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STATEMENT OF PURPOSE

The *Wisconsin Journal of Law, Gender & Society* grew out of two traditions: the University of Wisconsin Law School's "law in action" approach and the interdisciplinary design of gender studies. Through "law in action" we look beyond the statutes and cases to study the practical effects of the law on individuals, marginalized communities, and society at large. The interdisciplinary approach, with an emphasis on gender identity, offers different perspectives through which to expand and challenge our understanding of the law and its implications for society.

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INTERSEX AND TRANSGENDER ATHLETES AND ACCESS TO EFFECTIVE REMEDIES

*Dr. Ilias Bantekas**

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ABSTRACT

The *Semenya* case and its ultimate journey to the European Court of Human Rights (ECtHR) demonstrates that the contractual, pyramidal sports architecture that encompasses athletes, national federations, and sport governing bodies *may* produce anomalous human rights outcomes. In particular, because the Court of Arbitration for Sport (CAS) is treated the same way as any other form of commercial arbitration, human rights issues that would otherwise be entertained by pertinent courts now fall between the limited cracks of the set-aside mechanism available to the competent courts of the *lex arbitri* (the seat of the arbitration). The Swiss Federal Supreme Court is correct in its narrow application of set-aside challenges against CAS in respect of human rights claims, albeit this hardly addresses the issue.

This article suggests that the restrictive pyramidal structure with sport governing bodies at the apex will lead to other athletes attempting to vindicate their human rights concerns by engaging in creative forum shopping, particularly in jurisdictions perceived as being undeterred by forum *non conveniens* considerations. It may well be that the principles underlying the emerging Business and Human Rights (BHR) treaty will find application in the transnational sports arena so that the human rights jurisdiction of national courts becomes more active and engaged. This in turn might persuade the powers of

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CAS to embed human rights guarantees in the work of panels in order to avoid parallel jurisdiction and excessive external scrutiny.

I. INTRODUCTION

The *Semenya* case involves an intersex track and field athlete, Caster Semenya, who was prevented from participating in competitions under the aegis of World Athletics (the international governing body for athletics) unless she agreed to undergo experimental hormonal treatment. Semenya refused to become a guinea pig of a procedure whose results were unknown and unpredictable, and was excluded from participating in World Athletics events, including the Olympics.¹ Semenya's case is hardly unique for intersex (and mutatis mutandis transgender) athletes,² but at the same time highlights how certain sports-related stakeholders have made audacious claims of being autonomous from the constraints of law, including human rights and civil liberties. In its submissions to the *Šimunič* appeal before CAS, FIFA contended that the European Convention of Human Rights (ECHR)³ was not applicable because "these are not criminal law proceedings, but disciplinary proceedings and that such dispute is not governed by criminal law, but by civil law."⁴ This is an extraordinary argument that depicts the conscious attempt by FIFA and other entities, including inter-government organizations, to fragment their relationship from the international human rights regime. Inter-governmental organizations, while promoting democratic values in other substantive fields of their operation,⁵ generally do not favor democratic governance as to their own internal executive structure.⁶ International sports federations are not averse to what political scientists in the 1970s called systemic anarchy.⁷ This theory suggests that in an environment where states possess supreme authority (other than their sovereign territory), they behave in an anarchic manner and hence there can exist no world

1. See *Swiss Court Confirms Semenya Cannot Compete without Hormone-Suppressing Treatment*, FRANCE24 (Sept. 8, 2020), <https://www.france24.com/en/20200908-swiss-court-confirms-semenya-cannot-compete-without-hormone-suppressing-treatment> [<https://perma.cc/ZG6G-KPBU>].

2. See more recently, *Transgender Swimmer Lia Thomas is Seeking Ban Overrule, with Sights on the Olympics*, Sport Resols. (Jan. 26, 2024), <https://www.sportresolutions.com/news/view/transgender-swimmer-lia-thomas-is-seeking-ban-overrule-with-sights-on-the-olympics> [<https://perma.cc/P5LW-BUCE>].

3. Convention for the Prot. of Hum. Rts. & Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

4. Josip Simunic v. Fédération Internationale de Football Association (FIFA), CAS 2014/A/3562, Award, ¶ 40 (July 29, 2014, Ct. of Arb. for Sport).

5. See Christopher C. Joyner, *The United Nations and Democracy*, 5 GLOB. GOVERNANCE 333 (1999) (discussing the promotion of democracy-building by the UN through peacekeeping and other political measures).

6. John Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5 (Winter 1994-95); Andrew Moravcsik, *Is There a Democratic Deficit in World Politics? A Framework for Analysis*, 39 GOV. & OPPOSITION 336 (2004).

7. HEDLEY BULL, *THE ANARCHICAL SOCIETY* 49-50 (Macmillan, 1st ed. 1977). Bull draws from the Hobbesian concept of international anarchy in order to demonstrate that international legal order is always in conflict with the interests of states during war and transnational solidarity.

government, nor democratic rule.⁸ Its application to international sports federations and their challenge of conventional human rights norms, as this article illustrates, is paradigmatic of a species of systemic anarchy.

The *Semenya* judgment, while complex, is also rather straightforward. Semenya was a South African female intersex athlete who participated at the highest level in middle distance events.⁹ In fact, she was so good that the International Amateur Athletics Federation (IAAF), later renamed World Athletics, compelled her to take certain tests, at the behest of other competitors and national federations, to determine whether it was right for her as an intersex person to compete in the women's category. The tests were not about her sex as such, but rather whether her testosterone levels were comparable to those of female track and field athletes.¹⁰ This requirement was predicated on an internal regulation known as Eligibility Regulations for the Female Classification [Athletes with Differences of Sex Development]. This is referred to as the DSD Regulation,¹¹ and is common in the majority of sports governing bodies and national federations.¹²

When her testosterone levels were found to be too high, she was given a single option if she was still intent on running as a professional: undergo hormonal therapy. Semenya categorically refused. She claimed, among other reasons, that such therapy invaded her private life and subjected her to unknown potential health hazards. As a result, she was denied the right to participate in events under World Athletics, which includes the Olympics, given that World Athletics is the so-called sport governing body (SGB) that organizes track and field events under the IOC aegis.¹³ Semenya lodged an appeal against this decision before the CAS, effectively positing human rights arguments (i.e. discrimination, lack of access to judicial remedies, right to privacy, bodily

8. *Id.*

9. *Semenya v. Switz.*, App. No. 10934/21 (July 11, 2023), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22002-13274%22%7D> [https://perma.cc/337Q-6B9Y].

10. See Jonathan Ospina-Betancurt & Maria S Zakynthinak, *Outstanding Performances During Elite-Standard Short and Middle-Distance Finals and the Hyperandrogenism Regulation—A Detailed Analysis of Caster Semenya's Results*, 38 J. Sport Scis. 703 (2020).

11. World Athletics, *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)*, (March 23, 2023), <https://worldathletics.org/download/download?filename=2ffb8b1a-59e3-4cea-bb0c-5af8b690d089.pdf&urlslug=C3.6> [https://perma.cc/F6VV-NVKM]. The DSD Regulations under contention were those in place in 2017.

12. International Tennis Federation (ITF), *ITF Transgender Policy*, <https://www.itftennis.com/media/2163/itf-transgender-policy.pdf> [perma.cc/8C39-TBAV] (last updated August 10, 2023); Rugby Football Union, *Gender Participation Policy*, ENGLAND RUGBY (Aug. 1, 2022), <https://www.englandrugby.com/dxdam/26/26de38f3-d82f-4816-8be3-b582f6a9f757/TransgenderPolicy.pdf> [https://perma.cc/3C3G-ZKGZ]; see also Michele Krech, *To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics* 35 BERKELEY J. INT'L L. 262 (2017).

13. See Lena Holzer, *What Does it Mean to be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport*, 20 HUM. RTS. L. REV. 387, 388–89 (2020) (arguing that CAS endorsed a definition that reduces sex and gender to a matter concerning testosterone, which is largely predicated on a long-standing history at CAS that has led to institutionalizing gender, while also racializing body norms through sporting regulations).

integrity, degrading and inhuman treatment) in order to demonstrate that the unchecked authority of the *lex sportiva* exposes athletes to human rights risks, with little to no mechanisms to address such risks.¹⁴ It should be emphasized that the *lex sportiva* is a term of art suggesting that SGBs have been allowed to self-regulate their internal affairs to such a degree that with minor exceptions they have been detached from state regulations and hence have created a transnational sports law regime. The existence of such a regime was central to Semenya's legal battle.¹⁵

The CAS ultimately upheld the World Athletics regulations and found them to be wholly within the remit of the authority of sports governing bodies to decide matters within their sphere of operations and that the application of the DSD was in no way disproportionate.¹⁶ What is more interesting is that despite the submission of an amicus brief by three UN special procedures mandate holders, the CAS tribunal did not find the human rights arguments particularly relevant.¹⁷ What it found to be at stake was whether it was fair for other female athletes to compete against someone with far higher testosterone levels.¹⁸ In this conflict between sports fairness and fundamental human rights, the CAS accepted that the latter prevails.¹⁹

Given that fundamental human rights constitute *grundnorms* (constitutional norms) or *jus cogens* (norms of a peremptory character), it is implied in the CAS award that the *lex sportiva* is fragmented from general international law in the same manner that this claim has been made for the international law of foreign investment.²⁰ Upon losing her CAS battle, Semenya proceeded to challenge the CAS award on procedural grounds before the Swiss Federal Supreme Court

14. *Mokgdadi Caster Semenya v. Int'l Ass'n of Athletics Fed'n*, 2018/O/5794 & 2018/O/5798, Arbitral Award, ¶¶ 50–55, Court of Arbitration for Sport (April 30, 2019). The award was delivered in 2023.

15. See Leonardo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317 (2011) (emphasizing that the *lex sportiva* is a unique regulatory regime crafted and operated by sport governing bodies, which not only makes rules applicable against all athletes and stakeholders but also enforces these in judicial forums under its aegis).

16. Semenya CAS award, *supra* note 14, ¶¶ 603–04.

17. *Id.* ¶ 554.

18. *Id.*

19. The Semenya award very much relied on a similar case decided by CAS a few years earlier, namely *Dutee Chand v. Athletics Fed'n of India & Int'l Ass'n of Athletics Fed'n*, 2014/A/3759, Interim Arbitral Award, Court of Arbitration for Sport (July 24, 2015), which was vociferously criticized on similar grounds. See also *Mokgdadi Caster Semenya v. Int'l Ass'n of Athletics Fed'n*, 2018/O/5794 & 2018/O/5798, Arbitral Award, ¶¶ 625–26, Court of Arbitration for Sport (April 30, 2019).

20. Fragmentation has generally been applied to distinguish the obligations of states in international investment law from other treaty and customary-based obligations in the field of human rights and the environment. See Anne van Aacken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 FIN. Y.B. INT'L L. 91, 92–93 (2006). It should be admitted, however, that there is a growing body of practice and scholarly opinion advocating in favor of the principle of systemic integration between human rights and foreign investment obligations in accordance with Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT). See Silvia Steininger, *What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33, 33–36 (2017).

(SFSC), which has set aside jurisdiction against CAS awards.²¹ The SFSC, not surprisingly, upheld the CAS award on rather technical grounds.²²

As will be explained, competent courts such as the SFSC are only empowered to assess a very limited number of procedural irregularities associated with awards. The only possible irregularity the Semenya legal team could rely upon to flesh out its human rights arguments was that of public policy. In the case at hand, a public policy issue would arise only where it was sufficiently linked to claims of discrimination and lack of dignity in the award or the process underlying it.²³ The SFSC rejected claims that Swiss public policy had been offended in the present instance because neither the CAS award nor the proceedings were “manifestly untenable” or “shockingly offended justice and equity.”²⁴

This was not the end of the matter. Semenya challenged the judgment of the SFSC to the ECtHR.²⁵ Claims that the Swiss government or the state machinery as a whole (including its courts) have violated the ECHR are susceptible to review by the ECtHR, whose judgments are binding. The ECtHR held that gender discrimination can only be justified by “very weighty reasons,”²⁶ and crucially, that the SFSC’s balancing of sport fairness with fundamental human rights is incompatible with the ECHR and its long-standing case law.²⁷ For the purposes of this short article, the ECtHR found that the applicant had not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination.²⁸ It was immaterial for the Court that the Regulations in question were agreed to by all national track and field federations.

II. CONTRACTUAL LIMITATIONS ON ATHLETES IN TRANSNATIONAL SPORT LAW

The *Semenya* judgment has unintentionally exposed the ineffectiveness of contracts and by extension the much-glorified *lex sportiva* in balancing the rights

21. The set aside jurisdiction of the Swiss Federal Supreme Court is predicated on art. 190(2) Federal Private International Law Act (PILA).

22. Tribunal fédéral [TF] [Federal Supreme Court] Aug. 25, 2020, 4A_248/2019 & 4A_398/2019, 12, 43 (Switz.).

23. TF ¶¶ 9.4, 11.

24. TF ¶ 9.1. See also Lena Holzer, *The Decision of the Swiss Federal Supreme Court in the Caster Semenya Case: A Human Rights and Gender Analysis*, OPINIO JURIS (Sep. 30, 2020), <http://opiniojuris.org/2020/09/30/the-decision-of-the-swiss-federal-supreme-court-in-the-caster-semenya-case-a-human-rights-and-gender-analysis> [https://perma.cc/N2PR-6KQU].

25. The case was submitted on May 3, 2021. *Semenya v. Switzerland*, App. No. 10934/21 (May 3, 2021), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22002-13274%22%7D> [https://perma.cc/QR59-A5AG].

26. *Semenya v. Switzerland*, App. No. 10934/21, ¶ 169 (July 11, 2023), <https://hudoc.echr.coe.int/eng?i=001-226011> [https://perma.cc/U7B8-GEHQ].

27. *Id.* ¶¶ 174, 186.

28. *Id.* ¶ 169.

of professional athletes with their contracting parties, namely SGBs.²⁹ It is not that contracts are inept tools with which to negotiate and secure equal rights for the parties; rather, the vertical structure in which SGBs interact with national federations, and they in turn with athletes, narrowly circumscribes the underlying sports relationship. The sports relationship between all stakeholders in this vertical power structure is far greater than that which is penned on the relevant agreements. Moreover, the agreement, and the parties' rights and duties therein, is the basis for subsequent contractual claims and the judicial or arbitral institutions to which such claims must be submitted and entertained.

World Athletics went on to issue the contested DSD Regulations.³⁰ As a member of World Athletics, Athletics South Africa (ASA), the national athletics federation of South Africa, was obliged to adhere to all institutional rules adopted by its international SGB, World Athletics. As a South African national, Semenya was a registered athlete of the ASA and was similarly obliged to adhere to its institutional rules, as well as those of World Athletics. What Semenya was probably not aware of at the time of registering with the ASA was that she was bound by past, present, and future institutional rules and regulations adopted by ASA and World Athletics, irrespective of if she agreed with them or not. The contested (pre-2023) DSD Regulation provided in Article 5.2 that CAS enjoys exclusive jurisdiction for any pertinent dispute arising between an athlete, a national federation, and World Athletics. Disputes in this sense encompass the "validity, legality and/or proper interpretation" of the DSD Regulations.³¹ Article 5.4 of the original (not the amended 2023 version) DSD Regulations went on to provide that:

The law governing the dispute or appeal will be the IAAF Constitution and the IAAF Rules and Regulations (including these Regulations), with the laws of Monaco applying subsidiarily, and in the case of any conflict between any of the above instruments and the CAS Code currently in force, the above instruments will take precedence.³²

Unlike conventional contracts where the parties negotiate their mutual rights and obligations and are provided with an opportunity to carve out personalized exceptions, and choose their governing law and choice of court or arbitration, these choices are not available to professional athletes. Although Semenya is contractually bound to the terms of the DSD Regulation, she had absolutely no input in its negotiation and its binding effect.³³ It is not suggested

29. See Antoine Duval, *Transnational Sports Law: The Living Lex Sportiva*, in 493 THE OXFORD HANDBOOK OF TRANSNATIONAL LAW {Peer Zumbansen ed., 2021} (stressing that the *lex sportiva* is yet another emanation of *lex mercatoria* (i.e. the law of a particular class of merchants) and works alongside domestic laws. Duval further emphasizes that as SGBs grow in power so does their law-making authority).

30. Int'l Ass'n of Athletics Fed'ns, *supra* note 9.

31. This is now Article 7.1 of the 2023 version of the World Athletics' DSD Regulations.

32. This is now Article 7.3 of the 2023 version of the World Athletics' DSD Regulations.

33. See JACK ANDERSON, SPORTS LAW: A CONCISE INTRODUCTION 45 (2023) (stressing that the administrative jurisdiction enjoyed by SGBs over their members is contractual in nature).

that each and every athlete must be able to negotiate a new contract with their SGB. However, it is exactly because of the practical impossibility of individualized contracts that the ‘master agreement’ must include safeguards that do not ultimately impact the weaker party (i.e. athletes) in a negative manner.

Indeed, without exception, contract law and regulation in all states is particularly cautious about adhesive agreements, terms and conditions in contracts with vast negotiating disparity, as well as clauses that produce unfair and unjust outcomes.³⁴ This also includes the civil code of Monaco, which was at stake in this case.³⁵ Arbitration is not inherently unfair, and in fact, the ECtHR has made it clear that CAS judgments must adhere to ECHR standards.³⁶ Even so, athletes frequently find unanticipated contractual hurdles that impact their human rights.³⁷ While principles of contract law generally favor the rescission of unfair or unjust clauses in unevenly negotiated contracts,³⁸ the *sui generis*

34. See *Schlobhohm v. Spa Petite Inc*, 326 N.W.2d 920, 924–25 (Minn. 1982), where adhesion or unconscionable contracts were defined as follows: “There must be a showing that the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation *and* that the services could not be obtained elsewhere.” Unduly burdensome provisions in adhesive contracts give rise to unconscionability claims whereby the weaker party may be relieved of its contractual obligations. *United States v. Bedford Associates*, 657 F.2d 1300, 1313 (2d Cir. 1981). Adhesion contracts also give rise to the so-called *contra preferentum* doctrine, which is a defense for weaker parties allowing the courts to interpret vague contractual rules in their favour. See *Can. S.S. Lines Ltd. v. The King* [1952] 15 AC 192 (PC) (appeal taken from Sup. Ct. Can.). No doubt, it does not apply to sophisticated parties that can allocate risk. *Persimmon Homes Ltd. et al. v Ove Arup & Partners Ltd. et al.* [2017] EWCA (Civ) 373 (appeal taken from EWHC (TCC)). It is doubtful that junior athletes are so sophisticated when registering with their national federation, in respect of future access to justice difficulties.

35. Code Civil (C. Civ.) [Civil Code] 956 (Monaco), <https://www.ilo.org/dyn/natlex2/natlex2/files/download/113485/MCO-113485.pdf> [<https://perma.cc/UK9L-Y55A>].

36. On the right to fair trial before specialized sporting judicial and quasi-judicial entities, the ECtHR held that CAS proceedings amounted to compulsory arbitration, which in turn was obliged to provide all the procedural safeguards enunciated in Article 6 of the ECHR, including the right to a public hearing. See *Mutu v. Switzerland*, 222 Eur. Ct. H.R. (2018); The European Convention on Human Rights, Article 6, 1950. The ECtHR found a violation of Article 6.1 of the ECHR on grounds that the Arbitration Committee of the Turkish Football Federation (TFF) suffered from structural deficiencies, such that allowed external influence and lacked full independence in its decision-making. *Akal v. Turkey*, 2020 Eur. Ct. H.R.; The European Convention on Human Rights, Article 6 § 1, 1950.

37. By way of illustration, Rule 50.2 of the Olympic Charter emphasizes that “[n]o kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas.” It is clear that such formulation is inconsistent with fundamental human rights, particularly the right to peaceful assembly and freedom of expression, which by extension gives rise to a peaceful right of protest. See Eleni Polymenopoulou, *Expressing Dissent: Gag Laws, Human Rights Activism and the Right to Protest*, 32 FLA. J. INT’L L. 337 (2021). U.N. Hum. Rts. Comm., General Comment No. 37 on the Right of Peaceful Assembly (Article 21), U.N. Doc. C/GC/37, ¶ 3 (2020); Edison Lanza (Special Rapporteur), *Report on Protest and Human Rights: Standards on the Rights Involved in Social Protests and the Obligations to Guide the Response of the State*, Inter-Am. Comm’n H.R., ¶ 18 (2019).

38. Restraint of trade by reason of contract is paradigmatic of this approach, which finds fertile ground in the realm of sports contracts. See Ilias Bantekas, *Professional Tennis and*

contracts entered by athletes upon registering with a national federation have not been subjected to the same rules.³⁹ This has led to suggestions that the dispute resolution clauses in SGB institutional rules constitute a species of forced arbitration, given that they all refer to CAS jurisdiction.⁴⁰

III. CAS CLAUSES IN SPORTS INSTITUTIONAL RULES AS FORCED ARBITRATION?

The contractual dimension (as opposed to its procedural counterpart) of arbitration is predicated on the foundational principle of party autonomy.⁴¹ This suggests that recourse to arbitral proceedings must only be predicated on the consent of all parties to the agreement.⁴² Consequently, such consent, irrespective of how it is expressed, must be clear and unequivocal.⁴³ As a corollary, arbitration cannot be imposed by force of will.⁴⁴ Exceptionally, states will *impose* arbitration on particular classes of private actors, typically in a limited number of disputes involving state entities or concerning some element of public interest (statute-based arbitration).⁴⁵ The exclusion of party autonomy here is allegedly justified by the speediness inherent in arbitration, the assurances of fairness provided by the state, and the assumption that this is what the private actors would have chosen had they been given the option (essentially, that arbitration under the circumstances is pro-investor).⁴⁶

By way of illustration, tax arbitration, particularly in the realm of double taxation disputes between companies and states, is on the rise and in most cases

Restraint of Trade in the English Common Law, 22 Va. Sports & Ent. L.J. 1, 7–13 (2023) (citing *Proactive Sports Mgmt. Ltd. v. Rooney*, [2011] EWCA Civ. 1444, which concerned lengthy agency representation entered into by a 15-year-old footballer. The court rescinded the lengthy obligation in favor of the footballer; then citing *Zverev v. Ace Grp. Int'l*, [2020] EWHC (Ch) 3513 (U.K.), which effectively concerned a restraint of trade claim before English courts, but which was ultimately settled to the benefit of the tennis player). *See also* *Enderby Town FC Ltd. v. Football Ass'n Ltd.* [1971] 591, 606.

39. Lloyd Freeburn, *International Perspective: Forced Arbitration and Regulatory Power in International Sport—Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v. Switzerland*, 31 MARQ. SPORTS L. REV. 287, 299–300 (2021).

40. *Id.*

41. *See, e.g.* Symeon C. Symeonides, *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple*, 39 BROOK. J. INT'L L. 1123, 1127 (2014). *See also* Ole Lando, *THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE*, 134–35 (1989).

42. *See, e.g.* Thomas J. Stipanowich, *Contracts Symposium: Contract and Conflict Management*, 2001 WIS. L. REV. 831, 880–81.

43. *Id.*

44. *Id.*

45. Exceptionally, compulsory arbitration is extended to wholly private disputes. Part A of the Fourth Schedule to the Maltese Arbitration Act stipulates that condominium, traffic-related, and paying agency disputes are subject to mandatory arbitration. Arbitration Act, Cap. 387 Sched. 4(A) (2000) (Malta). Mandatory arbitration has also been introduced for any dispute in connection with building construction (to the exclusion of claims for personal injuries). Arbitration Act, Cap. 387 Pt. 2(10) (2000) (Malta).

46. *See* Ilias Bantekas, *Inter-State Arbitration in International Tax Disputes*, *Inter-State Arbitration in International Tax Disputes*, 8 J. INT'L DISP. SETTLEMENT 507, 518–19, 523 (discussing the various forms of inter-state and investor-state tax dispute settlement, the latter always being compulsory in nature).

the taxpayer in question has no option but to defer to compulsory arbitration under the terms of the local law.⁴⁷ Such mandatory forms of arbitration are exceptional, but they do exist in various fields, including sport disputes. But unless they are deemed to be devoid of fair trial guarantees, they are not considered invalid.⁴⁸ In one case, the Maltese Constitutional Court was asked to rule on the constitutionality of mandatory arbitration proceedings, whereby the appointment of the arbitrators was deferred in the arbitration clause to the chairman of the Malta Arbitration Centre.⁴⁹ The Constitutional Court was unanimous in its decision that the arrangement in question did not breach the Constitution of Malta,⁵⁰ or indeed the right to a fair trial under Article 6 of the ECHR.⁵¹ This, of course, does not mean that other courts are not free to reach different conclusions under the same or similar facts, and no doubt the landscape of compulsory arbitration and its consequences on the parties' fair trial rights is still contentious. It is not surprising, therefore, that the Italian Constitutional Court in *Mortini v. Comune di Alidono* reached a different conclusion from its Maltese counterpart.⁵²

While there can be little doubt that institutional arbitration under SGB rules qualifies as forced arbitration, it is not suggested that this is *always* unfair. On the contrary, both the CAS rules and the Swiss Federal Supreme Court provide ample guarantees to counterweigh the parties' imbalanced contractual undertakings,⁵³ and increasingly, SGBs are equipping themselves with human

47. This is usually the result of what is known as Mutual Agreement Procedure (MAP) to settle tax disputes. *Id.* at 518. It is found in bilateral tax agreements and institutionalized internationally under Article 25 of the Organization for Economic Cooperation and Development (OECD) Model Tax Treaty. *Id.*

48. See Wesley A Sturges, *Compulsory Arbitration: What Is It?* 30 FORDHAM L. REV. 1 (1961) (stressing that such forms of arbitration are constitutionally repugnant).

49. *Untours Ins. Agency Ltd. v. Micallef*, (2013), App. No. 81/2011/1, Maltese Constitutional Court Judgment (Malta).

50. CONSTITUTION OF MALTA, Sept. 21, 1964, ch. IV, art. 39(2); *Untours Ins. Agency* (2013).

51. *Untours Ins. Agency Ltd. v. Micallef*, (2013), App. No. 81/2011/1, Maltese Constitutional Court Judgment (2013). The same Court had reached a different outcome in another case two years earlier in *Vassallo & Sons Ltd. v. Att'y Gen. Water Servs. Corp.*, (2011) App. No. 31/2008/1, (Malta). This case is cited in Ilias Bantekas, *INTRODUCTION TO INTERNATIONAL ARBITRATION* 7 (Colum. Univ. Press 2015).

52. *Mortini v. Comune di Alidono*, Corte cost., 9 May 1996 [1996] Foro pad 4 (It.). The Court was asked to decide whether a mandatory provision in Italy's public procurement legislation that compelled parties to compulsory arbitration was consistent with the right of access to the courts. The Italian Supreme Court was of the opinion that such compulsory arbitration was a violation of this right. Bantekas, *supra* note 38, at 7.

53. *Mutu & Pechstein v. Switzerland*, (2018), App. Nos. 40575/10 & 67474/10, where the ECtHR held that CAS proceedings amounted to compulsory arbitration, which in turn was obliged to provide all the procedural safeguards enunciated in Art 6 ECHR, including the right to a public hearing. See also *Riza v. Turkey*, (2020), App. Nos. 30226/10, 17880/11, 17887/11, 17891/11 & 5506/16 where the ECtHR found a violation of art. 6(1) ECHR on the ground that the Arbitration Committee of the Turkish Football Federation (TFF) suffered from structural deficiencies, such that allowed external influence and lack of full independence in its decision-making capacity.

rights rules.⁵⁴ Moreover, it would be disproportionate in terms of cost and expediency for all SGBs to negotiate personalized contracts with all athletes with dispute resolution clauses that refer disputes to several arbitral institutions or the courts.⁵⁵ The very idea underlying CAS is that it builds sufficient expertise to deal with issues that are common across all courts. Where CAS fails is with its treatment of fundamental human rights in sports-related disputes. This may have to do with the fact that human rights expertise is missing from CAS arbitrators in a manner that would allow them to address human rights and alleviate forced arbitration concerns.⁵⁶ In addition, the SFSC does not exhibit serious signs of dissecting complex CAS awards in order to assess their human rights implications in accordance with the ECHR other than through a limited public policy lens that does not intrude in human rights substantive claims. In this state of affairs, affected athletes are left with no choice but to challenge CAS awards in creative ways.

54. The IOC website suggests that principles 1, 2, 4 and 6 of its Fundamental Principles and Article 2 of the IOC Charter enshrine human rights. This author suggests that this is hardly the case. *But see*, IOC Olympic Agenda 2020+5, 15 Recommendations, INTERNATIONAL OLYMPIC COMMITTEE, <https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Olympic-agenda/Olympic-Agenda-2020-5-15-recommendations.pdf> [https://perma.cc/FR63-F2G3], which suggests adopting an overarching IOC human rights strategic framework with specific action plans for each of the IOC's three different spheres of responsibility; linking the overarching IOC human rights strategic framework to various existing or forthcoming IOC strategies; amending the Olympic Charter and the "Basic Universal Principles of Good Governance" of the Olympic and Sports Movement to better articulate human rights responsibilities; and enabling the newly created IOC Human Rights unit to develop the IOC's internal capacity with regard to human rights. *See e.g.* FIFA Human Rights Policy, FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION (2017), <https://digitalhub.fifa.com/m/1a876c66a3f0498d/original/kr05dqyhwr1uhqy2lh6r-pdf.pdf> [https://perma.cc/XJX8-9XTB]; FIFA World Cup Qatar 2022: Sustainable Source Code, FIFA WORLD CUP (2020), <https://digitalhub.fifa.com/m/03dc1047f4cf6995/original/hp3yd5g3hlqzdlko6bev-pdf.pdf> [https://perma.cc/49EP-H53Z]; the establishment of a FIFA Human Rights Advisory Board and others. *See* FIFA Human Rights Documents, INSIDE FIFA, which includes human rights impact assessments for tournaments in potential host cities, <https://www.fifa.com/social-impact/human-rights/documents?filterId=CT2728f535-ea60-4c7a-9ff7-893dcc5a8e27> [https://perma.cc/6R3U-K8TY]. More remarkable is Article 3 of the FIFA Statutes, which is unique among all other SGB institutional rules. It stipulates that "FIFA is committed to respecting all internationally recognized human rights and shall strive to promote the protection of these rights." FIFA, *Human Rights & Anti-Discrimination*, INSIDE FIFA, <https://inside.fifa.com/social-impact/human-rights> [https://perma.cc/5B5J-YL2W].

55. In *Platini v. Switzerland*, App. No. 526/18 (2020), the ECtHR was of the opinion that the then President of UEFA, Michel Platini, was not in any way a participant in forced arbitral proceedings at CAS. CAS was the only forum available to Platini by which to challenge his suspension from UEFA for alleged financial misconduct.

56. *See* John Ruggie, *For the Game, For the World: FIFA and Human Rights*, HARV. KENNEDY SCH. (2016) (noting that "in its current setup, human rights are sidelined and the applicable CAS arbitration rules do not offer adequate human rights protection...CAS' 300-plus arbitrators...generally lack human rights expertise").

IV. ACCESS TO JUSTICE AND JUDICIAL REMEDIES IN SPORT

In liberal democracies, all persons have the right to seek remedies for their claims, irrespective of whether they are of a civil, administrative, or criminal nature. These remedies may be judicial or administrative, but above all they must be *effective* and *accessible*.⁵⁷ A remedy is effective where its pursuit by the claimant is not futile or without real purpose.⁵⁸ This requires that the courts are independent from the state and that they dispense justice in a timely and appropriate fashion. In countries where judicial remedies are ineffective, people are either distrustful of the courts or bypass them in favor of other mechanisms. Additionally, proceedings must be fair,⁵⁹ and parties treated equally. A judicial mechanism is accessible where all persons, irrespective of their status or level of wealth, can access it without fear of retribution, cost, or other consequences. Where justice mechanisms are expensive and where no right of free counsel is available to the indigent, such justice is inaccessible. Hence, the mere availability of justice mechanisms is insufficient to meet the foundational requirements of effectiveness and accessibility.

The law generally allows arbitral proceedings in substitution of ordinary judicial proceedings. It does so not to respect party autonomy, but to assure that arbitral tribunals will provide the same degree of fair trial guarantees as regular courts.⁶⁰ Hence, arbitral proceedings must be effective and accessible safeguards.⁶¹ Although arbitral awards produce *res judicata* (i.e. binding effect between the disputing parties under the particular set of facts and claims) in exactly the same way as court judgments, this is only pertinent to the dispositive part of the award. The parties to an otherwise binding commercial award can still approach the courts and file human rights claims arising from their dispute.

57. By way of illustration, the right to an effective remedy is enshrined in Article 13 of the European Convention of Human Rights (ECHR).

58. Effective remedies should be available, known, accessible, affordable and capable of providing appropriate redress. See Kathleen Gutman, *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come*, 20 GERMAN L.J. 884 (2019).

59. A determination as to whether or not proceedings are fair, according to established case law, must be assessed by reference to their entirety. *Ankerl v. Switzerland*, 32 Eur. Ct. H.R. 1, 17 (2001); *Centro Europa 7 S.r.l. v. Italy*, 974 Eur. Ct. H.R. ¶ 197 (2012).

60. *Levages Prestations Servs. v. France*, 1530 Eur. Ct. H.R., ¶ 46 (1996); see also Clare Ambrose, *Arbitration and the Human Rights Act*, LLOYD'S MAR. & COM. L.Q., 2000, at 468; see also Charles Jarroson, *L'Arbitrage et la Convention Européenne des Droits de l'Homme*, 4 *Revue de l'Arbitrage* 573 (1989).

61. *Klausecker v. Germany*, 61 Eur. Ct. H.R. 118, 129–31 (2015); *Deweert v. Belgium*, 169 Eur. Ct. H.R. ¶ 49 (1980); *Tabbane v. Switzerland*, App. No. 41069/12, ¶ 27 (Mar. 19, 2018), <https://hudoc.echr.coe.int/eng?i=002-11120> [<https://perma.cc/N7QE-7LF8>]; *Lithgow v. United Kingdom*, 8 Eur. Ct. H.R. 329, ¶ 201 (1986).

Arbitral awards cannot and should not culminate in the pursuit of relevant human rights claims,⁶² as opposed to incidental contractual claims.⁶³ The same is true of arbitral or quasi-arbitral (expert determination or other) mechanisms existing in SGBs, to which athletes and national federations have subscribed. The *Semenya* case demonstrates that there is no doubt that CAS is a model arbitral institution with arbitrators of the highest caliber served by one of the most competent courts. Even so, it is equally uncontested that several claims are dealt as though all relevant aspects have been finally resolved by CAS, despite the fact they involve matters not attended or not adequately attended by CAS. As the following section will demonstrate, Semenya resorted to a *sui generis* forum shopping in order to fill the judicial gaps in her justice claims. Either the arbitral process (broadly understood) must be able to offer claimants effective and accessible justice in respect of all their claims, or arbitral justice must be supplemented by courts or other mechanisms capable of offering such justice.

A. *The Move Towards Sports Forum Shopping*

The *Semenya* case highlights the superior status of agreement, even if unconscionable, and *lex sportiva* above other considerations. Athletes possess little to no opportunity for negotiating personalized agreements containing a mutually agreed dispute resolution clause in their relationship with national and international sport governing bodies. Personalized agreements are usually outside of the sporting relationship with a national or international federation and concern relationships with agents, sponsors, broadcasters, and sports clubs.⁶⁴ Semenya's key claims of discrimination, privacy breach, and degrading treatment can only be challenged through the DSD Regulation, which as we have already seen provides for CAS arbitration; there is nothing in the Regulation that

62. See *Transado-Transportes Fluviais do Sado v. Portugal*, App. No. 35943/02, <https://hudoc.echr.coe.int/fre?i=002-4550> [<https://perma.cc/N3B3-4V3X>]; see also *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG*, 1982 E.C.R. 1095, where the CJEU was emphatic in that the parties to a contract were not at liberty to carve out exceptions from the application of European Union (EU) law, as EU law is mandatory and not permissive in nature. See also, *Société Licensing Projects v. Société Pirelli*, Paris Appeals Court judgment (November 17, 2011); see also Swiss Code of Civil Procedure [CC] Jan. 1, 2021, CC art. 396, para. 2, which allows a limited review of domestic arbitral awards where the claimant alleges a violation of the ECHR.

63. *Sumukan Ltd. v. Commonwealth Secretariat* [2007] EWCA (Civ) 243 [48]-[50] (Eng.). This judgment stands as good precedent that an agreement by the parties to a contract whereby they exclude the possibility of an appeal on a point of law under § 69 of the Arbitration Act 1996 does not breach their right to a fair trial under Article 6 of the ECHR. This is exceptional, since a similar agreement to exclude the right to appeal in litigation would violate fair trial guarantees. Such an approach regarding appeal limitations arising from arbitral agreements is consistent with ECtHR case law as far back as the early 1960s. See *Suovaniemi v. Finland*, App. No. 31737/1996, Eur. Ct. H.R. (1999); see also *X v. Germany*, App. No. 1197/1961, Eur. Comm'n H.R. Dec. & Rep. (1962).

64. This is generically known as a sports contract, in contrast to institutional rules to which athletes are bound, but which are not characterized as contracts. See John H. Shannon & Richard J. Hunter Jr., *Principles of Contract Law Applied to Entertainment and Sports Contracts: A Model for Balancing the Rights of the Industry with Protecting the Interests of Minors*, 48 LOY. L.A.L. REV. 1171 (2015).

could plausibly give rise to human rights claims unless CAS itself decided that it was in the best interests of justice to entertain them.

The question that arises here is whether Semenya, or any other athlete in a similar situation, could avail herself of alternative forums to resolve those parties of such disputes that ordinarily pertain to the civil rights sphere. If an athlete is discriminated against by her national federation, the courts of that state would ordinarily enjoy clear territorial jurisdiction, whether as a matter of contract or tort. This would not be the case where the institutional rules of SGBs reserve jurisdiction to CAS for disputes between national federations and athletes.⁶⁵

In the vast majority of jurisdictions, national sports federations have set up judicial or arbitral institutions, as have SGBs themselves.⁶⁶ The disputes in question are contractual in nature, despite the existence of human rights issues incidental to the contractual claims. The “validity, legality and interpretation” of the (pre-2023 version of the) DSD Regulation under Article 5.2 is broad enough to encompass all issues arising therefrom and it may be thought by the World Athletics legal team that “legality” is sufficiently broad to cover incidental human rights concerns. While this is true, it does not cover direct human rights claims that arise from the DSD Regulation. Courts are obliged to defer to party autonomy in respect of contractual disputes—including where a contract submits tort-related claims to arbitration—but the courts enjoy unhindered jurisdiction in relation to constitutional claims; human rights are constitutional claims of the highest order.⁶⁷ Contracts cannot impede the lodging of constitutional claims before the courts in the same manner that an agreement to arbitrate cannot exclude from the ambit of courts public/constitutional aspects of the dispute.⁶⁸ In the case at hand, Semenya, as well as ASA, would not have been precluded from approaching South African courts in order to entertain their human rights. Even so, South African courts may end up declining jurisdiction because of the CAS clause in the DSD, or because of the argument that World Athletics was not present in any discernible manner on the territory in South Africa and that the impact of the DSD Regulation was not felt there. The discrimination against Semenya effectively occurred during all of the foreign tournaments in which she was denied participation.

If Semenya is prevented from lodging a constitutional claim before the South African courts, she might be justified in bringing a similar claim before the courts of countries hosting events where she could participate. Such a claim could not be brought on the basis of a choice of court agreement, given that one does not exist. Rather, the claim would be extra-contractual as the courts in

65. Court of Sports-related Arbitrations, CAS R27 (2023), https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2023__EN_.pdf [<https://perma.cc/8TA8-YUY6>].

66. Examples include the FIFA Dispute Resolution Chambers and its Football Tribunal. The same is true of the ITF’s Independent Tribunal. See Ilias Bantekas, *The Resolution of Professional Tennis Disputes*, 14 J. INT’L DISP. SETT. 488, 496–501 (2023).

67. Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EJIL 749 (2008).

68. The pioneer case in this regard was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614, 648 (1985). It went on to inspire similar developments throughout the globe. See Ilias Bantekas, *The Foundations of Arbitrability in International Commercial Arbitration*, 27 AUSTL. Y.B. INT’L L. 193, 207 (2008).

question would be prevented from exercising jurisdiction in favor of arbitral proceedings. While a territorial link may be established (by reason of the event that Semenya could have participated in), and although this would be stronger if the forum was the country where the SGB is incorporated (Monaco in the present instance), there is no guarantee that the courts of the forum will agree to hear this claim on such tenuous grounds. Even so, there is some scope for success.

Article 3.3 of the draft UN Business and Human Rights (BHR) treaty encompasses business activities that impact or affect “all internationally recognized human rights treaties.”⁶⁹ A possible issue with such a broad and all-encompassing approach is the diversity of ratification of multilateral treaties, with some states having ratified all, while others only a portion. As a result, a country adopting the BHR treaty may only be subject to a fraction of human rights obligations where it has not ratified multilateral human rights treaties, or where it has appended a large number of reservations. Article 9 of the draft BHR treaty serves to remedy this inconsistency.⁷⁰ Paragraph 1 thereof provides that all procedural and substantive issues regarding claims shall be governed by the *lex fori* (the law of the country before whose courts a dispute is seized) or the law of the court in which the proceeding is brought, including the forum’s conflict of laws rules.⁷¹ Jurisdiction for human rights violations under Article 9.1 of the draft treaty is vested in the courts of the state where:

- a. the human rights abuse occurred and/or produced effects; or
- b. an act or omission contributing to the human rights abuse occurred;
- c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled; or
- d. the victim is a national of or is domiciled.⁷²

This provision is broad enough to confer jurisdiction on a large number of national courts, falling slightly short of universal tort jurisdiction. Article 9.1 further expands the authority of national courts by stipulating that: “[nothing] exclude[s] the exercise of civil jurisdiction on additional grounds provided for by international treaties or domestic laws.”⁷³ A provision like this effectively puts to rest *forum non conveniens* by courts seized of tort suits against corporations for extra-territorial conduct. Suits brought before the courts of states with minimal links to the conduct or its impact have generally been disinclined to

69. The Open-Ended Intergovernmental Working Group (OEIGWG), *Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transaction Corporations and Other Business Enterprises* (Aug. 17, 2021), <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> [<https://perma.cc/86ZT-GF5P>] [hereinafter BHR].

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.*

entertain such disputes and invoke the *forum non conveniens* doctrine to decline jurisdiction.⁷⁴ Moreover, the courts of countries whose human rights armory is weak can assert jurisdiction and apply a more extensive gamut of rights that are in force in a country with a link to the claim under consideration. Article 9.3 of the BHR treaty removes *forum non conveniens* from the litigation of transnational tort claims. It stipulates that “[c]ourts vested with jurisdiction on the basis of Article[s] 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in line with Article 7.5 of this (legally binding instrument).”⁷⁵

It obliges states to eliminate the likelihood of their courts dismissing legitimate proceedings brought by victims on the basis of the *forum non-conveniens* doctrine.⁷⁶ This is further reinforced by Articles 9.4 and 9.5 of the 2021 version of the BHR treaty as follows:

9.4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is connected with a claim against a legal or natural person domiciled in the territory of the forum State.

9.5. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State Party concerned as follows:

- a. the presence of the claimant on the territory of the forum;
- b. the presence of assets of the defendant; or
- c. a substantial activity of the defendant.⁷⁷

The BHR treaty is not yet in force,⁷⁸ but it does reflect current trends and practices whereby athletes who feel wronged or victimized by a decision or action of an SGB may turn to the courts of states willing to entertain extra-territorial torts, or torts with a link to the territorial state, particularly where the

74. See, e.g., *AAA v. Unilever PLC* [2018] EWCA (Civ) 1532, (appeal taken from QB) (holding because “no duty of care by a U.K. parent company in respect of third parties harmed by the business conduct of a foreign subsidiary); see *Kalma v. African Mins. Ltd.*, [2020] EWCA (Civ) 144 (appeal taken from QB) (deciding that there was no liability for a UK company’s operations in Sierra Leone mired by police abuse).

75. BHR, *supra* note 69.

76. See *id.* The foundations of *forum non conveniens* in English law were spelled out by the House of Lords in *Spiliada Mar. Corp. v. Cansulex Ltd.* [1986] 3 WLR 972 at 979 (HL). One of the key elements for deferring to another jurisdiction in *Spiliada* was the possibility of obtaining justice there. See *id.* at 983.

77. BHR, *supra* note 69.

78. The latest draft of the BHR treaty was published in 2023. See The Open-Ended Intergovernmental Working Group (OEIGWG), *Updated Draft Legally Binding Instrument (Clean Version) to Regulate, in International Human Rights Law, the Activities of Transaction Corporations and Other Business Enterprises* (July 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf> [<https://perma.cc/C56M-MUJM>].

claims have a human rights dimension.⁷⁹ This trend is increasingly witnessed in the case law of industrialized states. In *Nevsun Resources Ltd. v. Araya*, the Canadian Supreme Court held that Canadian corporations are liable for the breach of customary and *jus cogens* (peremptory norms) obligations.⁸⁰ Significantly, the holding is not limited to tort liability, particularly given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.⁸¹ At the time of writing, there is no evidence that athletes have ventured to the courts of states willing to exercise universal tort jurisdiction in respect of sports-related human rights claims. It should be noted that whether or not an SGB is incorporated as a limited liability company⁸² or as a non-profit entity⁸³ is immaterial for the purposes of tort claims.

A particularly thorny problem with universal tort judgments concerns their enforcement. Even if the courts of the athlete's nationality were to entertain a claim against such an SGB and issue a judgment in the athlete's favor, it is unlikely that said judgment would be enforced in the SGBs' country of incorporation (or any other country for that matter). For enforcement to be possible, there would need to exist a bilateral or multilateral treaty on recognition of civil and commercial judgments. This kind of agreement is lacking outside the European Union.⁸⁴

In the present case, Semenya was hoping for two possible forums to engage. CAS was in fact a springboard for judicial claims whereby Switzerland would be used as a territorial link. The first was the Swiss Federal Supreme Court (SFSC), which was duly engaged as the competent court for set aside claims in arbitral proceedings seated in Switzerland. The hope was that the SFSC would entertain Semenya's human rights concerns and deliberate on them. In the event that it did not—and this was likely anticipated by Semenya's legal team given the history of similar human rights claims entertained by the SFSC arising as set

79. In *Sherpa v. Lafarge*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Sept. 7, 2021, Bull. Crim., No. 868 (Fr.), the Court of Cassation held that there was enough evidence to suggest that Lafarge had been complicit in crimes against humanity in Syria by making large cash payments to Islamic States. The Court held that the company, among others, endangered the lives and fundamental rights of its employees and was further liable for terrorist financing. See equally *Vedanta Resources PLC v. Lungowe* [2019] UKSC 20, at 56–58, 62 (appeal taken from EWCA) (UK), which unlike other cases, did find a duty of care arising from a company's overseas business operations.

80. *Nevsun Res. Ltd. v. Araya*, [2020] S.C.R. 166 (Can.).

81. *Id.* at 170.

82. The ITF, which is organized and registered as a limited liability company under the laws of the Commonwealth of the Bahamas, is headquartered in London. ITF Constitution, Memorandum of Association 2024.

83. The IOC is incorporated as a non-profit association under Article 60ff of the Swiss Civil Code. Even so, it has entered into a host state agreement with Switzerland. IOC, *Agreement between Switzerland and the International Olympic Committee*, 0.129.122.415.1 (Nov. 1, 2000), <https://archive.icann.org/en/psc/annex6.pdf>. [<https://perma.cc/G23U-HSR>]. See Margareta Baddeley, *The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to be Drawn*, 20 INT'L SPORTS L.J. 5 (2020).

84. Council Regulation 1215/2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1 (EU).

aside claims from CAS awards—the ultimate aim was the ECtHR. The ECtHR had little problem with the jurisdictional issue at hand. Since a part of the case involved judicial proceedings in Switzerland, the ECtHR found that the jurisdictional link had been satisfied.⁸⁵ The ECtHR emphasized that Semenya had no choice but to submit to CAS and that the latter had no obligation to apply the ECHR,⁸⁶ although the author disagrees with this contention.⁸⁷ The ECtHR took issue with the limited protection offered by the SFSC in a dispute between a powerful SGB and a sole athlete.⁸⁸ The SFSC, like all competent courts, would not want to make significant inroads on the Swiss perspective to public policy, as this might have serious ramifications for commercial arbitration. It is a conservative court that would not like to rock the boat too much. Just as such attempts have failed in the past, the court here could not examine the substance of the dispute or the parties' substantive claims.⁸⁹

For SGBs incorporated in EU member states, or claims entertained before the courts of such states, a likely forum shopping strategy would entail a request for a preliminary reference to the Court of Justice of the European Union (CJEU).⁹⁰ The reference would demand clarity on the conformity of SGB institutional rules with the EU Charter of Fundamental Rights.⁹¹ It is not

85. *Semenya v. Switzerland*, no. 10934/21, ¶¶ 85–89, ECHR 2023, <https://hudoc.echr.coe.int/eng?i=001-226011> [<https://perma.cc/76VW-7ZXH>].

86. *Id.* ¶ 107.

87. In *Markovic v. Italy* [GC], no. 1398/03, ECHR 2006, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22002-2955%22%7D> [<https://perma.cc/G7PN-HBHD>], the ECtHR emphasized that a jurisdiction link exists “from the moment a person brings an action before the civil courts” of a member state to the ECtHR. It is irrelevant that CAS is not a ‘civil court,’ but an arbitral tribunal, given that the ECtHR has reiterated on several occasions that the same principle applies to arbitral tribunals, particularly where set aside proceedings against their awards are heard by national courts such as the SFSC. See *Mutu v. Switzerland*, nos. 40575/10 & 67474/10, ECHR 2018, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22002-12113%22%7D> [<https://perma.cc/5Y8L-427A>].

88. *Semenya*, no. 10934/21 at ¶ 111.

89. See *Bakker v. Switzerland*, App. No. 7198/07 (Sept. 3, 2019), <https://hudoc.echr.coe.int/eng?i=001-196440> [<https://perma.cc/J3N4-66QG>], where a professional cyclist's complaint concerning the SFSC's limited powers of review over CAS awards was found inadmissible.

90. Where a national court considers a matter of EU law that has not already been dealt by the CJEU, it must make a request to the CJEU to resolve that matter (preliminary reference). This is regulated in Article 267 of the Treaty for the Functioning of the European Union (TFEU). Consolidated Version of the Treaty on the Functioning of the European Union art. 267, June 7, 2016, 2016 O.J. (C 202) 1.

91. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> [<https://perma.cc/SZK8-9EGK>]. Any EU entity acting in the sphere of EU law must act in conformity with the Charter. In *Joined Cases C-8-10/15P, Ledra Advert. Ltd. v. Eur. Comm'n*, ECLI:EU:C:2016:701 ¶¶ 55–59 (Sept. 20, 2016), the CJEU went even further. It held that where the EC Commission is involved in the signing of memoranda of understanding (MoU) within the framework of the European Stability Mechanism, it is acting within the sphere of EU law. *Id.* Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights. *Id.*

uncommon for the CJEU to offer preliminary references on sports-related issues that have wide-ranging impact on the EU sports architecture.⁹²

V. CONCLUSION

The merits of the *Semenya* case are hardly straightforward. Whether one sides with sport fairness on the basis of biological grounds, or with an absolutist non-discrimination outlook, it is easy to appreciate the limitation of appropriate remedies for athletes bound to agreement between their national federation and its SGB. While CAS is probably one of the most exemplary arbitral tribunals ever created and operated, the structure of international sports law fails athletes and their families on many occasions.

But CAS can hardly take the sole blame for this state of affairs. A single national federation would find it difficult to break ranks with convention and suggest that human rights-related aspects of a dispute involving an athlete should be considered by its domestic courts, or that CAS should invite human rights arbitrators alongside those on the CAS roster. Athletes, like Semenya, who are ‘trapped’ in compulsory arbitration mechanisms realize that when disputes with human rights implications arise, the issues in question are heard in exactly the same manner as any other substantive sport issue. At all levels of judicial inquiry, the athlete is bound by a rule crafted by its SGB and it is the judicial institution of that SGB that determines its legality and application.

The CAS will decide the same issue along similar grounds and it is unlikely that the Swiss Federal Supreme Court will oppose a SGB regulation that is shared so widely among most SGBs. If the same human rights issue was introduced outside the sports context, the parties in question could choose to resolve it through arbitration or litigation, while allowing room for mediation and negotiation. In the event of arbitration, their submission agreement could make references to human rights, in which case the tribunal would have to be guided by human rights considerations when reaching its award. In the event of litigation, the issue in question would undergo a thorough constitutional/civil rights review, especially if the injured party pressed the point particularly poignantly. In addition to a first instance judgment, there would also be recourse in the forms of appeal and cassation. Depending on the jurisdiction, there may well be involvement of a supranational court, such as the CJEU, and access to a regional human rights court or tribunal, with ultimate authority to decide on the human rights dimension of the dispute. Litigation further offers the possibility of several forums in accordance with applicable conflict of laws rules. In short, the possibilities are endless. And because both parties are aware of their own limitations, they may even be swayed towards a reasonable compromise. In the

92. See *Eng. Bridge Union Ltd. v. Comm’rs for her Majesty’s Revenues & Customs*, ECLI:EU:C:2017:814 (Oct. 26, 2017), where it was held that duplicate bridge is not a ‘sport’ for the purposes of the VAT Directive and cannot therefore be exempt as such; see also Case C-415/93, *Union Royale Belge des Sociétés de Football Ass’n v. Bosman*, 1995 E.C.R. I-5040. This was a landmark case in European professional sports and EU law because it extended the right of movement and work in national leagues among all EU member states to footballers—and by extension other sportsmen and women—and also allowed EU players to move to any club of their choice in the EU upon expiration of their contract.

absence of such opportunities, it is not unlikely that the *limited* species of forum shopping in which Semenya was engaged will be reinforced with strategic choices that ultimately lead to courts and tribunals being perceived as willing to undertake such cases and break the traditional mold.⁹³

93. The English Commercial Court may be an option. In *CGU Int'l Ins. plc v. AstraZeneca Ins. Co. Ltd.* [2006] EWCA Civ 1340 (UKSC) (appeal taken from Eng.), it held that the UK's Human Rights Act provided the courts with a "residual jurisdiction" to interfere with the Commercial Court's refusal of permission to appeal, despite the fact that § 69(8) of the English 1996 Arbitration Act seemingly disapproves in respect of set aside proceedings.

FEAR AND LOATHING IN ANIMUS: MORAL PANIC, THE CONTEXTUALIZING TOOL FOR CHALLENGING GENDER-AFFIRMING CARE BANS

*Maggie Crain**

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*I would like to thank my parents for their unending support and Professor Matthew Hall for his guidance in shaping the focus of this article. I dedicate this article to my son Munro; I hope this work helps make the world you grow up in a better one.

ABSTRACT

Recent legislative attempts to restrict or prohibit gender-affirming for non-binary and transgender individuals are part of a broader trend by some states to undermine LGBTQ rights. Advocacy groups are actively challenging the constitutionality of these measures. This article argues that these groups should apply the sociological theory of moral panic to argue that the legislation is unconstitutional because the law is based on, and fosters, fear and irrationality. Moral panic is a social phenomenon that involves an exaggerated reaction to a perceived threat, often of an already marginalized group, that the rest of society or community views as a danger to a social value, norm, or morality. Laws drafted to capitalize on the fear of constituents or in reaction to the disproportional fear do not address the root issues of these panics but rather target marginalized groups that suffer from existing stigma. The constitutional doctrine of animus has long been a useful, though recently underused, tool to strike down laws that, whether intentionally or not, discriminatorily impact a particular group due to fear, dislike, or disgust. While animus is not a central argument that advocates are making in the current litigation challenging gender-affirming care bans, advocates should use moral panic to highlight the foundational role fear and loathing play in the legislation's discriminatory intent to harm transgender individuals.

I. INTRODUCTION

Recent scholarship from both sociologists and criminologists has focused the moral panic schema on the Satanic Panic to explain the unique cultural, political, and religious influences that created a moral panic that had a profound impact on the legal system. Their work helps map how legitimate concerns can develop into irrational anxiety that is then pinned on an out-group that serves as the central figure upon which to inflict unjust and disproportional legislative power. This article proposes that moral panic is a valuable framework for litigants to use to challenge recent anti-LGBTQ legislation as it contextualizes the development of legislation and highlights the legislature's "bare desire to harm...a politically unpopular group" when bringing an equal protection challenge.¹ The recent trend in state law and executive action to prohibit gender-affirming care for transgender minors illustrates how moral panic is helpful in challenging irrationality and fear-based legislation.

In the past two decades, legal scholarship has begun to look at moral panic as a schema to apply to specific legal issues.² For example, scholars used moral panic in their analysis of the intention and application of legislation around sex

1. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

2. See, e.g., Susan Bandes, *The Lessons of Capturing the Friedmans: Moral Panic, Institutional Denial and Due Process*, 3 LAW, CULTURE & HUMANS. 293 (2007); Kristen M. Zgoba, *Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation*, 17 CRIM. JUST. STUD. 385 (2004); John Felipe Acevedo, *Crime Fantasies*, 46 AM. J. CRIM. L. (2019); Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41 (2022).

offenders. In her work on how fear is fueling the broader monitoring and harsher punishment of sex offenders, Catherine Carpenter uses moral panic to argue that this “panicked legislation” is mainly symbolic, as the laws enacted are unnecessary, insufficient, and increase risk, as opposed to the intended reduction of the risk perceived by the group fostering in the moral panic.³ Carpenter’s work on panicked legislation, which she defines as “hastily crafted and without empirically sound data or reason,”⁴ is distinct from the legal issue in this work because Carpenter’s analysis of moral panic legislation focuses on the reactive nature of legislation that arises out of moral panic.⁵

Similarly, legislation banning gender-affirming care is entirely informed by language, arguments, and dialogue originating from moral panic. Carpenter argues that the panicked legislation fueling unconstitutional infringements on the rights of sex offenders shares similar hallmarks of the legislation in states banning gender-affirming care and from early panics.⁶ These hallmarks include disparate impact on one group, empirical evidence of ineffectiveness to the stated goal of the laws, and stigmatizing impact. While these same features are present in the current panicked legislation around transgender healthcare, the laws at the focus of this work are not drafted to “appease a fearful public.”⁷ Instead, they are carefully drafted to inflame and enrage existing fears to keep constituents distracted or engaged⁸ as conservative politicians struggle to draft and support policies that address real social issues and maintain unity within their party.⁹

Moral panic is a helpful tool to contextualize anti-LGBTQ legislation as fundamentally irrational and discriminatory due to the inextricable influence of the exaggerated fear that is attached to a distinct out-group. This article will apply the moral panic schema to the various prohibitions on gender-affirming care for minors to illustrate how moral panic is so entangled with the law that the

3. Catherine L. Carpenter, *Panicked Legislation*, 49 J. LEGIS. 1, 4–5 (2022).

4. *Id.* at 5.

5. *Id.* at 26.

6. *Id.* at 12. Carpenter notes that panicked legislation from recent history includes laws drafted in reaction to the HIV/AIDs crisis and the crack-cocaine panic which sought to reduce risk, but instead overly criminalized already at-risk communities. *Id.*

7. *Id.* at 51.

8. See Kate Sosin, *Why is the GOP Escalating Attacks on Trans Rights? Experts Say the Goal is to Make Sure Evangelicals Vote*, PBS NEWS HOUR (May 20, 2022, 3:37 PM) (quoting Professor Randall Balmer that the rise in Republican support for anti-transgender legislation is to keep “the base riled up about one thing or another, and when one issue fades, as with same-sex relationships and same-sex marriage, [Republican politicians] got to find something else...it’s almost frantic”) <https://www.pbs.org/newshour/politics/why-is-the-gop-escalating-attacks-on-trans-rights-experts-say-the-goal-is-to-make-sure-evangelicals-vote> [<https://perma.cc/6KKS-U6M7?type=standard>].

9. See, e.g., Julie Carr Smyth & Nicholas Riccardi, *Internal Conflicts and Power Struggles Have Become the Hallmark of the Modern GOP*, ASSOCIATED PRESS (Oct. 11, 2023, 3:22 PM), <https://apnews.com/article/republicans-house-leadership-chaos-states-infighting-bb5d9287214cd5aa0a1fd03b56bebc> [<https://perma.cc/K2FL-G9Z7>]; Johnathan Bernstein, *McCarthy’s Ouster Highlights Deeper GOP Dysfunction*, WASH. POST (Oct. 4, 2023, 11:14 AM), https://www.washingtonpost.com/business/2023/10/04/republican-house-speaker-kevin-mccarthy-ousted-in-historic-vote/e659124c-62c8-11ee-b406-3ea724995806_story.html [<https://perma.cc/NXS8-PXPA>].

legislation targeting the rights of an insular group fails even the lowest constitutional scrutiny. Furthermore, this article hopes to introduce and advocate for the use of moral panic as a tool to revive animus as a viable doctrine to challenge legislation. Moral panic as an analytical tool does not make a value judgment on the issues forming the panics but rather a rational judgment on the actions of different groups that ultimately influence and frame legislation.

II. BACKGROUND

A. Animus – A Constitutional Doctrine

The modern constitutional jurisprudence for “suspect class” comes from footnote four of *United States v. Carolene Products*: “[p]rejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”¹⁰ The origins of animus doctrine began in 1973, with the Supreme Court’s decision in *Department of Agriculture v. Moreno*.¹¹ *Moreno* challenged an amendment to the Federal Food Stamp Act that denied food stamps to households with non-related members. In a review of the legislative history, the Court found that the only reasoning provided by Congress at that time was a congressperson’s verbal attacks on “hippies” and “hippy communes” during the amendment’s hearing.¹² Based on its findings, the Court pronounced “that a bare...desire to harm a politically unpopular group cannot constitute a legitimate governmental interest...without reference to [some independent] considerations in the public interest.”¹³

The Court again applied animus doctrine in its 1985 decision invalidating a city’s zoning permit scheme to exclude a group home for the mentally disabled in *City of Cleburne v. Cleburne Living Center*.¹⁴ In that decision, the Court rejected the city’s proffered reasoning that they had concerns about overcrowding, flood-evacuation, and street congestion because such reasoning “obviously fail[ed] to explain why apartment houses, fraternity and sorority house, hospitals, and the like may freely locate in the area,” but a permit requirement was imposed on the group home for the mentally disabled.¹⁵ In short, the special permit failed rational basis scrutiny because “mere negative attitudes, or fear,” were not permissible interests in prohibiting the group home.¹⁶ Justice White’s prophetic statement that legislation with such discriminatory intent

10. *United States v. Carolene Products Co.*, 304 U.S. 144, 145 n. 4 (1938).

11. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

12. William D. Araiza, *ANIMUS: A SHORT INTRODUCTION INTO BIAS IN THE LAW*, 32 (2017).

13. *Moreno*, 413 U.S. at 533–34.

14. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

15. *Id.* at 450.

16. *Id.* at 448.

could not be salvaged, “whether by referendum or otherwise...”¹⁷ would become a foundational part of the Court’s decision in *Romer v. Evans*.¹⁸

The Court’s application of animus doctrine in *Romer* would begin a string of equal protection victories for LGBTQ rights.¹⁹ In 1992, Colorado voters passed Amendment 2 to the State Constitution, which prohibited all legislation, at any level of state or local government, from protecting “homosexual persons or gays and lesbians.”²⁰ The Court struck down Colorado’s Amendment 2 on two grounds. First, the amendment imposed “a broad and undifferentiated disability on a single named group.”²¹ Second, the breadth of the amendment’s reach was so disproportionate to the state’s offered legitimate interest that it constituted “animus toward the class it affect[ed].”²² Because Amendment 2 was at once too narrow in who it applied to and at the same time too broad in its denial of constitutional protections to the class, it raised the concern that such a blanket denial to an insular group was designed “not to further a proper legislative end...but deem a class of person a stranger to its laws.”²³

Animus was also the foundation for Justice O’Connor’s concurrence in *Lawrence v. Texas*. She would have struck down Texas’s anti-sodomy law as violative of the Equal Protection Clause rather than violative of due process as the majority held.²⁴ Justice O’Connor questioned that the issue in *Lawrence* was distinct from *Bowers*: “whether, under the Equal Protection Clause, moral disapproval is a legitimate interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy.”²⁵ Her answer was a resounding no: “moral disapproval,” without any other asserted state interest, cannot be “a sufficient rationale...to justify a law that discriminates among groups of persons.”²⁶

A decade later, the Court applied animus doctrine to LGBTQ rights in its *United States v. Windsor* decision holding the Defense of Marriage Act (DOMA) to be unconstitutional.²⁷ In striking down DOMA, which defined marriage as between a man and a woman, the Court relied heavily on the legislative history behind DOMA and the social and legal benefits that the designation of being married grants, which reflects the reasoning of Justice O’Connor’s *Lawrence* concurrence.²⁸ Similarly to his opinion in *Romer*, Justice Kennedy recognized indicators in *Windsor* that were too broad and too narrow for possible animus, which led to his interrogation of the law’s legislative history.²⁹ Upon reviewing

17. *Id.*

18. See *Romer v. Evans*, 517 U.S. 620 (1996).

19. William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 157, 157–58 (2019).

20. *Romer*, 517 U.S. at 624.

21. *Id.* at 632.

22. *Id.*

23. *Id.* at 635.

24. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

25. *Id.* at 582.

26. *Id.*

27. *United States v. Windsor*, 570 U.S. 744 (2013).

28. Araiza, *supra* note 12, at 67–68; *Lawrence*, 539 U.S. at 581–82.

29. Araiza, *supra* note 12, at 69.

the legislative history, Justice Kennedy found that DOMA “was invalid, for no legitimate purpose overcomes the purpose and effect [of] those...[state] laws, [which] sought to protect...dignity.”³⁰

The last case involving LGBTQ issues within equal protection and animus parameters is *Obergefell v. Hodges*.³¹ However, the Court’s decision in *Obergefell* presents the Court’s shift from an unequivocal invocation of animus, as seen in *Romer*, to an ambiguous use of animus.³² This shift is perhaps the result of Justice Scalia’s accusations that the Court engaged in the “homosexual agenda” as a part of its broader involvement in the “culture wars” in past decisions involving LGBTQ rights.³³ William Araiza remarks that Justice Kennedy’s opinion in *Obergefell* described those opposed to same-sex marriage as sincerely holding religious and philosophical beliefs based on “decent and honorable” premises.³⁴ Rather than striking down the bans on animus grounds, Justice Kennedy focused on the harmful effects those bans had on couples who wished to marry.³⁵ In combination with his earlier finding that same-sex marriage serves the same legitimate interests as recognizing opposite-sex marriages, he found that religious and philosophical beliefs, no matter how sincere, could not be the sole barrier to the dignity bestowed by marriage to same-sex couples.³⁶

These decisions represent the foundational cases for equal protection animus doctrine. Animus-based analysis continues to appear before the Court, most recently in challenges to former President Trump’s travel bans targeted at majority Muslim countries³⁷ and through recent Free Exercise Clause and First Amendment challenges related to individuals denying services to same-sex couples.³⁸ Recent litigation challenging states’ bans on gender-affirming care

30. *Windsor*, 570 U.S. at 775.

31. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

32. Araiza, *supra* note 19, at 168.

33. *Lawrence*, 539 U.S. at 602 (Scalia, J. dissenting) (“Today’s opinion is the product of a Court...that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activist directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct...It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as a neutral observer, that the democratic rules of engagement are observed.”); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting) (“The court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a ‘bare...desire to harm’ homosexuals...but rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores...”).

34. Araiza, *supra* note 19, at 168.

35. *Id.*

36. *Id.*

37. *See Trump v. Hawaii*, 585 U.S. 667, 729 (2018) (challenging the Trump administration’s executive orders as a violation of the Establishment Clause).

38. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 584 U.S. 617 (2018) (upholding the rights of a baker, who, on free exercise grounds, challenged the application of Colorado’s public accommodation laws to his refusal to provide a same-sex couple a wedding cake); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (finding that Colorado’s public accommodation law violated wedding website designer’s First Amendment right to speak freely by demanding that she either celebrate marriages that she did not endorse, or face sanctions for expressing her belief that marriage is only between those of the opposite sex).

relies primarily on the Fourteenth Amendment's Equal Protection and Due Process Clause, thus making equal protection animus doctrine the central focus of this work.

B. Moral Panic – Past and Present

Stanley Cohen coined the phrase “moral panic” in his 1972 work *Folk Devils and Moral Panics*. He defined moral panics as “a condition, episode, person or group of persons emerges to become defined as a threat to societal values” and “presented in stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians, and other right-thinking people...experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.”³⁹

Building on Cohen's work, sociologists Erich Goode and Nachman Ben-Yehuda offered five features of moral panics that could be applied to any reaction by members of a social group. These features are (1) volatility, (2) concern, (3) consensus, (4) hostility toward a “folk devil,” which is the group or individual that embodies or represents the communities' anxiety, and (5) disproportional fear of actual harm.⁴⁰ Furthermore, Goode and Ben-Yehuda identified three models to analyze the origins and ideological foundations that form moral panics. The first theory is the “interest group,” which explains moral panics as an unintended outcome of moralizing projects undertaken by certain interest groups to moralize a specific social issue.⁴¹ The second theory focuses on elite groups who engineer moral panic to divert attention from real social, economic, or cultural issues.⁴² The final theory postulates that moral panics originate with the general public and function as a release for the reservoir of social insecurity or fears.⁴³ Other sociologists have developed and deviated from Cohen, Goode, and Ben-Yehuda's foundational work on moral panics, but what remains the same across the scholarship is that moral panic, no matter its source or structural criteria, is defined by an exaggerated, often irrational fear attached to a targeted group or people that represent the social threat.

Some critics would argue that the current concern over transgender people is unrelated to other culture wars like gay marriage and broader LGBTQ rights, but the “successful moral panics owe their appeal to their ability to find points of resonance with wider anxieties.”⁴⁴ As discussed later in this work, the

39. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS*, 9 (3RD ED., Routledge 2011) (1972).

40. Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOCIO. 149, 157–59 (1994).

41. *Id.* at 161–66.

42. *Id.* at 164 (drawing upon STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER*, (London: Macmillan, 1978) (arguing that “moral panic ‘function[s] as a mechanism for the construction’ of a definition of social and political reality that serves the interest of the powerful”).

43. Goode & Ben-Yehuda, *supra* note 40, at 161–64.

44. COHEN, *supra* note 39, at xxxvii.

language used to oppose employment protection for gay people in Miami-Dade in the 1970s⁴⁵ was resurrected by proponents of Amendment 2 in Colorado in the 1990s⁴⁶ and, like in the rhetoric around gender-affirming care for minors, shares the same tone, phrases, and irrationalities that demonstrate this particular moral panic is now endemic. Legal advocates who challenge laws that infringe on LGBTQ rights have identified the broader political orchestration to oppose rights despite the larger social acceptance of LGBTQ people.⁴⁷ However, these advocates are leaving a developed body of scholarship out of their arguments that can contextualize how irrationality and fear are melded into state action in recent legislation aimed at limiting LGBTQ rights.

The Satanic Panic

To illustrate the sociological explanation of moral panic, consider one of the largest moral panics from modern American history—the Satanic Panic. The Satanic Panic originated from converging social, political, religious, and professional movements in the 1970s. The 1960s counter-culture movement was a source of anxiety for Americans, as shown by the well-publicized stories about cults and their followers. Charles Manson and his cult dominated headlines for the murder of pregnant movie star Sharon Tate. A witness for the prosecution in the trial testified that Manson claimed he was the “devil” in the weeks leading up to the August 1969 murders.⁴⁸ Geraldo Rivera conducted a high-profile interview with Charles Manson on his alleged connection to Satanism in a widely publicized investigation of alleged underground Satanic cults across the United States on NBC primetime.⁴⁹

The 1970s ushered in a change in gender politics and legal rights for women. The first wave of feminism coincided with the doubling of divorce rates in the United States,⁵⁰ primarily due to the ubiquity of no-fault divorce and emerging opportunities for women in education and the workplace.⁵¹ The rise in divorced households, women’s participation in the workforce, and childcare shifts outside the home and into daycare centers also contributed to the discourse around child sexual abuse.⁵²

After decades of framing childhood sexual abuse as “father-daughter incest,”⁵³ the language around abuse, especially sexual abuse, shifted due to the efforts of survivors, social reform groups, social workers, psychologists, mental

45. See *infra*, Section III, part B and accompanying text.

46. See *Romer v. Evans*, 517 U.S. 620 (1996).

47. Carpenter, *supra* note 3, at 12.

48. Martin Waldron, *Witness Recalls Manson as “Devil,”* N.Y. TIMES, Sept. 18, 1970.

49. DEVIL WORSHIP: EXPOSING SATAN’S UNDERGROUND (NBC Oct. 22, 1988).

50. Sandra Hoffman & Kristin Moore, *Women’s Employment and Marriage*, in *SUBTLE REVOLUTION: WOMEN AT WORK* 99, 103 (Ralph E. Smith, ed., 1979).

51. See SUZANNE KAHN, *DIVORCE, AMERICAN STYLE: FIGHTING FOR WOMEN’S ECONOMIC CITIZENSHIP IN THE NEOLIBERAL ERA* 7–8 (2021).

52. See You’re Wrong About, *The Satanic Panic* (May 2, 2018) (downloaded using Spotify).

53. See Philip Jenkins, *The Child Abuse Revolution, 1976-1986*, in *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 128 (1998).

health professionals, and law enforcement.⁵⁴ In 1974, Congress introduced legislation requiring mandatory reporting of child abuse and founded the National Center on Child Abuse and Neglect.⁵⁵ Though directly opposed on issues of abortion, sexuality, and the importance of the nuclear family, conservatives and feminists found mutual ground in their concerns about child pornography and sexual abuse.⁵⁶

In the psychology profession, recovered memory and hypnosis became a standard tool to help patients retrieve memories of past abuse alleged to be hiding deep within their memory.⁵⁷ Recovered memories and allegations of occult or Satanic abuse became incredibly popular with the 1980 publication of *Michelle Remembers*, a pseudo-case study and memoir.⁵⁸ Written in collaboration with her psychiatrist and later husband, Lawrence Pazder, Michelle recounted her abuse as a small child at the hands of a Satanic cult in Canada.⁵⁹ Law enforcement and social workers used *Michelle Remembers* as an investigatory aid in over thirty-five alleged daycare Satanic ritual abuse cases, including the McMartin case.⁶⁰

Between 1983 and 1988, investigations into alleged Satanic ritual abuse were initiated in over one hundred communities, resulting in arrests and prosecutions.⁶¹ The best-known example of this Satanic abuse trial is the McMartin preschool case. A year-long investigation, including clinical interviews with 400 children, resulted in the arrest of seven preschool teachers.⁶² The McMartin case took nearly five years to prosecute, costing over 15 million dollars.⁶³ None of the McMartin employees were found guilty of sexual abuse. Criminal prosecutions fueled by the Satanic Panic would continue through the 1980s and into the 1990s. As a note, allegations of ritual sexual abuse were not the only crimes to come before the court. Police quickly began to assign satanic or occult undertones to murders, especially by those who occupied the outskirts of society.⁶⁴

At the height of the Satanic Panic, multiple states introduced and passed legislation criminalizing ritualistic abuse.⁶⁵ However, as Mary deYoung points

54. *Id.*

55. *Id.* at 119–20.

56. *Id.* at 123–25.

57. Mary deYoung, *One Face of the Devil: The Satanic Ritual Abuse Moral Crusade and the Law*, 12 BEHAV. SCI. & L. 389, 403 (1994).

58. *Id.* at 391–92.

59. *Id.* Michelle alleged that her abuse included sexual abuse, being placed in a coffin with a corpse, human sacrifice, and having devil horns and tail surgically implanted on her body. See also You're Wrong About, *Quarantine Book Club: Michelle Remembers, Week 1-5* (March 26 through April 30, 2020) (downloaded using Spotify).

60. *Id.* at 392.

61. deYoung, *supra* note 57, at 403.

62. *Id.*

63. *Id.*

64. See generally, Dan Stidham, Haley Fitzgerald & Jason Baldwin, *Satanic Panic and Defending the West Memphis Three: How Cultural Differences Can Play a Major Role in Criminal Cases*, 42 U. MEM. L. REV. 1061 (2012).

65. deYoung, *supra* note 57, at 404 (including “states like Texas, Idaho, Pennsylvania, Louisiana, Washington, and Illinois”).

out, such legislation includes “slippery” definitions of ritual abuse so as not to run afoul of the Constitution’s protection for religious belief.⁶⁶ Only four states continue to include statutes specifically criminalizing ritual abuse: Montana,⁶⁷ Idaho,⁶⁸ Illinois,⁶⁹ and Louisiana.⁷⁰ The language in each of these statutes, apart from Idaho, is broad and vague, framing the sexual, physical, or sexual abuse within the context of subjecting the minor to any ceremony, rite, practice, performance, or ritual.⁷¹ Idaho’s statute contains similar language but explicitly adds a provision for “involv[ing] the child in a mock, unauthorized or unlawful marriage ceremony with another person or representation of any force or deity, followed by sexual contact with the child.”⁷² No one appears to have been convicted under the specific sections of the four remaining statutes for ritual sexual, physical, or psychological abuse since their enactment in the late 1980s and 1990s. Prosecutors likely chose not to charge under these sections because of the incredibly broad language of ritual abuse and the constitutional challenges to convictions under a law that probably runs afoul of protections for religious freedom.

The public panic around Satanic ritual abuse faded from headlines by the late 1990s and early 2000s. However, the cultural and legal impact of the Satanic Panic continues to shape public perception of the risk to children. The 2000s brought increased attention to child abduction and molestation, prompting legislation like Amber Alert in an attempt to assuage the public fear and panic created by well-publicized incidents of child homicide, abuse, and kidnapping.⁷³ Kristen Zgoba applies moral panic theory to explain the sudden push to create laws due to public concern for child safety and to contextualize the problems in statutes like Megan’s Law and Amber Alert.⁷⁴ Like the laws created during the Satanic Panic, they are largely ineffective in addressing the actual sources of harm for children. As Zgoba points out, only 7.3% of missing children would qualify for an Amber Alert by falling within the statutory limits for alerts to only children abducted by a non-family member.⁷⁵ Like the Satanic Panic, fear of child abduction and kidnapping shows that moral panics are a powerful influence on legislation.

66. *Id.* (“Because religious beliefs, no matter how distasteful, are constitutionally protected (*U.S. v. Ballard*, 1944), the word ‘satanic’ is notably absent.”).

67. MONT. CODE ANN. § 45-5-627 (2023).

68. IDAHO CODE § 18-1506(a) (2023).

69. 720 ILL. COMP. STAT. ANN. 5/12-33 (LexisNexis 2023).

70. LA. STAT. ANN. § 14.107.1 (2023).

71. *See id.*, at (C)(2)-(3); MONT. CODE ANN. § 45-5-627(1)(a).

72. IDAHO CODE § 18-1506(a)(1)(D) (2023).

73. Zgoba, *supra* note 2, at 386. Zgoba cites the media obsession in the late 1990s and early 2000s surrounding the kidnapping of children such as Elizabeth Smart and Polly Klass who were both abducted from their bedrooms.

74. *Id.* at 399–401.

75. *Id.* at 400.

Wayfair, QAnon, and Other Sex Trafficking Conspiracies

In the early months of the COVID-19 pandemic, a child sex trafficking conspiracy quickly spread across various social media platforms, alleging that sex traffickers were using online retailer Wayfair's expensive cabinets and other home décor to sell children.⁷⁶ The allegations of Wayfair's involvement in trafficking originated from a QAnon conspiracy that asserted former President Donald Trump was waging a war on a covert sex trafficking ring run by Democratic politicians and their supporters.⁷⁷ Although QAnon appeared to suddenly burst upon the internet and greater cultural consciousness in the early days of the pandemic, the conspiratorial foundation that QAnon relies on is not new. QAnon draws upon the antisemitic belief that Jewish people are funding modern Democratic politicians and running Hollywood and banking. Though extreme, the conspiracy that Wayfair and the COVID-19 mask mandates were aiding in the widespread sex trafficking of children were embraced by social media users, including members of Facebook parenting groups.⁷⁸

This overstated concern about the sexual abuse of children by an elite pedophile ring follows the framework of a moral panic as the issue was picked up by mainstream media and spread quickly to diverse communities on social media. It is crucial to note that this sex trafficking panic corresponds with the cultural and economic insecurities created by the pandemic. There is also a direct connection between the stay-at-home orders impacting children's mental health and welfare and the conspiracies of child sex trafficking. In the first few months of 2020, child welfare professionals and advocacy groups expressed concern over a likely rise in children experiencing abuse due to the movement to school online instead of in the classroom, noting that the stay-at-home orders were likely impacting mandatory reporters' ability to spot and report signs of child abuse.⁷⁹

But just as the Satanic Panic projected the threat of sexual abuse onto Satanic cults operating out of daycares despite the majority of sexual abuse happening at home, the more recent conspiracies project the threat of trafficking and abuse outward despite evidence that most of it occurs much closer to home. Similarly, the child safety laws of the 1990s and early 2000s misplaced this same fear of out-groups instead of those most likely to cause harm. And like clockwork, the newest moral panic spurred by irrational conspiracies of sex trafficking, pedophile rings, and the elite's attempt to groom children is a

76. Amanda Seitz & Ali Swenson, *Baseless Wayfair Child-Trafficking Theory Spreads Online*, ASSOCIATED PRESS, July 16, 2020.

77. See also Michael E. Hayden, 'There's Nothing You Can Do': The Legacy of #PizzaGate, S. POVERTY L. CTR. (July 7, 2021), <https://www.splcenter.org/hatewatch/2021/07/07/theres-nothing-you-can-do-legacy-pizzagate> [<https://perma.cc/Q8GV-T7YB>].

78. See generally Kiera Butler, *The Terrifying Story of How Qanon Infiltrated Mom's Groups*, MOTHER JONES (Sept. 23, 2022), <https://www.motherjones.com/politics/2020/09/the-terrifying-story-of-how-qanon-infiltrated-moms-groups> [<https://perma.cc/HB68-YN75>].

79. See Leila Fadel, *Coronavirus Is Isolating Some Kids in Protective Care from Parents and Services*, NPR (March 21, 2020), <https://www.npr.org/2020/03/21/817991076/coronavirus-is-isolating-some-kids-in-protective-care-from-parents-and-services> [<https://perma.cc/YR6K-YDVD>].

hysterical belief rooted in real concerns that the COVID-19 pandemic would have devastating consequences on children's well-being. But because moral panic is based on irrational fear, the public concern around childhood sexual abuse in their own homes is not taking legislative shape to protect children in the places and under conditions that they are most likely to experience abuse: in their homes, at the hands of someone they know, and with aggravating factors such as poverty.⁸⁰ Instead, these anxieties have mutated into disproportional fear and concern over transgender people using bathrooms, banning LGBTQ+ books and drag shows, and, at the heart of this article, banning gender-affirming care for minors.

III. ARGUMENT

Moral panics are unique because they are irrational, fear-based responses to real anxieties that impose or assign the feared quality onto a "scapegoat" or "folk devil."⁸¹ Legislation based on the public consensus created by moral panics risks incorporating the panics' irrationalities, hostilities, and rhetoric into the legislative history. In the case of the rush to pass moral panic legislation against gender-affirming care for transgender people, especially children, the rhetoric and arguments are now tainted by irrationality and fear. When legislation is so wholly dependent on the language, arguments, and proponents of the moral panic, the argument should be that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."⁸² The court must determine whether a law is motivated by an improper animus or purpose, and where there is "discrimination of an unusual character," such disparate treatment is given careful consideration.⁸³ The moral panic legislation prohibiting gender-affirming care mirrors legislation, such as DOMA, that the Court has already struck down; the ban on gender-affirming care is an "unusual deviation from the usual tradition of recognizing and accepting"⁸⁴ the rights of parents to raise their children as they see fit.⁸⁵

In reviewing the legislation on banning gender-affirming care for minors, there are four distinct features of the legislative intent that are inherently tied to moral panic and, therefore, form the foundation on which the law should be challenged as a violation of the Equal Protection Clause. They are (1) statistical irrationalities, (2) causal irrationalities, (3) narrative irrationalities, and (4) reliance on contradictory parental rights arguments. Each of these four features of the current legislation highlights how moral panic is the cornerstone on which these laws stand and is "strong evidence of...the avowed purpose and practical

80. See HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (July 2000).

81. See generally Goode & Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOCIO. 149, 157–59 (1994); COHEN, *supra* note 39.

82. *United States v. Windsor*, 570 U.S. 744, 770 (2013) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

83. *Windsor*, 570 U.S. at 770 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

84. *Windsor*, 570 U.S. at 770.

85. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

effect of the law[s] here...to impose a disadvantage” on those families who want to provide care for their children.

Two cases, *Dekker v. Weida*, challenging Florida’s prohibition of Medicaid funds for gender dysphoria, and *Brandt v. Rutledge*, challenging a blanket ban on gender-affirming care for minors in Arkansas, have gone to trial in federal court.⁸⁶ Both of the trial courts’ findings of law make extensive use of the scientific findings behind the effectiveness and safety of gender-affirming care, standards of medical care for minors and adults with gender dysphoria, and expert testimony by medical and mental health professionals. Though neither *Dekker* nor *Brandt* reference moral panic or animus in their decision, the opinions engage with the larger political and cultural dialogue surrounding these gender-affirming care bans. This work will use the theory of moral panic to highlight these arguments and illustrate how a moral panic analysis could have strengthened the plaintiffs’ arguments and the court’s findings.

For example, in *Brandt*, which challenged Arkansas’ Act 626, Arkansas offered the following assertions to support the need for prohibiting gender-affirming care for minors: (1) the care lacked evidence for its efficacy; (2) the banned treatment had risks and side effects; (3) patients will eventually stop having gender dysphoria with or without treatment; (4) some patients will experience regret undergoing irreversible procedures; and (5) medical providers are providing treatment without appropriate evaluation or informed consent.⁸⁷ Florida’s proffered justifications in *Dekker* for prohibiting Medicaid funds for gender-affirming care are essentially the same as those in *Brandt*. Florida argued that the evidence in support of gender-affirming care for people with gender dysphoria is of low quality,⁸⁸ that the off-label use of puberty blockers or cross-sex hormones carried risks that outweighed the benefits,⁸⁹ and that the overwhelming support for gender-affirming care by all major medical associations was in pursuit of “good politics, not good medicine.”⁹⁰ But as District Judge Hinkle rightly pointed out, “[i]f ever a pot called a kettle black, it is here...[t]he statute and the rule were an exercise in politics, not good medicine.”⁹¹

The plaintiffs wisely remained focused on the evidence that all science, research, data, and clinical study supports the finding that gender-affirming care is safe, effective, and life-saving for minors and adults. However, it is clear, based on the near-identical arguments utilized by both Arkansas and Florida, that states are going to use arguments built on biased expert testimony, irrational assertions, and barely concealed dislike for transgender individuals to argue for the constitutionality of transgender prohibitions. Plaintiffs would benefit from using a moral panic lens to show the judge the irrational and fear-based decision-making process that produced these specific pieces of legislation.

86. *Dekker v. Weida*, 679 F. Supp. 3d 1271 (N.D. Fla. 2023); *Brandt v. Rutledge*, 677 F. Supp. 3d 877 (E.D. Ark. 2023).

87. *Brandt*, 677 F. Supp. 3d at 901–02.

88. *Dekker*, 679 F. Supp. 3d at 1293.

89. *Id.* at 1297.

90. *Id.* at 1295.

91. *Id.*

*A. Statistical Irrationalities*⁹²

First, the concerns expressed by proponents of banning gender-affirming care are not supported by statistical evidence. Opponents of gender-affirming care argue that the proliferation in the affirming model to treat gender dysphoria “throws caution out the window,”⁹³ creating a medical environment in which parents are offered quick diagnoses and treatment for their children experiencing gender incongruence and turning children transgender. The purported legislative goal and intent in prohibiting gender-affirming care is to protect the health and safety of children.⁹⁴ However, as the court noted in *Dekker*, the “fact sheet” provided by the Florida Department of Health asserted that “social transitioning, which involves no medical intervention at all, should not be a treatment option for children or adolescents.”⁹⁵ Thus, if even the non-medical treatment for children experiencing gender dysphoria is under attack, nothing but a bare opposition to transgender individuals remains the state’s objective in this legislation.

The dominant concern expressed in these bans is the rise of minors who identify as transgender. Current estimates place that among children aged 13 to 17, only 1.4% (around 300,000) identify as transgender.⁹⁶ More minors indeed identify as transgender than a decade ago, but the increase is not a result of taking cisgender children and turning them transgender.⁹⁷ Instead, a generational shift in acceptance and knowledge about gender identity is leading to more minors identifying as transgender or gender nonconforming.⁹⁸ Dr. Goepferd of Children’s Hospital Minnesota also pointed to another reason why the transgender population of the United States is so young: “[b]ecause of lower access to health care, along with high rates of H.I.V., violence, and suicide, transgender people are more likely to die at younger ages” and therefore “[t]he harsh reality is we don’t have trans elders because they didn’t survive.”⁹⁹

Legislators who seek to ban gender-affirming care argue that the more prudent and evidence-based approach to treating gender dysphoria is the “wait

92. For this work, “statistical” is the catch-all for the data, reports, science, and advisory guides compiled and peer-reviewed by the relevant community.

93. *Brandt*, 677 F. Supp. 3d at 921; *Dekker*, 679 F. Supp. 3d at 1280; but see Jody L. Herman, Andrew R. Flores & Kathryn K. O’Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. (June 2022). Some estimates put the number of minors at risk of losing gender-affirming care at around 146,300, meaning that almost half of transgender youth will lose access to their gender-affirming care because of healthcare bans.

94. *Brandt*, 677 F. Supp. 3d at 921.

95. *Dekker*, 679 F. Supp. 3d at 1292–93.

96. Herman, *supra* note 93, at 11.

97. See Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH 1, 8 (Feb. 2017) (A meta-analysis of studies conducted from 2007 to 2016, researchers estimated that 390 per 100,000 adults were transgender in 2016, “but the evidence suggests that future surveys will likely observe higher numbers.”).

98. Azeen Ghorayshi, *Report Reveals Sharp Rise in Transgender Young People in the U.S.*, N.Y. TIMES (June 10, 2022).

99. *Id.*

and see” approach, which would wait to begin the treatment recommended by all significant medical and psychological associations until after the child is far beyond puberty, into almost adulthood.¹⁰⁰ This approach does not encourage the social transitioning of children with gender dysphoria, which is the least intrusive and is a non-medical treatment for gender dysphoria.¹⁰¹ The “watchful waiting” approach is not recognized as appropriate treatment for adolescents with gender dysphoria because it is understood that at that point in the development of the minor, their gender incongruence is unlikely to cease.¹⁰² But a close examination of the state’s experts and amicus briefs reveals that the so-called concern about children experiencing gender dysphoria as a concern for their well-being is nothing more than a hollow proffer to the court. The briefs and testimony reveal that these opponents to gender-affirming care believe that transgender individuals have only a “false belief” in their gender identity that they maintain as a part of a “charade” or “delusion.”¹⁰³

The court in *Brandt* rejected the State’s assertions that the risks outweigh the benefits and that minors will desist from having gender dysphoria, finding that the state failed to meet its burden of showing that its restrictions closely and substantially related to its stated objective.¹⁰⁴ Similarly, in *Dekker*, the court found that “the State’s disapproval of transgender status” was “a substantial motivating factor in the enactment of the challenged rule and statute.”¹⁰⁵ This improper motivating factor led the court to strike down the state’s prohibition on puberty blockers and cross-sex hormones for transgender individuals.

Mental Health Outcomes

Those who oppose gender-affirming care often suggest that the mental health issues present in children with gender dysphoria are not a result of gender incongruences but rather that gender incongruence is a result of the “high rates of early childhood trauma” and other psychological disorders.¹⁰⁶ Arkansas spent considerable time at trial arguing a causal relationship between more transgender youth and increased mental illness, abuse, and “social encouragement.”¹⁰⁷ This theory that gender dysphoria is wholly caused by an existing mental health issue

100. *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 905 (E.D. Ark. 2023); see generally Chip Ingram, *Transgender Resources*, FOCUS ON THE FAMILY (Sept. 25, 2023), <https://www.focusonthefamily.com/parenting/transgender-resources/> [<https://perma.cc/SW5M-2JYF>].

101. Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 42 PEDIATRICS 4, 5–6 (2018).

102. *Brandt*, 677 F. Supp. 3d at 905.

103. *Dekker*, 679 F. Supp. 3d at 1279.

104. *Brandt*, 677 F. Supp. 3d at 921.

105. *Dekker*, 679 F. Supp. 3d at 1292.

106. *Testimony on the Dangers of Gender-Affirming Care: Hearing on The Dangers and Due Process Violations of ‘Gender-Affirming Care’ Before the Subcomm. on Const. & Ltd. Gov’t of the H. Comm. on the Judiciary*, 118th Cong., 3 (2023) (Statement of Jennifer Bauwens, Center for Family Studies at Family Research Council) <https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/evo-media-document/bauwens-testimony.pdf> [<https://perma.cc/WB3J-JRWJ>].

107. *Brandt*, 677 F. Supp. 3d at 921.

or trauma argues that the high rate of suicide in the transgender community is only because transgender people share the “same risk factors for a completed suicide.”¹⁰⁸ Thus, to opponents of any gender-affirming care, when a child expresses suicidal ideation, they are “using the threat of suicide to motivate a...family member to engage in an intervention.”¹⁰⁹

However, the process of providing the first stage of gender-affirming treatment is entirely based on addressing mental health and underlying psychological disorders. Under the World Professional Association for Transgender Health (WPATH) Standards of Care, the diagnostic criteria for gender dysphoria are six months of clinically significant distress or social or occupational impairment in addition to years of evidence of gender diversity.¹¹⁰ The data show that providing gender-affirming care, such as access to puberty suppression treatment, is directly associated with lower odds of lifetime suicidal ideation among transgender adults.¹¹¹ Similarly, youth who sought access to puberty blockers or hormone treatment reported lower rates of depression and suicidality.¹¹² A growing body of evidence suggests that an affirmative model of gender-affirming care, such as mental health and social transitioning, results in fewer mental health concerns in young people, regardless of whether they ultimately identify as transgender.¹¹³ Furthermore, the consensus among the American Association of Pediatrics (AAP) is that “if a mental health issue exists, it most often stems from stigma and negative experiences rather than being intrinsic to the [transgender] child.”¹¹⁴ The court ended its equal protection analysis in *Brandt* by finding that “[r]ather than protecting children or safeguarding medical ethics, the evidence showed that the prohibited medical care improves the mental health and well-being of patients and that by prohibiting it, the State undermined the interests it claims to be advancing.”¹¹⁵

Surgery as Genital Mutilation

U.S. Representative Marjorie Taylor Greene, the sponsor of H.B. 1399 (“Protect Children’s Innocence Act”), a bill that would make it a felony to provide gender-affirming care to minors, employs inflammatory language in

108. Bauwens, *supra* note 106, at 4.

109. *Id.* at 5.

110. *Brandt*, 677 F. Supp. 3d at 888.

111. Elana Redfield, Kerith J. Conron, Will Tentindo & Erica Browning, *Prohibiting Gender-Affirming Medical Care for Youth*, WILLIAMS INST. (March 2023) (citing Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 PEDIATRICS 68–76 (2020)).

112. Redfield, *supra* note 111 (citing Diana M. Tordoff, Jonathon W. Wanta & Arin Collin, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 J. AM. MED. ASSOC. NETWORK OPEN (2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423> [<https://perma.cc/XU3N-WRY2>]).

113. Rafferty, *supra* note 101, at 4.

113. *Id.*

114. *Id.*

115. *Brandt*, 677 F. Supp. 3d at 922.

describing gender-affirming care, claiming that the care is designed to “mutilate your kids” and “chemically castrate them.”¹¹⁶ In a sub-committee of the House Judiciary hearing on gender-affirming care, U.S. Representative Mike Johnson¹¹⁷ described gender-affirming care as “barbarism.”¹¹⁸ By fixating on surgery, legislatures are shaping the rhetoric and talking points around gender-affirming care on the impression that minors are undergoing irreversible surgeries without consent, without being risk-informed, and with pressure from parents and providers. This heightened attention to one small component of care given to transgender people is like past panics of hyper-fixation and theatrical (mis)interpretation of realities.

In her discussion on registration and monitoring laws for sex offenders, Carpenter extends her analysis on panicked legislation to include “Crime Control Theatre.” This theatre is often a form of a law that recognizes “that the public is ‘obsessed with risk and addicted to panic.’”¹¹⁹ Just as Carpenter defines panicked legislation as laws drafted only to address the over-stated risk or danger created by the moral panic, laws created as a part of crime control theatre are similarly reactive.¹²⁰ What distinguishes the two is that crime control theatre is even emptier in its goals to appease a hysterical public because it attempts to legislate an undefined risk.¹²¹

In the case of gender-affirming care, what risk are these states attempting to legislate? Based on states’ filings and arguments in *Dekker* and *Brandt*, the risk is cross-sex hormones, puberty-suppressing medication, and surgeries. However, as both courts noted, the same drugs, medications, and surgeries are not prohibited for cisgender children.¹²² For example, a cisgender child on puberty blockers for precocious puberty is not prohibited from accessing the same medication that is prohibited for use by a transgender child to delay or slow puberty. Here, the states’ histrionic language and irrational reasoning are directly rooted in the larger moral panic around gender expression and transgender identity, especially among minors. States risk violating equal protection when they irrationally target transgender children when the same treatments are not prohibited for cisgender children.

Nowhere is this hyper-exaggerated and political theatre more easily identifiable than in language used to describe gender-affirming care or transgender people in general. Language framing surgery and gender-affirming care as evil or abusive appeared in both *Dekker* and *Brandt*. Dr. Patrick Lappert, a consultant hired by Florida to contribute and testify in *Dekker* to the State’s finding that cross-sex hormones were not within the standard of accepted medical

116. *Tucker Carlson Tonight* (FOX television broadcast Aug. 18, 2022).

117. Rep. Johnson is now Speaker of the House.

118. *The Dangers and Due Process Violations of ‘Gender-Affirming Care’ Before the Subcomm. on Const. & Ltd. Gov’t of the H. Comm. on the Judiciary*, 118th Cong., 2023 (opening statement of Rep. Johnson).

119. Carpenter, *supra* note 3, at 38–39.

120. *Id.* at 40.

121. *Id.* at 39.

122. See *Dekker v. Weida*, 679 F. Supp. 3d 1271 (N.D. Fla. 2023); *Brandt v. Rutledge*, 677 F. Supp. 3d 877 (E.D. Ark. 2023).

use, called gender-affirming care “a ‘lie,’ a ‘moral violation,’ a ‘huge evil,’ and ‘diabolical.’”¹²³ Many state legislative bodies, including the nine¹²⁴ that have enacted statutes prohibiting gender-affirming care for youth, use the language of protecting children and families from the pressure “to receive harmful, experimental puberty blockers and cross-sex hormones and to undergo irreversible, life-altering surgical procedures.”¹²⁵ In total, twenty-two states have limitations or full bans on gender-affirming care for minors.¹²⁶ The realities of gender-affirming care are vastly different from the fear-mongering picture being painted in committee hearings and press releases.

Gender-affirming surgeries, such as “top” surgery (to create a male-typical chest shape or enhance breasts), “bottom” surgery (surgery on genitals or reproductive organs), facial feminization, and other procedures, are interventions undergone by adults.¹²⁷ Both the World Professional Association of Transgender Health (“WPATH”) and the Endocrine Society recommend the following progression of gender-affirming care: (1) social affirmation, the reversible intervention in which minors express partially or wholly their gender identity through clothing, pronouns, names, etc.; (2) legal affirmation, the process of making social affirmation formal on legal documents, often requiring specific documentation from pediatric providers; (3) medical affirmation, which begins the process of using hormone treatment or puberty blockers; and the final step (4) surgical affirmation, which is reserved for adults and rarely for adolescents, and only on a case by case basis.¹²⁸

This concern over life-changing and permanent surgery was a primary part of Arkansas’s argument that Act 626 served a legitimate state interest in protecting children from these surgeries. However, the State could not provide any instance of Arkansas doctors prescribing puberty blockers or cross-sex hormones outside of the WPATH standard of care, nor could the State present evidence that any gender-affirming surgeries were performed on minors, undermining the contention that surgeries were being performed on demand.¹²⁹

123. *Dekker*, 679 F. Supp. 3d at 1279.

124. These states are Arkansas, Arizona, Alabama, Iowa, Mississippi, South Dakota, and Utah. Florida enacted legislation banning Medicaid funds in providing gender-affirming care to transgender patients on Medicaid. FLA. STAT. § 286.31(2) (2024), as defined in FLA. STAT. § 456.001. Similarly, Oklahoma enacted additional measures revoking pandemic recovery funds for public Oklahoma University Hospital Authority facilities that provide gender-affirming care. S.B. 3, 58th Leg., 2nd Spec. Sess. (Okla. 2022).

125. MONT. CODE. ANN. § 99.5 (2023).

126. *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN (Sep. 15, 2023) <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map> [<https://perma.cc/DG3Z-YA3Y>].

127. Rafferty, *supra* note 101, at 7 (citing C. Milrod, *How Young is Too Young: Ethical Concerns in Genital Surgery of the Transgender MTF Adolescent*, 11 J. SEX. MED. 2, 338–46 (2014); Johanna Olson-Kennedy, Jonathan Warus, Vivan Okonta, Marvin Belzer & Leslie F. Clark, *Chest Reconstruction and Chest Dysphoria in Transmasculine Minors and Young Adults: Comparisons on Nonsurgical and Postsurgical Cohorts*, 172 J. AM. MED. ASSOC. PEDIATRIC. 5, 431–36 (2018)).

128. Rafferty, *supra* note 101, at 6–7.

129. *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 923 (E.D. Ark. 2023).

The claims that those who undergo gender-affirming care, especially surgery, have a higher regret rate than other medical procedures are also refuted. Some studies place the rate of regret for gender-affirming surgery around 1%.¹³⁰ In a long-term evaluation of regret and satisfaction, respondents who had undergone gender-affirming care between January 1990 and February 2020 validated other studies' findings of low regret rates and high levels of stratification with gender-affirming mastectomies.¹³¹ The general regret rate for surgery is around 14%.¹³² The concerns around gender-affirming surgeries are often supported by anecdotal narratives by anti-transgender activists.¹³³ The assertion that most young people transition and subsequently de-transition is unsupported by research.¹³⁴ Studies support the finding that de-transitioning is rare.¹³⁵ The fear of children making hasty or fanciful decisions¹³⁶ about gender identity was repudiated in a study that found after five years from their social transition, 94% of the 317 youth still identified as transgender, including 1.3% who transitioned to another identity before returning to their binary transgender identity.¹³⁷ A total of 2.5% of youth identified as cisgender and 3.5% as non-binary.¹³⁸ It is also important to note that the later cisgender identities were more common among youth whose initial transition occurred before age six, and this reversion back to a cisgender identity occurred before age ten.¹³⁹

Gender-affirming care is experimental

The opponents of gender-affirming care often argue that the treatment for gender dysphoria is experimental, and that the use of puberty-blocking or cross-hormone drugs is being prescribed for "off-label" use, which politicians are genuinely concerned about and properly legislate upon. But these assertions fail upon even a cursory exploration. As the court pointed out in *Brandt*, the WPATH has published guidelines for the treatment of gender dysphoria and its prior

130. Lauren Bruce, Alexander N. Kouri & Andrew Bolze, *Long-Term Regret and Satisfaction with Decision Following Gender-Affirming Mastectomy*, 158 JAMA SURG. 1070 (2023).

131. *Id.*

132. Ana Wilson, Sean M. Ronnekleiv & Timothy M. Pawlik, *Regret in Surgical Decision Making: A Systematic Review of Patient and Physician Perspectives*, 41 WORLD J. SURGERY 145, 146 (2017).

133. *The Dangers and Due Process Violations of 'Gender-Affirming Care' Before the Subcomm. on Const. & Ltd. Gov't of the H. Comm. on the Judiciary*, 118th Cong., 2023 (testimony by Chloe Cole).

134. *See id.*

135. Bruce, *supra* note 130, at 1071, 1075.

136. *The Dangers and Due Process Violations of 'Gender-Affirming Care' Before the Subcomm. on Const. & Ltd. Gov't of the H. Comm. on the Judiciary*, 118th Cong., 2023. Rep. Hunt compared a child expressing gender-dysphoria to a toddler demanding ice cream for every meal of the day.

137. Kristina R. Olson, Lily Durwood & Rachel Horton, *Gender Identity 5 Years After Social Transition*, 150 *Pediatrics* 2, 6 (2022).

138. *Id.*

139. *Id.*

diagnostic labels related to gender incongruence since 1979.¹⁴⁰ Similarly, the Endocrine Society, a professional society made up of over 15,000 endocrinologists and endocrinology researchers, first published guidelines for the treatment of gender dysphoria in 2011, with an update in 2017.¹⁴¹

Furthermore, the risks of puberty blockers or cross-hormone therapy treatment are not hidden from patients and their parents or guardians. As Dr. Hutchinson testified at trial in *Brandt*, the average age of beginning hormone treatment at the Arkansas Children's Hospital Gender Clinic was 16, and the average timeline was roughly 10.5 months from the first visits to the clinic to starting hormone therapy.¹⁴² Both the medical providers in Arkansas and Florida follow the American Association of Pediatrics' guidance that pediatric providers should help families "in considering whether pubertal suppression is indicated in the context of their children's overall wellbeing as gender diverse."¹⁴³

Despite efforts by politicians to frame gender-affirming care as experimental, dangerous, and ineffective, research and data unequivocally show that gender-affirming care is a safe and effective treatment and that the regret rates and risks of treatment are far outweighed by the positive mental health outcomes. The findings of fact in *Brandt* and *Dekker* confirm the evidence provided by plaintiffs that reflect these scientific and medical findings. Arkansas did not supply any evidence to rebut the decades of clinical experience put forth by the plaintiffs demonstrating the efficacy of gender-affirming care.¹⁴⁴ The goal of right-wing politicians is not to help children who are experiencing gender dysphoria, but to use medical care and treatment endorsed by every major medical association as a "treadmill of rage"¹⁴⁵ to instill fear and anxiety about non-binary, queer, and trans people amongst their constituents.

For example, in *Dekker*, the trial judge, on his own, cited a Florida legislator's statements to transgender Floridians at a hearing describing them as "mutants" and "demons."¹⁴⁶ These are the exact statements that the plaintiff should have introduced at trial to show the animus towards transgender individuals in Florida's legislative body. The plaintiffs could then utilize these statements in conjunction with the State's expert's testimony calling gender-affirming care "diabolical."¹⁴⁷ This shared language and cultural perception of transgender people is precisely why moral panic as the contextualizing lens is useful when framing arguments that these laws are nothing more than irrational

140. *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 889 (E.D. Ark. 2023).

141. *Id.*

142. *Id.* at 895.

143. Rafferty, *supra* note 101, at 5.

144. *Brandt*, 677 F. Supp. 3d at 901.

145. *The Dangers and Due Process Violations of 'Gender-Affirming Care': Hearing Before the Subcomm. on the Const. and Ltd. Gov't of the H. Comm. on the Judiciary*, 118th Cong. (July 27, 2023) (statement by Rep. Escobar, Member, H. Comm. on the Judiciary, <https://judiciary.house.gov/committee-activity/hearings/dangers-and-due-process-violations-gender-affirming-care> [<https://perma.cc/5B4R-X4FN>] (time stamp 1:52:00 to 1:57:35)).

146. *Dekker v. Weida*, 679 F. Supp. 3d 1271, 1295 (N.D. Fla. 2023).

147. *Id.* at 1279.

attempts to target transgender children. Further, moral panic as a lens could show the pervasive taint of bare hatred or disgust toward a suspect class of individuals.

Similarly, the plaintiffs' arguments would benefit from contextualizing a sociological perspective of this panic legislation. For example, the plaintiffs could use sociological research on moral panics to clarify and draw connections within the recent and specific sequences of events leading to the AHCA's decision to remove puberty blockers and cross-sex hormones from Medicaid coverage. Using the research from Goode and Ben-Yehuda's origination models of moral panic is especially relevant to the drastic deviations in the AHCA's approval process. Secretary Marstiller signed the letter to ACHA to create a Generally Accepted Professional Medical Standards ("GAPMS") report in April 2022.¹⁴⁸ In March of 2022, Governor DeSantis signed H.B. 1557, the "Parental Rights in Education Act,"¹⁴⁹ which most notably prohibits public schools from having classroom discussions or instruction on sexual orientation or gender identity.¹⁵⁰ The law also includes a provision that requires teachers to inform parents when children request to use a different name or gender identifier in the classroom, which essentially outs children without regard to any safety implications.¹⁵¹ Here, Goode and Ben-Yehuda's elite-engineered origination theory would clarify the bare desire to harm a specific group (transgender and queer children) is nothing more than an impermissible desire to harm a politically unpopular group through specific legislative action.¹⁵²

Further, moral panic would also explain sudden deviations from previously non-controversial policies. In *Dekker*, the court extensively examines the historical background of the AHCA's decision. It details the deviations the AHCA took from its regular practices to ban Medicaid for gender-affirming care. Florida has a long history of limiting Medicaid coverage to services that are "medically necessary."¹⁵³ The AHCA's rules have defined "medically necessary" treatment as, among other things, "consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational."¹⁵⁴

148. Letter from Simone Marstiller, Sec'y for Fla. Agency for Health Care Admin., to Thomas Wallace, Deputy Sec'y, (Apr. 20, 2022), Attachment "A" of the GAPMS Report, https://ahca.myflorida.com/content/download/4862/file/AHCA_GAPMS_June_2022_Attachment_A.pdf [<https://perma.cc/7S8E-KVFP>].

149. Opponents of H.B. 1557, and the media, sometimes refer to the law as the "Don't Say Gay" law.

150. FLA. STAT. § 1001.42(8)(c)(3) (2023).

151. § 1001.42(8)(c)(3).

152. Goode & Ben-Yehuda, *supra* note 40, at 164.

153. *Dekker v. Weida*, 679 F. Supp. 3d 1271, 1279 (N.D. Fla. 2023). Federal law makes some services mandatory to provide through Medicaid but allows states to place appropriate limits based on criteria such as "medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d) (2024); *see also* *Rush v. Parham*, 625 F.2d 1150, 1156 (5th Cir. 1980).

154. *Dekker*, 679 F. Supp. 3d at 1280 (quoting FLA. ADMIN. CODE ANN. r. 59G-1.01(2.83)). The court lists the four circumstances that make a drug experimental: (1) the drug has not been approved by the FDA; (2) the drug is in phases I, II, or III of clinical trials; (3) experts agree that further studies are needed to determine the drug's safety or efficacy; or (4) the drug is used for a purpose not approved by the FDA, meaning the use is not listed in one of three compendia of off-label uses or supported by peer-reviewed literature.

As the court points out, AHCA prepared a GAPMS report in 2016 on puberty blockers for transgender adolescents.¹⁵⁵ That report concluded that Medicaid payments should be available when based on an individualized assessment of medical necessity for the specific patient.¹⁵⁶ Most importantly, the 2016 report noted that the risk of not treating transgender minors with puberty blockers “may be worse than” treatment.¹⁵⁷ A 2017 GAPMS report, though never formally adopted, concluded that cross-sex hormones as a treatment for transgender individuals “was consistent with generally accepted professional medical standards” and, therefore, met the requirements for Medicaid coverage through the AHCA’s established process.¹⁵⁸

However, in 2022, the Governor’s office directed the AHCA to conduct a new analysis of coverage for gender-affirming care.¹⁵⁹ Though the AHCA’s practice is to prepare a GAPMS report only for its initial consideration of treatment, the AHCA elected for the first time to prepare another report for an already-approved treatment, thus representing a significant procedural deviation from the customary practices of the department.¹⁶⁰ However, this was not the only procedural deviation in preparing the report. The AHCA ordinarily prepares reports internally without retaining consultants, but in this case, they retained consultants who were well known for their staunch opposition to gender-affirming care.¹⁶¹ Moral panic would be helpful for the plaintiffs to frame the state’s actions as irrational and fear-based and, therefore, within the doctrine of animus.

The contentions that gender identity is unsupported by science or medical evidence are where moral panic theory would serve the plaintiffs in their challenges to these laws. The language of moral panic is supplanting the states’ legal arguments that regulating or prohibiting this type of care is a legitimate interest in protecting children. Instead, the states are focusing much of their energy on regurgitating the beliefs of the panic that transgender children are created by radical medical providers and through social media.¹⁶² By pointing to the irrational and fear-based assertions of the state, plaintiffs can argue that the proffered reason for the legislation is no more valid than the proffered reason for the special permit at the heart of *City of Cleburne*.¹⁶³ Plaintiffs should actively argue that the legislation is the direct influence of moral panic to contextualize the law as not the result of the careful and conservative effort to legislate an

155. *Dekker*, 679 F. Supp. 3d at 1280.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1281.

160. *Dekker v. Weida*, 679 F. Supp. 3d 1271, 1281 (N.D. Fla. 2023).

161. *Id.* at 1279.

162. *See infra*, Section III, subpart B.

163. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). The Cleburne Court rejected the city council’s argument that the special permit was required because concerns of fire, flooding, and other public safety hazards only applied to the group home for the mentally disabled and not other types of group housing like boarding houses or fraternity houses. The Court found that “requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded...” *Id.* at 434.

actual risk to children, but rather a reactive result of the social hysteria around transgender children.

However, as Carpenter noted in her work on panicked legislation, though the law is hastily drafted to be incongruent with the data of what works in the management of recidivism of sex offenders, “[n]o matter the empirical evidence or how it is presented, [proponents of the legislation] stand firm.”¹⁶⁴ A question remains on how the different circuits or the Supreme Court will view data and science behind transgender care presented at the trial level by plaintiffs. In *Brandt* and *Dekker*, the trial courts spend considerable time going through the evidence presented at trial to contextualize and support the finding that distinguishing between transgender children and cisgender children as to medication and treatment is the key violation of plaintiffs’ equal protection claims. Challenges to other states’ bans on gender-affirming care should infuse such arguments: that the legislation is irrational based on its distinction between cisgender and transgender children. The context provided through moral panic highlights the impermissible influence of the bare desire to harm an already marginalized outgroup.

B. Causal Irrationalities

The second distinguishing feature of the recent legislative acts to ban gender-affirming care for minors as the product of moral panic is the causal relationship of why children identify as transgender or nonbinary. The irrationality here draws heavily from past panics that followed closely on the heels of growing visibility for lesbian and gay rights in the 1970s. History certainly is repeating itself; modern technology and evolving social norms are inflaming the irrational belief that the rise in young people identifying as LGBTQ is caused by cultural attacks through the use of social media.

Social Contagion

In 1977, Anita Bryant launched a fight in Miami-Dade County to repeal a municipal ordinance that prohibited employment discrimination against gays and lesbians. Bryant, well-known in Florida and across the United States as the national spokesperson for the Florida Citrus Commission and her career as a pop-turned-Christian-singer, insisted that she had a right to control “the moral atmosphere” in which her children grew up and that the county’s support for civil rights for gays infringed on her parental rights.¹⁶⁵ Her campaign, “Save Our Children,” sometimes called “Protect America’s Children,” was organized to oppose the ordinances in Florida but soon took on a national character. On the surface, Bryant’s organization was against the general moral decay among America’s youth. Its targets revealed its true intent: to frame homosexuals as the corrupting force of children by sexually molesting them and sharing their message of homosexuality to indoctrinate children into gays themselves. Bryant

164. Carpenter, *supra* note 3, at 8.

165. Gillian Frank, “The Civil Rights of Parents”: Race and Conservative Politics in Anita Bryant’s Campaign Against Gay Rights in 1970s Florida, 22 J. HIST. SEXUALITY 126, 127, 156 (2013).

often utilized the phrase “homosexuals can’t produce, so they have to recruit” to drive home the dangers of allowing gay people to have a visible presence in the public sphere.¹⁶⁶

Book & Classroom Materials

Once again, Florida is a major battleground for the role of LGBTQ people in the public sphere. Echoing Bryant’s concern in the 1970s, current Florida legislators passed multiple bills limiting and opposing the influence of gender-diverse perspectives in public schools. For example, the Florida Legislature passed HB 1557, the “Parental Rights in Education” bill, to “prohibit classroom instruction on sexual orientation or gender identity before the 4th grade.”¹⁶⁷ Proponents of the bill argued that the legislation allows parents to determine if and how to introduce LGBTQ subjects to their children; on the other hand, opponents of the bill, which included the Trevor Project, the Walt Disney Company, and the Florida Parent Teacher Association (PTA), expressed concerns that the vague wording of the law will cause a chilling effect in schools and have negative impacts on students’ mental health and safety.¹⁶⁸ The legal profession has expressed similar concerns as the statute leaves undefined “classroom instruction,” “age appropriate,” and “developmentally appropriate,” leaving teachers and administrators unsure of what conduct would run afoul of the law, which provides both criminal and civil causes of actions for parents to bring against Florida public school employees.¹⁶⁹

The association between the classroom as a place of indoctrination for gender ideology is also present on the national stage. Representative Doug Lamalfa claimed that “some of the so-called educational materials...[are] nothing short of pornography” that are being used by “activist” teachers, principals, and school counselors to “push[] radical ideology on children as

166. *Id.* at 127.

167. Abbie E. Goldberg, Impact of HB 1557 (Florida’s Don’t Say Gay Bill) on LGBTQ+ Parents in Florida, WILLIAMS INST. (Jan. 2023), <https://williamsinstitute.law.ucla.edu/publications/impact-dont-say-gay-parents/> [https://perma.cc/5QQT-2ZX8]. Fla. H.B. 1069 extended the prohibition on gender-identity and sexual orientation to up to 8th grade. Governor DeSantis signed H.B. 1069 into law on May 17, 2023.

168. *Id.* at 3.

169. Edward Swidriski, *Florida’s “Don’t Say Gay” Law Raises Serious Legal Questions*, LAB. & EMP. L. NEWSL. (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/full-2022/florida-do-not-say-gay-law [https://perma.cc/PD29-BWRN]. These concerns have been confirmed in the complete removal of books from library shelves under the law. For example, Escambia County School District removed some 1,600 titles for mentions of sexual conduct. These books include Webster’s Dictionary and Thesaurus for Students, World Book Encyclopedia of People and Places, and the World Almanac and Book of Facts. See Justin McDaniel & Hannah Natanson, *Florida Law Led School District to Pull 1,600 Books – Including Dictionaries*, WASH. POST (Jan. 11, 2024, 9:02 PM), <https://www.washingtonpost.com/education/2024/01/11/escambia-dictionaries-removed> [https://perma.cc/9BPY-6UXN].

young as elementary school.”¹⁷⁰ While Lamalfa does not assert any evidence of a direct causal relationship between the classroom and children’s gender identity, he uses the stories of two children expressing their gender identity at school to call for a prohibition on gender-affirming care.¹⁷¹ In *Dekker*, the court drew attention to the apparent political machinations in implementing the challenged Medicaid rules, citing state employees and consultants who suggested that gender-affirming care for transgender people was a “woke idea.”¹⁷²

Social Media

The social contagion theory has also focused on the supposed role of social media in spreading transgender ideology to children. In an article that compared the fads of the 1960s among kids to have glasses or braces to the new popularity of being transgender, Rhonda Robinson asserts that the ubiquity of iPhones is responsible for the “rapid-onset of gender dysphoria.”¹⁷³ Using a study that primarily relied on reports of parents’ perceptions of their transgender children’s use of social media,¹⁷⁴ Robinson argues that children who do not feel like they fit in “turn to the internet where evil will gladly hand them the answers that validate their fears and insecurities.”¹⁷⁵

Scholars have questioned the theory that such development of gender dysphoria is “sudden,” and instead hypothesize that the “sudden” disclosure of gender dysphoria is children waiting to come out safely.¹⁷⁶ This is particularly persuasive since almost 40% of transgender youth experience homelessness, often as a result of being rejected or abused by a family member.¹⁷⁷ Lisa Littman’s language such as “rapid” and “social contagion” intrinsically frames the issue of social media’s alleged influence on children’s gender identity as an out-of-control disease, which incites fear in the broader public.¹⁷⁸

170. 169 CONG. REC. H1305-06 (daily ed. Mar. 22, 2023) (statement of Rep. Doug LaMalfa).

171. *Id.* at 1306.

172. *Dekker v. Weida*, 679 F. Supp. 3d 1271, 1279 (N.D. Fla. 2023).

173. Rhonda Robinson, *Rapid Onset Gender Dysphoria: A Social Contagion?*, FOCUS ON THE FAMILY (last visited Nov. 18, 2023), <https://www.focusonthefamily.com/parenting/rapid-onset-gender-dysphoria-a-social-contagion> [<https://perma.cc/3DPN-XRCL>].

174. See Lisa Littman, *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, 13 PLOS ONE 8 (Aug. 16, 2018), <https://doi.org/10.1371/journal.pone.0202330> [<https://perma.cc/9F82-UB2Q>]; but cf. Timmy Broderick, *Evidence Undermines ‘Rapid Onset Gender Dysphoria’ Claims*, SCI. AM., (Aug. 24, 2023) <https://www.scientificamerican.com/article/evidence-undermines-rapid-onset-gender-dysphoria-claims> [<https://perma.cc/3ABN-A2DD>].

175. Robinson, *supra* note 174, at 24.

176. Broderick, *supra* note 175, at 12–13.

177. *Homelessness and Housing Instability Among LGBTQ Youth*, THE TREVOR PROJECT (Feb. 3, 2022), <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf> [<https://perma.cc/L3MG-JW38>].

178. Littman, *supra* note 174.

C. Narrative Irrationalities

Third, the moral panic around LGBTQ and transgender issues is rooted in conspiracy theories so far-fetched and detached from reality that its irrational qualities are laid bare in the narratives to bolster the attacks on gay and transgender individuals and communities.

The QAnon Conspiracy

Though the earliest examples of the QAnon conspiracy originated on 4chan in 2017, QAnon gained more significant influence during the COVID-19 pandemic, especially among politicians and supporters who opposed mask mandates and shutdowns.¹⁷⁹ The central QAnon conspiracy is that there is a shadowy cabal made up mostly of Democratic politicians, their wealthy donors, and Hollywood elites who kidnap children, torture and sexually abuse them in Satanic rituals, and drain them of “adrenochrome,”¹⁸⁰ which conspiracists believe that the elites use as a drug.¹⁸¹ QAnon draws on a long-held historical conspiracy that has deeply antisemitic roots in the Middle Ages’ blood libel conspiracies when Christians falsely accused Jewish communities of abducting and murdering Christian children for blood rituals.¹⁸²

On its face, QAnon appears to be a racist, antisemitic fringe conspiracy theory, but the reality is that some 14% to 17% of the American public believes in the conspiracy.¹⁸³ While this might not be of concern on its own, the impact QAnon has had on what is popular among the far-right has bled into the rhetoric used by politicians. Capitalizing on the generalized fear for the safety of children, far-right and more central conservative politicians are utilizing terms like “pedo” and “groomers” to describe the LGBTQ community.¹⁸⁴ Thus, politicians are transferring the perpetrator of abuse from the highest echelon of society, as asserted by QAnon, to teachers and drag queens since these individuals, like the daycare workers in the Satanic Panic, have less power and are easy to vilify. As

179. Noah Caldwell, Ari Shapiro, Patrick Jarenwattananon & Mia Venkat, *America's Satanic Panic Returns - This Time Through QAnon*, NPR: ALL THINGS CONSIDERED (May 18, 2021), <https://www.npr.org/2021/05/18/997559036/americas-satanic-panic-returns-this-time-through-qanon> [https://perma.cc/P43Z-WKHK].

180. Tarpley Hitt, *Followers of the Pro-Trump Conspiracy Theory QAnon Believe Hollywood and Democratic Elites Take a Psychedelic Drug Called Adrenochrome Harvested from the Fear of Children*, THE DAILY BEAST (Aug. 14, 2020, 4:34 AM), <https://www.thedailybeast.com/how-qanon-became-obsessed-with-adrenochrome-an-imaginary-drug-hollywood-is-harvesting-from-kids> [https://perma.cc/JHM8-SBMK].

181. *Id.*

182. Miroslav Vrzal, *QAnon as a Variation of a Satanic Conspiracy Theory*, 9 THEORY & PRAC. ENG. STUD. 47, 49–50 (2020).

183. David Smith, *Belief in QAnon Has Strengthened in the US Since Trump was Voted Out, Study Finds*, THE GUARDIAN (Feb. 24, 2022, 12:01 AM), <https://www.theguardian.com/us-news/2022/feb/23/qanon-believers-increased-america-study-finds> [https://perma.cc/6X8S-RV24].

184. Joshua Zeitz, *From Pizzagate to Drag Bills: The ‘Groomer’ Myth That Will Not Die*, POLITICO (Mar. 4, 2023, 7:00 AM), <https://www.politico.com/news/magazine/2023/03/04/pizzagate-drag-bills-groomer-myth-00085323> [https://perma.cc/V68J-URH5].

discussed previously, the accusation that queer children are only created through abuse and recruitment is a conspiracy theory that conservative politicians have relied on before to stall and reverse protections for LGBTQ people.¹⁸⁵

Conspiracy Accusations in Recent Litigation

Charges of a conspiracy have not remained confined to internet message boards and Facebook groups. In *Brandt* and *Dekker*, both Florida and Arkansas claimed that all the major professional medical and psychological findings in support of gender-affirming care were politically motivated.¹⁸⁶ But to accept this assertion, the judge must accept two underlying premises: the existence of a massive conspiracy between at least thirty leading professional associations and the opinions of the state experts whose testimony does not pass *Daubert*.¹⁸⁷ The court rejected such conspiratorial accusations based on a lack of evidence.¹⁸⁸ Such assertions that these different professional associations are in concert with one another are perpetuated by different conservative organizations that have long been associated with political opposition to LGBTQ rights. The American College of Pediatrics, a medical association closely aligned with Focus on the Family and the Heritage Foundation,¹⁸⁹ accused the American Academy of Pediatrics of partnering with “radical pro-trans activists” and being taken over by the “most radical” members of the professional guild.¹⁹⁰

Again, plaintiffs should use sociological explanations for the irrational narratives that underpin moral panics. This would serve as an example of how illogical it would be to ask a judge to find a massive conspiracy between all major medical associations, which are made up of thousands of individual providers, researchers, and clinicians. This could be as simple as stating during closing statements that the state’s experts’ charge that there exists a conspiracy is irrational. Plaintiffs could then state how many individual practitioners and clinicians make up these institutions to highlight how grand a conspiracy and consensus to engage in the conspiracy would be. This would highlight how irrational the state’s contention and conspiratorial explanation are and show how it is nothing more than a sophist interpretation of moral panic.

185. See *infra*, Section B.

186. See *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 925 n.13 (E.D. Ark. 2023).

187. *Medical Association Statements in Support of Health Care for Transgender People and Youth*, GLAAD (June 21, 2023), <https://glaad.org/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory> [https://perma.cc/Q7ED-XPZF]; *Brandt*, 677 F. Supp. 3d at 925 n.13.

188. *Brandt*, 677 F. Supp. 3d at 925 n.13.

189. See, e.g., Transgender Resources, FOCUS ON THE FAMILY (Sept. 25, 2023), <https://www.focusonthefamily.com/parenting/transgender-resources> [https://perma.cc/9LQP-WF6W]; *Biology isn’t Bigotry Panel Discussion*, THE HERITAGE FOUND. (December 17, 2019), <https://www.youtube.com/watch?v=Rt9DW4e1Cvw> [https://perma.cc/W2V2-EAT7].

190. Jane W. Robbins & Vernadette R. Broyles, CHILD & PARENT RIGHTS CAMPAIGN, *Do Physicians and Health Professionals Really Support “Gender-Affirming” Interventions for Minors?*, <https://acpeds.org/assets/Do-Physicians-and-Health-Professionals-Really-Support-Gender-Affirming-Interventions-in-Minors-handout.pdf> [https://perma.cc/JX22-YXER].

D. Parental Rights Fallacies

Finally, the legislative history, national dialogue, and political rhetoric around parental rights are logically inconsistent.

A prime example of the contradictory use of parental rights can be seen in H.R. 5636. Introduced as an amendment to Chapter 110 of Title 18 of the United States Code, this bill proposes to ban gender-affirming care for minors and make any person who knowingly performs any gender-affirming care on a minor guilty of a felony punishable by up to ten years in prison.¹⁹¹ Subsection B includes exceptions for “[a]n individual concerning whom a physician has determined through genetic or biochemical testing that the individual does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action.”

This statute and other proposed federal statutes limiting gender-affirming care appear to acknowledge parental rights to make gender-affirming care for their children when the minor is intersex or has a non-binary expression of gender characteristics.¹⁹² But this carveout for intersex children, who receive genitalia-normalizing surgery as infants, is medically and legally no different than gender-affirming care performed on transgender individuals later in life.¹⁹³ Intersex can refer to various conditions, including chromosome or hormonal variances or atypical external or internal sex characteristics that fall outside the standard characteristics for males and females.¹⁹⁴ It is estimated that 1 in 2000 babies are born with ambiguous genitalia.¹⁹⁵

There is a body of legal analysis on the legality and ethics of performing surgery on intersex babies.¹⁹⁶ It has long been accepted that parents, upon their baby receiving a diagnosis of intersex and atypical genitalia and with advice from their providers, should intervene and choose whether to raise the baby as a boy or girl through genital normalizing surgery.¹⁹⁷ Horowicz argues that because of the long history of intervention and the question of what is considered an abnormal presentation of genitalia, surgical intervention on intersex babies gives providers the ability to satisfy social and parental desires for babies to align within the binary genital morphology.¹⁹⁸ But as Horowicz points out, the current

191. H.R. 5636.(a).

192. See S.B. 2357; H.R. 1399.

193. Intersex can refer to various conditions, including chromosome or hormonal variances or atypical external or internal sex characteristics that fall outside the standard characteristics for males and females. See *What is Intersex?* INTERACT: ADVOCATES FOR INTERSEX YOUTH (January 26, 2021), <https://interactadvocates.org/faq/#definition> [https://perma.cc/A85M-SWQE].

194. *Differences of Sex Development*, Medline Plus (2023), [https://medlineplus.gov/ency/article/001669.htm#:~:text=Differences%20of%20sex%20development%20\(DSD,an%20older%20term%20for%20DSD](https://medlineplus.gov/ency/article/001669.htm#:~:text=Differences%20of%20sex%20development%20(DSD,an%20older%20term%20for%20DSD) [https://perma.cc/F4YF-4JT6].

195. Edmund M. Horowicz, *Intersex Children: Who are We Really Treating*, 17 MED. L. INT’L. 183, 184 (2017).

196. Genital-normalizing surgery is not necessarily like other surgeries that often occur on babies born with atypical anatomy that affects their health such as genitourinary abnormalities which require immediate intervention. *Id.* at 184.

197. *Id.* at 187.

198. *Id.* at 188.

ethical and legal standards do not protect the intersex child who faces the potential detrimental physical and psychological impact of irreversible surgery.¹⁹⁹

The proposed statutory language of H.R. 5636 frames the decision-making of parents of intersex children as legally distinct from the rights of parents of transgender children. But a closer look at genital surgery on intersex children shows that legal scholars and medical professionals question this body of medical care. The body of research around the effectiveness of gender-affirming care and the emerging body of research around early surgical interventions on intersex children shows that such interventions have irreparable harm.²⁰⁰ Unlike the majority of transgender individuals who have undergone medical transitions and have low regret rates, there is a “unanimous voice of the adult intersex community” that denounces surgeries as harmful.²⁰¹ However, conservative legislators do not express their concerns about these types of surgeries on infants, the youngest and even more vulnerable children. It is only transgender children, who visibly express their gender expression later in their development, that these legislators focus their concerns on, though they undergo the same procedures and treatments as intersex children.

One example of this fallacious concern is that transgender children undergo irreversible procedures and that treatments like “deliberately disrupting sex-related functions involved in reproduction” may affect fertility and sexual function.²⁰² But these are the same concerns that legal scholars, intersex activists, and medical ethicists have about genital normalizing surgery for infants born with atypical genitalia. Intersex people report that genital surgery deprived them of the ability to orgasm and resulted in other sexual impairments and chronic pain.²⁰³ Unlike transgender minors who rarely undergo surgery as a part of the treatment for gender dysphoria, intersex children report undergoing three to five surgeries, and sometimes more, throughout childhood to “normalize” the appearance of genitals.²⁰⁴ Tamar-Mattis argues that the surgery is presented as a “magic wand” that oversimplifies surgery to parents and providers as a “one-time, painless, cost-free event in which the child goes to sleep as intersex and awakens transformed into a ‘real’ boy or girl.”²⁰⁵ This medical approach, apparently completely fine with conservative lawmakers, is easily juxtaposed with the reality of the standard of care for minors with gender dysphoria. The standard of care is clear that minors receive incremental, cautious, and informed

199. *Id.* at 184.

200. Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants*, 21 BERKLEY J. GENDER L. & JUST. 59, 62 (2006).

201. *Id.*

202. Jennifer Bauwens, *Do Not Sterilize Children: Why Physiological Gender Transition Procedures for Minors Should be Prohibited*, CTR FOR FAM. STUD. AT FAM. RSCH. COUNCIL (July 2021) <https://downloads.frc.org/EF/EF20J34.pdf> [<https://perma.cc/KX2G-MHB9>].

203. Tamar-Mattis, *supra* note 200, at 69–70.

204. *Id.* at 70.

205. *Id.* at 67–68.

treatment after careful deliberation that coincides with less invasive and more supportive mental health treatment.²⁰⁶

Advocates challenging statutes like H.R. 1537 with exceptions for intersex children from gender-affirming care should draw the court's attention to the fallacious argument for parental rights made by sponsors and drafters of the legislation. Suppose the legitimate objective of this legislation is to protect children from experimental, irreversible, and risky medical interventions. Why are intersex children left to be subjected to the very treatment that lawmakers wish to prohibit for transgender children? Further, how do the parents of intersex children have a greater legal right to give these treatments to their children but not the parents of transgender children? To answer these questions, advocates should contextualize these illogical distinctions between the rights of parents of intersex children and transgender children through moral panic.

IV. CRITIQUES

A. *The Problems with Animus*

Though animus has a long history as an important doctrine in equal protection analysis, scholars like James Fleming argue that focusing judicial analysis on prejudice, bigotry, and irrational hatred "is unnecessary to justify gay and lesbian rights."²⁰⁷ Another foundational critique of animus takes Justice Scalia's dissents in the cases concerning LGBTQ rights to heart.²⁰⁸

A central part of Fleming's issue with animus is in *Romer*: Fleming argues that Justice Kennedy could have used precedent involving race and gender as more analogous than discrimination against hippies²⁰⁹ to find Colorado's Amendment 2 unconstitutional. Fleming postulates that Justice Kennedy went with animus instead of strict scrutiny to avoid controversy and thus went with "rational basis" with bite.²¹⁰ But as Fleming acknowledges, using animus still drew criticism. Justice Scalia took issue with the Court's decision in *Romer*, arguing that the Court was "equating moral disapproval of homosexual conduct with racial and religious bigotry."²¹¹ This is what another critique of animus calls the jurisprudence of denigration.²¹² Taking up Justice Scalia's dissents in the cases involving LGBTQ rights, Professor Steven Smith argues that because animus focuses on ill will and subjective prejudice, it is nothing more than a

206. See *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 893–98 (E.D. Ark. 2023) (detailing the procedures for gender-affirming care treatment in Arkansas).

207. James E. Fleming, *The Unnecessary and Unfortunate Focus on "Animus," "Bare Desire to Harm," and "Bigotry" in Analyzing Opposition to Gay and Lesbian Rights*, 99 B.U. L. REV. 2671, 2673–74 (2017).

208. See generally *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (Scalia, J., dissenting).

209. See Fleming, *supra* note 207.

210. *Id.* at 2675.

211. *Romer v. Evans*, 517 U.S. 620, 646 (Scalia, J., dissenting).

212. See Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 677–78 (2013). ("[B]y maintaining and contributing to...destructive discourse, [animus doctrine] aggravates the conflict that is often described... as the 'culture wars.'").

doctrine that amplifies the lack of modern social consensus on issues surrounding liberty and equality.²¹³

Advocates for the legal reasoning given in *Lawrence* and *Obergefell*, such as Fleming, focus on how the denial of rights to gays and lesbians, such as the right to autonomy, intimate associations, and marriage, “demean their existence [and] control [over] their destiny.”²¹⁴ This legal justification for gay and lesbian rights would be based on the failure to protect such rights, denying them “equal dignity and respect, demean[s] their existence, and deprive them of the status and benefits of equal citizenship without adequate reasons.”²¹⁵

However, Fleming’s critique of animus as a tool for interpreting the constitutionality of government action falters in his focus on the language of *Romer*. Fleming’s analysis focuses on *Moreno*’s “bare desire to harm” sentence. Still, it ignores the following sentence: “[a] purpose to discriminating against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest.”²¹⁶ This sentence and the Court’s analysis in *Moreno*, moving on to address the government’s anti-fraud justification, clearly show that animus is not a constitutional silver bullet. Despite a finding of animus, the Court must look at justifications given by the government to complete its analysis. In *Moreno*, the Court found that the government failed to show how the “unrelated” exclusion of the Amendment was “a rationale effort” to deal with fraud.²¹⁷ Here, the moral panic schema applied to the analysis of the government’s rationale is not based on a moral or value-based evaluation of the panic but rather focuses on the rationality of the government’s actions.

This two-step analysis for animus was followed in the *City of Cleburne*; upon finding that the mentally disabled were a quasi-suspect class, the Court continued to address each of the City Council’s proffered rationales for rejecting the group home, such as the location of the home in a “five-hundred-year flood plain.”²¹⁸ The Court found that each one lacked any rational connection and drew attention to the double standard the city applied in requiring a special permit for the home. Still, the concern of a possible flood could not be sustained on the distinction between the living center and hospitals or nursing homes that could be built on the site without the special permit the government was requiring.²¹⁹ To reaffirm this argument, using the animus analysis is not the *per se* rejection of laws when animus is found but must be followed by the second step, where the Court applies the standard of scrutiny on the proffered reasons for denying equal protection to an insular minority group.

When applying moral panic to this two-step analysis, the critique from scholars like Professor Smith becomes less convincing because moral panic, unlike a sincerely held religious or philosophical belief, is founded on irrationality from the start. Moral panic, whether created by the elite, grassroots,

213. *Id.*

214. Fleming, *supra* note 207, at 2678.

215. *Id.* at 2676.

216. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973).

217. *Id.* at 535–36.

218. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449 (1985).

219. *Id.* at 449.

or particular interest groups, is entirely based on exaggerated fear that is then projected onto the insular group. The panicked legislation will undoubtedly have the hallmarks of animus in its legislative history, such as the law's deviation from the standard practice and reek of a bare desire to harm. But as the plaintiffs in *Brandt* and *Dekker* argued, the states claimed it was in the government's interest to protect children from experimental medical treatment only as applied to the treatment received by transgender children.²²⁰ Under the law, cisgender children or babies born intersex are not impacted by the laws banning gender-affirming care. Under the moral panic explanation, when the panicked legislation is so irrational in its intent and its application, the only recourse left to the states is removed when there is a charge of animus because "it takes evidence of a non-animus-based justification to beat evidence of an animus-based justification."²²¹ This is where states lose: the justification for preventing these specific medical procedures is defined by their approval for use in cisgender minors but not transgender minors.

For example, under Act 626, a breast augmentation surgery for a 17-year-old cisgender girl with her parents' permission is not within Arkansas's stated interest of protecting minors from unnecessary surgery with risks. But for a transgender 17-year-old girl who has her parents' consent to a breast augmentation surgery—the State's interest is triggered. The medical procedure has not changed, nor have the risks of the surgery and regret rates changed between the cisgender and transgender teens. So, what gives the State an objective interest in regulating the procedure for one teen but not the other?

The answer is that "dissuading a person from conforming to the person's gender identity rather than to the person's natal sex is not a legitimate state interest." The State of Florida has admitted as much and falters in articulating a legitimate interest in prohibiting care for transgender minors but not cisgender minors.²²² When there is no evidence of a non-animus-based justification, we are left only with animus toward transgender people. While some judges and scholars might continue to view animus as the "jurisprudence of denigration" to those who sincerely believe that gender is determined by the sex assigned at birth, moral panic provides an approach that frames the legislation not as a sincerely held belief but as a pervasive fear or anxiety that targets a class of people with irrational laws.

B. *Dobbs*' Impact

Dobbs v. Jackson Women's Health also calls into question the prudence in relying on *Lawrence* and *Obergefell* through its erosion of the constitutional right to privacy. Despite the Court's attempt to downplay *Dobbs*' impact on

220. *Dekker v. Weida*, 679 F. Supp. 3d 1271, 1294 (N.D. Fla. 2023).

221. Araiza, *supra* note 19, at 153.

222. *Dekker*, 679 F. Supp. 3d 1271 at 1279 ("[T]he defendants have explicitly acknowledged that this view [cisgender individuals properly adhere to their natal sex and transgender individuals have inappropriately *chosen* contrary gender identity, male and female] is wrong and that pushing individuals away from their transgender identity is not a legitimate state interest.").

substantive rights of marriage and intimate relations, many scholars have expressed concern that *Dobbs* will serve as the foundation to undermine LGBTQ rights.²²³ With *Obergefell* and *Lawrence* on shaky ground because of *Dobbs*, animus may be the only route upon which to challenge the constitutionality of anti-LGBTQ laws. Many states are citing *Dobbs* as legal standing to prohibit gender-affirming care. For example, Alabama's Attorney General argued that *Dobbs* provides the foundation for banning gender-affirming care to minors.²²⁴

Current litigation confirms this reliance on *Dobbs* as a way for the State to ban gender-affirming care. In the State's response to the plaintiff's motion for a preliminary injunction in *Doe v. Ladapo*, the State cited *Dobbs* extensively.²²⁵ The State relies almost exclusively on *Dobbs* in its equal protection arguments, arguing that under *Dobbs*, the State has a presumption of validity in health, safety, and welfare regulations and that only rationale basis applies in these regulations.²²⁶ But as the trial court reasoned in *Brandt v. Rutledge*—as affirmed by the Eighth Circuit—animus remains a viable path to challenging anti-transgender health care laws in the wake of *Dobbs*.

V. CONCLUSION

This article illustrates moral panic's unique role in creating legislation rife with irrationalities and subject to constitutional challenge. Drawing upon the history of the Satanic Panic and the legal scholarship around panicked legislation in reaction to the child safety panic of the late 1990s, moral panic has and continues to create irrational, fear-based legislation that relies on rumors and conspiracy to target distinct groups. Most recently, that manifests as the rush to pass laws prohibiting gender-affirming care for minors. Moral panics are the unique social phenomena characterized by an exaggerated fear-based response to real anxieties and issues within society, a fear that projects onto a "folk devil" who is often already disadvantaged and marginalized to express social anxiety. Legislation born out of, or in response to, such panic risks incorporating irrationalities, hostilities, and inflammatory rhetoric into its legislative history and its statutory language, as exemplified in the discourse around prohibiting gender-affirming care for transgender minors but not for cisgender or intersex minors.

223. *Impact on Dobbs on Health Care*, 76 SMU 77, 98–99 (2023) (citing Kimberly Strawbridge Robinson & Jordan S. Rubin, *Abortion Draft Raises Alarm Over Privacy, LGBTQ Rights*, BLOOMBERG L. (May 3, 2022, 11:01 AM), <https://news.bloomberglaw.com/us-law-week/abortion-draft-rasies-alarm-over-future-of-privacy-lgbt-rights> [https://perma.cc/4ZLD-MZCG]).

224. *Id.* (citing Erin Davis, *Ala. AG Uses Dobbs Decision in Transgender Youth Treatment Argument*, WRBC NEWS (July 4, 2022, 7:21 PM), <https://www.wbrc.com/2022/07/05ala-ag-uses-dobbs-decision-transgender-youth-treatment-argument> [https://perma.cc/5G5Z-NFLR]).

225. State's Response in Opposition to Plaintiff's Preliminary-Injunction Motion at 14, *Doe v. Ladapo*, No. 23-CV-114 (N.D. Fla. May 15, 2023).

226. *Id.* at 14–15 (citing *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 221 (2022)).

The legislative intent behind banning gender-affirming care for minors reveals four distinct features inherently tied to moral panic: statistical irrationalities, causal irrationalities, narrative irrationalities, and reliance on contradictory parental rights arguments. Each of these features serves as the cornerstone upon which these laws stand, providing strong evidence of the avowed purpose and practical effect of imposing a disadvantage on families seeking gender-affirming care for their children.

The argument presented here is that when legislation is so profoundly informed or dependent on the language, arguments, and proponents of the moral panic, the law is tainted by animus. The Constitution's guarantee of equal protection under the Fourteenth Amendment demands that a law that distinguishes a legal classification "drawn for the purpose of disadvantaging the group burdened by law" may not stand.²²⁷ There is no doubt that the prohibition on the same surgery and medical treatment for a transgender child but not for a cisgender child is the "unusual character" of the class distinction that triggers the Court's animus analysis.²²⁸ While this work analyzed the role of equal protection, the panicked legislation raises serious questions about parents' rights to raise their children as they see fit. Though not based on the parents' rights to make medical decisions for their children, parental rights were firmly established in *Pierce v. Society of Sisters*. Written nearly 100 years before the current debate around parent's decisions to provide gender-affirming care, the Court declared: "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."²²⁹ The gender of the child is not the creation of the State, nor is it the State's prerogative to overstep into the informed decisions made by parents in close conference with medical professionals who are backed by the weight of evidence that shows gender-affirming care is safe, cautiously applied, and life-saving.

227. *Lawrence v. Texas*, 539 U.S., 539 U.S. 558, 583 (2003) (O'Connor, J., concurring).

228. *United States v. Windsor*, 570 U.S. 744, 768 (2013).

229. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

SWORD OR SHIELD: THE GENDERED CONSEQUENCES OF STATUTORY RAPE LAW FOR TEENAGERS IN WISCONSIN AND BEYOND

*Teresa Kulick**

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INTRODUCTION

In 1997, Kevin Gillson, an eighteen-year-old male from Port Washington, Wisconsin, was sentenced to two years of probation and forced to register as a sex offender after engaging in consensual sexual intercourse with his fifteen-

*University of Wisconsin Law School, Class of 2024. This work, like all things I do, is dedicated to my mother Margaret Spoerl and my father Steven Kulick, and to my sister Emma and my Grandma Pat, all of whom taught me to cultivate empathy, justice, fairness, and kindness in all places. I am additionally incredibly grateful to Professor Ryan Poe-Gavlin for her meaningful feedback, immeasurable support, and the safe haven of her office. Thank you to the Wisconsin Journal of Law, Gender, and Society—especially Alyssa Dorman, Firuze Barimani, and Montana Beeson—for the edits, feedback, community, and friendship. And finally, thank you to Ambar Cornelio, Abby Clemons, and Morgan Bloch, without whom I never would have made it through day one.

year-old girlfriend, resulting in a pregnancy.¹ The two were in a committed relationship, intending on getting married and raising their child together. Despite those facts, the girlfriend's testimony that the sex was consensual, and the support of his community, Kevin was convicted of sexual assault of a child.² Under Wisconsin's statutory rape statute at that time, he faced a maximum of forty years' imprisonment. When the charges were brought, Kevin's girlfriend was just one year below the age of consent.³

Statutory rape laws criminalize sexual activity where at least one party is a minor, even in the absence of overt physical threat or force.⁴ Even when a minor agrees to participate in sex, the law considers them unable to *legally* give consent, due to the coercion inherent in interactions between individuals with a substantial age gap; minors, due to their youth and inexperience, may "not fully appreciate the full physical and emotional implications of [their] decision," and therefore may be unable to make an informed choice to participate in sexual activity.⁵ Statutory rape is a strict liability offense, punishable even in the absence of criminal intent, and can be enforceable even when *both* parties are under the age of legal consent.⁶ This "strict liability approach," as evinced by Kevin's case, "catches nonviolent, consenting teens" as well as genuine sexual predators.⁷

Despite that risk, statutory rape laws are not without merit. In fact, they serve an important function in deterring sexual violence and combating sexual abuse of children, particularly sexual abuse of young girls, who may be "especially vulnerable to being raped by the adults in their lives,"⁸ or easily coerced into sex with peers.⁹ Statutory rape laws can also provide a crucial avenue for prosecution in cases where there was a true act of sexual violence against a minor, but evidence of physical threat or force falls below the burden of proof. Additional justifications for statutory rape law include "enforcing morality" and attempting to reduce rates of teen pregnancy,¹⁰ among other "state

1. *Teen Sentenced as Sex Offender in Consensual Act With Girlfriend*, L.A. TIMES (June 25, 1997), <https://www.latimes.com/archives/la-xpm-1997-06-25-mn-6679-story.html> [https://perma.cc/9DF4-ZYJ4].

2. *State v. Gillson*, 587 N.W.2d 214 (Wis. Ct. App. 1998).

3. L.A. TIMES *supra* note 1; WIS. STAT. § 948.02 (2021-22).

4. *What is Statutory Rape?*, WOMENSLAW (Aug. 20, 2021), <https://www.womenslaw.org/about-abuse/forms-abuse/sexual-abuse-and-exploitation/sexual-assault-rape/basic-info/what-statutory> [https://perma.cc/Z5VZ-LV6Z].

5. Sherry F. Colb, *The Pros and Cons of Statutory Rape Laws*, CNN (Feb. 13, 2004), <http://www.cnn.com/2004/LAW/02/13/findlaw.analysis.colb.statutory.rape/index.html> [https://perma.cc/W9G6-DX5T].

6. See Michelle Goodwin, *Law's Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481 (2013).

7. *Id.* at 505.

8. Colb, *supra* note 5.

9. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 709 (2000) (arguing that "a multiplicity of factors beyond sexual desire and love...lead teenagers to consent to sex" including "fear, confusion, coercion, peer pressure, and a desire for male attention").

10. Daryl J. Olszewski, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 699 (2006); Jamie L. Small, *Conceptualizing Consent:*

and societal interests.”¹¹ Statutory rape laws respond to these needs and interests by creating a “protected class” of minors by way of a “generalization,” establishing a potentially arbitrary age “at which adolescents are deemed mature enough to make safe and meaningfully consensual decisions about sex,” and restricting the decision-making of individuals below that age to protect them from actual and perceived harm.¹² Thus, in addition to identifying and capturing sexual predators, statutory rape laws provide a means of “addressing cultural anxieties about out-of-control teenagers.”¹³ Incorporating these sorts of subjective morality considerations into the law, while also centralizing girls as victims, has led to consistent and dramatic gendered disparities in charges and convictions of statutory rape laws: young men are considerably more likely to be charged, even when both parties are underage.¹⁴

This comment will demonstrate how statutory rape laws are often enforced against teenagers who willingly engage in sex with other teenagers, the very same protected class established by those laws,¹⁵ thereby “penaliz[ing] even the most innocent and mutually desired expressions of adolescent sexuality.”¹⁶ Though “consent” may not exist in the legal sense of the word in these circumstances, both parties are willing participants and there is no force or threat at play. By bringing charges in such cases, some could argue that prosecutors are essentially forcing one version of morality upon these teenagers—attempting to dissuade and penalize teenage sexual activity—with disastrous consequences. The resultant convictions, and even the mere act of bringing charges, can be extremely harmful for the teenagers involved and for teenagers in general. These harms are disproportionately felt by young men, with some research suggesting that young men of color are particularly vulnerable.¹⁷

In 2017, two decades after Kevin Gillson’s conviction, the Wisconsin State Legislature amended its sexual abuse of a child statutes to reduce charges and penalties in cases where both parties are teenagers above the age of fifteen and below the age of nineteen.¹⁸ This change was perhaps partially motivated by the substantial community backlash following Kevin’s conviction.¹⁹ Though a

How Prosecutors Identify Sexual Victimization in Statutory Rape Cases, 45 LAW & SOC. INQUIRY 111, 112 (2020) (arguing that “statutory rape laws were as often focused on moral or economic concerns as they were about sexual victimization”).

11. Goodwin, *supra* note 6, at 490.

12. Anna High, *Good, Bad, and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class*, 69 ARK. L. REV. 787, 788 (2016).

13. Small, *supra* note 10, at 112.

14. See Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 119 (2019).

15. See High, *supra* note 12.

16. Oberman, *supra* note 9, at 706.

17. Garfield Tenzer, *supra* note 14.

18. S.B. 414, 2017–2018 Leg., Reg. Sess. (Wis. 2017) (amending the sexual intercourse with a child age 16 or older statute and creating underage sexual activity law to be codified in Wis. Stat. § 948.093).

19. Roberto Suro, *Town Faults Law, Not Boy in Sex Case*, WASH. POST, May 11, 1997, <https://www.washingtonpost.com/archive/politics/1997/05/11/town-faults-law-not-boy-in-sex-case/ec55a66e-2ed2-42d9-96d5-30cb33143624/> [https://perma.cc/J85T-SVAK].

current teenage resident of Wisconsin will no longer face such severe penalties for engaging in consensual sexual activity with a peer, statutory rape laws continue to harm teenagers, especially teenage boys, both in Wisconsin and across the nation.

Thus, this comment will argue that unfair and uneven enforcement of statutory rape laws against teenagers engaging in consensual sexual activity with other teenagers disproportionately harms young men, and effectively distorts statutory rape law from a doctrine intended to protect children and teenagers into one that harms them, both individually and collectively. Though changes to the Wisconsin Statutes—changes that other states should be encouraged to emulate—have mitigated some of this harm for teenagers in the state, they did not go far enough. The ongoing practice of criminally charging and convicting teenagers who engage in normal, consensual sexual exploration with their peers continues to have profound individual and societal consequences, the effects of which are not felt equally across gender and racial groups. Therefore, sexual activity between consenting minors in their late teens should be decriminalized entirely to prevent these ongoing harmful impacts.

Part I of this comment provides a brief overview of statutory rape laws in general, before moving into a closer analysis of the Wisconsin Statute, including a survey of the legislative history and intent behind its evolution. Part II, the primary focus of the comment, will discuss how statutory rape laws are enforced unevenly and address the factors that contribute to that uneven enforcement. Specifically, it will discuss the impact of prosecutorial discretion and stereotyping, exploring disparate enforcement of statutory rape laws against men compared to women, as well as the impact of racial discrimination on how statutory rape is charged. Part III will explore the consequences of these disparities, including the potentially elevated risk of sex offender registration for young men and the deterrent impact these legal consequences have on sexually active teenagers from seeking support or care related to sexual health. Finally, Part IV will summarize and recommend that other states adopt provisions similar to Wisconsin's section 948.093 as a first step towards combating the harmful impact of statutory rape law enforcement against teenage peers in consenting sexual relationships, with the ultimate recommendation of decriminalizing this type of consensual teenage sexual activity entirely and replacing criminal laws with improved access to sexual education and resources.

I. BACKGROUND

Statutory rape originates in English common law, with statutes prohibiting sexual activity with children dating back to the late Middle Ages.²⁰ Initially, English statutory rape laws were gender-specific, placing restrictions on only “a male’s sexual relations with young females.”²¹ These gendered protections strove to protect the financial and social value of female virginity, typically on behalf

20. Olszewski, *supra* note 10, at 694.

21. *Id.*

of the girls' fathers, against the dangers of male aggression and the risk of pregnancy.²²

As in England, early American laws prohibiting sex with minors were also gender-specific, prohibiting only sex with young girls and centered similarly around interests in protecting the value of virginity and feminine purity.²³ This remained the case until the 1970s, when second-wave feminist activists led a call to reform such laws to make them gender-neutral in an effort to remove stereotypes of women as especially vulnerable and orient the law towards protecting all at-risk youth.²⁴ Furthermore, though the age of consent in America was originally only ten years old, individual states gradually increased that age over the course of many decades.²⁵ Today, the age of consent ranges from sixteen to eighteen across the country.²⁶

Despite the successful movement to remove gendered language from statutory rape laws and reorient them towards protecting *children* instead of solely protecting *girls*, the remnants of those gendered statutes linger across the country in how statutory rape laws are enforced, leading to disproportionate enforcement against the male partner, even in cases where both parties are consenting underage teenagers.²⁷

A. Legislative History of Statutory Rape in Wisconsin

The evolution of statutory rape law in Wisconsin followed a similar progression to the rest of the nation. Prior to 1976, Wisconsin's statutory rape statute was gendered; that year, the legislature made substantial changes to either remove gendered language across the statutes or replace that language with gender-neutral alternatives.²⁸

In addition to making the language gender neutral, the 1976 reforms involved other substantial changes to Wisconsin's statutory rape law. Significantly, the offense was recategorized as a crime of sexual assault, whereas previously it had been considered a "crime against sexual morality." It was also expanded to prohibit all sexual contact with minors, not only sexual intercourse.²⁹ Additionally, the criminal penalties were substantially reduced from a maximum of thirty years to a maximum of fifteen years of incarceration. The impacted ages were also adjusted; though the crime became "age neutral," meaning sexual conduct was now criminalized even if *both* parties were underage, the statutory presumption that "a minor could not consent" was

22. *Id.* at 695; Goodwin, *supra* note 6, at 494.

23. Colb, *supra* note 5.

24. Olszewski, *supra* note 10, at 695.

25. *Id.* at 695.

26. *Statutory Rape: A Guide to State Laws and Reporting Requirements*, U.S. DEP'T HEALTH & HUM. SERVS., (Dec. 14, 2004), <https://aspe.hhs.gov/reports/statutory-rape-guide-state-laws-reporting-requirements-1> [<https://perma.cc/63YT-J7SR>].

27. See Garfield Tenzer, *supra* note 14, at 120.

28. S.B. 845, 1975-1976 Leg., Reg. Sess. (Wis. 1976) (amending the language of state statutes to be gender neutral).

29. Olszewski, *supra* note 10, at 696.

“rebutted” if the alleged victim was aged fifteen or older.³⁰ These changes allowed teenagers aged fifteen to eighteen to retain some “sexual autonomy” while still offering them protection from “coerced sex that did not otherwise rise to the level of sexual assault.”³¹ However, when statutory rape became a strict liability offense in 1982, that provision was omitted from the statute and the age of consent was lowered to sixteen.³²

In 1988, the Wisconsin Legislature made even more changes to reform the crime of statutory rape to its current state.³³ Over the subsequent decades, the maximum penalties have continued to steadily increase, notably doubling in 1994 to reach the forty year maximum that Kevin Gillson faced.³⁴

B. Wisconsin’s Current Statutory Rape Statute

Wisconsin’s current statutory rape statute is laid out in Wisconsin Statute section 948.02, defined as “sexual assault of a child.”³⁵ First degree sexual assault of a child, a Class A or B Felony, can take several forms. It applies when a person (1) causes “great bodily harm” to a person under the age of thirteen during sexual contact or intercourse, (2) has sexual intercourse with a person under the age of twelve; (3) has sexual intercourse with a person under the age of sixteen by use of threat or force; or (4) has sexual contact or intercourse with a person under the age of thirteen.³⁶ Second degree sexual assault of a child, section 948.02(2), imposes a Class C Felony upon “whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years,” regardless of the age of the defendant or the absence of violence or threat.³⁷ In Wisconsin, therefore, second degree sexual assault of a child captures what most people think of as “statutory rape.”

Wisconsin’s statutory rape statutes have been consistently upheld against constitutional challenges. For example, the defendant in *State v. Fisher* was convicted of violating section 948.02(2) and challenged his conviction on the grounds that “the State’s criminalization of consensual sexual relations with children under age sixteen violates both his constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation,” rights which arise from the Fourteenth Amendment.³⁸ He also alleged a constitutional right to present evidence of the minor’s given consent as a defense.³⁹ The Court of Appeals of Wisconsin rejected his argument. Though the United States Supreme Court has consistently held that the Fourteenth

30. *Id.*

31. *Id.*

32. S.B. 569, 1981-1982 Leg., Reg. Sess. (Wis. 1982) (changing the age of consent in § 940.225(2)(e) from 18).

33. Olszewski, *supra* note 10, at 698.

34. *Id.*; L.A. TIMES, *supra* note 1.

35. WIS. STAT. § 948.02 (2021-22).

36. § 948.02 (1)(am)–(e).

37. § 948.02(2).

38. *State v. Fisher*, 565 N.W.2d 565, 567 (Wis. Ct. App. 1997).

39. *Id.* at 569.

Amendment does establish some privacy interest,⁴⁰ a state can limit that interest to “protect society or in support of other legitimate interests.”⁴¹ Citing precedent, the Court in *Fisher* held that a “significant state interest” is all that is required to justify such age distinctions.⁴² Because regulating the sexual activity of children presents a significant state interest, stemming from the State’s need to protect children “from others and from themselves,” the Court upheld section 948.02(2) as constitutionally valid.⁴³

Discussion of the possible constitutional implications of statutory rape laws has occurred nationwide, not only in Wisconsin. Ultimately, concerns about criminalizing consensual sex with or between minors, even in the absence of force, have traditionally been swiftly silenced by the simple assertion that “sex with minors is not a constitutionally protected activity,” even if the act is “victimless” and the perpetrator is a minor themselves.⁴⁴ However, as “consensual sex among teenagers” becomes “generally understood to be both common and profoundly different from the crime of rape,” the law must evolve to reflect that understanding and protect teenagers—especially teenage boys—from facing life-altering criminal penalties for normal sexual exploration.⁴⁵

In a reflection of that understanding, Wisconsin’s statutory rape statute changed again, recently and significantly.⁴⁶ As of 2017, section 948.02(2), second degree sexual assault of a child, does not apply in cases where the newly established section 948.093 does apply.⁴⁷ The latter statute, entitled “[u]nderage sexual activity,” imposes merely a Class A Misdemeanor on “[w]hoever has sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years, or whoever has sexual intercourse with a child who has attained the age of 15 years . . . if the actor has not attained the age of 19 years when the violation occurs.”⁴⁸

Prior to 2017, Wisconsin’s statutory rape statute was unusually strict compared to other states, prohibiting “not only sexual conduct between an adult and an underage partner but also criminaliz[ing] all sexual conduct involving underage persons, even when that conduct involves peers and is fully consensual,” in the colloquial meaning of the word.⁴⁹ The enactment of section 948.093 remedied that somewhat, reducing the severity of the charge and therefore the penalty in cases where teenagers in Wisconsin engaged in mutually agreed-upon sexual activity. Age-gap provisions such as these, sometimes called

40. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that an implied right of privacy exists within the Bill of Rights of the Constitution).

41. *Fisher*, 565 N.W.2d at 568.

42. *Id.* at 569.

43. *Id.*

44. Colb, *supra* note 5.

45. *Id.*

46. See S.B. 414, 2017-2018 Leg., Reg. Sess. (Wis. 2017).

47. WIS. STAT. § 948.02(2) (2021-22) (“this subsection does not apply if s. 948.093 applies”).

48. WIS. STAT. § 948.093 (2021-22). This statute does not apply in cases where the actor is the child’s spouse.

49. Olszewski, *supra* note 10, at 693.

“Romeo and Juliet laws,” protect teenagers from the most severe sentences available under traditional statutory rape law.⁵⁰

However, even these changes are not enough. It is important to recognize that a Class A Misdemeanor in Wisconsin, the current penalty for underage sexual activity, still incurs “a fine not to exceed \$10,000 or imprisonment not to exceed 9 months, or both.”⁵¹ For a teenager—in fact, for anyone—those criminal penalties could have severe consequences on the progression of their life, especially when coupled with the social stigma of a sex crime conviction. Teenagers should not face such life-altering penalties for normal sexual exploration within their own peer group.⁵² Furthermore, as Part II of this comment will show, unequal enforcement of statutory rape statutes means that young men face those consequences at much higher rates. For those reasons, consensual sex between teenage peers must be decriminalized to prevent those consequences from profoundly harming the same teenagers statutory rape law was designed to protect.

II. FACTORS CONTRIBUTING TO UNEVEN ENFORCEMENT

The complex moral component of statutory rape law, evolving attitudes towards teenage sexual activity, and the gendered history of the statutes make it complicated and challenging to determine exactly how actors within the criminal justice system should and do respond to allegations of statutory rape.⁵³ As a result of this multifaceted moral landscape and the sheer number of potential offenses that occur anywhere in the United States during any given year, “selective enforcement of statutory rape laws is inevitable.”⁵⁴ Two prominent, interrelated factors that contribute to selective enforcement are prosecutorial discretion and stereotyping.

A. Prosecutorial Discretion

Of all the actors in the American criminal justice system, none enjoy broader discretion in the decision-making process than prosecutors.⁵⁵ Prosecutors, as government attorneys who represent the State, wield this

50. Jennifer L. Klein & Danielle T. Cooper, *Do Perceptions of Statutory Rape Vary Based on Offender and Victim Pairings? Testing the Effects of Race and Gender*, 13 APPLIED PSYCH. CRIM. JUST. 33, 35 (2017); High, *supra* note 12, at 788 (noting that “age gap provisions” do not exist in all jurisdictions nor apply in all situations, meaning many minors who engage in sexual contact with other minors have “technically committed statutory rape”).

51. WIS. STAT. § 939.51(3)(a) (2021-22).

52. Studies suggest that “nearly half of unmarried Americans aged fifteen to nineteen years old have had sexual intercourse.” Small, *supra* note 10, at 113. Additionally, the American Academy of Pediatrics recognizes “healthy sexual activity” as “an important part of adolescent development.” *Adolescent Sexual Health*, AM. ACAD. PEDIATRICS, <https://www.aap.org/en/patient-care/adolescent-sexual-health/> [https://perma.cc/4JUF-ZMTL].

53. See Oberman, *supra* note 9, at 706.

54. *Id.*

55. BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – TECHNICAL REPORT*, 1 (Vera Inst. of Just., 2012).

discretion at several pivotal moments throughout the criminal justice system, including determining which charges (if any) to bring and against whom, what deals are offered during plea negotiations, and what sentence is recommended to the court.⁵⁶ However, they often face little public scrutiny for those decisions.⁵⁷ Furthermore, prosecutors' decisions are often difficult to analyze and understand, as there is a lack of transparency surrounding those decisions; prosecutors rarely "release information on how they make charging decisions" or even "internally analyze" those decisions.⁵⁸ While prosecutorial discretion does allow for some important flexibility in tailoring how the system responds to a particular defendant or victim, it also creates the potential for harm in the form of bias (including gender and racial bias), "vindictiveness," or "overcharging" by the prosecutor.⁵⁹

Despite the risks, the wide scope of prosecutorial power and discretion has consistently been upheld by the courts. Notably, in *Bordenkircher v. Hayes*, the Supreme Court held that prosecutors are free to charge any and every crime for which probable cause exists, absent proof that a charging decision was motivated by an impermissible consideration, such as race.⁶⁰ Considering how difficult it is to prove factors like race and gender factored into a prosecutor's decision-making process, this essentially allows for unchecked, free-ranging discretion in bringing charges.

This wide discretion, often driven by broad and ill-defined philosophies of "justice," is frequently accompanied by a stark lack of "formal guidance," and as a result prosecutors are largely guided by their own personal beliefs, priorities, and goals.⁶¹ Therefore, there is a great deal of inconsistency across how different prosecutors bring charges, leading to uneven enforcement of many criminal statutes, including statutory rape.⁶²

In making charging decisions, prosecutors may be impacted by a large variety of factors, which can be "legal," "quasi-legal," or "extra-legal."⁶³ Legal factors include considerations based on the available evidence, the offense, the defendant's culpability, and the likelihood of conviction.⁶⁴ Quasi-legal factors include the "defendant-victim relationship," the parties' respective ages, and the potential impact of conviction; these may be of elevated importance in making charging decisions in statutory rape cases, where physical evidence is often limited and age is a crucial element.⁶⁵ In cases where both parties are teenagers, the impact of a conviction on their lives may be additionally severe. Finally, extra-legal factors such as the parties' race and gender, despite being

56. Shima B. Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1130–31 (2021).

57. FREDERICK & STEMEN, *supra* note 55.

58. Baughman, *supra* note 56, at 1131.

59. *Id.* at 1137.

60. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

61. FREDERICK & STEMEN, *supra* note 55, at 58–59.

62. *Id.* at 280.

63. *Id.* at 1.

64. *Id.*

65. *Id.*

impermissible under *Bordenkircher*, may have an additional insidious and discrete impact on prosecutorial decision-making, in both conscious and unconscious ways.⁶⁶ In addition to internal or personal bias, external pressures from the community or from one party's family may offer extra-legal influence on prosecutorial decision-making.⁶⁷ In statutory rape cases, external pressure from family typically comes from white, middle- or upper-class parents of teenage girls, who are more likely than other demographic groups to "initiate law enforcement involvement" in statutory rape cases in order to prevent their daughters from "engaging in sexual relationships."⁶⁸ For example, in Kevin Gillson's case, law enforcement was notified of the couple's sexual relationship after his girlfriend's mother erupted in anger upon learning of her daughter's pregnancy.⁶⁹

In most jurisdictions, gender-neutral statutory rape statutes empower the prosecutor to "choose" which party to charge in statutory rape cases where two teenage partners each chose to engage in the legally prohibited sexual activity.⁷⁰ Some states have effectively limited prosecutorial discretion in these cases by implementing "age-differential prosecution statutes," which prevent a prosecutor from charging the younger party in these cases; other states have "arbitrary prosecution statutes" which enable the prosecutor to "charge either party when two minors consent" to the sexual activity, if they choose to bring charges at all.⁷¹

When statutory rape laws prohibit all sex between minors and do not include limits on who the prosecutor can charge, "theoretical" prohibitions on underage sexual activity may only apply "in practice" when cases involve sexual activity the prosecutor views as "bad" or "morally unworthy."⁷² How a prosecutor—and the public—views underage sexual activity depends on multiple factors; the "boundary" between good and bad sex is "dynamic and contested."⁷³ Gender, race, age, class, sexual orientation and subsequent outcomes (such as pregnancy) may all impact that perspective.⁷⁴ It is therefore clear that, especially in arbitrary prosecution jurisdictions, impermissible extra-legal factors such as racial and gender bias can have a dramatic and dangerous impact on charging and other key prosecutorial decisions, even more so when compounded by external community pressures that reflect those same biases.⁷⁵ Therefore, prosecutorial discretion leads to higher rates of charges brought against the male partner.

66. *Id.*

67. See Garfield Tenzer, *supra* note 14, at 123.

68. *Id.* at 143.

69. Suro, *supra* note 19.

70. Garfield Tenzer, *supra* note 14, at 121.

71. *Id.* at 122.

72. High, *supra* note 12, at 789, 809, 837 (defining "bad" sex as sex involving immature adolescence or harmful outcomes like pregnancy).

73. *Id.* at 793.

74. *Id.*

75. Small, *supra* note 10, at 113 (arguing that prosecutors "rely on commonplace notions of appropriate adolescent sexual behavior, which are informed by cultural ideologies about age, gender, race, and sexual identity").

B. Stereotyping & Disparate Impact

Regardless of prohibitions from the Supreme Court and general assurances of equality under the law, stereotyping inevitably affects the decision-making of actors in the criminal justice system, from law enforcement to prosecutors to judges. While stereotypes can be a useful tool for quickly understanding the complexities of the world around us, they can also be profoundly dangerous when used as a justification for violence and prejudice.⁷⁶ Stereotypes are often employed to “maintain the *status quo*,” thereby “keeping the objects of the stereotypes bound in their prescribed roles, and perpetuating misconceptions.”⁷⁷ This is certainly true in the context of statutory rape laws, which are often wielded as a “justification to discipline individuals in subordinate social groups.”⁷⁸ The following section will first analyze disparate impact by gender, revealing how statutory rape is more frequently and more harshly enforced against male partners, and then discuss the impact of race to demonstrate how those disparate impacts may be even more greatly felt by young men of color.

It is important to emphasize that race and gender do not operate in wholly distinct spheres within the enforcement of statutory rape laws and cannot be considered as separate. An intersectional approach is necessary, as statutory rape laws are in many ways “rooted in assumptions about *white women’s* vulnerability, chastity, and agency.”⁷⁹ Essentially, the consequences of violating a statutory rape statutes “apply unevenly between males and females,” and “disparate racial prosecutions may result based on who prosecutors choose to target and for what reason.”⁸⁰

i. Disparate Impact by Gender

When considering the dramatic disparate impact that gender has on statutory rape law enforcement and outcomes, it is important to recall the gendered origins of the doctrine, and the early emphasis on preserving the social and economic value⁸¹ of female virginity specifically.⁸² Unfortunately, even the eventual shift to gender-neutral language did little to change public perspective or the way charges are brought in cases where male and female teenagers have sex with each other.⁸³ Indeed, actors in the criminal justice system, including prosecutors and judges, may “interpret and enforce statutory rape cases in a

76. Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 11–13 (1998).

77. *Id.*

78. Small, *supra* note 10, at 113.

79. Goodwin, *supra* note 6, at 494. Emphasis added.

80. *Id.* at 489.

81. *Id.* at 494.

82. Colb, *supra* note 5, at 1.

83. Garfield Tenzer, *supra* note 14, at 121; Amanda Cairns, *Hot For Teacher: Gender Bias in Sentencing of Teachers that have Sex with Their Students*, CAMPBELL LAW OBSERVER (2012), <http://campbelllawobserver.com/hot-for-teacher-gender-bias-in-sentencing-of-teachers-that-have-sex-with-their-students/> [https://perma.cc/65XV-LA2Q] (“simply injecting gender-neutral language into statutes cannot eradicate the morals and beliefs held by the general public that young males cannot fall victim to female sexual predators”).

manner that entrenches stereotypes and biases” as manifested by the previously gendered laws.⁸⁴ This gendered effect unravels differently depending on the gender of the perpetrator and the victim.

Generally, statutory rape statutes are not enforced as frequently or as harshly against women, even in cases where the perpetrator is *not* the victim’s teenage peer, and the age gap is much more significant. For example, an article analyzing the gendered sentencing disparities in cases where teachers have sex with students found that “female teachers seem to merely get a slap on the wrist compared to the hefty jail time male teachers must serve.”⁸⁵ In a society that has historically oriented women as subservient victims, it is difficult to conceptualize the idea of a female sexual predator; additionally, media portrayals of relationships between older women and younger men have “glamorized” these relationships, normalizing and even encouraging them.⁸⁶ As a result, male victims become less likely to come forward and female perpetrators are less likely to be taken seriously by law enforcement or the public.

On the other hand, even in statutory rape cases involving teenage peers, where both parties are below the legal age and therefore either party could be charged under the law in most states, “prosecutions for heterosexual consensual sexual intercourse fall heavily on the male partner,” further demonstrating how the shift to gender-neutral language has done little to neutralize how statutory rape laws are prosecuted.⁸⁷ Indeed, 75 percent of recorded statutory rape perpetrators are male, which reinforces deeply entrenched associations of men with predation and women with victimhood.⁸⁸ Moreover, significant data indicates that “male offenders [are] perceived more negatively than female offenders” in statutory rape cases.⁸⁹

While the male partner in heterosexual relationships is almost always charged as the perpetrator when both parties are under the legal age of consent, the female partner is often viewed as a victim even if she was a willing participant. This is fueled by assumptions that young women need protection from sex, lack agency,⁹⁰ and cannot decide for themselves “at what age they may enjoy intimate sexual relations and the age of those with whom they can enjoy sexual intimacy.”⁹¹ As such, “parents of females alert authorities about the prohibited sexual activity of their daughters at a rate that is largely disproportionate to that of parents of males,” thereby attempting to police their daughters’ sexuality in a perhaps misguided effort to protect them.⁹² This reinforces conceptions of teenage girls as “parental property” in need of protection from victimization, leading to ongoing reinforcement of the commodification of young women that led to the gendered nature of early

84. Goodwin, *supra* note 6, at 483.

85. Cairns, *supra* note 83, at 3.

86. *Id.*

87. Garfield Tenzer, *supra* note 14, at 145.

88. *Id.* at 148.

89. Klein, *supra* note 50, at 46.

90. Goodwin, *supra* note 6, at 485.

91. Garfield Tenzer, *supra* note 14, at 149.

92. *Id.* at 121.

statutory rape law.⁹³ The assumption that sexually active teenage girls must automatically be victims, even when they are agreeing to participate in sex with a teenage peer, may prevent or dissuade girls from engaging in normal sexual exploration and often results in criminalization of their consenting teenage male partners.

Substantial empirical evidence and widespread public perceptions support a conclusion that, despite the transition to gender neutral language, enforcement of statutory rape laws continues to be “very much informed by a sexual stereotype of female as victim” and male as predator.⁹⁴ This leads to worse perceptions of and greater rates of charging against the male party, even when both parties are underage and consent to the sexual activity.⁹⁵ Therefore, teenage boys are more likely to be charged in cases of consensual sex between teenage peers and feel the harmful impacts of statutory rape law enforcement against teenagers the most strongly.

ii. Disparate Impact by Race

There is a long and extremely harmful racialized history of sexual crimes in the United States, and an equally long history of associated racial stereotypes, especially against Black men and women.⁹⁶ For example, deeply pervasive stereotypes associate Black men with “sexual potency,” causing a “fear of black male aggressiveness,”⁹⁷ which has contributed and continues to contribute to segregation and gendered racial violence.⁹⁸ On the other hand, “Black American women continue to be stereotyped as promiscuous, hypersexual, sexually available, and as having ‘animalistic’ sexuality”⁹⁹ whereas white women “have been historically characterized” as “feminine” and “delicate.”¹⁰⁰ These stereotypes, made more powerful when operating in conjunction with each other, generate a still-prevalent conception that sexual offenders are Black men, and victims of sex crimes are white women.¹⁰¹ These stereotypes and assumptions profoundly impact the way sex crimes are investigated, charged, and convicted. To put it simply, “race matters in the prosecution of sexual offenses.”¹⁰²

There is less information available, and therefore a need for additional research, connecting racialized sexual stereotypes to the charging and prosecution of statutory rape specifically. Studies that do exist on the topic are

93. *Id.* at 149.

94. *Id.* at 145.

95. *Id.*

96. See Fenton, *supra* note 76.

97. Gary L. Davis & Herbert J. Cross, *Sexual Stereotyping of Black Males in Interracial Sex*, 8 ARCH. SEXUAL BEHAV. 269, 269 (1979). The year this study was published indicates how long this phenomenon has been studied and discussed.

98. Fenton, *supra* note 76, at 20 (discussing negative stereotypes of Black men as justification for lynching).

99. Lisa Rosenthal & Marci Lobel, *Stereotypes of Black American Women Related to Sexuality and Motherhood*, 40 PSYCH. WOMEN Q. 414, 416 (2016).

100. Fenton, *supra* note 76, at 21.

101. *Id.* at 25.

102. Goodwin, *supra* note 6, at 495.

limited and sometimes conflicting, with one study finding that participants were “significantly less concerned about Black victims than white victims”¹⁰³ and another study discovering the opposite, that “participants had more negative views of the offender when presented with a [B]lack victim.”¹⁰⁴ Existing evidence about reports of statutory rape also suggests that “parents of Caucasian females bring complaints at a higher rate than parents of color,” and that “authorities are alerted to potential statutory rape crimes by white males at a rate that is disproportionate to the general population.”¹⁰⁵ This suggests that both reported perpetrators and reported victims of statutory rape are statistically more likely to be white, perhaps due to white families’ increased comfort interacting with law enforcement.

In order to identify and discuss the racial impact of uneven enforcement of statutory rape law with the requisite specificity, these gaps in the existing research need to be filled. However, it is not difficult to draw from the larger body of research on race and sex crime prosecution in a criminal justice system “which often disfavors [B]lack males.”¹⁰⁶ For example, Black and Hispanic individuals convicted for sexual abuse are generally given harsher and longer sentences than their white counterparts, even when controlling for other variables.¹⁰⁷ It poses the question of whether additional statutory rape-specific research would reveal that young men of color face an increased likelihood of charges and harsher sentencing upon conviction in cases where they have consensual sex with members of their peer group. Either way, this issue is one that must be considered alongside the aforementioned impact of unrestrained prosecutorial discretion on uneven enforcement of statutory rape law; racism presents serious concerns “whenever officials are vested with a large amount of discretion.”¹⁰⁸ Only by considering these factors comprehensively and in conversation with each other can one fully understand why statutory rape is enforced so unevenly, and how that enforcement causes disproportionate harm to teenagers along gendered and racial lines.

III. CONSEQUENCES OF UNEVEN ENFORCEMENT

Being charged and convicted of statutory rape involves harsh criminal and social consequences, which are important and justified for adult sexual predators but are largely unnecessary and undeserved for non-violent underaged offenders. Specifically, a statutory rape conviction often results in fines, jail time, or other supervision and is additionally accompanied with mandatory sex offender

103. Sarah Koon-Magnin, Stacy H. Haynes & R. Barry Ruback, *Condemnation of Statutory Rape Based on Respondent Race, Perpetrator Race, and Victim Race*, 34 VIOLENCE & VICTIMS 414, 414 (2019).

104. Klein, *supra* note 50, at 41.

105. Garfield Tenzer, *supra* note 14, at 143, 145.

106. Goodwin, *supra* note 6, at 497.

107. Richard D. Hartley, Alexander Testa & Erika Martinez, *Race, Ethnicity, and Punishment for Federal Sex Offenses: Changing Composition in Child Pornography and Sex Abuse Cases and Temporal Disparity in Sentencing Over Time*, 33 SEXUAL ABUSE 891, 891 (2020).

108. Colb, *supra* note 5.

registration and other collateral consequences in many states. The risk of such severe criminal consequences, especially when coupled with the social stigma of a sex crime conviction, may deter teenagers from seeking out necessary resources for healthy sexual activity or from disclosing their activity to adult mentors and guardians. As the above analysis makes clear, these consequences are disproportionately felt by the young men who are more likely to be charged with statutory rape, even when they themselves are underage.

A. Statutory Rape and Sex Offender Registration

Uneven enforcement of statutory rape law puts teenage boys who engage in consensual sexual activity with their peers at greater risk of sex offender registration.

Sex offender registries, a relatively modern statutory phenomena which now exist nationwide, compile information about individuals with sex crime and related convictions on “government-operated Internet websites.”¹⁰⁹ Registered sex offenders “very often face a lifetime of registration requirements and community notification” once their information is entered into the register.¹¹⁰ For example, individuals convicted of certain sex crimes in Wisconsin must satisfy “initial registration and annual update requirements,” and those requirements are “generally applicable for a period of 15 years following discharge from supervision, and in certain cases never expire.”¹¹¹ Violation of the reporting requirements for sex offenders can lead to additional prosecution and incarceration.¹¹² Generally, a “community reporting” obligation is among those requirements imposed on registered sex offenders; in other words, “registrants ‘are not only forced to display a scarlet letter to the world, but state authorities are required to shine a spotlight on that letter.’”¹¹³ This leads to major social and interpersonal consequences for registrants, including “social ostracism, lost job and housing opportunities, and even harassment and vigilantism.”¹¹⁴

Like statutory rape laws themselves, sex offender registries were created to serve an important purpose; they alert law enforcement and the public to the presence of potentially dangerous individuals in the community, with the ultimate goal of protecting vulnerable people and preventing recidivism.¹¹⁵ However, when sex offender registration is available or statutorily mandated as a consequence for teenagers who violate statutory rape laws by engaging in non-

109. Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 220 (2015).

110. *Id.* at 221.

111. *State v. Martel*, 2003 WI 70, ¶13, 262 Wis. 2d 483, 664 N.W.2d 69.

112. *See* Logan, *supra* note 108, at 220; *Martel*, 2003 WI 70, ¶16.

113. *See* Logan, *supra* note 108, at 222 (citing *State v. Henry*, 228 P.3d 900, 908 (Ariz. Ct. App. 2010)).

114. Logan, *supra* note 108, at 223.

115. Laura M. Crylen, Note, *Badgering “Sex Offenders”: Problems with Wisconsin’s Sex Offender Registry and the Mandatory Registration for Non-Sexual Crimes*, 36 J. LEGIS. 375 (2010).

violent consensual sexual activity with other teenagers, registration becomes overwhelmingly more punitive than protective.¹¹⁶

For example, upon his conviction in 1997, Kevin Gillson—by all accounts a kind teenager who posed a threat to no one—was forced to register as a sex offender, placing a dark spot on his permanent record and preventing him from engaging in activities like coaching youth baseball.¹¹⁷ However, the 2017 amendment to Wisconsin’s statutory rape law remedied this for future cases involving teenage peers.¹¹⁸ Now, the state’s sex offender registry statute contains an explicit exception for underage sexual activity.¹¹⁹ However, Wisconsin remains an outlier in this area; in fact, “most states require juveniles convicted of statutory rape to register as sex offenders,” and sex offender registration statutes generally “do not distinguish consensual sex among minors from the heinous acts of adult rapists.”¹²⁰

In summary, when state statutory rape laws include a sex offender registration provision enforceable even against teenage perpetrators, as many currently do, this means that teenage boys, as the party more likely to be charged in statutory rape cases with two underage parties, will be forced to register as sex offenders at greater rates. This imposes harsh, life-altering, and potentially permeant consequences upon teenagers who choose to engage in normal, consensual sexual activity with their peers.

B. Disincentives Seeking Support

The risk of criminal consequences for engaging in sexual activity is likely to deter teenagers from seeking out support or resources regarding becoming sexually active. Teenage boys, who bear the brunt of those consequences, may be unwilling to disclose their sexual activity to trusted adults out of fear of being labeled as a predator and facing criminal charges. At the same time, teenage girls may fear getting their partner in legal trouble or being labeled as a victim, even if they gave consent and participated willingly in the sexual activity. This fear, perpetuated by ongoing criminalization of teenage sexual activity and the stereotypes entrenched in that criminalization, results in avoidance of resources and is simply dangerous.

The Centers for Disease Control and Prevention (CDC) has recognized the importance of providing teenagers with sexual health services (SHS), both prior

116. See Goodwin, *supra* note 6, at 484.

117. See Suro, *supra* note 19; see also *Convicted for Sex with a Minor, 19-Year-Old Gets 2-Year Probation*, CHI. TRIB. (June 25, 1997), <https://www.chicagotribune.com/news/ct-xpm-1997-06-25-9706250262-story.html> [<https://perma.cc/EU2G-X3AQ>].

118. The offenses that currently mandate sex offender registration in Wisconsin are laid out in Wis. Stat. § 301.45(b), and include incest, child enticement, human trafficking, sexual assault, some false imprisonment, and others. Sex offender registry no longer applies to underage sexual activity. See WIS. STAT. § 948.093 (2021-22).

119. WIS. STAT. § 301.45(1m)(a)(c) (2021-22).

120. Goodwin, *supra* note 6, at 509.

to and while teenagers are becoming sexually active.¹²¹ Access to SHS, including information and resources, can reduce the risks posed by sexual activity and aid teenagers in seeking help if and when they need it.¹²² Resources like relationship counseling, sexually-transmitted disease testing, contraception access, and pregnancy support can be vital for ensuring teenagers are making an informed choice to engage in sexual activity and are as safe as possible if and when they do make that choice. However, fear of legal repercussions is likely to dissuade teenagers from seeking these resources or asking the adults in their lives for assistance. Therefore, statutory rape laws that criminalize sex between consenting teenage peers pose serious consequences and risks for even those teenagers who are never charged and convicted for violating those laws.

IV. CONCLUSIONS AND SOLUTIONS

Though statutory rape laws serve an important function in preventing and prosecuting the sexual abuse of children, when the legislature fails to distinguish between adult predators and minors who engage in normal, consensual sexual activity with other minors, the same statutes designed to protect children become incredibly harmful to them; statutory rape thus becomes “a sword against a member of the class the laws were designed to shield.”¹²³ Because statutory rape laws are still highly gendered in practice, motivated in part by subjective interpretations of morality, and enforced unevenly for a number of reasons, the harms are disproportionately felt by young men.

Wisconsin’s 2017 amendment, which dramatically lessened the maximum penalty for statutory rape in cases where both parties are between the ages of fifteen and nineteen and removed sex offender registry as a collateral consequence of conviction in such cases, was a massive step in the right direction and one that other states should emulate. Replacing all arbitrary prosecution statutory rape statutes with age-differential prosecution statutes is another potential positive reform.¹²⁴ However, even these changes are not enough. The consequences will continue to harm all teenagers, and teenage boys disproportionately, for as long as consensual teen sexual activity is criminalized. Decriminalization is the surest and most effective way to negate those consequences and allow teenagers to make healthy, well-informed decisions regarding their sexual activity.

I understand that this proposal will inspire some degree of controversy, perhaps fueled in part by the moral concerns that have always motivated statutory rape laws. To address some potential apprehension, I would like to clarify a few points. First and foremost, if teenage sexual activity were decriminalized as per this comment’s argument, forcible rape among teenagers would still be criminalized under other sex crime laws. It is important to remember that

121. *Health Services for Teens*, CTRS. FOR DISEASE CONTROL & PREVENTION (last visited Jan. 04, 2023), <https://www.cdc.gov/healthyyouth/healthservices/index.htm> [https://perma.cc/WQ8Q-SG77].

122. *Id.*

123. High, *supra* note 12, at 798.

124. Garfield Tenzer, *supra* note 14, at 151.

statutory rape does not require proof of threat, force, or coercion. In cases where the presence of consent is unclear or disputed—for example if one party alleges consent that the other party disputes—law enforcement would need to thoroughly investigate and potentially adjudicate those allegations, as they should be already investigating any potential instance of sexual abuse. Additionally, this proposed change applies only to cases wherein *both* parties are under (but close to) the age of consent, and statutory rape law would still be available to bring criminal penalties to legal adults who have sex with children and underage teenagers (or older teenagers who have sex with younger ones), even without threat or force.

Like Wisconsin’s 2017 amendments, legislative acts decriminalizing sex between consenting teenage peers can provide clear age limits to still allow protection for younger children; Wisconsin’s underage sexual activity law offers reduced penalties to only those between the ages of fifteen and nineteen.¹²⁵ Then, existing law could still provide a more than adequate buffer to protect teenagers from rape and other non-consensual sexual activity. Decriminalizing consensual teenage sexual activity would prevent teenagers, especially teenage boys, from facing catastrophic legal and accompanying social consequences for normal behavior, while also removing a barrier to accessing crucial sexual health information and resources.

Decriminalization would also offer a crucial constraint on prosecutorial discretion. Decriminalizing consensual sexual activity between teenage peers would conclusively disallow prosecutors (or, in some cases, “parents via prosecutors”)¹²⁶ from deciding which teenager of two parties to a consensual sexual relationship “should” be charged with statutory rape.

The question remaining, of course, is that if criminalization is not the solution, what is? The analysis above suggests that replacing criminal penalties with improved sexual education would actually better serve societal interests in reducing teenage pregnancy and helping teenagers make informed decisions about sex. Information about consent, the risks of engaging in sexual activity, and accompanying SHS resources can empower teenagers and reduce the risk of vulnerability—which greatly inspired statutory rape laws in the first place—in meaningful ways. Additionally, a recent long-term study on the impact of federally funded sex education programs conducted by New York University revealed that comprehensive sex education reduces teen birth rates.¹²⁷ In fact, some evidence suggests that improved SHS for teens has potentially lifelong benefits, including “increased self-efficacy relating to skills of sexual health, increased knowledge, and perceived increased comfort dealing with issues of sexuality.”¹²⁸ This means that, in addition to reducing the immediate risks to sexually active teenagers, comprehensive SHS in fact creates more sexually

125. WIS. STAT. § 948.093 (2021-22).

126. Garfield Tenzer, *supra* note 14, at 152.

127. See Nicholas D.E. Mark & Lawrence L. Wu, *More Comprehensive Sex Education Reduced Teen Births: Quasi-experimental Evidence*, 119 PROCS. NAT’L ACAD. SCIS. (2022).

128. Konstance A. McCaffree & Amelia L. Matlack, *Does Sexuality Education Last? Self-Reported Benefits of a High School Comprehensive Sexuality Education Course*, 26 J. SEX EDUC. & THERAPY 347 (2015).

healthy adults as well. To obtain these long-term benefits, SHS could easily be incorporated into middle and high-school curriculums; specifically, the CDC recommends incorporating comprehensive sex education into existing healthcare infrastructure and curriculum at schools.¹²⁹

It is abundantly clear that statutory rape laws serve an important social function in protecting children from adult sexual predators who would take advantage of their vulnerability. However, when these same laws are wielded against teenagers who engage in consensual sexual relationships with other members of their age group as a means of enforcing morality or in a misguided attempt to prevent teenage sexuality, they transform from a source of protection to a source of profound harm, felt by teenagers both individually and collectively. Due to the historical and ongoing gendered enforcement of statutory rape laws, this enforcement disproportionately harms boys, and even more profoundly harms young men of color. For that reason, it is important that state legislatures begin to distinguish between adult and teen offenders, as Wisconsin did in its 2017 amendments. However, even this is insufficient. Therefore, states should move to decriminalize consensual sex between teenage peers, replacing criminal penalties with increased access to education and resources, allowing teenagers to make informed decisions on becoming sexually active without the risk of severe criminal and social penalties.

129. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 120.

MEDICAL SPEECH AFTER *303 CREATIVE*: HOW THE ROBERTS COURT’S EXPANSIVE CONCEPTION OF SPEECH MAY VINDICATE MEDICAL AUTONOMY

*David Phillips**

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ABSTRACT

This Comment considers the impact of *303 Creative LLC v. Elenis* on the speech of medical professionals. Medical speech is a particularly charged topic right now, as many states have increasingly regulated the provision of healthcare. Beyond restricting abortion and gender-affirming care procedures, some states have criminalized the mere provision of factual information about these treatments under an “aiding and abetting” theory of liability. Unlike the majority of scholarship—which advocates upholding the speech-conduct distinction and categorizing medical speech as “conduct”—this Comment argues that a jurisprudence that protects medical speech is essential to our present political moment. If federal courts find a protected interest in medical speech, they will provide a path towards rehabilitating a zone of privacy in the medical sphere. As medical autonomy is increasingly attacked, working toward a right to speech in medical treatments may be a necessary progressive legal strategy.

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INTRODUCTION

In a post-*Dobbs* United States, the ability to make informed and independent medical decisions can mean the difference between life and death.¹ Patient medical autonomy is in flux in states that have leveraged *Dobbs* to ban some or all abortion procedures. Beyond restricting access to abortion, a number of state legislatures have pushed “gag orders” that prevent doctors from openly advising their patients at all with regard to abortion.² Specifically, doctors may face criminal penalties under an “aiding and abetting” theory of criminal liability, whereby explaining to a patient that abortion is available and legal in a nearby state may result in fines or incarceration.³

Similarly, dozens of states have restricted access to “life saving” gender-affirming care.⁴ States like Iowa, Mississippi, and Indiana have likewise provided for “aiding and abetting” liability of gender-affirming care, whereby providers can be criminally sanctioned for advising minors about gender-affirming care.⁵ The provision of gender-affirming care touches on speech in another way: some states have banned non-surgical “talk therapy,” which is a routine form of therapy that involves only verbal communication between a healthcare professional and patient.⁶ This deluge of gag orders, as well as restrictions on procedures which are facilitated exclusively through speech, begs the question: how should courts treat restrictions on medical speech when physical treatment is entirely absent?

Critical to this particular moment in free speech jurisprudence is *303 Creative LLC v. Elenis*, a marked shift in analyzing the speech-conduct

1. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overturning fundamental right to abortion); Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn’t Get an Abortion*, CNN (June 20, 2023, 7:17 AM), <https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html> [<https://perma.cc/9MBN-X9RV>].

2. Lynette Martins & Scott Schweikart, *Physician Free Speech and the Doctor-Patient Relationship Post-Dobbs*, BILL OF HEALTH, PETRIE-FLOM CTR. HEALTH LAW, POL’Y, BIOTECHNOLOGY, & BIOETHICS HARV. L. SCH. (May 25, 2023), <https://blog.petrieflom.law.harvard.edu/2023/05/25/physician-free-speech-and-the-doctor-patient-relationship-post-dobbs> [<https://perma.cc/YW2L-M2B3>].

3. See, e.g., S.B. 1373, 124th Gen. Assemb., Reg. Sess. (S.C. 2022) (noting a proposed bill that would “make it unlawful to aid, abet, or conspire with someone to procure an abortion,” including “providing information to a pregnant woman”). Presently, South Carolina bans abortions after 6 weeks and criminalizes “abetting an abortion if the unborn child’s fetal heartbeat has been detected.” 44 S.C. Code Ann. § 41-630 (2021); see also *infra* notes 41 & 59.

4. *AMA Strengthens Its Policy on Protecting Access to Gender-Affirming Care*, ENDOCRINE SOC’Y, <https://www.endocrine.org/news-and-advocacy/news-room/2023/ama-gender-affirming-care> [<https://perma.cc/WNH8-577F>] (last visited Dec. 26, 2023).

5. Annette Choi & Will Mullery, *19 States Have Laws Restricting Gender-Affirming Care, Some With the Possibility of a Felony Charge*, CNN (June 6, 2023), <https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html> [<https://perma.cc/SMR2-GKMR>].

6. *Id.*; Sara Lindberg, *What Is Talk Therapy and Can It Help?*, HEALTHLINE (Feb. 14, 2023), <https://www.healthline.com/health/mental-health/talk-therapy#definition> [<https://perma.cc/5J5V-NBSJ>].

distinction in the context of professional speech. Historically, even literal speech by professionals was not necessarily within the gamut of the First Amendment when it was “associat[ed]...with some other factor which the state may regulate so as to bring the whole within official control.”⁷ This meant that when professionals—like financial advisors and lawyers—were “engaging in the practice of a profession,” the state was able to regulate their conduct, even if the state incidentally restricted speech as well.⁸ *303 Creative* departed from this norm by focusing not on the State’s regulation of conduct, but on the incidentally-restricted speech.⁹

Part I of this Comment tracks the Roberts Court’s shifted approach to the speech-conduct distinction, of which *303 Creative* is emblematic. Part II applies this shift to the question of medical speech, which looms larger than ever today. For example, the Court most recently denied certiorari after re-listing the petition of *Tingley v. Ferguson*, a case which squarely placed states’ police power in tension with the right of medical providers to speak.¹⁰ Contrary to existing scholarship which proposes a return to the traditional speech-conduct distinction for medical speech,¹¹ Part III advocates for protecting and expanding the professional speech of healthcare providers, thereby fortifying a medical zone of privacy that many states increasingly threaten.

I. 303 CREATIVE FURTHER AGGRANDIZED THE CATEGORY OF ‘PROFESSIONAL’ SPEECH, SHIFTING THE SPEECH-CONDUCT LINE

The Roberts Court has been called “the most libertarian [bench] in our nation’s history on free-speech issues.”¹² *303 Creative* extended this libertarian trend, finding unconstitutional a Colorado anti-discrimination law as it was applied to a website designer. Lorie Smith, the sole owner and operator of 303 Creative LLC, “decided to expand her offerings to include services for couples seeking websites for their weddings.”¹³ The court relied extensively on both parties’ stipulation that Ms. Smith’s service was inherently “expressive,” conveying a custom and “unique” message about each couple’s “love story.”¹⁴

7. *Lowe v. S.E.C.*, 472 U.S. 181, 231 (1985) (White, J., concurring) (citing *Jackson, J.*, concurring in *Thomas v. Collins*, 323 U.S. 516, 544 (1945)).

8. *Id.*

9. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 628–29 (2023) (Sotomayor, J., dissenting) (arguing “the focal point of [Colorado’s discrimination] prohibition” is “on the act of discriminating against individuals,” not speech, and therefore strict scrutiny should not apply).

10. *Tingley v. Ferguson*, 144 S. Ct. 33, 35 (2023) (denying certiorari).

11. *See, e.g., Kathleen Stoughton, Comment, Toxic Therapy: Examining the Constitutionality of Conversion Therapy Bans in Light of Otto*, 30 AM. U.J. GENDER, SOC. POL’Y & L. 81 (2022); Logan Kline, *Revitalizing the Ban on Conversion Therapy: An Affirmation of the Constitutionality of Conversion Therapy Bans*, 90 U. CIN. L. REV. 623 (2021).

12. Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, in 17 CATO SUP. CT. REV. 197, 198 (Ilya Shapiro, ed., 2018).

13. *303 Creative*, 600 U.S. at 579.

14. *Id.* at 582, 579.

To the extent that she would deny custom wedding websites to gay couples, the Supreme Court affirmed that Ms. Smith faced “a credible threat that...Colorado [would] invoke [its public accommodation laws] to force her to create speech she does not believe or endorse.”¹⁵

A particular point of contention between the justices was whether it mattered that Ms. Smith was offering a paid service. To the dissent, it mattered greatly that *303 Creative* involved a “commercial act of discrimination in the sale of publicly available goods.”¹⁶ The dissent distinguished Ms. Smith’s act of discrimination from two prior cases, *Hurley* and *Dale*, which likewise found that accommodation laws could not be used to compel speech. The dissent argued those cases did not involve “the act of discriminating...in the provision of publicly available goods by clearly commercial entities.”¹⁷ However, the six-justice majority rejected this reasoning; even though “Ms. Smith offers her speech for pay and does so through...a company[,] ...none of that makes a difference.”¹⁸ The commercial status of Ms. Smith’s professional speech was neither dispositive nor *relevant* to the Court’s analysis.¹⁹

In this regard, *303 Creative* does more than merely apply precedent to protect speech rights.²⁰ Rather, the majority has signaled a significant aggrandizement of “professional speech,” thereby displacing historical deference “to ordinary commercial or regulatory legislation that affects speech in less direct ways.”²¹ Courts have routinely applied lesser scrutiny when “a regulation is unrelated to the suppression of expression and ‘promotes a substantial government interest that would be achieved less effectively absent the regulation.’”²² This question—whether a law is a neutral regulation of conduct that incidentally affects speech—is particularly relevant when a case concerns both speech and non-speech elements (e.g. graphic design). Such a question would normally be answered by applying a standard announced in *U.S. v.*

15. *Id.* at 583, 588.

16. *Id.* at 636 (Sotomayer, J., dissenting).

17. *303 Creative LLC v. Elenis*, 600 U.S. 570, 634 (2023) (Sotomayer, J., dissenting); *see also* *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 571 (1995) (holding parade organizers may not be compelled by Massachusetts to include a gay group in their annual parade); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding First Amendment rights of an “expressive association” overcome New Jersey’s interest in preventing discrimination).

18. *303 Creative*, 600 U.S. at 594.

19. *Id.* at 589 (“Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty.”).

20. *But see* Catherine J. Ross, *The Real and the Phantom 303 Creative: Which Is More Dangerous?*, GEO. WASH. L. REV. (July 25, 2023), <https://www.gwlr.org/303-creative-elenis-response> [<https://perma.cc/S573-4CHB>] (arguing *303 Creative* is a narrow holding consistent with precedent).

21. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 584 (2011) (Breyer, J., dissenting).

22. *303 Creative*, 600 U.S. at 626 (Sotomayer, J., dissenting) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)); *see also* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019) (“[I]ntermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech.”).

O'Brien.²³ However, the *303 Creative* majority did not even apply the *O'Brien* threshold test to determine whether the law at issue violated the First Amendment, mentioning the case only in a footnote.²⁴ Ostensibly, this looks like “fundamental error in suggesting that a law does not regulate conduct if it ever applies to expressive activities.”²⁵ However, there is no error or accident in the majority’s holding. In reality, the majority signals a shift in applying the speech-conduct distinction after a sustained, incremental effort by the Roberts Court to substantively recast which professional actions are considered ‘speech.’²⁶

303 Creative marks a fundamental departure from precedent because Ms. Smith’s design of a website largely involves the rendering of professional services, but the majority did not find this to be ‘conduct.’ Historically, professions that were facilitated primarily, or even exclusively, through speech were nonetheless considered ‘conduct’ for First Amendment purposes.²⁷ To distinguish speech-based conduct from actual speech, courts asked “whether the speech in any particular case was ‘associat[ed]...with some other factor which the state may regulate so as to bring the whole within official control.’”²⁸ So, when a financial professional advises a client about which securities to purchase, she is “engaging in the practice of a profession;”²⁹ she does not receive First Amendment protections for her conduct because she is facilitating a transaction (which itself is subject to government regulation). Similarly, Ms. Smith’s creation of a wedding website involved non-speech conduct: graphic design, element placement, and transcription of client information.³⁰ To be sure, there were clear expressive elements involved in Ms. Smith’s work, too: narrating an original “love story” in her own words, for example. In the dissent’s telling, Colorado’s accommodation law did “not target speech or discriminate on the basis of its content...[r]ather, the focal point of its prohibition is on the act of

23. See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms...[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”).

24. *303 Creative*, 600 U.S. at 600.

25. *Id.* at 626 (Sotomayor, J., dissenting).

26. See, e.g., *IMS Health Inc.*, 564 U.S. at 570 (rejecting state’s position that “sales, transfer, and use of prescriber-identifying information are conduct, not speech,” and applying intermediate scrutiny); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 770 (2018) (rejecting state’s position that law requiring disclosure of abortion availability was a “regulation of professional conduct”).

27. See, e.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech...extends its immunity to speech or writing used as an integral part of conduct.”).

28. *Lowe v. S.E.C.*, 472 U.S. 181, 231 (1985) (White, J., concurring).

29. *Id.* at 232.

30. Admittedly, these actions are expressive in common parlance: re-typing a client’s information involves literally writing language. But Ms. Smith didn’t ‘speak’ for purposes of the First Amendment any more than a stenographer speaks when she types a court’s record.

discriminating against individuals in the provision of publicly available goods, privileges, and services.”³¹

In this way, the *303 Creative* dissent is correct that “the majority collapses the distinction between [conduct and speech]” for practicing professionals.³² But this Comment does not adopt the dissent and many scholars’ position that the speech-conduct distinction should be re-entrenched as it once was; instead, lawyers should recognize and accept that *303 Creative* establishes a new substantive norm.³³ Whereas regulable conduct was historically sufficient to transform literal speech into non-speech, the Roberts Court has found the opposite: speech, even by a professional in her practice, is sufficient to transform conduct into “pure speech.”³⁴ The majority rejects the proposition that “speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny” merely because the statute at issue sought to regulate non-speech elements.³⁵

This is not the first time that the Court has protected the speech of professionals. In *NIFLA v. Becerra*, the Roberts Court refused to “recognize[] ‘professional speech’ as a separate category of speech [subject to lesser protections]. Speech is not unprotected merely because it is uttered by ‘professionals.’”³⁶ But even in that case, the Court reaffirmed the validity of commercial “regulations of professional conduct that incidentally burden speech.”³⁷ As an example, the *NIFLA* Court recognized that informed consent laws “regulate[] speech only ‘as part of the *practice* of medicine.’”³⁸ In *NIFLA*, then, the Roberts Court invoked the regulation of a professional’s speech-based practice as *the* quintessential example of a law that passes First Amendment muster. Departing from that position, the Court in *303 Creative* treats professional practice (with indisputable non-speech elements) as pure speech. By declining to even apply the *O’Brien* test, *303 Creative* marks more than a mere error or temporary aberration. The case exemplifies a paradigmatic shift in how courts should approach professional speech, culminating a decades-long

31. *303 Creative*, 600 U.S. at 628 (Sotomayor, J., dissenting) (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995) (internal quotations omitted)).

32. *303 Creative*, 600 U.S. at 633.

33. See *Marks v. United States*, 430 U.S. 188, 194 (1977) (stating that where a Court’s holding “marked a significant departure,” the case was not a mere modification but a new test).

34. *303 Creative*, 600 U.S. at 587; see also *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 584 U.S. 617, 653–54 (2018) (Gorsuch, J., concurring) (disagreeing with Circuit Court’s finding “that Phillips’ conduct was not expressive and was not protected speech”). Gorsuch’s concurrence in *Masterpiece Cakeshop* is emblematic of this approach which blurs the distinction between speech and professional conduct. It wasn’t until *303 Creative*, though, that Gorsuch’s reasoning won over a majority of the Supreme Court.

35. *303 Creative*, 600 U.S. at 593.

36. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (holding pro-life crisis pregnancy centers may not be compelled to provide state resources about abortion).

37. *Id.* at 2373.

38. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022)).

extension of speech protections to strike down ordinary commercial regulations of conduct.³⁹

II. PARTIES MAY LEVERAGE 303 CREATIVE TO PROTECT PROFESSIONAL MEDICAL SPEECH

Despite the United States' historical treatment of expression as a sacrosanct right—speech has been called a “fixed star in our constitutional constellation”⁴⁰—medical professionals face increasing scrutiny and restrictions of their speech.⁴¹ This is particularly pressing because the First Amendment was meant to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail;”⁴² yet, it is precisely evidence-backed medical positions which are increasingly censored.⁴³ A number of states have censored or are presently attempting to censor critical information concerning abortion and gender-affirming care.⁴⁴ This is precisely the type of threat that our Constitution structurally rejects; it is no coincidence that the first enumerated amendment emphasizes speech rights.⁴⁵ Parties can and should leverage the Roberts Court's increasing protection of professional speech to re-establish a sphere of medical privacy that protects both providers and patients.⁴⁶

Building upon precedent, *303 Creative* reified professional speech as a domain of protected expression. Even though the Court in *NIFLA* held that “[s]peech is not unprotected merely because it is uttered by ‘professionals,’”⁴⁷ the majority did “not foreclose the possibility that some such reason exists...for treating professional speech as a unique category that is exempt from ordinary

39. See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

40. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); see also *303 Creative*, 600 U.S. at 584.

41. See generally *Barnette*, 319 U.S. 624; *303 Creative*, 600 U.S. at 584.

42. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); see also *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (citing same proposition in the context of reproductive healthcare).

43. Dylan Scott, *Republicans Want to Force Doctors to Mislead Patients About Reversing Abortions*, VOX (Apr. 13, 2013, 10:00 AM), <https://www.vox.com/policy/2023/4/13/23679164/abortion-pill-reversal-5th-circuit-ruling> [<https://perma.cc/B9N2-3846>] (noting that “the claims legislators are asking doctors to make are not supported by good science” and do not meet clinical standards); see also Choi, *supra* note 5.

44. Choi, *supra* note 5; Annette Choi Cole Devan, *See Where Abortions Are Banned and Legal—and Where It's Still in Limbo*, CNN (2022), <https://www.cnn.com/2022/08/31/us/abortion-access-restrictions-bans-us/index.html> [<https://perma.cc/6S7A-SM39>].

45. *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 115 (1943) (The right to free speech is “in a preferred position” in Constitutional structure.).

46. The First Amendment was key to the Supreme Court's establishment of a zone of privacy protecting the right to contraception in *Griswold v. Connecticut*. 381 U.S. 479, 484 (1965) (“Various guarantees create zones of privacy...the First Amendment is one.”); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (finding that the First Amendment establishes a zone of privacy to possess obscene materials within privacy of one's home).

47. *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 766 (2018).

First Amendment principles.”⁴⁸ To the extent that this question remained open, 303 *Creative* provides a decisive answer: “[u]nder Colorado’s logic, the government may compel anyone who speaks for pay on a given topic to...choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so....[T]he First Amendment tolerates none of that.”⁴⁹ At this point in time, precedent upon precedent has established that whether government seeks to compel speech or silence, such “a pall of orthodoxy” is an unconstitutional violation of professionals’ speech.⁵⁰

The Supreme Court has historically skirted application of strict scrutiny to expression by medical professionals;⁵¹ however, faithful application of 303 *Creative*, paired with the Court’s other cases, indicates that strict scrutiny should apply to restrictions on provider speech.⁵² In addition to finding that professional speech is still speech, the *NIFLA* court (in dicta) offered doctors as the quintessential illustration of the “dangers” of speech regulation:

[R]egulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.’ *Take medicine, for example*. ‘Doctors help patients make deeply personal decisions, and their candor is crucial.’ *Throughout history, governments have ‘manipulat[ed] the content of doctor-patient discourse’ to increase state power and suppress minorities.*⁵³

Since *NIFLA*, the 11th Circuit has found that restrictions on providers’ speech are subject to strict scrutiny:⁵⁴ *Otto v. City of Boca Raton, Fla.*, decided in the controversial area of conversion therapy, split from the 9th Circuit’s

48. *Id.* at 773.

49. 303 *Creative LLC v. Elenis*, 600 U.S. 570, 589–90 (2023).

50. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

51. See Paula Berg, *Toward A First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 235–36 (1994) (Until recently, “advocates challenging statutes that included restrictions on physician speech about contraception or abortion did not assert that those provisions violated the First Amendment.”); see also *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (declining to conduct First Amendment analysis of restriction on abortion counseling by Title X grantees); *Tingley v. Ferguson*, 144 S. Ct. 33, 35 (2023) (denying certiorari).

52. See *Cohen v. California*, 403 U.S. 15, 18 (1971) (finding that where “the only ‘conduct’ which the State sought to punish is the fact of communication” without “any separately identifiable conduct,” courts should apply strict scrutiny. In this case, Cohen’s only conduct was wearing a jacket that said “Fuck the Draft.”); see also *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 770 (2018) (finding law requiring disclosure of clinic’s unlicensed status “regulates speech as speech”).

53. *NIFLA*, 585 U.S. at 771 (internal citations omitted) (emphasis added).

54. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 861 (11th Cir. 2020) (“[B]ecause the ordinances [banning conversion therapy] depend on what is said, they are content-based restrictions that must receive strict scrutiny.”); but see *Stoughton*, *supra* note 11 (arguing that the 11th Circuit erred in its application of strict scrutiny, and the act survives even this most-exacting standard).

finding in *Tingley* that medical speech is conduct.⁵⁵ But *303 Creative* counsels that the Roberts Court would prefer the 11th Circuit’s analysis to the 9th Circuit’s. Justices Thomas and Alito confirmed as much in their dissents from the denial of certiorari in *Tingley*, expressing their belief that laws regulating talk therapy run into the First Amendment.⁵⁶ Moreover, *Otto*’s holding aligns with precedential treatment of non-professional speech: the Court has applied strict scrutiny.

A. Gag Orders are Impermissible Speech Restrictions

Gag orders on healthcare providers undoubtedly constitute content-based restrictions on the professional speech of doctors. Take the model abortion law—promulgated by the National Right to Life Committee—under consideration by South Carolina, for example.⁵⁷ The bill would prohibit “providing [abortion-related] information to a pregnant woman.”⁵⁸ This is a straightforward content-based law, determining the (il)legality of speech based on its content. A doctor seems to violate the law by saying, for example, “[t]he standard treatment in your case would be abortion. Although I cannot provide that procedure in this state, Virginia is within driving distance.” This speech could be criminally punished, while the same statement about, say, the unavailability of orthodontia in a rural town, would not.⁵⁹

Gag orders are doubly unconstitutional as viewpoint restrictions. “Viewpoint discrimination is...an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”⁶⁰ Viewpoint discrimination is “all the more blatant”⁶¹ than mere

55. *Tingley v. Ferguson*, 57 F.4th 1072, 1074 (9th Cir. 2023) (O’Scannlain, J., dissenting) (acknowledging existence of circuit split); see also Jason Miranda, Note, *Ninth Circuit Rejects Challenge to Washington State Ban on Conversion Therapy for Minors, Paving the Way for Possible Supreme Court Review*, 2022 LGBT L. NOTES 3, 6 (2022) (detailing circuit split).

56. *Tingley v. Ferguson*, 144 S. Ct. 33, 35 (2023) (denying certiorari) (Alito, J., dissenting) (“It is beyond dispute that these laws [regulating talk therapy] restrict speech.”).

57. See Act. No. 96, 2021 S.C. Acts 2; James Bopp Jr., Courtney Milbank & Joseph Maughon, *NRLC Post-Roe Model Abortion Law*, NAT’L RIGHT TO LIFE COMM. (June 15, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf> [<https://perma.cc/QN7Z-724R>].

58. Act. No. 96, 2021 S.C. Acts 2.

59. See also *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1307 (11th Cir. 2017) (Florida firearm privacy law, which applied to doctors “during an examination” of a patient, “constitute[d] speaker-focused and content-based restrictions on speech. The record-keeping and inquiry provisions expressly limit the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict their ability to communicate and/or convey a message. As a result, there can be no doubt that these provisions trigger First Amendment scrutiny.”).

60. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

61. *Id.*

content discrimination because it censors speech based on “disapproval of the ideas expressed,”⁶² thereby proscribing not just a topic but a specific *stance*.⁶³

When a healthcare provider describes their position that abortion or gender-affirming care, despite being unauthorized in a state, is the appropriate treatment, that statement does express a viewpoint. Specifically, it expresses the provider’s individual adoption of a particular, clinically-supported position, in opposition to the state legislature’s belief that the same position is immoral. And to be clear, the providers in such instances are not expressing a fringe position or attempting to describe a federally-prohibited treatment—they are describing federally-approved treatments that their state legislature opposes on moral grounds. This elucidates precisely how science and morals can come into play regarding topics like abortion and gender-affirming care, such that medical speech becomes representative of the provider’s stance on a polarizing issue.

Even when gag orders are not explicit, and are instead executed through a state’s enforcement of aiding and abetting liability against doctors, First Amendment principles still carry the day. To be sure, states have openly affirmed they would prosecute doctors under conspiracy and accessory laws.⁶⁴ Here, too, *303 Creative* is instructive. Ms. Smith faced only minor penalties: the possibility of an administrative hearing, and perhaps some mandatory non-discrimination lessons.⁶⁵ Where states have levied criminal sanctions against purely factual professional speech, courts should be even more attuned to the risk of pretextual justifications for censorship.⁶⁶ The 9th Circuit holding in *Conant v. Walters* demonstrates this point. The *Conant* Court considered whether the Federal Government could criminally “punish physicians [under an aiding and abetting theory] for communicating with their patients about the medical use of marijuana.”⁶⁷ But the Court held that merely recommending marijuana use is insufficient to create criminal liability and improperly chills speech in the doctor-patient relationship.⁶⁸ “A doctor’s anticipation of patient conduct...does not translate into aiding and abetting, or conspiracy. A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana.”⁶⁹ Similarly, a doctor’s mere discussion of abortion or gender-affirming care, through the provision of factual information, does not meet the requisite *mens rea* or *actus reus* for aiding and abetting. So, states are punishing and chilling “pure speech” under the guise of regulating criminal conduct.⁷⁰ But

62. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

63. *Id.*

64. Josh Moon, *Alabama AG: State May Prosecute Those Who Assist in out-of-State Abortions*, ALA. POL. REP. (Sept. 15, 2022), <https://www.alreporter.com/2022/09/15/alabama-ag-state-may-prosecute-those-who-assist-in-out-of-state-abortions> [https://perma.cc/VN56-VEX9] (last visited Dec 26, 2023).

65. *303 Creative LLC v. Elenis*, 600 U.S. 570, 583 (2023).

66. *Cohen v. California*, 403 U.S. 15, 19 (1971) (overturning conviction that “rests squarely upon [Appellant’s] exercise of the ‘freedom of speech’”).

67. *Conant v. Walters*, 309 F.3d 629, 633 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003).

68. *Conant v. Walters*, 309 F.3d 629, 635–36 (9th Cir. 2002).

69. *Id.*

70. *303 Creative*, 600 U.S. at 599.

“the First Amendment tolerates none of that.”⁷¹ Such pretextual uses of criminal codes to censor disfavored views violates the right to speak freely that providers hold, particularly in their professional capacity.

Neither can state laws gagging doctors be considered content neutral laws that merely restrict *when* doctors can express their view on abortion or merely incidentally burden speech. While states may restrict the time, place, and manner of certain speech, they can only do so where the state’s motivation is not based on disagreement with a particular message.⁷² But medical gag orders fail this inquiry at the outset. State legislatures pass abortion and gender-affirming care bans because of substantive disagreement with those procedures.⁷³ This reasoning aligns with other speech cases: when “the only ‘conduct’ which the State sought to punish is the fact of communication” without “any separately identifiable conduct,” the Court has applied strict scrutiny.⁷⁴

In *Cohen v. California*, a man was indicted under a disorderly conduct statute for wearing a jacket that said “Fuck the Draft” in a courthouse.⁷⁵ The Court determined the statute was a content-based speech restriction applied because of the offensive content of Cohen’s message—specifically repudiating California’s argument that the law was a mere regulation of *where* Cohen could express his anti-war views.⁷⁶ Likewise, in *Holder v. Humanitarian Law Project*, the Supreme Court noted that strict scrutiny may be appropriate even where a statute “generally functions as a regulation of conduct.”⁷⁷ In *Holder*, the law targeted providing aid to terrorist organizations. But the Supreme Court found that the law did not operate as a content-neutral time, place, and manner restriction when used to stop lawyers from speaking: “[p]laintiffs want to speak...and whether they may do so...depends on what they say.”⁷⁸ Along the same vein, while a state might be able to pass “aiding and abetting” laws against abortion, those laws are subject to strict scrutiny when they are applied to suppress speech.⁷⁹

71. *Id.* at 590.

72. *Hill v. Colorado*, 530 U.S. 703, 708 (2000); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content neutrality in speech cases...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”).

73. *See* Bopp Jr., *supra* note 57 (noting that the motivation for abortion gag orders is a “policy choice” without any mention of medical evidence); Melissa Block, *Parents Raise Concerns as Florida Bans Gender-Affirming Care for Trans Kids*, NPR (Feb. 20, 2023), <https://www.npr.org/2023/02/20/1157493433/florida-bans-gender-affirming-care-trans-kids> [<https://perma.cc/TWC2-ZEKM>] (“Politicians disagree with the medical consensus on the safety of gender affirming care for minors” and quoting Governor Ron DeSantis’s claim that gender-affirming care should be banned because the procedures are “an example of woke ideology infecting medical practice.”).

74. *Cohen v. California*, 403 U.S. 15, 18 (1971).

75. *Id.* at 15.

76. *Id.*

77. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010).

78. *Id.* at 27.

79. *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (finding that a hate crime “ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses”).

Finally, gag orders do not fall within the exception to First Amendment strict scrutiny for non-controversial, factual disclosures, like informed consent laws. Under this exception, courts will apply more deferential review to laws requiring the disclosure of “purely factual and uncontroversial information about the terms under which...services will be available.”⁸⁰ Notably, this exception only applies in commercial contexts, where the service is actually being advertised or provided.⁸¹ But where informed consent laws require a healthcare provider to disclose relevant information, medical gag orders censor relevant information.

This distinction between compelling speech and silencing speech is analytically dispositive because the entire purpose of an informed consent law is to *increase* the flow of information, while gag orders *decrease* informational flow.⁸² Moreover, as the Supreme Court noted in *NIFLA*, “abortion [is] anything but an ‘uncontroversial’ topic,” and the same could be said of trans-affirming medical care, taking gag orders out of the realm of the “non-controversial” exception.⁸³ Most importantly, in states where abortion and gender-affirming care are illegal or restricted, a doctor’s provision of advice is definitionally *not tied to any procedure* because the healthcare provider cannot provide any medical procedure. So, this exception is not relevant because no “service[] will be available.”⁸⁴

B. Even Speech Used as Part of a Treatment Should Receive First Amendment Protection

Because *303 Creative* has shifted the speech-conduct line to be more inclusive of services which are facilitated exclusively through speech, even a course of non-surgical medical treatment, like talk-based gender-affirming care, could be considered protected speech. This is precisely what the 11th Circuit held in *Otto*. It makes sense that a treatment like talk-therapy, which involves only speech, would be expressive to the same extent that publishing a wedding website expresses Ms. Smith’s views about marriage. Just as Ms. Smith’s websites, under the *303 Creative* majority’s reasoning, “‘celebrat[e] and promot[e]’ what Ms. Smith understands to be a true marriage,”⁸⁵ the provision of gender-affirming care celebrates and promotes an individual’s inherent right to live consistently with their gender identity. So, where a course of treatment is exclusively speech-based and reflects a provider’s sincerely held beliefs about the validity of transness, a law restricting the provision of this care no longer regulates conduct. It has crossed the line: “[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech...beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment.”⁸⁶

80. Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 585 U.S. 755, 756 (2018).

81. *Id.*

82. Berg, *supra* note 51, at 206 (1994).

83. *Id.*

84. *NIFLA*, 585 U.S. at 768.

85. *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023).

86. *Lowe v. S.E.C.*, 472 U.S. 181, 230 (1985) (White, J., concurring).

This reasoning flows directly from the majority's analysis in *303 Creative*. There is nothing substantively different about 'medical' speech that would make it analytically immune from a traditional First Amendment analysis.⁸⁷ Medical speech, like a website designer's storytelling or a speechwriter's rhetoric, conveys a particular position on a given matter. Every time a therapist communicates with a patient, she is literally speaking and impliedly expressing her individual knowledge and perspective. While the effects of medical speech can be more severe because of their effect on a vulnerable patient and the need for expert advice, this does not transform medical speech into non-speech.⁸⁸ Instead, courts can consider the heightened interests states have in protecting the health of their citizens as part of the strict scrutiny analysis. But this doesn't negate the fact that strict scrutiny should apply from the outset.⁸⁹ Indeed, while it is outside the scope of this Comment to conduct a strict scrutiny analysis, which is heavily fact and context specific, it is worth noting that increasing the flow of information between doctors and patients would improve, not diminish, the quality of healthcare, and therefore promote health and welfare.⁹⁰ To the extent that a state claims it is protecting citizen health by censoring factual information, this is unconvincing and fails narrow tailoring.⁹¹

Finally, it is not so far-fetched that a course of treatment facilitated exclusively through language might be considered speech. The Supreme Court recently denied certiorari after re-listing in *Tingley v. Ferguson*.⁹² Dissenting from the denial of certiorari, at least two Justices expressly indicated their position that speaking to clients in the context of talk therapy "implicates the First Amendment."⁹³

87. See Berg, *supra* note 51.

88. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part), *overruled on other grounds by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). "Serious questions arise, however, when a State attempts to 'persuade the woman to choose childbirth over abortion.'" *Casey*, 505 U.S. at 878.

89. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (declining to treat a law restricting prescriber-identifying information as ordinary commercial legislation because of medicine's "great relevance in the fields of medicine and public health, where information can save lives").

90. See Berg, *supra* note 51 ("Patients' discovery of their medical truth—that is, of the particular course of treatment that is best for them—depends on an unconstrained flow of information from physicians.").

91. In strict scrutiny analysis, there must be "a tight relationship between means and ends." Owen Fiss, *The Law of Narrow Tailoring*, 23 U. PA. J. CONST. L. 879 (2021).

92. Re-listing is a notoriously ambiguous practice. It may indicate the Court is one justice short of the number of votes needed to grant certiorari, or a justice wants to take a "second look" at the case. *Tingley v. Ferguson*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/tingley-v-ferguson> [https://perma.cc/X62V-HHRD] (last accessed Nov. 22, 2023, 8:29 PM).

93. *Tingley v. Ferguson*, 144 S. Ct. 33, 35 (2023) (denying certiorari).

III. 303 CREATIVE SHOULD BE READ BROADLY, CONSISTENT WITH THE
ROBERTS COURT'S PRIOR CASES, TO PROTECT MEDICAL SPEECH

303 *Creative* squarely held that a State may not use its police power to compel a professional to speak the state's preferred message.⁹⁴ While the majority's reasoning relied extensively on the creative aspects of Ms. Smith's speech as an artist, the case should be construed broadly to protect professionals in other fields, particularly medicine, from content-based speech restrictions that fail narrow tailoring and do not serve a compelling state interest.

Just as "no public accommodations law is immune from the demands of the Constitution," laws regulating healthcare professionals should be subject to the same rigorous analysis that the 303 *Creative* majority applied to vindicate the constitutional rights of creative professionals.⁹⁵ Indeed, to the extent there is something qualitatively different about the speech of medical professionals, that difference counsels in favor of a broad reading of 303 *Creative*.

The dignity harm suffered by queer couples who are systematically denied a service like Ms. Smith's—based solely on their class—is egregious; but the harm suffered by patients who cannot access forthright, evidence-based healthcare is even more serious. This is precisely why the Supreme Court "has stressed the danger of content-based regulations 'in the fields of medicine and public health, where information can save lives.'"⁹⁶ For patients in the rural South who cannot discuss abortion or gender-affirming care with their healthcare provider, chilled speech can mean the difference between life and death.

Protecting the speech of medical professionals will not transform healthcare into an unregulated wild-west devoid of accountability mechanisms. Healthcare professionals would still remain subject to the requirements of licensure in their practice, meaning any services they render would be offered pursuant to standardized training and peer review. Moreover, healthcare professionals would remain accountable to the laws of tort for malpractice.⁹⁷ Fringe providers who use their speech to depart from reasonable standards would continue to be individually accountable for the harm they inflict, a fact which courts have repeatedly emphasized in speech cases.⁹⁸ Instead of partisan legislators regulating the field of healthcare, proper medical practice would be overseen by actual experts in the field, ensuring that competence is judged by similarly situated professionals instead of politicians.

94. 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023).

95. *Id.* at 592; *but see* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 221 (2022) (State abortion laws, like other "health and welfare laws, [are] entitled to a "strong presumption of validity.""). The *Dobbs* dictum noting that health and welfare laws are generally presumed valid is inapposite because the Court assumed that such laws operate as ordinary regulations and do not impact speech.

96. Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 585 U.S. 755, 771 (2018) (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011)).

97. *See* Otto v. City of Boca Raton, Fla., 981 F.3d 854, 870 (noting the 11th Circuit's decision to overturn a conversion therapy ban "does not stand in the way of '[l]ongstanding torts for professional malpractice' or other state-law penalties for bad acts that produce actual harm") (internal quotation omitted).

98. *See, e.g., NIFLA*, 585 U.S. at 769.

Along this vein, a broad reading of *303 Creative* does not imply that healthcare professionals ought to be able to discriminate against patients. Rather, the relevant holding from *303 Creative* is that states generally may not compel “professionals...to choose between remaining silent...or speaking their minds and incurring sanctions for doing so.”⁹⁹ But the Court emphasized that Ms. Smith, like all doctors, may not engage in status-based discrimination.¹⁰⁰ The Court only held that she could not be obligated to speak a particular expressive message. So too, here. Doctors and healthcare providers must treat all patients fairly and equally, but they cannot be compelled to stay silent on topics like abortion and gender-affirming care unless such a restriction achieves a compelling state interest through the least restrictive means.

Finally, a broad reading and application of *303 Creative* to medical speech does not give healthcare providers absolute immunity from state regulation. The right to free speech is not absolute; although content-based speech restrictions are “presumptively unconstitutional,” they may pass muster when a state “prove[s] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”¹⁰¹ This is a high bar, but strict scrutiny is not “fatal in fact” as some have claimed.¹⁰² For harmful speech like conversion therapy—which lacks any clinical basis—many have argued that a ban would pass muster under even the most exacting scrutiny, and it is unnecessary to rehash those arguments here.¹⁰³ Moreover, in the two instances where the Supreme Court has upheld speech restrictions under strict scrutiny, both cases involved licensed professionals (lawyers) using their speech for the most fringe circumstances—rendering aid to a designated terrorist group and a judge’s personal solicitation of campaign money.¹⁰⁴ So, even when recognizing their speech interests, healthcare providers would not have *carte blanche* to facilitate dangerous, unapproved treatments like conversion therapy through speech.

CONCLUSION

In an era of increasingly partisan regulation of lifesaving medical procedures, litigators must work to re-establish a zone of medical privacy. Cases like *Griswold v. Connecticut* took the first step towards this, drawing, in part, on a patient’s First Amendment right to receive information. But as doctors are burdened by increasingly unworkable and chilling regulations, including threats of incarceration, it is worth vindicating a provider’s own speech rights as a

99. *303 Creative LLC v. Elenis*, 600 U.S. 570, 590 (2023).

100. *Id.* at 594.

101. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 171 (2015).

102. *See, e.g., Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (“[T]hose cases do arise” that meet strict scrutiny.).

103. Samuel G. Bernstein, *The Not-So-Straight First Amendment: Why Prohibitions on Conversion Therapy for Children Survive Strict Scrutiny*, 63 B.C.L. REV. 1861 (2022); Stoughton, *supra* note 11; Nikki Caspers, *Changing Speech in A Changing World: An Examination of Contemporary SOCE State Legislation and the Fight for Legal Protection Amid Constitutional Challenge*, 31 TUL. J.L. & SEXUALITY 51 (2022).

104. *See generally Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010); *Williams-Yulee*, 575 U.S. at 433.

professional. A jurisprudence that confers a free speech right in a medical context is beneficial because it disrupts state efforts to restrict healthcare access, re-establishing at least some medical autonomy post-*Dobbs*. Even as the Roberts Court has rolled back abortion rights, it has expanded and preferenced speech rights in an unprecedented manner. Demanding an even-handed application of the Roberts Court's speech jurisprudence to medical speech would extend our nation's storied tradition of fiercely protecting expression, even—and perhaps especially—when that expression is by a professional.

23&MENTAL ILLNESS: PSYCHIATRIC GENETIC INFORMATION, GENETIC ESSENTIALISM, AND POTENTIAL IMPACTS ON CHILD CUSTODY

*Caitlin Vasington**

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INTRODUCTION

As genetic information becomes increasingly accessible in American society, we are regularly exposed to seemingly scientific claims about the heritable qualities of humans. Consumer genetics companies proclaim they can

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use your genetic information to determine which wines you'll prefer,¹ what sports your children should play,² and what perfume would be most appealing to you.³ However, this curiosity about our genetic foundation comes with a price.

The rise of genetics in popular discourse may also lead to an increase in genetic essentialist biases⁴—the belief that a person's characteristics and behaviors are the result of their perceived genetic composition.⁵ Genetic essentialist biases have influenced discussions about genes throughout history, often with devastating consequences.⁶ Phrenology and the broader eugenics movement both have genetic essentialism at the core of their philosophies, and the insidious vestiges of these misguided beliefs are still pervasive in modern society and in many of our systems, including medicine and law.⁷ As courtrooms increasingly rely on genetic evidence and information in all types of trials, from first-degree murder to tort liability, genetic essentialist biases may unduly influence outcomes and hamper the pursuit of justice.⁸

One of the most worrisome potential frontiers for genetics in the courtroom is in child custody disputes. Custody disputes are already inundated with accusations of mental instability and lack of parental fitness, and the increasing accessibility of psychiatric genetic information provides a breeding ground for genetic advances to be weaponized in these disputes before the science underlying the genetics is properly understood and contextualized.⁹ The weaponization of psychiatric genetic testing is particularly worrying in this context due to the gendered stigma already prevalent in custody cases with mentally ill mothers.¹⁰ Therefore, we must apply the wisdom of Dr. Ian Malcolm

1. Lydia Ramsey Pflanzner, *I Tried the Vinome Wine DNA Test*, BUS. INSIDER (Aug. 30, 2017, 9:56 AM), <https://www.businessinsider.com/vinome-wine-dna-test-2017-8> [<https://perma.cc/2TS2-Z396>].

2. Steven Salzberg, *Genetic Tests for Kids' Sports Abilities: Hype or Science?*, FORBES (May 21, 2011), <https://www.forbes.com/sites/stevensalzberg/2011/05/21/genetic-tests-for-kids-sports-abilities-hype-or-science/?sh=d3cbf3379bda> [<https://perma.cc/9TRC-H59P>].

3. Brandon Keim, *Perfume Customized to Your DNA: It's Your Smell, Deal With It*, WIRED (Sept. 7, 2007, 12:51 PM), <https://www.wired.com/2007/09/perfume-customi> [<https://perma.cc/6BRS-VWLN>].

4. Maya Sabatello & Eric Juengst, *Genomic Essentialism: Its Provenance and Trajectory as an Anticipatory Ethical Concern*, HASTINGS CTR. REP., May-June 2019, at S15.

5. Ilan Dar-Nimrod & Steven J. Heine, *Genetic Essentialism: On the Deceptive Determinism of DNA*, 137 AM. PSYCH. ASS'N PSYCH. BULL. 800, 800–18 (2011).

6. Lisa Forman Cody, *Essentialism in Context*, PERSPS. HISTORY (Dec. 1, 2015), <https://www.historians.org/research-and-publications/perspectives-on-history/december-2015/essentialism-in-context> [<https://perma.cc/7KJP-CVW5>].

7. *Id.*

8. See Maya Sabatello & Paul S. Appelbaum, *Behavioral Genetics in Criminal and Civil Courts*, 25 HARV. R. PSYCH. 289, 289–301 (2018).

9. See Gabriel Lázaro-Muñoz, Maya Sabatello, Laura Huckins, Holly Peay, Franziska Degenhardt, Bettina Meiser, Todd Lencz, Takahiro Soda, Anna Docherty, David Crepaz-Keay, Jehannine Austin, Roseann E. Peterson & Lea K. Davis, *International Society of Psychiatric Genetics Ethics Committee: Issues Facing Us*, 180 AM. J. MED. GENETICS 543, 543–54 (2019).

10. Judith Mosoff, *'A Jury Dressed in Medical White and Judicial Black': Mothers with Mental Health Histories in Child Welfare and Custody*, in CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY 227, 242 (Susan B. Boyd, ed., 1997).

in “Jurassic Park” and ensure that judges and lawyers overcome their preoccupation with whether we could use psychiatric genetic evidence in the courtroom and think more critically about whether we should.¹¹

In Part I of this paper, I will define genetic essentialism and explain the science, or lack thereof, behind it. I will also address the links between genetic essentialism and eugenics before turning to scientific research regarding the impact of genetic essentialist biases on perceptions of various classifications, such as gender, race, mental illness, and criminality. Part II centers around psychiatric genetic information and its impact on our justice system. I will address the current limitations of its scientific validity and applicability before turning to a consideration of its current and potential impacts on a variety of different fields of law. In Part III, I will focus on the stigma surrounding mentally ill parents in child custody disputes, which leads into a consideration of the gendered bias against mentally ill mothers. Lastly, in Part IV, I will combine the discussions of genetic essentialism, psychiatric genetic information, and stigmatization in child custody disputes to explain the potential consequences of introducing psychiatric genetic data into child custody disputes.

I. GENETIC ESSENTIALISM: A COGNITIVE BIAS AND ITS CONSEQUENCES

The study of human genetics is the science of differences as much as it is the science of connectedness.¹² Genomic research seeks to discover how “genetic differences between individuals (and groups) affect and explain the diversity of observable human traits.”¹³ However, while genes can be a powerful source of information about the biological component of identity formation, they cannot tell the complete story.¹⁴ Complex interactions between genetics and environment render genetic predispositions far more malleable than is commonly understood, and therefore “it is impossible to reduce and equate the self to a molecular entity, in disregard of individuals’ social, historical and moral complexity.”¹⁵

The complexity of human genetics leads many laypeople to rely on misleading essentialist intuitions in order to form an understanding.¹⁶ Essentialism is the psychological belief that order in the natural world emerges from deep, hidden forces, and these forces form the basis for natural categories.¹⁷ When these essentialist intuitions are applied to genes, it results in a perception

11. JURASSIC PARK (Universal Pictures 1993).

12. Sabatello & Juengst, *supra* note 4, at S11.

13. *Id.*

14. *Id.* at S12.

15. *Id.*

16. Benjamin Y. Cheung, Anita Schmalor & Steven J. Heine, *The Role of Genetic Essentialism and Genetics Knowledge in Support for Eugenics and Genetically Modified Foods*, 16 PLOS ONE 1, 3 (2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0257954> [<https://perma.cc/K7LG-L8QY>].

17. *Id.*

that individuals who share genetics must share an essence as well.¹⁸ Prominent psychologists Ilan Dar-Nimrod and Steven Heine posit that genetic essentialist thinking typically results in four predictable outcomes.

“First, genetic essentialism may lead people to view outcomes as immutable and determined,” such that if certain genes are present, the outcome is inescapable and beyond the individual’s control.¹⁹ Second, once a genetic attribution for an observable aspect is made, individuals will disregard other potential contributing factors in favor of the belief that genetics are the fundamental cause of the condition.²⁰ Third, genetic essentialism may lead individuals to believe that groups that share a genetic foundation are homogenous and discrete.²¹ If one member of the group has the potential for a certain genetic characteristic, all members of that group will, and the characteristic will not be observed outside of the group sharing a genetic foundation.²² Lastly, genetic essentialist thinking leads individuals to expect “natural” outcomes from genetic predispositions.²³ This expectation quickly gives rise to naturalistic fallacies in which individuals attach a moral character to natural properties, which may heavily influence moral judgments on outcomes with some degree of volitional control.²⁴

Some genes influence phenotypes in measurable ways.²⁵ The majority of human behaviors are heritable.²⁶ However, “much of the ways that genes relate to human conditions can be described as weak genetic conditions,” meaning that a genetic link to a condition is by no means a determinative factor.²⁷ Elevating risk assessments, increasing susceptibility, and heightening probability are all common ways that genes influence phenotypes, but it is irrational to view these tenuous genetic links through an essentialist lens.²⁸ Other factors, such as interactions with the environment and personal development, may be more impactful than a genetic link.²⁹ However, a simple genetic explanation for a condition is more attractive to many than the complexity associated with other factors, such as environment and socio-economic status, and genetic essentialist biases often influence people to more heavily value genetic contributions to conditions than is scientifically justified.³⁰

18. *Id.*

19. Dar-Nimrod & Heine, *supra* note 5, at 802 (emphasis removed).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Dar-Nimrod & Heine, *supra* note 5, at 802.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 803.

29. *Id.*

30. *Id.*

A. *Genetic essentialism and its links to eugenics*

“When genes are perceived to be the locus of causality then it follows that efforts to improve humanity will focus on improving genes or the gene pool,” caution Dar-Nimrod and Heine.³¹ Calls for eugenics in Western society date back to Plato, but the vague notions of engineering a superior human race did not gain serious scientific traction until the publication of Charles Darwin’s research on heritable traits and fitness.³² Darwin’s *On the Origin of Species* became the foundation of Sir Francis Galton’s eugenic ideologies.³³ Galton, a notable polymath later termed the “Father of Eugenics,”³⁴ spread his desire to utilize artificial selection as a means to perfect the human race, which was enthusiastically embraced by many throughout the late nineteenth and early twentieth centuries.³⁵ Galton himself was heavily influenced by Herbert Spencer, “an immensely important mid-nineteenth century social thinker who abhorred social welfare programs and coined the phrase ‘survival of the fittest.’”³⁶ Dar-Nimrod and Heine argue that the widespread popular appeal of this seemingly scientific ideology, both inside and outside of the eminent scientific community, “attests to how well eugenic ideologies resonated with people’s essentialist biases.”³⁷

The popularity of eugenic ideologies took a heavy hold in the United States, with one historian noting that “it was impossible to be active in any field of intellectual work in the three decades after the Civil War without mastering Spencer,” and therefore, eugenics.³⁸ ‘Survival of the fittest’ quickly began to influence public policy and law in the United States, with laws passing explicitly on eugenic grounds.³⁹ Connecticut became the first state to restrict marriage based on eugenic criteria in 1895, criminalizing marriage for anyone who was “epileptic, imbecile, or feeble-minded.”⁴⁰ Other states swiftly followed suit with their own restrictive marriage legislation, and many extended limitations to

31. Dar-Nimrod & Heine, *supra* note 5, at 810.

32. *Id.*

33. Philip R. Reilly, *Eugenics and Involuntary Sterilization: 1907-2015*, 16 ANN. REV. GENOMICS & HUM. GENETICS 351, 352 (2015).

34. Dominique Aubert-Marson, *Sir Francis Galton: The Father of Eugenics*, 25 médecine/sciences 641, 641 (2009), <https://www.medecinesciences.org/en/articles/medsci/pdf/2009/08/medsci2009256-7p641.pdf> [<https://perma.cc/5FW9-5HAE>].

35. Reilly, *supra* note 33.

36. *Id.*

37. Dar-Nimrod & Heine, *supra* note 5, at 810.

38. RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860-1915*, 20 (1st ed. 1944).

39. Phillip R. Reilly, *Eugenics and Involuntary Sterilization: 1907-2015*, 16 ANNUAL REV. GENOMICS HUM. GENETICS 351 (2015).

40. CENTER FOR THE HISTORY OF MEDICINE, *Eugenics Legislation*, HARVARD COUNTWAY LIBRARY, <https://collections.countway.harvard.edu/onview/exhibits/show/galtonchildren/eugenics-legislation#:~:text=In%201896%2C%20Connecticut%20became%20the,Ohio%2C%20Michigan%2C%20and%20Indiana> [<https://perma.cc/R8L6-CLSJ>]; 1895 Conn. Pub. Acts 667.

interracial marriage as well because of eugenic beliefs about the superiority of the white race.⁴¹

The evolution of the eugenics movement in the early 1900s shifted the focus of American lawmakers from promoting the selective breeding of “positive” traits to actively criminalizing and prohibiting the procreation of “negative” ones, and thus laws regulating reproduction began to take shape.⁴² In 1907, Indiana passed a compulsory sterilization law that was eventually mirrored in some form in 33 states,⁴³ allowing state governments to perform involuntary sterilization on anyone deemed genetically unfit to reproduce.⁴⁴ The constitutionality of these laws faced a challenge in the Supreme Court in 1927, and the Court upheld forced sterilization in an 8-1 vote in *Buck v. Bell*.⁴⁵ In the opinion for the majority, Justice Oliver Wendell Holmes, Jr. proclaimed that “[i]t 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.”⁴⁶ In a callous summation, affirming the misguided genetic essentialist beliefs underlying the policy of forced sterilization, the Court stated, “[t]hree generations of imbeciles is enough.”⁴⁷

Eugenic beliefs in America were also a matter of federal policy. The Immigration Act of 1924 limited quotas on immigration from certain countries due to allegedly “high levels of inherited deficiencies in intelligence and morality.”⁴⁸ This same immigration restriction would later play a seminal role in the atrocities of the Nazi regime during the Second World War because it prevented the United States from providing a refuge for those attempting to escape the genocide in Europe.⁴⁹ The quota system allowing only 27,000 immigrants from Germany and Austria into the United States resulted in the passengers of the MS *St. Louis* being refused entry at a port in Florida, and the

41. EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE*, 146 (2nd ed. 2012).

42. Tara Kibler, *The Complicated History of Eugenics in the United States*, HEINONLINE BLOG (June 11, 2011), <https://home.heinonline.org/blog/2021/06/the-complicated-history-of-eugenics-in-the-united-states> [<https://perma.cc/5SW6-E8MM>].

43. *Id.*; see 1907 Ind. Acts 377. For a list of the 31 states in which forced sterilization is presently still allowed, see NAT’L WOMEN’S L. CTR., *FORCED STERILIZATION OF DISABLED PEOPLE IN THE UNITED STATES* 18 (2022), https://nwlc.org/wp-content/uploads/2022/01/...NWLC_SterilizationReport_2021.pdf [<https://perma.cc/K4XU-M7TW>].

44. Kibler, *supra* note 40.

45. *Buck v. Bell*, 274 U.S. 200 (1927).

46. *Id.* at 207.

47. *Id.*

48. Dar-Nimrod & Heine, *supra* note 5, at 811; see also *Milestones in the History of U.S. Foreign Relations, The Immigration Act of 1924*, OFF. HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> [<https://perma.cc/E599-NQVH>].

49. Erin Blakemore, *A Ship of Jewish Refugees Was Refused U.S. Landing in 1939. This Was Their Fate*, HISTORY.COM (June 4, 2019), <https://www.history.com/news/wwii-jewish-refugee-ship-st-louis-1939> [<https://perma.cc/8HLE-Z4CG>].

return of the ship to Europe proved to be a death sentence to nearly half of the Jewish passengers who sought sanctuary in America.⁵⁰

The precipitous popularity of eugenics was met with an equally abrupt ending when the atrocities of the Nazi regime were revealed to the world, forcing humanity to confront the horrific and violent consequences of eugenic policies.⁵¹ Ultimately, humanity's resounding rejection of eugenics was not predicated on a scientific refutation of the soundness of the ideology but rather on the magnitude of the barbarous acts committed in pursuit of a superior human race.⁵² This distinction is crucial, not because there is merit to eugenic beliefs, but because it highlights the reality that laypeople often still subscribe to genetic essentialist views despite the lack of scientific findings to support them.⁵³

In sum, eugenic beliefs flourished largely because people's genetic essentialist biases attracted them to an ideology that confirmed immutable and heritable genes as the answer to all observable phenomena, and these biases persist as the lens through which most people view genetics.⁵⁴ As genetic technology continues to advance, and discourse surrounding genetics increasingly amplifies and is practically omnipresent in society, it tends to "reinforce the message that the source of life's problems and the answers to those problems [] is located in our genes."⁵⁵

B. The impact of genetic essentialist biases: race and gender

Few social categories have been the subject of greater genetic essentialist bias than race.⁵⁶ Despite the scientific consensus that there is no biological basis for the concept of race, the belief that there are biological markers that bind individuals to immutable and discrete categories persists.⁵⁷ Research on the race-related genetic attributions of white Americans "found that people who made more genetic attributions also tended to score higher on both measures of traditional racism," such as dislike of interracial marriage, "and modern racism (e.g., a belief that Blacks have themselves to blame for not doing well)."⁵⁸ Further studies comparing the impacts of exposure to a biological race theory versus a social race theory have shown that exposure to a biological race theory triggers more essentialist responses.⁵⁹ Additionally, studies about the heritability of intelligence have led many, including prominent scientists such as Nobel laureate James Watson, to wrongly conclude that intellectual potential is a racial and genetic trait.⁶⁰

50. *Id.*

51. Kibler, *supra* note 40.

52. *Id.*

53. Dar-Nimrod & Heine, *supra* note 5, at 811.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Dar-Nimrod & Heine, *supra* note 5, at 811.

60. *Id.* at 805.

Genetic essentialist thinking makes two key mistakes in reaching this conclusion. First, it assumes that “heritability estimates calculated within groups . . . demonstrate that between-group differences are due to the postulated genes underlying the heritability.”⁶¹ In essence, the genes associated with a heritable trait are assumed to be the sole factor in its heritability.⁶² Secondly, the heritability of a trait is assumed to be determinative of outcome without regard to modifiability.⁶³ Environment and development may have as much or more impact on the expression of a heritable trait as genetics do, though these factors are overlooked when one attributes heritability to supposed racial genetics.⁶⁴

“[S]tudies demonstrate that genetic arguments for race lead people to view themselves as more distinct from those of other races and increase unwarranted responses.”⁶⁵ Thus, exposure to genetic discourse can have a marked impact on the ways that individuals view race and may unconsciously increase racial bias and stereotyping.⁶⁶ An increase in genetic attributions made in the courtroom may have outsized implications when race is a factor. Given the already vast disparities in outcomes between Black and white defendants in the American criminal justice system, there is strong cause for concern about the influence of genetic essentialism on notions of equal justice.⁶⁷

Gender is a social category, but it is primarily viewed as a natural category.⁶⁸ Studies show that the more one attributes genetic causes to gender differences, “the more one views the sexes as homogeneous categories.”⁶⁹ Research providing women with a genetic attribution for male superiority in math compared to an experiential attribution showed that those who learned of a genetic attribution performed worse on the math test than those who were not informed of a genetic component.⁷⁰ In summary, when gender is viewed through genetic essentialist biases, people are more likely to view gender differences as predetermined and caused by genetics.⁷¹

C. *The impact of genetic essentialist biases: mental illness and criminality*

Remnants of eugenic ideology about “feeble-mindedness” are present in genetic essentialist responses to the heritability of mental illnesses.⁷² The concern that we are passing down immutable and predetermined illnesses with

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Dar-Nimrod & Heine, *supra* note 5, at 805.

66. *Id.*

67. Shasta N. Inman, Racial Disparities in Criminal Justice, AM. BAR ASS’N (Sept. 18, 2020), https://www.americanbar.org/groups/young_lawyers/resources/after-the-bar/practice-areas/racial-disparities-criminal-justice-how-lawyers-can-help [https://perma.cc/M3AH-BGTQ].

68. Dar-Nimrod & Heine, *supra* note 5, at 810.

69. *Id.*

70. *Id.* at 811.

71. *Id.* at 806, 811.

72. *Id.* at 815.

devastating consequences underlies the search for their genetic causes.⁷³ However, despite the strong evidence that such illnesses are heritable, a causal genetic link is unlikely to be identified because many mental illnesses have thousands of genetic variants associated with them.⁷⁴ In other words, the genetic links to these illnesses are so complex that “we do not have and are not likely to ever discover ‘genes for’ psychiatric illnesses.”⁷⁵ The lack of distinct and identifiable genetic markers for mental illnesses has not prevented society from viewing these illnesses through essentialist biases.⁷⁶ Research shows that when exposed to a genetic attribution for mental illness, people are more likely to be sympathetic to those afflicted due to a perceived lack of agency and control over their illness.⁷⁷

However, this sympathetic perception due to lack of agency carries its own disastrous potential for criminal law, because “a lack of control over one’s behavior may reduce one’s perceived culpability, but at the same time it increases perceptions of immutability,” and thus judicial decision-makers such as juries and judges may be more inclined to assume that a convicted individual will reoffend and cannot be rehabilitated.⁷⁸ A study conducted by researchers interested in the effects of scientific explanations on perceived culpability found that participants were more sympathetic to biological causes than experiential causes.⁷⁹ However, this sympathy may have dire impacts in the sentencing stage of a criminal trial because similar studies have shown that genetic essentialist beliefs predicted recommendations for harsher punishments as well as higher perceptions of recidivism risk.⁸⁰ Thus, even if genetic essentialist biases lead us to feel that a defendant is less biologically culpable for their actions, the double-edged sword strikes during sentencing, when we are accordingly less willing to believe that changed behavior is possible.

II. PSYCHIATRIC GENETIC INFORMATION: LIMITATIONS AND APPLICATIONS

The genetic component of psychiatric disorders is well-documented and established.⁸¹ Studies show that these disorders are highly heritable, meaning that a family history of a disorder may be significant for an individual.⁸² However, research into identifying genetic markers for psychiatric disorders has yielded few conclusive results thus far.⁸³ Further research into the interaction between

73. Dar-Nimrod & Heine, *supra* note 5, at 815.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 816.

78. Dar-Nimrod & Heine, *supra* note 5, at 815–16.

79. *Id.* at 814.

80. Meredith Meyer, Francine L. Dolins, Yesenia Grijalva & Susan A. Gelman, *Genetic Essentialist Beliefs About Criminality Predict Harshness of Recommended Punishment*, 151 J. EXPERIMENTAL PSYCH., 3230, 3230–48 (2022).

81. Maya Sabatello & S. Appelbaum, *Psychiatric Genetics in Child Custody Proceedings: Ethical, Legal and Social Issues*, 4 ETHICS GENETIC MED. 98, 99 (2016).

82. *Id.*

83. *Id.*

psychiatric genetics and their environment has produced more promising results, but many of these studies have been difficult to replicate or have otherwise been met with skepticism.⁸⁴ Thus, while it is accurate to say that genes do influence psychiatric disorders, the link between the two is ill-defined and not well understood even in the scientific community.⁸⁵ Therefore, the complex interactions between genes and environment do not currently support a genetic essentialist response with regard to psychiatric disorders, and it would be inappropriate to use purported genetic links to psychiatric disorders as evidence of immutable and determined behaviors.⁸⁶

A. Psychiatric genetic information in the courtroom: current regulations

The clear limitations of currently available psychiatric genetic information has not put a stop to the increased use of psychiatric genetic data in the judicial system.⁸⁷ The Supreme Court's *Daubert* standard for the admissibility of scientific evidence has further complicated efforts to differentiate between valid applications of genetic information and gratuitous and unfounded insertions of genetic data into the courtroom due to its reliance on judges to act as gatekeepers to unfounded science.⁸⁸ In *Daubert v. Merrell Dow Pharms., Inc.*, the Supreme Court overruled the previously-controlling *Frye* test for the admission of scientific evidence.⁸⁹ The *Frye* test required that scientific deductions used in court "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."⁹⁰ The merits of the *Frye* test were hotly contested as scientific innovation and scientific evidence expanded, because critics felt that the requirement of general acceptance might prevent valid but newly discovered scientific evidence from being allowed as evidence.⁹¹ However, the currently dominant *Daubert* test is not without its own substantial flaws. *Daubert* requires that scientific evidence need only be "relevant to the task at hand," and "rest[] on a reliable foundation."⁹² Crucially, *Daubert* also assigns the task of gatekeeping scientific evidence to judges, requiring them to wield decision-making authority as to whether scientific evidence is permissible and valid for the purposes of litigation.⁹³ Thus, *Daubert* substantially loosened the standards for admissible scientific evidence and empowered judges to make

84. *Id.*

85. *Id.* at 99–100.

86. Sabatello & Appelbaum, *supra* note 79, at 100.

87. *Id.* at 98–100.

88. See Deborah W. Denno, *Courts' Increasing Consideration of Behavioral Genetics Evidence in Criminal Cases: A Longitudinal Study*, 2011 MICH. ST. L. REV. 967, 991 (2011).

89. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 585 (1993).

90. *Frye v. United States*, 293 F. 1013, 1014 (1923).

91. Alma Kelley McLeod, *Is Frye Dying or is Daubert Doomed? Determining the Standard of Admissibility of Scientific Evidence in Alabama Courts*, 51 ALA. L. REV. 883, 886–87 (2000).

92. *Daubert*, 509 U.S. at 597.

93. *Id.*

decisions about the validity of scientific evidence despite the lack of necessary credentials or knowledge to make a truly educated decision.⁹⁴

This standard creates several consequential issues as to psychiatric genetic data in the courtroom. The complex and nuanced nature of psychiatric genetic data cannot support conclusive statements about the direct and isolated impact of psychiatric genetics on any individual person's behavior or character, but this is precisely what many attorneys would like judges and jurors to believe when they attempt to introduce psychiatric genetic data to a courtroom.⁹⁵ However, because genetic data has the veneer of objectivity, it is appealing to many judges who seek to uphold objective and factual proceedings.⁹⁶ Accordingly, under the *Daubert* standard, judges can determine psychiatric genetic data to be both relevant to the proceedings and resting on a reliable foundation without grasping the nuanced interaction between genes and environment that underpins any genetic data purporting to conclusively determine behavior.⁹⁷ Consequently, judicial actors may be unduly influenced both by genetic data that they do not fully understand and their own unconscious genetic essentialist biases.⁹⁸

B. Psychiatric genetic information in the courtroom: current applications in criminal trials

The misuse and misunderstanding of psychiatric genetic information in the courtroom is not merely a hypothetical problem. One of the most prominent and problematic venues for psychiatric genetic information thus far has been criminal courtrooms, especially in homicide cases where a defendant's mental state is a factor in determining guilt or sentencing.⁹⁹ Thus far, psychiatric genetic information has primarily played a role in the penalty phase of criminal proceedings.¹⁰⁰ In other words, it has not often been used successfully to allege innocence or escape all culpability, but psychiatric genetic data has been widely utilized as evidence to mitigate punishment.¹⁰¹

Sensational cases, such as those involving the MAOA allele or "warrior gene,"¹⁰² led many to worry that psychiatric genetic data would be used in courtrooms to completely exonerate culpable defendants because juries would find them to have been genetically forced to commit murder on account of their genes, but so far any such efforts have been widely unsuccessful.¹⁰³ In *State v. Waldroup*, an expert witness was allowed to testify that Bradley Waldroup, a

94. Sabatello & Appelbaum, *supra* note 8, at 4.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 10.

99. *Id.* at 4, 7.

100. Denno, *supra* note 86, at 976–77.

101. *Id.*

102. For a discussion of MAOA and other genes of interest to researchers studying psychopathy, see Tracy D. Gunter, Michael G. Vaughn & Robert A. Philibert, *Behavioral Genetics in the Antisocial Spectrum Disorders and Psychopathy: A Review of the Recent Literature*, 28 BEHAV. SCI. L. 148 (2010).

103. Denno, *supra* note 86, at 970.

carrier of the MAOA gene, was predisposed to violence due to a combination of his abusive childhood and the MAOA gene, which some scientists purported was linked to increased violence and violent tendencies.¹⁰⁴ However, while some jurors admitted that this genetic testimony affected their decision in declining to impose the death penalty, they ultimately found Waldroup guilty of murder and sentenced him to thirty-two years in prison.¹⁰⁵ Therefore, while there is credible evidence to show that psychiatric genetic evidence is influential in sentencing decisions, dire predictions that genetic data may become a “get-out-of-jail-free card”¹⁰⁶ in criminal cases seem to be overblown.¹⁰⁷

State v. Yepez is a prime example of the power of judicial decision-making to gatekeep the impact of genetic essentialism in courtrooms.¹⁰⁸ Anthony Yepez was charged with first-degree murder. His attorneys attempted to call expert witnesses to testify that Yepez’s carriership of the MAOA gene, coupled with his troubled childhood, precluded him from having capacity to form intent, a necessary element of his first-degree murder charge.¹⁰⁹ However, the district court found that while the expert’s testimony “satisfied the *Daubert* reliability factors,” it was “not based on reliable scientific knowledge” because it misstated the results of the studies the expert relied upon for his opinion.¹¹⁰ On appeal, the Supreme Court of New Mexico determined that the expert witnesses had not sufficiently evidenced their claims that Yepez suffered from symptoms purportedly associated with the MAOA gene.¹¹¹ Crucially, the Supreme Court of New Mexico noted that it was “wary of the risks of stigmatization associated with simplistic interpretations of the ‘casual relationships between genetic variants associated with violence or aggression and actual violent or aggressive behavior.’”¹¹²

However, studies on judicial decision-making and genetic essentialist stereotyping provide worrisome evidence that judges may be heavily influenced by genetic biases in criminal cases.¹¹³ Judicial stereotyping “arising from the relationships between genetic essentialist biases and stigmatization arising from such biases [] may negatively impact sentencing views with mental disorders

104. *Id.*; see also *State v. Waldroup*, No. E2010-01906-CCA-R3-CD, 2011 Tenn. Crim. App. LEXIS 787 (Mar. 29, 2011).

105. Barbara Bradley Hagerty, *Can Your Genes Make You Murder?*, NPR (July 1, 2010, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=128043329> [<https://perma.cc/Y65Q-8QYH>].

106. See Francesca Forzano, Pascal Borry, Anne Cambon-Thomsen, Shirley V. Hodgson, Aad Tibben, Petrus de Vries, Carla van El & Marina Cornel, *Italian Appeal Court: A Genetic Predisposition to Commit Murder?*, 18 EUR. J. HUM. GENETICS 519 (2010).

107. Denno, *supra* note 86, at 970.

108. *State v. Yepez*, 483 P.3d 576 (2021).

109. *Id.* at 579, 581.

110. *Id.* at 584.

111. *Id.* at 589.

112. *Id.* (citing Forzano, *supra* note 104, at 520).

113. Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Towards Mental Disorders and Potential Negative Effects on Sentencing*, 35 L. & SOC’Y REV. 202, 202–03 (2019).

known or thought to be genetically influenced.”¹¹⁴ Judges were found to be more likely to view criminal defendants as immutably prone to criminal behavior when exposed to a genetic cause for the behavior, and less likely to believe that defendants could be productively rehabilitated.¹¹⁵ Therefore, “knowledge of genetics may in fact increase perceptions that traditional regulatory punishments are warranted to prevent reoffending.”¹¹⁶ Genetic essentialist biases in judicial decision-making for criminal defendants may consequently contribute to the continued marginalization of mentally ill defendants through restrictive sentencing decisions based on a belief that rehabilitation will not be effective.¹¹⁷

C. *Psychiatric genetic information in the courtroom: current applications in civil litigation*

Psychiatric genetic data used as evidence in civil cases is very rare; many of the potential issues posed by its introduction into civil courtrooms are speculative.¹¹⁸ However, efforts to include genetic data as evidence in tort litigation provide insight into future concerns.¹¹⁹ Litigants often depend on scientific evidence in order to prove causation in tort cases, and therefore evidence about the physical, mental, and emotional state of individual litigants is often highly relevant.¹²⁰ In determining whether symptoms are caused by a defendant’s actions, the prior health and wellness of the plaintiff is a principal concern.¹²¹

In 2013, Canadian courts grappled with the role of genetic testing in tort litigation in *Adacsi v. Amin*.¹²² The Court of Appeal of Alberta ruled that the court could lawfully compel genetic testing of an objecting plaintiff in a negligence suit because her genetic history (or lack thereof) of Huntington’s Disease would be relevant to mitigating damages for the defendants.¹²³ It is not difficult to extrapolate the circumstances of *Adacsi v. Amin* to psychiatric genetic data, because it is foreseeable that an individual litigant’s genetic predisposition for mental illness could be relevant to mitigation of damages in tort litigation.¹²⁴ Individuals genetically marked for mental illness may be more readily liable for damages caused due to a perception that the damages were foreseeable, or may be at risk of having genuine damages to their mental health written off as inevitable genetic consequences rather than the result of real world harm.

Additionally, this case and others like it highlight another ethical issue with genetic data in civil litigation: compulsory genetic testing and disclosure. While

114. *Id.* at 227.

115. *Id.* at 233.

116. *Id.*

117. *Id.*

118. Sabatello & Appelbaum, *supra* note 8, at 7.

119. *Id.* at 9.

120. *Id.*

121. *Id.* at 10.

122. *Adacsi v. Amin*, 2013 ABCA 315 (Can.).

123. *Id.*

124. Sabatello & Appelbaum, *supra* note 8, at 9.

compulsory genetic testing is routine in many cases for identification purposes, such as establishing paternity, the merits of compulsory genetic testing for psychiatric genetic data are far murkier.¹²⁵ To begin, “the non-deterministic nature of behavioral genetics necessarily limits the scientific value of such evidence.”¹²⁶ Because psychiatric genetic data is not equatable to a diagnosis, it is not scientifically credible as evidence that an individual is actually suffering from mental illness or that their behavior can be attributed to their purported genetic markers for such an illness.¹²⁷ Furthermore, the stigma surrounding psychiatric disorders “may unjustly impact legal proceedings” due to its influence on judicial actors’ decision-making.¹²⁸ Genetic essentialism biases judges and juries alike where psychiatric disorders are concerned;¹²⁹ the decision to override personal autonomy and compel psychiatric genetic testing and disclosure should not be made lightly.¹³⁰

III. STIGMA AGAINST MENTALLY ILL PARENTS IN CHILD CUSTODY DISPUTES

There is perhaps no other type of litigation in which the stigma against mental illness can be weaponized against the pursuit of justice quite like child custody disputes.¹³¹ While child custody laws vary slightly by jurisdiction, each and every American state and territory has statutes that dictate child custody determinations must be made by considering a number of factors in pursuit of the outcome that serves the best interests of the child.¹³² “Although there is no standard definition of ‘best interests of the child,’” according to the United States Department for Health and Human Services, “the term generally refers to the deliberation that courts undertake when deciding what type of services...and orders will best serve a child as well as who is best suited to take care of a child.”¹³³ Accordingly, parental fitness to care for a child is of great importance to family courts in determining child custody, and mental wellness is one oft-considered element of parental fitness.¹³⁴ However, some psychologists, such as Robert Emery, Randy Otto, and William O’Donohue, feel that the individualized decision-making process embedded in the “best interests of the child” paradigm leads to an overemphasis on a child’s psychological best interests and allows bias

125. *Id.*

126. *Id.*

127. *Id.* at 11.

128. *Id.* at 10.

129. *Id.*; see also Berryesa, *supra* note 111, at 202–03.

130. Sabatello & Appelbaum, *supra* note 8, at 10.

131. Maya Sabatello, Audrey Chao, Beverly J. Insel, Thomas Corbeil, Bruce G. Link & Paul S. Appelbaum, *Psychiatric Genetic Essentialism and Stigma in Child Custody Proceedings: Public Views*, 8 J. LAW & BIOSCIENCES, July-Dec. 2021, at 1, 2.

132. *Determining the Best interests of the Child*, CHILD WELFARE INFO. GATEWAY (Sept. 2023) <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest> [https://perma.cc/HC9S-KPZ5].

133. *Id.* at 2.

134. *Id.* at 3.

to more heavily influence custody decisions.¹³⁵ Additionally, because child custody laws are determined by states, some factors considered in the best interest determination are geographically determined.¹³⁶ Alabama, Florida, Michigan, North Dakota, and Utah ask judges to consider the “moral character” of each parent, while South Carolina “takes into account the religious beliefs and commitment of the parents.”¹³⁷ These idiosyncratic factors allow for judicial bias to have a tremendous impact on custody decisions because judges are given a broad mandate to decide what is most important.¹³⁸

Parents with mental illnesses face many obstacles in acquiring and maintaining custody over their children. Studies show that parents with psychiatric conditions are at a much greater risk for the involvement of Child Protective Services (CPS), including interventions and loss of custody.¹³⁹ Outside of CPS, research has shown a high rate of custody loss for parents with psychiatric conditions, with rates ranging from 70 percent to 80 percent of custody loss depending on the definition of psychiatric conditions.¹⁴⁰ Furthermore, while these outcomes indicate that the judicial system heavily disfavors parents with psychiatric conditions, child custody disputes are further complicated by the fact that one parent can cast aspersions about the other parent’s mental fitness in order to favor their own position.¹⁴¹ Therefore, psychiatric data can be a powerful tool to cast doubt on parental fitness due to the weighty stigma associated with mental illnesses.¹⁴²

A. Gender bias against mentally ill women in child custody disputes

While both men and women are stigmatized for mental illness, mothers with psychiatric conditions are often at increased risk for negative custody outcomes as a result of gender bias.¹⁴³ To begin, women outnumber men in diagnoses for mental illnesses, particularly depression, anxiety, post-traumatic stress disorder, eating disorders, and borderline personality disorder.¹⁴⁴ Additionally, some feminist critics of psychiatry point out that much of the psychological distress women suffer is directly rooted in violence against them.¹⁴⁵ This criticism is particularly relevant to custody disputes due to the

135. Robert E. Emery, Randy K. Otto & William T. O’Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCH. SCI. PUB. INT., July 2005 at 1, 1.

136. *Id.* at 13.

137. *Id.*

138. *Id.*

139. Katy Kaplan, Eugene Brusilovskiy, Amber M. O’Shea & Mark S. Salzer, *Child Protective Service Disparities and Serious Mental Illnesses: Results From a National Survey*, 70(3) PSYCH. SERVS., Mar. 2019, at 202, 202.

140. Sabatello et al., *supra* note 129, at 3.

141. *Id.* at 2.

142. *Id.*

143. Suzanne Zaccour, *Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes*, 31 CAN. J. FAM. L. 57, 59 (2018).

144. *Id.*

145. *Id.* at 60.

frequency with which domestic violence intersects with family law.¹⁴⁶ In some ways, “the concept of mental illness obscures oppression by suggesting ‘an internal pathology that can be incontrovertibly categorized and cured by biomedicine.’”¹⁴⁷ In essence, women experiencing symptoms of mental illness may do so in part due to abuse or violence they have suffered, and thus the classification of mental illness does little to address their parental fitness.¹⁴⁸

Furthermore, conceptions of motherhood in our patriarchal society may bias courts against mentally ill mothers due to the dichotomy between the demands of a “good mother” and a “good patient.”¹⁴⁹ A “good mother” is meant to be wholly unselfish and unflinchingly tolerant, while a “good patient” must be self-absorbed and introspective in order to improve their mental state.¹⁵⁰ “The stark reality is that mothers with psychiatric disabilities are rarely able to meet the demands of autonomy and selflessness,” writes noted family lawyer and advocate Judith Mosoff, because mothers are often financially dependent on either male partners or the state.¹⁵¹ Proper patienthood requires further reliance on the state to provide mental healthcare, and the candor required in many therapeutic processes may lead a mother to disclose her true feelings about her children and motherhood.¹⁵² Confessing to negative feelings about one’s children or role as a mother “is fatal to the woman as a ‘good mother,’” and thus the scenario presents an inescapable fate of mother-shaming or patient-shaming (or both).¹⁵³

Moreover, most custody disputes occur between mothers and fathers where gendered power dynamics are highly influential.¹⁵⁴ Judges view women as less credible than men, and despite evidence that victims often minimize or cover up domestic violence, courts and mental health professionals “tend to doubt women’s testimony and to expect it to be exaggerated.”¹⁵⁵ A study of mental health labels and mothers’ credibility showed that labeling mothers as mentally ill frequently served to discredit assertions of domestic violence.¹⁵⁶ “The combined roles of fathers, experts, and judges leads to a shift in focus from the father’s violence to the mother’s delusionality.”¹⁵⁷

The focal concern on mentally ill mothers reinforces the framework for judicial determinations about mental health posited in Anat Geva’s research.¹⁵⁸

146. *Id.*

147. *Id.*

148. *Id.*

149. Mosoff, *supra* note 10, at 237.

150. *Id.*

151. *Id.*

152. *Id.* at 238.

153. *Id.*

154. *Id.* at 239.

155. Megan Shipley, *Reviled Mothers: Custody Modification Cases Involving Domestic Violence*, 86 IND. L.J. 1587, 1596 (2011).

156. Zaccour, *supra* note 141, at 70–71.

157. *Id.* at 71.

158. Anat S. Geva, *Judicial Determination of Child Custody When a Parent is Mentally Ill: A Little Bit of Law, A Little Bit of Pop Psychology, and a Little Bit of Common Sense*, 16 U.C. DAVIS J. JUV. L. & POL’Y 1, *passim* (2012).

Geva identified three main bases for judicial determinations of the impact of parental mental health on custody disputes: a favorable presumption for the mentally ill parent, reliance on mental health experts, or reliance on their own personal knowledge or “common sense” about mental illness.¹⁵⁹ However, the considerable discretion given to judges in determining child custody and parental fitness raises serious concerns when it comes to parents with psychiatric conditions, particularly mothers, because of the powerful influence of bias described above.¹⁶⁰ While both parents can be victim to genetic essentialist biases against those with psychiatric conditions, mothers face additional gender bias, and therefore being classified as a mentally ill mother carries its own increased stigma in the courtroom.¹⁶¹

IV. THE USE OF PSYCHIATRIC GENETIC INFORMATION IN CHILD CUSTODY DISPUTES

Courts should be wary of overemphasizing parental mental health in custody determinations because the science linking parental mental illness and poor outcomes for children is very complicated, and the best interests standard is not well equipped to address the nuance of the data we currently have.¹⁶² Emery et al. outline the broad conclusions that can be clearly drawn from current research. First, there is some evidence that children are adversely affected by parental mental illness and substance abuse, but these impacts may be caused by economic hardship, housing instability, and other environmental factors correlated with parental psychological issues.¹⁶³ Similar to the fallacy of genetic essentialism, it is not accurate to say that parental mental illness is the sole cause of a child’s issues because correlation is not the same as causation.¹⁶⁴ Second, whether the parent is currently seeking or receiving treatment for mental illness is a necessary consideration when weighing the impacts of parental mental health due to its potential to mitigate the harmful effects of parental mental illness.¹⁶⁵ Finally, outside of situations in which parental mental illness is so severe that it necessitates the intervention of protective services, assessment of parental mental illness “seems to us to be merely a search for a ‘tie-breaker’ under a vague custody rule fraught with problems.”¹⁶⁶ Ultimately, a parental diagnosis of mental illness should not be a primary concern when determining child custody.¹⁶⁷

The introduction of psychiatric genetic information into child custody litigation has dangerous potential to center and prioritize parental mental health in best interests determinations, and further amplifies the impact of mental illness

159. *Id.*

160. *Id.*

161. Mosoff, *supra* note 10, at 237.

162. Emery et al., *supra* note 134, at 8.

163. *Id.* at 17.

164. *Id.* at 39.

165. *Id.* at 40.

166. *Id.*

167. *Id.*

stigmatization in judicial decision making.¹⁶⁸ An interview with family court judges shows that, according to one judge's estimation, parental mental illness is at issue in 50% of custody disputes,¹⁶⁹ and current reliance on medical records, professional evaluations, and clinical assessments make consideration of parental mental health a lengthy and potentially costly factor to consider.¹⁷⁰ Psychiatric genetic information appears to provide a clear, cost-effective solution to judges unaware of the myriad ethical and scientific problems lurking below the surface of this dubious evidence.¹⁷¹

CONCLUSION

Increased access to genetic information carries weighty implications for our society, particularly because of humanity's natural inclination to view genetic data through essentialist biases that obscure and detract from the actual scientific information contained within it. These essentialist biases have a well-documented impact and are frequently connected to the darkest moral and ethical chapters of modern human history. The history of genetic essentialism coupled with scientific evidence validating the continued impact of these biases on our perceptions of race, gender, criminality, and mental illness should give judicial decision-makers great pause when considering the role of genetic data in courtrooms. Psychiatric genetic data in particular is often deeply misunderstood by those without a background in genetic science, and its validity as far as diagnosing or predicting behavior is minimal at best. The lack of scientific merit behind psychiatric genetics is further reason why courts must scrupulously apply the *Daubert* analysis at a minimum to all genetic data attempting to enter a courtroom.

Mentally ill parents, and particularly, mentally ill mothers, are already heavily stigmatized in life and child custody proceedings. Judges and judicial decision-makers are not immune to the stigma surrounding mental illness, and often use the 'best interests of the child' standard as a cudgel to beat down mentally ill parents who are doing their best to be both patients and parents. This documented bias against mentally ill parents will likely be made worse by the introduction as evidence of pseudo-scientific data that carries the veneer of objectivity. Courts therefore must be prepared to act as gatekeepers to the all-but-inevitable onslaught of genetic data that is overly deterministic and detrimental to our fundamental concepts of justice and equity under the law.

168. Sabatello & Appelbaum, *supra* note 79, at 11.

169. Geva, *supra* note 156, at 29.

170. Sabatello & Appelbaum, *supra* note 79, at 11.

171. *Id.* at 12.



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