired the structure of the bill before us." Sen. Alex Padilla, Sen. Alex Padilla | Padilla Defends Privacy Concerns in Cooper Davis Act | SJC | 7.13.21, YouTube, at 1:15 (July 13, 2023), https://www.youtube.com/watch?v=imYTY0HKG2A (on file with the *Columbia Law Review*) [hereinafter Padilla Remarks].

26. Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (codified in relevant part at 18 U.S.C. § 2258A (2018)).

27. 18 U.S.C. § 2258A(a)(2)(A).

28. Id. § 2258A(a)(1)(B); Missing Children's Assistance Act, Pub L. No. 98-473, 98 Stat. 2125 (1984) (codified as amended at 34 U.S.C. § 11292 (2018)) (authorizing federal funding for the establishment and operation of a national clearinghouse dedicated to improvement in managing cases of missing and exploited children and establishing NCMEC's five mandated functions); CyberTipline, Nat'l Ctr. for Missing & Exploited Child.,

Although CSAM remains ubiquitous on the internet,[29] the CyberTipline has played an instrumental role in curbing the proliferation of CSAM online.[30] In 2023, the CyberTipline received more than 36 million reports of suspected online CSAM, which contained more than 105 million images and videos.[31] Nearly all of those reports came from the tech industry: Five providers—Facebook, Instagram, Google, WhatsApp, and Snapchat—accounted for more than ninety percent of all reports.[32]

Providers typically detect CSAM using hashing technology. Hashing is a forensic technique that takes a large amount of data, like an image or video, and applies "a complex mathematical algorithm to generate a relatively compact numerical identifier" that is unique to that data.[33] This identifier, a hash value, is "a sort of digital fingerprint" for the file.[34] Providers search for CSAM by computing hash values for files uploaded or transmitted by users and automatically comparing those hashes to lists of hashes of known CSAM, a process called hash matching.[35] The most

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https://www.missingkids.org/gethelpnow/cybertipline [https://perma.cc/5VQN-SA99] (last visited Sept. 10, 2024).

29. See Fernando Alfonso III, The Pandemic Is Causing an Exponential Rise in the Online Exploitation of Children, Experts Say, CNN (May 25, 2020), https://www.cnn.com/2020/05/25/us/child-abuse-online-coronavirus-pandemic-parents-investigations-trnd/index.html [https://perma.cc/458C-JBY3].

30. See MaryJane Gurriell, Born Into Porn but Rescued by Thorn: The Demand for Tech Companies to Scan and Search for Child Sexual Abuse Images, 59 Fam. Ct. Rev. 840, 841–45 (2021).

31. Off. of Juv. Just. & Delinq. Prevention, Off. of Just. Programs, DOJ, CY 2023 Report to the Committees on Appropriations National Center for Missing and Exploited Children (NCMEC) Transparency 4–5 (2023), https://www.missingkids.org/content/dam/missingkids/pdfs/OJJDP-NCMEC-Transparency-CY-2023-Report.pdf [https://perma.cc/24S6-CQGV] [hereinafter OJJDP Report].

32. Nat'l Ctr. for Missing & Exploited Child., 2023 CyberTipline Report 6 (2023), https://www.missingkids.org/content/dam/missingkids/pdfs/2023-CyberTipline-Report.pdf [https://perma.cc/8KDR-FEHL] [hereinafter 2023 CyberTipline Report]; Nat'l Ctr. for Missing & Exploited Child., 2023 CyberTipline Reports by Electronic Service Providers (ESP) 1–8 (2023), https://www.missingkids.org/content/dam/missingkids/pdfs/2023-reports-by-esp.pdf [https://perma.cc/8F8X-XR72]. In 2023, NCMEC escalated 63,892 reports involving children in imminent danger to state and federal law enforcement. 2023 CyberTipline Report, supra, at 3.

33. Richard P. Salgado, Reply, Fourth Amendment Search and the Power of the Hash, 119 Harv. L. Rev. Forum 38, 38 (2005).

34. United States v. Ackerman, 831 F.3d 1292, 1294 (10th Cir. 2016) (citing Salgado, supra note 33, at 38–40); see also PhotoDNA, Microsoft, https://www.microsoft.com/en-us/photodna [https://perma.cc/U79W-XA6C] (last visited Sept. 13, 2024).

35. For instance, Google automatically computes the hash values of all email attachments that its users send or receive. See Michelle DeLaune, NCMEC, Google and Image Hashing Technology, Google Safety Centre, https://safety.google/intl/en_uk/stories/hash-matching-to-help-ncmec/ [https://perma.cc/WM75-7XRC] (last visited Sept. 13, 2024). PhotoDNA, a hash-matching tool developed by Microsoft to detect CSAM, is deployed worldwide across a number of platforms including Facebook, Twitter, and Google. Hany Farid, An Overview of Perceptual Hashing, J. Online Tr. & Safety, Oct. 2021, at 1, 12; see also United States v. Reddick, 900 F.3d 636, 637–38 (5th Cir. 2018)

common hashing technique in CSAM detection is "hard hashing," which requires two files to have the exact same hash value to be considered a match; even a small change in an image or video, like a minor crop or filter, can cause a significant change in the resulting hash.[36] NCMEC maintains a database of nearly eight million hashes of known CSAM files, which dozens of providers use for hash matching, and NCMEC's hash-sharing initiative uses a hard-hashing algorithm.[37]

Some providers also use perceptual image (or "fuzzy") hashing algorithms, which are more resilient to minor alterations like cropping, compression, and color changes.[38] Fuzzy hashing aims to extract "a concise, distinct, perceptually meaningful signature" from an image's pixels and can detect files that have been changed to evade hard-hashing algorithms but are still fundamentally the same content.[39] Microsoft's widely used PhotoDNA tool, for example, uses fuzzy hashing.[40]

When a provider identifies a hash match to known CSAM, it is statutorily obligated to report those files, along with the user's information, to NCMEC.[41] According to the Cooper Davis Act's cosponsors, the bill mirrors providers' reporting requirement under the PROTECT Act by requiring providers to report evidence of drug crimes.[42] Both laws require providers to report when they have "actual knowledge" of the proscribed activity.[43] They also use nearly identical language disclaiming a mandate on providers to proactively search for illegal activity.[44]

(describing the use of PhotoDNA to scan hash values of user-uploaded files and compare them against images in the NCMEC database). In 2014, Google developed its own technology, CSAI Match, to detect known CSAM videos on its services; Google's API is used by NGOs and companies like Reddit, Yahoo, and Adobe. Fighting Child Sexual Abuse Online, Google, https://protectingchildren.google/#tools-to-fight-csam [https://perma.cc/494L-BMND] [hereinafter Google Tools] (last visited Sept. 13, 2024).

36. See Farid, supra note 35, at 4.

37. OJJDP Report, supra note 31, at 11–13 (describing how providers may opt into NCMEC's hash-sharing initiatives); see also Farid, supra note 35, at 3 (citing the MD5 hard-hashing algorithm employed by NCMEC).

38. See Farid, supra note 35, at 3, 5 (explaining "perceptual hashing," also known as "fuzzy hashing").

39. Id.

40. See id. at 12; supra notes 34–36. Meta and Apple also use perceptual hashing algorithms. Tim Bernard, The Present and Future of Detecting Child Sexual Abuse Material on Social Media, Unitary (Oct. 16, 2023), https://www.unitary.ai/articles/the-present-and-future-of-detecting-child-sexual-abuse-material-on-social-media [https://perma.cc/P6CH-5L6M].

41. See 18 U.S.C. § 2258A(a) (2018).

42. See supra note 25 and accompanying text.

43. See supra note 19 and accompanying text; see also 18 U.S.C. § 2258A(a).

44. The PROTECT Act states:

> Nothing in this section shall be construed to require a provider to—
>
> (1) monitor any user, subscriber, or customer of that provider;
>
> (2) monitor the content of any communication of any person described in paragraph (1); or

B. *Mandatory Reporting, Not Mandatory Searching: How Online CSAM Reporting Complies With the Fourth Amendment*

In criminal prosecutions, the government may not use evidence obtained in violation of the Constitution, and, as with any governmental search and seizure, the government's use of information obtained under the PROTECT Act to prosecute criminal defendants is limited by the Fourth Amendment.[45] The Fourth Amendment confers protection onto what a person "seeks to preserve as private, even in an area accessible to the public."[46] When a purported search does not involve physical trespass onto private property, courts apply a two-part inquiry to determine whether a search has occurred: (1) whether a person "exhibited an actual (subjective) expectation of privacy" and (2) whether that expectation is, objectively, "one that society is prepared to recognize as 'reasonable.'"[47] Courts have long held that people have a reasonable expectation of privacy in the contents of their private communications, like letters and telephone calls.[48]

Since its passage in 2008, the PROTECT Act has prompted much litigation and debate over the constitutionality of CSAM detection and

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> (3) affirmatively seek facts or circumstances described in sections (a) and (b).

18 U.S.C. § 2258A(f)(1)–(3).

The Cooper Davis Act states:

> Nothing in this section shall be construed to—
>
> (1) require a provider to monitor any user, subscriber, or customer of that provider;
>
> (2) require a provider to monitor the content of any communication of any person described in paragraph (1);
>
> (3) require a provider to affirmatively search, screen, or scan for facts or circumstances described in subsection (b)(2) . . . .

S. 1080, 118th Cong. § 2 (2023) (adding § 521(g)(1)–(3) to Part E of the Controlled Substances Act).

45. U.S. Const. amend. IV (guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); Mapp v. Ohio, 367 U.S. 643, 654–57 (1961) (holding that evidence obtained in violation of the Fourth Amendment is inadmissible in court).

46. Katz v. United States, 389 U.S. 347, 351 (1967).

47. This test originates from Justice John Marshall Harlan's concurrence in *Katz*. See id. at 361 (Harlan, J., concurring). The *Katz* expectation-of-privacy test "has been *added to*, not *substituted for*, the common-law trespassory test." United States v. Jones, 565 U.S. 400, 409 (2012).

48. See *Katz*, 389 U.S. at 352 (holding that individuals have a right to privacy in the contents of their telephone calls). In contrast, there is no reasonable expectation of privacy in *noncontent*, such as phone numbers and to/from email addresses. Ex parte Jackson, 96 U.S. 727, 733 (1877) (holding that the contents of "[l]etters and sealed packages . . . in the mail" receive the same constitutional protection as papers in one's own domicile); see also Smith v. Maryland, 442 U.S. 735, 744 (1979) (phone numbers); United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008) (to/from addresses of emails).

mandatory reporting.[49] But, as this section explains, courts have rejected Fourth Amendment challenges to the government's use of CSAM evidence reported pursuant to the PROTECT Act—even though that evidence implicates the contents of users' private communications—under the private search doctrine.

1. *The Fourth Amendment's State Action Requirement.* — The Fourth Amendment applies only to state action, and its probable cause and warrant requirements do not apply to searches effected by private parties acting on their own initiative, no matter how arbitrary or unreasonable the search.[50] The private search doctrine is an exception to the Fourth Amendment's warrant requirement and allows the government to use information that a private party has voluntarily turned over based on its own search.[51] The government may not, however, "exceed the scope of the private search" unless it has the authority to make its own lawful, independent search.[52]

As the following subsection explains, the Courts of Appeals universally consider providers to be private parties under the PROTECT Act. Accordingly, providers may search for CSAM without implicating the Fourth Amendment, and, under the private search doctrine, the government may warrantlessly use CSAM evidence detected by providers (and then mandatorily reported to NCMEC), so long as it does not "exceed the scope" of the provider's private search.[53]

2. *Providers as Private Searchers.* — A private party is subject to the Fourth Amendment only if it acts as an agent or instrument of the

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49. See infra notes 59–66, 73–75 and accompanying text (citing CSAM cases in the lower courts); infra section I.C (describing a circuit split).

50. See Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 613–14 (1989) (holding that the Fourth Amendment guarantees "the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction"); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) ("[The Fourth Amendment's] origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority . . . .").

51. United States v. Jacobsen, 466 U.S. 109, 115 (1984) ("Whether those invasions were accidental or deliberate, . . . reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character. The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." (footnote omitted)).

52. Walter v. United States, 447 U.S. 649, 657 (1980).

53. *Jacobsen*, 466 U.S. at 116; United States v. Maher, 120 F.4th 297, 312 (2d Cir. 2024) (stating that "the private search doctrine is properly understood to authorize law enforcement authorities to conduct a warrantless search only when they repeat a search already conducted by a private party to the same degree it 'frustrate[s]' a person's expectation of privacy" (alteration in original) (quoting *Jacobsen*, 466 U.S. at 117)); United States v. Powell, 925 F.3d 1, 5 (1st Cir. 2018) (holding that the government does not violate the Fourth Amendment so long as its search is "coextensive with the scope of the private actor's private search and there is 'a virtual certainty that nothing else of significance' could be revealed by the governmental search" (quoting *Jacobsen*, 466 U.S. at 119)).

government.[54] Determining whether a private entity is acting as a government agent or instrument is a fact-intensive inquiry that depends "on the degree of the Government's participation in the private party's activities."[55] In *Skinner v. Railway Labor Executives' Ass'n*, the Supreme Court held that federal regulations requiring railroad companies to test some employees for illicit drugs and giving them discretion to test other employees converted the private railroads into government agents for purposes of the Fourth Amendment.[56] The Supreme Court provided only high-level principles in *Skinner* for determining when a private party becomes a government agent, so lower federal courts have formulated their own fact-dependent tests. The most popular Court of Appeals test considers two "critical factors": (1) the government's knowledge of and acquiescence in the search and (2) the intent of the searching party.[57] Some circuits have also drawn from the Supreme Court's state action jurisprudence under the Fourteenth Amendment to determine questions of Fourth Amendment government agency.[58]

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54. *Jacobsen*, 466 U.S. at 113 (holding that the Fourth Amendment is "wholly inapplicable" to searches conducted by private individuals not acting as government agents).

55. *Skinner*, 489 U.S. at 614.

56. See id.

57. United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981) (first stating the "critical factors"). The Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have applied a variation of the "critical factors" inquiry. See United States v. Kramer, 75 F.4th 339, 343 (3d Cir. 2023); United States v. Johnlouis, 44 F.4th 331, 337 (5th Cir. 2022); United States v. Koerber, 10 F.4th 1083, 1114 (10th Cir. 2021); United States v. Bebris, 4 F.4th 551, 561 (7th Cir. 2021) (emphasizing, however, that "no rigid formula has been articulated in this circuit"); United States v. Perez, 844 F. App'x 113, 116 (11th Cir. 2021) (considering "whether the government 'openly encouraged or cooperated in the search'" as an additional factor (quoting United States v. Ford, 765 F.2d 1088, 1090 (11th Cir. 1985))); United States v. Ringland, 966 F.3d 731, 735 (8th Cir. 2020) (considering an additional third factor, "whether the citizen acted at the government's request" (internal quotation marks omitted) (quoting United States v. Wiest, 596 F.3d 906, 910 (8th Cir. 2010))); United States v. Richardson, 607 F.3d 357, 364 (4th Cir. 2010); United States v. Bowers, 594 F.3d 522, 526 (6th Cir. 2010).

The First Circuit uses a different test that considers: (1) the extent of the government's role in initiating or participating in the search; (2) the government's intent and the degree of control it exercises over the search and the private party; and (3) the extent to which the private party aims primarily to help the government or to serve its own interests. See United States v. Rivera-Morales, 961 F.3d 1, 8 (1st Cir. 2020). The D.C. Circuit has not developed a government agency test. See In re Search of: Encrypted Data Provided by the Nat'l Ctr. for Missing & Exploited Child. for Nineteen Related Cyber Tipline Reps., No. 20-sw-321 (ZMF), 2021 WL 2100997, at *5 n.5 (D.D.C. May 22, 2021) [hereinafter *In re Search of: Encrypted Data*].

58. For example, in holding that Google did not act as a government agent by searching for CSAM, the Sixth Circuit considered three "tests" that the Supreme Court has used to discern state action under the Fourteenth Amendment: (1) a "function" test that asks whether a private party performs a public function; (2) a "compulsion" test that asks whether the government compelled a private party's actions; and (3) a "nexus" test that asks whether a private party cooperated closely with the government. United States v. Miller, 982

Regardless of which test they applied, all circuits to address the question have held that the PROTECT Act does not convert regulated entities into government agents—while federal law requires them to report CSAM, providers remain private parties because the law imposes no duty to "affirmatively search, screen, or scan for" CSAM.[59] As the Ninth Circuit held, "Mandated *reporting* is different than mandated *searching*. . . . [A] private actor does not become a government agent simply by complying with a mandatory reporting statute."[60]

3. *The Question of NCMEC.* — While courts universally treat providers as private parties under the PROTECT Act, they have diverged on whether NCMEC is a government agent. In 2016, the Tenth Circuit became the first and only Court of Appeals to hold that NCMEC qualifies as a governmental entity or agent under the PROTECT Act, emphasizing NCMEC's "special law enforcement duties and powers" established by Congress.[61] Applying the "critical factors," then-Judge Neil Gorsuch held that the PROTECT

F.3d 412, 422 (6th Cir. 2020); see also United States v. Sykes, 65 F.4th 867, 876–77 (6th Cir. 2023) (applying the three tests to Facebook).

The Second Circuit has also applied the nexus test, noting that private actions are attributable to the government "only where 'there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself.'" United States v. DiTomasso, 932 F.3d 58, 67–68 (2d Cir. 2019) (alteration in original) (quoting United States v. Stein, 541 F.3d 130, 146 (2d Cir. 2008)).

59. 18 U.S.C. § 2258A(f)(3) (2018); see also, e.g., United States v. Bohannon, No. 21-10270, 2023 WL 5607541, at *2 (9th Cir. Aug. 30, 2023) (holding that Microsoft is not a government agent); *Sykes*, 65 F.4th at 876–77 (same for Facebook); United States v. Rosenow, 50 F.4th 715, 735 (9th Cir. 2022) (Yahoo and Facebook); United States v. Meals, 21 F.4th 903, 907 (5th Cir. 2021) (Facebook); *Bebris*, 4 F.4th at 562 (Facebook); *Ringland*, 966 F.3d at 736 (Google); United States v. Stevenson, 727 F.3d 826, 830 (8th Cir. 2013) (AOL); United States v. Cameron, 699 F.3d 621, 636–38 (1st Cir. 2012) (Yahoo); *Richardson*, 607 F.3d at 364–67 (AOL); *In re Search of: Encrypted Data*, 2021 WL 2100997, at *5 (Google).

The remaining Courts of Appeals have not directly addressed whether providers are government agents, but district court decisions in those circuits are consistent with the general rule. See, e.g., United States v. Tennant, No. 5:23-cr-79, 2023 WL 6978405, at *12 (N.D.N.Y. Oct. 10, 2023) (holding that Snapchat, Instagram, and Discord are not government agents); United States v. Clark, No. 22-cr-40031-TC, 2023 WL 3543380, at *11 (D. Kan. May 18, 2023) (same for Omegle); United States v. Williamson, No. 8:21-cr-355-WFJ-CPT, 2023 WL 4056324, at *13 (M.D. Fla. Feb. 10, 2023) (Yahoo); United States v. Hart, No. 3:CR-20-197, 2021 WL 2412950, at *8 (M.D. Pa. June 14, 2021) (Kik); United States v. Coyne, 387 F. Supp. 3d 387, 396 (D. Vt. 2018) (Microsoft, Oath, and Chatstep).

60. *Rosenow*, 50 F.4th at 730. Numerous circuits have recognized "that a company which automatically scans electronic communications on its platform does 'not become a government agent merely because it had a mutual interest in eradicating child pornography from its platform.'" *Bebris*, 4 F.4th at 562 (quoting *Ringland*, 966 F.3d at 736).

61. See United States v. Ackerman, 831 F.3d 1292, 1295–1304 (10th Cir. 2016). The court emphasized that: (1) NCMEC alone is statutorily obligated to maintain an electronic reporting system and forward reports to federal law enforcement; (2) providers are obligated to report to NCMEC alone; (3) NCMEC is obligated to treat any report it receives as a preservation request issued by the government itself; and (4) NCMEC has a statutory exemption permitting it to receive CSAM knowingly and review it intentionally, which would otherwise subject one to criminal prosecution. See id.

Act's comprehensive scheme reflected congressional knowledge of and acquiescence in NCMEC's actions, and NCMEC possessed the requisite intent to assist law enforcement.[62] No other Court of Appeals has directly addressed NCMEC's status, having avoided the question by resolving Fourth Amendment issues under the private search doctrine; that is, even assuming NCMEC is a government agent, that assumption is usually immaterial since the government may lawfully duplicate searches conducted by private actors, and courts rarely hold that NCMEC exceeded the scope of a provider's private search.[63]

C. *When Does the Government Exceed the Scope of a Provider's Search?*

In a handful of cases, the Courts of Appeals have issued differing rules as to what it means to exceed the scope of a provider's search. Given the near-perfect accuracy of hash matching,[64] providers sometimes submit reports to NCMEC based solely on a hash match without first opening the detected file to confirm it is CSAM.[65] In such cases, courts confront the question of whether the government (or NCMEC, assuming it is an agent of the government) exceeds the scope of the private search by viewing the file.[66] This section discusses two approaches to this question, which has generated a circuit split. The first, the "sui generis" approach taken by the Fifth and Sixth Circuits, argues that the government does not conduct a new search by opening files that matched known CSAM hashes but were

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62. Id. The court noted that *Skinner* further bolstered its conclusion, as the government exhibited "encouragement, endorsement, and participation," which was enough to render the railroad a government agent. Id. at 1302 (internal quotation marks omitted) (quoting Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 615–16 (1989)).

63. See, e.g., *Sykes*, 65 F.4th at 876 (holding that even if NCMEC is a governmental entity, Facebook's private search was not attributable to the government); *Meals*, 21 F.4th at 908 (assuming arguendo that NCMEC was a government agent, it did not exceed the scope of the private search); *Ringland*, 966 F.3d at 736–37 ("[W]e need not decide whether NCMEC is a government agency . . . ."). The Ninth Circuit is the only other Court of Appeals to come close to ruling that NCMEC is a government agent. See *Rosenow*, 50 F.4th at 729–30 n.3 ("There is good reason to think that the NCMEC is, on the face of its authorizing statutes, a governmental entity . . . ."); cf. *Coyne*, 387 F. Supp. 3d at 397 (district court holding that NCMEC is a governmental agent).

64. See infra note 129 and accompanying text.

65. See infra notes 66–80 and accompanying text.

66. In the situation where a human reviewer confirms that a file that triggered a hash match is CSAM before reporting it to NCMEC, courts agree that the government (or NCMEC, acting as a government agent) may warrantlessly view the file without exceeding the scope of the private search, as that would merely replicate the provider's search. See, e.g., United States v. Powell, 925 F.3d 1, 6 (1st Cir. 2018) (holding that, assuming NCMEC was a government agent, it did not expand the scope of Omegle's private search by viewing the exact same files); United States v. Drivdahl, No. CR 13-18-H-DLC, 2014 WL 896734, at *4 (D. Mont. Mar. 6, 2014) (concluding that "there was no expansion of the private search" because the "suspect material was opened by a Google employee prior to being turned over to the government").

not viewed by a private party.[67] Under the second approach, taken by the Second and Ninth Circuits, the government may not warrantlessly take the "first look" at files, even those reported based on a hash match.[68]

1. *The Sui Generis Approach.* — In *United States v. Reddick*, the Fifth Circuit held that law enforcement could use CSAM evidence detected by a provider through hash matching that had not been viewed by any private party.[69] Microsoft's PhotoDNA hashing program identified files that the defendant had uploaded to his personal cloud storage, and Microsoft automatically reported the matches to NCMEC, which then forwarded the report to police.[70] The Fifth Circuit held that a police detective did not exceed the scope of Microsoft's search by opening and viewing the files, analogizing the detective's visual review of the files to the government's actions in *United States v. Jacobsen*, one of the Supreme Court's foundational private search doctrine cases.[71]

In *Jacobsen*, FedEx employees opened a damaged package and found plastic bags containing white powder concealed in a tube.[72] The employees turned over the package to DEA agents, who visually inspected the bags and conducted chemical field tests on the white powder; the tests revealed that the powder was cocaine.[73] The Supreme Court held that the DEA agents did *not* exceed the private search since their tests merely confirmed whether the substance was cocaine—similar to "sniff tests" by narcotics detection dogs, which are not Fourth Amendment searches.[74] The Fifth Circuit emphasized in *Reddick* that, like the chemical tests, the detective's

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67. Some have used the term "sui generis" in this context to invoke the binary search doctrine and analogize hash searches to dog sniffs. See, e.g., Tyler O'Connell, Comment, Two Models of the Fourth Amendment and Hashing to Investigate Child Sexual Abuse Material, 53 U. Pac. L. Rev. 293, 317 (2021) (describing hash searches as "sui generis" binary searches). But this Note uses "sui generis" to describe a broader reasoning that includes binary search arguments but relies more generally on the certainty with which the government knows a file contains CSAM after a hash match.

68. The Second Circuit has described the "challenging question" raised in the circuit split as

> whether the private search doctrine authorizes law enforcement authorities to conduct a warrantless visual examination of the contents of a digital file where a private party has not visually examined the contents of *that* file but, rather, has used a computer to match the hash value of the contents of that file to the hash value of an image previously located in another file, which image, upon visual examination, was determined to depict child pornography.

United States v. Maher, 120 F.4th 297, 314 (2d Cir. 2024).

69. 900 F.3d 636, 639 (5th Cir. 2018).

70. Id.

71. Id. at 639 (citing United States v. Jacobsen, 466 U.S. 109 (1984)).

72. 466 U.S. at 111.

73. Id. at 111–12.

74. Id. at 123–26 (citing United States v. Place, 462 U.S. 696, 699 (1983)).

review "merely confirmed" that the file was CSAM as the hash match suggested.[75]

The Sixth Circuit has also adopted the sui generis approach.[76] In *United States v. Miller*, the Sixth Circuit held that a police detective did not exceed the scope of Google's private search when he opened email attachments whose hashes were flagged as matching hashes in Google's CSAM database.[77] The court's analysis turned on the "virtual certainty" with which law enforcement knew the files were CSAM before even opening them.[78] Google had already frustrated the user's privacy interest in their files through its hash match, so the detective's actions did not disclose anything more than what Google's search had already shown.[79] In a case also involving Google, a magistrate judge on the United States District Court for the District of Columbia emphasized that before any file is added to Google's CSAM hash database, a Google employee trained in the federal definition of CSAM visually confirms that it is CSAM.[80] As such, while a Google employee may not review every flagged hash match before it is reported to NCMEC, "[t]he chances of Google's submission based on a hash match not being child pornography is 'astronomically small.'"[81]

2. *The First-Look Approach.* — Under the second, "first-look" approach, a provider's hash match does not extinguish a user's privacy interest in their files. In *United States v. Wilson*, the Ninth Circuit created a circuit split by departing from the Sixth Circuit in a case also involving Google, with nearly identical facts as *Miller*.[82] The Ninth Circuit held that law enforcement exceeded the scope of Google's hash search because it (1) learned new, critical information that it then used to obtain a warrant and prosecute the defendant and (2) viewed files that no Google employee or other person had viewed.[83] The court likened the detective's review to

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75. 900 F.3d at 639.

76. See United States v. Miller, 982 F.3d 412, 418 (6th Cir. 2020).

77. Id. at 417. While *Miller* involved nearly identical facts as *Reddick*, the Sixth Circuit declined to adopt the Fifth Circuit's analogy to the chemical tests in *Jacobsen*. Id. at 429.

78. Id. at 417 (internal quotation marks omitted) (quoting *Jacobsen*, 466 U.S. at 119).

79. Id. at 429–30.

80. *In re Search of: Encrypted Data*, 2021 WL 2100997, at *6.

81. Id. (quoting Salgado, supra note 33, at 39). Some district courts and state supreme courts have also adopted approaches akin to the sui generis approach. See, e.g., United States v. Rosenschein, No. 16-4571, 2020 WL 6680657, at *12 (D.N.M. Nov. 12, 2020) (analogizing the government's opening of previously unseen images to the chemical tests in *Jacobsen*); State v. Lizotte, 197 A.3d 362, 370 (Vt. 2018) (concluding that NCMEC and law enforcement did not exceed AOL's search by opening a video identified through hashing since they already knew from the hash match what the attachment contained).

82. *Wilson*, 13 F.4th 961, 976 (9th Cir. 2021) ("In so holding, we contribute to a growing tension in the circuits about the application of the private search doctrine to the detection of child pornography.").

83. Id. at 971–72.

the government's actions in *Walter v. United States*, the Supreme Court's other major private search doctrine case.[84]

In *Walter*, a package of obscene films was mistakenly delivered to a private company, and an employee opened the package and saw that the film boxes had labels on their exterior indicating they contained obscene pictures.[85] Employees tried and failed to view one of the films by holding it up to the light before turning the films over to the FBI.[86] Without seeking a warrant, FBI agents then viewed the films using a projector.[87] The Supreme Court concluded that the FBI agents' viewing exceeded the employees' search.[88] Even though the agents had acted on probable cause,[89] the warrantless screening was a "significant expansion" of the private search since prior to screening the films, one could only draw inferences about what they contained.[90] In *Wilson*, the Ninth Circuit compared the detective's visual review of the files matching CSAM hashes to the FBI agents' projection of the films in *Walter*.[91] By opening the files, the detective learned exactly what the image showed and whether the image was in fact CSAM, gaining more information than what the hash match alone conveyed.[92]

In October 2024, the Second Circuit joined the Ninth Circuit in ruling that "the private search doctrine does not permit police to conduct

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84. Id. at 973; see also Walter v. United States, 447 U.S. 649 (1980).

85. *Walter*, 447 U.S. at 651 (plurality opinion).

86. Id. at 651–52.

87. Id. at 652.

88. Id. at 654.

89. The Court noted that the FBI agents had probable cause to believe that the films were obscene based on their labels and that their reason for viewing the films was to determine whether their owner was guilty of a federal offense (interstate shipment of obscene content). Id.

90. Id. at 657.

91. United States v. Wilson, 13 F.4th 961, 973 (9th Cir. 2021).

92. Id. at 973–74. The *Wilson* court also noted that the Tenth Circuit invoked reasoning "consistent" with its approach in *Ackerman*, though the Tenth Circuit did not address this particular question. Id. at 977 (discussing United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016)). In *Ackerman*, AOL's hashing technology had identified one of four images attached to the defendant's email as CSAM, and AOL reported the email's text and all four attachments to NCMEC. 831 F.3d at 1294 (Gorsuch, J.). A NCMEC analyst opened the defendant's email attachments and confirmed that all four—not just the one AOL's hashing algorithm had identified—contained CSAM. Id. After holding that NCMEC was a state actor or agent, then-Judge Gorsuch concluded that NCMEC had exceeded the scope of AOL's search by viewing the three other images. Id. at 1294–308.

While *Ackerman* involved different facts from *Reddick*, *Miller*, and *Wilson*—the information the government viewed for the first time had not been identified by a hash match—the court's reasoning cast doubt on the sui generis approach. Id. The court noted that if the government had viewed only the one image AOL had identified as a hash match, that might have brought it "closer to a successful invocation of the private search doctrine." Id. at 1306–08. But, the court cautioned, such action may still have exceeded the private search since the government could "expos[e] new and protected information"—perhaps if the hash match had been "mistaken." Id. at 1306–07.

a warrantless visual examination of a digital file that a private party has not itself viewed but only computer hash matched to the contents of another digital file previously determined to contain child pornography."[93] That case, *United States v. Maher*, also presented nearly identical facts as *Miller* and *Wilson*.[94] The Second Circuit observed that after a Google employee or contractor identifies material on the platform as CSAM, the company does not retain the image once it has added its hash value to the company's repository.[95] As a result, the Second Circuit emphasized, Google "cannot, based only on a hash match, describe the specific contents of either matched file, *i.e.*, it cannot describe the age of any child depicted, the number of children depicted, whether any adults are also depicted, or the particular circumstances depicted that might be deemed child pornography."[96] Since Google does not convey such specific information to NCMEC, and NCMEC in turn does not convey it to law enforcement, police would be able to obtain that information only by exceeding the scope of Google's hash search and conducting a visual examination of the file.[97]

The Second Circuit understood Google's hash matching technology as having "*labeled* the [defendant's] file image as 'apparent child pornography' much as the pictures and images on the film labels in *Walter*" indicated that the films contained pornographic content.[98] While such a label may provide probable cause to support a warrant to search the containers' contents, "such a search is certainly going to reveal more than the label itself."[99] The Second Circuit thereby rejected the Fifth and Sixth Circuits' reasoning, emphasizing that the police's warrantless visual examination of the file's contents "did not simply replicate Google's own algorithmic search . . . but expanded on it in a way not employed by

93. United States v. Maher, 120 F.4th 297, 318 (2d Cir. 2024) (citing *Wilson*, 13 F.4th at 961).

94. The defendant had uploaded a file to his Google email account, and Google's hash algorithm determined that the file contained an image whose hash value matched a hash in Google's repository. Id. at 303. Google reported the file to NCMEC's CyberTipline, noting in its report that "while the contents of the [reported] file were not reviewed concurrently to making the report, historically a person had reviewed a file whose hash (or digital fingerprint) matched the hash of the reported image and determined it contained apparent child pornography." Id. (alteration in original) (citation omitted) (internal quotation marks omitted). NCMEC, too, did not visually examine the contents of the file, and it sent Google's report and the unopened file to New York police, who viewed the file without obtaining a search warrant. Id. at 303–04. Based on an affidavit describing the contents of this file, police then obtained warrants to search Maher's email accounts and his residence. Id. at 304.

95. Id. at 301 n.2, 303.

96. Id. at 303.

97. See id. at 306.

98. Id. at 318 (citation omitted).

99. Id.

Google, *i.e.*, human visual inspection, which allowed the police to learn more than Google had learned."[100]

Importantly, the circumstances giving rise to this circuit split rarely occur since providers must report to NCMEC, not directly to the government, and NCMEC analysts often view reported files before referring them to law enforcement, thereby extinguishing any privacy interest in those files.[101] Since NCMEC is generally understood to be a private actor that may "exceed" the scope of a provider's search—no matter how one defines that scope—the government may warrantlessly view those reported files under the private search doctrine.[102] Accordingly, the Supreme Court has declined to take up this circuit split in recent years.[103]

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100. Id. at 306. The Second Circuit explained that it was unpersuaded by the Fifth Circuit's reasoning in *Reddick* because it "d[id] not understand the Fourth Amendment to permit law enforcement officials to conduct warrantless searches of unopened property to confirm a private party's report—however strong—that the property contains contraband." Id. at 315. The court further rejected the Fifth Circuit's analogy to the chemical tests in *Jacobsen* because the Supreme Court did not approve of those tests under the private search doctrine but rather because the tests' "further intrusion was limited to a binary disclosure." Id. (citing United States v. Jacobsen, 466 U.S. 109, 122 (1984)). Likewise, the court rejected the Sixth Circuit's reasoning in *Miller* based on the reliability of hash matching and its analogy to *Jacobsen*. See id. While the DEA agents in *Jacobsen* conducted a warrantless search of the *same* container already privately searched by FedEx employees, "[b]y contrast, in *Miller* and [*Maher*], police conducted a warrantless visual search of a digital file . . . that no Google employee or contractor had ever opened or visually examined. Rather, what a Google employee or contractor had earlier opened and visually examined was a *different* file . . . ." Id. at 317. Accordingly, "[e]ven assuming the high reliability of Google's hash matching technology, it could reveal only that two images are virtually certain to be identical. It could not—and here did not—reveal what in particular was depicted in the identical images." Id. at 318.

101. See id. at 303 (describing how "in many cases . . . Google 'automatically reports' the computer matched image to the NCMEC as 'apparent child pornography' without any person viewing it" (citations omitted)); see also 2023 CyberTipline Report, supra note 32, at 4–8 (noting that NCMEC escalates a tiny fraction of reports to law enforcement).

102. *Ackerman* is the only circuit court decision to hold that NCMEC is not a private party. See supra notes 61–63 and accompanying text.

103. See United States v. Miller, 982 F.3d 412 (6th Cir. 2020), cert. denied, 141 S. Ct. 2797 (2021) (mem.); United States v. Ringland, 966 F.3d 731 (8th Cir. 2020), cert. denied, 141 S. Ct. 2797 (2021) (mem.); United States v. Reddick, 900 F.3d 636 (5th Cir. 2018), cert. denied, 139 S. Ct. 1617 (2019) (mem.). The Second Circuit's recent ruling could revive attention on the issue, but the Supreme Court has been reluctant to take Fourth Amendment cases in recent years, according to some commentators. See, e.g., Orin Kerr (@OrinKerr), X (June 18, 2023), https://x.com/OrinKerr/status/1670467183690784768 [https://perma.cc/7W6P-P2JB] (noting that the Supreme Court granted certiorari on no Fourth Amendment cases in OT2021 and OT2022).

Law students have also proposed solutions to the circuit split that broadly track these two approaches. Compare Kyle Brantley, Comment, The Algorithm's Alright: Trusting Big Tech's Image Match in the Wake of *Wilson*, 58 Wake Forest L. Rev. 525, 546 (2023) (arguing that the Supreme Court should resolve the circuit split by adopting the Fifth and Sixth Circuits' approach), with Virginia Kendall, Note, Constitutional Law—The Current System for Abolishing Child Pornography Online Is Ineffective: The Alternative Measure for

II. AN OLD FRAMEWORK FOR A NEW PROBLEM?

The PROTECT Act dramatically expanded the government's capacity to prosecute CSAM, and the Cooper Davis Act aims to achieve a similar result for fentanyl distribution and other drug crimes.[104] This Part explores the practical and constitutional differences between the two laws. Section II.A examines the differences between how providers search for CSAM and drug crimes. Section II.B introduces the Fourth Amendment issues raised by the Cooper Davis Act and discusses how they relate to the issues courts have faced in CSAM cases.

A. *Automated Technologies to Detect CSAM vs. Drug Crimes*

Many platforms already employ machine learning and artificial intelligence to detect drug-related content on their sites, driven in part by public pressure over the opioid epidemic,[105] and it is plausible that the Cooper Davis Act's passage would prompt further investment into developing technologies to proactively detect drug crimes.[106] While providers detect both drug-related activity and CSAM using nonhuman content moderation, CSAM is uniquely identifiable, through hash matching, with a level of precision and accuracy that has not been

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Eradicating Online Predators, 45 U. Ark. Little Rock L. Rev. 751, 778 (2023) (offering an approach similar to the Second and Ninth Circuits' rule).

104. See supra note 25.

105. See, e.g., Rachel Lerman & Gerrit De Vynck, Snapchat, TikTok, Instagram Face Pressure to Stop Illegal Drug Sales as Overdose Deaths Soar, Wash. Post (Sept. 28, 2021), https://www.washingtonpost.com/technology/2021/09/28/tiktok-snapchat-fentanyl/ (on file with the *Columbia Law Review*).

106. Snap reported taking action on over 241,000 drug-related accounts in the U.S. from July 1 to December 31, 2023. Transparency Report, Snap Priv., Safety & Pol'y Hub (Apr. 25, 2024), https://values.snap.com/privacy/transparency [https://perma.cc/4XDB-DGVG]. Snap detects eighty-eight percent of drug-related content proactively using machine learning and AI, and when it finds drug-dealing activity, Snap bans the account and blocks the user from creating new accounts; in some cases, it refers the account to law enforcement for investigation. Expanding Our Work to Combat the Fentanyl Epidemic, Snap Priv., Safety & Pol'y Hub (Jan. 18, 2022), https://values.snap.com/news/expanding-our-work-to-combat-the-fentanyl-epidemic [https://perma.cc/WEV3-ZVHD]. In 2022, Meta reported taking action on over fifteen million drug-related exchanges on Facebook and nine million exchanges on Instagram, based on both alerts from users and preemptive detection. Guy Rosen, Community Standards Enforcement Report, Fourth Quarter 2021, Meta (Mar. 1, 2022), https://about.fb.com/news/2022/03/community-standards-enforcement-report-q4-2021/ [https://perma.cc/95KK-QMEY] (describing Facebook's improved and expanded "proactive detection technologies").

The "proactive rate"—the percentage of content identified using machine detection technology—was over ninety-seven percent for Facebook and Instagram. Proactive Rate, Meta, https://transparency.fb.com/policies/improving/proactive-rate-metric/ [https://perma.cc/LQ4K-H8K6] (last updated Feb. 22, 2023); Restricted Goods and Services: Drugs and Firearms, Meta, https://transparency.meta.com/reports/community-standards-enforcement/regulated-goods/facebook/ [https://perma.cc/MX3U-Q7B8] (last visited Sept. 13, 2024).

replicated in any other context.[107] When providers have attempted to proactively detect visual content using automated methods other than hashing, the results have been less than ideal—Facebook and Tumblr, for example, have struggled to accurately detect nudity and sexual content.[108]

Detection of *speech*-based content is an even thornier problem.[109] Language is much more difficult to police on a mass scale given the

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107. Some providers use hash matching to detect terrorist content on their sites. Facebook, Microsoft, Twitter, and YouTube founded the Global Internet Forum to Counter Terrorism (GIFCT) in response to pressure by European governments to remove terrorist and violent extremist content from their sites following the 2015 and 2016 terrorist attacks in Paris and Brussels, respectively. See About, Glob. Internet F. to Counter Terrorism, https://gifct.org/about/ [https://perma.cc/NNC3-7JP9] (last visited Sept. 13, 2024); Svea Windwehr & Jillian C. York, One Database to Rule Them All: The Invisible Content Cartel that Undermines the Freedom of Expression Online, Elec. Frontier Found. (Aug. 27, 2020), https://www.eff.org/deeplinks/2020/08/one-database-rule-them-all-invisible-content-cartel-undermines-freedom-1 [https://perma.cc/JGH4-YESE].

The GIFCT operates a hash-sharing database containing hashes for terrorist content. GIFCT's Hash-Sharing Database, Glob. Internet F. to Counter Terrorism, https://gifct.org/hsdb/ [https://perma.cc/E82J-HKAY] (last visited Sept. 13, 2024). But efforts to detect terrorist content using GIFCT's hash database have had limited success because terrorist content may be acceptable in certain contexts, such as news reporting, but not in others. See Daphne Keller, Internet Platforms: Observations on Speech, Danger, and Money 7 (Hoover Inst. Aegis Paper Series No. 1807, 2018), https://www.hoover.org/sites/default/files/research/docs/keller_webreadypdf_final.pdf [https://perma.cc/7CHM-JXHH] ("An ISIS video looks the same, whether used in recruiting or in news reporting."). "Countless examples have proven that it is . . . impossible for algorithms[] to consistently get the nuances of activism, counter-speech, and extremist content itself right. The result is that many instances of legitimate speech are falsely categorized as terrorist content and removed from social media platforms." Windwehr & York, supra. The hash database may therefore have a "disproportionately negative effect on news organizations, human rights defenders, and dissidents who seek to expose and comment on violence." Bloch-Wehba, Automation in Moderation, supra note 13, at 76.

108. See, e.g., Paige Leskin, A Year After Tumblr's Porn Ban, Some Users Are Still Struggling to Rebuild Their Communities and Sense of Belonging, Insider (Dec. 20, 2019), https://www.businessinsider.com/tumblr-porn-ban-nsfw-flagged-reactions-fandom-art-erotica-communities-2019-8 (on file with the *Columbia Law Review*) (explaining how Tumblr's use of machine-learning algorithms to flag NSFW media mistakenly flagged pictures of breakfast, anime, and memes as pornography). In 2020, Facebook proactively removed a garden center's ad for onion seeds on the basis that an image of onions was "sexually suggestive." Isobel Asher Hamilton, Facebook's Nudity-Spotting AI Mistook a Photo of Some Onions for 'Sexually Suggestive' Content, Insider (Oct. 9, 2020), https://www.businessinsider.com/facebook-mistakes-onions-for-sexualised-content-2020-10 (on file with the *Columbia Law Review*); see also Denmark: Facebook Blocks *Little Mermaid* Over 'Bare Skin', BBC (Jan. 4, 2016), https://www.bbc.com/news/blogs-news-from-elsewhere-35221329 [https://perma.cc/XND3-8MZ7].

109. Crucially, hash matching is unable to detect illegal activity that necessarily involves speech, like drug transactions. As Senator Padilla explained in a Senate Judiciary Committee hearing on the bill:

> When it comes to discussions of controlled and counterfeit substances, context is pretty important. Drawing the line between someone seriously expressing a desire to acquire meth . . . versus innocent content, such as

importance of context, and automated detection of online hate speech has become an active area of research in the machine learning world, in large part because of how complicated the problem is.[110] Detection of hate speech is difficult to automate because slurs and derogatory language may be hateful only in certain contexts, and certain slurs may be used in ways that do not count as hate speech.[111] Technical barriers like end-to-end encryption and disappearing messages further hinder efforts to detect harmful speech.[112]

Like hate speech, drug-related speech presents significant detection challenges, as identifying drug activity requires knowledge of context and inferences of intent that cannot be easily captured by automated content moderation methods.[113] People often speak about drugs in vague terms and use slang and coded language in drug transactions.[114] Simple keyword

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> research or in jest, puts platforms in the difficult position of having to be subjective as to when they're required to report users.

Padilla Remarks, supra note 25, at 1:51–2:29.

110. See Sara Parker & Derek Ruths, Is Hate Speech Detection the Solution the World Wants?, 120 Proc. Nat'l Acad. Scis., no. 10, e2209384120, 2023, at 1, 1 (describing how "online hate speech has become the subject of substantial interest in the computer science community, inspiring groundbreaking research in machine learning (ML) that leverages deep learning and unsupervised methods to detect hate speech in ways and on scales unattainable by humans").

111. Id. Given these challenges, many platforms rely on users to report hate speech and do not rely solely, or even primarily, on automated detection. See id. at 3. But advances in machine learning techniques like self-supervision have enabled some platforms to proactively detect hate speech. See, e.g., Michael Auli, Matt Feiszli, Alex Kirillov, Holger Schwenk, Du Tran & Manohar Paluri, Advances in Content Understanding, Self-Supervision to Protect People, Meta (May 1, 2019), https://ai.meta.com/blog/advances-in-content-understanding-self-supervision-to-protect-people/ [https://perma.cc/4LMA-9E3E] ("[A]s we look to the long-term mission of keeping our platform safe, it will be increasingly important to create systems that can be trained using large amounts of unlabeled data.").

112. See Commission Report, supra note 2, at 22 (describing how platforms like B2B and social media sites, the darknet, and payment applications can facilitate fentanyl distribution); Leah Moyle, Andrew Childs, Ross Coomber & Monica J. Barratt, #Drugsforsale: An Exploration of the Use of Social Media and Encrypted Messaging Apps to Supply and Access Drugs, 63 Int'l J. Drug Pol'y 101, 102 (2019) ("[Wickr and WhatsApp] provide sellers with end-to-end encrypted communication to organise transaction details, and Wickr—alongside Kik, Telegram and Snapchat—has temporary photo and message capabilities that 'self-destruct' after a certain time period."); see also infra note 153 (citing NCMEC's concerns about the growing prevalence of encrypted communications and its impact on CSAM detection).

113. See Thomas Stackpole, Content Moderation Is Terrible by Design, Harv. Bus. Rev. (Nov. 9, 2022), https://hbr.org/2022/11/content-moderation-is-terrible-by-design (on file with the *Columbia Law Review*) ("Automation doesn't lend itself to moderation beyond rote cases such as spam or content that has already been identified in a database, because the work is nuanced and requires linguistic and cultural competencies.").

114. People usually do not search for drugs by name and often use "slang, street names of drugs, or other ways like misspelling, to evade being caught." Likes, Shares and Drug Deals: WVU Researchers Create Model that Detects Illicit Drug Trafficking on Social Media, WVU Today (Apr. 6, 2022), https://wvutoday.wvu.edu/stories/2022/04/06/likes-shares-and-drug-deals-wvu-researchers-create-model-that-detects-illicit-drug-trafficking-on-social-

filters—which many providers already use to block searches of drugs' exact names[115] and exclude hashtags promoting disordered eating[116]—do not effectively detect drug crimes since sellers and buyers rarely mention drugs by name (or spell them correctly).[117]

Nevertheless, the detection of online drug trafficking has become a popular area of machine learning research,[118] and some providers have successfully cracked down on drug sales using automated tools.[119] Researchers have examined the use of machine learning to detect drug dealing on Instagram,[120] Twitter,[121] and Google+.[122] Federal agencies have

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media [https://perma.cc/K75S-3Z8N] (internal quotation marks omitted) (quoting Professor Xin Li) ; see also Hoffman, supra note 2 ("In a two-month span in the fall, the D.E.A. identified 76 cases that involved drug traffickers who advertised with emojis and code words on e-commerce platforms and social media apps."). Emojis and code words are also often used to signal illicit drugs on social media. See, e.g., Drug Enf't Admin., Emoji Drug Code: Decoded 1 (2021), https://www.dea.gov/sites/default/files/2021-12/Emoji%20Decoded.pdf [https://perma.cc/NC8T-F83B]; Drug Enf't Admin., Social Media: Drug Trafficking Threat 1–2 (2022), https://www.dea.gov/sites/default/files/2022-03/20220208-DEA_Social%20Media%20Drug%20Trafficking%20Threat%20Overview.pdf [https://perma.cc/SAQ3-9V3Y].

115. See, e.g., Instagram Blocks Some Drugs Advert Tags After BBC Probe, BBC (Nov. 7, 2013), https://www.bbc.com/news/technology-24842750 [https://perma.cc/2LCP-GVXM] (reporting that in 2013, Instagram blocked searches for certain terms associated with suspected illegal drug sales).

116. See, e.g., Talya Minsberg, Why Eating Disorder Content Keeps Spreading, N.Y. Times (Feb. 6, 2024), https://www.nytimes.com/2024/02/06/well/move/tiktok-legging-legs-eating-disorders.html (on file with the *Columbia Law Review*) (noting that TikTok banned the hashtag "#legginglegs" after the National Alliance for Eating Disorders flagged the trend to the company).

117. See, e.g., Rebecca Heilweil, AI Can Help Find Illegal Opioid Sellers Online. And Wildlife Traffickers. And Counterfeits., Vox (Jan. 21, 2020), https://www.vox.com/recode/2020/1/21/21060680/opioids-artificial-intelligence-illegal-online-pharmacies [https://perma.cc/99RQ-WQWK].

118. See, e.g., Tim K. Mackey, Janani Kalyanam, Takeo Katsuki & Gert Lanckriet, Twitter-Based Detection of Illegal Online Sale of Prescription Opioid, 107 Am. J. Pub. Health 1910, 1910 (2017) (using topic modeling, a type of statistical modeling that detects themes and patterns in a large set of texts, to identify words and phrases associated with fentanyl and other illegal opioid transactions).

119. Facebook's AI systems, for example, proactively detected more than four million pieces of drug sale content in Q3 2019. Mike Schroepfer, Community Standards Report, Meta (Nov. 13, 2019), https://ai.meta.com/blog/community-standards-report/ [https://perma.cc/4Y6Q-5UZS].

120. E.g., Jiawei Li, Qing Xu, Neal Shah & Tim K. Mackey, A Machine Learning Approach for the Detection and Characterization of Illicit Drug Dealers on Instagram: Model Evaluation Study, 21 J. Med. Internet Rsch., June 2019, at 1, 2.

121. E.g., Tim Mackey, Janani Kalyanam, Josh Klugman, Ella Kuzmenko & Rashmi Gupta, Solution to Detect, Classify, and Report Illicit Online Marketing and Sales of Controlled Substances via Twitter: Using Machine Learning and Web Forensics to Combat Digital Opioid Access, J. Med. Internet Rsch., Apr. 2018, at 1, 1.

122. E.g., Fengpan Zhao, Pavel Skums, Alex Zelikovsky, Eric L. Sevigny, Monica Haavisto Swahn, Sheryl M. Strasser & Yubao Wu, Detecting Illicit Drug Ads in Google+ Using Machine Learning, *in* Bioinformatics Research and Applications 171, 172 (Zhipeng Cai, Pavel Skums & Min Li eds., 2019).

also invested in AI to detect and disrupt online opioid sales.[123] While these technologies are imperfect[124]—and far less accurate than hash matching—automated technologies may one day be able to parse the coded language of drug transactions and accurately distinguish illegal from innocuous activity.[125]

B. *Complicating the CSAM Debate: The Cooper Davis Act's Novel Constitutional Issues*

Like the PROTECT Act, the Cooper Davis Act's efficacy and constitutionality will largely depend on whether and how the private search doctrine applies. This section explores these questions, which have arisen under the PROTECT Act but are complicated by non-CSAM detection under the proposed scheme.

1. *Does the Fourth Amendment Protect the Contents of Private Electronic Communications?* — Automated CSAM detection—which looks for illegal activity in users' private communications—has survived constitutional challenges, and courts have avoided addressing the question of whether an automated search of private communications constitutes a Fourth Amendment "search" because providers are not considered government agents under the PROTECT Act.[126] Consequently, without a finding of state action, courts need not determine whether the search implicates the

123. The FDA's budget allocates funding to create a "data warehouse" to facilitate data analytics, including machine learning algorithms, to assess trends in the opioid epidemic. Press Release, Scott Gottlieb, Comm'r, FDA, Statement From FDA Commissioner Scott Gottlieb, M.D. on the Agency's 2019 Policy and Regulatory Agenda for Continued Action to Forcefully Address the Tragic Epidemic of Opioid Abuse (Feb. 26, 2019), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-agencys-2019-policy-and-regulatory-agenda-continued (on file with the *Columbia Law Review*). The National Institute on Drug Abuse has also invested in creating an AI tool to detect illegal opioid sellers. FTC, Combatting Online Harms Through Innovation 20 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Combatting%20Online%20Harms%20Through%20Innovation%3B%20Federal%20Trade%20Commission%20Report%20to%20Congress.pdf [https://perma.cc/D2ZZ-HQHJ].

124. See Proactive Rate, supra note 106 ("[Meta's detection technology] is very promising but is still years away from being effective for all kinds of violations. For example, there are still limitations in the ability to understand context and nuance, especially for text-based content.").

125. See Li et al., supra note 120, at 10 (noting a "clear need for innovative technology solutions that have high accuracy and are scalable and can help . . . detect, classify, and take action against digital drug dealers"). In testimony before the House Energy and Commerce Committee in 2018, Meta Chief Executive Officer Mark Zuckerberg described the need to "build more AI tools that can proactively find [drug-related] content" given the sheer volume of content being shared on Facebook every day, which human content moderators alone cannot review. Facebook: Transparency and Use of Consumer Data: Hearing Before the H. Comm. on Energy & Com., 115th Cong. 58 (2018) (statement of Mark Zuckerberg, CEO, Meta).

126. See supra section I.B.2.

Fourth Amendment.[127] Many scholars have argued that even assuming hash searches for CSAM constitute state action, they would not be "searches" for Fourth Amendment purposes under two related rationales: the binary search doctrine and the third-party doctrine.

First, under the binary search doctrine, a minimally intrusive technique revealing only the presence or absence of contraband, such as a dog sniff, does not generate the same Fourth Amendment concerns as other kinds of searches since individuals do not have a reasonable expectation of privacy in possessing contraband.[128] Hash matching makes it possible for providers to identify the presence of CSAM with "near-perfect accuracy"[129] and does not expose the contents of files in the same way a visual review of an image or video does.[130] The only personal information hashing can disclose is a match to known CSAM—a match to contraband, in other words. As such, some consider hash matches analogous to dog sniffs,[131] which are not Fourth Amendment searches.[132]

Second, under the third-party doctrine, the Fourth Amendment does not protect what one has voluntarily turned over to a third party.[133] Under

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127. See Orin S. Kerr, Terms of Service and Fourth Amendment Rights, 172 U. Pa. L. Rev. 287, 296 (2024) [hereinafter Kerr, Terms of Service] (noting that many cases challenging CSAM hashing have been resolved on state action grounds).

128. See United States v. Jacobsen, 466 U.S. 109, 123 (1984) (holding that "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest"); United States v. Place, 462 U.S. 696, 707 (1983) (explaining how a sniff by a narcotics detection dog "discloses only the presence or absence of narcotics, a contraband item" and that the information obtained by the search is "limited").

129. United States v. Miller, 982 F.3d 412, 418 (6th Cir. 2020). The odds of two different files coincidentally sharing the same hash value are "1 in 9,223,372,036,854,775,808." Id. at 430 (internal quotation marks omitted) (quoting United States v. Dunning, No. 15-cr-4-DCR-1, 2015 WL 1373616, at *2 (E.D. Ky. Oct. 1, 2015)).

130. See United States v. Keith, 980 F. Supp. 2d 33, 43 (D. Mass. 2013) ("[M]atching the hash value of a file to a stored hash value is not the virtual equivalent of viewing the contents of the file.").

131. See Laurent Sacharoff, The Binary Search Doctrine, 42 Hofstra L. Rev. 1139, 1182 (2014) ("Binary searches of computers present a pure form of a binary search, because they truly can disclose the presence or absence of contraband only without revealing other information, and often, with almost no physical intrusion whatsoever."); Kevin Groissant, Note, Should Warrantless Digital Searches Be Allowed to Decrease the Dissemination of Child Pornography: A Likely Future for Private and Governmental Use of Hash Value Algorithms, 56 Creighton L. Rev. 569, 590 (2023) (noting that the Supreme Court has not ruled on whether a hash value algorithm constitutes a Fourth Amendment search); Anirudh Krishna, Note, Internet.gov: Tech Companies as Government Agents and the Future of the Fight Against Child Sexual Abuse, 109 Calif. L. Rev. 1581, 1628–30 (2021) (arguing that PhotoDNA scans are "quite similar to drug-sniffing dogs"); see also Dennis Martin, Note, Demystifying Hash Searches, 70 Stan. L. Rev. 691, 717–21 (2018) (arguing that hash searches violate the Fourth Amendment if they are used to look for evidence outside the scope of a search warrant or other permissive mechanism).

132. *Place*, 462 U.S. at 707.

133. See *Jacobsen*, 466 U.S. at 117 ("It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that

this theory, searches of a user's private electronic communications transmitted via providers—such as cloud storage uploads, emails, and messages—are not Fourth Amendment searches because a user has reduced privacy interests in information they knowingly share with providers.[134] The third-party doctrine shares the same basic rationale as the private search exception: Both rely on the principle that "[a] private search extinguishes an individual's reasonable expectation of privacy in the object searched."[135]

But these arguments do not easily map onto automated searches for drug and other non-CSAM crimes.[136] First, (hard) hashing for CSAM is a rare example of a digital binary search. Possession of online CSAM is a crime regardless of context,[137] whereas most other online crimes require some degree of context to discern.[138] No other type of automated search can reveal solely the presence or absence of contraband, and nothing more.[139] Second, whether the third-party doctrine applies to the contents

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information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."); United States v. Miller, 425 U.S. 435, 443 (1976) (holding that the Fourth Amendment does not protect information disclosed to a third party, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed").

134. See Smith v. Maryland, 442 U.S. 735, 744 (1979) ("When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information . . . . In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed."); Orin S. Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561, 581–89 (2009) [hereinafter Kerr, Third-Party Doctrine].

135. Priscilla Grantham Adams, Nat'l Ctr. for Just. & Rule of L., Fourth Amendment Applicability: Private Searches 1–2 (2008), https://www.neshaminy.org/cms/lib6/PA01000466/Centricity/Domain/223/Private%20Search%20Doctrine.pdf [https://perma.cc/D23L-N4AJ]; see also *Jacobsen*, 466 U.S. at 117 (noting that the private search doctrine "follows from the analysis applicable when private parties reveal other kinds of private information to the authorities").

136. While courts need not resolve the issue of whether hashing constitutes a search in CSAM cases, it is harder to avoid under the Cooper Davis Act since providers may be considered government agents whose searches are subject to the Fourth Amendment. See infra section II.B.2.

137. 18 U.S.C. § 2252A(a)(2) (2018) (criminalizing the knowing receipt or distribution of child pornography); id. § 2252A(a)(5) (criminalizing the knowing possession of or access with intent to view child pornography).

138. See supra section II.A. Possession of a picture of drugs, for example, is not itself a crime.

139. The binary search doctrine has also attracted criticism for being inconsistent with the Court's Fourth Amendment jurisprudence. See, e.g., Lawrence Rosenthal, Binary Searches and the Central Meaning of the Constitution, 22 Wm. & Mary Bill Rts. J. 881, 920–21 (2014) (arguing that the doctrine "places to one side the most powerful pragmatic argument that is ordinarily advanced in favor of Fourth Amendment restraint on investigatory power—the claim that we must inhibit the ability of the government to gather evidence against the guilty in order to protect the innocent").

of private communications transmitted via third-party providers is an open question, as the Supreme Court has not directly addressed the issue.[140]

The Second and Sixth Circuits are the only Courts of Appeals to address the question.[141] In *United States v. Warshak*, the Sixth Circuit held that "a subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial [internet service provider].'"[142] The court emphasized that it would "defy common sense" for the Fourth Amendment to afford less protection to email compared to traditional forms of communication; the court then held that the third-party doctrine did not apply to an internet service provider, which, like a post office or telephone company, was not the intended recipient of the private communications.[143] In 2024, the Second Circuit formally adopted *Warshak*—confirming what it had previously assumed—holding "that a United States person ordinarily has a reasonable expectation in the privacy of his e-mails sufficient to trigger a Fourth Amendment reasonableness inquiry."[144] Federal district courts across the country have also applied *Warshak*'s logic to providers like Facebook.[145]

The Department of Justice has also adopted a policy of obtaining a warrant whenever it seeks the content of user emails or other "similar stored content" from a provider—seemingly in accordance with *Warshak* (or in acquiescence to its influence).[146] And on the provider side, many

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140. See, e.g., Rehberg v. Paulk, 611 F.3d 828, 847 (11th Cir. 2010) ("No Supreme Court decision . . . defines privacy rights in email content voluntarily transmitted over the global Internet and stored at a third-party [internet service provider]."), aff'd on other grounds, 566 U.S. 356 (2012). The closest the Supreme Court has come to addressing the question was in *City of Ontario v. Quon*, in which the Court assumed arguendo that a police officer had a reasonable expectation of privacy in text messages he sent on his work pager. 560 U.S. 746, 750 (2010). Declining to resolve the question, the Court cautioned against "elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Id. at 759.

141. See United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010) (noting that the Fourth Amendment protects the content of emails); see also United States v. Maher, 120 F.4th 297, 307–08 (2d Cir. 2024) (following *Warshak*); cf. Schuchardt v. President of the U.S., 839 F.3d 336, 346 (3d Cir. 2016) (holding that plaintiff had "a constitutional right to maintain the privacy of his personal [electronic] communications, online or otherwise" for purposes of establishing injury-in-fact for Article III standing).

142. *Warshak*, 631 F.3d at 288 (quoting Warshak v. United States, 490 F.3d 455, 473 (6th Cir. 2007)).

143. Id. at 285–86.

144. *Maher*, 120 F.4th at 307 (internal quotation marks omitted) (quoting United States v. Hasbajrami, 945 F.3d 641, 666 (2d Cir. 2019)).

145. See, e.g., United States v. Chavez, 423 F. Supp. 3d 194, 203 (W.D.N.C. 2019) (citing *Warshak* in holding that defendant had a reasonable expectation of privacy in nonpublic content on his Facebook account); see also United States v. Ali, 870 F. Supp. 2d 10, 39 n.39 (D.D.C. 2012) (agreeing with *Warshak*'s conclusion that "individuals have a reasonable expectation of privacy in the content of emails").

146. See Elana Tyrangiel, Acting Assistant Att'y Gen., Testimony Before the House Judiciary Subcomm. on Crime, Terrorism, Homeland Sec. & Investigations, DOJ (Mar. 19,

companies require a warrant before disclosing user content to law enforcement.[147] Still, the Supreme Court has not formally blessed *Warshak* nor decided whether a reasonable expectation of privacy exists in the contents of private electronic communications.[148]

2. *Does the Cooper Davis Act Convert Providers Into Government Agents?* — Under lower courts' varying government agency tests, providers are universally considered private parties under the PROTECT Act.[149] But their status under the Cooper Davis Act is less clear, as two features of the proposed bill complicate the state action question: (1) the prohibition of deliberate blindness to violations and (2) the direct reporting channel to the DEA.

First, the Cooper Davis Act goes further than its model statute, prohibiting providers from deliberately turning a blind eye to "readily apparent" violations.[150] The Cooper Davis Act also imposes more severe penalties for violations: Failure to comply with the law is considered a criminal offense.[151] The bill imposes fines of up to $190,000 for initial violations and up to $380,000 for subsequent violations and, unlike its model statute, fines of up to $100,000 for submitting false or fraudulent information in reports to the DEA or omitting information that was reasonably available.[152] What constitutes blindness under the law is also

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2013), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-elana-tyrangiel-testifies-us-house-judiciary [https://perma.cc/6QGC-PMYK] (recognizing the "appeal" of requiring law enforcement to obtain a warrant to compel disclosure of emails and similar stored content information from a provider). The FBI's Domestic Investigations and Operations Guide provides that "[c]ontents in 'electronic storage' (e.g., unopened e-mail/voice mail) require a search warrant." FBI, Domestic Investigations and Operations Guide § 18.7.1.3.4.4 (2021), https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2021-version/fbi-domestic-investigations-and-operations-guide-diog-2021-version-part-2-of-3/ (on file with the *Columbia Law Review*).

147. See Ctr. for Democracy & Tech., Analysis of Department of Justice March 19, 2013 ECPA Testimony 2 n.4 (2013), https://cdt.org/wp-content/uploads/pdfs/Analysis%20of%20DOJ%20ECPA%20testimony.pdf [https://perma.cc/935K-VSCC] ("Leading Internet companies, including Google, Facebook, Microsoft, Twitter and Yahoo!, have all announced that they follow the *Warshak* rule nationwide . . . ."); Ira S. Rubinstein, Gregory T. Nojeim & Ronald D. Lee, Systematic Government Access to Personal Data: A Comparative Analysis, 4 Int'l Data Priv. L. 96, 115 (2014) (noting that "service providers and the Justice Department now seem to agree that a judicial warrant is needed to compel third-party disclosure of content.").

148. See supra note 140 and accompanying text.

149. See supra section I.B.2.

150. Cooper Davis Act, S. 1080, 118th Cong. § 2 (2023) (adding § 521(g)(4) to Part E of the Controlled Substances Act); see also supra note 44 (comparing the language of the statutes).

151. S. 1080 § 2 (adding § 521(f)(1)(A)). Under the PROTECT Act, providers are subject only to fines. See 18 U.S.C. § 2258A(e) (2018).

152. S. 1080 § 2 (adding § 521(f)(1)(B), (f)(2)). Providers that fail to make required reports under the PROTECT Act are subject to fines of up to $150,000 for initial violations and $300,000 for subsequent violations. 18 U.S.C. § 2258A(e).

unclear, which may lead risk-averse providers to report suspected violations more aggressively than they otherwise would to avoid incurring penalties.[153] The bill therefore places more pressure on providers to report than the PROTECT Act, creating a more coercive regulatory scheme.

Second, the Cooper Davis Act requires providers to report to a federal law enforcement agency, rather than to an intermediary private nonprofit like NCMEC, creating a direct connection between the government and private companies—similar to the reporting law at issue in *Skinner*.[154] Together, the bill's antiblindness provision and direct reporting channel to the DEA impose an affirmative obligation on providers that extends beyond what is required of them under the PROTECT Act. While the Cooper Davis Act places no obligation on providers to search for drug activity on their sites, the law may nevertheless have the "*de facto* effect of leading to proactive monitoring"[155]—much like how recent content regulations in the European Union have pushed providers to adopt more automated detection tools.[156] Compliance with the proposed bill would likely lead to overdeletion and overreporting of lawful content. Particularly in an area of rapidly developing technology like machine learning, legislation like the Cooper Davis Act that indirectly encourages automation may have the unwanted effect of pushing providers to adopt more complex technologies sooner than they otherwise would.[157]

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153. In response to concerns that the government would consider end-to-end encryption a form of deliberate blindness, the 2024 House bill added a provision noting that nothing in the bill shall be construed to "prohibit a provider from using end-to-end encryption or require a provider to decrypt encrypted communications." H.R. 8918, 118th Cong. § 2 (2024) (adding § 521(g)(5) to Part E of the Controlled Substances Act).

Many privacy advocates and criminal justice groups had criticized the Senate bill's blindness provision as encouraging platforms to undermine encryption features "out of the fear that law enforcement will argue that, by taking themselves out of the loop and allowing all users to have truly secure conversation[s], providers are 'blinding' themselves" from violations. India McKinney & Andrew Crocker, Amended Cooper Davis Act Is a Direct Threat to Encryption, Elec. Frontier Found. (July 20, 2023), https://www.eff.org/deeplinks/2023/07/amended-cooper-davis-act-direct-threat-encryption [https://perma.cc/K4LN-28QM]. NCMEC has also warned that, based on its communications with providers, it "anticipates that widespread adoption of end-to-end encryption by reporting [providers] will begin at some point in CY 2024 and could result in a loss of up to 80% of NCMEC's CyberTipline reports." OJJDP Report, supra note 31, at 3.

154. See supra notes 50–56 and accompanying text.

155. See Bloch-Wehba, Automation in Moderation, supra note 13, at 67.

156. See id. at 65–67 (describing how European regulations like Article 17 of the EU Copyright Directive and Germany's Network Enforcement Act of 2018 have pushed platforms toward adopting automated screening tools to identify illegal content, even though these laws explicitly disclaim any requirement of proactive monitoring or screening); see also The Text of Article 13 and the EU Copyright Directive Has Just Been Finalised, Felix Reda (Feb. 13, 2019), https://felixreda.eu/2019/02/eu-copyright-final-text/ [https://perma.cc/X87C-D9RF] (stating that under these provisions, service providers "will have no choice but to deploy upload filters" to block infringing content).

157. See Bloch-Wehba, Automation in Moderation, supra note 13, at 75 ("As it stands, automated content moderation already demonstrates the risk that technical 'solutions'

Regardless of whether the Cooper Davis Act is enacted, questions of government agency may well come before the courts, as Congress has demonstrated an interest in expanding providers' obligations regarding online CSAM.[158] In a world in which "police outsource surveillance to private third parties"[159]—third parties with access to scores of potentially incriminating and deeply personal information—the question of when

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designed to prevent bad content from spreading will have collateral effects on lawful expression.").

158. In 2023, senators introduced two bills aimed at cracking down on the proliferation of CSAM online by imposing greater obligations on providers. The first, the EARN IT Act, is a highly controversial bill that would strip providers of Section 230 immunity for civil claims for injuries involving CSAM and require providers to adhere to "best practices" aimed at combating CSAM. See EARN IT Act of 2023, S. 1207, 118th Cong. (2023). The EARN IT Act was first introduced in 2020 and reintroduced in 2022. See S. 3538, 117th Cong. (2022); S. 3398, 116th Cong. (2020). Many argue that the EARN IT Act presents a serious threat to user privacy and would deputize providers as government agents. See, e.g., Sophia Cope, Aaron Mackey & Andrew Crocker, The EARN IT Act Violates the Constitution, Elec. Frontier Found. (Mar. 31, 2020), https://www.eff.org/deeplinks/2020/03/earn-it-act-violates-constitution [https://perma.cc/W45U-NTN4]; see also Krishna, supra note 131, at 1618 (arguing that the Act would convert technology companies into government agents).

The second bill, the STOP CSAM Act of 2023, would increase liability for providers who promote, facilitate, host, store, or make available CSAM on their platforms; like the EARN IT Act, the STOP CSAM Act would remove providers' Section 230 immunity. See S. 1199, 118th Cong. (2023). The Senate Judiciary Committee approved the EARN IT and STOP CSAM Acts in May 2023, referring both to the full Senate. Press Release, Lindsey Graham, U.S. Sen. for S.C., Senate Judiciary Committee Unanimously Approves EARN IT Act (May 4, 2023), https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=5A0FDDE3-8F28-4A41-803A-92F38D2F2BA2 [https://perma.cc/K7W4-93XD]; Press Release, S. Comm. on the Judiciary, Senate Judiciary Committee Advances Durbin's STOP CSAM Act to Crack Down on the Proliferation of Child Sex Abuse Material Online (May 11, 2023), https://www.judiciary.senate.gov/press/dem/releases/senate-judiciary-committee-advances-durbins-stop-csam-act-to-crack-down-on-the-proliferation-of-child-sex-abuse-material-online [https://perma.cc/B8D7-3ULH].

Some privacy advocates and senators have criticized both bills for many of the same reasons they oppose the Cooper Davis Act—threats to encrypted communications, user privacy, and free speech. See Letter from Civil and LGBTQ+ Rights Groups to Chuck Schumer, S. Majority Leader (Sept. 25, 2023), https://www.aclu.org/wp-content/uploads/2023/09/STOP-CSAM-Sign-On-Letter6.pdf [https://perma.cc/DSY5-ZT43]; EFF Letter From Elec. Frontier Found. to Richard Durbin, Chairman, S. Comm. on the Judiciary & Lindsey Graham, Ranking Member, S. Comm. on the Judiciary (May 1, 2023), https://www.eff.org/document/eff-letter-senate-judiciary-committee-vote-no-earn-it-act-and-stop-csam-act [https://perma.cc/Y2Y3-2CVH]; Chamber of Progress, Senate Democrats Raise Issues With EARN IT, Stop CSAM and Cooper Davis Acts, YouTube (May 11, 2023), https://www.youtube.com/watch?v=52Nk9PttmdE (on file with the *Columbia Law Review*). The ACLU, for example, has urged the Senate Judiciary Committee to reject all three bills. Letter from Christopher Anders, Fed. Pol'y Dir., ACLU, Jenna Leventoff, Senior Pol'y Couns., ACLU & Cody Venzke, Senior Pol'y Couns., ACLU, to Dick Durbin, S. Comm. on the Judiciary & Lindsey Graham, Ranking Member, S. Comm. on the Judiciary (May 3, 2023), https://www.aclu.org/wp-content/uploads/2023/05/ACLU-Letter-EARN-It-STOP-CSAM-Cooper-Davis-May-17-202363.pdf [https://perma.cc/GL9G-HR39].

159. Paul Ohm, The Fourth Amendment in a World Without Privacy, 81 Miss. L.J. 1309, 1338 (2012).

third parties become state actors "may now be the most consequential quandary in Fourth Amendment jurisprudence."[160]

3. *What Is the Scope of an Automated Private Search?* — Assuming the Cooper Davis Act does not convert providers into state actors subject to the Fourth Amendment, the law's efficacy will depend on the scope of the private search exception—an issue that has created a circuit split in certain CSAM cases.[161] Imagine Provider A develops a highly accurate machine learning algorithm to detect fentanyl transactions in users' direct messages. When the algorithm gets a hit, a content moderator employed by Provider A confirms that it meets the requisite standard for reporting before sending the messages, as well as the user's information, to the DEA. Imagine Provider B uses the same algorithm, but when it gets a hit, it automatically reports the user's messages and information to the DEA.

For Provider A, it is clear under either the sui generis or first-look approach that the DEA may view the messages without a warrant since it would learn no more than what the moderator already knew from their search; this is akin to a detective viewing images that a provider identified through hash matching and visually confirmed to be CSAM before reporting.[162] But for Provider B, the answer is less clear under the sui generis approach. Under the Cooper Davis Act, there is no private intermediary between providers and the DEA that can extinguish a user's privacy interest in their information before it reaches the government, making it harder for courts to avoid the question of what it means for the government to exceed the provider's private search—the same question that has created a circuit split in online CSAM cases.[163]

Regardless of whether the Cooper Davis Act is enacted, the question of the private search doctrine's applicability to automated searches is already a live issue. Many providers currently use complex fuzzy hashing algorithms to detect previously unseen CSAM.[164] While courts (on both sides of the circuit split) have relied on the "near-perfect accuracy" of hash

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160. Christopher Slobogin, "Volunteer" Searches, 85 U. Pitt. L. Rev. 1, 4 (2023) (arguing that the government can work around the Fourth Amendment's restrictions "simply by asking or paying" private companies for users' personal information without triggering state action); see also Joseph Zabel, Public Surveillance Through Private Eyes: The Case of the EARN IT Act and the Fourth Amendment, 2020 U. Ill. L. Rev. Online 167, 168, https://www.illinoislawreview.org/wp-content/uploads/2020/08/Zabel.pdf [https://perma.cc/5WJN-PDPZ] ("[T]he inquiry as to whether or not a private actor has been deputized has become far less straightforward as law enforcement consumes more and more data from private enterprises.").

161. See supra section I.C.

162. See supra note 66.

163. See supra section I.C.

164. See, e.g., Google Tools, supra note 35 ("For many years, Google has been working on machine learning classifiers to allow us to proactively identify never-before-seen CSAM imagery so it can be reviewed and, if confirmed as CSAM, removed and reported as quickly as possible.").

matching for CSAM,[165] these arguments apply best to hard hashing, which requires an exact match to known CSAM hashes.[166] On the other hand, fuzzy hashing to identify never-before-seen CSAM carries the inherent risk of incorrectly matching two files.[167] Courts have glossed over the distinction between hard and fuzzy hashing algorithms, touting the accuracy of "hashing" without specifying which kind.[168] To be sure, many fuzzy hashing algorithms, including Microsoft's PhotoDNA technology, are highly reliable and accurate,[169] and they offer significant practical benefits since they can identify new and AI-generated CSAM,[170] rather than being limited to known CSAM that has been reported, viewed, classified, hashed, and entered into a database. But it is not obvious that the sui generis approach applies with the same force to fuzzy hashing algorithms, which lack many of the characteristics that courts have relied on when justifying the sui generis approach[171]—most importantly, fuzzy hashing algorithms identify "matches" even when the exact contents of a file have never been viewed before. Under the sui generis approach, may the government constitutionally view files identified solely by a fuzzy hashing algorithm, which no private party has confirmed to be CSAM?

III. A PRIVATE SEARCH DOCTRINE FOR MODERN CRIME-DETECTION ALGORITHMS

The Cooper Davis Act highlights issues that have largely been avoided in the government's fight against online CSAM because of the PROTECT Act's reporting scheme and the exceptional qualities of hash matching for CSAM.[172] This Part assesses the Fourth Amendment issues raised by the proposed bill and discusses the implications of treating providers as government agents. If the Fourth Amendment protects the contents of private electronic communications and the Cooper Davis Act converts providers into state actors—issues discussed in sections III.A and III.B, respectively—then providers would need to obtain search warrants before searching for drug-related activity. This would effectively defang the

165. United States v. Miller, 982 F.3d 412, 418 (6th Cir. 2020); see also supra section I.C.1 (describing the sui generis approach).

166. See supra text accompanying note 36.

167. See supra text accompanying note 39.

168. No federal court has addressed perceptual or fuzzy hashing in the CSAM context. Cf. Intel Corp. v. Rivers, No. 2:18-cv-03061-MCE-AC, 2019 WL 4318583, at *2 (E.D. Cal. Sept. 12, 2019) (mentioning fuzzy hash searches of emails for alleged sharing of trade secrets).

169. See supra notes 34–35.

170. See Drew Harwell, AI-Generated Child Sex Images Spawn New Nightmare for the Web, Wash. Post (June 19, 2023), https://www.washingtonpost.com/technology/2023/06/19/artificial-intelligence-child-sex-abuse-images/ (on file with the *Columbia Law Review*) (reporting the rise in AI-generated CSAM).

171. See, e.g., supra note 129 and accompanying text (emphasizing the near certainty that hashed files contain CSAM).

172. See supra section I.B.

Cooper Davis Act since providers would often have no basis for probable cause to perform ex ante surveillance of users.

On the other hand, if the Cooper Davis Act maintains providers' status as private actors, then the government would be able to use all the information that providers are required to report to the DEA, so long as it does not exceed the scope of the private search—a situation that, by design, would bring an immense volume of previously inaccessible information about users into the government's hands.[173] Section III.C argues that if such cases arise, courts should adopt the "first-look" view of the private search exception because it is the approach most consistent with the principles underlying the Supreme Court's private search doctrine.

A. *Fourth Amendment Protection of the Contents of Private Electronic Communications*

While many have argued that users lack a reasonable expectation of privacy in information revealed by a hash match for CSAM under the binary search and third-party doctrines,[174] these doctrines should not prevent courts from recognizing that the contents of private communications sent using third-party providers fall within the Fourth Amendment's ambit.

1. *Inapplicability of the Binary Search Doctrine to Searches for Drug Crimes.* — First, the binary search doctrine is inapposite to searches for drug crimes, which necessarily involve user speech.[175] Most importantly, searches for drug crimes do not provide information in binary in the same way dog sniffs and CSAM hashing do. The target drug offenses require context to discern, and automated searches for drug-related activity reveal far more than the mere presence or absence of contraband. Much like hate speech, the presence of online drug-related "contraband" is bound up with the presence of protected speech.[176] Searches for drug crimes may therefore reveal *unlimited* amounts of innocuous information in which users have a legitimate expectation of privacy, whereas dog sniffs do not constitute searches precisely because they are "limited both in the manner

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173. See supra notes 6–7 and accompanying text.

174. See supra section II.B.1.

175. See supra notes 114–117 and accompanying text.

176. See supra notes 109–111 and accompanying text; see also Denae Kassotis, Note, The Fourth Amendment and Technological Exceptionalism After *Carpenter*: A Case Study on Hash-Value Matching, 29 Fordham Intell. Prop. Media & Ent. L.J. 1243, 1313 (2019) (arguing that hash matching is "qualitatively different from other types of binary authentication"). Many consider hashing to be more accurate at detecting the presence of contraband than dog sniffs and spot tests. See, e.g., Robyn Burrows, Comment, Judicial Confusion and the Digital Drug Dog Sniff: Pragmatic Solutions Permitting Warrantless Hashing of Known Illegal Files, 19 Geo. Mason L. Rev. 255, 279 (2011) ("Hashing is actually much more accurate than a dog sniff since it is almost mathematically impossible to mistake one file for another.").

in which the information is obtained and in the content of the information revealed."[177] Thus, automated searches for drug crimes—as contemplated by the Cooper Davis Act—cannot be treated as the digital equivalent of a dog sniff.[178] And even assuming arguendo CSAM hashing falls under the binary search doctrine, proactive detection of drug-related speech constitutes a far more intrusive search, potentially exposing the contents of user communications rather than a mere match to known illicit material.

2. *Problems With Extending the Third-Party Doctrine.* — As an initial matter, it would be strange to apply the third-party doctrine to providers when this inquiry assumes that those same providers are acting as government agents (since the Fourth Amendment applies only to state action).[179] Ignoring that wrinkle, the Supreme Court has never applied the third-party doctrine to the contents of private electronic communications,[180] and in recent years, the Court has expressed reluctance to liberally apply the third-party doctrine to personal information shared with modern electronic communications services, given the ubiquity of third-party providers in everyday life. In *Carpenter v. United States*, the Court declined to apply the third-party doctrine to cell-site location information (CSLI), even though the government had obtained that information from third parties, and it recognized "a legitimate expectation of privacy in the record of [one's] physical movements as captured through CSLI."[181]

Carpenter marked an important shift in the Court's application of the "reasonable expectation of privacy" test, as the Court paid close attention to what *kind* of information a search might reveal, moving away from its traditional focus on the *source* of the information or the *actions* law enforcement took to obtain the information.[182] The Court emphasized

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177. United States v. Place, 462 U.S. 696, 707 (1983).

178. The title of this Note, *Digital Dog Sniffers*, invokes this question of whether automated detection of drug crimes could be considered a kind of "digital dog sniff." The title also reflects how the Cooper Davis Act incentivizes providers to proactively search for drug crimes, much like sniffer dogs in a figurative sense. Some student scholarship has used the term "digital dog sniff" in the context of CSAM hashing. See Burrows, supra note 176, at 258; Martin, supra note 131, at 693.

179. See Krishna, supra note 131, at 1632 (considering whether tech companies might be "double agent[s]—providing both a messaging service to users and a law enforcement service to the government").

180. See supra notes 140–148 and accompanying text.

181. 138 S. Ct. 2206, 2217 (2018).

182. See Orin S. Kerr, The Digital Fourth Amendment 154–55 (2024) ("Before *Carpenter*, whether a Fourth Amendment search was recognized depended on the place or thing serving as the information source. *Carpenter* embarks on a different path. It imbues constitutional protection upon information outside of any places or things."); Paul Ohm, The Many Revolutions of *Carpenter*, 32 Harv. J.L. & Tech. 357, 385–86 (2019) (arguing that *Carpenter*'s multi-factor test will produce more predictable outcomes than the "reasonable expectation of privacy" test and empower courts "to propound a normative vision for the kind of society the [Fourth Amendment] seeks to protect").

that CSLI provides a detailed record of an individual's physical movements every day, every moment, and potentially over several years—implicating privacy concerns "far beyond those considered" in prior cases.[183] (*Carpenter*'s holding, however, was limited to the particular facts of the case, which involved the acquisition of more than six days of CSLI data; the Court declined to "decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny."[184])

Still, some have argued that the third-party doctrine should apply to providers since individuals consent to providers scanning their messages and disclosing illegal content in limited circumstances; users typically agree to terms of service that waive their right to privacy in their communications when it comes to detecting spam and CSAM.[185] But the notions of voluntariness and consent in which the third-party doctrine finds its basis are more questionable in the digital age, "in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[186] Terms of service should not

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183. *Carpenter*, 138 S. Ct. at 2220 (referencing Smith v. Maryland, 442 U.S. 735 (1979), and United States v. Miller, 425 U.S. 435 (1976)).

184. Id. at 2217 n.3 ("It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.").

185. See, e.g., Kerr, Third-Party Doctrine, supra note 134, at 588 (arguing that "[t]hird-party disclosure eliminates privacy because the target voluntarily consents to the disclosure, not because the target's use of a third party waives a reasonable expectation of privacy"). Some district courts have cited terms of service to justify concluding that users lack a reasonable expectation of privacy in their communications via third-party providers. Compare United States v. Montijo, No. 2:21-cr-75-SPC-NPM, 2022 WL 93535, at *7 (M.D. Fla. Jan. 10, 2022) (holding that the defendant did not have a reasonable expectation of privacy in his Facebook Messenger communications based in part on the fact that Facebook, in its terms of service, gave "fair warning" that users risked being reported to law enforcement or NCMEC if the platform discovered CSAM), with *In re Search of: Encrypted Data*, No. 20-sw-321 (ZMF), 2021 WL 2100997, at *4 (D.D.C. May 22, 2021) (noting that individuals "generally have reasonable expectations of privacy in the emails that they send through commercial providers like Google" despite providers having terms of service that prohibit using their platforms to violate the law (internal quotation marks omitted) (quoting United States v. Miller, 982 F.3d 412, 426 (6th Cir. 2020))).

186. United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring); see also *Carpenter*, 138 S. Ct. at 2220 (noting that since virtually any activity on a phone can generate CSLI, this information is not truly "shared" with a third party); id. at 2263 (Gorsuch, J., dissenting) ("Consenting to give a third party access to private papers that remain my property is not the same thing as consenting to a *search of those papers by the government*."); Orin S. Kerr, Lifting the "Fog" of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law, 54 Hastings L.J. 805, 813 (2003) (arguing that the internet presents unique Fourth Amendment challenges because it "does not protect information that has been disclosed to third-parties, and the Internet works by disclosing information to third-parties").

Most people also accept terms of service without ever reading them. See Jonathan A. Obar & Anne Oeldorf-Hirsch, The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services, 23 Info., Commc'n & Soc'y 128,

dictate the Fourth Amendment's applicability since such agreements define legal relationships among private parties, not between individuals and the government.[187] In line with *Carpenter*'s protection of sensitive personal information "shared" with third parties, courts should instead recognize a reasonable expectation of privacy in the communications that individuals send via providers, regardless of terms of service.[188] The third-party doctrine should apply only when individuals voluntarily disclose information online to the public, *not* to private recipients—for example, when users publish posts on social media that are visible to the public, they voluntarily disclose that information and assume the risk that the government may obtain and use it.[189]

B. *Reconsidering Government Agency*

Assuming the Fourth Amendment protects the information targeted by providers' searches for drug crimes, providers would still be subject to the Fourth Amendment only if they are agents or instruments of the government.[190] One member of the Senate Judiciary Committee has warned that the Cooper Davis Act "effectively deputize[s]" providers to serve as law enforcement.[191]

As the Supreme Court has repeatedly stated, whether a private party becomes a state actor is a "necessarily fact-bound inquiry,"[192] so it is

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143 (2020) (finding that more than ninety-eight percent of survey participants missed a clause about their data being shared with the NSA).

187. See United States v. Maher, 120 F.4th 297, 308 (2d Cir. 2024) (holding that "Google's particular Terms of Service—which advise that Google 'may' review users' content—did not extinguish [defendant's] reasonable expectation of privacy in that content as against the government" (citation omitted)); Kerr, Terms of Service, supra note 127, at 288–97 (calling the argument that terms of service define Fourth Amendment rights a "syllogism"). In *Maher*, the Second Circuit also noted that in a different context, the Supreme Court had "declined to construe even unqualified language in a private contract as extinguishing a person's expectation of privacy as against the government." *Maher*, 120 F.4th at 309 (citing Byrd v. United States, 584 U.S. 395 (2018)).

188. *Carpenter* is consistent with *Warshak* and suggests the Court's willingness to confer Fourth Amendment protection onto private electronic communications, which, like CSLI, contain detailed and extensive personal information. See Jesse Lieberfeld & Neil Richards, Fourth Amendment Notice in the Cloud, 103 B.U. L. Rev. 1201, 1207 (2023) ("In the 2018 case of *Carpenter v. United States*, the Court tacitly affirmed *Warshak*'s central holding . . . ." (footnotes omitted)); see also *Carpenter*, 138 S. Ct. at 2269 (Gorsuch, J., dissenting) (describing third-party doctrine cases like *Smith* and *Miller* as cases that under a *Katz* analysis "extinguish Fourth Amendment interests once records are given to a third party," whereas "property law may preserve them").

189. Courts should also respect the line between content and noncontent, dating back to the nineteenth century. See supra note 48 and accompanying text. Individuals' speech, even speech related to drug transactions, falls squarely within the "content" category.

190. See supra note 54 and accompanying text.

191. Padilla Remarks, supra note 25, at 2:33.

192. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001) (internal quotation marks omitted) (quoting Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982)).

impossible to declare with certainty how courts would treat providers under the Cooper Davis Act since the courts of appeals use different tests for determining government agency, which would all turn on the how the bill is ultimately interpreted and enforced. This section explores how lower courts might consider state action under the predominant "critical factors" test. After concluding that courts would likely maintain providers' status as private parties under the bill, this section then offers guiding principles for evaluating the law's enforcement, taking notice of the significant threat of surrogate surveillance by providers that this bill poses.

1. *Applying the Lower Courts' Government Agency Tests.* — Under existing formulations of Fourth Amendment state action, lower federal courts are unlikely to consider providers to be state actors under the proposed bill, just as they decline to do so vis-à-vis the PROTECT Act.[193] Although the bill undoubtedly reflects the government's awareness and indirect encouragement of providers searching for drug-related activity, "[m]ere governmental authorization of a particular type of private search in the absence of more active participation or encouragement" does not satisfy the first prong of the critical factors test—government knowledge and acquiescence.[194] The proposed bill does not require providers to affirmatively search for drug-related crimes, and even a prohibition of deliberate blindness to violations does not amount to explicit direction, which courts have required for this prong to be met.[195]

As for the second factor, assuming the bill is enacted, it is difficult to argue that providers would search for drug-related content with the intent of assisting law enforcement since many platforms already proactively detect this content in the absence of any reporting requirements.[196] Private parties may have a dual motive to assist law enforcement without implicating the Fourth Amendment as long as they have "a legitimate, independent motivation."[197] Similar to their interest in eradicating CSAM,[198] providers have a legitimate, independent interest in rooting out illegal drug activity on their sites, particularly given mounting public scrutiny of their role in the opioid crisis (which itself motivated lawmakers to propose the legislation at issue).[199] This interest likely negates the

193. See supra section I.B.2.

194. See United States v. Rosenow, 50 F.4th 715, 731 (9th Cir. 2022) (alteration in original) (internal quotation marks omitted) (quoting United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981)).

195. See, e.g., United States v. Sykes, 65 F.4th 867, 877 (6th Cir. 2023) (holding that the government did not compel Facebook's actions); *Rosenow*, 50 F.4th at 742 (holding that the government did not incentivize, direct, or encourage Yahoo's investigatory efforts); see also supra note 59 and accompanying text.

196. See supra note 119 and accompanying text.

197. *Rosenow*, 50 F.4th at 733 (citing United States v. Cleaveland, 38 F.3d 1092, 1094 (9th Cir. 1994)).

198. See supra note 60 and accompanying text.

199. See, e.g., Louise Matsakis & Kate Snow, Snapchat Makes It Harder for Kids to Buy Drugs, NBC News (Jan. 18, 2022), https://www.nbcnews.com/tech/social-media/snapchat-

second critical factor.[200] Furthermore, court determinations of intent often rely on how a provider justifies its actions in declarations or suppression hearing testimony, and courts have given broad deference to corporate leaders in establishing intent.[201]

Even adopting the Tenth Circuit's flexible application of the "critical factors" test in *United States v. Ackerman*—arguably the broadest circuit court conception of Fourth Amendment state action—courts would likely reach the same conclusion.[202] At a high level of generality, providers might act with the government's consent and to further the government's goals, but providers could argue any number of alternative intents besides aiding law enforcement.[203] For one, providers could assert that hosting drug advertising and distribution on their sites is bad for business. So, even under their differing applications of the "critical factors," courts would likely consider providers to be private actors since the Cooper Davis Act does not explicitly require them to search for drug crimes and providers may have multiple motivations driving their automated detection—irrespective of the bill's coercive features.

2. *Guiding Agency Principles.* — Courts must apply workable and predictable government agency standards that give providers notice of their potential Fourth Amendment obligations and give users clarity regarding the scope of their Fourth Amendment rights when using these ubiquitous communication services.

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makes-harder-kids-buy-drugs-rcna12652 (on file with the *Columbia Law Review*) (describing internal changes Snapchat made following public scrutiny over the number of teenagers buying drugs on the platform); see also Marshall Press Release, supra note 7 (describing how the growing trend of teenagers buying drugs on social media inspired the introduction of the Cooper Davis Act); Shaheen Press Release, supra note 6 (same).

200. As the Seventh Circuit has noted, "this sort of activity is analogous to shopkeepers that have sought to rid their physical spaces of criminal activity to protect their businesses." United States v. Bebris, 4 F.4th 551, 562 (7th Cir. 2021) (citing United States v. Miller, 982 F.3d 412, 425 (6th Cir. 2020)).

201. See, e.g., United States v. DiTomasso, 81 F. Supp. 3d 304, 307–10 (S.D.N.Y. 2015) (concluding that Omegle did not intend its CSAM monitoring to assist law enforcement based on a declaration by the platform's founder that Omegle monitored chats "to improve the user experience by removing inappropriate content" in response to "negative media attention" (citation omitted) (internal quotation marks omitted) (quoting Lief K-Brooks)).

202. See supra notes 61–62 and accompanying text.

203. See, e.g., United States v. Cameron, 699 F.3d 621, 638 (1st Cir. 2012) ("[I]t is certainly the case that combating child pornography is a government interest. However, this does not mean that Yahoo! cannot voluntarily choose to have the same interest."). For these reasons, providers would likely not be considered state actors under the Second Circuit's nexus test either. The nexus test is stricter than the critical factors test used by most other circuits since the "requisite nexus is not shown merely by government approval of or acquiescence in the activity." United States v. DiTomasso, 932 F.3d 58, 68 (2d Cir. 2019). Whether providers would be considered state actors under the compulsion and public forum tests is unclear since the bill does not explicitly compel providers to search for drug-related activity and regulated entities do not clearly perform a public function. Cf. Prager Univ. v. Google LLC, 951 F.3d 991, 996–99 (9th Cir. 2020) (holding that YouTube is not a public forum subject to the First Amendment despite hosting speech by others).

First, courts should not attempt to discern providers' subjective intent given how intertwined platforms' economic and legal interests are.[204] The Supreme Court's decisions have focused more on the actions of the *state* than the private party,[205] and the second prong of the "critical factors" inquiry requires courts to reconstruct providers' subjective intent, often leading to "inconsistent and unpredictable results."[206] Discerning subjective intent is particularly challenging with regard to providers, as companies are rarely acting with a single intent; as profit-driven entities, providers may consider assisting law enforcement to be part and parcel of furthering their business ends.[207]

Economic and legal interests are particularly intertwined under the Cooper Davis Act: Providers may well have an interest in eradicating illegal drug activity from their platforms, but unlike CSAM, which "inherently lacks any redeeming social value,"[208] proscribing suspected drug-related activity may sweep in a broad range of desirable speech, including journalism, research, and public health messages, that providers want to retain.[209] While providers lack any justifiable interest in protecting CSAM, they *do* have a strong business interest in protecting user speech.[210] Courts

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204. See Jeff Kosseff, Private Computer Searches and the Fourth Amendment, 14 I/S: J.L. & Pol'y for Info. Soc'y 187, 190 (2018) (arguing that "courts should rework their Fourth Amendment agency tests to focus on the objective actions of both the government and private parties, rather than attempting to guess the intent of private parties").

205. See, e.g., Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989) (stating that agency hinges on "the degree of the Government's participation in the private party's activities"); Coolidge v. New Hampshire, 403 U.S. 443, 489 (1971) (stating that attempts by the government to "coerce," "dominate," or "direct" the actions of a private person may result in a search and seizure that implicates the Fourth Amendment).

206. Kosseff, supra note 204, at 206 ("Courts examine whether the private party *intended* to assist law enforcement, or whether the private party intended to advance its own interests that are unrelated to law enforcement. Similarly, courts consider whether the government *knew* of the private party searches.").

207. See id. at 215 (emphasizing that courts struggle to discern providers' motives because providers can "have a number of intentions"—from helping law enforcement to preventing child exploitation to protecting their business interests); see also Avidan Y. Cover, Corporate Avatars and the Erosion of the Populist Fourth Amendment, 100 Iowa L. Rev. 1441, 1445 (2015) (arguing that tech companies have economic and legal incentives to cooperate with government surveillance); Slobogin, supra note 160, at 19 (noting that for businesses, even "volunteered" disclosures are often "driven by the hope of cultivating government favor, in all sorts of ways, ranging from beneficial regulatory decisions to direct sales"); Bruce Schneier, Opinion, Spy Agencies Are Addicted to Corporate Data Load, Bloomberg (July 31, 2013), https://www.bloomberg.com/opinion/articles/2013-07-31/the-public-private-surveillance-partnership (on file with the *Columbia Law Review*) (arguing that the "primary business model of the Internet is built on mass surveillance").

208. Bloch-Wehba, Automation in Moderation, supra note 13, at 83.

209. The same is true of hash searches for terrorist and extremist content, which is also context dependent. See supra note 107.

210. This concern may be particularly acute for providers who want to avoid accusations of colluding with the government to censor unpopular speech on their platforms. See, e.g., Murthy v. Missouri, 144 S. Ct. 1972, 1997 (2024) (Alito, J., dissenting) (discussing how federal officials allegedly coerced social media platforms into suppressing user speech in a

adopting an intent-based agency test are likely to reach inconsistent and unpredictable results, making it difficult for providers to determine ex ante whether they are subject to the Fourth Amendment and how to structure their businesses accordingly. This unpredictability poses practical difficulties for providers, many of which already use automated drug-detection tools.[211]

Second, courts must take seriously the notion that state action may be present even in the absence of explicit government compulsion.[212] In *Skinner*, the Court found relevant that the government had "removed all legal barriers to the testing" of employees by private railroad companies and had "made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions."[213] The Court considered these factors "clear indices of the Government's encouragement, endorsement, and participation" sufficient to render the railroads government agents.[214] Similarly, the Cooper Davis Act removes legal barriers that currently limit providers' ability to share the contents of user communications with the government.[215] Like the federal regulations in *Skinner*, the bill makes plain Congress's strong preference for surveillance as well as its desire to share the fruits of such surveillance: The bill imposes severe criminal and civil penalties on providers that turn a blind eye to "readily apparent" drug crimes, and the DEA stands to benefit from direct access to reported evidence.[216]

While courts may still ultimately conclude that providers are private parties under the Cooper Davis Act, an analysis that disregards subjective intent and takes seriously the blindness provision will provide clarity to providers about their obligations under the Fourth Amendment, or lack thereof, and to individuals about their rights in a rapidly changing digital landscape.

"'far-reaching and widespread censorship campaign' . . . against Americans who expressed certain disfavored views about COVID-19 on social media" (quoting Missouri v. Biden, 680 F. Supp. 3d 630, 729 (W.D. La. 2023))). Providers have also faced intense public scrutiny after taking down obviously innocuous content caught by their algorithms. See supra note 108 (discussing Facebook and Tumblr's gaffes).

211. See supra note 106 and accompanying text.

212. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614–15 (1989) ("The fact that the Government has *not* compelled a private party to perform a search does not, by itself, establish that the search is a private one." (emphasis added)).

213. Id. at 615.

214. Id. at 615–16.

215. The Stored Communications Act prohibits providers from divulging the contents of user communications to law enforcement except in limited circumstances. See 18 U.S.C. § 2702(b)(7) (2018) (noting that a provider may divulge the contents of communications to a law enforcement agency if the contents "were inadvertently obtained" and "appear to pertain to the commission of a crime").

216. See Hannah Bloch-Wehba, Content Moderation as Surveillance, 36 Berkeley Tech. L.J. 1297, 1299 (2021) ("As police increasingly depend upon digital evidence in investigating and prosecuting crime, content governance strategies also shape the kinds of data that are germane to investigations and affect how law enforcement does its job.").

C. *Adopting the First-Look Approach to the Private Search Doctrine*

Assuming providers remain private entities under the Cooper Davis Act, the government's ability to rely on private surveillance will turn on the scope of the private search exception. This section argues that courts should adopt the Ninth Circuit's first-look approach and require human review of an automated search before applying the private search exception.

1. *Rejecting the Sui Generis Approach.* — The approach taken by the Fifth and Sixth Circuits is inapposite outside the sui generis world of CSAM hard hashing. First, hash matching depends on the availability of highly reliable systems that can identify CSAM with near-absolute certainty. Hash matching is possible only because providers have access to, or have developed their own, hash databases containing content already vetted by experts trained in the legal definition of CSAM.[217] But no such database exists, or could exist, for drug crimes since the "facts and circumstances" establishing drug crimes are often nonvisual, subjective, and may constitute lawful—even socially beneficial—speech.[218]

Furthermore, the rationale for the sui generis approach—that a hash search frustrates any legitimate expectation of privacy by detecting the presence of contraband—does not apply to detection of drug-related content since such searches are not merely confirmatory but necessarily context dependent.[219] As a result, courts should apply the private search exception only if a human has already viewed the private electronic communications before reporting them to the government.[220] Otherwise, if no private party has viewed the contents of the private communications, the government conducts a new search requiring a warrant.[221]

2. *Benefits of the First-Look Approach.* — The first-look approach comports with the Supreme Court's formulation of the private search doctrine as being premised on private searches conducted by *individuals*,

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217. See supra notes 80, 95 and accompanying text (discussing Google and AOL's databases).

218. See supra note 209 and accompanying text. Consider, for instance, how lawful speech has been misidentified as "terrorist content." See supra note 107.

219. See supra section II.A. An additional, more practical reason to reject the sui generis approach is that courts should not base their definition of a sweeping Fourth Amendment exception on their perceptions of a cutting-edge algorithm's reliability and accuracy—especially in a rapidly evolving area like machine learning. This would likely lead to forum shopping, as with any circuit split; a doctrine that applies uniformly across the circuits is preferable given that most major providers' services are used nationwide.

220. See supra section I.C.2.

221. For the hypothetical scenario involving Provider B, see supra section I.C, the government would exceed the scope of the private search by viewing messages reported solely based on an algorithm since, no matter how advanced the algorithm, the government would risk exposing more personal information than what the hit alone would convey. See supra note 92 and accompanying text. The government also learns much more information from viewing these messages than it would by viewing a file detected by a hash match.

not machines.[222] In *Walter*, the Court held that the films' owners retained a reasonable expectation of privacy in their films even after employees had opened their packages and exposed the films' labels—the owners "expected no one except the intended recipient either to open the . . . packages or to project the films."[223] The film boxes had been "securely wrapped and sealed, with no labels or markings to indicate the character of their contents," and the employees' opening of the packages to reveal the film boxes constituted a partial invasion of privacy, not a complete one.[224] Similarly, users retain a reasonable expectation of privacy in electronic communications that they expect only their intended recipient to see, and an automated search of such communications, no matter how accurate, does not constitute a complete frustration of an individual's privacy interest.[225]

Such a rule makes intuitive sense: A true "frustration" of privacy requires that a person actually view the private information.[226] Applied to the Cooper Davis Act, this rule is also consistent with the text of the statute—"actual knowledge" requires actual *human* knowledge of suspected illegal activity, and a violation of the statute is only "readily apparent" if a provider has actually viewed the facts or circumstances establishing a drug crime.[227]

3. *Addressing Potential Criticisms.* — Requiring human review to constitute a private search has some drawbacks. Most obviously, it may undermine one of the main benefits of automation: lessening the human toll of content moderation.[228] Still, effective content moderation requires

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222. Both *Walter* and *Jacobsen* involved private searches by individual employees of suspicious materials. See supra notes 72, 84–86 and accompanying text.

223. Walter v. United States, 447 U.S. 649, 658 (1980).

224. Id. at 658–59.

225. In *Carpenter*, the Supreme Court emphasized that while there is a reduced expectation of privacy in information knowingly shared with others, "the fact of 'diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.'" Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018) (quoting Riley v. California, 573 U.S. 373, 392 (2014)).

226. While the circuits may be divided on how to handle edge cases involving hash matches that were not confirmed by a provider, courts universally agree that the government does not conduct a new search when it views material that a human reviewer has already seen. See supra note 66.

227. See supra note 20 and accompanying text.

228. For accounts of the intense human impact of content moderation, see Andrew Arsht & Daniel Etcovitch, Commentary, The Human Cost of Online Content Moderation, Harv. J.L. & Tech.: JOLT Digest (Mar. 2, 2018), https://jolt.law.harvard.edu/digest/the-human-cost-of-online-content-moderation [https://perma.cc/3Z52-DBHH]; Isaac Chotiner, The Underworld of Online Content Moderation, New Yorker (July 5, 2019), https://newyorker.com/news/q-and-a/the-underworld-of-online-content-moderation (on file with the *Columbia Law Review*). Manual review of all automated search results may also be unrealistic and greatly strain providers' resources, limiting the potential efficacy of a law like the Cooper Davis Act. See Stackpole, supra note 113 (noting that without human

a combination of ex ante automated screening *and* ex post human review, and many providers use both before voluntarily disclosing evidence to law enforcement.[229] The proposed approach would therefore be unlikely to substantially change providers' procedures in practice.

While providers are indeed constrained by their capacity to hire content moderators, the proposed approach best balances individuals' privacy interests in the contents of their electronic communications against providers' (and the government's) legitimate goal of preventing harmful activity. Unlike the sui generis approach, this rule provides ex ante clarity to providers, giving them notice of what circumstances trigger the private search exception since the rule applies consistently to different kinds of automated moderation, regardless of what form the technology takes—including fuzzy hash matching.[230]

This approach is also consistent with how individuals expect providers to handle their private data. In their terms of service, many providers alert users of the possibility that they may refer illegal activity to law enforcement, so users reasonably expect that providers sometimes share data with the government to prevent imminent harm.[231] But users do not—and should not—expect these services to operate as surrogates for law enforcement, algorithmically combing through their personal data for evidence of crimes and reporting that evidence without a human at least performing some verification first.[232] A law like the Cooper Davis Act would bring an unprecedented amount of personal information into the hands of law enforcement, regardless of which side of the circuit split prevails.[233] And given the history of overenforcement of drug crimes in

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content moderators, "social media companies—and their ad-driven business models—likely couldn't exist as they do now").

229. See Bloch-Wehba, Automation in Moderation, supra note 13, at 84. Ex post human review is particularly crucial when it comes to suspected instances of context-dependent crimes, like drug trafficking, so that providers can catch false positives. See supra notes 210, 218 and accompanying text.

230. Some might interpret the first-look approach as requiring manual review of CSAM hash matches as well, which would dramatically hinder the government's ability to fight CSAM. But this rule leaves courts' jurisprudence intact for CSAM hashing, at least for searches conducted via hard hashing. Hard hashing is premised on the fact that at least one private party (either at NCMEC or a provider) has at one point viewed the file and classified it as CSAM, and that initial viewing of the file by a private party satisfies the first-look approach. See supra note 66; supra text accompanying note 162. In contrast, a fuzzy hash match does not guarantee that a flagged file is the same as one that has been vetted by a private party. See supra notes 164–168 and accompanying text.

231. See supra note 185 and accompanying text.

232. See Kerr, Terms of Service, supra note 127, at 325 ("When a person signs up for an account with a private provider, . . . [t]he government's future role is an abstraction. . . . [T]here is a possibility that the government might someday be involved . . . [but] the mere act of proceeding after receiving such an abstract future conditional warning is insufficient to generate consent.").

233. Whether encouraged by law or adopted voluntarily, automated content moderation "open[s] new kinds of behavior and new actors to scrutiny that [were]

communities of color,[234] the bill raises serious concerns about how the government might prosecute drug crimes using the trove of information that providers would be required to report. Against this backdrop, courts must adopt an approach to the private search exception that maintains the status quo and does not risk overburdening users' privacy rights.[235]

CONCLUSION

As more and more illegal activity occurs on the internet—on third-party platforms and out of the government's sight—the government has more and more reasons to outsource surveillance to providers through legislation like the Cooper Davis Act.[236] This Note shows that although the Cooper Davis Act is modeled after the PROTECT Act, analysis of its constitutionality—and, more broadly, of Fourth Amendment issues raised by automated content moderation and mandatory reporting statutes for providers—requires a different approach, as much of the reasoning regarding CSAM is inapplicable outside the narrow realm of hard hashing.

While the Cooper Davis Act's future is uncertain, it poses important Fourth Amendment questions that extend beyond a single piece of legislation and are likely here to stay. Providers rely on rapidly evolving technologies like machine learning and artificial intelligence to detect unwanted content on their platforms, and some state legislatures have introduced legislation similar to the Cooper Davis Act aimed at halting drug activity on social media platforms.[237] Regardless of whether the

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previously beyond the state's capabilities." Bloch-Wehba, Automation in Moderation, supra note 13, at 80.

234. See generally Drug Pol'y All., The Drug War, Mass Incarceration and Race (2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf [https://perma.cc/98WH-NG8F] (showing how the war on drugs has driven racial disparities in U.S. incarceration); Jay Stanley, The War on Drugs and the Surveillance Society, ACLU (June 6, 2011), https://www.aclu.org/news/smart-justice/war-drugs-and-surveillance-society [https://perma.cc/AZ7N-GZ3N] (describing the role of electronic surveillance in the war on drugs).

235. See Orin S. Kerr, An Equilibrium-Adjustment Theory of the Fourth Amendment, 125 Harv. L. Rev. 476, 482 (2011) (arguing that courts should respond to changing technologies and social practices that expand police power by "tighten[ing] Fourth Amendment rules to restore the status quo").

236. See generally Cyber Criminology: Exploring Internet Crimes and Criminal Behavior (K. Jaishankar ed., 2011) (discussing the prevalence of cybercrimes); Internet Crime Complaint Ctr., FBI, Internet Crime Report 2022, at 3 (2022), https://www.ic3.gov/Media/PDF/AnnualReport/2022_IC3Report.pdf [https://perma.cc/G2PC-VF63] (noting that "[t]oday's cyber landscape has provided ample opportunities for criminals and adversaries").

237. See, e.g., S.B. 680, 2023 Leg., Reg. Sess. (Cal. 2023) (proposing to ban providers from using features or algorithms that they know, or reasonably should know, will cause harm to children, including receiving information about obtaining a controlled substance and subsequently obtaining or using it); Queenie Wong, California Lawmakers Want to Make Social Media Safer for Young People. Can They Finally Succeed?, L.A. Times (Aug. 9,

Cooper Davis Act is enacted, the constitutionality of mandatory reporting laws and the scope of the private search exception will only become more relevant as automated content moderation methods improve and Congress and the states continue legislating with an eye toward tech companies.[238]

2023), https://www.latimes.com/politics/story/2023-08-09/meta-instagram-twitter-tiktok-social-media-onlinesafety (on file with the *Columbia Law Review*).

238. See supra note 158 (describing Congress's proposed EARN IT and STOP CSAM Acts).

EMBRYOS ARE NOT PEOPLE, BUT DISABILITY IS DIFFERENCE: TOWARD AN ANTIDISCRIMINATION THEORY FOR REPRODUCTIVE SERVICES

*Kristen L. Popham**

Women are becoming increasingly disempowered in reproductive choice just as new technologies offer scientists and clinicians more power and discretion in selecting the types of children to bring into the world. As these phenomena converge, a gap in antidiscrimination law has emerged. Fertility clinic practitioners are free to refuse the transfer of embryos based on disability-related animus. Mothers unable to prove coverage under the Americans with Disabilities Act (ADA) have no apparent legal remedy.

Parallel to other civil rights statutes, the ADA covers people*, and primarily people with disabilities. The 2008 Amendments clarified that disability definitions should be construed broadly, favoring coverage to the maximum extent possible under the terms of the ADA. Yet the statute has never been interpreted to afford broad coverage to those with unexpressed genetic indicators for disability. The ADA and its Amendments provide little recourse, then, for women with genetic indicators for disease who are denied assisted reproductive technology services on that basis.*

The resurgence of the fetal personhood movement further complicates this picture. Its advocates could seize this opportunity to supplant narratives around an emerging form of disability discrimination with arguments for further constraining women's autonomy. Solutions that bridge antidiscrimination principles and women's autonomy are therefore urgent and imperative. This Note introduces theoretical frameworks for extending disability antidiscrimination law toward expanding reproductive autonomy.

* J.D. Candidate, 2025, Columbia Law School. I would like to thank Professors Elizabeth Emens and Katherine Franke for their generous guidance and support. This Note is dedicated to my mother, who taught me that people in pain love just a little harder.

I will never forget the day my mother found out she was the source of my HLA-B27 positivity and told me: "I am sorry." It was several years after my diagnosis with a chronic illness that has and would cause me suffering. My mother was made to feel that by having a disabled child, she did something wrong. This Note is about the systems that instilled in my mother the need to say sorry.[1]

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

— Oliver Wendell Holmes, *Buck v. Bell*.[2]

INTRODUCTION

Developments in reproductive technology are introducing new possibilities for reproductive health, genetic testing, and disease eradication. Simultaneously, legislators and the judiciary have decreased autonomy in reproductive choices. This pernicious combination presents challenges for many women[3] seeking reproductive care and protection from federal antidiscrimination laws when healthcare providers make decisions based on unsubstantiated and even intolerant preconceptions about the quality of disabled life.

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1. This use of first person is a deliberate choice by the author to foreground narratives about disability identity and interpret the law through a disabled person's lens. Disability theorists have highlighted the importance of disability narratives in illuminating the constitutive outside and "inserting persons into the social world." See Tobin Siebers, Disability as Masquerade, 23 Literature & Med. 1, 8 (2004) ("Narratives about disability identity . . . are political because they offer a basis for identity politics, allowing people with different disabilities to tell a story about their common cause.").

2. 274 U.S. 200, 207 (1927).

3. This Note generally favors the use of "women" over "pregnant people" despite acknowledging the mosaic of identities associated with pregnancy. "Unsexing pregnancy" using gender-inclusive terminology and the recognition of pregnancy discrimination's unique effect on the LGBTQ community is an ontological project that expands perceived possibilities for transgender men and nonbinary people. See Jessica Clarke, Pregnant People?, 119 Colum. L. Rev. Forum 173, 173–76 (2019), https://columbialawreview.org/wp-content/uploads/2019/10/Clarke-Pregnant_People-1.pdf [https://perma.cc/GQS3-UJQ3] ("The law could see pregnancy not only as something that happens to women's bodies, but also as a bodily condition experienced by people who do not identify as women."). This Note nonetheless retains some reference to "women" in part because transgender people may qualify for ADA coverage under the theory that a "gender dysphoria diagnosis" enables transgender plaintiffs to invoke the ADA's protections. See Namrata Verghese, The Promise of Disability Rights Protections for Trans Prisoners, 21 Dukeminier Awards J. 291, 293 (2022). In June 2023, the Supreme Court denied a petition for certiorari in Kincaid v. Williams, 143 S. Ct. 2414 (2023), after a Fourth Circuit panel ruled the ADA does not exclude coverage for people who are "transgender" or have "gender dysphoria." See Williams v. Kincaid, 45 F.4th 759, 773 (4th Cir. 2022); Arthur S. Leonard, Supreme Court Declines to Review 4th Circuit Ruling that Gender Dysphoria Is a "Disability" Under the Americans With Disabilities Act, LGBT L. Notes, July 2023, at 6, 6.

Parallel to other civil rights statutes, the Americans with Disabilities Act (ADA) covers *people*, and primarily people with disabilities. Under Title III of the ADA, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[4] The 2008 Amendments (ADAAA) clarified that disability definitions should be construed broadly, favoring coverage to the maximum extent possible under the terms of the ADA.[5] Yet the ADA has not been interpreted to afford broad coverage to those with unexpressed genetic indicators for disability.[6] The ADA and its Amendments provide little recourse, then, for women with genetic indicators for disease who are denied assisted reproductive technology (ART) services on that basis.

Fertility clinics have the discretion to refuse these women equal access to healthcare services based on disability-related animus, and the law provides no remedy. In fact, the United States' weak regulatory framework on ART[7] and the American Society for Reproductive Medicine's (ASRM) recommendation that physicians consider "the well-being of offspring" in determining whether to deny services[8] encourages such preconceptions to drive reproductive healthcare. At present, antidiscrimination law affords few protections for individuals with genetic conditions,[9] just as technology renders genetic conditions easier to detect and weed out.[10]

Published studies and reporting mechanisms documenting fertility clinic practitioner refusals to transfer embryos are lacking.[11] Nonetheless,

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4. ADA Amendments Act (ADAAA) of 2008, 42 U.S.C. § 12182(a) (2018).

5. Section 2(b) of the ADAAA states that it was enacted "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA." ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3553 (quoting 42 U.S.C. § 12101(b)) (codified in scattered sections of Title 42 of the U.S.C.).

6. This Note sometimes refers to individuals with genetic conditions as "genetic carriers" or individuals with "unexpressed genetic indicators for disability," as here. These terms are used interchangeably to describe individuals likely to pass on certain genomic variants associated with an impairment in reproduction, but who do not show symptoms of the impairment themselves. Research compiling data of carrier screening across numerous healthcare practices found approximately twenty-four percent of individuals were carriers for at least one of 108 disorders. Gabriel A. Lazarin et al., An Empirical Estimate of Carrier Frequencies for 400+ Causal Mendelian Variants: Results From an Ethnically Diverse Clinical Sample of 23,453 Individuals, 15 Genetics Med. 178, 179 (2013).

7. See infra section I.A.

8. Ethics Comm. of the Am. Soc. for Reprod. Med., Child-Rearing Ability and the Provision of Fertility Services, 100 Fertil. Steril. 864, 865 (2009), https://www.fertstert.org/article/S0015-0282(09)02474-1/pdf [https://perma.cc/4HH3-NR77] [hereinafter ASRM Ethics Committee, Child-Rearing Ability].

9. See infra section I.B.

10. See infra notes 146–148 and accompanying text.

11. See Judith Daar, A Clash at the Petri Dish: Transferring Embryos With Known Genetic Anomalies, 5 J.L. & Bioscis. 219, 246 (2018) [hereinafter Daar, A Clash at the Petri

fertility clinic policies and patient anecdotes confirm the regularity of the practice.[12] Popular media has amplified anecdotes of disabled people seeking in-vitro fertilization (IVF) to intentionally select for disabled embryos, such as a deaf lesbian couple seeking a deaf sperm donor.[13] In general, fertility clinic physicians have refused these types of requests, with one Maryland-based physician telling the *New York Times*, "In general, one of the prime dictates of parenting is to make a better world for our children . . . . Dwarfism and deafness are not the norm."[14]

In one infamous case, a deaf lesbian couple from Maryland employed sperm from a deaf male friend because they sought a deaf baby,[15] and conservative commentators decried the act as creating "victims from birth."[16] Some couples, on the other hand, use genetic testing to

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Dish] ("The absence of published studies or other formal reporting on the frequency and motivation for physician refusals to transfer embryos on the basis of anticipated offspring health poses challenges to an empirical analysis of this clinical scenario, but sufficient anecdotal and ancillary data exist to permit a reasonable discussion.").

12. See, e.g., Iris G. Insogna & Elizabeth Ginsburg, Transferring Embryos With Indeterminate PGD Results: The Ethical Implications, 2 Fertility Rsch. & Prac. Feb. 1, 2016, at 1, 2 (describing the case of a woman seeking the transfer of an embryo with BRCA-1 mutation and the clinic denied implantation).

13. See, e.g., Richard Gray, Couples Could Win Right to Select Deaf Baby, The Telegraph (Apr. 13, 2008), http://www.telegraph.co.uk/news/uknews/1584948/Couples-could-win-right-to-select-deaf-baby.html (on file with the *Columbia Law Review*); Liza Mundy, A World of Their Own, Wash. Post (Mar. 31, 2002), https://www.washingtonpost.com/archive/lifestyle/magazine/2002/03/31/a-world-of-their-own/abba2bbf-af01-4b55-912c-85aa46e98c6b/ (on file with the *Columbia Law Review*) (recounting the story of a couple that sought out a deaf sperm donor); Darshak M. Sanghavi, Wanting Babies Like Themselves, Some Parents Choose Genetic Defects, N.Y. Times (Dec. 5, 2006), https://www.nytimes.com/2006/12/05/health/05essa.html (on file with the *Columbia Law Review*); see also Sarah Aviles, Note, Do You Hear What I Hear?: The Right of Prospective Parents to Use PGD to Intentionally Implant an Embryo Containing the Gene for Deafness, 19 Wm. & Mary J. Women & L. 137, 139 (2012) (comparing the lack of media attention when preimplantation genetic diagnosis (PGD) is used to screen out disabilities compared to the "public outcry" associated with designing babies with certain characteristics).

14. Sanghavi, supra note 13 (internal quotation marks omitted) (quoting Dr. Robert J. Stillman). Another physician interviewed from the Chicago area echoed the sentiment, stating, "If we make a diagnostic tool, the purpose is to avoid disease." Id. (internal quotation marks omitted) (quoting Dr. Yury Verlinsky).

15. See Mundy, supra note 13. There is no national regulation prohibiting selection for traits like deafness. In the United Kingdom, on the other hand, the 2008 Human Fertilisation and Embryology Act prohibited the selection and implantation of embryos known to have a genetic abnormality resulting in the birth of a child with a "serious physical or mental disability" or a "serious illness." Human Fertilisation and Embryology Act 1990 § 14(4)(9) (UK); see also Gerard Porter & Malcolm K. Smith, Preventing the Selection of "Deaf Embryos" Under the Human Fertilisation and Embryology Act 2008: Problematizing Disability?, 32 New Genetics & Soc'y 171, 173 (2013) (scrutinizing the legislative review process prior to the Act's passage).

16. Wendy McElroy, Victims From Birth: Engineering Defects in Helpless Children Crosses the Line, Fox News (Jan. 13, 2015), https://www.foxnews.com/story/victims-from-birth-engineering-defects-in-helpless-children-crosses-the-line [https://perma.cc/FJP3-3U9H].

determine whether their embryos carry genes for certain impairments—even with the initial aim of selecting against disability[17]—but seek implantation of some genetically anomalous embryos notwithstanding the test's results. Selecting for traits raises numerous ethical questions;[18] at present, the arbiters of these ethical debates are clinics[19] rather than the individuals producing these embryos. Policies prohibiting implantation of genetically anomalous embryos not only screen out prospective parents seeking disabled children but also refuse service to those for whom

17. For examples of individuals with disabilities using IVF to select against a trait leading to a disability, see Sonja Sharp, How Modern Medicine Neglects Mothers-to-Be With Disabilities, L.A. Times (Nov. 17, 2021), https://www.disabilityscoop.com/2021/11/17/how-modern-medicine-neglects-mothers-to-be-with-disabilities/29600/ (on file with the *Columbia Law Review*) ("Even Flores, who decided to screen out embryos with her condition when she and her husband began IVF, bristled at the implication that she should have to, or that she was selfish for wanting an experience that close to 90% of American women will have in their lifetimes."). For a reproductive medicine case study involving individuals who were unknowing carriers of a genetic disorder nevertheless seeking implantation of genetically affected embryos, see Sigal Klipstein, Transfer of Embryos Affected by Genetic Disease, *in* Case Studies in the Ethics of Assisted Reproduction 37, 37–42 (Louise P. King & Isabelle C. Band eds., 2023).

18. See, e.g., Rosamund Scott, Choosing Between Possible Lives: Legal and Ethical Issues in Preimplantation Genetic Diagnosis, 26 Oxford J. Legal Stud. 153, 161 (2000) (exploring implications for the widespread use of PGD without serious justifications); Rachel E. Remaley, Note, "The Original Sexist Sin": Regulating Preconception Sex Selection Technology, 10 Health Matrix: J.L.–Med. 249, 250–51 (2000) (reviewing the "unique legal and ethical dilemmas" associated with sex selection); Karen E. Schiavone, Comment, Playing the Odds or Playing God? Limiting Parental Ability to Create Disabled Children Through Preimplantation Genetic Diagnosis, 73 Alb. L. Rev. 283, 294–302 (2009) (considering moral arguments that weigh a parent's autonomy to create disabled life against a child's future autonomy); Lindsey A. Vacco, Comment, Preimplantation Genetic Diagnosis: From Preventing Genetic Disease to Customizing Children. Can the Technology Be Regulated Based on the Parents' Intent?, 49 St. Louis L.J. 1181, 1218–20 (2005) (explaining how the value of procreative liberty has led to a lack of regulation on ART); see also infra notes 144, 148. A body of scholarship on "intentional diminishment" considers the ethical permissibility and potential liability of parents' selection of disabled children. See, e.g., Taylor Irene Dudley, Comment, A Fair Hearing for Children, 9 Whittier J. Child & Fam. Advoc. 341, 343 (2010) (contending intentional selection of a child with deafness is a form of child abuse).

19. Some clinics use ethics committees to respond to complicated ethical questions that arise in embryology. In 1992, the Joint Commission on Accreditation of Healthcare Organizations mandated that hospitals have a mechanism for resolving ethical questions, recommending a multidisciplinary ethics committee. Anne-Marie Slowther & Tony Hope, Clinical Ethics Committees, 321 Brit. Med. J. 649, 649–50 (2000) (referencing the 1992 Accreditation Manual for Hospitals). Nonetheless, a 2009 analysis estimated 73.5% of U.S. clinics are not university or hospital affiliated, meaning they may not have ethics committees. Robert Klitzman, Beata Zolovska, William Folberth, Mark V. Sauer, Wendy Chung & Paul Appelbaum, Preimplantation Genetic Diagnosis on In-Vitro Fertilization Websites: Presentations of Risks, Benefits and Other Information, 92 Fertility & Sterility 1276, 1281 (2009).

selection of viable genetically anomalous embryos represents their only opportunity at biological parenthood.[20]

Women predisposed to having disabled children face compounded constraints on reproductive autonomy. A woman who is an asymptomatic genetic carrier for Duchenne Muscular Dystrophy (DMD) can be denied services by a fertility clinic because any son she conceives has a fifty percent chance of developing DMD.[21] A mother to two deaf sons can be denied reproductive care after her embryos test positive for a gene associated with hearing impairment.[22] An aspiring mother who can only afford one round of IVF can be denied the implantation of any of her embryos because they carry a genetic indicator for autoimmune diseases.[23] While federal law prohibits genetic discrimination in employment and health insurance,[24] and disallows service denials based on disability,[25] fertility clinics' refusals to provide reproductive services on the basis of genetic conditions go largely unchecked. In many cases, women are not presently disabled enough to qualify for the ADA's protections, but nevertheless become victims of discrimination in reproductive services based on stereotypes about disabled people. Permitting this gap in antidiscrimination law to persist legitimizes the devaluation of disabled lives, prevents some women with genetic conditions from becoming mothers, and kindles the fire igniting current debates surrounding fetal personhood legislation.[26]

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20. Transferring Embryos With Genetic Anomalies Detected in Preimplantation Testing: An Ethics Committee Opinion, 107 Am. Soc'y for Reprod. Med. 1130, 1131 (2017) [hereinafter ASRM Ethics Committee, Transferring Embryos With Genetic Anomalies] ("[R]equests may be the result of prospective parents actively seeking to birth a child with a condition that one or both of the intended parents express, or it may be that all the viable embryos produced are genetically anomalous and thus represent the patient's only opportunity for biologic parenthood.").

21. See infra section II.B.1 ("Cam").

22. See infra section II.B.2 ("Lia").

23. See infra section II.B.3 ("Judy").

24. See infra section I.C (describing the Genetic Information Nondiscrimination Act (GINA)).

25. See infra section I.B (outlining the ADA's multiple theories of coverage).

26. Without addressing the regulatory gap that enables healthcare professionals to discriminate based on antidisability animus in a way that maximizes, rather than further contracts, women's autonomy, abortion opponents may deploy personhood laws to do the same. See infra section I.A.2 (reviewing the rise of fetal personhood laws in the United States). Some predict the battleground over reproductive rights will turn to state limitations on women's autonomy in using in-vitro fertilization and preimplantation genetic diagnosis. See Christian J. Sorensen, Thinking Outside the Box: Preimplantation Genetic Diagnosis, In Vitro Fertilization, and Disability Screening in the Wake of *Box v. Planned Parenthood*, 31 Wm. & Mary Bill Rts. J. 149, 152 (2022) (concluding "the next logical step for states concerned with parents committing reproductive discrimination in the wake of advancements in genetic screening is to target PGD and IVF, just as they have targeted trait selection in the abortion context"); see also Judith Daar, Emerging Reproductive Technologies: Regulating Into the Void, *in* Case Studies in the Ethics of Assisted Reproduction, supra note 17, at 13, 19–20 ("Routine aspect[s] of IVF, including preimplantation genetic testing and embryo cryopreservation may be subject to restriction

This Note highlights the risks of allowing unchecked fertility clinic discretion in assisted reproductive technology to persist and proposes several possible solutions that bridge antidiscrimination principles and women's autonomy.

I. THE LANDSCAPE OF REPRODUCTIVE TECHNOLOGY REGULATIONS AND ANTIDISCRIMINATION LAW'S COVERAGE OF GENETIC ANOMALIES

Women are becoming increasingly disempowered in reproductive choice just as new technologies offer fertility clinics greater power and discretion in selecting the characteristics of children brought into the world. When such selection reflects discriminatory animus against people with disabilities—or stereotypes about the quality of life with a disability—prospective mothers have no legal recourse. This Part explores why theories of antidiscrimination coverage for women with expressed or unexpressed genetic indicators for disability are, at best, incomplete. To better understand the current legal protections for women carrying genetic disorders seeking implantation of genetically anomalous embryos,[27] the following sections summarize (A) the degree of discretion afforded to fertility clinics in the law; (B) current theories of coverage under the ADA; and (C) current applications of the Genetic Information Nondiscrimination Act (GINA).

A. *Fertility Clinic Discretion in the Law*

At present, regulations of fertility clinics and assisted reproductive technology are lacking. While states have medical licensing requirements and disciplinary regimes for physician misconduct, comprehensive federal laws are nonexistent,[28] and states have largely failed to regulate in the

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in a post-*Roe* world as the balance of state interests shifts from protecting patient choice and autonomy to favoring unborn human life over any other interests.").

27. In this Note, reference to "genetically anomalous embryos" refers to a widely accepted scientific term for embryos that have undergone genetic testing and revealed genetic anomalies, providing a "near certainty that a child . . . will manifest certain health-affecting symptoms." Daar, A Clash at the Petri Dish, supra note 11, at 221. This term is used interchangeably with "genetically affected," sometimes used in this context. See, e.g., Lacey Brennan & Louise King, Transferring Genetically Affected Embryos in IVF, Harv. Med. Sch. Ctr. for Bioethics (June 1, 2019), https://bioethics.hms.harvard.edu/journal/ivf-affected-embryos [https://perma.cc/FMP2-K6AB].

28. See Assisted Reproductive Technologies, 24 Geo. J. Gender & L. 337, 338 n.3 (Leanne Aban, Jenna Pickering, Kira Eidson, Reema Holz, Chunhui Li & Olivia Luongo eds., 2023) ("While the federal government did enact the Fertility Clinic Success Rate and Certification Act, which does address the industry, the Act explicitly bars federal regulation of the 'practice of medicine in assisted reproductive technology programs.'" (quoting Delores V. Chichi, Note, In Vitro Fertilization, Fertility Frustrations, and the Lack of Regulation, 49 Hofstra L. Rev. 535, 545 (2021))). The federal government passed the Fertility Clinic Success Rate and Certification Act of 1992 to address the reproductive healthcare industry, but the Act prohibits federal legislation regulating the "practice of

absence of federal action.[29] With the extraordinary discretion wielded by fertility clinics, critics accuse clinical practitioners of "playing God" in the face of power over procreation.[30]

Preimplantation genetic diagnosis (PGD) enables patients to test embryos for genes that cause disease.[31] For some, this technology has prevented the transfer of serious inherited genetic conditions from parent to child.[32] In the early 1990s, when the technology was introduced, the innovation was hailed for its prospect of preventing the inheritance of genetic disorders.[33] For others, PGD presents a threat to respect for disabled lives.[34]

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medicine in assisted reproductive technology programs." Fertility Clinic Success Rate and Certification Act of 1992, Pub L. No. 102-493, 106 Stat. 3146, 3149.

29. See Delores V. Chichi, Note, In Vitro Fertilization, Fertility Frustrations, and the Lack of Regulation, 49 Hofstra L. Rev. 535, 554 (2021) (observing "state lawmakers' hesitation in attempting to regulate the industry").

30. See Kimberly M. Mutcherson, Disabling Dreams of Parenthood: The Fertility Industry, Anti-Discrimination, and Parents With Disabilities, 27 Law & Ineq. 311, 311 (2009) ("Critics of the fertility industry frequently lament that those working in the field of reproductive technology are playing God, as they manipulate embryos, create and sustain pregnancies that could not exist or continue without their aid, and bring the gift of biological parenthood to those longing for it."). Religious communities have also wielded this language to warn against the unchecked development of this technology. See generally Ariana Eunjung Cha, Gifts From God, Wash. Post (Apr. 27, 2018), https://www.washingtonpost.com/graphics/2018/national/how-religion-is-coming-to-terms-with-modern-fertility-methods/ (on file with the *Columbia Law Review*) ("Some religious leaders have objected to using gene editing on embryos or in ways that could affect future generations, arguing the human genome is sacred and editing it violates God's plan for humanity.").

31. Harvey J. Stern, Preimplantation Genetic Diagnosis: Prenatal Testing for Embryos Finally Reaching Its Potential, 3 J. Clinical Med. 280, 281 (2014).

32. See Michelle J. Bayefsky, Comparative Preimplantation Genetic Diagnosis Policy in Europe and the USA and Its Implications for Reproductive Tourism, 3 Reprod. BioMed. & Soc. Online 41, 42 (2016) ("The technique is primarily used to detect serious heritable disorders, such as Tay-Sachs or cystic fibrosis, which the parents wish to avoid passing on to their children.").

33. See Bergero v. Univ. S. Cal. Keck School of Med., No. B200595, 2009 WL 946874, at *2 (Cal. Ct. App. Apr. 9, 2009) ("[PGD] is intended to allow parents to avoid conceiving a child that will be born with a particular genetic disorder."); see also Karen Sermon, André Van Steirteghem & Inge Liebaers, Preimplantation Genetic Diagnosis, 363 Lancet 1633, 1638 (2004) ("New methods for diagnosis of monogenic diseases are being developed at a rapid rate . . . .").

34. See Adrienne Asch & Eric Parens, The Disability Rights Critique of Prenatal Genetic Testing 14, *in* Prenatal Testing and Disability Rights (Erik Parens & Adrienne Asch eds., 2000) ("Indeed, many people with disabilities, who daily experience being seen past because of some single trait they bear, worry that prenatal testing repeats and reinforces that same tendency toward letting the part stand in for the whole."); Jeanne Salmon Freeman, Arguing Along the Slippery Slope of Human Embryo Research, 21 J. Med. & Phil. 61, 73 (1996) (presenting the full slippery slope argument that funding embryo research could promote eugenic practices).

In the United States, there are no formal laws regulating the selection and transfer of genetically anomalous embryos.[35] The United States stands apart from Europe in this regard. In Italy, a 2004 law restricted the use of PGD to individuals diagnosed as infertile to prevent the deployment of reproductive technology to select against inheritable traits.[36] Patient advocates challenged the law's constitutionality and prevailed in 2008.[37] Now, Italians can use PGD to maximize the embryo's health and development, but the law still bans "any form of eugenic selection" or "breeding techniques . . . intended to alter the genetic heritage of the embryo or gamete or to predetermine genetic characteristics, except interventions with diagnostic or therapeutic purposes."[38] Switzerland similarly permits PGD for serious heritable disorders, without clarity on the exact disorders that qualify.[39] France limits PGD services to only some certified fertility specialists allowing selection against only serious, incurable diseases.[40] A 2004 law vested the Agence de la Biomédecine

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35. ASRM Ethics Committee, Transferring Embryos With Genetic Anomalies, supra note 20, at 1131.

36. Luca Gianaroli, Anna Maria Crivello, Ilaria Stanghellini, Anna Pia Ferraretti, Carla Tabanelli & Maria Cristina Magli, Reiterative Changes in the Italian Regulation on IVF: The Effect on PGD Patients' Reproductive Decisions, 28 Reprod. BioMed. Online 125, 126 (2014).

37. Id.

38. Norme in materia di procreazione medicalmente assistita [Rules Regarding Medically Assisted Procreation], Legge 19 febbraio 2004, n.40, art. 13, para. 3, G.U. Feb. 24, 2004, n.45 (It.) (author's translation). For more regarding this decision confirming the law's constitutionality, see Mirzia Bianca, Il *best interest of the child* nel dialogo tra le Corti [The Best Interest of the Child in the Dialogue Between the Courts], *in* The Best Interest of the Child 669, 669–70 (Mirzia Bianca ed., 2021).

39. See Christian De Geyter, Assisted Reproductive Medicine in Switzerland, Swiss Med. Wkly., May 2, 2012, at 1, 5 (explaining the legislative history of PGD in Switzerland). After historically restrictive laws prohibiting PGD, the Swiss voted in 2015 to modify the Constitution to allow PGD. See Constitution fédérale [Cst] [Constitution] Apr. 18, 1999, RO 101, art. 119 para. 2 (Switz.) (amended on June 14, 2015, to legalize PGD); see also Loi fédérale sur la procréation médicalement assistée [Federal Act on Medically Assisted Reproduction], Dec. 18, 1998, SR 810.11 art. 5a (Switz.) ("L'analyse du patrimoine génétique de gamètes et leur sélection . . . ne sont autorisées que pour détecter des caractéristiques chromosomiques susceptibles d'entraver la capacité de se développer du futur embryon ou si le risque de transmission d'une prédisposition à une maladie grave ne peut être écarté d'une autre manière." ["The analysis of the genetic material of reproductive cells and their selection . . . are only permitted in order to identify chromosomal properties that may inhibit the development capacity of the embryo to be created, or if there is no other way of avoiding the risk of transmitting a predisposition for a serious disease."]).

40. Loi no. 2011-814 du 7 juillet 2011 relative à la bioéthique [Law No. 2011-814 of July 7, 2011 Relating to Bioethics] Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 8, 2011, art. 33. ("L'assistance médicale à la procréation a pour objet de remédier à l'infertilité d'un couple ou d'éviter la transmission à l'enfant ou à un membre du couple d'une maladie d'une particulière gravité. Le caractère pathologique de l'infertilité doit être médicalement diagnostiqué." ["The purpose of medically assisted procreation is to remedy the infertility of a couple or to prevent the transmission of a

(Agency of Biomedicine) with the power to regulate the uses of PGD.[41] Now, requests for PGD are reviewed by a Centre Pluridisciplinaire de Diagnostic Prénatal (CPDPN), a group of physicians, biologists, and others who evaluate whether the conditions are sufficiently severe and the genetic information sufficiently prognostic.[42] The United Kingdom's legislation, on the other hand, lists disorders for which PGD is permitted.[43] Fertility clinics can apply to add new conditions to the list.[44]

In the United States, there is no list of permissible conditions to evaluate using PGD, nor are there state or federal laws regulating the acceptable use of the technology.[45] The Center for Human Reproduction estimates over half of IVF cycles in the United States involve preimplantation genetic testing (PGT).[46] Some clinics explicitly state that they will not implant embryos that are genetically affected by diseases like Down syndrome and Turner syndrome.[47] A 1987 survey found that 79% of ART practitioners would deny ART to patients at risk of transmitting a serious genetic disorder to their offspring.[48]

The ASRM states that ART providers in the United States have traditionally not engaged in any "systematic screening of [a prospective

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particularly serious illness to the child or a member of the couple. The pathological nature of infertility must be medically diagnosed."]).

41. Loi no. 2004-800 du 6 août 2004 relative à la bioéthique [Law 2004-800 of August 6, 2004, Relating to Bioethics] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 6, 2004, art. 2 ("L'Agence de la biomédecine se substitue à l'Etablissement français des greffes pour l'ensemble des missions dévolues à cet établissement public administratif." ["The Agency of Biomedicine replaces the French Registry Establishment for all the missions assigned to this public administrative establishment."]).

42. Rep. Agence de la Biomédecine, Le diagnostic préimplantatoire et vous [Preimplantation Diagnostics and You] 6 (2022), https://www.agence-biomedecine.fr/IMG/pdf/agencebiomedecine_ledpi_vous.pdf [https://perma.cc/2NLS-AHTN] ("Le CPDPN doit valider, après étude du dossier, le principe de recourir au DPI pour la maladie que vous êtes susceptible de transmettre." ["The CPDPN must validate, after studying the file, the objective of using PGD for the disease that you are likely to transmit."]).

43. PGT-M Conditions, Hum. Fertilisation & Embryology Auth., https://www.hfea.gov.uk/pgt-m-conditions/ [https://perma.cc/WG82-CMKQ] (last visited Jan. 5, 2024).

44. Human Fertilisation and Embryology Act 1990, c. 37, § 10 (U.K.) (introducing the licensing procedure for clinics to perform PGD for a certain condition).

45. Bayefsky, supra note 32, at 43.

46. Norbert Gleicher, CHR Reports Excellent Rates From "Chromosomal Abnormal" Embryos, Ctr. for Hum. Reprod., https://www.centerforhumanreprod.com/blog/chr-reports-excellent-rates-from-chromosomal-abnormal-embryos [https://perma.cc/V3C3-HZU2] (last visited Jan. 7, 2024).

47. ASRM Ethics Committee, Transferring Embryos With Genetic Anomalies, supra note 20, at 1132.

48. U.S. Cong. Off. of Tech. Assessment, Artificial Insemination: Practice in the United States: Summary of a 1987 Survey 29–30 (1988), https://ota.fas.org/reports/8804.pdf [https://perma.cc/58A9-6DYM].

patient's] ability or competency in rearing children"; however, ASRM also provides that physicians may "withhold services from prospective patients on the basis of well-substantiated judgments that those patients will be unable to provide or have others provide adequate child-rearing for offspring."[49] While the ASRM does not elaborate on its definition of a "well-substantiated judgment," an ASRM Ethics Opinion clarifies practitioners "may take the welfare of resulting children into account in deciding whether to provide services."[50] There is no existing regulatory body that reviews physician decisions for suitable substantiation or disciplines physicians whose decisions are motivated principally by presumptions about disability.[51]

Prior scholarship has identified the effect these practices have on screening out mothers with disabilities, whom medical practitioners regard as less suited to parent a child based on ableist assumptions about a disabled individual's capacity for parenthood.[52] Authors like Judith Daar characterize ART as legitimizing a "stratification of reproductive freedom" and serving as a "commentary on the social worth of certain prospective parents."[53] Disabled women, long subject to a history of forced sterilization,[54] report being regarded as unfit mothers.[55]

Scholarship has not yet addressed concerns that these policies screen out individuals who are denied the implantation of genetically anomalous embryos, based less on ableist assumptions about a parent's life than on

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49. ASRM Ethics Committee, Child-Rearing Ability, supra note 8, at 864.

50. Id. at 866.

51. See Mutcherson, supra note 30, at 319–20 ("There is no overarching regulatory body like the HFEA [Human Fertilisation and Embryology Authority] to subject them to fines or the loss of a license, which could help to compel conformance to any particular set of non-discrimination practices.").

52. Id.; see also U.S. Cong. Off. of Tech. Assessment, supra note 48, at 33; Dave Shade, Empowerment for the Pursuit of Happiness: Parents With Disabilities and the Americans With Disabilities Act, 16 Minn. J.L. & Ineq. 153, 171–72 (1998) (analyzing an August 1987 Office of Technology Assessment survey revealing fertility provider biases in selection of patients for artificial insemination). A 1987 survey of 1,213 fertility physicians by the Office of Technology Assessment revealed one in five patients seeking artificial insemination are denied. U.S. Cong. Off. of Tech. Assessment, supra note 48, at 27. Around 52% of physician participants reported performing a personality assessment, which included screening of genetic diseases. Id. at 29. Asked "[h]ave you ever rejected or would you be likely to reject a request for artificial insemination for a potential recipient because she was/has: ___," 79% of participants reported they would reject a woman with a serious genetic disorder and 32% would reject a woman with less than average intelligence. Id.

53. Judith F. Daar, Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms, 23 Berkeley J. Gender, L. & Just. 18, 49 (2008).

54. See, e.g., Buck v. Bell 274 U.S. 200, 208 (1927) (upholding a Virginia law authorizing the forced sterilization of individuals with mental disabilities).

55. A personal account by a mother with multiple sclerosis elaborates: "Whether a woman is born with a disability or acquires it later in life, the message she gets from the medical system and society is that she is ineligible for normal societal female roles of lover, wife, or mother." Carrie Killoran, Women With Disabilities Having Children: It's Our Right Too, 12 Sexuality & Disability 121, 122 (1994).

assumptions about the value of prospective disabled lives. The law currently affords fertility clinics and healthcare providers ample discretion to discriminate on the basis of the protected identities of parents as well as the propensity those parents have to produce disabled embryos. This Note is the first to address autonomy-maximizing legal recourses available for prospective parents denied services based not on their capacity as parents but on their likelihood to bring disabled children into the world.

1. *Unchecked Discretion Is Pitting the Marginalized Against One Another: The Disability and Reproductive Health Debate.* — Despite disability's positionality as a feminist issue,[56] disability rights and women's reproductive rights have long been pitted against each other. Abortion opponents have connected abortion to eugenics.[57] After *Roe*,[58] antiabortion activists wielded disability issues as a slippery slope argument against women's reproductive autonomy.[59] Beginning in 2015, legislators in states like Indiana, Ohio, and Texas began considering bills banning abortions on the basis of disabilities like Down Syndrome.[60] Some scholars have framed the assisted reproduction industry as a "primary site of eugenic practices"

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56. Disability studies drew influence from feminist theory, and numerous early works focused on the lives of disabled women. See generally Michelle Fine & Adrienne Asch, Women With Disabilities: Essays in Psychology, Culture, and Politics (1988) (describing disabled women's lives across many dimensions); Jenny Morris, Able Lives: Women's Experience of Paralysis (1989) (publishing the results of questionnaires completed by 205 women with spinal cord injuries); Harilyn Rousso, Susan Gushee O'Malley & Mary Severance, Disabled, Female, and Proud! Stories of Ten Women with Disabilities (1988) (detailing the lives of ten women with the goals of destigmatizing the barriers associated with disabled life). Rosemarie Garland-Thomson introduced the field of feminist disability studies in 1994. See Rosemarie Garland Thomson, Redrawing the Boundaries of Feminist Disability Studies, 20 Feminist Stud. 583, 592 (1994) (reviewing work that "participates in the discourse of feminist disability studies without even announcing itself as such"). Recent contributions have criticized the field for its exclusion of disabled women of color. Sami Schalk & Jina B. Kim, Integrating Race, Transforming Feminist Disability Studies, 46 J. Women Culture & Soc'y 31, 32 (2020) (arguing "the insights of feminists of color on disability have largely been excluded as intellectual contributions to feminist disability studies").

57. See, e.g., Sarah St. Onge, Aborting Disabled Babies Is Genocide, So Why Is It Legal?, The Federalist (June 9, 2021), https://thefederalist.com/2021/06/09/aborting-disabled-babies-is-genocide-so-why-is-it-legal/ [https://perma.cc/ME8R-4JMK] (arguing "[u]nborn babies who face complicated medical diagnoses are living human children"). In his opinions, Justice Clarence Thomas has also frequently directed his anti-abortion arguments at protecting disability rights. See, e.g., Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring) ("Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.").

58. Roe v. Wade, 410 U.S. 113 (1973).

59. See Mary Ziegler, The Disability Politics of Abortion, 2017 Utah L. Rev. 587, 600 ("As the decade progressed, however, pro-lifers took up the issue of disability, using it to argue for the reversal of *Roe* and the importance of the right to life.").

60. Id. at 613.

as women use PGT to select against certain genes.[61] Given disability's inextricable ties to a history of eugenics,[62] abortion opponents often claim protections for hypothetical disabled fetuses and overlook pregnant persons with disabilities who become what some scholars have termed "collateral damage in the war against reproductive justice."[63]

Scholars and disability activists have begun pushing back against the deployment of disabled stories to justify limiting abortion access. Recent studies challenge the antieugenicist promise of disability-based abortion bans, finding states with these bans do not tend to implement other antieugenicist measures.[64] Disability activist Kendall Ciesemier describes the destructive consequences of this divide by stating:

> Despite the fact that abortion opponents would champion my disabled "life" in my mom's womb, the laws they've levied across the country now put my life and that of other disabled and chronically ill people in danger by potentially forcing us to carry a pregnancy to term even in the face of serious health consequences.[65]

According to many, abortion opponents' wielding of disability rights to limit reproductive autonomy has proven detrimental to people with disabilities. People with disabilities are disproportionately exposed to the risks of sexual violence, unwanted pregnancy, and maternal and infant mortality.[66] For individuals with chronic health conditions, pregnancy's physiological effects can "severely compromise health or even cause death."[67] Legislation imposing burdensome regulations on abortion

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61. Suzanne Holland, Selecting Against Difference: Assisted Reproduction, Disability and Regulation, 30 Fla. St. U. L. Rev. 401, 402 (2003).

62. See Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a Virginia law authorizing the forced sterilization of individuals with mental disabilities); see also Robyn M. Powell, Confronting Eugenics Means Finally Confronting Its Ableist Roots, 27 Wm. & Mary J. Race, Gender & Soc. Just. 607, 620 (2021) (discussing eugenics' roots in antidisability animus and termination of parental rights on grounds of disability).

63. Allison M. Whelan & Michele Goodwin, Abortion Rights and Disability Equality: A New Constitutional Battleground, 79 Wash. & Lee L. Rev. 965, 996 (2022).

64. See Sonia M. Suter, Why Reason-Based Abortion Bans Are Not a Remedy Against Eugenics: An Empirical Study, 10 J.L. & Bioscis., 2023, at 1, 32 [hereinafter Suter, Reason-Based Abortion Bans] (comparing the presence of antieugenicist legislation in states with reason-based abortion bans).

65. Kendall Ciesemier, Opinion, Leave My Disability Out of Your Anti-Abortion Propaganda, N.Y. Times (July 31, 2022), https://www.nytimes.com/2022/07/31/opinion/disability-rights-anti-abortion.html (on file with the *Columbia Law Review*).

66. Asha Hassan, Lindsey Yates, Anna K. Hing, Alanna E. Hirz & Rachel Hardeman, *Dobbs* and Disability: Implications of Abortion Restrictions for People With Chronic Health Conditions, 58 Health Serv. Rsch. 197, 199 (2022); see also Whelan et al., supra note 63, at 999 ("Finally, persons with disabilities are more likely to be victims of intimate partner violence and violent crimes like rape and sexual assault. Persons with disabilities make up approximately 12% of the population, but 26.5% of rape/sexual assault victims." (footnote omitted)).

67. Hassan et al., supra note 66, at 198 (internal quotation marks omitted) (quoting Abortion Can Be Medically Necessary, Am. Coll. Obstetricians & Gynecologists (Sept. 25,

providers after *Dobbs* has resulted in clinic closures that restrain access to nonabortion healthcare services.[68] Restricting abortion access nationally has also created barriers for individuals with disabilities for whom travel is physically and administratively challenging.[69] These harms faced by disabled individuals are compounded for disabled people of color, who are more likely to be unemployed and live in poverty,[70] and for Black women, who face a higher risk of pregnancy-related complications.[71]

2019), https://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary [https://perma.cc/9BEE-RDFN]). See generally Jessica L. Gleason, Jagteshwar Grewal, Zhen Chen, Alison N. Cernich & Katherine L. Grantz, Risk of Adverse Outcomes in Pregnant Women With Disabilities, 4 JAMA Network Open, e2138414, Dec. 1, 2021, at 1, 4 (finding in a study that women with disabilities were at higher risk of adverse maternal outcomes); Meena Venkataramanan, Their Medications Cause Pregnancy Issues. Post-*Roe*, That Could Be Dangerous., Wash. Post (July 25, 2022), https://www.washingtonpost.com/health/2022/07/25/disabled-people-abortion-restrictions/ (on file with the *Columbia Law Review*) ("Studies have found that those with disabilities experience higher rates of sexual violence—which can lead to abortions—in addition to higher rates of unplanned pregnancies and a higher risk of death during pregnancy than people without disabilities."); Suzanne C. Smeltzer, Bette Mariani & Colleen Meakim, Pregnancy in Women With Disabilities, Nat'l League for Nursing, Vill. Univ. Coll. of Nursing (2017), https://www.nln.org/education/teaching-resources/professional-development-programsteaching-resourcesace-all/ace-d/additional-resources/pregnancy-in-women-with-disabilities-a830c45c-7836-6c70-9642-ff00005f0421 (on file with the *Columbia Law Review*) ("During the prenatal period, women with disabilities that affect their mobility are at higher risk than women without disabilities for several health issues.").

68. Whelan et al., supra note 63, at 979–80 (noting "when [trigger] laws result in clinic closures, they inhibit access to essential non-abortion healthcare services, such as contraception, cancer screenings, prenatal care, gender-affirming care, and more").

69. See id. at 996 ("Laws that require medically unnecessary clinic trips, prohibit the use of telemedicine, or prohibit the use of local retail or mail pharmacies to obtain medication abortion create significant and sometimes insurmountable barriers for persons with disabilities for whom travel may be physically or logistically difficult."). For more on the outsized burden faced by disabled people when deciding to or planning travel, see Kristen L. Popham, Elizabeth F. Emens & Jasmine E. Harris, Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People, 55 Colum. Hum. Rts. L. Rev. Forum 1, 16–34 (2023), https://hrlr.law.columbia.edu/files/2023/08/Popham-Emens-and-Harris_Disabling-Travel_20230809_Final-Upload.pdf [https://perma.cc/86K7-MN6X] (detailing the main barriers to hotel access for individuals with disabilities).

70. See, e.g., Employment Status of the Civilian Noninstitutional Population by Disability Status and Selected Characteristics, 2022 Annual Averages, U.S. Bureau Lab. Stats. (last modified Feb. 23, 2023), https://www.bls.gov/news.release/disabl.t01.htm [https://perma.cc/6WKW-TRSH] (showing Black people with disabilities had an unemployment rate of 10.2% compared to a rate of 6.7% for white people with disabilities); see also Nanette Goodman, Michael Morris, Kelvin Boston & Donna Walton, Financial Inequality: Disability, Race, and Poverty in America, Nat'l Disability Inst. 12 (2019), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf [https://perma.cc/J36SNL85] ("The poverty rate varies by color for people with and without disabilities. Almost 40 percent of African Americans with disabilities live in poverty, compared with 24 percent of Non-Hispanic Whites, 29 percent of Latinos and 19 percent of Asians." (citation omitted)).

71. See Donna L. Hoyert, Nat'l Ctr. for Health Stats., Maternal Mortality Rates in the United States 1 (2021), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.pdf [https://perma.cc/X5TK-5JKV] ("In 2021, the maternal

Despite the unique and augmented harms abortion restrictions place on the disabled community, disabled advocates like Ciesemier have observed that "[a]bortion opponents like to use disabled fetuses as pawns to support their politics."[72]

The disability rights problems explored in this Note are likewise susceptible to being deployed to justify further minimizing women's autonomy. Post-*Dobbs*, developing a statutory framework that centers both women's autonomy and disability rights in reproductive healthcare services is urgent.

2. *Situating This Debate in a Post-*Roe *World: The Rise of Fetal Personhood Laws.* — Many of the states that once implemented disability-based abortion bans enacted trigger laws generally banning abortion after *Dobbs*.[73] In 2021, states like Montana and Arizona sought to pass laws criminalizing abortion and PGT/IVF based on a fetus's personhood.[74] Louisiana currently has a law designating IVF fetuses as juridical persons, limiting the destruction of viable embryos and the use of embryos for research and commercial purposes.[75] Since *Dobbs*, legislators have proposed thirty-six fetal personhood bills, twenty-three of which were introduced in 2024.[76]

Since *Dobbs*, state courts have also increasingly validated fetal personhood theories. In February 2024, the Alabama Constitution's fetal personhood clause gained national attention after the Alabama Supreme Court ruled frozen embryos created through IVF are children and individuals disposing of the embryos could be subject to liability.[77] The

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mortality rate for non-Hispanic Black (subsequently, Black) women was 69.9 deaths per 100,000 live births, 2.6 times the rate for non-Hispanic White (subsequently, White) women (26.6)." (citation omitted)).

72. Ciesemier, supra note 65.

73. See Suter, Reason-Based Abortion Bans, supra note 64, at 4 ("Just five months after *Roe* was overturned, 14 of the 17 states with [reason-based abortion] bans had enacted or already had trigger laws with complete bans . . . .").

74. Press Release, Democratic Legis. Campaign Comm., Arizona Legislature Passes Fetal Personhood Bill (Apr. 23, 2021), https://dlcc.org/press/arizona-legislature-passes-fetal-personhood-bill/ [https://perma.cc/8PGG-UVSA]; Iris Samuels, Montana House Advances 'Personhood' Bill to Limit Abortions, AP News (Mar. 18, 2021), https://apnews.com/article/bills-montana-810bee54e0b6b6fd5795414a00e10c9e [https://perma.cc/27EC-TZL3].

75. La. Stat. Ann. §§ 9:121–9:133 (2020). By recognizing an embryo as a "juridical person," the Louisiana law confers certain legal rights on to the embryo, including the ability "to sue or be sued." Id. § 9:124. Its existence as a "juridical person" is recognized "until such time as the in vitro fertilized ovum is implanted in the womb." Id. § 9:123.

76. State Legislation Tracker: Major Developments in Sexual & Reproductive Health, Guttmatcher Inst., https://www.guttmacher.org/state-legislation-tracker [https://perma.cc/VSZ2-CDRP] (last updated Sept. 1, 2024).

77. See LePage v. Ctr. for Reprod. Med., No. SC-2022-0515 & SC-2022-0579, 2024 WL 656591, at *5–6 (Ala. Feb. 16, 2024) (holding that the meaning of "child" in Alabama's Wrongful Death of a Minor Act encompasses "unborn children," including IVF embryos that have not been implanted).

decision sparked confusion and fear for reproductive healthcare providers with IVF clinics across the state temporarily pausing services.[78] While fetal personhood laws exhibited the initial aim of constraining abortion access, states are now leveraging the movement to constrain access to reproductive healthcare more generally.[79]

The moral panic animating the fetal personhood movement has roots predating *Dobbs*. Proponents of the personhood movement have long employed Justice Harry Blackmun's language in *Roe* suggesting Fourteenth Amendment protections for fetal persons to justify a narrowing of women's right to reproductive autonomy.[80] *Dobbs* "breathes new life" into this argument.[81] In his opinion for the Court, Justice Samuel Alito did not address the issue of fetal personhood head-on. But just two months after the *Dobbs* decision, the Supreme Court received and ultimately declined a petition for writ of certiorari filed by two pregnant women and Catholics for Life presenting the issue of whether "unborn" fetuses are persons entitled to Fourteenth Amendment rights.[82] At least six states currently have fetal personhood provisions on the books,[83] indicating cases invoking this argument are likely to persist.[84] Justice Alito's decision has empowered states to draw lines on when "the rights of personhood begin."[85] Some commentators assert originalism compels

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78. See Joshua Sharfstein, The Alabama Supreme Court's Ruling on Frozen Embryos, Johns Hopkins Bloomberg Sch. Pub. Health (Feb. 27, 2024), https://publichealth.jhu.edu/2024/the-alabama-supreme-courts-ruling-on-frozen-embryos [https://perma.cc/S5RE-HRDU] ("Several of the state's IVF clinics have since paused services, and lawmakers, doctors, and patients are raising concerns about the far-ranging impacts of the ruling on health care, including reproductive technology.").

79. Monika Jordan, Comment, The Post-*Dobbs* World: How the Implementation of Fetal Personhood Laws Will Affect In Vitro Fertilization, 57 U. Ill. Chi. L. Rev. 249, 272 (2024).

80. Jonathan F. Will, Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice, 39 Am. J.L. & Med. 573, 578 (2013). In *Roe*, Justice Harry Blackmun argued, "If this suggestion of [fetal] personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." See Roe v. Wade, 410 U.S. 113, 157 (1973).

81. Cynthia Soohoo, An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life, 14 ConLawNOW 81, 82 (2023).

82. Petition for Writ of Certiorari at i, Doe as Next Friend Doe v. McKee, 143 S. Ct. 309 (2022) (No. 22-201), 2022 WL 4096782.

83. See, e.g., Ariz. Rev. Stat. Ann. § 1-219 (2024); Ga. Code Ann. § 1-2-1 (2024); Kan. Stat. Ann. § 65-6732 (West 2024); Ky. Rev. Stat. Ann. § 311.720 (West 2024); Mo. Ann. Stat. § 1.205 (2024); 18 Pa. Stat. and Cons. Stat. Ann. § 3202 (2024).

84. See Soohoo, supra note 81, at 82 ("Prenatal Personhood claims are unlikely to go away.").

85. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022). Conservative scholars have argued that states should have this power. See, e.g., Brief for Professors Mary Ann Glendon and Carter Snead as Amici Curie in Support of Petitioners at 8, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), 2021 WL 3375877 (criticizing *Roe* for keeping states from "treating the unborn as persons"); see also Soohoo, supra note 81, at 114 ("Essentially the state's police power is repackaged as a rights claim that the zygote-embryo-fetus does not

fetal personhood,[86] and others repackage personhood arguments in scientific terms.[87]

Already, states are assigning personhood status to embryos in ways that limit access to lifesaving reproductive medicine and access to technologies that expand the reproductive possibilities for many women with disabilities.[88] Applying antidiscrimination law to fertility clinics denying women the choice to implant genetically affected embryos aims at expanding women's autonomy, offering one avenue to challenge the values underlying discretionary medical judgments. Even so, abortion opponents risk usurping these principles to constrain autonomy. If current antidiscrimination law continues to provide little recourse for genetic carriers, a void expands for abortion opponents to reinforce the need to assign personhood status to embryos as a theory of ADA disability coverage.

B. *Americans With Disabilities Act Title III Coverage for People With Expressed and Unexpressed Genetic Disorders*

The ADA does not create a positive right to medical care but mandates individuals with disabilities receive equal access to medical care compared to individuals without disabilities.[89] The ADA also provides

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(and cannot) assert on its own behalf that is used to override the decisions of a pregnant person about their body and the prenatal life inside them.").

86. See, e.g., Joshua Craddock, Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?, 40 Harv. J.L. & Pub. Pol'y 539, 547–48 (2017) (arguing that whether states asserted that fetuses were members of the human species at the time the Fourteenth Amendment was ratified did not matter if states asserted all human beings were persons).

87. See, e.g., Reva Siegel, Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 325 (1992) ("The science of human development now provides a coherent framework for reasoning about the morality of abortion, one so compelling that it is possible to make claims about abortion that seem to have no roots in matters of religious faith or judgments about family life."); see also Brief for Illinois Right to Life as Amici Curiae & Dr. Steve Jacobs, J.D., Ph.D., in Support of Petitioners at 24, *Dobbs*, 142 S. Ct. 2228 (No. 19-1932), 2021 WL 3375894 ("[T]he scientific consensus on the fertilization view on when a human's life begins is as clear and convincing as visual observations of fetal development." (footnote omitted)); Gregory J. Roben, Unborn Children as Constitutional Persons, 25 Issues L. & Med. 185, 250–55 (2010) (arguing that the Equal Protection Clause of the Fourteenth Amendment compels federal protection of "unborn persons").

88. See Adam Edelman, An Uptick in State Personhood Bills Fuels Growing Fears Over IVF Restrictions, NBC News (Feb. 23, 2024), https://www.nbcnews.com/politics/personhood-bills-ivf-restrictions-alabama-rcna140228 [https://perma.cc/65KW-XDTL] (last updated Feb. 26, 2024) (explaining that "[f]our states have enacted laws granting personhood rights to fertilized embryos, and one dozen more have introduced similar legislation in 2024").

89. Access to Medical Care for Individuals With Mobility Disabilities, U.S. DOJ C.R. Div., https://www.ada.gov/resources/medical-care-mobility/ [https://perma.cc/9PLW-7XBX] (last updated June 26, 2020) ("Both Title II and Title III of the ADA and Section

protection for individuals who were denied services because they are associated with an individual with a disability or because they are regarded as disabled.[90] This section explores the case law surrounding disability coverage[91] and considers why protection under the ADA has not yet proved sufficient for women with genetically anomalous embryos seeking equal access to reproductive technology.

1. *Genetic Anomaly as Disability.* — The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities."[92] Genetic conditions, when expressed, can result in disabilities that fall clearly within the scope of the ADA. Disability coverage is not designed to be a demanding standard under the ADA.[93] Courts have generally favored a broad construction of the substantial limitation requirement. In *Darby*, the Sixth Circuit held that a plaintiff with genetic mutation BRCA1—which limited her normal cell growth and warranted a double mastectomy, despite not yet being cancerous—plausibly alleged a disability under the ADA.[94] The Sixth Circuit cited the gene's present

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504 require that medical care providers provide individuals with disabilities . . . full and equal access to their health care services and facilities . . . .").

90. 42 U.S.C. § 12182(a) (2018).

91. This section focuses primarily on the status of people who are genetic carriers of disease as disabled or regarded as disabled. The third prong of coverage, associational discrimination, receives little consideration due to its reliance on the personhood status of an embryo. Titles I and III forbid discrimination "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." Id. § 12112(b)(4) (Title I); see also id. § 12182(b)(1)(E) (Title III, using similar language). By referencing an "individual," associational discrimination under the ADA still imposes a personhood requirement on the individual with which one is associated. While this represents one possible route to ADA coverage, this path would risk further retracting women's autonomy and disability rights if applied to association with an embryo. Individuals could apply this theory of coverage to instances where fertility clinics deny services based on the disability status of one's partner or the disability status of family members. Courts have found cognizable associational discrimination claims in cases where insurance companies deny coverage to an individual because their partner is HIV-positive. See, e.g., Cloutier v. Prudential Ins. Co. of America, 964 F. Supp. 299, 304 n.4 (N.D. Cal. 1997) (stating that "virtually any association or relationship requires conduct of some kind" and that "characterizing plaintiff's relationship with his mate as 'conduct' does not remove him from protected status under the ADA"); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1323 (C.D. Cal. 1996) (holding that a plaintiff who was denied insurance coverage because he had an HIV-positive wife "is entitled to bring a claim under Title III for the discriminatory denial of insurance coverage"). Nonetheless, these theories have gone untested in the context of reproductive health and risk bolstering claims for fetal personhood that could ultimately constrain women's reproductive choice.

92. 42 U.S.C. § 12102(1)(A).

93. See 29 C.F.R. pt. 1630, App. § 1630.2(j)(1)(iv) (2024) ("[T]he term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA.").

94. See Darby v. Childvine, Inc., 964 F.3d 440, 445 (6th Cir. 2020) ("Darby alleges both a genetic mutation that limits normal cell growth and the growth of abnormal cells. . . . [H]er condition was serious enough to warrant an invasive corrective procedure. Taking all

effects on the plaintiff's body as warranting this classification, rather than the possibility of future disability development.[95] While the ADA has not yet been leveraged to this effect, a couple pursuing IVF with one or more genetic indicators of disability that *presently* limit a major life activity may qualify for ADA coverage if denied reproductive services on that basis. Even so, this leaves many individuals who are genetic carriers for disabilities without present, discernible physiological effects uncovered by the ADA's protections and leaves fertility clinic discretion and discrimination largely unchecked.

Infertility itself can qualify as a disability under the ADA, which could cover at least some women who are also genetic carriers. The ADAAA of 2008 expanded the definition of a "major life activity" to include "major bodily functions," including "reproductive functions."[96] Even before the amendments, in 1998, *Bragdon v. Abbott* seemed to settle the question of whether infertility was a major life activity within the meaning of the ADA.[97] *Bragdon* involved a dentist's denial of services to a woman who tested positive for HIV.[98] Even though the plaintiff's HIV had not yet reached a symptomatic stage, the Supreme Court ruled she qualified for ADA coverage because her HIV infection substantially limited her ability to reproduce.[99] The Court reasoned that individuals with HIV risk passing on the disease to a partner and child, which represents a substantial limitation to the major life activity of reproduction.[100] While infertility constitutes a protected disability under *Bragdon*'s reasoning,[101] *Bragdon* has

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of that together, it is at least plausible that Darby is substantially limited in normal cell growth . . . .").

95. Id. at 446–47 ("We agree that a genetic mutation that merely predisposes an individual to other conditions, such as cancer, is not itself a disability under the ADA."). Insofar as a gene merely predisposes an individual to the development of a future disability, the court clarified, "the terms of the [ADA] do not reach that far." Id. at 466. The *Darby* court distinguished the plaintiff's disability from that at issue in *Shell*, where the Seventh Circuit denied disability coverage based on conditions that plaintiff feared would develop as a result of his obesity. See Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 335–36 (7th Cir. 2019) (finding no ADA disability where plaintiff based his claim on conditions he feared he would develop as a result of obesity).

96. ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, § 4(a)(2)(B), 122 Stat. 3553, 3555 (codified in scattered sections of Title 42 of the U.S.C.).

97. See 524 U.S. 624, 638 (1998) ("We have little difficulty concluding that [reproduction] is [a major life activity].").

98. Id. at 628–29.

99. Id. at 641.

100. See id. at 639–40 ("[R]espondent's infection substantially limited [a major life activity because] a woman infected with HIV . . . imposes on the man a significant risk . . . and risks infecting her child during gestation and childbirth . . . .").

101. Some may argue the ADA could be deployed to cover women with genetic anomalies who are pursuing ART due to infertility, under the theory that their infertility constitutes a disability under the ADA. This theory of coverage would be unlikely to prevail. A patient's infertility is not the basis for discrimination when clinics decline the implantation of embryos that are genetically affected by disability; policies that limit implantation of genetically-affected embryos tend to "screen out" not infertile people but individuals with

never been extended to cover all individuals with unexpressed genetic indicators.

2. *Genetic Anomaly as Regarded-As Disabled.* — The ADA also protects individuals from discrimination when an entity denying services regards an individual as disabled, discriminating on the basis of perceived disability rather than actual disability.[102] The statute finds "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[103] This provision does not apply to "impairments that are transitory and minor."[104]

This prong of ADA coverage, developed from 1974 Amendments to the Rehabilitation Act,[105] reflects Congress's intent to strike down overly restrictive interpretations of ADA coverage by removing any requirement to show substantial limitation in major life activities.[106] As the Court

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genetic indicators for disability. Courts have used *Bragdon*'s reasoning to recognize infertility as a per se disability under the ADA. See, e.g., Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 324–26 (S.D.N.Y. 2000) (holding that infertility is a disability under the ADA, but insurance excluding medically necessary treatments for infertility from insurance coverage does not discriminate against infertile individuals). Nonetheless, this theory of ADA coverage may not resolve claims of discrimination brought by genetic carriers in the context of fertility treatments. In prior cases, ADA discrimination claims by infertile people denied health insurance coverage for infertility treatments have not succeeded when policies applied uniformly to disabled and nondisabled employees. See id. (holding infertility treatment insurance exclusions did not violate the ADA because the policies applied equally to disabled and nondisabled employees); see also Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999) (holding health plans capping AIDS treatment costs did not violate the ADA as long as disabled and nondisabled employees received the same benefits). Fertility clinic policies prohibiting implantation of genetically anomalous embryos likewise apply uniformly to infertile and non-infertile patients. In another case, a woman claiming disability discrimination for a Catholic school's decision to fire her after receiving IVF treatments lost her case on summary judgment because "the evidence in the record indicates that the Diocese acted . . . not on any animus against infertility." Herx v. Diocese of Ft. Wayne-S. Bend Inc., 48 F. Supp. 3d 1168, 1180 (N.D. Ind. 2014) (holding "a religious organization can require its employees to conform to the organization's religious tenets" (citing 42 U.S.C. § 12113(d)(2) (2012))). Infertility alone is an unsteady basis of coverage for individuals with genetic indicators for disease denied on the basis of those genetic indicators, rather than on the basis of their infertility.

102. 42 U.S.C. § 12102(1)(C) (2018).

103. Id. § 12102(3)(A).

104. Id. § 12102(3)(B).

105. Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (1974) (codified as amended at 29 U.S.C. § 706(8)(B) (1994)).

106. With the regarded-as prong, Congress aimed to reject the Supreme Court's reasoning in Sutton v. United Air Lines, 527 U.S. 471, 475 (1999) (holding individuals whose eyesight was corrected with glasses were not disabled under the ADA because their condition could be mitigated), toward the broader coverage envisioned in School Board of Nassau County v. Arline, 480 U.S. 273, 284–86 (1987) (holding an individual is regarded-as disabled

acknowledged, legislators developed the regarded-as prong to counter "archaic attitudes" and stereotypes about the capacity of individuals with disabilities.[107] The Senate Committee Report reflected concerns related to negative attitudes and misconceptions that perpetuate discrimination and exclusion.[108] Some scholars draw connections between this theory of disability coverage and the social model of disability,[109] where societal stigmas—including, in some cases, myths about demonic possession[110]—can subject individuals to discrimination whether or not their condition substantially limits a major life activity.[111]

The Fifth Circuit held there was sufficient evidence for a jury to conclude an individual with reported chest pains was regarded as disabled by their employer when their employer collected documentation from supervisors tying complaints to the individual's asserted medical needs.[112] A subsequent Fifth Circuit case lifted the requirement that an employee show their employer regarded them as substantially limited in a major life activity, stating, "The amended 'regarded as' provision reflects the view that 'unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are just as disabling as actual impairments.'"[113]

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when adversely treated on the basis of their impairment, notwithstanding an employer's subjective beliefs about their limitations).

107. See *Nassau County*, 480 U.S. at 278–79 (internal quotation marks omitted) (quoting S. Rep. No. 93-1297, at 50 (1974)).

108. S. Rep. No. 101-116, at 105 (1989) ("Discrimination also includes harms affecting individuals . . . based on false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.").

109. The social model of disability developed in England in the 1970s to distinguish the discriminatory and inaccessible social environment as a cause of disability from the medicalized conditions of impairment. One union of disabled veterans, thought to have originated the concept, released a 1976 statement writing, "In our view, it is society which disables physically impaired people." Union of the Physically Impaired Against Segregation & the Disability Alliance Discuss Fundamental Principles of Disability 3 (1976), https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf [https://perma.cc/EFA6-7K8M]. Early academic articulations of the social model can be found in the work of Michael Oliver. See Mike Oliver, Social Policy and Disability: Some Theoretical Issues, *in* Overcoming Disabling Barriers: 18 Years of Disability and Society 7, 8 (Len Burton ed., 2006) (proposing a departure from the personal tragedy theory of disability dominating disability thought).

110. E.g., Isaac T. Soon, A Disabled Apostle: Impairment and Disability in the Letters of Paul 54–67 (2023) (describing biblical analysis mythologizing demons as impairment).

111. See Samuel R. Bagenstos, Subordination, Stigma, and "Disability", 86 Va. L. Rev. 397, 501 (2000) (concluding individuals with a seizure disorder qualify for protections under the "social-stigma 'regarded as' analysis" because generations have developed elaborate, demeaning myths about people with epilepsy).

112. Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 230–31 (5th Cir. 2015).

113. Cannon v. Jacobs Field Servs. N. Am., Inc., 813 F.3d 586, 591 (5th Cir. 2016) (quoting 29 C.F.R. Pt. 1630 app. § 1630.2(l) (2016)).

The Eleventh Circuit has held that this designation does not apply to those with the potential to become ill.[114] The court clarified, "Even construing the disability definition broadly in favor of coverage, we still conclude that the terms of the ADA protect anyone who experiences discrimination because of a current, past, or perceived disability—not a potential future disability."[115] For the purposes of this provision, unexpressed genetic conditions without sufficient physiological effects could be interpreted as potential future disabilities.

C. *GINA's Promise*

The Genetic Information Nondiscrimination Act, which prohibits discrimination on the basis of genetic information,[116] applies uniquely to health insurance and employment.[117] GINA applies its protections to the genetic tests of individuals or family members and to manifestation of a disease or disorder in family members of an individual.[118] State laws prohibiting genetic discrimination in insurance predated GINA,[119] and the "patchwork" of differing laws on the state and federal level was one motivation for GINA's passage.[120]

Scholars lauded GINA as a form of preemptive legislation, anticipating discrimination "that may pose a future threat."[121] In contrast with the ADA, GINA "*only* applies to future impairments."[122] Some argue this ADA–GINA divide has led to inconsistent policymaking and

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114. See Equal Emp. Opportunity Comm'n v. STME, LLC, 938 F.3d 1305, 1315 (11th Cir. 2019) ("[W]e must conclude that the disability definition in the ADA does not cover this case where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future due to the voluntary conduct of overseas travel.").

115. Id. at 1316.

116. 42 U.S.C. §§ 2000ff to 2000ff-11 (2018).

117. See Yann Joly, Charles Dupras, Miriam Pinkesz, Stacey A. Tovino & Mark A. Rothstein, Looking Beyond GINA: Policy Approaches to Address Genetic Discrimination, 21 Ann. Rev. Genomics & Hum. Genetics 491, 494 (2020) (clarifying the scope of GINA as to "discrimination based on 'genetic information' in employment and health insurance").

118. 42 U.S.C. § 2000ff(4)(A).

119. See, e.g., Miss. Code R. § 3-10-24(A), (C), (G) (LexisNexis 2024); 31 Pa. Stat. and Const. Stat. Ann. § 89.791(c)–(d) (2024); see also Joly et al., supra note 117, at 494–96 ("State insurance laws prohibiting [genetic discrimination] based on certain genetic conditions in specific types of insurance (e.g., health insurance) date back to the 1970s.").

120. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 2(5), 122 Stat. 881, 882 (codified at 42 U.S.C. §§ 2000ff to 2000ff-11) ("Congress has collected substantial evidence that the American public and the medical community find the existing patchwork of State and Federal laws to be confusing and inadequate to protect them from discrimination.").

121. Jessica L. Roberts, Preempting Discrimination: Lessons From the Genetic Information Nondiscrimination Act, 63 Vand. L. Rev. 439, 441 (2010).

122. See Mark A. Rothstein, Predictive Health Information and Employment Discrimination Under the ADA and GINA, 48 J.L. Med. & Ethics 595, 598 (2020) ("GINA prohibits discrimination based on information about future impairments, precisely the kind of discrimination that the ADA has been held not to cover for non-genetic impairments.").

inadequate coverage.[123] GINA case law primarily addresses employment discrimination, in part because the Affordable Care Act's health insurance reforms "overlap" with important GINA protections.[124] Even in employment, courts are at odds over the breadth of the meaning of "genetic information" under GINA.[125] Under even the most demanding constructions of GINA, individuals with genetic anomalies could recover where facts suggest employment and insurance discrimination. This Note addresses whether expanding GINA's antidiscrimination protections to places of public accommodations would remedy unchecked fertility clinic discretion.

II. DENYING REPRODUCTIVE CARE BASED ON DISCRIMINATORY DISABILITY ANIMUS UNDERMINES DISABILITY AS DIFFERENCE

A. *Disability as Difference*

Disability carries different symbolic meanings for different societies and individuals, particularly when compounded by the oppression associated with other identities.[126] Despite this range of experiences, certain narratives around physical disability predominate. The radical and deviant existence of disabled people signals a failure of Western science to achieve desired control over the body.[127]

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123. See id. at 598–601 ("GINA applies only to discrimination based on genetic information about a condition that has not yet manifested. By contrast, the ADA applies only to symptomatic individuals who have an impairment that constitutes a substantial limitation of a major life activity. Two gaps in coverage remain.").

124. Sonia M. Suter, GINA at 10 Years: The Battle Over 'Genetic Information' Continues in Court, 5 J.L. & Biosciences 495, 505 (2019).

125. Courts vary in how demanding a standard they place on plaintiffs claiming genetic discrimination; some assert plaintiffs must show another individual's diagnosis would affect the plaintiff's ability to develop a genetic disease. One view, introduced in *Poore v. Peterbilt of Bristol, L.L.C.*, is that GINA does not protect an individual against discrimination based on a family member's diagnosis with a genetic disorder when the diagnosis does not affect "an individual's propensity to get an inheritable genetic disease." 852 F. Supp. 2d 727, 730 (W.D. Va. 2012) (internal quotation marks omitted) (quoting H.R. Rep. No. 110–28, pt. 3, at 70 (2007), as reprinted in 2008 U.S.C.C.A.N. 112, 141). Other courts present a broader construction, and in cases like *Jackson v. Regal Beloit America, Inc.*, they have ruled that unlawful requests of genetic information are not subject to added scrutiny based on whether they actually affect the plaintiff's propensity to develop disease. No. 16-134-DLB-CJS, 2018 WL 3078760, at *15 (E.D. Ky. June 21, 2018).

126. See Susan Wendell, The Rejected Body: Feminist Philosophical Reflections on Disability 62–63 (1996) [hereinafter Wendell, Rejected Body] ("[D]ifferent disabilities and illnesses can have different meanings within a society . . . and the same disability or illness may have different meanings in different societies or in the same society at different times . . . . Moreover . . . race, age, gender, class, or sexual identity[] may alter the meaning of . . . disability.").

127. See id. ("In the societies where Western science and medicine are powerful culturally, and where their promise to control nature is still widely believed, people with disabilities are constant reminders of the failures of that promise, and of the inability of science and medicine to protect . . . from illness, disability, and death.").

Among scholars, disagreement persists around the framing of physical disability as a condition of an oppressive society[128] or of a medical nature in need of a cure.[129] A new wave of scholarship rejects the medicalized view of disability and embraces the social model, whereby the source of a disabled person's disadvantage can be found not in physical impairment but in social barriers.[130] Critics of the social model posit that viewing disability as merely a social condition erases individuals with chronic illnesses from the disability community.[131] To create space for a vision of chronic illness as difference, scholars like Alison Kafer have proposed a "political/relational model" of disability.[132] In this model, Kafer interrogates inaccessibility and discrimination as political efforts to reinforce a constitutive normalcy and deconstructs the marginalizing effect of social limitations; at once, Kafer's model "neither opposes nor valorizes medical intervention."[133] This Note likewise adopts a political/relational model, neither opposing nor valorizing a woman's choice to select against disability in the face of intricate social and medical realities, whilst resisting the social barriers to selecting *for* disability.

The notion of eradicating and preventing disability is a complicated one, even in the disability community. Some deaf individuals oppose the use of cochlear implants because of the intrinsic value members of the community place on deafness as "entry into a rich culture, ripe with

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128. See Alison Kafer, Feminist, Queer, Crip 5–7 (2013) (arguing the social model posits "impairments aren't disabling, social and architectural barriers are"); see also Liz Crow, Including All of Our Lives: Renewing the Social Model of Disability, *in* Encounters With Strangers: Feminism and Disability 206, 208 (Jenny Morris ed., 1996) (criticizing the medical model's necessity of "the removal or 'overcoming' of impairment" through "cure or fortitude").

129. See Kafer, supra note 128, at 5 (arguing that the medical model frames "atypical bodies and minds as deviant, pathological, and defective," addresses disability in "medical terms," and suggests the "proper approach to disability is to 'treat the condition and the person with the condition'" (quoting Simi Linton, Claiming Disability: Knowledge and Identity 11 (1998))).

130. See Rabia Belt & Doron Dorfman, Disability, Law, and the Humanities: The Rise of Disability Legal Studies, *in* The Oxford Handbook of Law and Humanities 145, 147 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020) (discussing the rise and content of the social model of disability); Adi Goldiner, Understanding "Disability" as a Cluster of Disability Models, 2 J. Phil. Disability 28, 31 (2022) (characterizing the social model's perception of "disability as the social disadvantage and exclusion that some people face due to their surrounding environment"); see also Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1406 (2021) (noting "the ADA embodies a social model of disability").

131. People with chronic illnesses face the disabling effects of social barriers, structural inaccessibility, and also their own bodies. See Kafer, supra note 128, at 7 (claiming "the social model with its impairment/disability distinction erases the lived realities of impairment; in its well-intentioned focus on the disabling effects of society, it overlooks the often-disabling effects of our bodies").

132. Id. at 6.

133. Id.

language, arts, and tradition."[134] Others favor the use of cochlear implants to lessen the social barriers faced by a child with a disability.[135] Notwithstanding these seemingly incompatible approaches, bioethicists and disability experts alike generally support parental choice.[136] Parental choice, however, is absent from the conversation surrounding prenatal testing and reproductive care.

Among "unhealthy disabled" people,[137] the calculus surrounding disease prevention is not without complexities. Some chronically ill people, like Kafer, embrace a "personal, embodied truth," whereby they do not oppose the choice to prevent disability or impairment.[138] Others, like Susan Wendell, cite "the history of eugenics" as enlivening "skeptic[ism] about whether prevention and cure are intended primarily to prevent suffering or to eliminate 'abnormalities' and 'abnormal' people."[139]

Wendell, in her framework departing from "disability as 'the Other'" toward "disability as difference," acknowledges the "devastating social consequences" of navigating life with a disability.[140] But, as she points out, socially created obstacles are never cited as reasons to exclude children of

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134. Alicia Ouellette, Hearing the Deaf: Cochlear Implants, the Deaf Community, and Bioethical Analysis, 45 Val. U. L. Rev. 1247, 1257–58 (2011).

135. See id. at 1266–69 (explaining that some favor cochlear implants so that children are not confined "forever to a narrow group of people and a limited choice of careers" (internal quotation marks omitted) (quoting Dena S. Davis, Genetic Dilemmas 82 (2nd ed. 2010))).

136. See id. at 1268 ("The one issue about which bioethicists appear to have reached a consensus is that a parental choice to use cochlear implants is ethically and morally defensible." (emphasis omitted)).

137. See Susan Wendell, Unhealthy Disabled: Treating Chronic Illnesses as Disabilities, Hypatia, Fall 2001, at 17, 18–19 [hereinafter Wendell, Unhealthy Disabled] (defining "healthy disabled" as "people whose physical conditions and functional limitations are relatively stable and predictable for the foreseeable future," distinct from those with chronic diseases, who require medical treatment and experience "no reasonable expectation of cure").

138. See Kafer, supra note 128, at 4 ("As much joy as I find in communities of disabled people, and as much as I value my experiences as a disabled person, I am not interested in becoming more disabled than I already am. I realize that position is itself marked by an ableist failure of imagination, but I can't deny holding it.").

139. Wendell, Unhealthy Disabled, supra note 137, at 31.

140. Wendell, Rejected Body, supra note 126, at 82; see also id. at 57–84 (describing how disability can be viewed as "Otherness" or as "difference"). This Note adopts Susan Wendell's framework of "disability as difference" over other theoretical frames, such as anti-eliminationism which advocates for "the preservation of, and resources for, disabled lives." Katherine L. Moore, Disabled Autonomy, 22 J. Health Care L. & Pol'y 245, 246 (2019) ("Anti-eliminationism inherently challenges the notion that getting rid of disability is a good thing."). Some scholars advancing an anti-eliminationist lens for disability rights are critics of disability-selective abortion and argue "a resolution that is satisfactory to both abortion rights and disability rights may be . . . elusive." Id. at 278. This Note, by contrast, advances a model that explicitly rectifies the abortion rights and disability rights divide.

color from coming into the world.[141] What distinguishes these cases from disability is, in part, the perception of disability as "abnormality" and "pathology."[142] Likewise, contrary to other identity groups, children with disabilities are rarely born into families or communities of people with disabilities "committed to valuing their differences and fighting for their rights."[143] These obstacles to disability as diversity are ever-present in the context of reproductive healthcare.

This Note does not posit that selecting for disability is the ethically, politically, medically, or socially superior choice. Rather, it raises questions about why these deeply personal choices—about which disability activists are divided[144]—rest in the hands of medical professionals rather than individuals. A uniform policy of physician discretion in rejecting reproductive care centers one vision of disability over other, valid perceptions of disability as a fundamental form of diversity.

As Wendell notes,

> People who take it for granted that it would be a good thing to wipe out all biological causes of disability (as opposed to social causes) are far more confident that they know how to perfect nature and humanity than I am. Even supposing that everyone

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141. See Wendell, Rejected Body, supra note 126, at 82 ("The fact is that a child born with spina bifida or Down's syndrome will face many socially created obstacles to living well. . . . [T]he same thing is true for children-of-colour in white-dominated societies, but few people-of-colour would argue that it is a sufficient reason not to bring a child-of-colour into the world.").

142. Id.

143. Id.

144. For an overview of competing moral conceptions of using PGD to select for disabled traits, see I. Glenn Cohen, Intentional Diminishment, the Non-Identity Problem, and Legal Liability, 60 Hastings L.J. 347, 350–59 (2008) (arguing the non-identity problem applies in cases of creating disabled children through either selection or genetic manipulation); Alexander D. Wolfe, Wrongful Selection: Assisted Reproductive Technologies, Intentional Diminishment, and the Procreative Right, 25 T.M. Cooley L. Rev. 475, 484–95 (2008) (discussing arguments for and against legal regulation of using PGD to select for disabled traits). For the debate surrounding disability-selective abortion in the disability rights movement, see, e.g., Adrienne Asch & David Wasserman, Where Is the Sin in Synecdoche? Prenatal Testing and the Parent-Child Relationship, *in* Quality of Life and Human Difference: Genetic Testing, Health Care, and Disability 172, 209–11 (David Wasserman, Jerome Bickenbach & Robert Wachbroit eds., 2005) ("[M]ost decisions to abort for, or select against, impairment are misguided—based on harmful stereotypes, unreasonable expectations, or relentless institutional pressures."); Marsha Saxton, Disability Rights and Selection Abortion, *in* Abortion Wars: A Half Century of Struggle, 1950–2000, at 374, 381–84 (Rickie Solinger ed., 1998) (reviewing how attitudes about disabilities affect women's choices around PGD and abortion); Claire McKinney, Selective Abortion as Moral Failure? Revaluation of the Feminist Case for Reproductive Rights in a Disability Context, Disability Stud. Q., Winter 2016, https://dsq-sds.org/index.php/dsq/article/view/3885/4213 [https://perma.cc/ESH9-L46B] ("[W]hile it may be the case that many women could cope with the additional time, stress, and money necessary to raise a child with a disability, to universalize from this perspective without empirical support ensures that we ignore the lived reality of women for whom such additional costs and burdens could be unbearable.").

> involved in such an effort were motivated entirely by a desire to prevent and alleviate suffering, what else besides suffering might we lose in the process? And would they know where to stop?[145]

B. *"Would They Know Where to Stop?" Three Scenarios in Which Fertility Clinic Discretion Undermines Women's Autonomy to Bring a Disabled Child Into the World*

Fertility clinic practices of refusing to implant genetically anomalous embryos allow fertility clinic practitioners to discriminate based on a patient's genetic qualities. Unchecked discretion limits reproductive autonomy such that individuals with disabilities or with a propensity to develop disabilities are siloed from equal access to new reproductive technologies.

Innovations like PGT and CRISPR increase the level of knowledge practitioners and patients can gain about embryos. These technologies open up possibilities for preventing the transfer of certain conditions[146] and could do away with some disabilities altogether.[147] This raises important political questions about the value of disabled life and perceptions of disability as diversity. It also raises deeply personal, ethical questions around the knowing transfer of disease on to offspring.[148] While

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145. Wendell, Rejected Body, supra note 126, at 84.

146. See Firuza Rajesh Parikh, Arundhati Sitaram Athalye, Nandkishor Jagannath Naik, Dattatray Jayaram Naik, Rupesh Ramesh Sanap & Prochi Fali Madon, Preimplantation Genetic Testing: Its Evolution, Where Are We Today?, 11 J. Hum. Reprod. Sci. 306, 311–12 (2018) (explaining PGT's development as a "diagnostic tool to prevent transmission of any known genetic disorder").

147. See Ruiting Li, Qin Wang, Kaiqin She, Fang Lu & Yang Yang, CRISPR/Cas Systems Usher in a New Era of Disease Treatment and Diagnosis, Molecular Biomed., no. 31, Oct. 2022, at 1, 2 (observing "CRISPR-based genome editing technology has created immense therapeutic potential" to remove defective genes).

148. See Shawna Benston, CRISPR, a Crossroads in Genetic Intervention: Pitting the Right to Health Against the Right to Disability, Laws, no. 5, Mar. 2016, at 1, 2 ("With the emergence and refinement of reproductive genetic technologies (RGTs), especially gene-editing technologies like CRISPR/Cas9, potential parents must decide whether—and if so, how—to utilize the technologies available to them, and genetics scientists and legislatures must determine how best to regulate the technologies."). CRISPR's development has provoked ethical critiques related to the devaluation of disability. See, e.g., Katie Hafner, Once Science Fiction, Gene Editing Is Now a Looming Reality, N.Y. Times (July 22, 2020), https://www.nytimes.com/2020/07/22/style/crispr-gene-editing-ethics.html (on file with the *Columbia Law Review*) ("While still highly theoretical when it comes to eliminating disabilities, gene editing has drawn the attention of the disability community. The prospect of erasing some disabilities and perceived deficiencies hovers at the margins of what people consider ethically acceptable."); see also Sandy Sufian & Rosemarie Garland-Thomson, Opinion, The Dark Side of CRISPR, Sci. Am. (Feb. 16, 2021), https://www.scientificamerican.com/article/the-dark-side-of-crispr/ [https://perma.cc/T8DV-T38N] ("But CRISPR's tantalizing offer to achieve the supposedly 'best' kind of people at the genetic level is an uneasy alert to those who are often judged to be biologically inferior . . . . People like us whose being is inseparable from our genetic condition would be the first to go.").

this Note does not delve into the ethical implications underlying the development and use of gene-editing tools, it posits that protecting reproductive choice will become increasingly critical in the wake of these debates.

Perhaps most critical is the threat unchecked discretion in the use of these emerging technologies will have on reproductive autonomy. Failure to develop an antidiscrimination principle that centers women's reproductive choice will risk further disempowerment. The post-*Dobbs* reinvigoration of the fetal personhood movement[149] has narrowed reproductive freedom, using disability rights as its talking point. Indeed, fetal personhood proponents will doubtless leverage reproductive technology's implications on disability rights to justify limiting women's choice, particularly if antidiscrimination law continues to provide little recourse.

This section explores three hypothetical scenarios in which the rights of individuals with genetic conditions to equal access to reproductive services are implicated when denied service due to their propensity to pass disability on to their embryos. The first two examples pull from issues that have not been presented in public cases, in part because cases have not been cognizable under current antidiscrimination laws. The third example draws from the author's own family experience carrying a gene that predisposes children to inflammatory disabilities. This Part aims to showcase the toll of denying reproductive services based on their transmission of disability to offspring.

1. *Cam.* — Cam and her partner, Maddy, wish to have a child. Cam is excited about conceiving her own biological child and opts for IVF. Cam is a known carrier for DMD, a rare disease resulting in muscular degeneration and shortened life span.[150] In consultation with a genetic counselor, Cam learned that because she has a dystrophin mutation on one of her two X chromosomes, every son she conceives has a fifty-percent chance of inheriting the gene and having DMD, and every daughter she

149. See supra section I.A.2.

150. DMD is a rare muscular degeneration disease almost exclusively affecting children assigned male at birth. Recent studies report a life expectancy of 31.7 years. Mary Wang, David J. Birnkrant, Dennis M. Super, Irwin B. Jacobs, & Robert C. Bahler, Progressive Left Ventricular Dysfunction and Long-Term Outcomes in Patients With Duchenne Muscular Dystrophy Receiving Cardiopulmonary Therapies, Open Heart, e000783, Jan. 2018, at 1, 6. Children typically develop symptoms at ages two or three, and use wheelchairs around age ten to twelve. Dongsheng Duan, Nathalie Goemans, Shin'ichi Takeda, Eugenio Mercuri & Annemieke Aartsma-Rus, Duchenne Muscular Dystrophy, Nature Revs. Disease Primers, no. 13, 2021, at 1, 1. Studies on caregiver outcomes report some DMD caregivers of teenage children experience constraints on life choices and compromised mental health. Carolyn E. Schwartz, Roland B. Stark, Ivana F. Audhya & Katherine L. Gooch, Characterizing the Quality-of-Life Impact of Duchenne Muscular Dystrophy on Caregivers: A Case-Control Investigation, 5 J. Patient-Reported Outcomes, no. 124, Nov. 2021, at 1, 1–2.

conceives has a fifty-percent chance of inheriting the mutation and being a carrier.[151]

Cam has a nephew with DMD who she has known to live a rich adolescence,[152] and Cam has been careful to educate herself on raising a child with DMD. She decides she will proceed with fertility treatments and does not want to use PGT on her embryos, leaving the status of her prospective children as carriers unknown.

She calls the clinic to schedule her next appointment and learns the clinic will no longer treat her. The fertility clinic staff explain that the clinic team reviewed her case and concluded providing Cam fertility services would contravene ASRM recommendations. They point Cam to the ASRM Ethics Committee decision, counseling:

> In circumstances in which a child is highly likely to be born with a life-threatening condition that causes severe and early debility with no possibility of reasonable function, it is ethically acceptable for a provider to decline a patient's request to transfer such embryos. Physician assistance in the transfer of embryos in this category is ethically problematic and therefore highly discouraged.[153]

2. *Lia.* — Lia and her husband, Dani, are the parents of two young boys, both of whom the couple conceived naturally. Lia and Dani have not experienced hearing loss, but Lia grew up in a family in which her parents and siblings were all deaf; Dani became fluent in American Sign Language (ASL) as soon as he met Lia to communicate more effectively with her family.

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151. See Duchenne Muscular Dystrophy (DMD), Muscular Dystrophy Assoc. https://www.mda.org/disease/duchenne-muscular-dystrophy/causes-inheritance [https://perma.cc/5MWR-E5JY] (last visited Jan. 9, 2024) ("Each son born to a woman with a dystrophin mutation on one of her two X chromosomes has a 50 percent chance of . . . having DMD. Each of her daughters has a 50 percent chance of inheriting the mutation and being a *carrier*."). Carriers can pass on the mutation without displaying any disease symptoms. Id.

152. The notion that individuals with DMD contribute meaningfully to society and live rich adolescences is not and should not be a radical one. Studies show boys with DMD "engage[] with their finitude head-on." Thomas Abrams, David Abbott & Bhavnita Mistry, Ableist Constructions of Time? Boys and Men With Duchenne Muscular Dystrophy Managing the Uncertainty of a Shorter Life, 22 Scandinavian J. Disability Rsch. 48, 55 (2020). One study has found health-related quality of life in children with DMD is similar to healthy children and is unaffected by disease progression. See S.L.S. Houwen-van Opstal, M. Jansen, N. van Alfen & I.J.M. de Groot, Health-Related Quality of Life and Its Relation to Disease Severity in Boys With Duchenne Muscular Dystrophy: Satisfied Boys, Worrying Parents—A Case-Control Study, 29 J. Child Neurology 1486, 1489–93 (2014) ("[E]xcept for the physical domain, the health-related quality of life is similar to their healthy peers and is not influenced by disease progression in boys with Duchenne muscular dystrophy in contrast to previous studies . . . .").

153. ASRM Ethics Committee, Transferring Embryos With Genetic Anomalies, supra note 20, at 1130.

When both of their sons were born deaf, Lia and Dani underwent genetic testing and learned they are both carriers for a genetic mutation, GJB2, that can lead to hearing loss.[154] While neither member of the couple experienced hearing loss to date, they were excited that their children shared an element of their extended family's identity. The family communicated exclusively using ASL, and the sons attended a school catered to deaf students.

The couple decided to have a third child but was experiencing fertility challenges and thus pursued IVF at a university hospital's fertility clinic. Lia and Dani requested PGT to determine whether the embryos inherited the gene for deafness. The couple did not communicate to physicians whether they sought this information to select *for* or *against* deafness, or to merely acquire information. The PGT results indicated all three embryos developed after one round of IVF were dominant carriers for deafness. Lia and Dani enthusiastically requested the implantation of the embryos. The clinic staff, citing their policy prohibiting implantation of genetically anomalous embryos, refused implantation. The clinic noted implantation of embryos with genetic abnormalities, such as deafness, violated a physician's duty to "do no harm."

3. *Judy*. — Judy grew up working as a nanny and had always dreamed of being a mother to her own children.[155] After trying unsuccessfully to conceive naturally for several years, she learned IVF was an option for her. Judy grew up in a family with relatively low medical literacy. She had long heard stories about her maternal grandmother, who died during childbirth after experiencing what her family recounted as "fused hips." Judy long suspected there were undiagnosed medical complexities that contributed to her grandmother's death. Judy also knew that her grandmother's sister had lupus and experienced pain and limited mobility throughout her lifetime. Recently, in the process of investigating long-term joint damage, her father learned he was positive for human lymphocyte antigen B27 (HLA-B27) and was thus predisposed to a variety of inflammatory diseases.[156] Judy herself grew up with mysterious joint pains that were largely dismissed by physicians, and she was never diagnosed with a disability.

Little is understood about the interactivity between this gene and the development of autoimmune diseases, as complex and varied biological

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154. For an overview of the genetic indicators of deafness and ways carriers can pass deafness on to their offspring, see A. Eliot Shearer, Michael S. Hildebrand, Amanda M. Schaefer & Richard J.H. Smith, Genetic Hearing Loss Overview, GeneReviews (Feb. 14, 1999), https://www.ncbi.nlm.nih.gov/books/NBK1434/ [https://perma.cc/7PQH-24SD] (last updated Sept. 28, 2023).

155. This anecdote draws inspiration from the author's firsthand family experience.

156. Padmini Parameswaran & Michael Lucke, HLA-B27 Syndromes, StatPearls, https://www.ncbi.nlm.nih.gov/books/NBK551523/ [https://perma.cc/XWT8-LGBP] (last updated July 4, 2023).

and environmental factors contribute to disease manifestation.[157] Individuals who are HLA-B27 positive are more likely to develop ankylosing spondylitis and spondyloarthropathies than are those without the gene.[158]

Judy could afford only one round of IVF. After a conversation with her father, she decided to test her embryos for the gene HLA-B27. Having learned from her great-aunt about the physical, social, and financial challenges of life with lupus, Judy feared passing a gene on to her children that would increase their chances of developing an autoimmune disease. Without a college education and the ability to fund childcare, she worried she could not afford a child with an autoimmune disease.

When the clinic reported the results of Judy's PGT, Judy learned that all her embryos produced after one cycle of IVF were carriers for HLA-B27. Notwithstanding her initial concerns around raising a child with the potential to develop a disability, Judy requested to implant the embryos. The clinic refused her request, citing its commitment to procreative beneficence—the notion conferring an ethical responsibility to produce embryos and fetuses that will have the best possible life.[159] The clinic reasoned it is ethically impermissible to facilitate the creation of a child that could face legitimate health concerns in their lifetime.

Unexpectedly, Judy successfully gave birth to a daughter several years later. At a young age, her daughter would develop juvenile arthritis, ankylosing spondylitis, and uveitis.

Her daughter would also grow up to question the assumption that her life—despite, and perhaps because of, her suffering—was not the *best possible one.*

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157. See Anthoula Chatzikyriakidou, Paraskevi V. Voulgari & Alexandros A. Drosos, What Is the Role of HLA-B27 in Spondyloarthropathies? 10 Autoimmunity Revs. 464, 465 (2002) ("[T]he autoimmune diseases are complex disorders with both genetic and environmental factors contributing to their manifestation which is also extremely heterogenic.").

158. Muhammid Asim Khan, HLA-B27 and Its Pathogenic Role, 14 J. Clinical Rheumatology 50, 50 (2008). These autoimmune conditions result in increased inflammation in joints and ligaments, causing chronic pain and, in some cases, spinal fusions. Spondyloarthritis, Am. Coll. Rheumatology, https://rheumatology.org/patients/spondyloarthritis [https://perma.cc/NH4V-DV6K] (last updated Feb. 2023).

159. See generally Julian Savulescu, Procreative Beneficence: Why We Should Select the Best Children, 15 Bioethics 413, 415 (2001) ("Procreative Beneficence implies couples should employ genetic tests for non-disease traits in selecting which child to bring into existence and that we should allow selection for non-disease genes in some cases even if this maintains or increases social inequality."); Schiavone, supra note 18, at 294 ("The primary ethical conflict that emerges from using PGD to ensure that a child is born with some sort of disability, disease, or otherwise harmful disorder, is between two ethical principles known as beneficence and autonomy.").

III. TOWARD AN ANTIDISCRIMINATION FRAMEWORK FOR REPRODUCTIVE SERVICES THAT MAXIMIZES DIVERSITY AND AUTONOMY

Cam, Lia, and Judy do not presently have legal recourse to remedy clinic denials of fertility services on the basis of clinicians' judgments about the quality of disabled life. Because the ADA has not yet been interpreted to capture disease carriers and no law prohibits discrimination based on genetic information in healthcare services, these women are underserved by present antidiscrimination law.

From this void, abortion opponents may see opportunity. Consistent with prior attempts to invoke disability rights toward constraining reproductive freedom,[160] proponents of fetal personhood may encourage resolving this gap by recognizing embryos as people within the meaning of the ADA. This Part presents the relative advantages and limitations of two possible avenues for closing the coverage gap that would protect women's autonomy, including the choice to select *for* disabled life.

A. *Solution I: Expanding GINA*

GINA has only provided coverage in the context of health insurance and employment.[161] Many scholars have criticized GINA for its narrow scope, advocating for broader coverage. Some scholars argue GINA should include a provision on disparate impact.[162] Others propose broadening GINA's scope to embrace other contexts, such as property and privacy rights.[163]

Were GINA amended to prohibit discrimination in the delivery of goods and services, individuals like Cam, Lia, and Judy would unquestionably be captured. As defined by GINA, genetic information includes "(i) such individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual."[164] GINA's extension to genetic information gathered in the context of fertility services would prohibit clinics from denying services based on a patient's family history and even the results of PGD.

Some states have already passed laws extending genetic discrimination prohibitions beyond the context of healthcare and employment. Massachusetts was one of the first states to pass laws prohibiting genetic discrimination, adding "genetic information" to its list of protected

160. See supra notes 56–63 and accompanying text.

161. See supra notes 117–125 and accompanying text.

162. See, e.g., Ifeoma Ajunwa, Genetic Data and Civil Rights, 51 Harv. C.R.-C.L. L. Rev. 75, 100 (2016).

163. Anya E.R. Price, Comprehensive Protection of Genetic Information: One Size Privacy Models May Not Fit All, 79 Brook. L. Rev. 175, 177 (2013).

164. 42 U.S.C. § 2000ff(4)(A) (2018).

classes.[165] In 2011, California passed the California Genetic Information Nondiscrimination Act (CalGINA), which prohibits genetic discrimination in housing, lending, and emergency services.[166] California also amended its Unruh Civil Rights Act to prohibit businesses from engaging in discrimination based on genetic information.[167] CalGINA's legislative history reveals a motivation to broaden genetic protections beyond federal law, noting the state possessed a "compelling public interest in realizing the medical promise of genomics[,] . . . relieving the fear of discrimination and prohibiting its actual practice."[168] So far, no state has explicitly expanded genetic discrimination to the provision of reproductive services.

1. *Limitations of Extending GINA: The End of PGD as We Know It?* — There are several drawbacks to expanding GINA to prohibit discrimination in the provision of reproductive services: Such an extension may represent the end for PGD. A law of this kind could be said to capture the use of PGD to select against embryos with *any* conditions. While this Note does not go so far as to suggest PGD is a fundamental right,[169] the testing has an important function in enhancing women's autonomy, allowing women for whom parenting a child with a disability is financially burdensome[170] or medically risky[171] to gain information about their choice.

Legislators amending GINA may face challenges agreeing on language that distinguishes discrimination by service providers based on disability-related animus and discrimination by service providers acting on a patient's informed desire to select against disability. Situating a solution in nondiscrimination law, however, may resolve this concern. The ADA

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165. Mass. Gen. Laws Ann. ch. 175, § 108I (West 2024).

166. California Genetic Nondiscrimination Act of 2011, ch. 261, 2011 Cal. Stat. 95 (codified in scattered sections of Civ., Educ., Elec., Gov't, Penal, Rev. & Tax., and Welf. & Inst.). CalGINA extended protection to: (1) "all business establishments of every kind whatsoever;" (2) access to any "program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state;" (3) housing, including mortgage lending; and (4) emergency medical care and services. Id. CalGINA may even apply protections to discrimination by public schools. See Tyler Wood, Comment, Genetic Information Discrimination in Public Schools: A Common-Sense Exception, 49 U. Pac. L. Rev. 309, 323 (2018) (arguing CalGINA covers a real-life example of a public school's genetic discrimination against a student with genetic markers for cystic fibrosis).

167. California Genetic Nondiscrimination Act of 2011, § 3, 2011 Cal. Stat. 98.

168. See id. § 1.

169. Some scholars have argued there is a fundamental right to PGT protected by substantive due process. See Sorensen, supra note 26, at 182 (advocating a fundamental right to PGD to prevent constraints on ART regulation).

170. For more on the complicated lived experiences that can inform the choice to terminate a pregnancy after prenatal testing, see McKinney, supra note 144 (encouraging that selective abortion be viewed "in the context of social circumstances where many women do not have access to support systems for raising children with disabilities").

171. See supra notes 65–71 and accompanying text.

and GINA rely on individual lawsuits for enforcement, and those seeking the benefits of PGD would be unlikely to sue a service provider for offering it. A broadscale prohibition on PGD, on the other hand, would mean forgoing the benefits of expanded choice this reproductive technology has presented to many women. The concern for overregulating this technology, though, may deter legislators from supporting any new legislation, leaving women like Lia, Cam, and Judy as collateral damage in a war on the spread of disease waged by developing technologies.

B. *Solution II: Expanding* Bragdon *Interpretation to Provide ADA Coverage for Disease Carriers Based on Disabling Attitudes*

Bragdon's expansive ruling on HIV and reproduction could be interpreted more expansively to prohibit discrimination against individuals like Cam, Lia, and Judy. The Sixth Circuit's ruling in *Darby*[172] and the 2008 Amendments[173] opened the door to the extension of *Bragdon*'s theory of ADA coverage to many genetic conditions. The *Darby* court correctly observed the ADA's spirit of inclusion regarding disability coverage, ruling an individual with a genetic mutation that substantially limited cell growth can plausibly allege disability.[174] While *Darby* did not extend to all genetic carriers,[175] interpreting *Darby* in combination with *Bragdon* invites the conclusion that many genetic carriers denied reproductive services meet the ADA's deliberately broad coverage requirements.[176]

The Supreme Court in *Bragdon* reasoned an asymptomatic individual who is HIV-positive was substantially limited in the major life activity of "reproduction"[177] in two ways: (1) a woman with HIV risks passing the condition on to her partner when conceiving a child[178] and (2) a woman

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172. Darby v. Childvine, Inc., 964 F.3d 440, 445 (6th Cir. 2020) (ruling an individual's genetic mutation and noncancerous abnormal cell growth resulted in a plausible claim of disability under the ADA); see also supra notes 94–96 and accompanying text.

173. ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 29 U.S.C. § 705 (2018) and scattered sections of Title 42 of the U.S.C.).

174. See *Darby*, 964 F.3d at 445, 447; see also Jessica L. Loiacono, Substantially Mutated: Are Genetic Mutations "Disabilities" Under the Americans With Disabilities Act?, 62 B.C. L. Rev. 446, 449 (2021) (arguing the *Darby* court correctly interpreted the ADA to extend to genetic mutations).

175. Such a broad ruling was unlikely. In *Bragdon*, the Supreme Court advised "whether respondent has a disability covered by the ADA is an individualized inquiry." Bragdon v. Abbott, 524 U.S. 624, 657 (1998) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

176. 42 U.S.C. § 12102(1)(A)–(C) (broadening statutory definitions of disability and encouraging cases to focus less on the issue of whether a claimant was disabled and more on the issue of whether discrimination occurred).

177. *Bragdon*, 524 U.S. at 638 (majority opinion) ("Reproduction and the sexual dynamics surrounding it are central to the life process itself.").

178. Id. at 639 ("[A] woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected.").

with HIV risks passing the infection on to her child during gestation and childbirth.[179] In its discussion of major life activities, the Court also pointed to the "economic and legal consequences" reproduction presents for individuals like the Respondent, which include "costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and, tragic to think, treated for the infection."[180] In its evaluation of the compounded limitations presented by status as a genetic carrier, the Court even permitted consideration of a potential child's healthcare.[181] Just as the *Bragdon* Respondent was substantially limited by the financial and medical implications of having a child with HIV, so too are individuals like Cam, Lia, and Judy. In fact, in these anecdotes, women face discrimination *because* of this very limitation: the prospect of transferring a genetic anomaly on to a child.

Darby and subsequent circuit court interpretations of *Bragdon* strengthen the case for ADA coverage of individuals who are disease carriers. In *Darby*, the Sixth Circuit dismissed the district court's characterization of the plaintiff's genetic condition as one "that might lead to a disability in the future," pointing to its present biological effects.[182] The *Darby* court restated the reasoning in *Bragdon* as providing that "HIV qualifies as a disability under the ADA because of its immediate effect on . . . bodily functions, not because it will eventually develop into AIDS."[183] Since the *Darby* plaintiff alleged sufficient facts to show a reasonable jury could determine the presence of her genetic mutation substantially limited normal cell growth, the court held she presented a satisfactory showing of disability.[184]

Other circuits have not yet reviewed cases involving the question of a genetic carrier's disability status and thus have not yet deviated from the *Darby* court's treatment of this issue of first impression.[185] Therefore, *Darby*

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179. Id. at 640 ("[A]n infected woman risks infecting her child during gestation and childbirth, *i.e.*, perinatal transmission.").

180. Id. at 641.

181. Id.

182. Darby v. Childvine, Inc., 964 F.3d 440, 446 (6th Cir. 2020) (internal quotation marks omitted) (quoting Darby v. Childvine, Inc., No. 1:18-CV-00669, 2019 WL 6170743, at *4 (S.D. Ohio Nov. 20, 2019)).

183. Id. (citing *Bragdon*, 524 U.S. at 637). The court goes on to clarify that "[t]o qualify as a disability . . . a condition must substantially limit a major life activity, not merely have the potential to cause conditions that do." Id.

184. Id. at 445 ("Taking all of that together, it is at least plausible that Darby is substantially limited in normal cell growth 'as compared to' the general population.").

185. Several cases in the other circuits have cited *Darby* to ultimately dismiss claims of disability status, but the facts did not constrain application of the ADA to individuals with genetic mutations. See Chancey v. BASF, No. 23-40032, 2023 WL 6598065, at *4 (5th Cir. Oct. 10, 2023) (holding an individual claiming disability discrimination based on a workplace COVID-19 policy was not regarded-as disabled because plaintiff may contract COVID-19 in the future); see also Reid v. Aubrey's Rest. Inc., No. 20-5440, 2021 WL 5174392, at *8 (6th Cir. July 12, 2021) (holding that an acute, two-day "bout of abdominal pain" did not qualify as disabled under the ADA).

and *Bragdon*—read together—herald a framework whereby some genetic conditions that substantially limit a woman's ability to reproduce qualify as disabilities under the ADA.

1. *Limitations of the* Bragdon–Darby *Extension to Genetic Carriers Seeking Reproductive Services.*

a. *Many Genetic Conditions Are Not Substantially Limiting Enough.* — Extending *Bragdon* and *Darby* may be constrained by the lack of scientific evidence pointing to the immediate physiological dimensions of some genes and the risk that courts will deem transmission of these conditions a direct threat within the meaning of the ADA.

Importantly, *Darby* did not impose a requirement that genetic mutations inhibit cell growth, specifically, to plausibly classify as disabilities. Even so, it is unlikely courts would read *Bragdon* and *Darby* to extend to all three conditions described in Part II of this Note. Decided at the pleading stage, *Darby*'s opinion merely "opened the possibility" that the ADA captures genetic mutations as disabilities and remanded the case to the district court for a factual inquiry before which the case settled.[186] Such a factual inquiry might have compared BRCA1's effects on normal cell growth to the substantial limitations presented by HIV.[187] Plaintiffs alleging denial of reproductive services based on disease carrier status may not survive such a factual inquiry.

A court may conclude Judy's status as HLA-B27 positive, for example, does not constitute a substantial limit on reproduction in the same way that the *Bragdon* Court reasoned HIV does. Opponents could argue that Judy, having never been diagnosed with an autoimmune disease, is merely predisposed to developing a disability in the future.[188] While the prospect of potential disease for her offspring constrains her reproductive choices, courts may reason HLA-B27's largely unknown and disparate physiological effects[189] do not compare to "the immediacy with which [HIV] begins to

186. *Darby*, 964 F.3d at 446 ("Whether a diagnosis of HIV is an apt analogy for the[se] genetic issues . . . is a fair point of debate. . . . [I]t is enough to note that *Bragdon* was decided at summary judgment, . . . thereby allowing the courts to consider more developed medical and factual evidence regarding the condition at hand."). Before the district court could rule on the matter, the parties came to a settlement agreement and the district court dismissed the case on November 18, 2020. Darby v. Childvine, Inc., No. 18-cv-00669, 2019 WL 6170743 (S.D. Ohio dismissed Nov. 18, 2020).

187. See Loiacono, supra note 174, at 459 ("[H]ad the case not settled, the principal issue on remand would likely have been whether the BRCA1 mutation presently and substantially affects normal cell growth in a manner similar to HIV.").

188. While the association between HLA-B27 and disabilities is well established, the "disease pathogenesis remains unclear," rendering it more difficult for plaintiffs to outline the present physiological effects of the gene. Anna S. Sahlberg, Kaisa Granfors & Markus A. Penttinen, HLA-B27 and Host-Pathogen Interaction, *in* Molecular Mechanisms of Spondyloarthropothies 235, 235 (Carlos López-Larrea & Roberto Díaz-Peña eds., 2009).

189. Many individuals who carry the gene for HLA-B27 do not ultimately present symptoms consistent with autoimmune diseases. Studies estimate five percent of HLA-B27 positive people get ankylosing spondylitis or associated forms of spondyloarthropathies. See,

damage the infected person's white blood cells."[190] For genetic indicators with unknown or minor physical manifestations, courts may dismiss these conditions as indicative only of future disabilities, which *Bragdon* and *Darby* exclude from ADA coverage.[191]

Cam's case for coverage based on DMD carrier status could present similar barriers. Because "DMD-carriers are usually asymptomatic," Cam cannot point to any then-existing physiological manifestations of her genetic condition.[192] Lia and her husband may also struggle to prove GJB2 carriers are substantially impaired because of the mere presence of the genetic mutation, without more.[193] Like the Petitioner in *Bragdon*, Cam and Lia risk transmitting a condition on to their children, but courts may not uniformly consider this a substantial limitation analogous to HIV, which presents risk of infection transmission during conception, gestation, and childbirth.[194] Chief Justice William Rehnquist, in his *Bragdon* opinion, admonished such an extension as clearly beyond the scope of the ADA, stating, "Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects."[195]

These concerns over coverage may be resolved in some cases under the regarded-as-disability prong of the ADA.[196] Where evidence of present physiological genetic effects is lacking, stigmatic and social effects are evident. Given the roots this provision has in the motivation to dispel the

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e.g., Muhammad Asim Khan, Ankylosing Spondylitis and Axial Spondyloarthritis 22 (2d ed. 2023). HLA-B27 is also only one of multiple genes involved in disease production, which can also be triggered by environmental factors. Id.

190. Bragdon v. Abbott, 524 U.S. 624, 637 (1998).

191. *Darby*, 964 F.3d at 446 ("We agree that a genetic mutation that merely predisposes an individual to other conditions, such as cancer, is not itself a disability under the ADA."); see also *Bragdon*, 524 U.S. at 635 (holding that HIV immediately affects an individual's immune system and thus constitutes a disability, in contrast to a predisposition).

192. Josef Finsterer, Claudia Stöllberger, Birgit Freudenthaler, Desiree De Simoni, Romana Höftberger & Klaus Wagner, Muscular and Cardiac Manifestations in a Duchenne-Carrier Harboring a Dystrophin Deletion of Exons 12–29, 7 Intractable Rare Disease Rsch. 120, 120 (2018). Research indicates "some of the DMD-carriers become symptomatic and develop a progressive DMD-like phenotype" resulting in skeletal-muscular weakness and cardiac disease. Id. Even so, the case study presented in Part II of this Note considers Cam an asymptomatic DMD carrier. See supra section II.B.1.

193. Some studies show women who are heterozygous carriers of pathogenic GJB2 gene mutations experience more hearing loss compared to women without the gene mutation. See D. Groh, P. Seeman, M. Jilek, J. Popelář, Z. Kabelka & J. Syka, Hearing Function in Heterozygous Carriers of a Pathogenic GJB2 Gene Mutation, 62 Physiological Rsch. 323, 323 (measuring hearing loss in GJB2 carriers across gender). Nonetheless, the potential development of future hearing loss is unlikely to amount to a disability under the ADA. See supra notes 95–100 and accompanying text.

194. *Bragdon*, 524 U.S. at 639 (outlining the different ways an HIV infection could constrain a woman in the process of engaging in reproduction).

195. Id. at 661 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

196. 42 U.S.C. § 12102(3)(A) (2018).

disabling effects of social attitudes, courts may interpret fertility clinic assumptions about a woman's genetic condition as sufficiently disabling to qualify for ADA coverage.[197] This job should be made easier after the passage of the ADAAA, which instructs, "[T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[198] While courts may require a clear showing of discriminatory stereotyping on the part of healthcare professionals for such a ruling, the regarded-as prong may offer a remedy for some women discriminated against based on their genetic status.[199]

b. *Future Child Interests as Direct Threat.* — Assuming a court recognized all genetic carriers as disabled, some individuals may be denied ADA coverage under an independent basis: the ADA's "direct threat" provision, which permits refusal of treatment when a condition "poses a direct threat to the health or safety of others."[200] In *Bragdon*, when the Court remanded the question of whether a patient's HIV infection met this designation, it characterized the direct threat defense as reconciling the "importance of prohibiting discrimination against individuals with disabilities" with the "protect[ion of] others from significant health and safety risks, resulting, for instance, from a contagious disease."[201] In the reproductive health context, this would amount to the characterization

197. See supra section I.B.2. EEOC regulations interpreting the regarded-as-disability prong also mention attitudes as a driving force to this analysis of coverage. The regulations read, "[A] physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment." 29 C.F.R. § 1615.103(4)(ii) (2024). For more on the attitudinal drive behind the regarded-as prong of the ADAAA, see Elizabeth F. Emens, Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act, 60 Am. J. Compar. L. 205, 210 (2012). Professor Elizabeth Emens points to the unique ways attitudes drive antidiscrimination law for disability, especially in permitting an antisubordination model that is not applied to race and sex in the same way. In discussing the unusual asymmetrical model of the ADA, Emens notes, "I think the assumption that disability truly signals inferiority means that (almost) no one expects disabled people to take over society and subordinate nondisabled people." Id. at 228.

198. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554 (codified in scattered sections of Title 42 of the U.S.C.).

199. Decisive administrative guidance by the DOJ could assist in clarifying the ADA's coverage for individuals with genetic conditions. The *Bragdon* Court deemed compelling the conclusion of the Office of Legal Counsel of the DOJ that the Rehabilitation Act covers "symptomatic and asymptomatic HIV-infected individuals against discrimination." *Bragdon*, 524 U.S. at 642 (internal quotation marks omitted) (quoting Application of Section 504 of the Rehab. Act to HIV-Infected Individuals, 12 Op. O.L.C. 264, 264–65 (1988) (Preliminary)). The Court also "dr[ew] guidance from" DOJ regulations that added "HIV infection (symptomatic and asymptomatic)" to the list of disorders amounting to a physical impairment. Id. at 646–47 (internal quotation marks omitted) (quoting 28 C.F.R. § 36.104(1)(iii) (2024)). Were the DOJ to recognize some asymptomatic genetic conditions as disabilities under the ADA, an extension of *Bragdon* and *Darby* that captures the discrimination described in this Note would be more likely.

200. 42 U.S.C. § 12182(b)(3).

201. *Bragdon*, 524 U.S. at 649 (citing Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287 (1987)).

that providing reproductive services to a genetic carrier parent is a direct threat to the resulting child.

Professor Carl Coleman claims the direct threat defense would be unlikely to prevail in the context of ART because "[w]ithholding ARTs would not have led to the birth of the child without the impairments."[202] Drawing from the logic of courts that opted against recognizing a tort of "wrongful life," Coleman emphasizes that "courts cannot rationally determine whether the burdens of a particular existence outweigh the benefits of life itself."[203] He concedes there are still some situations where the birth of a child who experiences "such unqualified suffering" could be "harmed by the technologies that enabled" their birth.[204] Nonetheless, Coleman surmises few disabilities would arise to this level and that the "remote possibility of harm to the child probably would not satisfy the direct threat defense."[205] To strike the balance between antidiscrimination and antisuffering in this context, Coleman proposes an alternative framework for applying the direct threat defense whereby courts weigh the relative risks and benefits of using ART compared to other reproductive and parenting choices available under the circumstances.[206] In other words, Coleman's proposal substitutes the judgment of physicians for the judgment of courts.

Those emphasizing the goal of promoting antisuffering may be concerned about taking this evaluation away from physicians. Even if courts adopted Coleman's proposed approach to evaluating direct threat in these cases, though, scientific judgment would not be overlooked altogether. In assessing the risk of direct threat, *Bragdon* notes the views of "public health authorities" are entitled to "special weight and authority."[207] Even Chief Justice Rehnquist's opinion concedes "a presumption of validity when the actions of those authorities themselves are challenged in court."[208] In the case of reproductive service denials, the Court would likely give some deference to the determinations of ASRM, ethics committees, and medical practitioners about what genetic disorders present a direct threat to future life.

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202. Carl H. Coleman, Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies, 50 UCLA L. Rev. 17, 44 (2002).

203. Id. at 45–46; see also Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978) ("Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."); Ellis v. Sherman, 515 A.2d 1327, 1329 (Pa. 1986) ("[W]e regard the assertion that the child has been injured by its existence as too speculative for us to determine.").

204. Coleman, supra note 202, at 46.

205. Id. at 47.

206. See id. at 50.

207. Bragdon v. Abbott, 524 U.S. 624, 650 (1998).

208. Id. at 663 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Some individuals at risk of passing fatal diseases on to their children, like Cam, may fail under a direct threat defense when courts defer to public health authorities and compare other available reproductive options. Nonetheless, a theory of coverage that permits Cam to bring an ADA claim would still empower courts to reexamine purely scientific judgments against the risk of disability discrimination. At present, these scientific judgments go unchecked, and a void in antidiscrimination law persists.

CONCLUSION

In the face of receding legal protections for women seeking reproductive care and as new technologies have the potential to weed out people with disabilities, legal scholars and practitioners alike must begin to consider solutions that bridge movements for disability rights and women's autonomy. Antidiscrimination law has the potential to fill this gap, empowering individuals to challenge decisions based on disability-related animus while preserving and expanding access to these technologies, rather than constraining it. New gene-editing and genetic-testing technologies will continue to develop, raising important questions about the ethical implications of unequal access to and discriminatory application of these technologies. As those developments proliferate, the law must provide recourse for technological imperfections in ways that maximize women's choice and center disability as diversity. Maybe then women like Judy will understand that their choice to bring disabled life into the world is exactly that: their choice—and nothing to be ashamed of.

ESSAY

FISCAL CITIZENSHIP AND TAXPAYER PRIVACY

*Alex Zhang**

Should individual tax data be public or confidential? Within the United States, secrecy has been the rule since the Tax Reform Act of 1976. But at three critical junctures—the Civil War, the 1920s, and the 1930s—Congress made individual tax records open for public inspection, and newspapers published the incomes of the billionaires of the time. Today, Finland, Norway, and Sweden all mandate significant transparency for individual tax information.

This Essay intervenes in the tax-confidentiality debate by building a new analytical framework of fiscal citizenship. Until now, scholars have focused on compliance—whether disclosure incentivizes honest reporting of income, and if it does, whether compliance gains outweigh the intrusion into a generalized notion of taxpayer privacy. But the choice between confidentiality and transparency implicates more than compliance. It rests on the taxpayers' dynamic interactions with the fiscal apparatus of a state that aspires to democracy and egalitarianism. This Essay posits that fiscal citizens play the roles of reporters, funders, stakeholders, and policymakers in the tax system. Within these roles, transparency and privacy have distinct valences. Further, the degree to which any taxpayer partakes in each role depends on both their own income and the income inequality within the community structured by federal taxation. Under this taxonomy, the propriety of disclosure falls onto a spectrum, and transparency is more appropriate for ultrawealthy taxpayers in times of high economic inequality. The Essay thus provides

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insights to help policymakers design public-disclosure regimes that cohere with the norms implicit in our fiscal social contract with the state.

INTRODUCTION

Economic inequality in the United States has reached record levels and poses serious threats to the egalitarianism that forms the foundation of our democracy.[1] Exacerbating this inequality is a perception that the

1. See Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 32 (2022) [hereinafter Fishkin & Forbath, Anti-Oligarchy] ("For the revolutionary generation, political liberty—the very heart of the [American] Revolution—depended on economic equality."); Rosalind Dixon & Julie Suk, Liberal Constitutionalism and Economic Inequality, 85 U. Chi. L. Rev. 369, 371–74 (2018) (noting rising income inequality around the world); Joseph Fishkin & William Forbath, Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality, 94 Tex. L. Rev. 1287, 1292–93 (2016) ("The American Constitution . . . is threatened in a fundamental way by gross inequalities of wealth."); Ari Glogower, Taxing Inequality, 93 N.Y.U. L. Rev. 1421, 1423–24 (2018) (noting that income inequality has reached levels not seen since the Great

ultrawealthy have not borne their fair share of the costs of governance.[2] In response, policymakers and advocates have renewed calls for not only substantive tax and welfare reforms but also transparency in the tax records of the wealthy and the powerful.[3] President Donald Trump's tax returns provided the most dramatic illustration. During his first presidential campaign and tenure, Trump refused to release his tax returns, breaking from the longstanding practice—since 1973—of voluntary disclosure.[4] The fight for Trump's tax returns prompted the House Ways and Means Committee to request his tax records from the

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Depression); Ajay K. Mehrotra, The Missing U.S. VAT: Economic Inequality, American Fiscal Exceptionalism, and the Historical U.S. Resistance to National Consumption Taxes, 117 Nw. U. L. Rev. 151, 159–63 (2022) ("[I]ncome inequality within countries has increased dramatically, with the concentration of wealth at the top end of the spectrum skyrocketing, especially in the United States." (emphasis omitted)); Thomas Piketty, Emmanuel Saez & Gabriel Zucman, Distributional National Accounts: Methods and Estimates for the United States, 133 Q.J. Econ. 553, 557 (2018) (showing significant increases in the income share of the top 1% of American earners); Emmanuel Saez & Gabriel Zucman, Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data, 131 Q.J. Econ. 519, 523 (2016) [hereinafter Saez & Zucman, Wealth Inequality] ("In 2012, the wealth share of the top 0.1% was three times higher than in 1978, and almost as high as in the 1916 and 1929 historical peaks."); Frederick Solt, Economic Inequality and Democratic Political Engagement, 52 Am. J. Pol. Sci. 48, 57–58 (2008) (finding that economic inequality adversely affects transitions to stable democratic regimes).

2. See, e.g., Alex Raskolnikov, Taxing the Ten Percent, 62 Hous. L. Rev. 57, 63 (2024) ("A common justification for taxing the rich is that their staggering economic success is destroying the American Dream.").

3. See, e.g., Joshua D. Blank, Presidential Tax Transparency, 40 Yale L. & Pol'y Rev. 1, 7 (2021) [hereinafter Blank, Tax Transparency] (arguing for the mandatory disclosure of elected officials' tax records, if done properly); Daniel J. Hemel, Can New York Publish President Trump's State Tax Returns?, 127 Yale L.J. Forum 62, 66–70 (2017), https://www.yalelawjournal.org/pdf/Hemel_hcpha29m.pdf [https://perma.cc/5G9B-5D4L] (discussing the potential benefits of presidential tax transparency); Marjorie E. Kornhauser, Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?, 18 Can. J.L. & Juris. 95, 98–103 (2005) [hereinafter Kornhauser, Full Monty] (emphasizing how public visibility of tax records could increase accountability and improve revenues); Joseph J. Thorndike, Presidential Tax Disclosure Is Important—and Not Because of Trump, 165 Tax Notes 1722 (2019) [hereinafter Thorndike, Presidential Disclosure] ("America needs a law mandating presidential tax disclosure—even if it means giving Trump a pass and imposing it only on future chief executives."); Joseph J. Thorndike, The Thorndike Challenge, 123 Tax Notes 691, 691 (2019) [hereinafter Thorndike, Challenge] (articulating the benefits of requiring elected officials to release their tax returns); Binyamin Appelbaum, Opinion, Everyone's Income Taxes Should Be Public, N.Y. Times (Apr. 13, 2019), https://www.nytimes.com/2019/04/13/opinion/sunday/taxes-public.html (on file with the *Columbia Law Review*) ("Disclosure also could help to reduce disparities in income, as well as disparities in tax payments."); Lily Batchelder & David Kamin, Taxing the Rich: Issues and Options 3 (unpublished manuscript) (on file with the *Columbia Law Review*) (discussing the policy options for systemic tax redistribution in the United States).

4. Julie Hirschfeld Davis, Trump Won't Release His Tax Returns, N.Y. Times (Jan. 22, 2017), https://www.nytimes.com/2017/01/22/us/politics/donald-trump-tax-returns.html (on file with the *Columbia Law Review*); see also Blank, Tax Transparency, supra note 3, at 11–14.

Treasury Department.[5] The New York District Attorney and the House Financial Services Committee likewise subpoenaed them from Mazars, LLP, and Deutsche Bank.[6] This struggle culminated in two Supreme Court rulings on separation of powers and the criminal investigation authority of state grand juries,[7] as well as an order quietly acquiescing to the disclosure of Trump's tax returns to the House Ways and Means Committee under the Internal Revenue Code (Code).[8] After the House released those tax returns to the public, it became clear that Trump had engaged in years of tax avoidance, often reported no income tax liability due to business losses, and broken his campaign promise to donate his salary.[9]

Even more consequential is the leak of thousands of ultrawealthy Americans' tax records to ProPublica in 2021.[10] These records, including the tax information of Jeff Bezos, Elon Musk, and Warren Buffett, reveal how the wealthy use legal doctrine and loopholes to achieve substantial tax avoidance. For example, the ProPublica report revealed that Musk

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5. Letter from Richard E. Neal, Chairman, H. Comm. on Ways and Means, to Charles P. Rettig, Comm'r, IRS (Apr. 3, 2019), https://cdn.cnn.com/cnn/2019/images/04/03/neal.letter.to.rettig.signed.2019.04.03.pdf [https://perma.cc/PGU2-5CBL]; see also Ways and Means Comm.'s Request for the Former President's Tax Returns Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C., slip op. at 1–2 (2021).

6. Trump v. Vance, 140 S. Ct. 2412, 2420 n.2 (2020); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2027 (2020).

7. *Vance*, 140 S. Ct. at 2429; *Mazars*, 140 S. Ct. at 2035–36.

8. See Trump v. Comm. on Ways & Means, 143 S. Ct. 476 (2022) (mem.) (denying Trump's application for stay); see also 26 U.S.C. § 6103(f)(1) (2018) ("Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives . . . the Secretary shall furnish such committee with any return or return information specified in such request.").

9. Russ Buettner, Susanne Craig & Mike McIntire, Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance, N.Y. Times (Sept. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html (on file with the *Columbia Law Review*); Jim Tankersley, Susanne Craig & Russ Buettner, Trump Tax Returns Undermine His Image as a Successful Entrepreneur, N.Y. Times (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/us/politics/trump-tax-returns.html (on file with the *Columbia Law Review*).

10. Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax, ProPublica (June 8, 2021), https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax [https://perma.cc/6L36-3VC6]; see also David Gamage & John R. Brooks, Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform, 100 N.C. L. Rev. 487, 512 n.123 (2022) (discussing the reports released by ProPublica).

used the realization doctrine and the nontaxation of borrowed funds[11] to pay no federal income tax in 2018.[12]

The ProPublica leak triggered investigations by the Department of Justice and the Inspector General for Tax Administration after some lawmakers decried the "egregious and unprecedented leak of confidential taxpayer information."[13] Ken Griffin, the billionaire founder of a major hedge fund, sued the Internal Revenue Service (IRS) in federal court for willful and grossly negligent disclosure of his tax return, citing provisions of the Code that—according to his complaint—show "Congress's promise" to safeguard taxpayer privacy.[14] In January 2024, a federal district court sentenced the leaker—a former IRS contractor—to five years of imprisonment for his "egregious" crime of "attack[ing] . . . our constitutional democracy."[15] In June, the IRS settled Griffin's lawsuit, "sincerely apologize[d]" for the leak, and promised "to strengthen its safeguarding of taxpayer information" by investing in data security.[16]

Recent events thus foreground the enduring debate whether individuals' tax information should be public records or kept confidential.[17] In the United States, the Tax Reform Act of 1976 enacted

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11. In general, the realization doctrine requires disposition of property before taxing appreciation so that, for example, appreciated stocks are not taxed until sold, if ever. See Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 559 (1991) (holding that an exchange of legally distinct entitlements is sufficient for realization); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) ("Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."); Eisner v. Macomber, 252 U.S. 189, 212 (1920) (holding that pro rata stock dividends are not taxable).

12. Eisinger et al., supra note 10; see also Edward J. McCaffery, The Death of the Income Tax (or, The Rise of America's Universal Wage Tax), 95 Ind. L.J. 1233, 1263–64 (2020) (describing the use of the realization doctrine by the wealthy to avoid income taxes).

13. Letter from Jason Smith, Chairman, H. Comm. on Ways & Means, to J. Russell George, Treasury Inspector Gen., Tax Admin. (Feb. 16, 2023), https://waysandmeans.house.gov/wp-content/uploads/2023/02/2.16.23-Ltr-to-TIGTA-on-ProPublica.pdf [https://perma.cc/L44S-TA4F].

14. Complaint at 8, Griffin v. Internal Revenue Serv., No. 1:22-cv-24023-KMW (S.D. Fla. filed Dec. 13, 2022).

15. See Brian Faler, Trump Tax Return Leaker Sentenced to 5 Years in Prison, Politico (Jan. 29, 2024), https://www.politico.com/news/2024/01/29/irs-charles-littlejohn-tax-prison-trump-00138367 (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Judge Ana Reyes); see also Reuven S. Avi-Yonah, Littlejohn's Unjust Tax Sentence, 183 Tax Notes 1441 (2024) (discussing the "five-year prison sentence" imposed on the contractor); Press Release, DOJ, Former IRS Contractor Sentenced for Disclosing Tax Return Information to News Organizations (Jan. 29, 2024), https://www.justice.gov/opa/pr/former-irs-contractor-sentenced-disclosing-tax-return-information-news-organizations [https://perma.cc/3XRF-ZU5H].

16. Press Release, IRS, IRS Statement as Part of the Resolution of Kenneth C. Griffin v. IRS, Case No. 22-cv-24023 (S.D. Fla.), IR-2024-172 (June 25, 2024), https://www.irs.gov/newsroom/irs-statement-as-part-of-the-resolution-of-kenneth-c-griffin-v-irs-case-no-22-cv-24023-sd-fla [https://perma.cc/64X6-MU6F].

17. Within the United States, the debate on tax confidentiality is as old as the income tax itself. See infra section I.A (describing tax-disclosure provisions associated with the first federal income tax during the Civil War).

the statutory scheme that governs taxpayer privacy today.[18] I.R.C. § 6103 prohibits employees and officers of the United States from disclosing to the public any tax information or returns, broadly defined to include the taxpayer's identity, income, deductions, exemptions, liability, and net worth.[19] Exceptions authorize disclosure only to congressional committees in charge of tax legislation (e.g., the House Ways and Means Committee, which obtained Trump's tax returns), state and federal law enforcement, and the taxpayer's designees.[20]

But confidentiality has not always been the rule. The nation's first income tax, enacted to fund the Civil War, authorized public inspection of tax records.[21] By 1865, the *New York Times* regularly printed the incomes and the tax liabilities of the richest Americans, like the Vanderbilts.[22] Transparency again prevailed in the mid-1920s, after progressive lawmakers pushed for public scrutiny of tax evasion,[23] and for a moment in 1934, at a time of heightened economic inequality during the Great

18. Pub. L. No. 94-455, § 1202, 90 Stat. 1520, 1667–85 (codified as amended at 26 U.S.C. § 6103 (2018)).

19. 26 U.S.C. § 6103(a), (b)(1)–(2).

20. Id. § 6103(d)–(i).

21. Revenue Act of 1864, ch. 173, § 19, 13 Stat. 223, 228; Revenue Act of 1862, ch. 119, §§ 15, 19, 12 Stat. 432, 437, 439.

22. Our Internal Revenue; The Sixth Collection District in Full. Official Lists of Assessments and Collections. Interesting Data Statistical and Personal Peculiarities of the District. Tremendous Income List. William B. Astor's Income One Million. Three Hundred Thousand Dollars. The Sixth Collection District, the Collector's Office the Last Six Months, the Total Annuals Manufacturers' Returns the Special War Tax the Assessor's Office Assistant Assessors, Assistant Assessors, N.Y. Times (July 8, 1865), https://www.nytimes.com/1865/07/08/archives/our-internal-revenue-the-sixth-collection-district-in-full-official.html (on file with the *Columbia Law Review*) [hereinafter N.Y. Times, Our Internal Revenue].

23. Mark Leff, The Limits of Symbolic Reform: The New Deal and Taxation, 1933–1939, at 67 (1984) (describing tax transparency as a "prototypical progressive reform"); see also Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293 (mandating public inspection of income tax liabilities).

Depression.[24] Today, Finland,[25] Norway,[26] and Sweden,[27] among others, allow a significant degree of disclosure of individual income and wealth tax information to the public. Importantly, both historical legislative debate and contemporary disclosure regimes ground tax transparency in egalitarian terms. That is, disclosure of tax information instantiates a foundational, democratic commitment to open fiscal governance.

In this lasting contest between taxpayer privacy and disclosure, scholarship has had a clear focus: compliance. It has questioned whether publicity aids compliance with tax laws, and if it does, whether the compliance gains outweigh the intrusion into a generalized notion of the taxpayer's right to privacy.[28] Proponents of disclosure stress its potential as an automatic enforcement tool.[29] They argue that public access to tax information could deter tax evasion by increasing the perceived risk of detection and lower revenue-collection costs by fostering social norms of voluntary compliance.[30] By contrast, defenders of privacy dispute the

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24. Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 680, 698; Saez & Zucman, Wealth Inequality, supra note 1, at app. fig.B2 (showing that the top 10%'s share of wealth reached a height of above 80% from the mid-1920s to the mid-1930s); see also Marjorie E. Kornhauser, Shaping Public Opinion and the Law: How a "Common Man" Campaign Ended a Rich Man's Law, 73 Law & Contemp. Probs. 123, 129–30 (2010) [hereinafter Kornhauser, Shaping Public Opinion] (discussing the Congressional push for tax publicity to prevent abuse).

25. 1346/1999 Laki verotustietojen julkisuudesta ja salassapidosta [Act on the Public Disclosure and Confidentiality of Tax Information], ch. 2, § 5 (Fin.) (defining as public information a taxpayer's annual income, as well as income tax and wealth tax liabilities); Kristiina Äimä, Finland, *in* Tax Transparency: EATLP Annual Congress Zürich 491, 491–92 (Funda Başaran Yavaşlar & Johanna Hey, eds., 2019).

26. See Ricardo Perez-Truglia, The Effects of Income Transparency on Well-Being: Evidence from a Natural Experiment, 110 Am. Econ. Rev. 1019, 1019–20 (2020) ("In the fall of 2001, the Norwegian media digitized tax records and created websites that allowed any individual with internet access to search anyone's tax records.").

27. Tryckfrihetsförordningen [TF] [Constitution] 2:1 (Swed.) (Freedom of the Press Act of 1766) (providing public access to all official documents); 27 ch. 6 § Offentlighets- och sekretesslag (Svensk författningssamling [SFS] 2009:400) (Swed.) (authorizing public disclosure of tax decisions, which include the taxpayer's earned income and capital gains); see also Anna-Maria Hambre, Tax Confidentiality in Sweden and the United States—A Comparative Study, 43 Int'l J. Legal Info. 165, 171–198 (2015).

28. See Boris I. Bittker, Federal Income Tax Returns—Confidentiality vs. Public Disclosure, 20 Washburn L.J. 479, 479 (1981) (arguing that "privacy and disclosure can come into conflict—a possibility that has been insufficiently recognized by the courts and the commentators."); Joseph J. Darby, Confidentiality and the Law of Taxation, 46 Am. J. Compar. L. 577, 587 (Supp. 1998) (arguing that confidentiality "provides an important incentive" to ensure compliance); Michael Hatfield, Privacy in Taxation, 44 Fla. State U. L. Rev. 579, 606 (2017) (describing how tax scholarship portrays taxpayer compliance as a "tradeoff").

29. See infra notes 290–297 and accompanying text.

30. See, e.g., Erlend E. Bø, Joel Slemrod & Thor O. Thoresen, Taxes on the Internet: Deterrence Effects of Public Disclosure, 7 Am. Econ. J.: Econ. Pol'y 36, 37 (2015) (arguing that public disclosure of tax information presents an opportunity for an individual to demonstrate financial success, incentivizing compliance); Kornhauser, Full Monty, supra

enforcement potential of publicity.[31] They contend that taxpayers entrust the state with private information on the expectation that it will keep such information confidential.[32] More recently, scholars have argued that privacy enables the federal government to exploit taxpayers' cognitive biases to influence their perception of its tax-enforcement capacity, thus aiding compliance goals.[33]

But the choice between privacy and transparency implicates more than just tax compliance.[34] Federal taxation not only aims to maximize the revenues collected within the bounds of rules that determine taxpayers' liability, it also structures our fiscal relationship with a state that aspires to

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note 3, at 96–97 (discussing the social and moral factors that may incentivize compliance); Susan Laury & Sally Wallace, Confidentiality and Taxpayer Compliance, 58 Nat'l Tax J. 427, 428–29 (2005) (arguing that individuals would be more likely comply to avoid public embarrassment if noncompliance were publicly disclosed); Leandra Lederman, The Interplay Between Norms and Enforcement in Tax Compliance, 64 Ohio St. L.J. 1453, 1457–62 (2003) [hereinafter Lederman, Norms and Enforcement] ("[D]eterrence does not seem to explain all tax compliance and there is empirical evidence that compliance norms play a role." (footnote omitted)); David Lenter, Joel Slemrod & Douglas Shackelford, Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives, 56 Nat'l Tax J. 803, 823–27 (2003) ("Undoubtedly full disclosure of corporate tax returns would substantially change what is revealed in the document, but how much this disclosure would compromise IRS enforcement efforts is unknown . . . ."); Marc Linder, Tax Glasnost' for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum, 18 N.Y.U. Rev. L. & Soc. Change 951, 977 (1991) (outlining how twentieth-century Progressives favored publicity as a means of forcing the rich to comply with tax law); Stephen W. Mazza, Taxpayer Privacy and Tax Compliance, 51 U. Kan. L. Rev. 1065, 1076–78 (2003) (discussing how public messaging can encourage tax compliance); Eric A. Posner, Law and Social Norms: The Case of Tax Compliance, 86 Va. L. Rev. 1781, 1791, 1796 (2000) [hereinafter Posner, Law and Social Norms] (arguing that fear of social retribution may incentivize people to comply).

31. See infra notes 298–304 and accompanying text.

32. See Off. of Tax Pol'y, Treasury Dep't, Report to Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions 18–19 (2000) (explaining the Department of the Treasury's long-standing position that reliance on self-reporting is justified "principally because" taxpayers know that their information will remain private); Joshua D. Blank, In Defense of Individual Tax Privacy, 61 Emory L.J. 265, 280–82 (2011) [hereinafter Blank, In Defense of Individual Tax Privacy] (describing the taxpayer-trust theory); Hatfield, supra note 28, at 606 (same).

33. Blank, In Defense of Individual Tax Privacy, supra note 32, at 269–70; see also Joshua D. Blank, Reconsidering Corporate Tax Privacy, 11 N.Y.U. J.L. & Bus. 31, 77–79 (2014) (explaining that tax publicity in the corporate context may lead to decreased compliance due to the perception that competitors could benefit from information in the disclosure); Joshua D. Blank & Daniel Z. Levin, When Is Tax Enforcement Publicized?, 30 Va. Tax Rev. 1, 5–8 (2010) (explaining the belief that publicity of tax abuses may weaken tax morale and compliance by causing individuals to believe that other taxpayers are engaged in similar tax abuse without detection). For a broader discussion on the influence of tax transparency on economic behavior, see generally Deborah H. Schenk, Exploiting the Salience Bias in Designing Taxes, 28 Yale J. on Regul. 253, 264–70 (2011) ("If [a] tax is not very salient, there will be no change in response or less change in response than there would have been had the tax been more visible.").

34. For historical and comparative arguments that ground the demand for public disclosure in values beyond tax enforcement, see infra sections I.A–II.A.

democracy and egalitarianism.[35] Whether the government should disclose any individual citizen's tax records to the public therefore depends on the nature of this dynamic relationship between the taxpayer and the state. This Essay constructs such a framework, positing that taxpayers play four main roles as they interact with the fiscal apparatus of a democratic regime: (1) as reporters of nonpublic information; (2) as funders of the state; (3) as stakeholders entitled to what they deserve as a matter of law and dignity; and (4) as policymaking partners with the government in shaping federal tax law.[36] Within these roles, transparency and privacy have distinct valences. Further, the degree to which any taxpayer partakes in each role depends on two factors: (a) the taxpayer's own income and wealth; and (b) the extent of inequality in the distribution of income and wealth within the community structured by federal taxation.[37] This Essay refers to the "community structured by federal taxation" because noncitizens, including unregistered immigrants and foreign workers, also contribute to and occasionally derive benefits from the federal fiscal machinery.[38] This Essay's taxonomy suggests that the propriety of disclosure falls onto a spectrum. Rises in economic inequality and in taxpayers' own income or wealth accentuate the need for transparency. Given this normative conclusion, lawmakers can limit disclosure regimes to segments of the population who exercise significant fiscal power. They can choose from individualized, anonymized, or statistical disclosure. They can even leave the choice between transparency and privacy to taxpayers themselves.[39]

This Essay thus makes three contributions. First, it uncovers historical arguments that ground demands for tax transparency in egalitarianism in addition to compliance. Second, it intervenes in the taxpayer-privacy debate by developing a conceptual framework to analyze when, and for which taxpayers, privacy values should prevail. In the process, it propels the scholarly discourse beyond tax enforcement and compliance and yields insights to help policymakers design public-disclosure regimes that cohere with the norms implicit in our fiscal social contract with the state.[40]

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35. Conversely—and much more discussed in scholarship—democratic institutions and the design of their bureaucracies influence tax policymaking. See, e.g., Sven Steinmo, Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State 7–13 (1993) (explaining that the different democratic systems in Britain, Sweden, and the United States "have profoundly shaped the formulation of tax policy in each of these three countries").

36. See infra section III.A.

37. See infra sections III.B–.C.

38. See Vanessa S. Williamson, Read My Lips: Why Americans Are Proud to Pay Taxes 41–44 (2017) (citing national survey data showing that, even though unregistered immigrants pay considerable amounts in taxes, there is a widely held misconception to the contrary).

39. See infra notes 499–500 and accompanying text.

40. As section II.B shows, the existing literature focuses on issues of tax enforcement and compliance. To be sure, this focus is not exclusive: Some scholars have looked to past

Third, this Essay contributes to the burgeoning literature on fiscal citizenship. Drawing on federal income taxation's use of voluntary compliance, scholars have conceptualized taxpayers' political and civic engagement with the state as they self-assess their tax liabilities.[41] This Essay adds to this scholarly dialogue a positive, analytical framework of precisely what roles taxpayers occupy as they shape, and are shaped by, the fiscal state.[42]

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egalitarian justifications to frame their own views on tax publicity. See, e.g., Kornhauser, Full Monty, supra note 3, at 99–100 (quoting 79 Cong. Rec. 3403 (1935) (statement of Rep. Sauthoff)) (describing President Benjamin Harrison's egalitarian arguments for tax transparency). But none has developed, as this Essay does, a substantive framework and taxonomy of fiscal citizenship applicable to the privacy debate.

41. See, e.g., Ajay K. Mehrotra, Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929, at 143–46 (2013) [hereinafter Mehrotra, American Fiscal State] (arguing that the shift to a direct and graduated tax regime at the turn of the twentieth century marked the emergence of a new fiscal polity animated by both functional needs and broad social concerns); James T. Sparrow, Warfare State: World War II Americans and the Age of Big Government 3–10 (2011) [hereinafter Sparrow, Warfare State] (studying the expansion of the federal government during World War II and how Americans adapted to its increased authority); Lawrence Zelenak, Learning to Love Form 1040: Two Cheers for the Return-Based Mass Income Tax 3–5 (2013) [hereinafter Zelenak, Form 1040] (defending the civic effects of return-based taxation); Assaf Likhovski, "Training in Citizenship": Tax Compliance and Modernity, 32 Law & Soc. Inquiry 665, 669–81 (2007) (analyzing the creation of a tax-compliant culture in Israel); Ajay K. Mehrotra, The Price of Conflict: War, Taxes, and the Politics of Fiscal Citizenship, 108 Mich. L. Rev. 1053, 1055–58 (2010) [hereinafter Mehrotra, Price of Conflict] (assessing fiscal citizenship during wartime, from the Civil War through the war on terror); James T. Sparrow, "Buying Our Boys Back": The Mass Foundations of Fiscal Citizenship in World War II, 20 J. Pol'y Hist. 263, 266–70 (2008) [hereinafter Sparrow, Buying Our Boys Back] (examining the durability of the fiscal regime developed during World War II and its contribution to notions of national citizenship); Ajay K. Mehrotra, Reviving Fiscal Citizenship, 113 Mich. L. Rev. 943, 957, 962–64 (2015) [hereinafter Mehrotra, Reviving Fiscal Citizenship] (book review) (chronicling popular attitudes towards taxation since World War II). Of course, the payment of federal taxes is not voluntary. By "voluntary," scholars refer to the fact that taxpayers self-assess their income tax liability, instead of paying the state up front. See, e.g., infra notes 308–310, 318–320, 421–423 and accompanying text.

42. This Essay therefore focuses on federal taxation of individuals. Whether the state should permit public access to corporate tax returns raises distinct questions, including the nature of corporations' interactions with the fiscal state. See Blank, In Defense of Individual Tax Privacy, supra note 32, at 274 (noting "significant differences between corporations and individuals" which impact tax privacy). For analyses of fiscal citizenship, public tax disclosures, and corporations, see generally Lenter et al., supra note 30, at 814–23 (discussing the justifications for and against public corporate tax disclosure); Alex Freund, Note, Western Corporate Fiscal Citizenship in the 21st Century, 40 Nw. J. Int'l L. & Bus. 123, 144–50 (2019) (noting that corporations are less affected by poor fiscal citizenship than individuals who rely on regulatory and welfare regimes). Two factors in particular counsel the inclusion of corporate tax records into a transparency regime. First, if individuals set up corporate structures to evade taxes or hide their fiscal contributions to the state, then the responsibilities of their individual fiscal citizenship might flow to those corporate structures. See infra section III.A (providing a taxonomy of individual fiscal citizenship). Second, extending corporations' societal roles to include, for example, furtherance of public norms like transparency could also make corporate tax disclosure appropriate independent of individual fiscal citizenship. See Max M. Schanzenbach & Robert H. Sitkoff, Reconciling

This Essay proceeds in three Parts. Part I examines past disclosure regimes of the federal income tax. It shows that tax confidentiality has always been contested in the United States. It also uncovers historical arguments in favor of disclosure not (only) to increase revenue collection but also to advance egalitarian goals. Part II discusses contemporary treatment of tax transparency. It provides a comparative analysis of the disclosure regimes in Nordic countries, as well as an overview of the scholarly literature. Part III builds a taxonomy of fiscal citizenship. It articulates the four roles of taxpayers as they interact with the fiscal state and explains the distinct valences of privacy and transparency within each role. It examines how each component of our fiscal citizenship—as reporters, funders, stakeholders, and policymakers—varies based on our income levels and the degree of equality in the distribution of income within the community structured by federal taxation. Finally, it discusses scholarly and policy implications. It contends that transparency values, instead of privacy demands, prevail as to the tax records of the ultrawealthy, especially in times of high economic inequality.

One final note: By "democracy" and "egalitarianism," this Essay refers broadly to a notion of democratic equality.[43] Citizens in democratic regimes should have, all else equal, an equal share in ruling, instantiated in equal opportunity to ventilate their views in public debate and, absent justification, roughly equal influence in policy outcomes.[44] Importantly,

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Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee, 72 Stan. L. Rev. 381, 384–85 (2020) ("[A] growing and influential group of scholars and practitioners[] ha[ve] even taken the position that fiduciary principles require a trustee to use ESG factors.").

43. This notion of democratic equality traces its origins to Classical Athenian law and Aristotle and is the subject of continued discussion in contemporary political theory. See, e.g., T.M. Scanlon, Why Does Inequality Matter? 75–76 (2018) (describing John Rawls' view that "the fair value of political liberties is achieved when 'citizens similarly gifted . . . have roughly an equal chance of influencing the government's policy'" (quoting John Rawls, A Theory of Justice 46 (2001))); James Lindley Wilson, Democratic Equality 5 (2019) (discussing the distinction between "inequalities that are in fact objectionable from those that are consistent with equal citizen status"); Alex Zhang, Separation of Structures, 110 Va. L. Rev. 599, 618–20 (2024) (describing Aristotle's typology of constitutional structures, with democracy dependent on the public's consent).

44. This is not to say that democracy and privacy are transhistorical Platonic forms. Instead, their content has been contested. See generally Sarah E. Igo, The Known Citizen: A History of Privacy in Modern America 3–4 (2018) ("Arguments about privacy were really arguments over what it meant to be a modern citizen. To invoke its shelter was to make a claim about the latitude for action and anonymity a decent, democratic society ought to afford its members."); James T. Kloppenberg, Toward Democracy: The Struggle for Self-Rule in European and American Thought 1–18 (2016) (discussing the "rival understandings of what democracy means" throughout the United States and Europe). But a baseline of some type of equality in the exercise of political power is common to most democracies. It is inherent in the world's first radical democracy, which allowed all citizens to participate in lawmaking, selected executive offices by lottery or sortition, and enabled ordinary people to serve the dual role of jury and the judge in the courtroom. See Paul Cartledge, Democracy: A Life 108, 170, 310 (2016) (describing Athenian democratic decisionmaking process and culture); Michael Gagarin, Democratic Law in Classical Athens 17–18 (2020)

this is not to require that political power be, in substance, equally shared. Deviations from the baseline of equality are common and not necessarily illegitimate. It only shifts the burden to demand reasons for any inequality in governance. Expertise, for example, grounds certain forms of inequality in a democracy. Transparency may do the same. Importantly, transparency serves a higher-order and trans-substantive value: It allows the public to see whether any inequality—deviations from the principle of equal share in ruling—is in fact grounded in a legitimate value. It enables the state to write policy on an informed basis, thus fulfilling its reciprocal duty to ensure a fair and effective tax system.[45] Both are key to democratic fiscal governance.

I. HISTORICAL TAX-TRANSPARENCY REGIMES IN THE UNITED STATES

This Part of the Essay examines three instances of legislatively mandated disclosure regimes in the early history of the U.S. federal income tax. It uncovers congressional proceedings that grounded tax transparency in egalitarianism. As we shall see, lawmakers contended that publicity would not only result in revenue gains but also serve important constitutional and democratic functions.

The norm of confidentiality embodied in I.R.C. § 6103 emerged with the transformation of the federal income tax from a wartime tax and a "class tax" to a "mass tax."[46] In its infancy, income taxation of individuals

(noting that "[t]he poorest citizens paid nothing in direct taxes . . . and received . . . pay for attending the Assembly, serving on a jury, or serving as an official"); Douglas M. MacDowell, The Law in Classical Athens 25 (1986) (discussing the appointment of executive officials in classical Athens by lottery); Adriaan Lanni, "Verdict Most Just": The Modes of Classical Athenian Justice, 16 Yale. J.L. & Humans. 277, 284–86 (2004) ("Classical Athens was a participatory democracy run primarily by amateurs . . . . [with] juries chosen by lot . . . ." (footnote omitted)). It is embodied, perhaps most directly, in the one-person-one-vote principle of our representative democracy. See Reynolds v. Sims, 377 U.S. 533, 560–62 (1964) (holding that "one person's vote must be counted equally with those of all other voters" because "the right of suffrage is a fundamental matter in a free and democratic society"); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (discussing the importance of voting equality to the principles of a democracy); Gray v. Sanders, 372 U.S. 368, 379–80 (1963) (discussing the importance of one person one vote to the American conceptualization of political equality and democracy).

45. This duty flows from fiscal citizenship. See infra notes 307–310 and accompanying text. It also flows from the state's need to foster quasi-voluntary tax compliance and create confidence among the citizenry that fiscal rulers will keep their part of the bargain by (1) enforcing existing tax law and (2) maintaining relative fairness in tax policy (e.g., declining favoritism of special interest groups). See Margaret Levi, Of Rule and Revenue 54 (1989) (describing the concept of quasi-voluntary compliance as an aspect of "legitimacy" and as a species of tax compliance that is neither based solely on state coercion nor purely voluntary, because taxpayers will comply only if others do too); infra notes 363, 426 and accompanying text.

46. See Leonard E. Burman, Taxes and Inequality, 66 Tax L. Rev. 563, 563–64 (2013) (explaining that while the federal income tax was a "class tax" in its first thirty years, it expanded into a "mass tax" during World War II with the creation of withholding); Carolyn C. Jones, Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income

targeted the rich[47] and featured a rate structure like that of wealth taxes proposed by progressive policymakers today.[48] Transparency values prevailed at three junctures during this formative time: during the Civil War, when Congress taxed income for the first time;[49] in 1924, a decade after the Sixteenth Amendment paved the path for a permanent, unapportioned income tax;[50] and during the Great Depression, when a well-organized grassroots campaign led to the demise of the disclosure regime before it went into full effect.[51]

A. *Public Inspection of Income Tax Records During the Civil War*

During the Civil War, the federal government taxed income for the first time to meet its increasing fiscal needs.[52] At first, the House Ways and Means Committee proposed a direct tax on land, apportioned among the states in accordance with their census population as required by the

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Tax During World War II, 37 Buff. L. Rev. 685, 685–86 (1988/89) (arguing that while the income tax was initially viewed as a "'class tax' directed toward the rich," it was transformed into a "war financing device" during World War II and eventually became a "people's tax").

47. See W. Elliot Brownlee, Federal Taxation in America: A History 58–123 (3d ed. 2016) (noting that the Civil War income tax reflected popular support for taxing the rich and that this trend continued in tax legislation during World War I). Far less than half of the population was covered by the Civil War income tax or the first two decades of the modern federal income tax. The Revenue Act of 1862 exempted income below $600, while the average monthly wage of farm labor in 1860 was just under $15. See Revenue Act of 1862, ch. 119, § 90, 12 Stat. 432, 473; Sec'y of the Interior, Statistics of the United States (Including Mortality, Property, &c.,) in 1860, at 512 (Washington, Gov't Printing Off. 1866); Sheldon D. Pollack, The First National Income Tax, 1861–1872, 67 Tax Law. 311, 321 (2014). From 1918 to 1932, an average of 5.6% of the population filed taxable returns. The fiscal demands of World War II led to a dramatic expansion in the income tax base and hike in rates: By 1945, more than 42 million people had income tax liabilities, and the top marginal tax rate reached 94%. Individual Income Tax Act of 1944, ch. 210, §§ 4(b), 11, 58 Stat. 231, 231–32 (codified at I.R.C. § 12(g) (1939)) (providing a 3% tax on income and a 91% surtax on income in excess of $200,000); Jones, supra note 46, at 686–88. The revenues needed to finance World War I and the economic vicissitudes of the Depression led to significant variation in the coverage of income taxation during this period. In fiscal year 1919, for example, nearly 20% of the labor force filed income taxes. See Mehrotra, American Fiscal State, supra note 41, at 299–300.

48. The Revenue Act of 1913, ch. 16, 38 Stat. 114, provided for marginal tax rates of 1%–7% based on income levels. By comparison, Senator Elizabeth Warren has proposed a wealth tax of 2%–6% based on wealth levels. Ultra-Millionaire Tax, Elizabeth Warren, https://elizabethwarren.com/plans/ultra-millionaire-tax [https://perma.cc/JYA6-C9AX] (last visited Sept. 11, 2024); see also Ari Glogower, A Constitutional Wealth Tax, 118 Mich. L. Rev. 717, 719 n.1 (2020).

49. See infra section I.A.

50. See infra section I.B.

51. See infra section I.C.

52. Pollack, supra note 47, at 312; see generally Steven A. Bank, Kirk J. Stark & Joseph J. Thorndike, War and Taxes (2008) (providing a historical overview of American taxation during wartime, including the Civil War); Roger Lowenstein, Ways and Means: Lincoln and His Cabinet and the Financing of the Civil War (2022) (describing the context in which Congress developed a progressive income tax regime during the Civil War).

Constitution.[53] The federal government had taxed land in 1798 and 1813.[54] Proponents in Congress suggested that a land tax would aid post-war recovery of lost revenue: Uncollected taxes would result in a lien on the land that could be collected after the war, while efforts to collect taxes on personal property in Southern states would be futile.[55] But other lawmakers attacked the land tax as unfair. For them, it would disproportionately burden land-rich states while exempting personal property (primarily tangible assets like equipment during this period, in contrast to stocks and securities today) that formed the bulk of wealth in manufacturing states.[56] Congress found compromise in the Revenue Act of 1861, imposing both an apportioned tax on land and an income tax at a uniform rate of 3% on incomes above $800.[57] As a practical matter, however, the 1861 Act never went into effect.[58] In 1862, Congress enacted a more comprehensive internal revenue system. It established the post of the Commissioner of Internal Revenue and imposed numerous taxes on bonds, dividends, salaries, and goods like liquor and coffee.[59] Income was taxed for the first time at graduated rates: at 3% for income between $600 and $10,000, and at 5% for income above $10,000.[60] The exemption for any income under $600 meant that only about 1% of the population paid any income tax.[61] This system of progressive income taxation targeting the rich survived for most of the 1860s. Congress let it expire in 1871 and returned to a fiscal order that relied heavily on protective tariffs.[62]

Between 1861 and 1870, income tax records were open to public inspection and routinely published by leading newspapers. The Revenue Act of 1861 directed tax collectors to advertise collection lists in newspapers and public places in their respective districts.[63] This

53. See Act of July 30, 1861, H.R. 71, 37th Cong. § 1; Cong. Globe, 37th Cong., 1st Sess. 246 (1861).

54. Act of July 22, 1813, ch. 37, 3 Stat. 53, 53 (imposing a direct tax of $3 million, apportioned among the states); Act of July 14, 1798, ch. 75, § 1, 1 Stat. 597, 597 (imposing a direct tax of $2 million, apportioned among the states); John R. Brooks & David Gamage, Taxation and the Constitution, Reconsidered, 76 Tax L. Rev. 75, 102–03 (2022).

55. See Cong. Globe, 37th Cong., 2d Sess. 2039 (1862) (statement of Sen. Fessenden); Cong. Globe, 37th Cong., 1st Sess. 314 (1861) (statement of Rep. Blair).

56. See Cong. Globe, 37th Cong., 1st Sess. 248 (1861) (statements of Reps. Colfax, Lovejoy, Ashley & McClernand); Pollack, supra note 47, at 317.

57. Revenue Act of 1861, ch. 45, §§ 8, 13, 49, 12 Stat. 292, 294–95, 297, 309. The Revenue Act of 1861 provided preferential treatment to income derived from interest on government securities, taxing it at 1.5%, and penalized U.S. citizens abroad, taxing their income at 5%. Id. § 49.

58. Edwin R.A. Seligman, The Income Tax: A Study of the History, Theory, and Practice of Income Taxation at Home and Abroad 435 (1911); Pollack, supra note 47, at 320–21.

59. Revenue Act of 1862, ch. 119, §§ 51, 75, 90, 12 Stat. 432, 450–51, 463, 473.

60. Id. § 90.

61. See Pollack, supra note 47, at 327 n.98 (noting that in 1866, the $600 threshold exempted all but 1.3% of the population from paying income taxes).

62. Id. at 330.

63. Revenue Act of 1861, ch. 45, § 35, 12 Stat. 292, 303.

requirement was intended to provide notice to taxpayers, given the absence of administrative procedures to notify taxpayers of liability.[64] The 1861 Act also made an oblique reference to publicity: After income taxes were "assessed and *made public*," they operated as liens on the property of delinquent taxpayers.[65] The Revenue Act of 1862 went further, authorizing the public to examine taxpayers' names and liabilities within a fifteen-day statutory period and directing tax assessors to advertise opportunities for public examination in local newspapers.[66] By 1864, Congress codified the public's right to inspect and publish full tax records, requiring assessors to submit their "proceedings" and "annual lists . . . to the inspection of any and all persons who may apply for that purpose."[67] This requirement of tax publicity generated sensational headlines in the 1860s: In a July 1865 report on "our internal revenue" for the Sixth Collection District (which included Manhattan), the *New York Times* exclaimed, "William B. Astor's Income One Million Three Hundred Thousand Dollars."[68]

Tax publicity was contested from the very beginning. The *Times*'s internal revenue reports from 1865 disclaimed any desire to gratify "an idle or morbid curiosity" and purported to broadcast "only specimen returns which are of interest to the public."[69] But opponents attacked the income tax itself and the public-inspection requirements as "inquisitorial,"[70] requiring excessive public inquiry into the personal finances and property ownership of private individuals. Both the *Times* and the Treasury Department resisted publicity at first. In 1863, the Treasury Department interpreted the Revenue Act of 1862 to authorize inspection of taxpayers' names and liabilities only (i.e., to provide notice) and instructed assessors to withhold full tax returns from the public.[71] The Treasury Department conceded the impropriety of its interpretation and requested Congress to remove the "doubt . . . by express enactment" guaranteeing confidentiality.[72] The *Times* initially favored privacy on "policy and morality" grounds and criticized the "disgraceful" fact that "the Evening Post or any-body out of the Assessor's office should know anything about [taxpayers' incomes]."[73] Publicity, the *Times* criticized, was "another illustration of the hasty and slipshod way in which our system of

64. See Cong. Globe, 37th Cong., 2d Sess. 1258–59 (1862) (statement of Rep. Porter).

65. Revenue Act of 1861 § 49 (emphasis added).

66. Revenue Act of 1862, ch. 119, §§ 15, 19, 12 Stat. 432, 437, 439.

67. Revenue Act of 1864, ch. 173, § 19, 13 Stat. 223, 228.

68. See N.Y. Times, Our Internal Revenue, supra note 22.

69. See id.

70. See Treasury Dep't, Report of the Secretary of Treasury on the State of the Finances for the Year Ending June 30, 1863, at 70 (1863).

71. Id.

72. Id.

73. The Internal Revenue Law—Telling Other People's Secrets, N.Y. Times (Dec. 29, 1864), https://www.nytimes.com/1864/12/29/archives/the-internal-revenue-lawtelling-other-peoples-secrets.html (on file with the *Columbia Law Review*).

taxation has been formed."[74] Beyond this generalized complaint about undue intrusion into private affairs, opponents of publicity made two concrete arguments: First, publicity harmed businessmen's credit in years when they suffered (and had to report for all to see) their losses.[75] Second, publicity incentivized pervasive "false returns[] when everybody feels that everything he puts down [on the tax return] will be known to the whole city"—a primitive version of the taxpayer-trust theory of confidentiality.[76]

By 1865, however, publicity appeared settled as a feature of federal income taxation. In the Revenue Act of 1864, Congress rebuked the Treasury Department's request for confidentiality by expressly requiring public inspection.[77] The Treasury Department, in turn, directed tax assessors to "give full effect to [the publicity] provision with reference to the lists . . . containing the assessments upon the income for the year 1863."[78] Newspapers started publishing those lists and defended publicity as an important value in tax administration.[79]

At this time, publicity was desirable for both administrability and normative reasons. The absence of an administrative apparatus to enforce tax laws made disclosure a cost-effective means of providing notice. There was no Commissioner of Internal Revenue until 1862, and the Treasury Department relied on bounties to collect taxes until their abolition in 1872.[80] Further, a peculiar notion of equality drove efforts to publicize tax records. As described, Congress taxed income to fund the war in part because it was more equitable than taxing land.[81] Instead of concentrating

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74. Id.

75. The Publication of Incomes, N.Y. Times (July 9, 1866), https://www.nytimes.com/1866/07/09/archives/the-publication-of-incomes.html (on file with the *Columbia Law Review*); see also Cong. Globe, 39th Cong., 1st Sess. 2789 (1866) (statement of Rep. Morrill) ("If a man has been doing a disastrous business, . . . he does not quite like to have the fact immediately published to the world.").

76. The Internal Revenue Law—Telling Other People's Secrets, supra note 73. Under the taxpayer-trust theory, individuals honestly report financial information to the government on the assumption of confidentiality. See infra section III.A.1.

77. Revenue Act of 1864, ch. 173, § 19, 13 Stat. 223, 228.

78. W.P. Fessenden, Treasury Dep't, Regulations for the Assessment and Collection of the Special Income Tax Upon the Income of 1863 (July 20, 1864), *in* Collection of Circulars and Specials Issued by the Office of Internal Revenue, to January 1, 1871, at 298, 299 (Washington, Gov't Printing Off. 1871).

79. See The Publication of Incomes, supra note 75 ("Show every taxpayer's *sworn* return of income to . . . his most intimate friends, to himself, indeed, in public journals, and you have a security that no laws, no oaths, and no scrutiny, has or can furnish.").

80. Revenue Act of 1862, ch. 119, § 1, 12 Stat. 432, 432 (creating the office of the Commissioner of Internal Revenue "for the purpose of superintending the collection of internal duties" imposed pursuant to the Act); see also Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, at 222 & n.5 (2013) (discussing the abolition of bounties for internal revenue and custom officers).

81. Land and real estate taxes were also costly for the federal government to administer. See Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real

tax burdens among landowners, income taxation fell on all forms of property, thus spreading the costs of governance over a broader swath of individuals who were "best able to bear them."[82] In 1866, for example, the *Times* framed compliance explicitly in egalitarian terms, as a species of horizontal equity. Income was "the most just and equitable" tax base, and "the regularity and certainty of the publication" of returns would "equalize[]" tax burdens by incentivizing honest reporting and increasing revenue collection.[83]

This notion of tax equity in part concerns compliance—the refrain of contemporary scholarship.[84] The Treasury Department's 1864 circular to tax assessors mandated implementation of the publicity provisions "in order that the amplest opportunity may be given for the *detection of any fraudulent returns*" and asked assessors to "seek the co-operation of all tax-paying citizens."[85] In 1866, James Garfield, the representative from Ohio who later became President, proposed an amendment to the Revenue Act that would prohibit any publication of taxpayer information.[86] Defenders of tax publicity appealed to its role in revenue collection. Speaking in the House, Representative Hiram Price stated that "the amount given in by persons upon which they pay income tax has been increased from the fact that they knew it would be published."[87] Price warned that the federal government stood to "lose millions of dollars" without the publication of income tax records.[88] Even opponents of publicity conceded its revenue potential. Garfield noted that some degree of "publicity [was] necessary to act as a pressure upon men to bring out their full incomes."[89] Justin Morrill, chair of the House Ways and Means Committee, acknowledged publicity's "tendency to increase the revenue" but dismissed it as "an inconvenience [that] causes a great deal of complaint."[90]

But the egalitarian language went further than the distribution of tax burdens: It encompassed a more foundational commitment to structuring a political community of equal citizens. Glenni Scofield, a representative from Pennsylvania, spoke on the House floor in 1866 to defend newspapers' publication of income tax returns (i.e., as distinct from public

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Estate in the 1790s, 130 Yale L.J. 1288, 1327–36 (2021) (describing "the structure and sheer size of the official organization that valued real estate" under the direct-tax regime).

82. Cong. Globe, 37th Cong., 1st Sess. 248–51 (1861) (statement of Rep. Colfax); see also Seligman, supra note 58, at 143 (describing an argument in favor of taxing all forms of property).

83. The Publication of Incomes, supra note 75.

84. See infra section I.C.

85. Fessenden, supra note 78, at 299 (emphasis added).

86. Cong. Globe, 39th Cong., 1st Sess. 2789 (1866) (statement of Rep. Garfield).

87. Id. (statement of Rep. Price).

88. Id.

89. Id. (statement of Rep. Garfield).

90. Id. (statement of Rep. Morrill).

inspection of returns at assessors' offices).[91] Raising "the constitutional question," Scofield drew a baseline of transparency for all government records, including its transaction with taxpayers.[92] "[A]ll the proceedings of this Government," Scofield argued, "are public," and if Congress denied newspapers access to wealthy citizens' tax records, "the public can have no real information upon the subject."[93] Confidentiality was akin to "put[ting] a padlock on the return which the wealthy man makes" and hiding data crucial to governance from the poor who would be burdened by the wealthy's tax evasion.[94] Transparency of tax returns was therefore a matter of public discourse, grounded in the media's scrutiny whether the rich bore the due costs of governance—information critical to constituting a democratic regime.[95] For egalitarians like Scofield, any deviation from the baseline of publicity required justification. And whatever arguments made by opponents of publicity—that it harmed business credits or undermined trust in government—failed to meet this burden.[96]

B. *Tax-Transparency Regime in 1924*

The Civil War's end diminished the need for an income tax. As public opposition to income taxation grew, Congress first replaced the progressive rate structure with a flat 5% tax in 1867.[97] In 1870, Congress repealed the publicity provision, raised the amount for personal exemption, and provided that the income tax would expire by the end of 1871.[98] For the next forty years, the federal government relied heavily on tariffs and excises to raise revenue.[99]

But the question of tax transparency returned as soon as income taxation itself. In the early twentieth century, federal fiscal policy shifted

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91. See id. (statement of Rep. Scofield).

92. Id.

93. Id.

94. Id.

95. Id.

96. See id (arguing in favor of public access to tax records).

97. Revenue Act of 1867, ch. 169, §§ 13–14, 14 Stat. 471, 477–80; Pollack, supra note 47, at 327.

98. Revenue Act of 1870, ch. 255, § 11, 16 Stat. 256, 259 (prohibiting the publication of any information from "income returns" except "general statistics"); id. § 6 (levying an income tax of 2.5% for 1870 and 1871, and "no longer"); id. § 8 (providing for an exemption amount of $2,000). The $2,000 exemption amount meant that only 74,775 individuals (fewer than 0.2% of the U.S. population) paid income taxes in 1870. Treasury Dep't, Annual Report of the Commissioner of Internal Revenue on the Operation of the Internal Revenue System for the Year 1872, at VI (Washington, Gov't Printing Off. 1872).

99. See Mehrotra, American Fiscal State, supra note 41, at 3, 7 tbl.1.1, 72 tbl.1.1 (describing "customs duties and excise taxes on alcohol and tobacco" as "the two dominant sources of late-nineteenth-century federal revenue"); Pollack, supra note 47, at 313 (explaining that "customs duties, the tariff, and the sale of public land" were "more than adequate to finance the limited activities" of the government in peacetime).

from taxing goods to people.[100] Pursuant to its power under the Sixteenth Amendment, ratified in 1913, the federal government imposed and administered the first income tax during peacetime.[101] Congress started discussing publicity in 1921 and enacted, as part of the Revenue Act of 1924, a provision for public inspection.[102] Instead of providing access to *all* return information, Congress directed the Commissioner of Internal Revenue to "prepare[] and ma[k]e available to public inspection" lists containing taxpayers' names and the amounts of income tax paid by each.[103] Leading newspapers soon started reporting on the income tax liabilities of the ultrawealthy of the time: J.D. Rockefeller, for example, paid over $7 million of income taxes in 1924.[104]

Transparency of individuals' income tax liabilities was a political compromise and the product of persistent advocacy for full disclosure. Throughout the early 1920s, progressive lawmakers called for both public and congressional access to tax records. This legislative debate was far more extensive than during the Civil War and reflected four aspects of an egalitarian commitment to fiscal governance: (1) a constitutional baseline for tax returns to be public records; (2) the instrumental democratic value of tax transparency; (3) the potential for transparency to curb government abuse of selective release of information; and (4) a distinction between tax evasion and tax avoidance, as well as the capacity of transparency to remedy both.

First, progressive lawmakers argued that tax publicity, rather than confidentiality, was the baseline in a political community of equals. Benjamin Harrison, a former President, laid the foundation for this view at a speech that he gave in 1898 at the Union League Club in Chicago.[105] In this speech, *Obligations of Wealth*, Harrison noted how "accumulated property and corporate power" had "submerged" the country's commitment to "equality of opportunity and of right."[106] But instead of

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100. Brownlee, supra note 47, at 93–123 ("The Revenue Act of 1916 imposed the first significant tax on personal incomes . . . ."); Mehrotra, American Fiscal State, supra note 41, at 8.

101. See Revenue Act of 1913, ch. 16, § 2, 38 Stat. 114, 166.

102. See Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293; 61 Cong. Rec. 7364–74 (1921).

103. Revenue Act of 1924 § 257(b).

104. Income Tax Returns Made Public; J.D. Rockefeller Jr. Paid $7,435,169; Ford Family and Company Pay $19,000,000, N.Y. Times (Oct. 24, 1924), https://www.nytimes.com/1924/10/24/archives/rockefeller-jr-heads-list-amounts-paid-by-other-wealthy-new-yorkers.html (on file with the *Columbia Law Review*).

105. Harrison on Tax Dodging, N.Y. Times (Feb. 23, 1898), https://www.nytimes.com/1898/02/23/archives/harrison-on-tax-dodging-the-expresident-declares-in-chicago-that.html (on file with the *Columbia Law Review*).

106. Id. During this period, lawmakers also called for the transparency of corporate information. See id. (internal quotation marks omitted) (quoting Benjamin Harrison); see also Steven A. Bank & Ajay K. Mehrotra, Corporate Taxation and the Regulation of Early Twentieth-Century American Business, *in* Corporations and American Democracy 177, 177

"indiscriminate denunciation of the rich," Harrison argued that the "security of wealth" was conditional upon accepting the associated fiscal responsibility: "Equality" was "the foundation stone of our governmental structure" and demanded a "doctrine of a proportionate and ratable contribution to the cost of administering the Government."[107] That is, Harrison did not see market pre-tax distribution of resources as determinative. The generation and maintenance of wealth itself were predicated on the state's provision of security and government services.[108] Individuals, in addition, had divergent abilities to bear the costs of governance. He therefore called for a "system that shall equalize tax burdens."[109] Central to this system was transparency.[110] Harrison asserted:

> We have treated the matter of a man's tax return as too much of a personal matter. We have put his transactions with the State on much the same level as his transactions with the bank . . . . Each citizen has a personal interest, a pecuniary interest, in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership . . . . It is not a private affair; it is a public concern of the first importance.[111]

Harrison thus saw tax transparency as integral to egalitarian fiscal governance. Progressive lawmakers shared this vision as they pushed for a publicity provision in Congress. In 1921, Senator Robert La Follette proposed a publicity amendment to the Revenue Act of 1921 while heavily quoting from the *Obligations of Wealth*.[112] (La Follette was a key politician of the Progressive Era and championed, inter alia, the regulation of railroads and utilities.[113]) Like Harrison, La Follette contended that "our individual covenant as citizens with the State" demanded proportionate

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(Naomi R. Lamoreaux & William J. Novak eds., 2017); Marjorie E. Kornhauser, Corporate Regulation and the Origins of the Corporate Income Tax, 66 Ind. L.J. 53, 72–82 (1990).

107. Harrison on Tax Dodging, supra note 105.

108. Modern scholars have made similar (and more developed) versions of this argument. See Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice 8 (2002) (arguing that tax burdens must be assessed as part of the overall system of property, which government services help to create); see also Taisu Zhang & John D. Morley, The Modern State and the Rise of the Business Corporation, 132 Yale L.J. 1970, 2045 (2023) (arguing that the state "has a more affirmative role to play in promoting the corporate form" and that corporations "are not socioeconomically viable without robust institutional support by a modern state"). Progressive lawmakers shared Harrison's view: "[S]ecurity of property rests upon property bearing its fair share of taxation." 61 Cong. Rec. 7366 (1921) (statement of Sen. La Follette).

109. Harrison on Tax Dodging, supra note 105.

110. Id.

111. Id.

112. 61 Cong. Rec. 7372–74 (1921); see also Revenue Act of 1921, ch. 136, § 257, 42 Stat. 227, 270.

113. See Robert La Follette: A Featured Biography, U.S. Senate, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_LaFollette.htm [https://perma.cc/DHK2-8QWR] (last visited Sept. 9, 2024).

contribution to governance costs.[114] This meant a baseline norm of tax transparency, that is, "a cardinal principle" in government of "absolute open publicity."[115] La Follette noted that Government records should be, and in general were, open to public scrutiny, criticizing the statutory exception for privacy in *tax* enacted by the Revenue Act of 1913.[116] He therefore proposed to amend the statute to provide that income tax filings "shall constitute public records and be open to inspection as such under the same rules and regulations as govern the inspection of public records generally."[117]

This effort to put access to tax returns on the same footing as other public records did not meet with initial success. La Follette's publicity amendment failed in the Senate by a vote of 33-35.[118] Three years later, progressive lawmakers renewed their call for transparency. As this section will explain, the political landscape shifted in 1924 and featured a bitter, personal fight between Congress and the executive branch, in particular Treasury Secretary Andrew Mellon.[119] This fissure helped unite Congress to pass a limited publicity provision, and proponents again started with a foundational distrust of any secrecy in government. Speaking on the House and Senate floors, lawmakers noted that tax transparency was integral to a "republic" and the "democratic form of government."[120] Tax returns were "inherently public records," and their confidentiality deviated from the baseline of open and transparent governance.[121] "The burden of proof," therefore, lay "with those who oppose publicity" and public scrutiny of income tax records.[122] In this regard, lawmakers often analogized tax administration to exercises of the judicial power. Federal courts maintained legitimacy by adjudicating on the basis of open records (and thus by its accountability to "an enlightened public conscience").[123] So too in fiscal governance, especially in the wealthy's transactions with the federal government.

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114. 61 Cong. Rec. 7373 (1921) (statement of Sen. La Follette) (internal quotation marks omitted) (quoting Benjamin Harrison).

115. Id. at 7365 (statement of Sen. La Follette); see also id. at 7366 (statement of Sen. La Follette) ("[I]t is a fundamental proposition of government that all matters pertaining to the Government should be open to the inspection of the public, and I believe that when applied to tax returns it will work a very great reform . . . .").

116. See Revenue Act of 1913, ch. 16, § II G.(d), 38 Stat. 114, 177; infra notes 148–149 and accompanying text.

117. 60 Cong. Rec. 7365 (1921) (proposed amendment to § 257 of the Revenue Act of 1913).

118. Id. at 7374.

119. See infra notes 151–158 and accompanying text.

120. 65 Cong. Rec. 9405 (1924) (statements of Sen. Caraway and Sen. Norris).

121. Id. at 7682–84 (statement of Sen. McKellar) ("Tax claims, the most important of all claims to our citizens, are alone singled out to be determined in secret.").

122. Id. at 7688 (statement of Sen. Copeland).

123. Id. at 7690 (statement of Sen. Reed).

Lawmakers grounded transparency in not only democratic governance but also constitutional text. Speaking on the Senate floor, Senator Kenneth McKellar argued that "[p]ublicity of tax returns" cohered with "the very letter of our Constitution."[124] He pointed to the Appropriations Clause, which requires Congress to publish "a regular Statement and Account of the Receipts and Expenditures of all public Money . . . from time to time."[125] By way of historical context, the federal government was starting to issue large amounts of refunds to income tax payers during this time. In 1923, the Treasury Department refunded over $100 million, roughly 8% of the total federal receipts from income and profits taxes.[126] Lawmakers complained about the secrecy of these refunds, noting the possibility of corruption, bureaucratic incompetence, and regulatory capture.[127] After all, one of the wealthiest men of the time, Andrew Mellon, headed the Treasury Department.[128] But they also made the broader claim that *any* large tax refund—even if correctly made—fell within the meaning of "expenditures" subject to the constitutional accounting and disclosure requirement (and exempt from the statutory provision of secrecy).[129] This claim had some intuitive appeal. At the most basic level, an income tax refund was an "Expenditure[] of . . . public

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124. See id. at 7679 (statement of Sen. McKellar).

125. U.S. Const. art. I, § 9, cl. 7; 65 Cong. Rec. 7679 (1924) (statement of Sen. McKellar); see also id. at 4017 (statement of Sen. McKellar).

126. See Off. of the Sec'y, Treasury Dep't, Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30, 1923, With Appendices 431 (Washington, Gov't Printing Off. 1924) (showing total refunds of $123,992.820.94 in fiscal year 1923 and total receipts of $1,691,089,534.56 from the income and profits tax). Lawmakers claimed that the Treasury Department made $229 million in refunds in 1923. 65 Cong. Rec. 7679 (1924) (statement of Sen. McKellar).

127. See 65 Cong. Rec. 7682 (1924) (statement of Sen. McKellar) (opposing secrecy in the determination of enormous claims of tax refund and charging that "rich taxpayers having a 'pull' can get refunds when the poorer taxpayers are unable to do it"); id. at 6521 (statement of Sen. McKellar) (noting the possible role of "campaign contributions" and "corruption" in the distribution of tax refunds); id. at 4630 (statement of Sen. King) (observing that "[i]nferior and subordinate officials" held power over refund claims of millions of dollars); see also id. at 1204 (statement of Sen. Couzens) ("There never was a greater representative of the moneyed interests in the Treasury Department than is there at this particular time . . . .").

128. M. Susan Murnane, Selling Scientific Taxation: The Treasury Department's Campaign for Tax Reform in the 1920s, 29 Law & Soc. Inquiry 819, 827 (2004); George K. Yin, James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff, 66 Tax L. Rev. 787, 787 (2013) [hereinafter Yin, Greatest Tax Suit]; Board of Governors of the Federal Reserve System, Andrew W. Mellon, Fed. Res. Hist. (2024), https://www.federalreservehistory.org/people/andrew-w-mellon [https://perma.cc/AH6F-JGQT] ("By the 1920s, Mellon was one of the wealthiest men in the United States.").

129. See, e.g., 65 Cong. Rec. 4015 (1924) (letter from Sen. McKellar to Sec'y of Treasury Mellon) (asserting that a $4 million refund to an oil-refining corporation fell within the constitutional requirement of disclosure and outside of the secrecy provision of the Revenue Act of 1913).

Money" disbursed from the Treasury Department.[130] But a correct refund was, in general, for previous overpayment of the tax, that is, money to which the federal government was never entitled.[131] To characterize all tax refunds as government expenditures was therefore a stretch.

This peculiar notion of tax refunds rested on a nascent view of the constitutional status of the wealthy. The few decades before 1924 saw immense expansion of economic activity and corporate power, as well as the rise of the federal machinery in antitrust and taxation to curb abuse and effect redistribution.[132] This transformation "compelled" Congress "to realize that great industries consistently become more and more important in their relations to the private citizens, more and more important in their relation to the Government itself."[133] The distinction between private affairs and public governance was one of degree, not of nature. And as the market power of corporations and industrialists (as well as their influence over the public fisc) grew, they became more like "public utilit[ies]" than private institutions.[134] Like other public utilities, they were "capable of great good or of great injury"—a feature that increases "the necessity . . . for a full advisement to the public" of their activities.[135] Wealthy taxpayers therefore played an outsized role in fiscal governance that subjected them to a heightened publicity requirement. Transparency accorded with the constitutional mandate of public accounting of government expenditures. Thus, at one point during the legislative debate, a representative suggested, at a minimum, a limited publicity

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130. U.S. Const. art. I, § 9, cl. 7.

131. Congress does not appear to have provided any refundable tax credits until the 1960s. See Michelle Lyon Drumbl, Tax Credits for the Working Poor: A Call for Reform 9–10 (2019) ("The EITC was not the first refundable tax credit enacted by Congress—the first was a refundable gasoline tax credit, enacted ten years earlier in the Excise Tax Reduction Act of 1965.").

132. See Herbert J. Hovenkamp, The Antitrust Movement and the Rise of Industrial Organization, 68 Tex. L. Rev. 105, 107–20 (1989) (examining the theoretical and intellectual development of American antitrust law during the late 1800s); Ajay K. Mehrotra, Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax, 52 UCLA L. Rev. 1793, 1842, 1857–59 (2005) ("[B]ecause the income tax seemed to correspond with the level of political and economic development that existed in turn-of-the-century America, Seligman and his reformist colleagues became vocal advocates for the implementation of a permanent federal income tax.").

133. 65 Cong. Rec. 7690 (1924) (statement of Sen. Reed); see also K. Sabeel Rahman, The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept, 39 Cardozo L. Rev. 1621, 1628–31 (2018) ("The problem of private power, . . . is best understood as not just economic, but a political problem of domination—the accumulation of arbitrary authority unchecked by the ordinary mechanisms of political accountability.").

134. 65 Cong. Rec. 7690 (1924) (statement of Sen. Reed); see also Bank & Mehrotra, supra note 106, at 177–78 (discussing early efforts to regulate corporate power through taxation).

135. 65 Cong. Rec. 7690 (1924) (statement of Sen. Reed).

provision for the tax returns of the "largest" 100 taxpayers in the country.[136]

Second, in addition to a constitutional default, lawmakers ascribed to tax publicity an instrumental democratic value—it helped citizens deliberate on fiscal governance and legislators craft tax laws in an informed way. Lawmakers decried the "thousands of ways the real spirit of the law was being violated" through loopholes in the income tax,[137] but no one outside of the Bureau of Internal Revenue knew how.[138] Before the Revenue Act of 1924, the President and the Treasury Department controlled the release of tax returns.[139] Congress had access to individual tax information only through specific requests to the President, and the request was not always granted.[140] In practice, this led to legislative ignorance about how tax policy worked on the ground.[141] Regarding income taxation, for example, members of Congress explained that they "d[id] not know whether Mr. Rockefeller or Mr. Ford or Mr. Mellon or any other taxpayer [was] paying his just proportion."[142] Congress was forced to discuss tax legislation "in the darkness" and without the benefit of "governmental experience."[143] Public inspection of tax returns would allow Congress to "legislate correctly" and to provide the "general public" with the "necessary accurate information" in political decisionmaking.[144] Lawmakers thus charged that "[s]ecrecy [was] a prime cause for failure to secure needed curative financial legislation."[145]

This instrumental democratic value was salient at the time. According to scholarly estimates, income inequality in the United States started to grow during the antebellum period, reaching a plateau after the Civil War

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136. Id. at 2958 (statement of Rep. Garner).

137. Id. at 9405 (statement of Sen. Norris).

138. See id. at 7677, 9405 (statement of Sen. Norris) ("Nobody knows . . . to what extent [a recently discovered loophole] has been carried on in the past because of the secrecy of these returns . . . . No person . . . outside of the bureau . . . knows to-day how many million dollars of taxation have been avoided by the taxpayers creeping through that one loophole.").

139. Revenue Act of 1913, ch. 16, § II G.(d), 38 Stat. 114, 177; see also infra notes 148–149 and accompanying text.

140. See infra notes 164–176 and accompanying text.

141. 65 Cong. Rec. 2953 (1924) (statement of Rep. Frear) ("Today we have no means of access [to tax returns] except to go to the President of the United States after the Secretary of Treasury has determined what the rules are. Nobody ever goes or attempts to go."); id. at 1207 (statement of Sen. Norris) ("The Secretary of the Treasury has [the tax information], but it is locked up. . . . We who are going to be called upon to pass a new law on the subject are kept in absolute ignorance as to what the experience under this law has shown . . . .").

142. Id. at 2768 (statement of Sen. McKellar).

143. Id. at 1208 (statement of Sen. Norris).

144. Id. at 7689 (statement of Sen. Reed).

145. Id. at 648 (statement of Rep. Frear).

and a crescendo by 1929.[146] One recent study attributes the ownership of roughly half of American wealth in the late 1920s to the top 1% of households.[147] Economic inequality enlarged the gulf between the wealthy and the poor, heightening the former's civic duty to contribute to the state because of their ability to pay. This made access to income tax records even more important for Congress and the public.

Third, lawmakers justified transparency on its potential to curb government abuse of selective release of information. Before the 1924 Act's publicity provision, the governing law featured a startling discrepancy between rhetoric and reality. Under the Revenue Act of 1913, income tax returns "constitute[d] public records . . . open to inspection as such."[148] But the statute also provided that public inspection of tax returns was possible only by order of the President, under presidentially approved regulations promulgated by the Treasury Department.[149] Tax returns were therefore "public records" in name only, and the authority to grant access to tax returns rested entirely in the hands of the executive department. Members of Congress criticized this regime as "manifest subterfuge"—a regime that declared tax returns public records but in practice kept them secret from public scrutiny.[150]

This power asymmetry between Congress and the executive branch over tax returns fueled a bitter contest. Treasury Secretary Andrew Mellon led a campaign to reduce high surtax rates, relying on quasi–supply side arguments that they discouraged investment and incentivized tax evasion.[151] On the other side was Congress, in particular Senator James Couzens, who accumulated significant wealth through his management of Ford Motor.[152] Like his progressive colleagues, Couzens opposed the

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146. E.g., Jeffrey G. Williamson & Peter H. Lindert, American Inequality: A Macroeconomic History 77 (1981); Gene Smiley, A Note on New Estimates of the Distribution of Income in the 1920s, 60 J. Econ. Hist. 1120, 1123 tbl.1 (2000).

147. Emmanuel Saez & Gabriel Zucman, The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts, J. Econ. Persps., Fall 2020, at 3, 10 fig.1.

148. Revenue Act of 1913, ch. 16, § II G.(d), 38 Stat. 114, 177.

149. Id. ("[A]ny and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President . . . .").

150. 65 Cong. Rec. 7684 (1924) (statement of Sen. McKellar).

151. Yin, Greatest Tax Suit, supra note 128, at 816; see also Murnane, supra note 128, at 827, 837 (2004) (detailing the three "key elements" of Mellon's surtax-rate reduction plan). Mellon also led an effort to repeal the federal estate tax. See M. Susan Murnane, Andrew Mellon's Unsuccessful Attempt to Repeal Estate Taxes, Tax Notes (Sept. 7, 2005), https://www.taxnotes.com/tax-history-project/andrew-mellons-unsuccessful-attempt-repeal-estate-taxes/2005/09/07/ylvf [https://perma.cc/KNP4-UQG3].

152. Yin, Greatest Tax Suit, supra note 128, at 814 ("Couzens had been vice president and treasurer of the Ford Motor Company, and his financial leadership was instrumental in the company's success").

reduction of surtaxes.[153] In the course of the debate over surtaxes, Couzens revealed that he had invested in tax-exempt securities issued by state and local governments.[154] Couzens argued that he had "prepaid" income taxes on those bonds in the form of a lower rate of return—in effect a tax subsidy for fiscal federalism.[155] But Mellon insinuated that Couzens's opposition to surtax reduction stemmed from self-interest.[156] Exemption from high surtaxes was built into the pricing of the securities held by Couzens. If surtax rates dropped, so would the value of Couzens's investment. During one heated moment, one of Mellon's allies in Congress asked Couzens on the Senate floor whether Couzens had paid any income taxes from 1920 to 1924.[157] This startling question made Couzens, as well as other lawmakers, accuse Mellon of illegally leaking Couzens's tax returns, and using his access to them for political advantage.[158]

The feud between Mellon and Couzens thus bred suspicion of leaks by the Treasury Department. At the same time, Congress was attempting—in vain—to gain access to individuals' tax returns for legitimate ends. The Senate Committee on Public Lands was investigating bribes paid by oil companies to a former Secretary of the Interior in exchange for leases of oil fields at low rates.[159] This would become the Teapot Dome scandal, the most infamous example of government corruption before Watergate.[160] To complete its investigation, the Senate requested the income tax returns filed by the lessees of the oil fields.[161] As discussed, under the Revenue Act

153. Id. at 817–24 ("At first noncommittal, Couzens soon opposed Mellon's ideas in correspondence that would be published prominently in the national press.").

154. Couzens Invites Mellon to Debate, N.Y. Times (Jan. 13, 1924), https://www.nytimes.com/1924/01/13/archives/couzens-invites-mellon-to-debate-denies-need-of-cutting-surtaxes.html?searchResultPosition=2 (on file with the *Columbia Law Review*).

155. Id.

156. See Mellon Reproves Couzens on Taxes, N.Y. Times (Jan. 16, 1924), https://www.nytimes.com/1924/01/16/archives/mellon-reproves-couzens-on-taxes-says-the-senator-answers-himself.html?searchResultPosition=1 (on file with the *Columbia Law Review*) ("Mr. Mellon laid particular stress upon the admission made by Senator Couzens in a recent letter that his capital was now invested largely in tax exempt securities, contending that Senator Couzens therefore was 'the answer to your own arguments' against surtax reduction.").

157. 65 Cong. Rec. 1203 (1924) (statement of Sen. Reed).

158. See id. at 1203–04 (statement of Sen. Couzens) (protesting that the Secretary of the Treasury "violated the law" by disclosing Couzens' personal tax records). Lawmakers' discontent stemmed less from the act of disclosure than from the information asymmetry between the Treasury Department, which held the records, and Congress, which had little information about individual taxes. After all, Couzens himself had revealed his purchases of tax-exempt bonds. See supra notes 154–155 and accompanying text.

159. See 65 Cong. Rec. 3220 (1924) (introducing Senate Resolution 180, resolving to provide relevant tax returns to the Senate Committee on Public Lands).

160. See The Oxford Companion to United States History 764 (Paul S. Boyer ed., 2001) (describing the Teapot Dome scandal as "one of the most sensational in American political history").

161. S. Res. 180, 68th Cong. (1924); see also 65 Cong. Rec. 3220 (1924).

of 1913, tax returns were "open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President."[162] Pursuant to this provision, the Senate resolved to request President Calvin Coolidge to direct Mellon, as Secretary of Treasury, to "turn over" the relevant income tax returns to the Public Lands Committee.[163]

At first, President Coolidge refused the request and disclaimed any power to turn over tax returns to Congress.[164] Coolidge relied on a memorandum from the Department of Justice, which made two specious distinctions. First, the memorandum read heavily into the statutory language. Because tax returns were "open to *inspection*" under Treasury regulations, the statute did not authorize the President to "turn over" any tax information.[165] While Congress could have viewed the returns in the Treasury Department, the President had no power to "furnish[]" them to the Senate Public Lands Committee.[166] This distinction between inspection and transmission was self-defeating: Recall that the Revenue Act of 1913 made tax returns "public records" but made them open to inspection only by order of the President.[167] If the Justice Department's distinction had been genuine, the clause making tax returns open to *inspection* only by order of the President would not have applied to *transmission* of tax returns to Congress. Instead, the transmission of tax returns to Congress would have fallen under the general provision of tax returns as "public records."[168] That is, the Senate Public Lands Committee would have been able to ask the Treasury Department to turn over the tax returns as they could any other public record. This result obviously ran contrary to the statutory regime of confidentiality (under the Revenue Act of 1913) and the executive branch's preferred policy.

The Justice Department relied on a further distinction in reading the regulations. The Treasury's rules delegated the power over tax returns back to the President.[169] By executive order, President Warren Harding had allowed "the head of an executive department (other than the Treasury Department) or of any other United States Government

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162. Revenue Act of 1913, ch. 16, § II G.(d), 38 Stat. 114, 177; see also supra notes 148–149 and accompanying text.

163. 65 Cong. Rec. 3220 (1924).

164. Id. at 3699 (recording a communication from the President to the Senate, in response to S. Res. 180, 68th Cong. (1924), on March 5, 1924).

165. DOJ, Memorandum in re Power of Senate to Direct the President to Transmit to It Copies of Income-Tax Returns (1924), reprinted in 65 Cong. Rec. 3700 (1924) (emphasis added) [hereinafter DOJ, Memo].

166. Id.

167. Revenue Act of 1913, ch. 16, § II G.(d), 38 Stat. 114, 177.

168. Id.

169. See Treasury Dep't Regulations 62 (1922 ed.) Relating to the Income Tax and War Profits and Excess Profits Tax Under the Revenue Act of 1921 art. 1090 (1922) (stating that tax records are only open to inspection as authorized by the President).

establishment" to request inspection of returns.[170] In its memorandum, the Justice Department concluded that "any other United States Government establishment" did not include Congress (or one of its chambers).[171] The Acting Attorney General contended that the word "other" must have limited "United States Government establishment" to executive departments or agencies, and that the phrase "head of an executive department" made the provision inapplicable to Congress.[172] This argument was again unsatisfying. The word "other" modified "United States Government establishment," which ordinarily would include Congress.[173] The word "any" gestured toward a broad reading of the term, "United States Government establishment."[174] And it is hardly a stretch to construe the Speaker as the "head" of the House.[175] But because the Justice Department read "United States Government establishment" to exclude Congress, the executive order did not allow the President to provide any tax return information to the Senate Public Lands Committee.[176]

The executive branch's refusal to turn over tax returns angered many in Congress. Speaking on the Senate floor, lawmakers characterized it as "whimsical and trivial"—a "labored attempt . . . to find some possible technicality" between inspection and transmission to obstruct the legitimate work of the Public Lands Committee.[177] The broader difficulty for Congress to obtain tax returns contrasted with (and was rendered particularly salient by) the Treasury Department's seemingly cavalier attitude in exposing Senator Couzens's tax information. Speaking on the House floor, one representative complained: "[T]he Senate of the United States could not go to the Treasury and look at a single income-tax return, or get the same information. Yet the Secretary of the Treasury took these

170. Id.

171. DOJ, Memo, supra note 165, at 3700 (emphasis omitted).

172. Id.

173. See 65 Cong. Rec. 3701.

174. See id.; see also United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting Webster's Third New International Dictionary 97 (1976))).

175. See U.S. Const. art. I, § 2, cl. 5; Valerie Heitshusen, Cong. Rsch. Serv., 97-780, The Speaker of the House: House Officer, Party Leader, and Representative 1 (2017), https://crsreports.congress.gov/product/pdf/RL/97-780 [https://perma.cc/9GPQ-AF3W] (describing the Speaker as the "administrative head of the House").

176. DOJ, Memo, supra note 165, at 3701. The memorandum identified one remaining source of authority for the inspection of tax returns. The Revenue Act of 1921 empowered the Commissioner of Internal Revenue "to make all needful rules and regulations for the enforcement" of the Act. Revenue Act of 1921, ch. 136, § 1303, 42 Stat. 227, 309. Pursuant to this provision, the Commissioner promulgated regulations that did allow the Treasury Department to furnish tax returns to other government entities. But this provision only applied to U.S. Attorneys who needed the tax returns as evidence in a case or in preparation for litigation. See Treasury Dep't Regulations 62 (1922 Edition) Relating to the Income Tax and War Profits and Excess Profits Tax Under the Revenue Act of 1921 art. 1090 (1922).

177. 65 Cong. Rec. 3701 (1924) (statement of Sen. McKellar).

secret returns of this Senator and made them public."[178] While the Treasury Department eventually provided the requested tax returns, this saga inevitably created a perception that the Executive used the statutory secrecy provision to impede the work of Congress.[179] Tax publicity was thus a matter of separation of powers. By equalizing information, it worked to preserve an equilibrium between the constitutional branches such that none could gain a competitive advantage through its superior access to tax records.

Finally, lawmakers noted publicity's revenue potential. They distinguished illegal noncompliance from tax evasion: The former was blatant dishonesty or fraud, and public inspection of tax returns would deter it.[180] The latter, on the other hand, minimized the wealthy's tax burdens through legal means. (This nomenclature may strike the modern audience as strange. Contemporary scholars generally use "tax evasion" to refer to illegal, deliberate underpayment of taxes, and "tax avoidance" to refer to legal efforts that minimize tax liability. By contrast, lawmakers during the 1920s often used "evasion" to denote what modern scholars describe as "avoidance.") For example, speaking in favor of full tax publicity, Senator Royal Copeland pointed to "an accumulation of evidence . . . [of] an evasion of the *spirit* of our tax laws."[181] Similarly, Senator Kenneth McKellar explained that the wealthy were evading the "manifest purpose" of the federal income tax.[182] In response, Senator David Reed clarified that by "evasion of taxes," he meant *not* that "men [were] doing dishonest or illegal things to escape taxation," but that the wealthy had "legally . . . taken advantage of" Congress's "lack of power to reach them and the [tax] deductions" allowed under the Revenue Acts.[183]

Especially thorny was the issue of surtaxes: additional marginal taxes on income above a high exemption amount.[184] Led by Secretary Mellon, the Treasury Department had repeatedly proposed to reduce the surtax

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178. Id. at 2959 (statement of Rep. Browne).

179. See S. Res. 185, 68th Cong, 65 Cong. Rec. 3702 (1924) (adopting an amended version of S. Res. 180 altered to comply with the Department of Justice memorandum); Yin, Greatest Tax Suit, supra note 128, at 855–56 & n.366 (discussing the impact Coolidge's protest had on legislators).

180. See 65 Cong. Rec. 1209 (1924) (statement of Sen. Norris) (arguing for the publicity of tax returns, which would reveal that Mellon's proposed tax cuts would benefit himself personally); id. at 1204 (statement of Sen. Reed) (arguing that tax publicity will show whether the wealthy are evading the surtaxes); id. at 1203 (statement of Sen. Couzens) ("More dishonest statements, misstatements if not absolute falsehoods, have been handed out at the Treasury Department . . . for the purpose of misleading the public . . . .").

181. Id. at 7688 (statement of Sen. Copeland) (emphasis added).

182. Id. at 1204 (statement of Sen. McKellar).

183. Id. (statement of Sen. Reed).

184. The Revenue Act of 1921, for example, imposed surtaxes (for 1922 and subsequent taxable years) starting at 1% on income between $6,000 and $10,000 rising to 50% on income above $200,000. Revenue Act of 1921, ch. 136, § 211(a)(1), 42 Stat. 227, 237; see also Roy G. Blakey, The Revenue Act of 1921, 12 Am. Econ. Rev. 75, 81 (1922).

rates, in part on the ground that high surtax rates—as high as 50% under the Revenue Act of 1921—incentivized tax evasion.[185] But lawmakers had a different perspective. They thought that the Treasury Department got it backwards: Evasion of high surtax rates was not a reason to eliminate surtaxes.[186] Instead, it should prompt the government to minimize tax evasion by the rich.[187] And publicity of returns would allow Congress to close the loopholes that enable such evasion.

Underlying this conception of tax evasion was a commitment to fairness in fiscal policy. Like former President Harrison, progressive lawmakers recognized the economic inequality of their time and advocated the use of tax instruments to "adjust [the] burdens of government" and compel "great wealth [to make its] fair contribution."[188] This commitment motivated the adoption of the income tax itself, which was designed as a "substitute" for the "personal-property tax" and meant to reach the property holdings of the wealthy.[189] Lawmakers defended the progressive nature of income taxation—and the high surtax rates—on the ground that they could not be passed onto ordinary workers and consumers.[190] Given the perception that the incidence of high marginal tax rates fell on the wealthy, some elevated the redistributive function of income taxation to constitutional status and called for its "preserv[ation] as a part of our fundamental law."[191] Clever lawyers can read the statutory *text* to minimize surtax burdens for their wealthy clients.[192] But the "*spirit*" or the "manifest purpose" of the regime of federal income taxation was to effect a fair distribution of resources that reflected citizens' civic fiscal

185. See Yin, Greatest Tax Suit, supra note 151, at 815–16.

186. See 65 Cong. Rec. 2959 (1924) (statement of Sen. Browne) (arguing that the evasion of high surtax rates was a reason for increased publicity, not elimination).

187. See id. at 1204 (statements of Sen. McKellar and Sen. Reed) (arguing that Congress should take steps to prevent tax evasion by the rich).

188. Id. at 647 (statement of Rep. Frear).

189. Id. at 2960 (statement of Rep. Frear).

190. This claim made more sense in the context of the fiscal tools in the early 1920s: The income tax was in its infancy, and the federal government otherwise relied on excise and tariffs—forms of consumption taxation whose costs could easily be passed onto to consumers. See Treasury Dep't, Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30 1921, at 12 tbl.1 (1922). Some lawmakers also voiced the fear that the wealthy were campaigning to replace income taxes with sales taxes. See 65 Cong. Rec. 2449 (1924) (statement of Rep. Dickinson); see also id. at 648 (statement of Rep. Frear) (criticizing the Mellon tax-reduction plan and the Supreme Court's decision in Eisner v. Macomber, 252 U.S. 189 (1920), which held pro rata stock dividends constitutionally untaxable, for "emasculat[ing]" and "weaken[ing]" the income tax).

191. 65 Cong. Rec. 2449 (1924) (statement of Rep. Dickinson).

192. See 61 Cong. Rec. 7369 (1921) (statement of Sen. La Follette) (accusing the wealthy of "devis[ing] cunning plans to defeat the intent of legislation" based on "the advice of lawyers and tax experts").

duties and their divergent abilities to bear the costs of governance.[193] Wealthy taxpayers' deviation from the redistributive norms inherent in the statute therefore warranted disclosure.[194] This view reflected two other grounds for transparency that this section has already discussed: Publicity of returns served an instrumental democratic value by helping Congress legislate with knowledge. And wealthy taxpayers, with their influence over fiscal governance, were akin to public utilities subject to heightened requirements of disclosure.[195] Lawmakers thus concluded: "Publicity is the only way to bring about a fair and equitable adjustment of income taxes."[196]

Progressives' advocacy for tax transparency met resistance in Congress. Opponents criticized what they saw as the "saturnalia of inquisitorial publicity."[197] They relied heavily on the arguments of Cordell Hull who, as a representative from Tennessee, drafted much of the federal income tax.[198] Hull had argued against publicity of returns in 1918, five years after the ratification of the Sixteenth Amendment.[199] He believed in the normative and distributive superiority of income taxation because it achieved "relative fairness . . . more accurately" than other tax bases or methods.[200] Hull was thus cautious to ensure the survival of the federal income tax at its very infancy, when its legitimacy and existence as a fiscal tool were contested.[201] He warned that publicity of returns could result in broader opposition to the income tax itself because it could expose business strategies of the taxpayer.[202] And he questioned whether publicity would generate more revenue, pointing to defects in state and local property tax regimes (where tax information was generally public), as well

193. 65 Cong. Rec. 1204, 7688 (1924) (statements of Sen. McKellar and Sen. Copeland) (emphasis added); see generally Mehrotra, American Fiscal State, supra note 41 (describing the transformation of the American tax system towards progressive income taxes to better reflect citizens' divergent abilities to bear fiscal burdens).

194. Cf. 65 Cong. Rec. 2449 (1924) (statement of Rep. Dickinson) (stating that he "favored the taxation of stock dividends when distributed for the purpose of avoiding taxation, and . . . hoped that a fair and proper amendment seeking to reach such evasions would be written into th[e] bill").

195. See supra notes 133–144 and accompanying text.

196. 65 Cong. Rec. 1211 (1924) (statement of Sen. McKellar).

197. Id. at 9544 (statement of Rep. Threadway).

198. See Lawrence Zelenak, Figuring Out the Tax: Congress, Treasury, and the Design of the Early Modern Income Tax 1–26 (2018) [hereinafter Zelenak, Figuring Out the Tax] (describing Cordell Hull's key role in drafting the federal income tax).

199. Letter from Cordell Hull on the Publicity of Income-Tax Returns, June 13, 1918, reprinted in 65 Cong. Rec. 2956–57 (1924) [hereinafter Letter from Cordell Hull].

200. Id. at 2956.

201. Id. ("Both now and after the war it is extremely vital that [the income tax] . . . should be safeguarded by the most effective means."). Lawmakers still felt that the income tax was threatened in 1924, as some campaigned to replace it with a sales tax. See supra note 190.

202. Letter from Cordell Hull, supra note 199, at 2956.

as existing provisions for third-party reporting in the federal tax system.[203] Hull therefore saw publicity "unwise," as it might "seriously jeopardize," "discredit[,] or break down the income-tax system."[204] Opponents to publicity in Congress accordingly argued that the Treasury's disclosure of general statistics, instead of individual tax information, was enough.[205]

In the end, those arguments against publicity did not prevail, and progressive lawmakers succeeded in enacting a limited transparency provision, § 257(b), as part of the Revenue Act of 1924.[206] This provision required the Treasury Department to make the amount of income taxes paid by individual taxpayers available for public inspection, and leading newspapers quickly published the tax liabilities of ultrawealthy Americans at the time.[207]

The 1924 Act's transparency provision did not stop the executive branch from its pursuit of secrecy. Soon after the newspapers' publication of individual tax information, the federal government indicted them in the district court.[208] The government alleged that it made the tax lists publicly available "not for the purpose of being printed in newspapers or public prints."[209] The district court dismissed the indictment, both on statutory grounds and because restraining newspapers from publishing what the federal government had already publicized violated the First Amendment.[210] The government appealed from the district court. Arguing before the Supreme Court, the Solicitor General relied on § 3167 of the Revised Statutes, which made it unlawful for anyone to publish tax information "in any manner 'not provided by law.'"[211] One might expect that the 1924 Act's transparency provision provided precisely this authorization. After all, § 257(b) made available for public inspection both the taxpayer's name and their tax liabilities.[212] But the Solicitor General distinguished public *inspection* from *publication*, arguing that the right to *inspect* did not entail "the right to communicate the information so

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203. Id. at 2957.

204. Id. at 2956.

205. See 65 Cong. Rec. 2957 (statement of Rep. Mills) ("[W]e have all of the information needed in the way of statistics. The income tax paid by any particular individual is not the kind of information which you need in framing a revenue law.").

206. Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293.

207. Id.; see also supra notes 103–104 and accompanying text.

208. United States v. Dickey, 3 F.2d 190 (W.D. Mo. 1924) (internal quotation marks omitted); United States v. Baltimore Post, 2 F.2d 761 (D. Md. 1924).

209. See *Dickey*, 3 F.2d at 190.

210. Id. at 191–92 (sustaining the demurrers because "the names of the taxpayers and amounts paid" were not deemed essential to secrecy, and any congressional attempt to impose such secrecy would "exceed[] its authority" and infringe upon the First Amendment).

211. United States v. Dickey, 268 U.S. 378, 379–85 (1925); Revenue Act of 1924, § 1018, 43 Stat. at 345 (re-enacting § 3167 of the Revised Statutes).

212. Revenue Act of 1924, § 257(b), 43 Stat. at 293.

[inspected]."[213] The Supreme Court rejected this distinction, reminiscent of that between public inspection and transmission made by the Justice Department's memorandum to Congress.[214] Instead, the Court held that the question over tax-return privacy primarily belonged to legislative discretion.[215] And as a matter of statutory construction, Congress clearly liberalized § 3167's secrecy provision by making tax information open to public inspection.[216]

The transparency regime enacted by the Revenue Act of 1924 lasted for a couple of years. After the Court's decision in *Dickey* to allow newspaper publication of taxpayer information, the executive branch continued to oppose tax publicity with vigor. In part because of persistent lobbying by Mellon (whose own tax liabilities were routinely exposed), Congress stopped requiring the publication of individual tax data as part of the Revenue Act of 1926.[217]

C. *The Pink-Slip Requirement of 1934*

Within a decade of its repeal, tax publicity returned to the table when the federal government faced a far different fiscal reality. Congress had enacted the transparency regime in 1924 amid a sizable budget surplus.[218] This triggered discussions about how best to distribute government largesse—for example, whether to cut surtax rates or issue bonus payments to World War I soldiers.[219] The healthy surpluses explained in part why

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213. *Dickey*, 268 U.S. at 380.

214. See supra notes 164–168 and accompanying text.

215. *Dickey*, 268 U.S. at 386. As the Court noted, no contention was made that the transparency regime invaded the constitutional rights of the taxpayer. Id. at 386. The Court thus decided the case on statutory grounds and assumed Congress's power to require disclosure of taxpayer data. Id. at 388.

216. Id. at 388 (holding that Congress intended to allow full publicity of tax information).

217. Revenue Act of 1926, ch. 26, § 257(e), 44 Stat. 9, 52; see also Revenue Revision, 1925: Hearings Before the H. Comm. on Ways & Means, 69th Cong. 8–9 (1925) (statement of Hon. Andrew W. Mellon, Sec. Treasury) [hereinafter, Revenue Revision 1925] (characterizing the tax publicity provision under the Revenue Act of 1924 as "utterly useless"); Blank, In Defense of Individual Tax Privacy, supra note 32, at 277 ("The Treasury Department, headed by Secretary Andrew Mellon . . . vigorously opposed the publication of tax return information."); Andrew W. Mellon Paid $1,173,987 Tax; Brother of Secretary of the Treasury Paid $348,646 and a Nephew $225,834, N.Y. Times (Oct. 25, 1924), https://www.nytimes.com/1924/10/25/archives/andrew-w-mellon-paid-1173987-tax-brother-of-secretary-of-the.html (on file with the *Columbia Law Review*).

218. See Table 1.1: Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2029, OMB, White House, https://www.whitehouse.gov/wp-content/uploads/2024/03/hist01z1_fy2025.xlsx (on file with the *Columbia Law Review*) (last visited Sept. 12, 2024) [hereinafter White House, Table 1.1] (showing a federal surplus of $509 million in 1921, growing to $1,155 million in 1927).

219. 65 Cong. Rec. 647 (1924) (statement of Rep. Frear) (discussing the estimated $310 million Treasury surplus, Mellon's tax-cuts plan, and bonus payments to soldiers); see also Anne L. Alstott & Ben Novick, War, Taxes, and Income Redistribution in the Twenties: The

progressive lawmakers heavily relied on egalitarian, democratic, and constitutional arguments in favor of transparency. By 1932, the budget surpluses—often totaling hundreds of millions in the 1920s—vanished. Instead, the Treasury Department ran enormous deficits throughout the Great Depression, surpassing $3 billion in 1934 (i.e., more than the total federal revenues received during that year), because of both declining receipts and increased spending as part of the New Deal.[220]

Fiscal constraint thus resurrected tax publicity. The legislative debate reflected continuity from the discussions in the early 1920s and featured some of the same progressive proponents of publicity. Lawmakers again pointed to the "fundamental," "constitutional right" to public inspection of tax returns and drew a baseline of transparency for all records that document the federal government's fiscal decisions.[221] According to its supporters, publicity served an epistemic function in a democracy, enabling all citizens to see the extent of economic inequality and whether wealth fulfilled its civic duty to bear tax burdens in accordance with its ability to pay.[222] As in 1924, members of Congress appealed to separation of powers and the executive branch's abuse of its superior knowledge of tax information. They again accused Mellon of making large refunds to himself and to his own companies and blamed the Treasury Department for dumping "truckloads" of paperwork "for the deliberate purpose of preventing" congressional investigation.[223] Because the federal government ran large deficits during the Great Depression, lawmakers emphasized the potential revenue gains from tax publicity. They contended that publicity would "force . . . honest and adequate [reports]

1924 Veterans' Bonus and the Defeat of the Mellon Plan, 59 Tax L. Rev. 373, 411–20 (2006) ("As early as December 1923 . . . Coolidge began promoting the Mellon Plan and inveighing against the bonus, warning that the nation could not afford tax reduction if the veterans' lobby prevailed.").

220. See White House, Table 1.1, supra note 218 (showing a deficit of $3,586 million in 1934, and total federal receipts of $2,955 million).

221. 75 Cong. Rec. 5939 (1932) (statement of Rep. Peavey); see also 78 Cong. Rec. 2601 (1934) (statement of Rep. Patman) ("[T]he Government should deal with its taxpayers in an open and above-board fashion[,] [and] no secrecy should be allowed either in the expenditure or collection of public money."); 78 Cong. Rec. 946 (1934) (statement of Rep. Patman) ("[P]ublic funds should be collected and disbursed in a way that will permit them to be subject to public inspection."); 75 Cong. Rec. 6972 (1932) (statement of Rep. Connery) (contending that the public is "entitled" to "all the knowledge about [income tax] returns" like committee votes and deliberations in Congress).

222. See, e.g., 75 Cong. Rec. 6972 (1932) (statement of Rep. Connery) ("[A]nything which would shed a little light . . . on the amounts which are paid into the Treasury of the United States . . . certainly can not do any harm but will give the people an opportunity to determine just where the concentration of wealth in the United States is.").

223. 78 Cong. Rec. 2515 (1934) (statement of Rep. Patman); see also id. at 2600 (alleging that it would take twenty-five years for the Joint Committee on Taxation to investigate one case of refund given the enormous record that the Treasury Department sent to Congress); id. at 6553 (statement of Sen. Couzens) (accusing the Bureau of Internal Revenue of discriminatory applications of tax rulings).

of incomes,"[224] deter taxpayers from hiring accountants and lawyers "skilled in the art of tax-law evasion,"[225] result in "billions" of additional revenue,[226] and foster the citizens' "recognition of public duty."[227] By contrast, tax secrecy was "a badge of permission to commit fraud"[228] and put the government's revenue collection in "the same position as a blind man passing around the hat."[229]

Proponents of transparency thus put forth egalitarian, constitutional, and revenue-based arguments like those articulated in 1924. Opponents, on the other hand, developed rather different objections. As discussed, hostility to tax publicity in 1924 rested on the intellectual foundations laid by Representative Hull.[230] Hull was both concerned with the survival of income taxation and unconvinced as to publicity's revenue potential, at least in 1918.[231] By 1932, opponents to publicity took a populist turn and focused on the potential abuse of transparency regimes in far-fetched scenarios that captured the imagination of ordinary people. Publicity could, for example, "embarrass" businessmen engaged in unprofitable activities and expose others to "blackmail."[232] Taxpayers would be "hounded by bond and stock salesmen, promoters . . . trying to get a commission,"[233] as well as "every panhandler in America, every soliciting organization in America, . . . every organization looking for a hand-out, [and] even [their] relatives" greedy for their fortune.[234]

At first, progressive lawmakers succeeded. The Revenue Act of 1934 provided for a limited transparency regime. It directed all taxpayers to file along with their tax returns pink-colored forms—the so-called "pink slips"—which contained the following information: (1) names and addresses, (2) total gross incomes, (3) total deductions, (4) net incomes, (5) total amount of tax credits, and (6) taxes payable.[235] The Act then directed the Commissioner of Internal Revenue to make the pink slips "available to public examination and inspection" for at least three years

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224. See 77 Cong. Rec. 5419 (1933) (statement of Sen. La Follette).

225. 75 Cong. Rec. 5939 (1932) (statement of Rep. Peavey).

226. 78 Cong. Rec. 2600 (1934) (statement of Rep. Patman).

227. Id. at 2434 (statement of Rep. Lewis); see also Steven A. Bank, When Did Tax Avoidance Become Respectable?, 71 Tax L. Rev. 123, 131 (2017) [hereinafter Bank, Become Respectable] (documenting the rise of the tax-avoidance industry during the 1920s and 1930s, when "creative tax lawyers and accountants focused on observing the letter, but not the spirit of the law").

228. 78 Cong. Rec. 2521 (1934) (statement of Rep. Frear).

229. Id. at 946 (statement of Rep. Patman).

230. See supra notes 198–205 and accompanying text.

231. See Letter from Cordell Hull, supra note 199, at 2956 ("Viewed from this standpoint, I have been unable to bring myself to the conclusion that publicity would secure the most desirable revenue results.").

232. 78 Cong. Rec. 2602 (1934) (statement of Rep. Treadway).

233. Id.

234. 75 Cong. Rec. 6972 (1932) (statement of Rep. O'Connor).

235. Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 680, 698.

after filing.[236] The statutory regime therefore did not provide for full transparency as lawmakers had called for.[237] But it imposed a broader disclosure requirement than the Revenue Act of 1924, which publicized only taxpayers' names and income tax liabilities.[238]

Congress repealed the pink-slip requirement before it went into effect.[239] As documented by other scholars, a group called the Sentinels of the Republic ran a tenacious campaign against publicity.[240] Like congressional opponents to publicity (but in a cruder style), the Sentinels took advantage of populist arguments that preyed on everyday fears. They predicted, for example, that "criminal racketeers, kidnappers[,] and gangs of the underworld" would descend on ordinary taxpayers and render them victims of heinous crimes.[241] The reference to and focus on kidnapping were designed to capture the public's attention at a time when the Lindbergh kidnapping generated headlines and spurred legislative reform.[242] The irony, of course, was that only the wealthy were ever subject to any disclosure requirements—whether in 1864, 1924, or 1934—as only a small minority of Americans filed any tax returns before the expansion of income taxation during World War II.[243] The Sentinels thus secured secrecy—a benefit for the wealthy—by appealing to ordinary citizens whose information would never have been disclosed on a pink slip.[244]

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236. Id.

237. 78 Cong. Rec. 6545 (1934) (statement of Sen. La Follette) ("The individual making out his return knows full well that no question as to how he has computed his tax or what devices he may have used to reduce it are revealed.").

238. See supra section I.B.

239. 'Pink Slip' Repeal is Voted by Senate; Count is 53-16 on Measure, Already Passed by House, to Ban Tax Publicity, N.Y. Times (Mar. 29, 1935), https://www.nytimes.com/1935/04/12/archives/pink-slip-repeal-voted-both-houses-adopt-conference-report-on-tax.html (on file with the *Columbia Law Review*) (noting that the first set of pink slips, filed along with the income tax returns for 1934, "will never be made public").

240. See Kornhauser, Shaping Public Opinion, supra note 24, *passim*.

241. Id. at 137 (internal quotation marks omitted) (quoting Raymond Pitcairn, Petition to Treasury (Feb. 6, 1935)); accord Petition to the Congress of the United States Protesting Against the Inquisitorial Publication of the Personal Incomes of Citizens, by Raymond Pitcairn on Behalf of the Sentinels of the Republic (Feb. 20, 1935), printed in 79 Cong. Rec. 2267 (1935).

242. Kornhauser, Shaping Public Opinion, supra note 24, at 131; see also Federal Kidnapping Act, Pub. L. No. 72-189, 47 Stat. 326 (1932) (codified at 18 U.S.C. § 1201 (2018)) (forbidding kidnapping and making it a felony).

243. See Income Tax Unit, Treasury Dep't, Statistics of Income From Returns of Net Income for 1924 Including Statistics From Capital Stock Tax Returns, Estate Tax Returns, and Gift Tax Returns 1 (1926) (noting the number of individual income taxes filed in 1924 as 7,369,788); Annual Report of the Commissioner of Internal Revenue on the Operation of the Internal Revenue for the Year 1872, supra note 98, at VI (showing that in 1870, the number of people "assessed for income" was 276,661).

244. This is similar to the strategy adopted by opponents to the estate tax. See Michael J. Graetz & Ian Shapiro, Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth

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The discussion in this Part yields three main insights. First, at the most basic level, the history of transparency regimes shows that secrecy of tax return information has often been contested. During the nation's first income tax and the infancy of our current income tax, Congress enacted statutes providing for varying degrees of disclosure of tax information. Lawmakers—even opponents of publicity—never assumed that secrecy was the natural default.

It was not until the Tax Reform Act of 1976 that Congress firmly settled on a policy of confidentiality.[245] Curiously, the immediate trigger for this confidentiality regime was President Richard Nixon's abuse of the executive branch's superior access to tax information. Nixon had repeatedly asked for his opponents' tax returns and pressured the IRS to audit them for his political gain.[246] By contrast, in the 1920s and 1930s, complaints about the tax-information asymmetry between Congress and the Executive fueled calls for transparency, not confidentiality.[247] This coheres with one of the arguments that Part III will make, that disclosure of tax information is more appropriate for ultrawealthy taxpayers.[248] Few paid federal income taxes in 1924, making transparency a ready option to resolve the information asymmetry between Congress and the President: The entire public would have access to the tax records of the wealthy few who filed returns.[249] Far more paid federal income taxes in 1976, making the general rule of confidentiality a more appropriate choice.[250]

Second, this Part uncovers powerful historical arguments in favor of disclosure. In particular, the extensive legislative record from the early 1920s shows that tax transparency is not merely a matter of revenue

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73 (3d prtg. 2006) ("[T]he repeal campaign altered public perceptions about who would profit from the demise of the death tax.").

245. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1520, 1667 (codified at 26 U.S.C. § 6103 (2018)).

246. Eileen Shanahan, An Explanation: The Allegations of Nixon's I.R.S. Interference, N.Y. Times (June 14, 1974), https://www.nytimes.com/1974/06/14/archives/an-explanation-the-allegatoins-of-nixons-irs-interference-many.html (on file with the *Columbia Law Review*); see also John A. Andrew III, Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon (2002) (detailing how Nixon used the IRS to single out his political opponents and audit them).

247. Of course, either resolves the problem of asymmetry: A baseline of confidentiality means neither Congress nor the President has access to tax information, while a baseline of transparency means everyone does. See supra notes 148–179 and accompanying text.

248. See infra Part III.

249. Fewer than 10% of the population would have been subject to the pink slip requirement in the 1930s. See Kornhauser, Shaping Public Opinion, supra note 24, at 142.

250. The IRS received more than 80 million tax returns in 1976. Off. of Tax Analysis, Treasury Dep't, High Income Tax Returns 1975 and 1976: A Report Emphasizing Nontaxable and Nearly Nontaxable Income Tax Returns 27 tbl.7 (1978), https://home.treasury.gov/system/files/131/Report-High-Income-1978.pdf [https://perma.cc/99SC-AJVC].

collection. Instead, lawmakers justified tax publicity with reference to an egalitarian vision of fiscal governance. They argued for a small-c constitutional baseline for the transparency of tax returns like any other public records, noted its instrumental value for democratic decisionmaking and discourse, and grounded transparency in separation of powers and executive overreach.[251] To be sure, lawmakers contended that publicity would result in significant revenue gains to the federal government, especially during the 1930s when it ran large deficits. But they also grasped the intrinsic, not only the consequentialist, value of transparency.

Finally, previous legislative advocacy for transparency mirrored today's debate in tax and redistributive policy. As in 1924, today's progressive lawmakers have seen—and found alarming—record economic inequality and its erosion of the norms constituting our society.[252] They have also accused the wealthy of not bearing a fair share of the costs of government due to both evasion and design flaws in tax law.[253] Those precise concerns drove policymakers to seek transparency of returns during the infancy of our current income tax.[254] Further, selective release of public figures' tax information for political gain has drawn scrutiny today as in the 1920s. Hunter Biden, for example, has sued the IRS, and blamed the Republican-controlled House Ways and Means Committee, for a "public campaign to selectively disclose [his] confidential tax . . . information."[255] At the same time, Trump has accused the Democrat-controlled Ways and Means Committee of weaponizing his tax returns and releasing them to the public.[256] These concerns thus cut across the political spectrum today. That same fear of selective information leak led lawmakers in the 1920s to draw tax transparency as a constitutional baseline.

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251. Supra section I.B.

252. See, e.g., Jim Tankersley, Warren Revives Wealth Tax, Citing Pandemic Inequalities, N.Y. Times (Mar. 1, 2021), https://www.nytimes.com/2021/03/01/business/elizabeth-warren-wealth-tax.html (on file with the *Columbia Law Review*) (discussing Senator Elizabeth Warren's proposed wealth tax legislation in 2021, designed to reduce income inequality).

253. Jonathan Weisman & Alan Rappeport, An Exposé Has Congress Rethinking How to Tax the Superrich, N.Y. Times (Oct. 27, 2021), https://www.nytimes.com/2021/06/09/us/politics/propublica-taxes-jeff-bezos-elon-musk.html (on file with the *Columbia Law Review*) (chronicling lawmakers' responses to a report showing that the ultrawealthy paid just a fraction of their wealth in taxes, including by exploiting tax loopholes).

254. See supra notes 105–117 and accompanying text.

255. Complaint at 4, Biden v. Internal Revenue Serv., No. 23-2711 (D.C.C. Sept. 27, 2024), 2023 WL 6185232.

256. Jim Tankersley, Susanne Craig & Russ Buettner, Trump Tax Returns Undermine His Image as a Successful Entrepreneur, N.Y. Times (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/us/politics/trump-tax-returns.html (on file with the *Columbia Law Review*).

II. TAX TRANSPARENCY TODAY

This Part examines contemporary treatment of tax transparency. Section II.A describes the disclosure rules of Sweden, Finland, and Norway. This discussion serves three purposes. First, along with Part I's historiography, it shows feasibility. Disclosure was a recurring feature of our federal income tax and remains a critical component of Nordic tax administration. Contemporary data also provide practical insights into the design of transparency regimes for policymakers. Second, Nordic countries and the United States share a commitment to egalitarianism and transparency in governance. This commitment might be more foundational in Nordic legal cultures and constitutionally mandated, but it is also embodied in super-statutes like the Freedom of Information Act in the United States.[257] Section II.A's discussion, therefore, fleshes out how this commitment translates into regulatory regimes, enacted through political systems different from the United States. Third, Nordic countries have grounded tax transparency—as did lawmakers in the United States in 1924 and 1934[258]—in democratic values like open governance rather than compliance. This accentuates the lacuna in contemporary scholarship.[259] Section II.B offers a brief survey of the scholarly literature on tax privacy and fiscal citizenship.

A. *Contemporary Tax-Transparency Regimes*

While Congress settled on confidentiality in 1976,[260] Nordic countries today have robust transparency rules under which everyone's basic tax information is public. Importantly, tax disclosure in Finland, Norway, and Sweden is premised on a constitutional default of open governance. Sweden, for example, has required transparency of government records since the Freedom of the Press Act of 1766.[261] The current version of the Act was drafted in 1949 and is one of the four fundamental laws that form Sweden's modern Constitution. The Act provides for a general guarantee of "public access to official documents," defined broadly as any records held by (and received or drawn up by) a public authority.[262] This

257. Infra notes 284–289 and accompanying text.

258. See supra Part I.

259. See infra section II.B.

260. See supra note 245 and accompanying text.

261. Tryckfrihetsförordningen [TF] [Constitution] 2:1–2 (Swed.) (Freedom of the Press Act of 1766); see also Jonas Nordin, The Swedish Freedom of Print Act of 1776—Background and Significance, 7 J. Int'l Media & Ent. L. 137, 137 (2018) (explaining that the Act allowed complete freedom of print outside of explicit prohibitions against "challenges to the Evangelical faith; attacks on the constitution, the royal family or foreign powers; defamatory remarks about civil servants or fellow citizens; and indecent or obscene literature").

262. Tryckfrihetsförordningen [TF] [Constitution] 2:1 (Swed.); see also Regeringskansliet (Ministry of Just. of Swed.), The Constitution of Sweden 3 (2013), https://www.government.se/contentassets/7b69df55e58147638f19bfdfb0984f97/the-

constitutional entitlement aims to "encourage the free exchange of opinion [and] the availability of comprehensive information."[263]

Similarly, Norway's Constitution confers "a right of access to documents of the State and municipalities."[264] It explicitly puts the burden on the government to "create conditions that facilitate open and enlightened public discourse."[265] Transparency of government records is therefore an integral component of the state's performance of its constitutional duty to develop the infrastructure of free expression.[266] This duty entails an "inclusive" design of a public sphere "with genuine access to information and opportunities for participation."[267] Finland's Constitution does the same: Article 12 provides that documents "in the possession of" government institutions are public, to which all shall have access.[268]

Transparency is therefore the default in the Nordic countries. The constitutional right of access to public records covers a broad swath of data deposited with government institutions, and the state has an affirmative duty to facilitate information exchange and open discourse. Because transparency is crucial to the functioning of democracy, Nordic countries allow government secrecy only to achieve defined goals and through explicit statutory exemptions.[269] In Sweden, for example, the government may restrict the freedom of information only if necessary to achieve specific interests enumerated in the Constitution, including national security, fiscal policy, and "protection of the personal or economic circumstances of individuals."[270] Finland's Constitution provides that the state may, by statute, specifically restrict the publication of a document

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constitution-of-sweden [https://perma.cc/D5WR-R2WB] ("In most cases a state's constitution is contained in a single document. Sweden, however, has four[,] [including] . . . the 1949 Freedom of the Press Act (which contains the principle of the public nature of official documents and rules about the right to produce and disseminate printed matter) . . . .").

263. See Tryckfrihetsförordningen [TF] [Constitution] 2:1 (Swed.).

264. Kongeriket Norges Grunnlov [Constitution] May 21, 2024, art. 100, cl. 5 (Nor.).

265. Id. cl. 6.

266. See Norwegian Ministry of Culture and Equal., The Norwegian Commission for Freedom of Expression Report 20 (2022), https://www.regjeringen.no/contentassets/753af2a75c21435795cd21bc86faeb2d/en-gb/pdfs/nou202220220009000engpdfs.pdf [https://perma.cc/KZ76-CYMQ] (explaining the importance of access to public records in maintaining an informed democracy).

267. Id. at 12.

268. Suomen perustuslaki [Constitution] June 11, 1999, ch. 2, § 12 (Fin.).

269. See Regeringskansliet (Ministry of Just. of Swed.), supra note 262, at 6; Swedish Inst., Openness in Sweden, Sweden, https://sweden.se/life/democracy/openness-in-sweden [https://perma.cc/LK7W-KR8W] (last updated Jan. 19, 2024) ("Openness and transparency are vital parts of Swedish democracy.").

270. Tryckfrihetsförordningen [TF] [Constitution] 2:2 (Swed.) (listing seven grounds that justify government restriction of public access to public documents); Regeringskansliet (Ministry of Just. of Swed.), supra note 262, at 6 (noting that the freedom of information may be properly restricted by statute upon defined conditions).

held by the government, but only "for compelling reasons."[271] Similarly, Norway allows the government to limit access to public documents to protect individual privacy or "for other weighty reasons."[272]

The Nordic constitutions thus balance the democratic guarantee of transparency against compelling government interests in secrecy, like the protection of personal information. This framework has produced three tax-transparency regimes that disclose important individual tax information, but not full returns, to the public. For example, Finland's Act on the Public Disclosure and Confidentiality of Tax Information first provides that tax information on "identifiable" taxpayers is confidential.[273] The Act then lays out exceptions to the rule of confidentiality, making public the following data: (1) taxable earned income, (2) taxable capital income and property, (3) income and net wealth tax,[274] (4) amount of withholding taxes, and (5) amount of tax refund or payment.[275] Similarly, Norway discloses its citizens' net income and wealth, as well as taxes paid, on a searchable internet database organized by the names, post codes, and cities of the individual taxpayers.[276] The Norwegian Tax Administration balances the ease of online access to tax information with a deterrent: Anyone who inspects the tax information of an individual taxpayer will have their own identity disclosed to the taxpayer whose information has been accessed.[277]

As discussed, Sweden's Constitution explicitly allows the government to curtail disclosure to protect the "personal or economic circumstances"

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271. Suomen perustuslaki [Constitution] June 11, 1999, ch. 2, § 12 (Fin.).

272. Kongeriket Norges Grunnlov [Constitution] May 21, 2024, art. 100, cl. 5 (Nor.).

273. 1346/1999 Laki verotustietojen julkisuudesta ja salassapidosta [Act on the Public Disclosure and Confidentiality of Tax Information], ch. 2, § 4 (Fin.).

274. Finland abolished its wealth tax in 2006. Sarah Perret, Why Were Most Wealth Taxes Abandoned and Is This Time Different?, 42 Fiscal Stud. 539, 540 (2021); Taxable Incomes: Documentation of Statistics, Statistics Finland, https://www.stat.fi/en/statistics/documentation/tvt [https://perma.cc/9SJU-GK9B] (last visited Sept. 11, 2024).

275. 1346/1999 Laki verotustietojen julkisuudesta ja salassapidosta [Act on the Public Disclosure and Confidentiality of Tax Information] § 5, ¶ 1 (1)–(6) (Fin.); see also Äimä, supra note 25, at 3; Public Information on Individual Income Taxes, Vero Skatt, https://www.vero.fi/en/About-us/finnish-tax-administration/data-security-and-information-access/public-information-on-taxes/public-information-on-individual-income-taxes [https://perma.cc/67ZD-N4KA] (last updated Oct. 9, 2024) (making public individual taxpayers' earned income, capital gains, tax liability, withholding taxes, and tax payments or refunds).

276. Search the Tax Lists, Skatteetaten, https://www.skatteetaten.no/en/forms/search-the-tax-lists [https://perma.cc/5XH6-HV5J] (last visited Sept. 13, 2024); see also Ken Devos & Marcus Zackrisson, Tax Compliance and the Public Disclosure of Tax Information: An Australia/Norway Comparison, 13 eJ. Tax Rsch. 108, 121 (2015).

277. See Skatteetaten, supra note 276 ("You can also see who has accessed your information. If you access the tax information for a person, they can see that you have been searching for them.").

of individuals.[278] Sweden's Public Access to Information and Secrecy Act of 2009 ("PAISA") effects this constitutional provision. Similar to the Finnish statute, PAISA first mandates confidentiality for information about individuals' personal and financial circumstances held by the state in connection with tax administration.[279] Full secrecy as to individual tax information, however, contradicts Sweden's constitutional guarantee of public inspection of documents held by the state.[280] PAISA thus provides that all tax *decisions*, and the basis for determining tax liability, are public.[281] That is, the government's determinations of the taxpayer's income and tax liability are public, but sources of income (or of specific deductions) reported on the tax returns are confidential.[282] Further, if the government denies a taxpayer's deduction in an audit, it would have to disclose its decision explaining the denial and publicize information about the deductions that would otherwise be confidential.[283] The underlying principle is that the government must disclose the revenue agency's findings and decisions, whereas unprocessed information filed on the tax returns is confidential. As a result, the public has access to some of the most salient tax data, including the total amount of earned income, capital gain, and tax liability.

The Nordic countries have thus developed extensive regimes that disclose individuals' income, wealth, and tax liability to the public.[284] Importantly, they have not justified transparency on the ground that it

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278. Tryckfrihetsförordningen [TF] [Constitution] 2:2 (Swed.); see also Regeringskansliet (Ministry of Just. of Swed.), supra note 262, at 6.

279. 27 ch. 1 § Offentlighets- och sekretesslag (Svensk författningssamling [SFS] 2009:400) (Swed.). For translations of relevant portions of PAISA, see Hambre, supra note 27, *passim*.

280. See Tryckfrihetsförordningen [TF] [Constitution] 2:1,3 (Swed.); Hambre, supra note 27, at 198.

281. 27 ch. 6 § Offentlighets- och sekretesslag (SFS 2009:400) (Swed.); see also Public Information, Skatteverket (2023), https://www.skatteverket.se/servicelankar/otherlanguages/inenglishengelska/moreonskatteverket/publicinformation.4.2106219b17988b0d2314cf.html [https://perma.cc/TY3J-2C9Q] (last visited Sept. 13, 2024) (showing that "decisions on taxation" are public and not subject to the general rule of confidentiality).

282. See Hambre, supra note 27, at 198.

283. Id.; see also Joshua D. Blank, The Timing of Tax Transparency, 90 S. Cal. L. Rev. 449, 499 (2017) [hereinafter Blank, Timing] (explaining that "public disclosure of tax information itself may even bolster positive attitudes toward the taxing authority and the tax system").

284. Japan has also mandated tax disclosure in the past. Between 1950 and 2004, Japan instituted a high-income taxpayer notification system and posted the name, the address, and either the taxable income or the income tax liability of select individual taxpayers for two weeks in bulletin boards of tax offices. As many as 6.7% of all taxpayers' information was made public each year. Japan abolished the notification system in 2005 but started mandating public disclosure of highly compensated corporate executives in 2010. See Makoto Hasegawa, Jeffrey L. Hoopes, Ryo Ishida & Joel Slemrod, The Effect of Public Disclosure on Reported Taxable Income: Evidence From Individuals and Corporations in Japan, 66 Nat'l Tax J. 571, 576–78, 579 n.17 (2013).

would result in increased revenue and better compliance.[285] Instead, tax disclosure flows from a constitutional default of open public records and governance and channels democratic functions.[286] This open-governance basis for tax transparency is not foreign to the United States. As discussed, progressive lawmakers had grounded calls for tax publicity in the constitutional requirement of public accounting of federal receipts and expenditures.[287] Today, the Freedom of Information Act is a super-statute that entrenches a normative framework of transparency in not only fiscal but all matters of governance.[288] To be sure, the Nordic countries differ from the United States in their egalitarianism (manifested in, for example, robust social-welfare programs), their historical traditions of transparency, and their trust of government power.[289] But the core commitment to government transparency is one to which all democracies, including ours, aspire.

B. *Scholarly Approaches*

This section surveys the existing literature on tax privacy and fiscal citizenship. First, scholars have criticized the current statutory guarantee of tax confidentiality, grounding their calls for transparency in

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285. See Devos & Zackrisson, supra note 276, at 121 ("The transition from paper to electronic distribution [of the tax lists] was not primarily driven by any concerns about compliance, but rather as a consequence of the Norwegian government's digitalization strategy.").

286. See supra notes 261–272 and accompanying text.

287. See supra notes 130–136 and accompanying text; see also U.S. Const. art. I, § 9, cl. 7.

288. 5 U.S.C. § 552 (2018); see also John C. Brinkerhoff Jr., FOIA's Common Law, 36 Yale J. on Regul. 575, 614–16 (2019) ("The APA's influence on FOIA looks quite like Eskridge and Ferejohn's description of the 'colonizing effects' of a 'superstatute.' That is, certain well-entrenched statutes 'form a normative backdrop, influencing the way [other] statutes are read and applied.'" (alteration in original) (footnote omitted) (quoting William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1235, 1265–66 (2001))); William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216 (2001) ("A super-statute is a law or series of laws that . . . seeks to establish a new normative or institutional framework for state policy . . . ."); Vivian M. Raby, The Freedom of Information Act and the IRS Confidentiality Statute: A Proper Analysis, 54 U. Cin. L. Rev. 605, 624–25 (1985) (describing the purpose of the Freedom of Information Act as encouraging the "open flow and access of information to the public").

289. See supra notes 261–268 and accompanying text. Compare Public Trust in Government: 1958–2024, Pew Rsch. Ctr. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/ [https://perma.cc/U853-VNCF] (describing patterns of American trust in the United States government throughout the twentieth and twenty-first centuries, with 22% of Americans trusting the government to do the right thing in April 2024), with Elsa Pilichowski, Building Trust to Reinforce Democracy: Main Findings from the OECD Trust Survey, OECD (July 13, 2022), https://www.oecd.org/governance/oecd-presentation-trust-report-launch-2022.pdf (on file with the *Columbia Law Review*) (finding Nordic countries with the highest levels of trust among those surveyed in 2021).

compliance-based arguments.[290] They argue for the use of publicity as an effective "tool to attack intentional and unintentional non-compliance with the tax laws," characterizing privacy (at least as to tax information) as a "fading social norm" and IRS enforcement mechanisms as overly "intrusive" and "not sufficient."[291] These scholars reject the view that confidentiality encourages accurate reporting of income. Instead, they contend and offer evidence that publicity could deter tax evasion and foster the social norms of voluntary compliance, thus resulting in revenue gains.[292] In their view, the knowledge of disclosure would increase the taxpayers' perceived risk of detection of any potential fraud and disincentivize underreporting of income.[293] And because people tend to abide by laws more if they perceive a high level of compliance by others—due to the operation of social norms—tax publicity would aid compliance by providing information on compliance rates and promoting trust in tax administration.[294] Transparency of full tax returns, however, could undermine that trust. Scholars have thus proposed limited disclosure of key data (or ranges) of all income taxpayers, including their incomes and

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290. See supra note 30 (collecting examples of scholarly arguments in favor of tax transparency); see also George K. Yin, Reforming (and Saving) the IRS by Respecting the Public's Right to Know, 100 Va. L. Rev. 1115, 1124–40 (2014). For earlier debate, see generally Bittker, supra note 28; Archie W. Parnell, Jr., The Right to Privacy and the Administration of the Federal Tax Laws, 31 Tax Law. 113 (1977). For a general overview, see Darby, supra note 28.

291. Kornhauser, Full Monty, supra note 3, at 97–98, 101; see also Mazza, supra note 30, at 1076–78.

292. See, e.g., Bø, et al., supra note 30, at 36; Laury & Wallace, supra note 30, at 428–29; Linder, supra note 30, at 977; Mazza, supra note 30, at 1076–78; see also Richard A. Posner, The Right of Privacy, 12 Ga. L. Rev. 393, 407 (1978); Paul Schwartz, The Future of Tax Privacy, 61 Nat'l Tax J. 883, 887–90 (2008).

293. See, e.g., Leandra Lederman, Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance, 60 Stan. L. Rev. 695, 697–98 (2007) [hereinafter Lederman, Statutory Speed Bumps] (describing structural mechanisms of the federal income tax as red lights and speed bumps that encourage taxpayer compliance). Ignorance of disclosure enables opportunities for tax evasion. See Leandra Lederman, The Fraud Triangle and Tax Evasion, 106 Iowa L. Rev. 1153, 1188–90 (2021).

294. See Kornhauser, Full Monty, supra note 3, at 104 ("[Publicity] encourages taxpayers to follow the law by strengthening the social norm of compliance by . . . providing information about compliance rates, reasons for taxes, and increasing trust in the system."); Lederman, Norms and Enforcement, supra note 30, at 1468–75 (2003) ("[E]mpirical studies of taxpayer behavior . . . have shown that at least some taxpayers respond with increased compliance to appeals that suggest that tax compliance is the norm."). Some scholars have described these social effects in terms of reciprocity. See Dan M. Kahan, The Logic of Reciprocity: Trust, Collective Action, and Law, 102 Mich. L. Rev. 71, 71–72 (2003) (describing individuals' motivation to contribute to public goods when they perceive that others are doing the same and applying that principle to tax reform proposals); Posner, Law and Social Norms, supra note 30, at 1794–95 (describing how social norms around tax compliance can function as an additional social penalty when someone fails to pay their taxes).

tax liabilities.[295] They conclude that the "social auditing"[296] instantiated in transparency regimes could serve as an "automatic enforcement device."[297]

Second, a different group of scholars and commentators has defended confidentiality on the grounds of both compliance and taxpayer privacy.[298] They dispute the value of publicity in facilitating revenue collection. Earlier arguments focused on the taxpayer-trust theory: Taxpayers entrust the state with private information on the expectation of confidentiality.[299] On this view, government disclosure of individual tax data, instead of enlisting the public in tax enforcement, discourages taxpayers from submitting accurate information to the state in the first place.[300] More recently, scholars have turned to behavioral insights. They contend that disclosure could disincentivize tax compliance by revealing the extent of noncompliance to other taxpayers, who then reduce their own compliance levels.[301] By contrast, confidentiality allows the state to

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295. E.g., Kornhauser, Full Monty, supra note 3, at 21–22 (proposing to publicize the taxpayer's name, rough address, narrow income range, capital gains range, exclusions, deductions, credits, and tax rates); Joseph Thorndike, Show Us the Money, 123 Tax Notes 148, 149 (2009) (proposing to publicize "key pieces of individual tax information," such as total income plus taxes paid).

296. Thorndike, Challenge, supra note 3, at 691.

297. Anna Bernasek, Should Tax Bills Be Public Information?, N.Y. Times (Feb. 13, 2010), https://www.nytimes.com/2010/02/14/business/yourtaxes/14disclose.html (on file with the *Columbia Law Review*); see also Lederman, Norms and Enforcement, supra note 30, at 1457–62 ("[T]here is empirical evidence that compliance norms play a role [in tax compliance].").

298. See supra notes 32–33 (collecting examples of arguments in favor of tax privacy); cf. Blank, Timing, supra note 283, at 455 (proposing privacy in ex post tax enforcement actions but transparency in ex ante tax rulings and agreements).

299. The locus classicus of the taxpayer-trust theory is an argument made by Mellon to oppose the 1924 transparency regime. Mellon contended:

> While the government does not know every source of income of a taxpayer and must rely upon the good faith of those reporting income, still in the great majority of cases this reliance is entirely justifiable, principally because the taxpayer knows that in making a truthful disclosure of the sources of his income, information stops with the government. It is like confiding in one's lawyer.

Off. of Tax Pol'y, supra note 32, at 18–19; see also S. Rep. No. 94-938, at 317–18 (1976), as reprinted in 1976 U.S.C.C.A.N. 3438, 3746–48 (suggesting that privacy aids the voluntary, self-assessment system key to the success of the federal income tax).

300. See Blank, In Defense of Individual Tax Privacy, supra note 32, at 280–82 (outlining principal arguments for the taxpayer trust theory, including fear of harassment, loss of credit, and advantage to business competitors); Hatfield, supra note 28, at 606 ("[T]axpayers provide information because they trust the IRS to keep it confidential.").

301. See, e.g., Blank, In Defense of Individual Tax Privacy, supra note 32, at 322–26 ("Memorable examples of the government's failure to detect or penalize noncompliant taxpayers, however, could have negative tax-compliance effects on individuals whose voluntary compliance is conditional on that of other taxpayers."); Kay Blaufus, Jonathan Bob, Philipp E. Otto & Nadja Wolf, The Effect of Tax Privacy on Tax Compliance—An Experimental Investigation, 26 Eur. Acct. Rev. 561, 577 (2017) ("[P]ublic disclosure could

make salient instances of successful enforcement actions (e.g., those that result in criminal sanctions for tax fraud), without exposing its tax-enforcement weaknesses (e.g., the IRS's failure to audit or penalize underreporting of income).[302] The government could therefore exploit taxpayers' cognitive biases to maximize revenue collection. Further, taxpayers today submit a broad swath of personal information to the IRS, and scholars have defended tax confidentiality based on the state's obligation to safeguard individual privacy and autonomy.[303] Part III discusses this literature in greater detail in connection with taxpayers' role as stakeholders.[304]

Third, an outgrowth of this debate focuses on the narrower question of whether the tax records of public figures should be public. In partial response to Trump's refusal to release his tax returns, scholars and commentators have argued for the need of mandatory disclosure of presidential candidates' tax returns and financial data.[305] They have also

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lead to more, instead of less, evasion."); see also Kahan, supra note 294, at 83 (reporting that the "social cueing" resulting from inferred noncompliance of other taxpayers "triggers a reciprocal motive to evade"); Lederman, Norms and Enforcement, supra note 30, at 1487 ("[P]ublicity of large tax gap figures tend to increase others' perceived dishonesty."); Yair Listokin & David M. Schizer, I Like To Pay Taxes: Taxpayer Support for Government Spending and the Efficiency of the Tax System, 66 Tax L. Rev. 179, 185–86 (2013) (discussing the literature on tax morale); cf. Marsha Blumenthal, Charles Christian & Joel Slemrod, Do Normative Appeals Affect Tax Compliance? Evidence From a Controlled Experiment in Minnesota, 54 Nat'l Tax J. 125, 134–35 (2001) (finding "little or no evidence that either of two normative appeals delivered by letter affects aggregate tax compliance behavior"). But see Alex Raskolnikov, Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement, 109 Colum. L. Rev. 689, 700 (2009) [hereinafter Raskolnikov, Revealing Choices] ("When asked, real taxpayers repeatedly assert that their main reason for paying taxes honestly is personal integrity or anticipation of the guilt they would feel if they failed to comply." (footnote omitted)).

302. Blank, In Defense of Individual Tax Privacy, supra note 32, *passim*; see also Blank & Levin, supra note 33, at 5–8 (arguing that public tax enforcement may build a sense of government vigilance among taxpayers). 26 U.S.C. § 6103(h)(4)(A) allows the federal government to disclose tax-return information in "judicial or administrative proceedings" to which the taxpayer is a party. Courts have read this provision to permit the government to disclose in press releases information already disclosed in previous judicial proceedings. See, e.g., Lampert v. United States, 854 F.2d 335, 337–38 (9th Cir. 1988) ("Thus if a taxpayer's return information is lawfully disclosed in a judicial proceeding . . . the information is no longer confidential and may be disclosed again . . . .").

303. See, e.g., James N. Benedict & Leslie A. Lupert, Federal Income Tax Returns—The Tension Between Government Access and Confidentiality, 64 Cornell L. Rev. 940, 943–46 (1979) ("In favor of privacy is the personal nature of the return information."); Hatfield, supra note 28, *passim*; see also Cynthia Blum, The Flat Tax: A Panacea for Privacy Concerns?, 54 Am. U. L. Rev. 1241, 1242–43 (2005) ("Some commentators view this [comprehensive] collection of information by the IRS as an unacceptable invasion of privacy . . . ."); Hayes Holderness, Taxing Privacy, 21 Geo. J. on Poverty L. & Pol'y 1, 2–5 (2013) (arguing that recipients of government programs to aid low-income Americans are subject to routine privacy violations).

304. See infra section III.A.3.

305. See, e.g., Blank, Tax Transparency, supra note 3, at 7 (arguing that disclosure of presidential candidates' tax information could lead to a more informed electorate); Hemel,

contested Congress's power to release candidates' returns and financial data to the public under existing law and constitutional constraints.[306]

Finally, beyond the debate over privacy and transparency as revenue-raising tools, tax scholars have begun a lively conversation about fiscal citizenship—that is, "the constellation of reciprocal rights and responsibilities" that bind individuals to the fiscal apparatus of the government.[307] Under this view, taxation forms an integral part of the social contract between individual citizens and the state: The former should make appropriate fiscal contributions based on their ability to pay, while the latter bears the reciprocal duty to ensure a fair and effective tax system.[308] Further, the voluntary nature of the income tax's self-assessment system fosters a beneficial tax consciousness and encourages civic engagement in the discourse about redistribution.[309] Scholars have in particular pointed to wars as times of shared sacrifice and heightened sensibility of the fiscal duties of citizenship.[310]

As this survey shows, contemporary discussions of tax confidentiality focus (albeit not exclusively) on the question of compliance, that is, to what extent publicity regimes incentivize compliance with tax law, and whether the resulting revenue gains outweigh an intrusion into individual privacy. This focus contrasts with historical debates and contemporary disclosure regimes, both of which emphasize transparency as a (sometimes

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supra note 3, at 62–63 ("Presidential tax transparency bolsters the confidence of individual income taxpayers that their elected leader also pays part of the price 'for civilized society.'"); Thorndike, Presidential Disclosure, supra note 3, at 1723 ("America needs a law mandating presidential tax disclosure . . . ."); Thorndike, Challenge, supra note 3, at 691 ("The public release of politicians' tax returns would have salubrious effects . . . put[ting] to rest the . . . suspicion that politicians play by a different set of rules . . . .").

306. See, e.g., Amandeep S. Grewal, The President's Tax Returns, 27 Geo. Mason L. Rev. 439, 440 (2020) ("[Section 6103(f)(1) of the tax code] cannot establish congressional access to [a President's] tax return information beyond that allowed by the Constitution."); see also George K. Yin, Preventing Congressional Violations of Taxpayer Privacy, 69 Tax Law. 103, 105–07 (2015) (arguing that a Congressional Committee broke the law by releasing the return information of 51 taxpayers during an investigation of a high-ranking IRS official).

307. Thorndike, Presidential Disclosure, supra note 3, at 1725; see also supra note 41 and accompanying text (scholarly discussion about fiscal citizenship).

308. See Mehrotra, Reviving Fiscal Citizenship, supra note 41, at 946 ("[T]axation is a fundamental part of the social contract between the state and its citizens . . . ."); see also The Fiscal Citizenship Project, Fiscal Citizenship, https://fiscal-citizenship.com [https://perma.cc/QV24-FAM5] (last visited Sept. 12, 2024) (describing a new research initiative on fiscal citizenship).

309. See, e.g., Zelenak, Form 1040, supra note 41, *passim*; Mehrotra, Reviving Fiscal Citizenship, supra note 41, at 94 (noting a history of civic engagement fostered by taxation).

310. Mehrotra, American Fiscal State, supra note 41, at 307 ("[World War I] gave new meaning to the idea of shared sacrifice and fiscal citizenship."); Sparrow, Warfare State, supra note 41, at 171 (explaining how wartime propaganda depicted labor, analogizing it to the patriotic sacrifice of soldiers); see also Steven A. Bank, Kirk J. Stark & Joseph J. Thorndike, War and Taxes 1–2 (2008); Bank, Become Respectable, supra note 227, at 128 (theorizing the public's tacit approval of tax avoidance today as compensation for the wealthy's fiscal sacrifice in the form of high marginal tax rates after the 1950s).

small-c) constitutional default critical to democratic and egalitarian fiscal governance.[311] Further, scholars treat the tax records of presidential candidates and elected officials as exceptions to the general rule of confidentiality, presumably on account of their significant political power. But this leaves unanswered the question whether others who exercise significant (for example, economic) power in the political community must also do so on the basis of transparency. Finally, while the fiscal-citizenship literature has theorized individual taxpayers' relationship with the fiscal state, it has often emphasized its attitudinal component.

III. TOWARD AN ANALYTICAL FRAMEWORK OF FISCAL CITIZENSHIP

This Part constructs an analytical framework of taxpayers' dynamic interactions with the fiscal state. The framework provides insights into the debate over tax confidentiality and contributes to the discourse on fiscal citizenship. In contrast to prevailing scholarly approaches, it incorporates compliance as only one of the multiple reasons that counsel in favor of or against privacy of individual tax records. Further, it grounds demands for tax transparency in broader democratic and egalitarian values, thus cohering with the terms of the historical legislative debate uncovered in Part I, as well as the goals of contemporary tax-disclosure regimes described in Part II.[312]

Under this framework, taxpayers play four different roles as they engage with the fiscal apparatus of a democratic regime: (1) They report nonpublic information to the state as they self-assess their income-tax liabilities;[313] (2) they fund the state by providing resources that pay the costs of governance;[314] (3) they are stakeholders in an egalitarian community who are entitled to claim fiscal benefits with dignity;[315] and (4) they shape the operation of tax policy on the ground by exercising their delegated discretion in interpreting tax law.[316] Section III.A examines the distinct valences of privacy and transparency within each role. Further, the degree to which each taxpayer engages in these respective roles depends on two factors: (a) their own income and wealth level; and (b) the distribution of income and wealth within the fiscal community structured by federal taxation.[317] As this Part will show, transparency is more appropriate for ultrawealthy taxpayers in times of heightened economic inequality.

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311. Compare notes 290–303 and accompanying text (describing scholarly views), with supra Part I, section II.A (describing foreign tax regimes which have constitutionalized transparency).

312. See supra sections I.B, II.A.

313. See infra section III.A.1.

314. See infra section III.A.2.

315. See infra section III.A.3.

316. See infra section III.A.4.

317. See infra section III.B.

A. *Taxpayers' Roles in a Democratic Regime*

1. *Taxpayers as Reporters of Nonpublic Information.* — At the most basic level, taxpayers report nonpublic information to the state as they self-assess their income-tax liabilities. Under 26 U.S.C. §§ 6011–6012, all taxpayers must submit to the IRS annual statements of their incomes.[318] In practice, this means filing Form 1040, either electronically or by mail.[319] This two-page document (and additional schedules) requires filers to report a broad swath of mostly financial information that determines how much income tax they must pay (or be refunded, if withheld taxes exceed overall liability). These data include identifying information like names, addresses, and social security numbers; filing status (e.g., single or married); data about net income, like wage, interest, dividends, annuities, Social Security benefits, and the standard or itemized deductions; data about taxes withheld and tax credits (e.g., the child tax credit or the earned income tax credit); and the amounts to be paid or refunded.[320]

Beyond the financial data reported on Form 1040, the IRS holds significant information about individual taxpayers in the form of supporting records filed in connection with their tax returns or disputes with the agency. This ranges from the mundane to the highly sensitive. For example, taxpayers who have wage income—roughly 80% of all filers—must include a W-2 statement that reveals the sources of their wage income (i.e., their employers).[321] Further, audited taxpayers who claim the medical-expense deduction might need to produce evidence that they incurred those expenses for legitimate medical care, and that evidence could include hospital treatment records and doctors' notes describing their symptoms.[322]

Tax controversy reveals an even broader array of personal information. In one case, a transgender taxpayer claimed the medical-

318. 26 U.S.C. §§ 6011–6012 (2018); see also Rev. Rul. 2007–14, 2007–20 C.B. 863 (describing as "frivolous" the "position taken by some taxpayers that complying with the internal revenue laws is purely voluntary and that taxpayers are not legally required to file federal tax returns or pay federal tax").

319. See 26 C.F.R. § 1.6011-1(b) (2024) (requiring taxpayers to report information on "prescribed forms").

320. IRS, Form 1040 (2023), https://www.irs.gov/pub/irs-pdf/f1040.pdf [https://perma.cc/79B7-YZXM].

321. See About Form W-2, Wage and Tax Statement, IRS, https://www.irs.gov/forms-pubs/about-form-w-2 [https://perma.cc/94KZ-THHC] (last updated Sept. 11, 2024); Erica York & Michael Hartt, Sources of Personal Income, Tax Year 2020, Tax Found. (June 28, 2023), https://taxfoundation.org/data/all/federal/personal-income-tax-returns-pi-data [https://perma.cc/MD24-LABB].

322. See 26 U.S.C. § 213; IRS Audits: Records We Might Request, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/audits-records-request [https://perma.cc/CMQ3-97GZ] (last updated Aug. 19, 2024).

expense deduction for gender-affirming care.[323] To support her claim, the taxpayer revealed to the IRS intimate details about her early life, including her physiological traits at birth, her discomfort with her assigned sex, her affinity with women's clothing, and the anxiety and low self-esteem that resulted from the incongruence between her assigned sex and her gender.[324] In another case, the taxpayers claimed an exclusion for gains received from the sale of real property.[325] Because the Code excludes certain gains from sale of "principal residence" from gross income, taxpayers do not ordinarily report them on their tax returns.[326] But whether a home is the taxpayer's "principal" residence (and therefore whether the taxpayer is entitled to an exclusion) entails a fact-intensive inquiry. Courts consider nonexhaustive factors like the taxpayer's place of employment, the "place of abode of the taxpayer's family members," and the locations of the taxpayer's banks, recreational clubs, and places of worship.[327] To show their entitlement to the principal-residence exclusion, taxpayers in that case revealed a host of details about their personal lives, including their family members' use of the hot tubs and extramarital sexual activities.[328] Beneath the surface of Form 1040 thus lies a deep repository of private individual information held by the IRS. This will not surprise viewers of the Academy Award–winning film, *Everything Everywhere All at Once*, who know well that IRS agents will chase taxpayers through the multiverse to obtain receipts of karaoke machines bought by laundromat owners.[329]

For taxpayer-reporters, the value of privacy lies in the protection of personal and sensitive information that individuals may reasonably want the state to keep secret.[330] That is, tax disclosure sounds primarily in

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323. O'Donnabhain v. Comm'r, 134 T.C. 34 (2010); see also Hatfield, supra note 28, at 614–15 (detailing how one taxpayer was forced to disclose medical information regarding gender-affirming care).

324. *O'Donnabhain*, 134 T.C. at 35–36.

325. Farah v. Comm'r, No. 23412–05, 94 T.C.M. (CCH) 595, at *6 (2007). For additional documentation of private information held by the IRS, see Hatfield, supra note 28, at 619–23.

326. 26 U.S.C. § 121 ("Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more."). The exclusion is currently limited to $500,000 for married taxpayers filing jointly. Id. § 121(b)(2)(A).

327. Treas. Reg. § 1.121-1(b)(2) (2023); see also Cohen v. United States, 999 F. Supp. 2d 650, 669 n.6 (S.D.N.Y. 2014) (listing the factors under the Treasury Regulations).

328. *Farah*, 94 T.C.M. (CCH) at *4; Brief for Petitioners at 29, *Farah*, 94 T.C.M. (CCH) 595 (No. 23412-05), 2005 WL 3498352.

329. See Everything Everywhere All at Once 16:40–17:29 (A24 Pictures 2022).

330. For early treatment of the legal concept of privacy, particularly in connection with common law and torts, see, e.g., Restatement (Second) of Torts § 652A (Am. L. Inst. 1977) (setting out general principles that govern privacy torts); William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960) (discussing the four privacy torts, including public disclosure

informational privacy—the dissemination of individually identifiable data by state actors.[331] And it affects decisional privacy at the margins. If individuals anticipate the state will disclose the records of their actions, they may decline to engage in certain activities ex ante and structure their lives and choices differently from a state of presumed secrecy. In other words, the possibility of scrutiny by others could reduce the "breathing room" that enables self-development, in the process burdening self-governance critical to a democracy.[332] Scholars have thus criticized unwarranted disclosure of private information for obstructing individual autonomy and inhibiting the "civility rules" that constitute both the individual and the community.[333]

These principles of informational and decisional privacy entail two corollaries. First, only the *dissemination* of information intrudes upon privacy norms. The government therefore leaves the individual undisturbed if it holds identifiable data (as it must for effective governance), limits circulation within government employees performing relevant duties, and withholds public access. As a result, modern regimes of tax transparency have not publicized the troves of data held by tax agencies which contain the most sensitive and personally revealing information. For example, the Revenue Act of 1924 mandated disclosure of only individual tax liabilities.[334] The 1934 pink slips asked for the taxpayer's name, address, gross income, total deductions, taxable income, and taxes payable.[335] Similarly, the Nordic countries today publicize only the amounts of the taxpayer's earnings and capital income, along with their tax paid.[336] These transparency provisions thus keep confidential, for example, records used to substantiate the medical-expense deduction that describe the symptoms of the taxpayer's illness. That is, they protect the most valuable forms of informational privacy while disclosing less sensitive financial data.

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of embarrassing private information); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195–96 (1890) (highlighting the need for privacy laws).

331. See Daniel J. Solove, A Taxonomy of Privacy, 154 U. Pa. L. Rev. 477, 525–52 (2006) (describing information dissemination as a category of privacy harms).

332. See Julie E. Cohen, What Privacy Is For, 126 Harv. L. Rev. 1904, 1906 (2013) (arguing that privacy regulation should preserve "breathing room").

333. See Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Calif. L. Rev. 957, 963 (1989) [hereinafter Post, Social Foundations of Privacy] (arguing that privacy torts uphold "civility rules"); see also Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 Stan. L. Rev. 1373, 1423–28 (2000) (discussing how informational privacy gives rise to individual autonomy).

334. Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293; see also supra section I.B.

335. Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 680, 698; see also supra text accompanying note 235.

336. 1346/1999 Laki verotustietojen julkisuudesta ja salassapidosta [Act on the Public Disclosure and Confidentiality of Tax Information] § 5, ¶ 1 (1)–(6) (Fin.); see also supra section II.A.

This corollary extends to decisional privacy. Scholars have justified informational privacy on the ground of individual autonomy.[337] The knowledge that the state will disclose one's medical records could discourage transgender individuals from seeking gender-affirming care (or from seeking the tax deduction). This would impose a serious burden on their autonomy. By contrast, the knowledge that the state will disclose one's income range is much less likely to discourage the kind of self-development and experimentation that implicate privacy norms. To be sure, disclosure could incentivize or disincentivize work.[338] But it is unclear whether the decision to work harder in fact sounds in decisional privacy. Even if disclosure of income levels affects motivation to engage in economic activities, the change results from the individual's decisionmaking process based on *full* information obtained from the transparency regime. And informed decisionmaking could in fact enhance the exercise of individual autonomy in comparison with the individual's agency under conditions of imperfect knowledge.[339] A legislative directive to disclose only income ranges and tax liabilities therefore leaves many forms of decisional privacy protected.

Second, only the dissemination of *nonpublic* information intrudes upon privacy norms. If the information is already publicly accessible from credible sources, disclosure by the IRS or the Treasury Department is unlikely to undermine individual privacy. Judicial doctrine on tax confidentiality has recognized this corollary. In *Lampert v. United States*, for example, taxpayers challenged the federal government's disclosure of their tax-return information in press releases.[340] The taxpayers in *Lampert* had participated in tax-evasion schemes that the government prosecuted in court.[341] In the process of litigation, the government disclosed tax information about those taxpayers (which became public court records) and subsequently issued press releases that contained the same tax information disclosed in court.[342] The Code authorizes the disclosure of tax information in judicial proceedings, but it does not explicitly allow the

337. See supra notes 332–333 and accompanying text.

338. See, e.g., Zoë Cullen & Ricardo Perez-Truglia, How Much Does Your Boss Make? The Effects of Salary Comparisons, 130 J. Pol. Econ. 766, 797–804 (2022) (offering empirical evidence that employees work harder when they find out that managers earn more than expected, and lose motivation when they find out that peers earn more than expected). It is of course a separate (but related) question whether taxpayers would try to increase their earnings in a disclosure regime that does not unbundle the sources of income (i.e., a disclosure regime that does not publicize whether a higher-income taxpayer earns more because of wage or because of, for example, capital investments).

339. See Cynthia Estlund, Just the Facts: The Case for Workplace Transparency, 63 Stan. L. Rev. 351, 354 (2011) (noting that disclosure regimes in other contexts have not intruded upon autonomy).

340. 854 F.2d 335, 337 (9th Cir. 1988).

341. Id. at 336.

342. Id.

government to do so in a press release.[343] The taxpayers thus argued that the government breached the statutory guarantee of confidentiality by releasing tax information that is already publicly accessible as court filings.[344] The Ninth Circuit disagreed and held on the basis of legislative purpose: "Congress sought to prohibit only the disclosure of *confidential* tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information."[345] To be sure, not all courts follow the Ninth Circuit.[346] But their disagreement derives from differing approaches to reading § 6103, not the underlying principle that privacy norms do not extend to information in the public sphere. That principle has gained broad acceptance.[347]

The extent to which tax-transparency regimes violate privacy thus depends on how much information the public already has. In the past few decades, the availability of and people's willingness to disclose financial information about themselves have expanded the public sphere at the expense of the domains of individual privacy.[348] That is, modern media contain a large depository of data about individuals and households, including financial data that would be disclosed under a tax-transparency regime. For example, *Forbes* publishes an annual "definitive ranking of America's richest people" and lists precise estimates of their net worth, with real-time updates pegged to changes in the value of their stocks and property.[349] It also publishes the residence, citizenship, marital status,

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343. See 26 U.S.C. § 6103(h)(4) (2018) (listing permissible disclosures of tax information in a judicial or administrative proceeding); *Lampert*, 854 F.2d at 337 ("There is also no dispute that 26 U.S.C. § 6103(h)(4)(A) authorizes the disclosure of return information in judicial proceedings . . . .").

344. *Lampert*, 854 F.2d at 337.

345. Id. at 338 (emphasis added) (citing Thomas v. United States, 671 F. Supp. 15, 16 (E.D. Wis. 1987); United Energy Corp. v. United States, 622 F. Supp. 43, 46 (N.D. Cal. 1985)).

346. See, e.g., Johnson v. Sawyer, 120 F.3d 1307, 1318 (5th Cir. 1997) (discussing how the Fourth and Tenth Circuits declined to adopt the Ninth Circuit's rule from *Lampert*); Mallas v. United States, 993 F.2d 1111, 1121–22 (4th Cir. 1993) (noting that the Tenth Circuit diverged from the Ninth Circuit's rule in *Lampert*). But see Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996) (following *Lampert*); William E. Schrambling Acct. Corp. v. United States, 937 F.2d 1485, 1489–90 (9th Cir. 1991) (same).

347. See, e.g., Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494 (1975) (noting that under the Second Restatement of Torts, "ascertaining and publishing the contents of public records are simply not within the reach of . . . privacy actions" (citing William L. Prosser, Law of Torts 810–11 (4th ed. 1964))); United States v. Posner, 594 F. Supp. 930, 936 (S.D. Fla. 1984) ("[O]nce certain information is in the public domain, as it is here, the entitlement to privacy is lost."); Daniel J. Solove, Conceptualizing Privacy, 90 Calif. L. Rev. 1087, 1105 (2002) (describing the disclosure of previously concealed information as a violation of privacy interests).

348. See Post, Social Foundations of Privacy, supra note 333, at 998 (describing mass media's role in constructing the public sphere).

349. Chase Peterson-Withorn, The Forbes 400: The Richest People in America, Forbes (Sept. 8, 2023), https://www.forbes.com/forbes-400 [https://perma.cc/N757-7XHZ].

education history, sources of wealth, and the history of net worth for those billionaires.[350] To be sure, third-party reporting does not accurately disclose *every* aspect of one's wealth and income, and the government may have access to far more financial data. Careful design of the legal regime, however, can mitigate these concerns. As the historical analysis has shown, disclosure can advance transparency goals without exposing every aspect of the taxpayer's financial life.[351] Knowledge of reported income and tax liabilities can be enough. Further, as this Part will discuss, policymakers can make disclosure a matter of taxpayer choice.[352]

Further, federal statutes require officials and nominees for federal offices to submit financial disclosures. The Ethics in Government Act of 1978 imposes this filing requirement on the President, the Vice President, members and certain employees of Congress and the judiciary, administrative law judges, nominees whose appointment requires Senate confirmation, along with federal employees compensated at level 15 of the General Schedule.[353] The content of federal financial disclosures is expansive.[354] Office of Government Ethics Form 278e includes information about employment incomes, employers, retirement accounts, bank account balances, debt, and spousal financial records.[355] State law mandates even greater disclosure. In general, the salary of any state or local employee is publicly accessible on online databases under the operation of state public records laws.[356] California alone discloses the precise amounts of the salaries and benefits of more than two million employees.[357] Employees have challenged the public records law as an invasion of their privacy, and state courts have in general disagreed. The California Supreme Court, for example, has relied on the values of open

350. E.g., Warren Buffett, Forbes (Jan. 10, 2024), https://www.forbes.com/profile/warren-buffett [https://perma.cc/J5P3-ULF7].

351. See supra sections I.B–.C.

352. See infra notes 499–500 and accompanying text.

353. 5 U.S.C. § 13103(a), (b), (f) (2018); see also id. § 13101 (defining categories of people covered by the financial disclosure requirement).

354. Scholars have criticized Form 278e for being vague and not conveying important information. See Blank, Tax Transparency, supra note 3, at 18–19 (summarizing the scholarly critique).

355. See OGE Form 278e: Overview, Off. Gov't Ethics, https://www.oge.gov/web/278eGuide.nsf/Overview [https://perma.cc/D83K-HSWZ] (last visited Oct. 24, 2024).

356. E.g., Public Records Act, Cal. Gov't Code §§ 7920.000–7931.000 (2024); Mass. Gen. Laws Ann. ch. 66, §§ 1–21 (2024); see also Public Records Law and State Legislatures, Nat'l Conf. State Legislatures, https://www.ncsl.org/cls/public-records-law-and-state-legislatures [https://perma.cc/CV64-5TQW] (last updated May 30, 2023) (providing a fifty-state survey of state transparency and public-records legislation).

357. See Government Compensation in California, Cal. State Controller, https://gcc.sco.ca.gov [https://perma.cc/U5FV-H8NP] (last visited Sept. 13, 2024).

governance and democratic accountability to exclude state employees' salaries from the zone of individual privacy.[358]

This section thus provides two main insights. First, policymakers can design—and have designed—tax-transparency regimes to mitigate harms to privacy values. Disclosing income ranges and tax liabilities, for example, would impose a much lower cost on the exercise of individual autonomy than public inspection of full tax records. Second, taxpayers qua reporters have attenuated privacy interests if they are ultrawealthy or hold political power. Tax-transparency regimes could disclose information about them, some of which is already public knowledge, and state dissemination of public facts does not produce any cognizable claim of invasion of privacy. This is not to dismiss the privacy interests of the wealthy but only to say that they are more attenuated today than in a world where individually identifying information were not publicly shared online. Further, wealthy taxpayers may have greater incentives and latitude to misreport financial data, both because the potential benefits of tax avoidance are significant and because they can more easily hide their income.[359] This aspect of the reporter role will be discussed in greater detail in the next section.[360] Of course, norms generated by other interactions with the fiscal state can defeat even strong privacy interests as reporters.[361] By contrast, lower- and middle-income taxpayers without government employment have much stronger privacy interests in their capacity as reporters. This distinction extends to the populist arguments against disclosure advanced, for example, by the Sentinels of the Republic in 1934[362]: If information about the income and wealth of the ultrarich is publicly accessible, tax disclosure will not put them at additional risk of falling victim to crimes (e.g., kidnapping). By contrast, the Sentinels' arguments appealed to the public precisely because lower- and middle-income households have strong privacy interests in their financial records.

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358. Int'l Fed'n of Pro. & Tech. Emps. v. Super. Ct. of Alameda Cnty., 165 P.3d 488, 491 (Cal. 2007) ("[W]ell-established norms of California public policy and American public employment exclude public employee names and salaries from the zone of financial privacy protection." (internal quotation marks omitted) (quoting Int'l Fed'n of Pro. & Tech. Emps. v. Sup. Ct. of Alameda Cnty., 27 Cal. Rptr. 3d 262, 267 (Ct. App. 2005))).

359. Wealthy taxpayers tend to have much more capital gains and less labor income than middle- or lower-income taxpayers. It is difficult to underreport wage and salaries because of third-party reporting. See Lederman, Statutory Speed Bumps, supra note 293, at 698 ("Structural systems that engage third parties to help facilitate compliance with the federal income tax are thus highly successful."); William G. Gale & Semra Vignaux, The Difference in How the Wealthy Make Money—and Pay Taxes, Brookings Inst. (Sept. 7, 2023), https://www.brookings.edu/articles/the-difference-in-how-the-wealthy-make-money-and-pay-taxes [https://perma.cc/GYM2-6ZSB] (explaining how lower-income taxpayers "receive almost all their income through wages and retirement income" while wealthier people rely on income from capital).

360. See infra section III.A.2.

361. See infra sections III.A.2–.4.

362. See supra notes 240–243 and accompanying text.

2. *Taxpayers as Funders of the State.* — Taxpayers perform another fundamental function in their interactions with the federal fiscal apparatus: They fund the state by collectively bearing the costs of governance. In our voluntary-compliance system, fiscal citizens self-assess their taxable income, subject to some third-party reporting.[363] For ultrawealthy taxpayers who derive most of their income from capital rather than labor, this self-assessment is accompanied by little oversight from administrative or enforcement agencies.[364] After years of underfunding, the IRS examined (or audited, in common parlance) only 0.2% of all personal income-tax returns in fiscal year 2022.[365] Regarding most forms of income derived from property dealings and investments (i.e., nonwage income), income taxes are not withheld at the source.[366] The federal tax system thus relies on the public's cooperation to distribute the costs of government services and programs that enable wealth accumulation in the first place.

As to taxpayers as funders, the values of privacy and disclosure sound in the egalitarian distribution of tax burdens. This concept has two components: (1) compliance and (2) democratic response. Compliance centers on the possibility that disclosing or safeguarding individual tax data would incentivize honest reporting of income and consequently honest assessment of income taxes. By contrast, democratic response centers on the possibility that disclosing or safeguarding individual tax data would create political pressure and mobilize legislation to improve tax fairness. In a democratic regime, this notion of tax fairness consists in the fiscal community's judgment after deliberation based on adequate information. This section discusses these two components in turn.

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363. See Levi, supra note 45, at 50–54 (distinguishing coercion from voluntary compliance and articulating the concept of "quasi-voluntary compliance"). Examples of third-party reporting include employer reports of wage income on the Form W-2 and reports of securities transactions by investment brokerages on the Form 1099-B. See About Form 1099-B, Proceeds from Broker and Barter Exchange Transactions, IRS (Feb. 14, 2023), https://www.irs.gov/forms-pubs/about-form-1099-b [https://perma.cc/P2BG-ZWBY]; About Form W-2, Wage and Tax Statement, IRS (July 14, 2023), https://www.irs.gov/forms-pubs/about-form-w-2 [https://perma.cc/94KZ-THHC]. Third-party reporting fosters compliance. See Leandra Lederman & Joseph C. Dugan, Information Matters in Tax Enforcement, 2020 BYU L. Rev. 145, 147–48 (explaining that information reporting results in substantial increases in compliance).

364. Scholars have documented the inadequate information reporting for high-income and wealthy taxpayers. See Joshua D. Blank & Ari Glogower, The Tax Information Gap at the Top, 108 Iowa L. Rev. 1597, 1601 (2023) (arguing that the government's "activity-based" approach to tax information reporting allows wealthy taxpayers to "avoid IRS scrutiny").

365. SOI Tax Stats—Examination Coverage and Recommended Additional Tax After Examination, by Type and Size of Return—IRS Data Book Table 17, IRS, https://www.irs.gov/pub/irs-soi/23dbs03t17ex.xlsx (on file with the *Columbia Law Review*) (last updated Apr. 19, 2024).

366. See 26 U.S.C. § 3402 (2018) (requiring collection of taxes at the source for labor income).

The effect of disclosure on tax compliance has received extensive scholarly treatment.[367] As discussed in the literature review, the conceptual underpinnings include: the taxpayer-trust theory, which posits that taxpayers entrust the government with nonpublic information on the promise of confidentiality and that disclosure would disincentivize honest reporting of income;[368] the social-audit theory, which posits that disclosure functions as automatic enforcement because taxpayers more accurately report their income when they know others will see the returns;[369] and behavioral (e.g., reciprocity-based) theories, which posit that taxpayers calibrate their compliance in accordance with their perception of overall compliance in the fiscal community.[370]

Studies have provided empirical support for these divergent theories. In one influential paper, for example, scholars examined the shift in Norway to an internet-based mechanism of tax disclosure.[371] Before 2001, some but not all Norwegian municipalities distributed tax information through widely circulated print catalogues.[372] The shift to internet disclosure in 2001 therefore substantially increased public access to tax information in localities without those catalogues. The study found that this stronger transparency regime resulted in a 3.1% increase in reported income, equivalent to a roughly 20% reduction of tax evasion in one income group.[373] By contrast, an experimental study found that disclosure could in fact lead to decreases in revenue collection because effects of social norms crowd out the social-audit effect when taxpayers see the significant level of noncompliance in the tax system.[374]

The empirical debate thus has not produced consensus. A recent intervention in this literature has pointed to the value of exploiting taxpayers' bounded rationality and cognitive biases in incentivizing compliance.[375] For example, due to the salience bias, taxpayers pay more attention to specific, conspicuous instances of tax evasion or enforcement

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367. See supra notes 30–33 and accompanying text; supra section II.B (providing examples of such scholarly treatment).

368. Supra notes 32, 299–300 and accompanying text.

369. Supra notes 291–292, 296–297 and accompanying text.

370. Supra notes 301–302 and accompanying text.

371. Bø et al., supra note 30.

372. Id. at 41–42.

373. Id. at 49. Indeed, because Norway had a transparency regime before the shift to internet disclosure in 2001, any deterrence effect would have resulted from the degree to which internet disclosure strengthened the existing transparency regime. That is, ceteris paribus, the shift from a full confidentiality regime to online disclosure of tax data would have resulted in even more honesty in income reporting.

374. See Blaufus et al., supra note 301, at 577.

375. See Blank, In Defense of Individual Tax Privacy, supra note 32, at 287–88 (relying on behavioral research and providing salient examples more likely to influence taxpayer compliance due to cognitive biases); see also Schenk, supra note 33, at 254.

than general statistics released by the IRS.[376] Disclosure could expose the federal government's enforcement weakness, reified as concrete examples of successful tax evasion by the wealthy, public figures, and celebrities.[377] This would lower taxpayers' subjective assessment of the government's enforcement power. By contrast, confidentiality allows the federal government to hide those concrete examples of enforcement failures and to publicize only concrete examples of enforcement success.[378] This would "inflate" taxpayers' perception of (1) the costs of noncompliance (e.g., penalties for underreporting of income) and (2) the risk that the IRS would find out about their noncompliance.[379] Under this framework, tax transparency disables powerful tools of revenue collection.

While scholars have not reached conclusive answers as to the revenue potential of disclosure/confidentiality, the cognitive bias framework highlights the variation of privacy values at different income levels. Two principles are at work here. First, salience bias is more pronounced when taxpayers encounter conspicuous examples of *similarly situated* taxpayers.[380] That is, Joe the cashier will likely lower his assessment of IRS enforcement capability if he sees vivid examples of other cashiers or wage-earning taxpayers getting away with tax evasion. By contrast, vivid examples of tax evasion by, for example, Martha Stewart will not have the same effect. Joe might chalk up any successful tax evasion to tax-avoidance techniques available to Martha Stewart but not himself.[381] Second, upper-income (in particular ultrawealthy) taxpayers have substantial resources to

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376. See David Gamage & Darien Shanske, Three Essays on Tax Salience: Market Salience and Political Salience, 65 Tax L. Rev. 19, 80 (2011) (arguing that the administration of individual income taxes involves high political salience); Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1519 (1998) (describing the salience bias as a form of availability heuristic).

377. See Blank, In Defense of Individual Tax Privacy, supra note 32, at 271 (describing how public access to tax information can allow the public to see who has been able to evade taxes among politicians, celebrities, and even people they know).

378. Id. at 272.

379. Id.

380. See id. at 290–91 (describing the salience bias); Joshua D. Rosenberg, The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane, 16 Va. Tax Rev. 155, 228 (1996) ("Many people have learned to evade tax liability by hearing others proudly tell of their own successful tax evasion.").

381. This effect is due to the operation of two factors. First, seeing similarly situated individuals engage in tax evasion might trigger the salience bias to a more significant degree simply because it is more relevant to one's decision whether to evade taxes, and relevance grabs attention. Second, individuals might learn of tax evasion by similarly situated individuals in more salient ways than tax evasion by others. For example, restaurant workers might find out first-hand that others in the restaurant have failed to report tips on income-tax returns. Those same workers are more likely to learn about tax evasion by ultrawealthy individuals in newspaper articles, which tend to attract less attention or appear less vivid. See generally Dan Pilat & Sekoul Krastev, Why Do We Focus on Items or Information that Are More Prominent and Ignore Those that Are Not? The Salience Bias, Explained, The Decision Lab, https://thedecisionlab.com/biases/salience-bias [https://perma.cc/S73K-VXCF] (last visited Sept. 13, 2024).

mitigate their cognitive biases. Those resources include tax lawyers and professionals who can present an accurate view of IRS enforcement capability to their clients.[382]

The combined operation of these two principles suggests that privacy norms are more valuable to lower- and middle-income taxpayers qua funders of the state. That is, lower- and middle-income taxpayers tend to lower their subjective assessment of IRS enforcement capacity upon seeing conspicuous examples of tax evasion by *other* lower- and middle-income taxpayers.[383] This leads to decreased compliance levels at that income group. It also leads to revenue loss in comparison to a confidentiality regime in which the government can advertise to lower- and middle-income taxpayers *only* conspicuous examples of successful enforcement. The dynamic is different for wealthy taxpayers. They, too, might lower their subjective assessment of IRS enforcement capacity upon seeing conspicuous examples of tax evasion by other wealthy taxpayers. After all, economic power eliminates some, but not all, cognitive and decisional biases.[384] But unlike their lower- and middle-income counterparts, wealthy taxpayers have immense resources at their disposal to mitigate the effects of any cognitive bias.[385] An $89 subscription to TurboTax is unlikely to correct a middle-income taxpayer's inaccurate perception of IRS enforcement strength.[386] But a tax lawyer at a large law firm who charges $2,000 an hour will.[387] Disclosure of wealthy taxpayers' tax records thus activates compliance-reducing cognitive biases to a much lower degree.

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382. See David M. Schizer, Enlisting the Tax Bar, 59 Tax L. Rev. 331, 331 (2006) [hereinafter Schizer, Tax Bar] (describing the resources of the private tax bar and how they "outmatch" even the government in "sheer numbers, . . . access to information, and, at least in some cases, . . . sophistication and expertise").

383. To be sure, examples of low-level tax evasion abound in nontax settings (e.g., in cash transactions like restaurant tipping). But disclosure of tax returns still confirms and provides additional data about the extent of such evasion.

384. See Kai Ruggeri et al., The Persistence of Cognitive Biases in Financial Decisions Across Economic Groups, 13 Nature 10329, 10333 (2023) (finding "clear evidence that resistance to cognitive biases is not a factor contributing to or impeding upward economic mobility"). But see Renu Isidore R. & Christie P., The Relationship Between Income and Behavioral Biases, 24 J. Econ. Fin. & Admin. Sci. 127, 141 (2019) (finding that higher-income investors exhibit lower cognitive biases except the overconfidence bias). This Essay argues that even if the wealthy suffer as much from bounded rationality as ordinary people, the wealthy have substantially more resources to mitigate cognitive biases than ordinary people.

385. There is reason to think that wealthy taxpayers are more likely to use the resources at their disposal to mitigate cognitive biases with respect to tax planning than in other decisionmaking processes. For one, the notorious complexity of income-tax rules may increase the perceived need to rely on expert advice.

386. TurboTax Online Tax Software & Pricing 2023–2024, Intuit, https://turbotax.intuit.com/personal-taxes/online [https://perma.cc/W935-CAA7] (last visited Sept. 10, 2024).

387. See Roy Strom, Big Law Rates Topping $2,000 Leave Value 'In Eye of Beholder', Bloomberg L. (June 9, 2022), https://news.bloomberglaw.com/business-and-practice/big-

The possibility of democratic response may also affect the values of privacy/transparency for taxpayers qua funders. An egalitarian distribution of tax burdens concerns not only taxpayers' compliance with the existing tax regime. It also concerns the fairness (or lack thereof) inherent in the existing regime itself. To use the terminology of the transparency debates in 1864, compliance goals "equalize" tax burdens by incentivizing honest reporting of liability.[388] By contrast, democratic response equalizes tax burdens by helping the public deliberate on fiscal governance and reach informed legislative solutions to improve tax fairness. It serves an instrumental and epistemic function, which lawmakers emphasized in 1924.[389]

Transparency thus holds the promise of improving tax fairness. The critical question is whether state disclosure of *individual* tax records can invigorate distributive discourse and force legislative action. This depends on two factors: (1) the degree of variation between different taxpayers' tax liabilities in the *same* income range and (2) the extent to which the (average or individual) tax burdens in one income group deviate from the public's conception of fairness.

The first factor reflects horizontal equity, the principle that tax law should treat similarly situated taxpayers similarly.[390] Scholars have criticized horizontal equity, arguing that it is a derivative norm without any independent value.[391] But the public has broadly agreed on an aspiration of equal tax treatment on the basis of market income.[392] Knowledge of large-scale violations of horizontal equity could therefore trigger democratic response to shape the law in accordance with the public's perception of fairness. Most lower- and middle-income groups feature

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law-rates-topping-2-000-leave-value-in-eye-of-beholder (on file with the *Columbia Law Review*).

388. The Publication of Incomes, supra note 75; see also supra notes 83–84 and accompanying text.

389. See supra notes 137–145 and accompanying text.

390. David Elkins, Horizontal Equity as a Principle of Tax Theory, 24 Yale L. & Pol'y Rev. 43, 43 (2006).

391. For examples of the classic debate over horizontal equity as an independent principle of tax fairness, see Louis Kaplow, Horizontal Equity: Measures in Search of a Principle, 42 Nat'l Tax J. 139 (1989); Ira K. Lindsay, Tax Fairness by Convention: A Defense of Horizontal Equity, 19 Fla. Tax Rev. 79 (2016); Richard A. Musgrave, Horizontal Equity, Once More, 43 Nat'l Tax J. 113 (1990); see also A Half Century With the Internal Revenue Code: The Memoirs of Stanley S. Surrey, at xxxv–xxxviii (Lawrence Zelenak & Ajay K. Mehrotra eds., 2022) (discussing Surrey's keen awareness of horizontal equity as a politically important principle).

392. See Martin Feldstein, Compensation in Tax Reform, 29 Nat'l Tax J. 123, 128 (1976) ("The principle of horizontal equity is not a mere abstraction of academic theory but a fundamental belief that is widely held and strongly felt. Many otherwise desirable tax reforms may never be enacted because doing so would violate this injunction that government action should not treat equals unequally.").

some, but not substantial, variation in individual tax liability.[393] Their income derives primarily from labor. And the federal government taxes wages as ordinary income, withholds them at the source, and provides virtually no option for tax deferral besides retirement savings.[394] By contrast, wealthy taxpayers have diversified income streams that may receive preferential federal tax treatment in the form of lower tax rates (for certain capital gains) and opportunity for deferral (due to the realization doctrine).[395] The variation in income-tax liability among the wealthy is therefore more substantial. ProPublica's analysis of the leaked tax returns shows, for example, that Ken Griffin had an effective income-tax rate of 29.2%, while Michael Bloomberg was taxed at 4.1%.[396] Disclosure of this variation is thus more likely to trigger democratic response than disclosure at lower income levels.

The second factor is a species of vertical equity, the principle that tax law should appropriately differentiate among differently situated taxpayers.[397] The precise content of vertical equity depends on a full theory of distributive justice, which is beyond the scope of this Essay. To analyze the value of privacy, however, it is enough to note most Americans believe that the wealthy are not paying their fair share of taxes. A recent poll shows that 60% of the public is bothered "a lot" by wealthy people's unwillingness to shoulder their tax burdens—a figure far higher than the 38% of the public bothered by their own taxes.[398] Disclosure of individual tax records—and salient examples of tax evasion by the wealthy—is then more likely to result in legislation that moves the law closer to the public's vision of vertical equity. The strongest evidence for this claim perhaps lies in the very response to the leak of tax returns to ProPublica.[399] After ProPublica's reporting showed the extent of the ultrawealthy's evasion of income taxes, a chorus of lawmakers, think tanks, and commentators called for structural

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393. See York & Hartt, supra note 321 (showing that wages and salaries constitute the vast majority of personal income for taxpayers earning less than $1 million).

394. 26 U.S.C. §§ 61, 3402 (2018).

395. Id. §§ 1, 1001; York & Hartt, supra note 321 (showing a mix of business, investment, and wage income for taxpayers earning more than $1 million).

396. America's Top 15 Earners and What They Reveal About the U.S. Tax System, ProPublica (Apr. 13, 2022), https://www.propublica.org/article/americas-top-15-earners-and-what-they-reveal-about-the-us-tax-system [https://perma.cc/Y7U5-7B3Z]. Ken Griffin is the founder and CEO of Citadel, a leading hedge fund. Kenneth C. Griffin, Citadel, https://www.citadel.com/our-teams/leadership/kenneth-c-griffin [https://perma.cc/PKZ3-MMFT] (last visited Sept. 10, 2024).

397. See Musgrave, supra note 391, at 113 ("The call for equity in taxation is generally taken to include a rule of horizontal equity (HE), requiring equal treatment of equals, and one of vertical equity (VE), calling for an appropriate differentiation among unequals.").

398. J. Baxter Oliphant, Top Tax Frustrations for Americans: The Feeling that Some Corporations, Wealthy People Don't Pay Fair Share, Pew Rsch. Ctr. (Apr. 7, 2023), https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share [https://perma.cc/SSL4-5NVK].

399. See supra notes 10–14 and accompanying text.

tax reform.[400] This culminated in President Joe Biden's proposal for accrual taxation.[401] While Congress has yet to pass any major tax reform legislation, the saga shows the potential of tax disclosure at the top income levels to foster distributive dialogue and initiate change.[402]

Thus, for taxpayers qua funders, transparency values may overcome privacy norms at the highest income and wealth levels. Disclosure of the ultrawealthy's tax records will not result in a significant reduction of tax compliance attributable to cognitive biases. It may in fact trigger a democratic response to effect a more egalitarian distribution of tax burdens. By contrast, neither compliance nor the possibility of democratic response counsels tax disclosure at the lower- and middle-income levels.

3. *Taxpayers as Stakeholders in a Fiscal Community.* — In addition to their reporting and funding roles, taxpayers are stakeholders entitled to claim fiscal benefits with dignity.[403] In the United States, given the lack of robust spending programs, like universal healthcare, tax law and administration are the primary redistributive tools of the federal

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400. See, e.g., Chuck Marr, Ctr. on Budget & Pol'y Priorities, ProPublica Shows How Little the Wealthiest Pay in Taxes: Policymakers Should Respond Accordingly 1 (2021), https://www.cbpp.org/sites/default/files/7-15-21tax.pdf [https://perma.cc/3WLJ-PAKY] (discussing the findings of ProPublica's investigation and the need for tax reforms); John Cassidy, The ProPublica Revelations Show Why We Need to Tax Wealth More Effectively, New Yorker (June 8, 2021), https://www.newyorker.com/news/our-columnists/the-propublica-revelations-show-why-we-need-to-tax-wealth-more-effectively (on file with the *Columbia Law Review*) ("The revelations from ProPublica have provided another demonstration of why this [tax reform] is so badly needed."); Jonathan Weisman & Alan Rappeport, An Exposé Has Congress Rethinking How to Tax the Superrich, N.Y. Times (June 9, 2021), https://www.nytimes.com/2021/06/09/us/politics/propublica-taxes-jeff-bezos-elon-musk.html (on file with the *Columbia Law Review*) (last updated Oct. 27, 2021) (noting increased congressional interest in tax reform following the ProPublica report).

401. See Samantha Jacoby, Biden Proposal Would Eliminate Tax-Free Treatment for Much of Wealthiest Households' Annual Income, Ctr. on Budget & Pol'y Priorities (May 6, 2022), https://www.cbpp.org/blog/biden-proposal-would-eliminate-tax-free-treatment-for-much-of-wealthiest-households-annual (on file with the *Columbia Law Review*) (characterizing the accrual-tax proposal as a response to the ProPublica investigation); Press Release, White House, President's Budget Rewards Work, Not Wealth With New Billionaire Minimum Income Tax (Mar. 28, 2022), https://www.whitehouse.gov/omb/briefing-room/2022/03/28/presidents-budget-rewards-work-not-wealth-with-new-billionaire-minimum-income-tax [https://perma.cc/6FTB-VT4U] (discussing President Biden's "Billionaire Minimum Income Tax" proposal).

402. Disclosure will not always fuel calls to increase tax burdens at the top. Instead, the point is to enrich public discourse about distributive fairness by providing salient data to citizens in a democracy. The transparency regime associated with the Revenue Act of 1924, for example, did not trigger proposals to tax unrealized gains, in part because the ultrawealthy of that time had *taxable* dividend income "at least somewhat reflective of their net worth." Lawrence Zelenak, 1924, 2021: Taxes of the Ultrarich, and Mark-to-Market Reforms, 172 Tax Notes 583, 592 (2021).

403. See Bruce Ackerman & Anne Alstott, The Stakeholder Society 11 (1999) (proposing a "stakeholder" plan which guarantees every American $80,000 upon reaching adulthood, in recognition of the belief that "[a]s a citizen of the United States, each American is entitled to a stake in his country").

government.[404] Congress has embedded critical welfare benefits in the Code. For example, the Earned Income Tax Credit (EITC) is one of the largest federal transfer programs and subsidizes low-income, working families by providing them with a refundable income-tax credit equivalent to a percentage of their earnings, up to a maximum amount.[405] The EITC reduces the regressive effects of payroll taxes, providing about $57 billion of benefits to more than 23 million low-income taxpayers in 2023.[406] To use a more recent example, the COVID-19 pandemic prompted Congress to expand the child tax credit.[407] The American Rescue Act of 2021 increased the maximum credit per child to $3,600, which contributed to the largest drop—46%—in childhood poverty in history.[408] Both the EITC and the child tax credit are implemented by the tax system, in part because tax-based administration is less costly, and determining the benefit amount under either regime requires income measurement. Taxpayers must file taxes—usually the Form 1040—to claim those benefits.[409] Those filings, of course, become part of the tax records that a disclosure regime could publicize.

Disclosure of lower- and middle-income taxpayers' records thus threatens their privacy interests as stakeholders. To be sure, scholars have contested the extent to which tax administration indeed reduces stigma—

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404. See Lily Batchelder & David Kamin, Policy Options for Taxing the Rich, *in* Maintaining the Strength of American Capitalism 200, 202 (Melissa S. Kearney & Amy Ganz eds., 2019) (noting that other high-income countries rely much more heavily on direct spending programs to redistribute income and wealth).

405. See 26 U.S.C. § 32 (2018); Jennifer Sykes, Katrin Križ, Kathryn Edin & Sarah Halpern-Meekin, Dignity and Dreams: What the Earned Income Tax Credit (EITC) Means to Low-Income Families, 80 Am. Socio. Rev. 243, 244 (2015) ("[T]he EITC is now by far the largest cash transfer to the poor . . . .").

406. See Anne L. Alstott, The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, 108 Harv. L. Rev. 533, 534 (1995) (noting the EITC's origin as a way to "offset[] the adverse distributional and incentive effects of federal income and payroll taxes"); Statistics for Tax Returns With the Earned Income Tax Credit (EITC), IRS, https://www.eitc.irs.gov/eitc-central/statistics-for-tax-returns-with-eitc/statistics-for-tax-returns-with-the-earned-income [https://perma.cc/64EW-T9K4] (last updated Jan. 8, 2024) (detailing the amount of EITC received per state).

407. See Coronavirus Tax Relief, IRS, https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments [https://perma.cc/426C-57FD] (last updated Sept. 24, 2024) (explaining the government's attempt to use the child tax credit to help with the impact of COVID-19).

408. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 144–45 (codified at 26 U.S.C. § 24); see also Kalee Burns, Liana Fox & Danielle Wilson, Expansions to Child Tax Credit Contributed to 46% Decline in Child Poverty Since 2020, U.S. Census Bureau (Sept. 13, 2022), https://www.census.gov/library/stories/2022/09/record-drop-in-child-poverty.html [https://perma.cc/KK8Y-5J5U]; Press Release, Congressman Don Beyer, Beyer Backs Legislation to Expand Child Tax Credit, Boost Affordable Housing (Jan. 19, 2024), https://beyer.house.gov/news/documentsingle.aspx?DocumentID=6067 [https://perma.cc/9MY2-987K] ("In 2021 Democrats passed an expanded Child Tax Credit that led to the largest drop in in child poverty in American history.").

409. See supra notes 319–320 and accompanying text (describing the Form 1040).

a dignitary harm associated with traditional means-tested entitlement programs.[410] But embedding a welfare program in the tax-filing process in which most middle- and upper-income groups participate must reduce stigma at least somewhat. That is, a reduction in income-tax liability attributable to the Child Tax Credit is surely less stigmatizing than applying for food stamps at an agency.[411] And for purposes of this Essay, it is enough that public knowledge of a taxpayer's claim of welfare benefits due to state disclosure is more stigmatizing than unawareness under a confidentiality regime. This is important because Congress decided to write welfare spending into the Code precisely on the ground that it minimizes stigma. The EITC, for example, was designed to help the working poor "without . . . a stigmatizing, invasive, and often degrading welfare system."[412] A recent sociological study showed that recipients of tax-administered welfare benefits see them as legitimate springboards for upward mobility.[413] Those programs thus foster a sense of "social inclusion and citizenship."[414] This is in part because tax confidentiality shields recipients from the loss of equal social standing and other people's scrutiny of their low-income status.[415] A disclosure regime that covers lower- and middle-income taxpayers detracts from these worthy goals.[416]

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410. See, e.g., Alstott, supra note 406, at 535 ("Tax-based transfer programs may be cheaper and less stigmatizing than welfare, although advocates typically assert these claims without empirical support."); Carlos Andrade, The Economics of Welfare Participation and Welfare Stigma, 2 Pub. Fin. & Mgmt. 294, 322–25 (2002) (evaluating studies suggesting that stigma impacts an individual's decision to use welfare); Robert Moffitt, An Economic Model of Welfare Stigma, 73 Am. Econ. Rev. 1023, 1033–34 (1983) (arguing that the stigma of welfare recipiency can impact an individual's decision to participate in a welfare program); David A. Weisbach & Jacob Nussim, The Integration of Tax and Spending Programs, 113 Yale L.J. 955, 1004 n.152 (2004) (discussing, but not endorsing, scholarly views that tax transfers have diminished stigmatizing effects).

411. See Tianna Gaines-Turner, Joanna Cruz Simmons & Mariana Chilton, Recommendations From SNAP Participants to Improve Wages and End Stigma, 109 Am. J. Pub. Health 1664, 1664–65 (2019) (explaining how SNAP recipients experience stigma both at the grocery store and at county assistance offices).

412. David T. Ellwood, Poor Support: Poverty in the American Family 115 (1988); see also Alstott, supra note 406, at 539 & nn.25–26 (collecting congressional statements that distinguish between the EITC and the welfare system).

413. Jennifer Sykes et al., supra note 405, at 244.

414. Id. For commentary on Americans' commitment to the duty of taxpaying, see generally Williamson, supra note 38.

415. E.g., David Neumark & Katherine E. Williams, Do State Earned Income Tax Credits Increase Participation in the Federal EITC?, 48 Pub. Fin. Rev. 579, 620 n.10 (2020) ("It is unlikely that social stigma is relevant to the EITC, given that it is claimed through one's tax return, and hence participation is most likely unknown to employers or others.").

416. Scholars have also argued against using tax administration to implement welfare programs. See e.g., Alstott, supra note 406, at 535 ("[B]ecause the EITC is a *tax-based* transfer program, it faces significant institutional constraints that are not present in traditional welfare programs. . . . [T]he tax system's limitations render the EITC inherently inaccurate, unresponsive, and vulnerable to fraud and error in ways that traditional welfare programs are not."). This Essay does not take a stance on this debate. It starts with the assumption that

The same conclusion does not follow for wealthy taxpayers. To be sure, they derive substantial fiscal benefits from the tax system. But disclosure does not intrude upon their privacy interests as stakeholders in the same way as lower- and middle-income taxpayers. The largest tax benefits for upper-income groups include tax deferral due to the realization doctrine, the charitable-contributions deduction, the exclusion of employer-provided healthcare coverage, and preferential tax treatment of capital gains and retirement contributions.[417] Some of these—for example, exclusions and tax deferral—are not ordinarily reported in tax filings and may not be subject to disclosure in a transparency regime.[418] Further, it is unclear whether any of these fiscal benefits implicate concerns like stigma or dignitary harms. Saving more or less for retirement has little to do with social equality, and disclosure of charitable contributions likely elevates rather than degrades one's social standing.[419] Privacy values for wealthy taxpayers qua stakeholders are thus more attenuated than for their lower- and middle-income counterparts.[420]

4. *Taxpayers as Policymakers in Fiscal Governance.* — Finally, in a democratic regime, taxpayers are policymaking partners with the state in shaping fiscal governance on the ground. As discussed, our federal income tax rests on voluntary compliance and self-assessment of liability.[421] The law requires taxpayers to submit to the IRS an annual statement of income.[422] It provides for little oversight by agencies beyond limited withholding, information-return matching, math-error notices, and highly selective audits.[423] Those tools of administrative oversight, in particular information reporting, often apply to specific activities like wage earning—an approach that benefits high-income taxpayers while subjecting others to significant scrutiny.[424] Absent audits or nonpayment

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tax-administered welfare programs will continue to exist. If this is so, lower- and middle-income taxpayers receiving those benefits have heightened privacy interests as stakeholders.

417. See Joint Comm. on Tax'n, Estimates of Federal Tax Expenditures for Fiscal Years 2022–2026, 32–45 tbl.1, 46 tbl.3 (2022), https://www.jct.gov/getattachment/46c5da1a-424b-4a6f-bf6e-e076845b168d/x-22-22.pdf (on file with the *Columbia Law Review*) (showing the vast disparity between the number of low- and high-income individuals claiming these deductions and exemptions).

418. See Dep't of the Treasury, IRS, Taxable and Nontaxable Income: For Use in Preparing 2023 Returns 9 (2024), https://www.irs.gov/pub/irs-pdf/p525.pdf [https://perma.cc/7M8E-4FU7].

419. See Amihai Glazer & Kai A. Konrad, A Signaling Explanation for Charity, 86 Am. Econ. Rev. 1019, 1019–20 (1996) (explaining how charitable donations may signal an individual's wealth to peers).

420. It is also an open question whether wealthy taxpayers truly "deserve" these fiscal benefits in the first place. See supra section III.A.2.

421. See supra notes 318–320, 363–365 and accompanying text.

422. 26 U.S.C. § 6012 (2018).

423. Id. §§ 3402, 6011–6012; Blank & Glogower, supra note 364, at 1601; Compliance Presence, IRS, https://www.irs.gov/statistics/compliance-presence [https://perma.cc/ZA6X-L3UR] (last updated Aug. 19, 2024).

424. See Blank & Glogower, supra note 364, at 1601.

of admitted liability, taxpayers' own assessments control and put an end to their interaction with the fiscal state.[425]

In conceptual terms, *delegation* is thus key to modern income taxation: Congress has delegated to ordinary citizens the authority to determine their tax liabilities.[426] It could have adopted a completely different model of agency adjudication. For example, it could have authorized the Treasury Department to conduct independent fact-finding and reach de novo conclusions of law as to the liability of each taxpayer. But it did not. Instead, Congress chose a less intrusive path. Based on a balance of factors like administrative costs, expertise, information asymmetry, and the degree of ordinary people's honesty in dealing with the state, the federal government gave individual citizens control over how to frame their economic power and how to bear the costs of governance. Scholars have noted that the statutory evolution of the Code has shifted power away from federal courts and the executive branch to Congress.[427] It has also shifted policymaking power to taxpayers themselves.

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425. In litigation, the government bears the burden of proving a tax deficiency, but the taxpayer must comply with extensive recordkeeping regulations. 26 U.S.C. § 7491. Section 7491 is a statutory override of the longstanding rule that IRS determinations are presumptively correct and that the taxpayer bears the burden of proof. See Welch v. Helvering, 290 U.S. 111, 115 (1933) ("[The Commissioner of Internal Revenue's] ruling has the support of a presumption of correctness, and the [taxpayer-]petitioner has the burden of proving it to be wrong." (citing Wickwire v. Reinecke, 275 U.S. 101 (1927); Jones v. Comm'r, 38 F.2d 550, 552 (7th Cir. 1930))). Section 7491 has helped taxpayers, but only sparingly (e.g., in the case of an evidentiary tie). See Steve R. Johnson, The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules, 84 Iowa L. Rev. 413, 414 (1999) ("[7491's] conditions and exceptions are so broad that they essentially swallow the rule. As a result, § 7491 will meaningfully alter allocation of the tax burden of brook only in rare cases. . . . The uncertainties and frustrations bred by § 7491 . . . will decrease the efficiency of our system of dispute resolution . . . .").

426. To be sure, taxpayers exercise delegated power in the shadow of state enforcement, but declining audit rates and an underfunded IRS have eroded this supervision. See Levi, supra note 45, at 52–54 (discussing the relationship between state coercion and quasi-voluntary tax compliance); supra notes 364–365 and accompanying text (discussing the light state oversight of high income taxpayers). The IRS has promised to increase audit rates for the wealthiest taxpayers, large corporations, and partnerships, but whether it will continue to have the resources to do so remains an uncertain question of political economy. See Press Release, IRS, IRS Releases Strategic Operating Plan Update Outlining Future Priorities; Transforming Momentum Accelerating Following Long List of Successes for Taxpayers (May 2, 2024), https://www.irs.gov/newsroom/irs-releases-strategic-operating-plan-update-outlining-future-priorities-transformation-momentum-accelerating-following-long-list-of-successes-for-taxpayers [https://perma.cc/T2TQ-ZNGP] [hereinafter IRS Press Release].

427. See, e.g., James Colliton, Standards, Rules and the Decline of the Courts in the Law of Taxation, 99 Dick. L. Rev. 265, 267 (1995) ("The shift from a simple statute composed of broad standards to a complex set of rules has reduced the power of the courts and the Treasury over the tax law."); James R. Hines Jr. & Kyle D. Logue, Delegating Tax, 114 Mich. L. Rev. 235, 248–49 (2015) ("It is commonly understood that U.S. tax policy is, to a remarkable (and unusual) extent, determined by Congress not only in its broad outlines but also in its details.").

This delegation comes with substantial discretion in interpreting federal statutes and regulations, as well as freedom to structure economic transactions to minimize tax burdens. One might think that a rules-based regime like taxation would constrain interpretive discretion.[428] Quite the opposite: Complex tax rules and long-exploited structural loopholes have broadened the range of tax outcomes at the top income levels, often at the election of the taxpayer. As discussed in the context of democratic response, taxpayers have achieved vastly different effective tax rates while enjoying similar levels of income and accretion to their wealth.[429] The distinction between Ken Griffin's 29.2% estimated effective tax rate and Michael Bloomberg's 4.1% estimated effective tax rate amounts to more than $400 million of potential federal revenue each year, from just one taxpayer.[430] This does not even take into account unrealized gains, the liability on which taxpayers can indefinitely defer and which the federal government forgives upon death.[431] If we do so, the differential balloons to more than $6 billion in potential income-tax liability over five years.[432] For two taxpayers with roughly the same incomes, this surely indicates an exercise of vast, congressionally delegated discretion. In 1934, Judge Learned Hand famously wrote: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[433] But the degree to which today's taxpayers have successfully avoided income taxes touches the outer bounds of permissible interpretations of the statute. This is precisely why lawmakers in 1924 accused wealthy taxpayers of violating not the letter but the "manifest purpose" of the income tax.[434]

Take the example of wash sales. Since 1921, Congress has disallowed deductions for loss incurred through sale of "stock or securities" if taxpayers acquire "substantially identical stock or securities" within a short

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428. See Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 609 (1992) ("Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power."); David A. Weisbach, Formalism in the Tax Law, 66 U. Chi. L. Rev. 860, 864–65 (1999) (discussing tax law's rule-based system and the assumption that it leaves little discretion to courts).

429. See supra notes 395–396 and accompanying text (discussing the different treatment of wealthy individuals under the tax system).

430. America's Top 15 Earners and What They Reveal About the U.S. Tax System, supra note 396.

431. See 26 U.S.C. § 1014 (2018).

432. See Eisinger et al., supra note 10 (calculating Bloomberg's true tax rate at 1.30%, after accounting for all accretions to wealth, including unrealized gains).

433. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (citing United States v. Isham, 84 U.S. 496, 506 (1873)); see also United States v. Isham, 84 U.S. 496, 506 (1873) (explaining that tax avoidance through legal means does not amount to fraud).

434. See 65 Cong. Rec. 7688 (1924) (statement of Sen. Copeland); supra notes 181–183 and accompanying text.

period of the sale.[435] The provision is designed to prevent taxpayers from harvesting tax losses (which may offset their income) when they repurchase substantially the same investments, thus maintaining their old portfolio—a critical provision in any realization-based income-tax system.[436] The past few decades have seen the rise of exchange-traded funds (ETFs) and other traded funds that track stock indices like the S&P 500.[437] The ProPublica tax leak has revealed that ultrawealthy taxpayers are selling depreciated ETFs (thus harvesting the tax loss) and then repurchasing another ETF with roughly the same stock holdings but issued by a different investment brokerage.[438] All without triggering the wash-sale rules.[439] That is, those taxpayers have read "substantially identical stock or securities" to exclude ETFs that hold substantially the same stocks.[440] That might be a permissible reading of the statute. But it is also reasonable—perhaps more so—to read "substantially identical stock or securities" to include ETFs that hold substantially the same stocks.[441] Given the ambiguity in the statute, this is a textbook example of an exercise of interpretive discretion and policymaking power. This enabled one taxpayer alone, the former CEO of Microsoft, to claim more than $500 million of tax loss in a few years.[442]

Taxpayers have thus exercised their interpretive discretion to attain vastly different income-tax outcomes. To be sure, these might well be legal exercises of their delegated power. After all, Congress wrote the law and is free to override any outcome it dislikes. But the basis of any legitimate act of legislative delegation is transparency. Take the example of administrative agencies, another set of entities to which Congress has delegated significant interpretive discretion and policymaking power.[443]

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435. 26 U.S.C. § 1091; Revenue Act of 1921, Pub. L. No. 67-98, § 214(a)(5), 42 Stat. 227, 240 (1921); see also Zelenak, Figuring Out the Tax, supra note 198, at 271–72 (recounting the *Wall Street Journal*'s advice regarding wash sales under the pre-1921 regime).

436. See David M. Schizer, Scrubbing the Wash Sale Rules, 82 Taxes 67, 67 (2004) [hereinafter Schizer, Wash Sale Rules] (explaining that wash sale and loss limitation rules are "inevitable feature[s] of any realization-based income tax").

437. Itzhak Ben-David, Francesco Franzoni & Rabih Moussawi, Exchange Traded Funds (ETFs) 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22829, 2017) (noting that, in 2016, ETFs made up over 30% of the United States's overall daily trading value).

438. Paul Kiel & Jeff Ernsthausen, How the Wealthy Save Billions in Taxes by Skirting a Century-Old Law, ProPublica (Feb. 9, 2023), https://www.propublica.org/article/irs-files-taxes-wash-sales-goldman-sachs [https://perma.cc/Q6GG-WS4E].

439. End runs around the wash-sale regime are not new. See Schizer, Wash Sale Rules, supra note 436, at 67 ("Indeed, it is only a slight exaggeration to say that compliance with the regime is voluntary for very wealthy taxpayers—or, at least, for those who are willing to take aggressive positions.").

440. See 26 U.S.C. § 1091.

441. See Id.

442. Kiel & Ernsthausen, supra note 438.

443. David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 Colum. L. Rev. 265, 266 (2013) ("Modern administrative law emerged in response to a now-foundational

The modern administrative state was born against the background of transparency in governance.[444] Section 3 of the Administrative Procedure Act (APA)—the first substantive provision of the statute—was devoted to administrative publicity.[445] It directed all agencies to publish its substantive rules, policy statements, and interpretations of the law in the *Federal Register*.[446] And unless public interest requires secrecy, or the matter concerns solely an agency's internal management, APA § 3 made the "official record" available to concerned parties.[447] In 1967, Congress broadened this commitment to transparency by enacting the Freedom of Information Act ("FOIA").[448] FOIA allows anyone to request agency records for whatever purpose, requires agencies to produce all nonexempt materials, and imposes little cost on the public for its requests.[449] Agencies today often make policy and exercise delegated power through notice and comment rulemaking.[450] This (even if oblique) mandate of democratic participation at a minimum requires disclosure of key administrative findings and purposes.[451]

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governmental practice: the delegation of broad lawmaking power to administrative agencies.").

444. See David E. Pozen, Transparency's Ideological Drift, 128 Yale L.J. 100, 107–23 (2018) (describing the emphasis policymakers and the public placed on transparency in government during the Progressive Era and the last half of the twentieth century).

445. See Administrative Procedure Act, Pub. L. No. 79-404, § 3, 60 Stat. 237, 238–39 (1946) (formerly codified at 5 U.S.C. § 1002).

446. Id. § 3(a)(3).

447. Id. § 3(c); see also Attorney General's Manual on the Administrative Procedure Act 17 (1947) (noting that APA § 3 should be read "broadly" to "assist the public in dealing with administrative agencies").

448. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2018)).

449. 5 U.S.C. § 552(a)(3)(A), (a)(4)(A), (a)(6); Pozen, supra note 444, at 118.

450. See 5 U.S.C. § 553.

451. See Cary Coglianese, Heather Kilmartin & Evan Mendelson, Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration, 77 Geo. Wash. L. Rev. 924, 930 (2009) ("Compared to many other countries, the United States has long had a relatively open and transparent rulemaking process. Following procedures outlined in statutes such as the APA . . . agencies regularly make information available to the public and give the public opportunities to comment on proposed rules."). For the traditional view of notice and comment rulemaking as an attempt at democratic participation and legitimacy, as well as criticism and refinement of this view, see generally Nicholas Bagley, The Procedure Fetish, 118 Mich. L. Rev. 345 (2019) (critiquing the procedural legitimacy of notice and comment); Joshua D. Blank & Leigh Osofsky, Democratizing Administrative Law, 73 Duke L.J. 1615 (2024) (detailing a "democracy deficit" created by administrative law's failure to address transparent communications between agencies and the general public); Mariano-Florentino Cuéllar, Rethinking Regulatory Democracy, 57 Admin. L. Rev. 411, 420 (2005) ("[A]gencies ordinarily provide notice of proposed regulations, and members of the public have a limited right to take part in most regulatory rulemaking proceedings. With few exceptions, the right belongs to the public . . . ."); Shu-Yi Oei & Leigh Osofsky, Legislation and Comment: The Making of the § 199A Regulations, 69 Emory L.J. 209, 211 (2019) (describing the view that

Policymaking power thus demands transparency. Like agencies, today's taxpayers exercise interpretive discretion delegated by Congress. But the distribution of policymaking function among taxpayers is uneven, for two reasons. First, as discussed, wealthy taxpayers have diversified income streams that enlarge the zone of possible tax outcomes.[452] By contrast, lower- and middle-income groups receive mostly compensation for employment (wages and salaries).[453] Tax liability for labor income is straightforward, and absent fraud, features little variation in outcomes.[454] Second, upper-income taxpayers' decisions matter more to the public fisc by virtue of their wealth. Michael Bloomberg's use of tax-avoidance techniques led to a loss of more than $6 billion of federal revenue over five years.[455] Exercise of interpretive discretion by lower- and middle-income taxpayers—to the extent they have any—will not have the same result. Both the *type* and the *magnitude* of wealthy taxpayers' income thus bolster their role as policymakers in fiscal governance. That role heightens the need for disclosure.

B. *The Impact of Economic Inequality*

This section has built a taxonomy of fiscal citizenship and analyzed privacy and transparency norms within taxpayers' roles in a democratic regime. This framework is dynamic, not static, for two reasons. First, as already discussed, the valences of privacy and transparency drift within *each* of the roles based on the taxpayer's own income and wealth. Ultrawealthy taxpayers, for example, share in fiscal governance and exercise policymaking power much more than wage earners. Table 1 illustrates the framework.

"'notice-and-comment' procedures are meant to infuse the unelected agency's rulemaking with democratic legitimacy").

452. See supra notes 393–396 and accompanying text.

453. See supra notes 393–395 and accompanying text.

454. Third-party information reporting and withholding of wage income (e.g., through W-2s) makes evasion difficult. See IRS, Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2014–2016, at 14 fig.3 (2022), https://www.irs.gov/pub/irs-pdf/p1415.pdf [https://perma.cc/W2ZD-QM3H] (showing a 1% misreporting rate for income subject to substantial reporting and withholding and a 55% misreporting rate for income subject to little or no information reporting).

455. See supra note 396 and accompanying text.

TABLE 1. TAXONOMY OF FISCAL CITIZENSHIP

Fiscal Function of the Taxpayer	**Values of Privacy and Transparency**	**Wealthy Taxpayers**	**Lower- and Middle-Income Taxpayers**
Reporter of nonpublic information	Informational and decisional privacy, grounded in autonomy	Weaker claim to privacy due to the availability of public information	Stronger claim to privacy due to the unavailability of public information
Funders of the state	Compliance and democratic response, grounded in an egalitarian distribution of tax burdens	Robust operation of transparency due to (1) mitigation of cognitive bias and (2) deviation of tax burdens from the public's perception of equity	Defective operation of transparency due to (1) compliance-reducing cognitive bias and (2) adherence to the public's perception of equity
		Inconclusive empirical data on compliance	
Stakeholders in a fiscal community	Dignity and stigma in claiming fiscal benefits through tax administration	Weaker claim to privacy due to the absence of stigma in tax benefits	Stronger claim to privacy due to the stigmatizing effect of disclosure in means-tested welfare programs
Policymakers in fiscal governance	Open governance and lawmaking, pursuant to Congress's delegation in a self-assessment tax regime	Robust operation of transparency due to taxpayers' exercise of vast interpretive discretion	Inadequate justification for transparency due to lack of delegation of significant discretion

As Table 1 illustrates, taxpayers' dynamic interactions with the fiscal state produce diverse privacy/transparency interests across their roles as reporters, funders, stakeholders, and policymakers. These values include individual autonomy, egalitarian distribution of tax burdens, dignity, and open governance. They operate to different effects across income levels. For example, lower- and middle-income taxpayers have stronger claims to privacy as reporters and stakeholders because disclosure would make available nonpublic information that stigmatizes their entitlements to fiscal benefits in means-tested welfare programs. By contrast, transparency norms prevail for wealthy taxpayers as funders and policymakers since variation in their tax liabilities violates the public's vision of vertical equity.

And exercise of significant interpretive discretion delegated by Congress—while perfectly legal—demands transparency. A taxpayer's income and wealth thus affect the valence of privacy/transparency in their fiscal functions.

The discussion in this Part refers to both "ultrawealthy" and "high-income" taxpayers. These are, of course, two distinct concepts. Wealth does not necessarily generate income. It certainly does not—as the ProPublica leak shows—necessarily generate *taxable* income.[456] But the two concepts at their core point to the high degree of economic power exercised by a small group of fiscal citizens, whether the old money or the nouveau riche, by virtue of capital accumulation. This power (in large part but not exclusively) differentiates them from other taxpayers under this Essay's taxonomy. For example, it enables them to mitigate their cognitive biases, interpret statutory ambiguities in ways that implicate policymaking, and help bring about a distribution of tax burdens that the public perceives to be unfair.[457]

Second, the degree of economic inequality may affect the operation of privacy/transparency norms. That is, the valence of privacy/transparency rests not only on taxpayers' income but also on the *extent* to which they partake in their respective roles in fiscal citizenship. For example, in a fiscal community with little inequality, the government likely has a more limited role in redistribution.[458] Lower- and middle-income taxpayers rely less on means-tested welfare programs administered through the tax system (although the government might offer non-means-tested programs like universal basic income).[459] In other words, those

456. See Eisinger et al., supra note 10; supra notes 10–12 and accompanying text.

457. See supra sections III.A.2, III.A.4.

458. Such communities might be hard to imagine, but they likely existed in the premodern period. Classical Athens, for example, combined relatively low inequality in wealth distribution and relatively weak redistribution carried out by the state. Scholars have estimated that the top 8% of Athenian households held title to 30% to 35% of the land in Attica. See Lin Foxhall, Access to Resources in Classical Greece: The Egalitarianism of the Polis in Practice, *in* Money, Labour and Land: Approaches to the Economies of Ancient Greece 209, 211 (Paul Cartledge, Edward E. Cohen & Lin Foxhall eds., 2002) (considering the distribution of wealth in the Greek polis). Despite its radical democracy (all Athenian citizens participated in lawmaking, and many occupied key offices by lottery), the state did not enact legislation to deprive the propertied class of their wealth and only required them to fund public activities or defense as part of the liturgy (i.e., tax) system. See Matthew R. Christ, Liturgy Avoidance and Antidosis in Classical Athens, 120 Transactions Am. Philological Ass'n 147, 148–51 (1990) ("Although the liturgical system dictated the parameters within which the wealthy were to serve the city, it left the individual with a certain degree of discretion as to where and how extravagantly to perform public service."); Geoffrey Kron, The Distribution of Wealth at Athens in Comparative Perspective, 179 Zeitschrift für Papyrologie und Epigraphik 129, 134 & tbl.1 (2011) (showing wealth distribution statistics from antiquity to the modern era).

459. See generally Walter Korpi & Joachim Palme, The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality and Poverty in the Western Countries, 63 Am. Socio. Rev. 661 (1998) (comparing Western countries' approaches to redistribution).

taxpayers partake less in the stakeholder role and have diminished privacy interests because they no longer participate in stigmatizing entitlement programs.[460] Further, wealthy taxpayers partake less in the policymaking role. Their exercise of interpretive discretion in minimizing taxes has a smaller impact on the public fisc because they control less disproportionate shares of the tax base (e.g., income).

By contrast, rises in economic inequality generate the opposite result. A fiscal community with a highly unequal distribution of income and wealth will have to make greater use of means-tested welfare programs to guarantee relative equality and economic security to poorer populations.[461] Lower- and middle-income taxpayers will therefore partake more in the stakeholder role where their privacy interest is strong. Further, wealthy taxpayers will partake more in the policymaking role, by virtue of their greater control of economic resources and power that form the basis of income taxation.[462] Economic inequality thus accentuates the need for tax transparency among upper-income groups: It bolsters the already-strong privacy interests of lower- and middle-income taxpayers as stakeholders, while cementing demands for open governance for wealthy taxpayers as policymakers.

C. *Policy and Scholarly Implications*

1. *Tax Transparency Beyond Compliance.* — This section articulates scholarly and policy implications. First, the fiscal-citizenship framework counsels that the scholarly discourse should move beyond just compliance.[463] As discussed, modern scholars have focused on whether tax-transparency regimes can deter tax evasion and result in revenue gains.[464] They have asked whether taxpayers would more honestly report their incomes if (1) they knew their tax returns are made public and (2) they could see the other taxpayers' returns.[465] The compliance question has generated wide-ranging theories like taxpayer trust, social audit, and

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460. See supra section III.A.3.

461. See Korpi & Palme, supra note 459, at 661–70 (describing how a fiscal community with a greater unequal distribution of wealth results in increased need and use for social welfare programs).

462. In 2021, for example, the top one percent in adjusted gross income controlled roughly half of the federal income tax base. Erica York, Summary of the Latest Federal Income Tax Data, 2024 Update, Tax Found. (Mar. 13, 2024), https://taxfoundation.org/data/all/federal/latest/ [https://perma.cc/EP9Z-NERY]; see also supra section III.A.4.

463. See supra sections III.A–.B (discussing taxpayers' changing roles due to economic status and the implications created by economic inequality).

464. See supra notes 290–303, 367–379 and accompanying text (surveying existing literature on tax disclosure).

465. See, e.g., Blank, In Defense of Individual Tax Privacy, supra note 32, at 268–69 ("Both sides have fixated on the question of how a taxpayer would comply with the tax system if [they] knew other taxpayers could see [their] personal tax return. Neither side, however, has addressed the converse question: How would seeing *other* taxpayers' returns affect whether a taxpayer complies?").

reciprocity, as well as empirical data that support or disfavor disclosure to varying degrees.[466] Recently, the scholarly discourse has stalled, in part because of inconclusive empirical data.[467]

This Essay shows that tax transparency concerns more than compliance. To be sure, disclosure's effect on tax evasion—and whether it will aid the federal government in collecting revenue, thus lowering administrative costs—is an important value in fiscal citizenship. But the reason we care about compliance is that it will "equalize" tax liability and enhance fairness, broadly conceived as a matter of the public's judgment on an informed basis.[468] Democratic response to disclosure and political pressures to enact legislative change will also make tax law cohere more with the public's vision of distributive justice. Compliance thus constitutes only one of the values for taxpayers as funders. A fuller analysis of taxpayer privacy requires an assessment of taxpayers' other roles in interacting with the fiscal state. In particular, taxpayers often use the self-assessment power delegated to them by Congress to minimize income-tax burdens. For wealthy taxpayers, that power implicates vast discretion in interpreting statutes and the potential loss of substantial federal revenue. Their exercise of policymaking authority heightens the need for transparency, which might trump individuals' privacy interests in their tax information. All such norms—compliance, democratic response, open governance, autonomy, and dignity—are pro tanto reasons for allowing disclosure or guaranteeing confidentiality. The scholarly discourse on taxpayer privacy thus needs to examine these values to move forward. This Essay fills that gap.

This Essay's historical and comparative discussions highlight the lacuna in scholarship. Part I has brought to light a treasure trove of past legislative debate that emphasized transparency's function in shaping egalitarian and democratic governance. In 1924, lawmakers justified tax disclosure on the ground of a constitutional baseline for tax returns to be

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466. See supra notes 368–370 and accompanying text; see also, e.g., Revenue Revision 1925, supra note 217, at 8–9 (statement of Rep. Mellon) (taxpayer-trust theory); S. Rep. No. 94-938, at 317–18 (1976), as reprinted in 1976 U.S.C.C.A.N. 3438, 3746–48 (same); Off. of Tax Pol'y, supra note 32, at 18–19 (same); Blank, In Defense of Individual Tax Privacy, supra note 32, at 272, 322–26 (behavioral and reciprocity theory); Kahan, supra note 289, at 71–72 (social-audit theory); Linder, supra note 30, at 977 (same); Mazza, supra note 30, at 1076–78 (same); Schwartz, supra note 292, at 887–90 (same); The Internal Revenue Law—Telling Other People's Secrets, supra note 73 (same).

467. Compare, e.g., Bø et al., supra note 30, at 37–38 (showing in a case study of Norway that transparency increased compliance), with Blaufus et al., supra note 301, at 577 (showing in an experimental setting that transparency did not increase compliance).

468. See The Publication of Incomes, supra note 75 ("In no other way can the income tax law be so efficiently and so searchingly executed and enforced as by the regularity and certainty of the publication of income assessment lists."); see also supra notes 83–84 and accompanying text. This is the state's reciprocal obligation to ensure an effective tax system as part of its social contract and the concept of fiscal citizenship. See supra note 308 and accompanying text.

public records, as well as the potential for transparency to curb government abuse.[469] Increasing compliance levels was only one—and a subsidiary—reason for publicity. Today's main tax-transparency regimes are in the Nordic countries. And they all ground disclosure in a constitutional default of open public records and governance. The scholarly literature's focus on compliance thus departs from the historical debate within the United States and the conceptual underpinnings of transparency today.

2. *Fiscal Citizenship: Taxation Within a Public Law Framework.* — Second, the taxonomy built by this Essay adds to the discourse on fiscal citizenship. As discussed, the existing literature has focused on the attitudinal component of citizenship, that is, the public's civic engagement and sense of shared sacrifice in paying tax bills.[470] This Essay articulates a positive (i.e., analytical) framework that complements the attitudinal component of fiscal citizenship.

The analytical framework raises additional questions about tax and its deep, under-explored relationship with American public law. For example, this Essay shows that Congress has delegated immense interpretive discretion to ultrawealthy taxpayers. Our federal income tax depends on voluntary compliance and self-assessment of liabilities. But is this delegation justified? Delegation to administrative agencies to interpret statutes traditionally rests on the agency's superior expertise and, on occasion, their democratic accountability through presidential control.[471] Neither value is present here.[472] To be sure, wealthy taxpayers could hire armies of expert lawyers and accountants. But their expertise is directed toward the singular goal of reducing their clients' tax burden. Congressional delegation of policymaking power to the ultrawealthy thus appears grounded in administrative cost—that is, it would be too expensive for the government rather than the taxpayer to produce the

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469. See supra notes 105–136, 148–179 and accompanying text.

470. Supra notes 307–310 and accompanying text; see also Mehrotra, Price of Conflict, supra note 41, at 1056 (discussing the relationship between wartime taxation and a sense of shared sacrifice); Sparrow, Buying Our Boys Back, supra note 41, at 264 (discussing how everyday Americans began paying income taxes and purchasing savings bonds during World War II, creating a sense of "fiscal citizenship"); Zelenak, Form 1040, supra note 41, at 59 (discussing fiscal citizenship as the "civic aspects of the return-filing requirement").

471. See Erwin Chemerinsky, Constitutional Law 341–49 (5th ed. 2015); Aditya Bamzai, Delegation and Interpretive Discretion, 133 Harv. L. Rev. 164, 190 (2019); Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2139–59 (2004); Lisa Schultz Bressman, Reclaiming the Legal Fiction of Congressional Delegation, 97 Va. L. Rev. 2009, 2011 (2016); see also Leandra Lederman, Avoiding Scandals Through Tax Rulings Transparency, 50 Fla. St. L. Rev. 219, 275–76 (2023) (discussing transparency and accountability in the tax context).

472. See James O. Freedman, Review, Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307, 335 (1976) ("Private parties . . . often do not possess a similar, if not unique, competence to exercise the particular legislative powers delegated to them. The doctrine of delegation of legislative power to private parties thus searches the fundamental question of institutional competence to perform a governmental task.").

initial determination of income-tax liability.[473] As the ProPublica leak has revealed, however, the exercise of that delegated power, in the form of tax-avoidance techniques used by the ultrawealthy, has resulted in substantial loss of federal revenue.[474] Beyond the cost calculus, only upper-income taxpayers exercise interpretive discretion due to the nature of our income-tax regime. That distribution of power alone might pose problems for an egalitarian society. This should prompt policymakers and scholars to rethink the conceptual foundations of delegation to taxpayers.[475]

Adding to the problem of delegation is the reality of deference. The past decade has witnessed a dramatic decline in the audit rates of tax returns.[476] As a result, most taxpayers' preferred readings of statutes and regulations receive controlling weight: They are not subject to even the remotest regulatory supervision. While the Biden Administration vowed to strengthen oversight of ultrawealthy individuals' self-assessment of income taxes,[477] IRS funding remains a perennial, highly ideological contest, and the private tax bar usually outlawyers the government.[478] In this landscape,

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473. Of course, self-assessment itself imposes compliance costs on taxpayers. See Zelenak, Form 1040, supra note 41, at 2 ("Studies have estimated that taxpayers spend 3.5 billion hours each year working on their federal and state income tax returns . . . ."); Michael J. Graetz, 100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System, 112 Yale L.J. 261, 295 (2002) (advocating family allowances of $100,000 to reduce the IRS's and taxpayers' workload).

474. See supra note 429 and accompanying text.

475. This Essay is thus in conversation with the influential literature on privatization: Scholars have analyzed the shift of regulatory power to the private sector in terms of legislative delegation. See, e.g., Kenneth A. Bamberger, Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State, 56 Duke L.J. 377, 381 (2006) ("[L]eaving such tasks to the judgment of regulated firms is analogous to Congress's delegation to agencies, through statutory ambiguity, the power to 'fill in the details.'"); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 546–47 (2000) ("Nongovernmental actors perform 'legislative' and 'adjudicative' roles, along with many others, in a broad variety of regulatory contexts."); Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1371 (2003) ("[C]urrent doctrine[] fail[s] to appreciate how privatization can delegate government power to private hands."). Of course, taxpayers' exercise of delegated power does not derive from the process of privatizing: Self-assessment has been the administrative mode of income taxation since its inception. But it is even more problematic than delegation to private entities to administer public programs. The latter is at least premised on the potential of the private sector's expertise and innovation to improve public welfare.

476. What Is the Audit Rate?, Tax Pol'y Ctr., https://www.taxpolicycenter.org/briefing-book/what-audit-rate [https://perma.cc/RKB2-8UMB] (last updated Jan. 2024) ("The audit rate of individual income tax returns fell by two-thirds between 2011 and 2018 . . . . About 7.2 percent of taxpayers with positive income above $1 million were audited on their 2011 returns; that figure dropped to 1.6 percent on 2018 returns.").

477. See IRS Press Release, supra note 426 ("[T]he IRS anticipates increasing audits on the wealthiest taxpayers.").

478. See Schizer, Enlisting the Tax Bar, supra note 382, at 331 ("In important respects, the private tax bar outmatches its counterpart in government."); Tobias Burns, House GOP Proposes IRS Funding Cuts, Defunding Free Tax Filing System, Hill (June 4, 2024), https://thehill.com/business/4703208-house-gop-proposes-irs-funding-cuts-defunding-

the *effect* of wealthy taxpayers' use of delegated discretion is akin to the deference traditionally accorded to administrative policymaking. This is not to imply the existence of formal legal doctrines that ask courts to decline independent exercises of interpretation when an agency has put forth a reasonable construction. Instead, low audit rates mean that no agency or court will pass judgment on taxpayers' inventive interpretations of tax law—similar in practice to granting them deference. Importantly, none of this is predicated on transparency. By contrast, statutory guarantees of transparency accompanied the rise of the administrative state.[479] They paved the path for the development of regulatory deference, which shifted interpretive power from the courts to agencies.[480] It is unsurprising that subsequent refinement of this doctrinal strand has the effect of preserving an agency's policymaking function when the statutory mandate for transparency and democratic participation is at the highest (e.g., notice and comment rulemaking).[481] In this past term, the Supreme Court overruled *Chevron*, [482] the most muscular of the agency-deference regimes. The disagreement between the majority and the dissent centered on whether agencies or courts have more expertise in statutory interpretation and the regulated subject matter.[483] But this is a comparative exercise, as even the majority does not argue that agencies have *no* knowledge or stand in perpetual tension with the interests of the federal government. *Loper Bright* thus problematizes the practice of deferring to taxpayers. If agencies are not entitled to deference by the courts, why

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free-tax-filing-system (on file with the *Columbia Law Review*) ("Republican appropriators in the House are proposing to scale back IRS funding . . . . Democrats immediately blasted the IRS funding cuts.").

479. See supra notes 443–451 and accompanying text.

480. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (stating that an agency's "interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference"), overruled by Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Nat'l Muffler Deals Ass'n v. United States, 440 U.S. 472, 484 (1979) (deferring to the Treasury Department's reasonable reading of a statute); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (finding that the agency's actions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

481. See Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 50, 57–58 (2011) (applying *Chevron* to Treasury regulations promulgated pursuant to express congressional delegation of rulemaking authority and after notice and comment procedures); United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (according *Chevron* deference to agency rules promulgated pursuant to a congressional grant of lawmaking authority).

482. See *Loper Bright*, 144 S. Ct. at 2273.

483. Compare id. at 2267 ("Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often 'may fall more naturally into a judge's bailiwick' than an agency's." (quoting Kisor v. Wilkie, 588 U.S. 558, 578 (2019))), with id. at 2294 (Kagan, J., dissenting) ("Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not.").

should the government defer to taxpayers, who lack the requisite expertise and exercise power in the dark?

Take a step back and assume that the current regime of delegation and self-assessment continues. This Essay's framework raises less foundational but equally pressing questions. We live in an age that has questioned both the entrenched power of the wealthy and the delegation of lawmaking power to unaccountable bureaucrats. Scholars have criticized "the wealthy [for] exercising vastly disproportionate power over politics and government"[484] and the "constitutional revolution" in letting agencies rather than Congress make federal policy.[485] The Supreme Court has cut back on agencies' statutory interpretation powers with the major questions doctrine and overruled *Chevron* deference this past term.[486] In unsettling the core of American administrative law, the majority contended: "[M]ost fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[487] But again, if expertise forms the foundation of delegated power, what kind of expertise could conceivably justify ultrawealthy taxpayers' exercise of that power? Scholars who care about the administrative state's political accountability should also favor restrictions on Congress's delegation to private parties like taxpayers. That is, what would be the equivalent of a major questions inquiry for ultrawealthy taxpayers' use of interpretive discretion to resolve ambiguities in the federal income tax? In past decades, searching scrutiny by the agency (e.g., higher audit rates for ultrawealthy taxpayers' returns) has limited that discretion. But the landscape today is far different. In broader conceptual language, what is the political—or even the constitutional—status of ultrawealthy taxpayers? Their deeply entrenched economic power is a fixture in our system of governance. This problematizes their exercise of congressionally-delegated power.

3. *Design of Disclosure Regimes.* — Third, this Essay provides insights into designing tax-disclosure regimes that cohere with our implicit social contract with the fiscal state. The main takeaway of Part III is the *dynamic* rather than static nature of taxpayers' interactions with the government. Under this framework, the propriety of disclosure falls onto a spectrum.

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484. Kate Andrias & Benjamin I. Sachs, Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality, 130 Yale L.J. 546, 548 (2021); see also Gillian E. Metzger, 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 8–51 (2017) (summarizing judicial, political, and academic attacks on the administrative state).

485. Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1231 (1994); see also Fishkin & Forbath, Anti-Oligarchy, supra note 1, at 3 ("[C]ircumstances resembling America's today, in which too much economic and political power is concentrated in the hands of the few, posed not just an economic, social, or political problem, but a *constitutional* problem.").

486. *Loper Bright*, 144 S. Ct. at 2273 (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); West Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, 2609–10 (2022) (major questions doctrine).

487. *Loper Bright*, 144 S. Ct. at 2266.

The taxpayer's own income and wealth, as well as economic inequality in the broader fiscal community, all affect whether privacy or transparency values predominate. In general, disclosure is more appropriate for the tax records of the ultrawealthy in times of high economic inequality because wealth and inequality augment the policymaking function of upper-income taxpayers, while cementing lower- and middle-income taxpayers' privacy claims as stakeholders.[488] This upshot coheres with the historical narrative of Part I: Tax-transparency regimes flourished in the United States when the income tax targeted the rich and disclosure would affect only ultrawealthy taxpayers.[489] They also flourished when economic inequality and the demand for redistribution were high.[490] As the income tax transformed from a class tax to a mass tax during World War II and inequality diminished with the New Deal, the drive for tax transparency diminished.[491] But as we enter another age of record inequality, calls for tax disclosure—and scrutiny of the ultrawealthy's fiscal contribution to the state—have intensified.[492]

This notion of fiscal citizenship accommodates variation across cultures and political systems in, for example, public trust and preferences for transparency/privacy. As a result, in regimes with a tradition of open governance, like Sweden, economic inequality or the taxpayer's own fiscal power (e.g., as exemplified in wealth and exercises of interpretive discretion) need not be high to justify transparency. By contrast, in societies that tolerate government secrecy, economic inequality and the taxpayer's own fiscal power may need to reach record levels to ground disclosure. This yields a range of policy options for more robust tax transparency in today's United States.

In general, tax-disclosure regimes can be (1) individualized, disclosing tax-return data that allow the public to identify the taxpayer personally; (2) statistical, disclosing *collective* data about groups of taxpayers (e.g., top one percent by adjusted gross income); or (3) anonymized, disclosing tax-return data about individual taxpayers but with identifying information removed.

If it decides on individualized disclosure, Congress should account for the following (with the caveat that income or wealth is an imperfect—albeit practicable—metric of fiscal power).[493] Defining the term

488. See supra sections III.A.3–.4.

489. See supra sections I.A–.B (describing calls for transparency during the Civil War and in the 1920s).

490. See supra section I.C (describing calls for transparency during the Great Depression).

491. See Saez & Zucman, Wealth and Inequality, supra note 1, at 521 fig.1 (showing a decline of economic inequality from 1933 to 1978); Jones, supra note 46, at 731–33 (discussing the federal income tax's shift from a class tax to a mass tax).

492. See supra notes 1–3 and accompanying text.

493. Taxpayers may challenge transparency mandates enacted by Congress. It is beyond the scope of the current project to assess the constitutionality of possible disclosure regimes.

"ultrawealthy" requires line drawing, but this Essay's taxonomy provides guidance. Recall that disclosure is more appropriate for ultrawealthy taxpayers because there is public information about their finances (qua reporters), because they have resources to mitigate their cognitive biases (qua funders), because transparency could mobilize legislation to improve tax fairness (qua funders), because they do not participate in means-tested welfare programs (qua stakeholders), and because they exercise interpretive discretion pursuant to Congress's delegation of power (qua policymakers).[494] The income and wealth thresholds that activate the operation of transparency (and the diminishment of privacy) values for each might be different. For example, taxpayers who earn more than $1–2 million each year likely can afford sophisticated tax lawyers to mitigate their cognitive biases.[495] For their financial information to be publicly available and capture media attention, they might need to earn more than $10 million. The opportunity to exploit statutory ambiguities might arise when taxpayers' income rises above a few million, but their privacy interests as stakeholders diminish as soon as the Child Tax Credit fades out—at roughly $200,000.[496] Additional empirical findings will help policymakers determine the precise amounts, but a rule of thumb is the top 0.01%. These 16,000 households receive on average approximately $18.9 million in income each year, grew their wealth much faster than even the top 1% in the past few decades, and have sufficient income to activate the value of transparency for each of the four aspects of fiscal citizenship.[497] Congress need not mandate disclosure of all records of these taxpayers. It could make available, in precise numbers or narrow

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It is noteworthy, however, that the Supreme Court has upheld, albeit on somewhat narrow grounds, the transparency regime of 1924 and commented that the choice between tax secrecy and disclosure belongs primarily to Congress. United States v. Dickey, 268 U.S. 378, 386 (1925). *Dickey* did not address the transparency regime's possible invasion into the constitutional rights of taxpayers, as no such claim was raised.

494. See supra Table 1.

495. Between 1999 and 2002, Ernst & Young LLP, a major accounting firm, designed and sold tax shelters to high-net-worth clients. The Department of Justice considered criminal prosecution of the firm but ended up settling. According to the statement of facts attached to the settlement agreement, Ernst & Young received gross fees of around $123 million from the sale of those tax shelters, or an average of approximately $615,000 per client. See Settlement Agreement Between Ernst & Young LLP and the Office of the United States Attorney for Southern District of New York, at exh.B (Feb. 26, 2013), https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/EY%20NPA.pdf [https://perma.cc/XY82-394H]. Assuming a combined state and federal marginal tax rate of 40%, anyone with more than $1.5 million of taxable income in the highest bracket will find these tax shelters—and sophisticated tax advice—attractive.

496. See The Child Tax Credit Benefits Eligible Parents: IRS Tax Tip 2019-141, IRS (Oct. 9, 2019), https://www.irs.gov/newsroom/the-child-tax-credit-benefits-eligible-parents [https://perma.cc/3QAQ-9MJF].

497. See Saez & Zucman, Wealth Inequality, supra note 1, at 523–24; Howard R. Gold, Never Mind the 1 Percent. Let's Talk About the 0.01 Percent, Chi. Booth Rev. (Nov. 29, 2017), https://www.chicagobooth.edu/review/never-mind-1-percent-lets-talk-about-001-percent [https://perma.cc/3FPZ-KEEQ].

ranges, their incomes, sources of those incomes, various deductions, and tax liabilities.[498] This would bring to light ultrawealthy taxpayers' fiscal contributions to the state, and how they have exercised their delegated discretion in self-assessment, without revealing sensitive data that do not facilitate public scrutiny.

Congress can even structure statutory transparency to enable taxpayer choice. This could enhance the political feasibility of disclosure but also flows from a key conceptual implication of fiscal citizenship. As section III.A has shown, ultrawealthy taxpayers serve as policymaking partners with the federal government as they self-assess their income-tax liabilities.[499] In exercising their delegated authority, those taxpayers resolve statutory ambiguities and fill in the interstices of the law, much as agencies used to do before *Loper Bright*. And *that* exercise of public power grounds demands for transparency. As a corollary, eliminating taxpayers' wide discretion in assessing income-tax liabilities diminishes the need for disclosure. Thus, Congress could present the choice to ultrawealthy taxpayers: either (1) continue to exercise delegated power and agree to public scrutiny by disclosing their tax records or (2) limit their exercises of delegated power by submitting to a guaranteed IRS audit of their tax returns and continue to enjoy privacy protections. This two-tiered system accommodates taxpayers who place outsized value on privacy.[500] It channels the core insight of section III.A.4: Power-wielding taxpayers cannot have their cake and eat it too.

On the other hand, if it decides against individualized disclosure, Congress could ameliorate existing mechanisms of statistical disclosure or introduce anonymized disclosure. This Essay's conclusion that tax transparency is more appropriate for ultrawealthy taxpayers might rekindle hopes for the IRS 400 Report. From 1992 to 2014, the Treasury Department compiled anonymized data about the top 400 individual income-tax returns with the largest adjusted gross incomes.[501] (The Trump administration discontinued the reports.[502]) It then publicized these data as part of the IRS's statistics of income.[503] Today, the IRS continues to

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498. Congress designed the pink-slip requirement in 1934 in precisely this way. See supra section I.C.

499. See supra section III.A.4.

500. See Raskolnikov, Revealing Choices, supra note 301, at 742–43 (arguing that taxpayers will be more comfortable with a regulatory regime if given a choice and allowed to pick the regime most aligned with their motivations).

501. IRS, The 400 Individual Income Tax Returns Reporting the Largest Adjusted Gross Incomes Each Year, 1992–2014 (2016), https://www.irs.gov/pub/irs-soi/14intop400.pdf (on file with the *Columbia Law Review*) [hereinafter 2014 IRS 400 Report].

502. Scott Klinger, President Trump Axed an IRS Report on the Richest 400 Americans. Let's Bring It Back., Inequality (Feb. 9, 2022), https://inequality.org/research/irs-report-on-richest-400-americans [https://perma.cc/6RB5-SVL7].

503. SOI Tax Stats—Top 400 Individual Income Tax Returns with the Largest Adjusted Gross Incomes, IRS (Jan. 5, 2024), https://www.irs.gov/statistics/soi-tax-stats-top-400-

publish selective information about tax returns with adjusted gross incomes of above $10 million.[504]

Such statistical disclosure can also advance transparency. The trick is to present the data without generating an *illusion of justice*. Existing and past IRS disclosure mechanisms can mislead the public as to the real tax burdens borne by the wealthy. This is because the IRS 400 Report is parasitic on the *legal* definition of income to extract data: The top 400 taxpayers identified in the report are those who had the largest *tax* income, not those who had the largest accretion to their wealth or economic power.[505] An individual with hundreds of millions of unrealized gain and little earned income will not appear on the list. Further, because the IRS 400 Report calculates the average tax rates on the basis of tax (generally realized) income, it hides the extent of tax avoidance at the top. The 2014 report, for example, shows a plurality of the 400 bearing an average effective tax rate of 20% to 25%.[506] Likewise, the statistics-of-income report for tax year 2021 shows households with more than $10 million of adjusted gross income bearing an average tax rate of 25.1%.[507] All this might prompt the public to think that the ultrawealthy faces a low but reasonable tax burden. But this is incorrect. Because the most significant forms of economic power for ultrawealthy taxpayers are untaxed, their actual tax burden is far lower—closer to 1% to 3.5%, according to the ProPublica Report.[508] Existing mechanisms of anonymized disclosure thus create an illusion of justice.

An easy fix is to make clear—and make salient to the public—that the IRS 400 and statistics-of-income reports calculate average tax rates on the basis of *tax* income and that tax law income deviates from economic income, often by wide margins for the wealthy. This would preempt any insinuation that the ultrawealthy pay 25% of their actual income in federal taxes. A more ambitious reform is to present tax information at the top income levels with not only a warning that the average tax rates do not track economic income but also data about (1) their estimated *economic* income during the taxable year and (2) their average tax rates as a percentage of their estimated economic income. Treasury can use its own

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individual-income-tax-returns-with-the-largest-adjusted-gross-incomes [https://perma.cc/U35E-TN6F] [hereinafter SOI Tax Stats].

504. See SOI Tax Stats—Individual Statistical Tables by Size of Adjusted Gross Income, IRS (Aug. 20, 2024), https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income [https://perma.cc/G6SD-CGW4].

505. See 2014 IRS 400 Report, supra note 501, at 1 (showing that the report relies on AGI calculations); SOI Tax Stats, supra note 503 (same).

506. 2014 IRS 400 Report, supra note 501, at 16 tbl.3.

507. All Returns: Selected Income and Tax Items, by Size and Accumulated Size of Adjusted Gross Income, Tax Year 2021 (Filing Year 2022), IRS (Aug. 20, 2024), https://www.irs.gov/pub/irs-soi/21in11si.xls (on file with the *Columbia Law Review*).

508. Eisinger et al., supra note 10.

estimates or rely on academic studies.[509] These reforms will ensure that existing and past mechanisms of disclosure present an accurate picture of the ultrawealthy's tax burdens. What they cannot replicate, however, is individualized disclosure's potential to mobilize public pressure for structural tax reform. Knowledge from ProPublica's report that Jeff Bezos had so little federal income-tax liability that he claimed the child tax credit will make the public much more indignant than knowledge that the ultrawealthy as a group paid roughly 3.4% of economic income in federal taxes.[510] But for the short term, perhaps the ProPublica report itself has generated enough political momentum with staying power.

Finally, to capture the variation of tax burdens within a particular group, Congress can introduce anonymized disclosure or task the agency with describing the dispersion within a statistical category. Importantly, anonymized disclosure of individuated data can clarify to a greater degree taxpayers' exercises of interpretive discretion to achieve their tax outcomes, even if it does not reveal *who* has exercised such discretion. Further, the public might tolerate anonymized disclosure of a wider range of individuated data (i.e., beyond the pink slip) than individualized disclosure with identifying information. The information gain from more detailed disclosure could offset the information loss from the failure to identify the taxpayer personally.

To be sure, any disclosure regime—whether individualized, statistical, or anonymized—based on the income tax necessarily misses the tax records of many wealthy taxpayers because of existing loopholes. As the ProPublica leak showed, some of the richest Americans like Elon Musk and Jeff Bezos relied on, inter alia, the realization doctrine to report no taxable income in multiple years.[511] Enactment of a wealth tax would thus improve the implementation of tax-disclosure regimes. It would provide more accurate metrics of taxpayers' economic power and catch what an income-tax disclosure regime would miss. But in an individualized regime, absence from the list of ultrawealthy taxpayers disclosed by the IRS itself invites scrutiny. Media widely publicize the extent of Musk's and Bezos's wealth, [512] and their failure to appear on the top 0.1% list by income suggests an aggressive use of interpretive discretion and tax-avoidance techniques. This reveals another virtue of transparency: Even limited disclosure of ultrawealthy taxpayers' records could galvanize and enrich

509. An example is Edward Fox & Zachary Liscow, How Do the Rich Avoid Paying Taxes? The Impact of Unrealized Gains and Borrowing on Income Taxes 1 (2024) (unpublished manuscript) (on file with the *Columbia Law Review*) (estimating the income tax burden on the *economic* income of the top one percent).

510. Eisinger et al., supra note 10 (calculating the "true tax rate" for the 25 wealthiest Americans).

511. Id.

512. E.g., Peterson-Withorn, supra note 349.

distributive discourse.[513] That is, it would supply the data that enable public conversation about the distribution of tax burdens and tax law's role in shaping and channeling economic power.[514] These dialogues are critical to a legitimate, well-functioning democracy.[515]

CONCLUSION

Recent events have reignited the debate about tax privacy in the United States. Until now, the scholarly literature has focused on whether tax disclosure would incentivize compliance. But a historical and comparative analysis shows transparency's potential in effecting open fiscal governance. This Essay constructs a taxonomy of fiscal citizenship, positing that taxpayers play the roles of reporters, funders, stakeholders, and policymakers in their dynamic interactions with the fiscal apparatus of a democracy. Under this framework, disclosure is more appropriate for ultrawealthy taxpayers in times of high economic inequality. This Essay thus pushes the scholarly discourse beyond compliance and provides insights into designing a transparency regime grounded in our fiscal social contract with the state.

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513. In an ideal world, anonymous disclosure of tax data by income groups would generate robust discourse. As long as the agency (1) has knowledge of taxpayers' real economic power (e.g., economic income as opposed to the statutory tax concept of income that does not include, for example, most unrealized gains), and (2) discloses such information in epistemically sensible categories (e.g., with sufficiently precise ranges to make clear the distribution of tax burdens across income groups), the public can deliberate about distributive justice on an informed basis. In reality, however, people have bounded rationality, making disclosure of salient data—for example, tax records of Elon Musk—a more effective discursive tool. The state, in addition, often lacks robust data about the real economic power of individuals because of tax-avoidance techniques. Of course, as this Essay has shown, the discursive value of individual tax disclosure is only part of the inquiry.

514. Distributive discourse (that is, speech about economic inequality and the extent of the state's obligation to foster egalitarianism) and the role of the broader legal regime in creating or stifling distributive discourse are important topics for future research.

515. See Joseph Blocher, Public Discourse, Expert Knowledge, and the Press, 87 Wash. L. Rev. 409, 415–16 (2012) ("'[T]hose who are subject to law should also experience themselves as the authors of law,' and should have 'the possibility of influencing public opinion.'" (quoting Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State 17 (2012))); Robert Post, Participatory Democracy and Free Speech, 97 Va. L. Rev. 477, 482–83 (2011) ("[Democracy] requires that citizens have access to the public sphere so that they can participate in the formation of public opinion, and it requires that governmental decision making be somehow rendered accountable to public opinion.").

Columbia Law Review. ISSN 0010-1958.

Published by Columbia Law School students monthly except for February, July, August, and September. Printed in Hanover, Pennsylvania. Editorial Office, 435 West 116th Street, New York, New York 10027. For issues prior to volume 118 inquire of William S. Hein & Co., Inc., 2350 North Forest Road, Suite 10A, Getzville, New York 14068, 1-800-828-7571, https://www.wshein.com. Back issues are also available in PDF format through HeinOnline, https://www.heinonline.org. For current and recently printed issues, please send an email to business@columbialawreview.org.

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VOL. 125, NO. 1 COLUMBIA LAW REVIEW Pages 1 to 318 JANUARY 2025